

# Restorative Justice: Perspectives on Contemporary Theoretical and Empirical Issues

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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. ‘Restorative justice’ revolves around the notions that crime is primarily a violation human relationships; 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; 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 not a new concept – It was a prevalent justice model in early civilizations in Europe and Asia and remains so among many indigenous communities around the world. 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 concerns that need to be addressed in the design and implementation of such practices.

**Keywords:** restorative justice; criminal justice, mediation; conferencing; circle sentencing

## 1. RESTORATIVE JUSTICE: PHILOSOPHY, GUIDING PRINCIPLES AND GOALS

Restorative justice may be described as a victim-centered 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.<sup>1</sup> Restorative justice, according to a well-known definition by Marshall 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.’<sup>2</sup>

The UN also recently 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.’<sup>3</sup> 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

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<sup>1</sup> Kent (2002) 249.

<sup>2</sup> 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.

<sup>3</sup> Dandurand and Griffiths (2006) 7.

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 also referred to as community justice.<sup>4</sup>

Restorative justice is both a new and an old concept. While the modern articulation has emerged in the past forty years,<sup>5</sup> 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.<sup>6</sup> 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 behavior. Such systems allowed the victim, the offender, the families concerned and members of the community to actively participate in the reconciliation process.<sup>7</sup> 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<sup>8</sup> and by the end of the 1990s most Western countries had embraced restorative justice programmes.<sup>9</sup>

<sup>4</sup> According to Braithwaite (1999), the aims and core values of restorative justice are about healing, moral learning, community participation and caring, dialogue, forgiveness, responsibility and making amends (p. 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).

<sup>5</sup> The term 'restorative justice' was coined by Albert Eglash in 1977 (Eglash [1977] 91–92).

<sup>6</sup> Braithwaite (1999) 1 ff. As Zehr (1985) 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' (p. 6–7). See Weitekamp (1999) and Johnstone (2002) 36 ff.

<sup>7</sup> It should be noted, however, that reconciliation was not always sought in cases where disputes involved comparative strangers.

<sup>8</sup> Peachey (1989).

<sup>9</sup> 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. At the Tenth UN Congress on the Prevention of Crime and Treatment of Offenders, held at 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. Following the conclusion of the Congress proceedings, the UN's Commission on Crime Prevention and Criminal Justice adopted a resolution inviting Member States to comment on 'Preliminary Draft Elements of Basic Principles on the Use of Restorative

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.<sup>10</sup> It 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 behavior 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 behavior through positive interventions; and,
- g) to provide a means of avoiding the escalation of legal justice and the associated costs.

The discussion suggests that 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 them to understand, accept and carry out their commitments to repair the harm. The victim's involvement is essential in defining the harm and how it might be repaired,<sup>11</sup> while offenders must be held accountable for their actions by accepting responsibility for their behavior and making reparation. Reparation can be made in a variety of ways, such as a verbal or written apology,<sup>12</sup> financial compensation or work carried out for the victim or the community e.g., work at a school, old age home or hospital).

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Justice Programmes in Criminal Matters'. The relevant proposal was subsequently approved by the UN Economic and Social Council.

<sup>10</sup> Zehr (1990) 181. and Roach (2000) 256. According to Pranis (2002), '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' (p. 25).

<sup>11</sup> 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 (1998) puts it, 'modern criminal justice has stressed the aggrandizement and edification of the state, rather than the satisfaction of victims' (p. 217). On this issue consider also van Dijk (1988).

<sup>12</sup> According to Retzinger and Scheff (1996), 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' (p. 317).

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 behavior, having regard to the needs of the individuals involved as well as cultural and circumstantial requirements. 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.<sup>13</sup>

An important feature of restorative justice is a shift away from the retributive paradigm pervading the traditional criminal justice system. Rather than merely ensuring that the offender pays their debt to society through punishment, the chief priority of restorative justice is to ensure that the offender is held accountable for their actions and repairs the harm, both material and symbolic, they have caused. In this context, accountability means understanding what one did and then taking responsibility for it.<sup>14</sup> 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.<sup>15</sup>

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.

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 them then becomes a way of life that is difficult to change and is rationalized as a defensive lifestyle within the deviant subculture.<sup>16</sup> The challenge for the restorative justice approach is to develop ways

<sup>13</sup> Morris (2002) 597.

<sup>14</sup> As John Braithwaite (2002b) 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' (p. 129).

<sup>15</sup> Johnstone (2002) 161.

<sup>16</sup> In the words of Gerry Johnstone (2002), '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' (p. 13). This approach draws support from the so-called 'labeling theories' in criminology.

of responding to offenders that would counter the naturally occurring stigmatizing processes and provide mechanisms for the reintegration of offenders into community life. Braithwaite remarked that 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. The community then forgives the offender through a process of earned redemption as the offender makes amends to those they have harmed. Successful reintegration presupposes that the disapproval of the offending behavior 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 of paramount importance. If the process is to have a reintegrative effect the offender must be made powerfully aware of the disapproval of their wrongful conduct by persons for whom they maintain 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.<sup>17</sup>

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.<sup>18</sup> 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

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Labeling 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 labeled, 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 labeling 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 labeling perspective Becker (1963), Lemert (1967) and Gove (1980).

<sup>17</sup> Braithwaite (2002b) 74. For a closer look on the issue of reintegrative shaming: Braithwaite (1989), Braithwaite (1993) and Masters and Roberts (2000) 145.

<sup>18</sup> 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.

resolve a variety of conflicts and disputes e.g., 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.<sup>19</sup> 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.

## **2. EXAMPLES OF RESTORATIVE JUSTICE PRACTICES**

### **2.1. 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 programs – also referred to in some communities as 'victim-offender mediation programs' or 'victim-offender dialog programs'.<sup>20</sup> These programs seek to mediate between victims and offenders with a view to providing an opportunity for the offender and the

<sup>19</sup> McCold (1999) 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) (p. 1). Umbreit (2001) 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 (p. 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.

<sup>20</sup> These were first introduced in Kitchener, Ontario, in 1974 (Peachey [1989]). The first victim-offender mediation program in the United States was introduced in Elkhart, Indiana, in 1978, and was modelled on the program developed in Kitchener.

victim to develop a mutually acceptable plan on how to deal with the harm caused by the offence.<sup>21</sup> During the relevant process, victims and offenders come together in a safe, controlled setting and engage in a mediated discussion of the crime and the circumstances in which it was committed. With the assistance of the mediator, the victim describes the physical, emotional and financial impact of the crime, asks questions about the crime and the offender and helps develop a plan for restoring losses.<sup>22</sup> The offender is given the opportunity to learn about the impact of the crime on the victim, describe what happened from their point of view and take direct responsibility for their 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.<sup>23</sup>

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.

<sup>21</sup> 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).

<sup>22</sup> 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.

<sup>23</sup> This is done, for example, with sexual assault victims and offenders in Canada and England.

## 2.2. Conferencing

Over the past fifteen years special attention has been given to issues concerning the nature and extent of the community's role in a restorative justice process. A restorative justice practice that has attracted much attention in recent years 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 contribute to the reconciliation process. It aims to involve the young 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 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.<sup>24</sup>

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.

## 2.3. 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.<sup>25</sup> 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.<sup>26</sup>

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

<sup>24</sup> Conferences are referred to by a number of different names, such as Family Group Conferences, Community Action Conferences and Community Accountability Conferences.

<sup>25</sup> Cayley (1998) 182.

<sup>26</sup> Stuart (1994), La Prairie (1995) and Lilles (2001).



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.

### 3. OTHER APPLICATIONS OF RESTORATIVE JUSTICE

Besides offering an alternative to ordinary criminal justice processing, restorative justice practices are also being 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

Furthermore, restorative justice methods have been used in a number of countries as a means of resolving conflicts between citizens and their governments.<sup>30</sup> 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

<sup>27</sup> Consider on this Rigby (1997, 2002).

<sup>28</sup> Gottfredson (1997).

<sup>29</sup> 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).

<sup>30</sup> 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.

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.<sup>31</sup>

#### 4. 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. It is noted in its Handbook on Justice for Victims that

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.<sup>32</sup>

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. Following the conclusion of the Congress proceedings, the UN's Commission on Crime Prevention and Criminal Justice adopted a resolution inviting Member States to comment on 'Preliminary Draft Elements of Basic Principles on the Use

<sup>31</sup> 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.

<sup>32</sup> United Nations Office for Drug Control and Crime Prevention (1999) 42–3.

of Restorative Justice Programmes in Criminal Matters'. The relevant proposal was subsequently approved by the UN Economic and Social Council.

At a European level, the increasing impact of the restorative justice approach is reflected in a number of recent 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 2000. In the same 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.<sup>33</sup> 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. In order 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 counseling 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.<sup>34</sup>

## **5. 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

<sup>33</sup> 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.

<sup>34</sup> 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.

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. Of particular interest is the data collected regarding satisfaction with outcomes from Family Group Conferences.

The evidence emerging from a number of studies on conferencing programs suggests that victims are in general satisfied with the relevant process and its outcomes.<sup>35</sup> Community members who have participated in such programs in support roles have also expressed high levels of satisfaction with the restorative process.<sup>36</sup> Victims are very appreciative of the opportunity a conference presents for them 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 conference 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 they deal face-to-face with the offender, involves the risk of further emotional harm.<sup>37</sup>

Now, with respect to offenders, 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.<sup>38</sup> 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.<sup>39</sup> There is also clear evidence that offenders view

<sup>35</sup> Similarly, 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) and Braithwaite (1999) 20–26.

<sup>36</sup> See Burford and Pennell (1998). Consider also McCold and Wachtel (2012).

<sup>37</sup> 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 studies 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.

<sup>38</sup> Consider on this Braithwaite (1999) and Maxwell and Morris (1999). See also Pollard (2000) 17 and Morris and Gelsthorpe (2000) 21 ff.

<sup>39</sup> A position supported by psychological research in the field of procedural justice. For a closer look see Tyler (1990).

conferencing as more procedurally fair than mainstream criminal procedure, despite the formal rules governing the latter and the absence of any rules beyond common courtesy in conferencing.<sup>40</sup>

## 6. RESTORATIVE JUSTICE: EVALUATION AND PROSPECTS

Over the past decade 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. 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.<sup>41</sup>

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 one scholar has 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.'<sup>42</sup> 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, revictimised. 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,<sup>43</sup> the

<sup>40</sup> See Umbreit (1992), Sherman et al. (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 Morris – Maxwell (1998).

<sup>41</sup> Consider La Prairie (1995).

<sup>42</sup> McCold (1995).

<sup>43</sup> See on this White (1994).

protection of the privacy of those participating in a restorative justice program and the status of the information provided by the participants (such as, for example, a confession by the offender of a separate crime). 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. In this respect, 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 confirmed by the New Zealand legislature.<sup>44</sup> 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.

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.<sup>45</sup> Others look for ways in which forms of restorative justice might be combined with current criminal justice practices so that the latter could be informed and influenced by restorative principles.<sup>46</sup> However, most hope that, provided that the evaluative research continues to show encouraging results, restorative justice programs will become a mainstream alternative to traditional criminal justice processing. This is not likely to happen, however, unless restorative justice is shown to have the capacity to prevent crime. Proving that capacity depends upon the 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 restorative justice offers both for enabling deliberative democracy and for providing a credible alternative to traditional criminal justice processing has already be shown to be worth pursuing.

<sup>44</sup> See 8 of the Sentencing Act 2002 provides that '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'.

<sup>45</sup> See Marshall (1990); Marshall and Merry (1990).

<sup>46</sup> See Walgrave and Aertsen (1996).

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