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**Workshop 2: Enhancing Criminal Justice Reform,  
Including Restorative Justice**

## **AN OVERVIEW OF RESTORATIVE JUSTICE AROUND THE WORLD**

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# AN OVERVIEW OF RESTORATIVE JUSTICE AROUND THE WORLD

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## Abstract

*Restorative justice has become a global phenomenon in criminal justice systems. Resonating with, and in some cases drawing from, indigenous conceptions of justice, it offers both an alternative understanding of crime and new ways of responding to it. Restorative processes include victim-offender mediation, conferencing and circles; restorative outcomes include apology, amends to the victim and amends to the community. Restorative interventions are being used by police, prosecutors, judges, prison officials and probation and parole authorities. Restorative interventions have developed somewhat differently from region to region, but in many cases, countries have found it useful to adopt appropriate legislation. Human rights and other objections or critiques of restorative justice have been raised. Due in part to this, the UN has endorsed the Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.*

*We brought the needle to sew the torn social fabric, not the knife to cut it.*

*Bantu proverb*

## Introduction

In only twenty-five years, restorative justice has become a worldwide criminal justice reform dynamic. Well over 80 countries use some form of restorative practice in addressing crime; the actual number could be closer to 100.<sup>1</sup> While in many of these countries, restorative programmes are experimental and localized, in an increasing number of others restorative policies and programmes play a significant part in the national response to crime.

This paper will provide an overview of the current use of restorative justice around the world. It is a survey of the field, and necessarily will only touch on subjects that could be, and have been, treated far more extensively elsewhere. It is hoped that the footnotes and references will be of use to persons seeking more detailed or elaborate information.<sup>2</sup>

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<sup>1</sup> In 2001, the Centre for Justice and Reconciliation at Prison Fellowship International identified 80 countries in which some form of restorative justice intervention was being used. (Van Ness, 2001, at 13). The estimated increase by 20 nations is based on two factors: the growing number of countries in which restorative approaches are being tried and the growing literature on the subject which is bringing existing restorative practices to the attention of observers.

<sup>2</sup> A survey is only as complete as the information available, of course. One of the tasks of the Centre for Justice and Reconciliation at Prison Fellowship International is to monitor worldwide developments related to restorative justice. We do this by following newspaper accounts, collecting newsletters, networking with consortiums and associations of practitioners, trying to stay on top of the burgeoning literature on the topic, and through our own involvement with the more than 100 national Prison Fellowship affiliates. My colleague,

## Roots of restorative justice

Restorative justice is both a new and an old concept. While the modern articulation (including the name) has emerged in the past 30 years, the underlying philosophy and ethos resonate with those of ancient processes of conflict resolution. The recent rediscovery of those processes in different parts of the world has stimulated, informed and enriched the development of restorative practices. But there have been other influences as well. Some of these have critiqued criminal justice practice in ways that are congruent with the restorative justice critique; others have offered new perspectives and programmes that have pointed the way toward deeper understanding of restorative practices.

Indigenous justice processes have significantly shaped restorative justice in at least three ways. Two hallmark restorative justice programmes are adaptations from indigenous practices: conferences (from traditional Maori practices in New Zealand) and circles (from First Nations practices in North America). Second, the underlying philosophy of indigenous processes that justice seeks to repair the torn community fabric following crime has resonated with and informed restorative justice. (Blue and Blue, 2001) Third, some indigenous forms of justice have been incorporated into the formal response to crime (see, for example, Golub's comparison of non-state justice systems in Bangladesh and the Philippines. 2003).

The rise of restitution in the 1970s, together with the victim rights and support movements of the 1980s, exposed the incompleteness of the criminal justice system's focus on the offender. Proceedings whose sole purpose is to determine whether accused individuals have violated the law and if so, how to punish them, leave out the parties most affected by the criminal acts: victims. The movements to secure restitution for victims, to provide them with support and assistance, and to give them a voice in the criminal justice process have underscored the injustice of a justice process that excludes victims from meaningful participation (Strang, 2002).<sup>3</sup>

Social justice critiques have also pointed to inadequacies in the conceptual foundations or practices of criminal justice. These include the prison abolition movement, whose recognition of the suffering and debilitation caused by imprisonment has motivated its drive to replace it with other sanctions. Religious critiques of criminal justice practice have focused on the inadequacies of retribution alone as a governing theory and on the appropriateness of offender accountability to their victims. Some feminist scholars have argued that societal responses to crime should reflect values such as harmony and felicity rather than those of control and punishment. (Van Ness and Strong, 2002)

## Defining restorative justice

There is no single accepted definition of restorative justice. Typically, however, definitions fall into one of two categories (Johnstone and Van Ness, 2005). The most

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Lynette Parker, ensures that most of this information finds its way onto the pages of Restorative Justice Online ([www.restorativejustice.org](http://www.restorativejustice.org)), and it is from there that much of this survey is derived.

<sup>3</sup> This is not to suggest that restorative justice programmes are inherently better at including victims. Considerable work needs to be done, particularly when particular programmes operate within the criminal justice system, to resist the strong offender-oriented current. For a thorough review of the issues, see Chapters 5-8 of Zehr, Howard And Toews, Barb. (2004). *Critical Issues in Restorative Justice*. Monsey, New York and Cullompton, Devon, UK: Criminal Justice Press and Willan Publishing.

restrictive category consists of process-based definitions emphasizing the importance of encounters between the stakeholders in the crime and its aftermath.<sup>4</sup> The most expansive category consists of justice-based definitions emphasizing the outcomes<sup>5</sup> and/or values<sup>6</sup> of restorative justice. A definition that combines the two (and that in terms of expansiveness lies somewhere between the two categories) is the following: *Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through inclusive and cooperative processes* (Van Ness, 2004).

A definition that includes attention to outcomes will allow for, and even require, not only restorative processes but also interventions such as victim support, offender reintegration services, victim participation in criminal court proceedings, and court-imposed restitution and community service orders, provided that those interventions incorporate restorative values to the extent possible. Such a definition, therefore, can offer a philosophical and jurisprudential framework for those and other interventions to repair the harm caused or revealed by crime. Further, it offers a robust critique of contemporary criminal justice, with its narrow conceptual focus on lawbreaking behaviour (Walgrave and Bazemore, 1999).

The process definition is less ambitious and therefore much more precise. It offers a clearer standard against which to determine whether a particular intervention is restorative. It has been used to criticize interventions that proponents of the broader definition accept as restorative, on the grounds that they offer limited opportunities (or no opportunities at all) for encounters among the parties (McCold, 2000).

A further distinction within the process definition concerns which “stakeholders” should be allowed to participate in the process. Some have argued for a narrow use of the term, one that is limited to the victim, the offender and their families and friends (McCold, 2000). Others argue for a more expansive definition that includes representatives from the broader community and from government as well (Marshall, 1999).

The Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (“UN Basic Principles”), endorsed by ECOSOC in 2002, avoids taking sides in this debate. Instead of attempting to define “restorative justice,” it assigns usages to the terms “restorative process” and “restorative outcome” and a fairly broad definition of “parties.”

“Restorative process’ means any process in which the victim and the offender, and, where appropriate, any other individuals or community members

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<sup>4</sup> For example: “Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.” Marshall, Tony F. (1996). *The evolution of restorative justice in Britain*. European Journal on Criminal Policy and Research 4 (4): 21-43.

<sup>5</sup> For example, “Restorative justice is every action that is primarily oriented to doing justice by repairing the harm that is caused by a crime.” Bazemore, Gordon And Walgrave, Lode. (1999). *Restorative juvenile justice: In search of fundamentals and an outline for systemic reform*. In Restorative juvenile justice: Repairing the harm of youth crime, ed. Gordon Bazemore and Lode Walgrave, 45-74. With an introduction by Gordon Bazemore and Lode Walgrave. Monsey, NY: Criminal Justice Press.

<sup>6</sup> For example, “Repairing harm or healing is the main value of restorative justice but not the only one. Restorative justice programs also aim to promote democratic values, in particular the values of participation and deliberation....Other values prized by restorative justice include reintegration, mercy, and forgiveness. Roche, Declan. (2001). *The Evolving Definition of Restorative Justice*. Contemporary Justice Review 4(3, 4): 341-353 at 347-48.

affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

“Restorative outcome’ means an agreement reached as a result of a restorative process.”

“Parties” means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.”<sup>7</sup>

## **Restorative processes, outcomes and values**

Each of the restorative processes described below can be used at any stage of the criminal justice process, or outside the system altogether. They take place after guilt is no longer an issue either because there has been a conviction or because the defendant admits responsibility. The results of the process may or may not have an effect on the sentence, depending on relevant laws or regulations.

The first contemporary restorative process was victim offender mediation. In its original form, a trained facilitator prepared and brought together a victim and offender to discuss the crime, the harm that resulted, and the steps needed to make things right (Umbreit, 2001). Conferencing, which was adapted from Maori traditional practices in New Zealand, involves more parties in the process than mediation. Not only are the primary victim and offender invited, so are family members or friends of the victim and the offender as well as representatives of the criminal justice system (McCold, 1999). Circles, which draw from First Nations’ practices in Canada, are perhaps the most inclusive process of the three, inviting any interested member of the community to participate. The participants sit in a circle, with discussion moving clockwise from person to person until the participants have arrived at a resolution. (Pranis, et al, 2003).

There are several ways in which offenders often make amends. The first is by offering an apology, a sincere admission and expression of regret for their conduct. (Cavanagh, 1998). A second is restitution, wherein the offender pays back the victim through financial payments, return or replacement of property, performing direct services for the victim, or in any way that the parties agree (Harland, 1982). The third is through performing community service by providing free services to a charitable or governmental agency. These and other measures to repair harm (if an expansive definition of restorative justice is used) are considered restorative outcomes.

Restorative justice values may be grouped into two categories.<sup>8</sup> In the first are normative values (the way the world ought to be); in the second are operational values (the way restorative programmes should function). Normative values find expression through the operational values implemented in restorative programmes. Figure 1 shows what might be included in each category:

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<sup>7</sup> Resolution 2002/12, E/2002/INF/2/Add.2, Section I, par.2, 3, & 4.

<sup>8</sup> The following material on values is drawn from Van Ness, Daniel W.. *RJ City*. Posted on Restorative Justice Online, <http://www.pficjr.org/programs/rjcity/latest/RJ%20City%20Draft%20-%204-30-04.pdf>, as of 10 March 2005.

<b>Normative Values of Restorative Justice</b>	<b>Operational Values of Restorative Justice</b>
<p><b>Active Responsibility</b> -- taking the initiative to help preserve and promote restorative values and to make amends for behaviour that harms other people</p> <p><b>Peaceful Social Life</b> -- responding to crime in ways that build harmony, contentment, security, and community well-being</p> <p><b>Respect</b> -- regarding and treating all parties to a crime as persons with dignity and worth</p> <p><b>Solidarity</b> -- fostering agreement, support, and connectedness, even amid significant disagreement or dissimilarity</p>	<p><b>Amends:</b> those responsible for the harm resulting from the offence are also responsible for repairing it to the extent possible.</p> <p><b>Assistance:</b> affected parties are helped as needed in becoming contributing members of their communities in the aftermath of the offence</p> <p><b>Collaboration:</b> affected parties are invited to find solutions through mutual, consensual decision-making in the aftermath of the offence</p> <p><b>Empowerment:</b> affected parties have a genuine opportunity to participate in and effectively influence the response to the offence</p> <p><b>Encounter:</b> affected parties are given the opportunity to meet the other parties in a safe environment to discuss the offence, harms, and the appropriate responses</p> <p><b>Inclusion:</b> affected parties are invited to directly shape and engage in restorative processes</p> <p><b>Moral education:</b> community standards are reinforced as values and norms are considered in determining how to respond to particular offences</p> <p><b>Protection:</b> the parties' physical and emotional safety is primary</p> <p><b>Resolution:</b> the issues surrounding the offence and its aftermath are addressed, and the people affected are supported, as completely as possible</p>

**Figure 1**

### **Evaluations of restorative justice processes**

The growing literature on research concerning restorative justice processes is remarkably consistent in key findings. First, satisfaction with the processes is higher for both victims and offenders than with court processes (Vanfraechem and Walgrave, 2004). Second, restitution and other obligations by the offender are more likely to be completed following a restorative process than in response to a judicial order alone (Walgrave, 2004). Third, victims who participate in restorative processes report that they feel more secure (Strang and Sherman, 2003). Fourth, offenders who participate have a greater understanding of the harm they have caused, feel more empathy toward their victims, and are less likely to repeat their

delinquent or criminal behaviour in the future (Rowe, 2002). Studies on recidivism consistently show that offenders who go through restorative processes are less likely to re-offend than those who proceed through criminal courts (Bonta, et al., 2002). The studies that have not found such a reduction have nonetheless concluded that offenders who participate in restorative processes are no more likely to re-offend than those who are dealt with by the courts (Wilcox, et al., 2004).

### **Uses of restorative justice processes in the criminal justice system**

The remainder of this overview will focus on *restorative processes*. These are the most distinctive dimensions of restorative justice even for those who adopt an expansive definition. They are also the aspects of restorative justice about which some observers have raised due process questions and cautions.<sup>9</sup>

The first use of restorative justice processes was as part of pre-sentence preparation. After the determination of guilt, the judge or probation officer responsible for a pre-sentence investigation referred the matter to the restorative programme, and if the parties were willing, they would meet. Any agreement reached as a result of the restorative process would be presented to the judge as a recommended sentence.

This use of restorative processes continues, as noted below. However, they have also been used in virtually every part of the criminal justice system. Their effects on the sentence and/or on the criminal proceeding vary from programme to programme. In some instances the result helps guide decisions by decision-makers in the justice system. In others, the result is independent of the justice process and has little if any effect on the outcome of the criminal justice proceedings.

*Use by police.* In a number of countries, police have begun using restorative processes (and in some instances, outcomes) in deciding what to do with juveniles and adults who come to their attention. This is, of course, only possible where police are given discretion to decide how to proceed with a matter. In New Zealand, the Children, Young Persons and Their Families Act of 1989 created a restorative alternative for police called family group conferences. One of the purposes of the Act was to divert juveniles from Youth Court. Even when matters were referred to the Court, it offers victims, offenders and their families a voice in deciding what sentence the judge should impose. When police do not refer juveniles to conferences or courts (which is the case a majority of the time), the offenders are often required to make apologies, do community service or pay restitution (Morris, 2004).

In some jurisdictions, the police conduct conferences themselves rather than referring the young people elsewhere. Thames Valley Police in England train police officers to conduct conferences that may involve the victim and offender, their family and friends, and in some instances members of the community (Parker, 2001).

A number of other countries have adopted similar programmes.<sup>10</sup> Successful completion of a mediation agreement results in the dismissal of charges (or in the decision

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<sup>9</sup> For a discussion of the restorative uses of other kinds of interventions, such as victim participation in court proceedings, court-imposed restitution and community service, see Van Ness, D And Heetderks Strong, Karen. (1997). *Restoring Justice*. Cincinnati, OH: Anderson Publishing Company, 228p. Second Edition 2002.

<sup>10</sup> Police are permitted to refer juveniles to restorative processes in Australia, the United States, the Netherlands, Russia and Canada, to name a few examples.

not to charge) and may, as in Norway, mean that the case is removed from the ordinary police certificate of good conduct (Paus, 2000).

In a growing number of countries, including New Zealand and England, these measures have been extended to adult offenders as well (Maxwell and Morris, 2001; Home Office, 2003). In South Africa, Community Peace Committees were formed to assume responsibility for crime prevention and resolution in localities where there was little confidence in the justice system. Recently, however, a pilot project was initiated to form a partnership with the police. While disputants may still go directly to the Community Peace Committee, they may also go to police who will refer appropriate cases to the Community Peace Committee (Sharma, n.d.)

*Use by prosecutors.* As a general rule, prosecutors are given more discretionary powers than police, and courts more than prosecutors.<sup>11</sup> In common law countries, prosecutors have the authority to divert cases. But even in civil law countries, recent legislation allows prosecutors to refer certain cases to restorative processes. In Austria, for example, prosecutors may send matters to mediation (referred to as “out of court offense compensation”) after they have received positive recommendations from the social worker/mediator (Pelikan, 1997). The German Juvenile Justice Act of 1990 allows prosecutors to dismiss criminal cases on their own authority if the juvenile has either reached a settlement with the victim or made efforts to do so.<sup>12</sup>

Following a pattern that often occurs as jurisdictions adopt restorative justice processes, countries that began with prosecutor-referred restorative processes for juveniles have since extended it to adults as well. An example of this is Austria, which in 2000 authorized prosecutorial diversion (including to victim offender mediation) to adult defendants facing sentences of not more than five years’ imprisonment (Löschnig-Gspandl, 2001).<sup>13</sup> In some other countries, such as Colombia, legislation authorizing the use of mediation has applied first to adult cases, when the prosecutor agrees.<sup>14</sup>

In general, the prosecutor’s authority to divert a matter after charges have been filed appears to depend on the legal tradition of the country. In common law countries the prosecutor may continue to divert until the trial (and withdraw charges in the event of a successful resolution) without the court’s permission. In civil law countries the power to divert is more likely to transfer to the judge once charges are laid (Van Ness and Nolan, 1998).

*Use by courts.* Judges use restorative processes both for pre-trial diversion and as part of sentencing preparation. In those jurisdictions where prosecutors have no authority to divert cases once charges are laid, judges may still have that authority. In Italy, for example, a judge

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<sup>11</sup> Laws that grant police discretion to divert cases typically give similar powers to prosecutors and courts. However, other legislation restricts the use of discretion to prosecutors and courts, and a final category of laws makes it available to judges alone.

<sup>12</sup> *Jugendgerichtsgesetz (JGG)*, §§ 47, 45(3)(10), no. 7 (1990).

<sup>13</sup> Other conditions include that the offence not be a petty offence, that the crime not have resulted in a fatality, that the prosecutor or the court consider the facts of the case to be settled (often through a confession), and that the suspect voluntarily accepts the offer of diversion. Löschnig-Gspandl, Marianne. (2001). *Diversion in Austria: Legal Aspects*. European Journal of Crime, Criminal Law and Criminal Justice. 9(4): 281-290.

<sup>14</sup> Criminal Process Code, Law 906 of 2004 (August 31).



may arrange for mediation between a juvenile offender and the victim, and following successful completion may enter an order suspending the trial and imposing probation (Paliero and Mannozi, 1992). In the U.S. State of North Carolina, this approach has become so routine that at the beginning of court hearings the prosecutor will invite any parties interested in mediation to identify themselves, and the judge will explain the benefits of mediation. Trained, volunteer court mediators are present to immediately help willing parties find a mutually acceptable resolution (McGeorge, 2004). In some jurisdictions, a judge may offer court-based mediation even after the trial has begun if it appears that the parties might benefit from it. However, as with other diversion programmes, the decision by the parties whether to participate will not influence the outcome of a trial.

In addition to pre-trial diversion of cases to restorative processes, judges may also use restorative processes after conviction or a guilty plea and before sentencing. For example, in Finland, the judge may suspend the matter until an agreement is made and then carried out, at which point the sentence may be waived (Iivari, 2000). Another example is the Restorative Resolutions Project in Canada, which focuses on adult offenders and their victims in cases of serious felonies. During its initial 18 months, the Project accepted 67 of the 115 cases referred. Of those 67, the Project developed plans for 56 offenders. These plans were submitted to judges at the time of sentences. The plans were accepted in the cases of 45 offenders (Richardson, et al., 1996).

*Use by probation officers.* Not all offenders and victims are willing or able to participate in a restorative process prior to disposition of the criminal case in court. In those instances, restorative processes may be used in the course of the offenders' sentences. In Japan, when the offender has been placed on probation, the probation officers may arrange meetings with the victim for the offender to apologize and make restitution (Norapoompipat, 2000). In fact, in 2001, a rehabilitation center was opened in order to arrange conferences between juvenile offenders and their victims. Participation is voluntary and may include family members and supporters of both parties. These conferences may be held prior to the court proceeding or while the juvenile is on probation. The agreement is then sent either to the judge or the probation officer for their use in working with the offender.

*Use in prison.* There are several reasons for providing restorative processes in prison. One is to help prisoners develop an awareness of and empathy for victims. This may be done by bringing surrogate victims (i.e., victims of crimes committed by other offenders) to meet with groups of prisoners. An example is the Sycamore Tree Project, a programme used by Prison Fellowship affiliates in a number of countries (Walker, 1999).

Other programmes provide an opportunity for prisoners to meet with their victims, their estranged families, or with hostile communities. The State of Texas developed a programme at the request of victims that facilitates meetings between crime victims or survivors with their offenders. Most of the offenders are serving very long sentences; some are on death row. The programme does not affect the prisoners' sentence length; however, the victims' opinions are very influential in parole hearings and some victims have decided not to contest parole after their meetings (Doerfler, 2001).

Many prisoners have alienated their families because of their involvement in crime, the embarrassment and harm they have caused their families, and in some cases because of crimes they have committed against family members. Furthermore, communities can be

fearful and angry at the prospect of a prisoner returning. Consequently, it may be necessary for prisoners, family members, and community representatives to meet to discuss how to re-establish meaningful relationships together. Volunteers with the Prison Fellowship affiliate in Zimbabwe act as facilitators in conversations between prisoners' families, the head man of the prisoners' villages, and the prisoners about the conditions needed for a successful re-entry to the village (Van Ness, 2005b).

A final purpose for restorative justice processes in prison is to create a culture within prison in which conflict is resolved peacefully. This includes dispute resolution programmes for conflict between prisoners. Imprisoned gang leaders in Bellavista prison in Medellin, Colombia, have created a peace table, at which they meet to resolve disputes between gangs arising both inside and outside the prison.<sup>15</sup> Other prisons have programmes that address workplace conflict between correctional staff members, including senior management. Such programmes have been used with success in Philadelphia City Prisons and the state of Ohio. The programmes have not only helped staff address their own conflicts, they have also improved prison staff members' ability to deal with conflicts they may have with prisoners (Roeger, 2003).

*Use by parole officers.* Restorative processes are used in parole in at least three ways. One is when, prior to the decision to parole an offender, the victim and offender have met in a restorative process and made agreements that could be considered in determining whether to parole the offender and what conditions to impose. These restorative processes might have taken place years before the parole hearing. The Parole Act 2002 in New Zealand provides that the dominant concern in deciding whether to release a prisoner on parole is the safety of the public. However, the board is also instructed to give "due weight" to restorative justice outcomes (Bowen and Boyack, 2003). On the other hand, there are those who oppose use of such agreements. The American Probation and Parole Association's manual on the victim's involvement in offender re-entry recommends that prisoners should not be offered, nor should they receive, any favourable treatment as the result of apologizing to the victim or attempting in some other way to make amends. The rationale is that victims will be able to trust the offenders' statements more if they know that the offenders have no ulterior motives (Seymour, 2001).

A third use of restorative processes is at the time a release decision is to be made. The National Parole Board in Canada has created specialized hearings when the prisoner is an Aboriginal offender. An "Elder-assisted hearing" is one in which an Aboriginal elder participates in the parole hearing in order to inform board members about Aboriginal culture, experiences and traditions, and their relevance to the decision facing the board members. The elder also participates in the deliberations. A "community-assisted hearing" takes place in an Aboriginal community, and all parties, including the victim and members of the community, are invited to participate in what is called a "releasing circle," which will consider the question of release.<sup>16</sup> (National Parole Board, 2002)

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<sup>15</sup> The author has visited this prison and met with participants at the peace table.

<sup>16</sup> While a number of jurisdictions allow victims to offer statements at parole hearings, these are restorative interventions only in the broadest sense of the term "restorative justice." They are not restorative processes, because the purpose of the hearing is to inform the decision-makers (the parole board) about factors it should consider in making the decision.

A second use for restorative processes is immediately before parole to discuss what conditions of parole will be imposed on the parolee after release from prison. The New South Wales Department of Corrective Services uses Protective Mediation in situations where it is likely that an offender will come into contact with the victim on release (e.g., they live in a small community, they are family members, etc.). The mediation is not “face to face,” but is instead conducted by a trained staff person who acts as a “go-between” to clarify the needs and wishes of each party about contact with the other, and helps them arrive at a practical agreement, when possible. The agreement may or may not be made part of the conditions of parole (NSW Department of Corrective Services, 1998).

*Other uses.* This paper has addressed the use of restorative justice processes in the criminal justice system. However, it should be noted that this methodology is being applied in a number of other settings. Many jurisdictions are using restorative justice in schools; this may be a logical extension of its use in responding to juvenile offences. It is used to address disciplinary problems, conflict among students, bullying and juvenile offences committed at school (see, for example, Hopkins, 2002).

One of the early formulations of restorative justice theory was developed by John Braithwaite as a result of research into successful interventions for securing compliance with corporate regulatory schemes (Braithwaite, 1989). Restorative processes are now used in addressing workplace conflict as well (Costello and O’Connell, 2002).

Restorative interventions are used to address community disputes ranging from misdemeanour crimes to chronic community conflicts (Abramson and Moore, 2001). Further, restorative justice has been applied to societal disputes in post-conflict settings. Perhaps the best-known instance is the South African Truth and Reconciliation Commission, but other countries, such as Rwanda, are also using restorative processes in response to state-sponsored or mass violence (Tiemessen, 2004).

### **Issues concerning adoption of restorative justice processes**

*Issue 1: Due process and restorative justice.* The informality of restorative processes has given rise to concerns that without the due process protections of formal justice systems, restorative processes will fail to protect the human rights of the participants. This is, in part, why the United Nations Economic and Social Council endorsed a Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters in 2002<sup>17</sup>. The principles offer guidance to governments intending to incorporate restorative processes so that both victims and offenders are treated with respect and their fundamental rights are protected.

Warnings about whether restorative processes can adequately protect the rights of accused persons have centred around five fundamental rights recognized in international law (Van Ness, 1999). Figure 2 reviews brief descriptions of how those rights might be violated in restorative processes and the approach taken in the Basic Principles to avoid such violations.

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<sup>17</sup> See note 6.

### **1. The right to recognition before the law and equal protection under the law.**

**Concern:**

Discriminatory behaviour might be masked by the informality of restorative proceedings.

**Basic Principles response:**

- Paragraph 9 provides that “disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring any case to, and in conducting, a restorative process.”
- Paragraph 18 provides that facilitators be impartial and that they should not only respect the dignity of the parties but ensure that the parties treat each other accordingly.

### **2. The right to freedom from torture and cruel, inhuman and degrading treatment or punishment.**

**Concern:**

The parties may not appropriately limit the kinds of obligations that the offender assumes. One way is by requiring obligations that are disproportionate to those assumed by other offenders in other agreements. A second way is by including an obligation that the law would reject as degrading or cruel.

**Basic Principles response:**

- Paragraph 7 states that agreements must be reached voluntarily and “should contain only reasonable and proportionate obligations.”
- Paragraph 15 calls for judicial supervision of agreements

### **3. The right to presumed innocent.**

**Concern:**

Offenders are expected to assume responsibility before using restorative processes. This confession could be used later as evidence of guilt in the event the restorative process fails to produce an agreement and the matter returns to court.

**Basic Principles response:**

- Paragraph 7 allows restorative processes only when there is sufficient evidence to charge the offender.
- Paragraph 8 provides that “participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.”
- Paragraph 14 provides that when restorative processes are not held in public, the discussions should be confidential.
- Paragraphs 16 and 17 address situations when either there is no agreement or the agreement is not fully implemented and the matter is referred back to the criminal

justice process. In those situations, the failure to agree or to complete an agreement may not be used in any criminal justice proceedings that may follow.

#### 4. The right to a fair trial.

**Concern:**

Offenders give up the opportunity for a trial when they choose to participate in a restorative process.

**Basic Principles response:**

- Paragraph 7 limits the use of restorative processes to matters when the offender and victim freely and voluntarily consent to participate. Furthermore, they should be allowed to withdraw the consent at any time during the process. The agreements must also be reached voluntarily.
- Paragraph 13 requires procedural safeguards be in place when referring cases to restorative processes. Among those are provisions requiring that the parties be “fully informed of their rights, the nature of the process and the possible consequences of their decision.” Another safeguard prohibits coercion or unfair inducement to participate in a restorative process or accept a restorative outcome.

#### 5. The right to assistance of counsel.

**Concern:**

The parties may be unaware of safeguards contained in the Basic Principles and in national and domestic law. They need the assistance of legal counsel to make educated decisions about participation in restorative processes.

**Basic Principles response:**

- Paragraph 13 provides that “subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian.”

Figure 2

*Issue 2: Legal status of restorative justice processes.* Some restorative justice processes are entirely independent of the criminal justice system and have no formal legal status except as their outcomes are accepted within the criminal justice system. This not only includes indigenous processes, such as the peace committees in Pakistan (Khan, 2004) and the sulha peacemaking process in the Middle East (Jabbour, 1996), but also contemporary community-

based mediation programmes such as the mediation centres in Guatemala (Parker, 2004) and Argentina (Paz, 2000). Other restorative processes operate under explicit and limited legislative authorisation, such as that developed in Austria and other civil law countries to allow development of restorative justice programmes (Pelikan, 2000). A third category of legislation concerning restorative processes consists of restorative measures that are included as part of a larger justice reform act, as were the Youth Offending Teams in The Crime and Disorder Act 1998 (England & Wales). A fourth category of legislation concerns efforts to base entire juvenile or adult justice systems on restorative justice philosophy and practice (Van Ness, 2005a).

It has been suggested, based on a survey of restorative justice legislation conducted several years ago, that there are five questions for a country to address before enacting legislation concerning restorative justice: (1) Is legislation needed to eliminate or reduce legal or systemic barriers to use of restorative programs? (2) Is legislation needed to create a legal inducement for using restorative programs? (3) Is legislation needed to provide guidance and structure for restorative programs? (4) Is legislation needed to ensure protection of the rights of offenders and victims participating in restorative programs? and (5) Is legislation needed to set out guiding principles and mechanisms for monitoring adherence to those principles?

Absent these or other compelling reasons, there may be no need to pursue legislatively-mandated restorative justice implementation.

## **Conclusion**

Restorative justice has become a global phenomenon in juvenile and criminal justice systems. Resonating with, and in some cases drawing from, indigenous conceptions of justice, it offers both an alternative understanding of crime and new ways of responding to it. Restorative processes include victim-offender mediation, conferencing and circles; restorative outcomes include apology, amends to the victim and amends to the community. Research shows that restorative programmes meet a number of important criteria, such as victim and offender satisfaction, fear reduction for victims, development of empathy in offenders, increased completion of agreements, and lowered recidivism.

This paper has offered an overview of how restorative justice processes are being used by police, prosecutors, judges, prison officials and probation and parole authorities in different parts of the world. Although restorative interventions have developed somewhat differently from region to region, in many cases, countries have found it useful to adopt appropriate legislation. The United Nations has endorsed the Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters to guide countries around potential human rights and due process roadblocks as they incorporate restorative process into their formal justice systems.

Restorative justice programmes are used far more now than they were at the time of the 10<sup>th</sup> UN Congress on Crime Prevention and Criminal Justice in 2000. This growth shows no sign of abating between now and the 12<sup>th</sup> Congress.

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