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## Restorative justice: some reflections on contemporary theory and practice

### Summary

Over the past decade a new way of thinking about how we should view and respond to crime and delinquency has been gaining ground around the world and is beginning to exercise a significant influence on criminal justice policy and practice. Known as “restorative justice”, it revolves around the ideas that crime is primarily a conflict between individuals involving harm to people and human relationships; that the chief aim of the justice process should be to reconcile parties while addressing the harm caused by the offence; and that the resolution of the conflict demands a positive effort on the part of victims and offenders and assumption of responsibility by the community. This paper outlines the broad principles of restorative justice, examines the differences between restorative justice and other prevailing conceptions of justice, and identifies and comments on the constitutive elements necessary for restorative justice practice. The paper then considers contemporary restorative justice programmes, presenting information on origins, guiding principles, procedures and goals and identifying a number of issues and concerns that need to be addressed in the development and implementation of such programmes.

### Herstellende geregtigheid: aspekte ter oorweging van die huidige teorie en praktyk

Die afgelope aantal dekades het 'n nuwe benadering tot misdaad regoor die wêreld posgevat en het dit 'n beduidende invloed op strafregbeleid en -praktyk uitgeoefen. Bekend as “herstellende geregtigheid”, behels dit die idee dat misdaad primêr 'n konflik tussen individue en benadeling van mense en menslike verhoudinge behels; dat die hoofdoel van die regsproses daarop gerig behoort te wees om die partye met mekaar te versoen, die benadeling deur die oortreding reg te stel en dat die oplossing van die konflik positiewe optrede van die slagoffers, oortreders en die aanvaarding van verantwoordelikheid deur die gemeenskap vereis. Hierdie bydrae skets breedweg die beginsels van herstellende geregtigheid, ondersoek die verskille tussen herstellende geregtigheid en ander heersende opvattings oor geregtigheid, en identifiseer en lewer kommentaar oor die onderliggende beginsels wat nodig is vir 'n praktyk van herstellende geregtigheid. Hierdie navorsing ondersoek kontemporêre programme van herstellende geregtigheid, gee inligting oor die oorsprong, leidende beginsels, prosedures en doelwitte en identifiseer 'n hele aantal kwessies en bekommernisse wat in die ontwikkeling en aanbieding van sodanige programme aangespreek moet word.

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## 1. The idea of restorative justice

The term 'restorative justice' refers to a range of informal justice practices drawing on a common set of values and a philosophy that calls into question many of the objectives and methods of traditional criminal justice systems.<sup>1</sup> The growing interest in restorative justice around the world in recent years and the related movement for criminal justice reform reflect a dissatisfaction with mainstream criminal justice theory and practice, and a reaction to what is perceived as a failure of our systems to significantly reduce crime and to meet the needs of the individuals and communities affected by it.

Traditional criminal justice theory proceeds from the assumption that it is society, the corporate whole, that is harmed by criminal wrongdoing.<sup>2</sup> Crime, as a wrong done to society, is defined by lawbreaking and guilt. Criminal justice is concerned with determining guilt and administering punishment through a process involving a contest between the offender and the state and governed by a set of impersonal and systematic rules. Proceedings take place in a world characterised by highly formalised patterns of interaction between legal experts who mainly subscribe to the same legal view of things, deciding which rules apply to a case and then constraining their deliberation within a technical discourse about that rule application. But, as critics often point out, the system, with its emphasis on the prevailing norms of legal rationality and procedural formalism, leaves little room for victims, offenders and the communities concerned to actively participate in the justice process and the impersonality of the proceedings tends to dehumanise both the criminal act and its consequences. As a result, the offender often fails to realise the real impact of his wrongful conduct, and the victim remains just that, a victim, knowing only that the offender, somewhere out of his sight and reach, serves whatever sentence was imposed on him. It is argued, moreover, that the restoration of social equality, that is relationships of equal respect, dignity and concern, cannot be achieved when priority is given to stigmatic punishment, as is very often the case under the mainstream system, for punishment is inherently isolating, removing the offender from the relationship and thereby precluding relationship altogether, let alone equality of relationship. The restoration of social equality can best be achieved by practices capable of promoting the reintegration of the offender into the community through a process to which the offender submits voluntarily as a result of negotiations with those affected by the offence, and as part of the offender's own efforts to restore equality to the relationship.

While traditional criminal justice theory regards crime as pertaining to the transgression of general rules laid down by the state for the protection of public interests, restorative justice proceeds from the assumption that

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- 1 The term 'restorative justice' was coined by Albert Eglash in a 1977 article where he drew a distinction between retributive justice, based on punishment, and restorative justice, based on restitution. Eglash 1977:91-92.
  - 2 According to the traditional understanding crime, "The wrong done to an individual extends beyond his own family: it is a wrong done to the community of which he is a member, and thus the wrongdoer may be regarded as a public enemy." Pollock and Maitland 1898, quoted by Wright 1991:5.

crime involves a violation of people and of human relationships resulting in injuries to victims, communities, and the offenders themselves. Rather than establishing guilt and exacting punishment under a set of impersonal rules, it seeks to repair the damage caused by the offence and restore the relationships between the parties concerned by actively involving all parties in a process of negotiation and reconciliation.<sup>3</sup> As Kay Pranis points out,

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.<sup>4</sup>

Similar to corrective justice, restorative justice recognizes that the harm begging redress following the commission of an offence involves more than simply the direct material loss suffered by the victim, for such a harm involves also the violation of the victim's rights. The two conceptions of justice differ, however, with respect to what is required to be done to address the wrong and restore equality. Whilst from the point of view of corrective justice a material transfer from the offender to the victim would be sufficient, restorative justice holds that the wrong cannot adequately be addressed unless the relationship between the parties is restored to one in which their rights are fully respected.

As has already been said, restorative justice is primarily concerned with restoring equality between the offender/wrongdoer and the victim/sufferer of the wrong. This is also the objective of retributive justice. Retributive justice, however, views the achievement of equality as hinging upon a particular set of punitive practices. It links the very idea of restoration of equality with retribution against the wrongdoer exercised through stigmatic punishment.<sup>5</sup> Restorative

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3 According to Zehr, restorative justice is based on the idea that 'crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions, which promote repair, reconciliation and reassurance.' Zehr 1990:181. One should note here that restoring relationships does not necessarily entail the reconstruction of intimate relationships between individuals (e.g. a marital relationship) but rather social relationships of equality, i.e. the parties' co-existence with security, dignity and equal respect within the same community.

4 Pranis 2002:25.

5 Reference should be made here to the distinction between theories of punishment which hold that the punishment of the wrongdoer is required for its own sake and theories offering instrumental justifications for punishment revolving around the notions of general and individual deterrence and rehabilitation. Critics recognise that deterrence and rehabilitation are desirable goals but maintain that these cannot be attained through punishment (or through punishment only). Being unable to justify the practice of punishment on these grounds, many criminal justice theorists have looked for ways of defending punishment by employing the idea of just deserts as a prerequisite of retribution. Retributivism serves supporters of punishment well for the community can be assured that it is morally right to punish wrongdoers because that is what they deserve, irrespective of whether acts of punishment protect people from criminal wrongdoing. The shift from instrumentalist justifications of

justice, on the other hand, gives priority to the question of what set of practices are most likely, in a given context, to undo or minimize the damage caused by the offence, thus achieving the goal of restoring social equality. It recognizes that the identification of these practices requires social dialogue that includes offenders, victims and the community to which they belong, and demands close consideration of the needs of each for restoration and healing. As John Braithwaite remarks,

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.<sup>6</sup>

Retributive justice, by placing the emphasis on individual guilt as a prerequisite of punishment, is primarily backward looking, focusing on what happened, not what must be done to address it. Restorative justice, by contrast, is essentially forward looking, for it is concerned with what needs to be done to restore the relationship between offender and victim, and not only with establishing responsibility. Of course, the process of restoration cannot begin unless the fact that a violation has occurred is fully acknowledged, for in order to repair the harm and restore the relationship one must know what happened. This acknowledgment confirms the ideal of restoration for victims because it affirms their expectation of relationships of social equality. In this sense restorative justice also looks back at the past, but it does so with a view to transforming the relationship for a better future. Thus, without being directly concerned with general or individual deterrence as a form of social control, it contributes to crime prevention by seeking to bring about a future state of affairs wherein the parties will remain in a relationship of social equality. Finally, in contrast to retributive justice, which sets a great premium on process as a means of establishing culpability for punishable conduct, restorative justice is more concerned with the outcome of the process, rather than with the process itself. It is thus flexible with respect to what must be done in response to a wrong, as long as the relevant action has the potential for achieving the ultimate goal of restoration.<sup>7</sup>

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punishment to retributive ones was motivated also by the desire to avoid the injustices happening in the name of deterrence and rehabilitation — e.g. wrongdoers being kept in prison indefinitely, or for extended periods of time, for relatively minor offences, contrary to the principle of proportionality. The latter principle, which is closely connected with the idea of just deserts, requires a correspondence between the relative seriousness of the offence and the relative severity of the punishment imposed on the offender. Regarding retributive justice as being concerned with nothing more than some abstract 'evening of scores' is too simplistic, however. At its basis, retributive justice is concerned with social equality — with making the offender and his victim equal by giving the offender his just deserts. The philosophical justification for retribution is essentially social and the state's power to punish derives from the idea of the social contract to which citizens notionally subscribe (the so called 'contractarian thesis'). For a critical look at contemporary retributivist theory see Braithwaite and Pettit 1990.

6 Braithwaite 2002:129.

7 On the distinction between restoration and punishment consider Walgrave 2001:17-37.

As has already been noted, in a restorative justice process all parties with a stake in a particular crime come together to resolve collectively, through dialogue and mutual understanding, how to deal with the aftermath of the crime and its implications for the future. Willingness to participate and truth telling are essential elements of any restorative justice programme — participation cannot be the result of fear, coercion or manipulation brought to bear on either the offender or the victim. A successful outcome presupposes that the parties are allowed to relay the story of the incident and their experience of it fully and honestly. Of special importance is the offender's willingness to acknowledge what happened and assume responsibility for his wrongful acts or omissions. Besides voluntary participation and truth telling, it is crucial that the parties are brought together to hear and challenge each other's stories of the incident directly and express their feelings. Bringing the parties face to face with one another makes it possible for the offender to hear the experience of his victim in the latter's own words and for the victim to see the offender as a person rather than as a faceless criminal, dispelling the myths and stereotypes each has of the other. The aim of the process is to produce a coherent picture of the events and reality at issue. The kind of truth sought is the intersubjective truth born out of the confrontation between subjective interpretations of reality. According to a commentator, this conception of truth

implies that truth is always and everywhere a social notion, part of a structure of interaction. ...[Such truth] stems from confirmation of the hard fact that truth is always someone's interpretation of reality. Truth exists between people and is a datum to be activated.<sup>8</sup>

Being concerned with 'right relationship', the truth which restorative justice seeks to arrive at is

much more than just an answer to the question of whether the criminal has really committed the crime and under what circumstances. It is concerned with whether we are capable of ruling out the conflict generated by the crime and how we can make life worth living again for both victim and criminal.<sup>9</sup>

The disparity in terms of power between the state and the accused in the conventional criminal justice process has justified the introduction of procedural protections intended to guard against abuse of rights by state organs. Although in a restorative justice process the offender is no longer pitted against the immense power of the state, the largely informal character of the process gives rise to rights concerns pertaining to possible power imbalances between the parties, as well as to the use of pressure tactics to make individuals participate in the process. In order to be able to address such concerns the process must embody mechanisms designed to protect the rights of the participants. The requirement of voluntariness with respect to participation has already been drawn attention to. Voluntary participation presupposes that the parties are informed about the nature and objectives

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8 Bianchi 1994:24.

9 Bianchi 1994:26.

of restorative justice and are given the time and support they need in deciding whether to participate or not. Once willingness to participate has been assured, the problem of possible power imbalances within the process needs to be addressed. Such imbalances might be the result of a previous relationship between the parties, or differences as to their social status. One way of dealing with this problem is by ensuring that the parties are adequately supported by persons close to them throughout the process. As far as the conduct of the process is concerned, it is required that a balance is struck between the need for free expression of experiences on the one hand, and the need to protect the integrity and sense of security of the parties on the other. Allowing the parties to play a role in setting the ground rules governing the process is of particular importance here, as it offers the parties a feeling of empowerment and strengthens their commitment to the restorative justice process and its objectives. As has been pointed out by commentators, the process of setting ground rules is a vital 'part of establishing an atmosphere and state that will be conducive to open communication and reconciliation.'<sup>10</sup>

Besides the victim and the offender, other parties with a stake in the process include the people in the lives of the victim and offender who care most about them, such as the families of each, and any other members of the community who may be affected or who may be able to contribute to the reconciliation process. Of particular importance is the role of the facilitator or coordinator. Besides having a symbolic role of community involvement in the process, it lies with him to bring the parties together and direct the discussion so as to ensure that the needs of the parties are considered and integrated and their rights protected. It rests with the parties and not the facilitator, however, to determine the content of the process according to what they believe is important in the situation and to decide how to arrive at an outcome that would best meet their needs. Any agreement reached must be consistent with restorative justice principles — it must be a product of a genuine commitment to restore the relationship between the parties to one of equal dignity and respect and not simply an acceptance of the offender's offer by the victim.<sup>11</sup> Ultimately, justice is measured by the extent to which responsibilities are assumed, needs are met and healing is effected.

## 1.1 Victims

When persons are wrongfully attacked or injured, when their possessions are stolen or when their homes are broken into, they experience a loss of self-respect and dignity, accompanied by feelings of grievance, resentment and disempowerment. In the words of Murphy and Hampton,

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<sup>10</sup> Chupp 1989:63.

<sup>11</sup> Although arguably punishment has no place in a restorative justice system, such an agreement might involve some form of suffering for the wrongdoer — e.g. he might be required to work off the damage he caused, to give up certain activities or to compensate the victim for the injury he suffered. Such suffering, however, is directly linked with the harm caused by the offence — not an intentional infliction of pain on the offender — and the result of a negotiated settlement between the parties concerned.

Intentional wrongdoing insults us and attempts to degrade us... It is moral injury, and we care about such injuries... and it is simply part of the human condition that we are weak and vulnerable in these ways. And when we are treated with contempt by others it attacks us in profound and deeply threatening ways.<sup>12</sup>

One of the main criticisms which proponents of restorative justice level against the conventional criminal justice system is that it ignores the needs of the victims of crime. As David Cayley puts it,

Modern criminal justice has stressed the aggrandizement and edification of the state, rather than the satisfaction of victims.<sup>13</sup>

It is argued that victims need to express and have validated their sense of injustice and, more importantly, to be restored to a sense of control and safety in their lives based on a feeling that their rights have been vindicated. The latter presupposes that their injuries, both material and psychological, are identified and repaired as far as possible. When it comes to dealing with the injuries brought about by a crime the distinction between primary and secondary victims is important in determining priorities, especially in the case of limited resources. In general it is fair that priority is given to the primary victims, i.e. those directly harmed by the offender's actions.<sup>14</sup> With respect to secondary victims, one should note that other factors beyond the offence may have contributed to or aggravated their injuries. Such victims are unlikely to have all their injuries adequately addressed unless the relevant factors are identified and explored. An important need of many victims of crime is reintegration into the community, as often the very fact of being a victim can lead to further victimization by society. Indeed victims often share the offenders' experience of being stigmatized and isolated. This can happen when a victim or his experience is disregarded or explained away as being the result of the victim's own acts or omissions.<sup>15</sup>

Restoration cannot be attained unless the harm done to the relationship between the victim and the offender, as well as to that between each of the parties and the community is addressed. From this point of view, participation of the victim, the offender and the community in the restorative justice process is of vital importance.<sup>16</sup> Reference should be made at this point to the central

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12 Murphy and Hampton 1988:25.

13 Cayley 1998:217. Some commentators remark that in many European legal systems, victims of crime have traditionally had considerably stronger rights in the criminal justice process than they have in common law countries. See on this van Dijk 1988:124.

14 Van Ness and Strong 1997:92.

15 According to Van Ness, this so called 'blame the victim' response is often prompted by our own fears. As he explains, 'because we are afraid of crime, we sometimes have trouble dealing with victims. They remind us of our own vulnerability, in the same way that someone with a terminal disease reminds us of our mortality. So we ignore them, we shun them, we blame them. The victim becomes invisible.' Van Ness 1986:28.

16 According to Zehr the following questions need to be considered in order to evaluate the restoring potential of a process with respect to victims: a) Are there sufficient opportunities for victims to tell their story to a relevant audience? b) Are they

role which apology plays in the process. The goal of apology is the granting of forgiveness and, when both occur, victim and offender join in a ritual of reconciliation through which social harmony is restored. Apology is here seen as a goal to be sought, and as an expression of the victim's satisfaction and a sign of reconciliation when it is given. According to Retzinger and Scheff, apology and forgiveness pertain to "symbolic reparation", a vital element of the restorative process. As they point out

Without [apology and forgiveness] the path towards settlement is strewn with impediments, whatever settlement is reached does not decrease the tension level ... and leaves the participants with a feeling of arbitrariness and dissatisfaction. Thus, it is crucially important to give symbolic reparation at least parity with material settlement ... Symbolic reparation is the vital element that differentiates [restorative justice] conferences from all other forms of crime control.<sup>17</sup>

## 1.2 Offenders

The injuries of offenders are usually a complex mix of those preceding and directly or indirectly contributing to the commission of the offence and those resulting from it. Of the latter, probably the most serious is their stigmatization as deviant and dangerous individuals cut off from the rest of society. The reintegration of offenders is necessary if they are to be reconciled with the community to which they belong so that they may participate on equal footing in relationships with fellow citizens. Moreover, reintegration is crucial if reparation is to be achieved, for in order for offenders to be able to make amends for the damage they caused, access to the means to do so must not be impeded. Reintegration as a condition of restoration 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. It presupposes, further, that offenders are given an active role in the restorative justice process, being encouraged to confront the shame which crime entails and to help decide what is to be done to reverse or minimize the harm they caused.

A few things need to be said in this connection about reintegrative shaming, an idea that has played an important part in the designing and implementation of restorative justice programmes. According to some criminologists, the incorrect use of shaming has been one of the main reasons behind the failure of mainstream criminal justice systems to deal effectively with the problem of crime, especially with juvenile offending. The type of social shaming generated and perpetuated by traditional systems through their formal processes and punitive measures is said to create outcasts, for it entails the stigmatisation of the offender. Once a person has been singled out as a deviant and dangerous

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receiving adequate compensation or restitution? c) Is the injustice they have experienced fully recognized? d) Are they allowed to participate in the process? Zehr 1990:230. On the effects of restorative justice on victims see also Johnstone 2002:62 ff.

17 Retzinger and Scheff 1996:317.



individual, the label attached may become the dominant label, or 'master status', which is seen as more important than all the other aspects of the person. As his role in society is undermined by his stigmatisation, deviance for him then

becomes a way of life that is difficult to change and is rationalized as a defensive lifestyle within the deviant subculture.<sup>18</sup>

In the words of Gerry Johnstone,

By segregating and ostracising offenders we render them more rather than less of a threat to us. We drive them into criminal subcultures where they become more and more like alien enemies of the community. We lose whatever chance we have of influencing them to behave better and to subject themselves to various forms of supervision and control.<sup>19</sup>

The challenge for a new approach to crime is to develop ways of responding to offenders which would counter the naturally occurring stigmatising processes and provide mechanisms for the reintegration of offenders into mainstream community life. As John Braithwaite has pointed out, 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 family and community life. Reintegration presupposes that the shaming of an offender takes place within his circle of acquaintances or his own community, and that the disapproval of the offending behaviour is not accompanied by the stigmatization or 'labelling' of the offender but, rather, by the re-affirmation of his value as a person and of his role as a community member. Thus the door is left open for the offender to re-enter the community after he has assumed responsibility for the harm he caused, apologized to the victim and made some kind of reparation. Clearly, a successful outcome depends on whether the procedure adopted succeeds in invoking feelings of genuine shame and remorse in the offender. In this respect, choosing the right participants to be present in supporting roles is of paramount importance. If shaming is to have a reintegrative and deterrent effect, an offender must be made powerfully aware of the disapproval of his wrongful conduct by persons for whom he maintains maximum respect. In the words of John Braithwaite,

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18 Braithwaite 1989:18. Much of the so-called 'labelling theory' comes from the general sociological perspective known as symbolic interaction theory. The latter theory states that reality is to a large degree defined by shared social symbols. When enough people agree that a certain idea is true then it 'becomes' true and is understood as real. If one person commits a crime and is defined a criminal then society may react to that person as a criminal. This will in turn require him to act as a criminal. The claims of the labelling theory have only in part been supported by empirical studies and the theory has been criticized by scholars on various grounds. Nevertheless, the theory has played a part in the introduction of programs which offer 'diversion' from the criminal justice system on the grounds that diversion prevents labelling and social stigma and hence facilitates rehabilitation and reintegration.

19 Johnstone 2002:13.

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>20</sup>

### 1.3 Community

The notion of community is central to the restorative justice philosophy and thus formulating a workable definition of community is a prerequisite for the development of a restorative justice practice. Such a definition might be based on geography, relationship, interest, or it might refer to society as a whole. As Paul McCold explains,

There are many different levels of community, as there are different levels of disputes. Each offender and each victim are members of several communities and informal organizations — personal communities — family, friends, neighborhood and school organizations, churches and community organizations. We are all members of our local community, municipal subdivision, metropolitan area, state, federal and societal level “communities”. Ultimately, we are all members of the human community.<sup>21</sup>

Each of these types of community is affected by crime in different ways and it is possible for each to play a part in a restorative justice process, depending on what is required in the specific context at issue. While the nature of restorative justice and the different ways in which communities may be affected by crime leave room for various types of community involvement, commentators agree that one can make the generalization that communities are harmed when the safety of their members is threatened.<sup>22</sup> Of particular importance is the notion of community based on relationship or immediate interest. Immediate interest communities, such as the victim's and the offender's family groups, are expected to provide counsel and support to each of the principal parties to the process. In some cases, members of the victim's family may be required to serve in place of the victim, if the latter is not able to participate in the process.

As it is concerned with social equality, restorative justice is realized in the community. In this respect, the resolution and prevention of crime requires a positive effort and assumption of responsibility by the community. At the same time restorative justice is transformative of that very community for, besides addressing a specific situation of conflict, it offers communities the chance to heal themselves from the harmful effects of crime. In other words, while the starting-point of restorative justice is a state of wrong that has

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20 Braithwaite 2002:74. For a closer look on the role of reintegrative shaming in the restorative justice process see Braithwaite 1989. And see Masters and Roberts 2000:145.

21 McCold 1995:7.

22 Van Ness and Strong 1997:120.

disturbed the relationship between the wrongdoer and the sufferer of the wrong, as well as that between each of them and the community, its endpoint may be quite different from the *status quo ante*.

The restorative justice approach is said to restore the deliberative control of justice by citizens by transforming those concerned from being passive participants in an impersonal process to being active players required to understand the nature and consequences of the crime and deliberate over how to deal with the problem and prevent its recurrence. It prevents the closed shop of the legal expert and, by infusing non-legal, ethical, values into the justice system, constitutes a constraint on legalism, arbitrariness and bureaucracy.<sup>23</sup>

## 2. Restorative justice in practice

### 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,<sup>24</sup> the term 'restorative justice' is currently understood as referring to programmes 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 programmes — also referred to in some communities as 'victim-offender mediation programs'

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23 Modern justice systems set a great premium on legal certainty, the knowledge that there is a fair procedure for applying a general rule to a particular case. The emphasis is on professionalism and the professional skills of a group of experts, who working in the system continually will be a guarantee of legal certainty. On this view lay participation is anomalous since it disturbs the basis for objectivity and predictability. Here we can see the contradiction in a liberal democratic society instantiated in the rule of law. For in order that the main moral imperative of that society, 'the government of laws and not men', flourish, another important value, that of participation, must, in part, be negated. One can see this in the tension between efficiency and democracy where efficiency, in the shape of reliability, constancy and predictability, is seen as continually subverted by the demands of democratic, and therefore inefficient participation. It is practices like those based on the notion of restorative justice which have the potential for managing this tension in society, by providing participation within the framework of the 'rule of law' and thus not damaging the main moral imperative of the system.

24 As Zehr remarks, 'It is difficult to realize that the paradigm which we consider so natural, so logical (i.e. the one pertaining to the traditional criminal justice system), has in fact governed our understanding of crime and justice for only a few centuries. We have not always done it like this. ... Instead, community justice has governed understandings throughout most of our history. ... For most of our history in the West, non-judicial, non-legal dispute resolution techniques have dominated. People traditionally have been very reluctant to call in the state, even when the state claimed a role. In fact, a great deal of stigma was attached to going to the state and asking it to prosecute. For centuries the state's role in prosecution was quite minimal. Instead it was considered the business of the community to solve its own disputes.' Zehr 1985:6-7; see also Weitekamp 1999; Johnstone 2002:36 ff.

or 'victim-offender dialog programs'.<sup>25</sup> These programmes seek to mediate between victims and offenders with a view to providing an opportunity for the offender and the victim to develop a mutually acceptable plan on how to deal with the harm caused by the offence.<sup>26</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>27</sup> The offender is given the opportunity to learn about the impact of the crime on the victim, describe what happened from his point of view and take direct responsibility for his 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 programmes by judges, probation officers, prosecutors, victim or defence lawyers and law enforcement agents. In some programmes 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 programmes, 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 USA, 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>28</sup>

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25 These were first introduced in Kitchener, Ontario, in 1974. See Peachey 1989. The first victim-offender mediation program in the United States was introduced in Elkart, Indiana, in 1978, and was modelled on the program developed in Kitchener.

26 For a closer look see Umbreit *et al* 1994. On the development and effectiveness of victim-offender mediation programs see Umbreit *et al* 2001.

27 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.

28 This is done, for example, with sexual assault victims and offenders in Canada and England.

Currently, there are approximately 300 victim-offender mediation programmes in Canada and the United States and more than 700 in Europe. In most countries these programmes 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 here 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.

## 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>29</sup> The relevant process has been implemented in schools, police departments, probation agencies, community mediation programmes, residential programmes 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. In the following paragraph this discussion will examine briefly the development of conferencing in New Zealand and Australian jurisdictions.

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29 Conferences are referred to by a number of different names, such as Family Group Conferences, Community Action Conferences and Community Accountability Conferences.

## 2.3 Conferencing in New Zealand and Australia

Conferencing in New Zealand, referred to as 'Family Group Conferencing' (FGC), was introduced primarily as a response to problems pertaining to the treatment of juvenile offenders. It is now used in the disposition of all but the most violent and serious delinquency cases. Conferencing was incorporated into New Zealand juvenile justice and child protection legislation in 1989 with the introduction of the *Children, Young Persons and Their Families Act*. The Act, which was developed in part as a response to Maori demands for a system of justice more sensitive to their traditional cultural values,<sup>30</sup> introduced significant changes in the way issues of juvenile justice and family welfare were addressed.<sup>31</sup>

Modelled upon the family (*whanau*) conference of Maori, a Family Group Conference involves a meeting held at a time and place chosen by the offender and his family (usually with the consent of the victim).<sup>32</sup> Entitled to participate are those people most affected by the crime, i.e. the victim (or a representative of the victim), the offender, and the family, friends and key supporters of both. Other participants include the offender's advocate, if one has been arranged, and a police representative. The affected parties are brought together by a trained facilitator, referred to as Youth Justice Coordinator. The conference begins with a prayer or blessing after which the participants are welcome and introduced. The facilitator then explains to them the nature and objectives of the conference. How the conference proceeds once the participants have been made aware of its purpose can vary considerably, but usually at this stage the police representative will outline the offence. The offender is then called upon to admit or deny involvement. Unless the offence has been proved in court, the offender must admit involvement if the conference is to proceed. Once responsibility is acknowledged, the victim is given the opportunity to describe his experience and feelings, explain the effects of the offence on him, and direct questions to the offender. At this point the rest of the participants enter the discussion and views are put forward regarding the gravity of the offence, the circumstances in which it was committed and its impact on the victim, his family and the community. The facilitator then directs the participants into a discussion of what should be done to repair the damage caused by the offence, and the victim is given the opportunity to state his expectations.

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30 Maori communities restorative justice practices were traditionally employed as a means of resolving problems caused by the violation of the customary norms governing community life. In these practices the emphasis was on reaching consensus through the involvement of the whole community and the desired outcome was the restoration of harmony through reconciliation. Members of Maori communities expressed dissatisfaction with the mainstream criminal justice system, especially with the system's response to juvenile offending, and this is understandable given that historically Maori justice was based on the notion that responsibility is collective and that redress is due not just to the victim but also to the victim's family. They insisted that families should play a part in decisions affecting young persons and were opposed to the removal of young offenders from their homes and communities.

31 McElrea 1994:93-103.

32 Maxwell and Morris 1994:22.

Following this, the offender and his family are left to deliberate privately with a view to formulating a plan on how to put things right. The meeting is then reconvened and the offender's proposal is discussed. If the victim accepts the offender's proposal, the details of it are recorded and the Family Group Conference comes to an end. If agreement is not reached, the case will be referred to the appropriate court for further consideration. It is important to note here that the agreement which is aimed at is concerned not only with restitution but with a broader plan of action designed to address the underlying causes of offending conduct and thereby prevent reoffending. The relevant plan of action may include an apology, reparation, community work, an undertaking by the young offender to attend school or not to associate with delinquent elements and, occasionally, a sanction.<sup>33</sup>

The implementation and relative success of Family Group Conferencing in New Zealand sparked widespread interest in conferencing and in restorative justice in general. Over the last decade similar programmes have been introduced in several countries around the world, including Australia. In Australia conferencing was implemented for the first time in 1991 in the city of Wagga Wagga (New South Wales) as part of police operations. Here it was modified so that the police rather than social welfare workers acted as conference organisers and coordinators and it became a strict justice intervention.<sup>34</sup> The programme was abandoned in 1995, but in 1997 legislation was passed — The *Young Offenders Act* — under which non-police conferencing was introduced for selected juvenile offenders.<sup>35</sup> The *Young Offenders Act* was modelled upon the generally successful youth diversionary scheme established in New Zealand under the *Children, Young Persons and Their Families Act* 1989. It places the emphasis on prevention rather than punishment and seeks to implement strategies of restorative justice which enable the participation of families in decisions concerning young offenders. Part 5 of the Act provides for the establishment of the Youth Justice Conferencing Scheme under which responsibility is transferred from the state and the court system to the community through the mechanism of the conference. Section 34 of the Act outlines the principles and purposes of conferencing as being: (a) to encourage the juvenile offender to assume responsibility for his actions; (b) to strengthen the family or family group of the offender; (c) to provide young offenders with developmental and support services that will enable them to overcome their offending behaviour; (d) to protect the rights and interests of victims and enhance their role in the justice process; and (e) to respect the cultural values of the persons involved in the relevant process.

In Queensland, the *Juvenile Justice Act* 1992 was amended in 1996 to include the community conference process both as a diversionary measure under Part 1C, Division 2, and as a sentencing option following a guilty

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33 See on this Masters and Roberts 2000:140-54.

34 For a closer look see Moore and Forsythe 1995.

35 The Act came about after a Community Youth Conferencing Scheme had been successfully piloted in New South Wales. The scheme was described as 'an innovative, alternative method of dealing with young offenders, based on principles of restorative rather than retributive justice.' See Cumes 1997:61.

verdict under Part 5, Division 1A.<sup>36</sup> The model used in the Queensland pilot projects (which was subsequently implemented) is in many respects similar to New Zealand Family Group Conferencing.<sup>37</sup> Participants in the conference include the young offender and his legal representative, a family member or any other person nominated by the offender, the victim or his representative, the referring police officer and the coordinator. Following a discussion of the nature, circumstances and consequences of the offence, the conference concludes with an agreement on the course of action that needs to be taken to address the relevant harm. An agreement may include an apology, restitution through voluntary work or financial compensation, or a promise regarding future conduct. For a conference to be held the victim's consent is essential. It is required, moreover, that the offender assumes responsibility for the offence, or has been found guilty by a court. It is important to note here that the police may only refer matters that would have otherwise been dealt with by a court of law. Although the conference coordinator has wide discretion in conducting the meeting, he is expected to observe certain provisions relating to confidentiality and disclosure of agreements included in the Act. Besides New South Wales and Queensland, South Australia and Western Australia established conferencing programmes in 1993-1994 with a view to diverting juvenile offenders away from mainstream criminal justice processes in suitable cases. Victoria, Tasmania, the Northern Territory and the ACT also have conferencing programmes managed by various agencies.

The Wagga Wagga model exercised a strong influence in a number of countries, including the United Kingdom where it was adopted by numerous UK police forces. Indeed, although victim-offender reconciliation programmes had been experimented on in the UK in the early 1980s, it was only when the police adopted the idea of 'restorative cautioning' that the restorative justice movement really began to gain ground in the UK. In the UK restorative justice is seen as being closely connected with the notion of reintegrating shaming, discussed earlier, but not enough attention has been paid to the broader ideas and values associated with restorative justice and to the ways in which these can be put into practice. The situation appears to be changing, however, especially after the introduction of the *Crime and Disorder Act 1998* and the *Youth Justice and Criminal Evidence Act 1999* which, according to restorative justice advocates, offer new opportunities for introducing restorative justice in the youth justice system. In exploring the opportunities the importance of adopting a broader understanding of restorative justice is increasingly being stressed.<sup>38</sup>

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36 There are three options available under the Queensland scheme: (a) a young offender who admits his guilt may be referred to a conference by the police as an alternative to his being charged with an offence; (b) the court may refer a young person to a conference after a finding of guilt, in place of sentencing; (c) the court may refer a young person to a conference after a finding of guilt as a pre-sentence option (in this case the court can consider the conference outcome at the time of sentencing).

37 The Community Conferencing program in Queensland was considerably influenced by the theory of reintegrative shaming mentioned earlier.

38 On the introduction and operation of restorative justice programmes in Britain see Smith *et al* 1988:123-49; Masters and Roberts 2000:140-54; Dignan and Marsh 2001.



## 2.4 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>39</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>40</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 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.

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39 See Cayley 1998:182.

40 Lilles 2001:161-179.

## 2.5 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 programmes 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, programmes 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>41</sup> These programmes 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>42</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>43</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>44</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 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>45</sup>

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41 Consider on this Rigby 1996.

42 See Gottfredson 1997.

43 Restorative justice techniques have adopted as a means of resolving often complex conflicts inside corporations, factories and other work settings. See on this McDonald and Moore 1999.

44 For example, Fresno, California has employed dispute resolution techniques to deal with allegations of abuse of power by police. A similar programme is being developed by Thames Valley police to deal with citizen complaints against police misconduct.

45 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

### 3. International recognition of restorative justice

As a result of the growing interest in restorative justice around the world, restorative justice has in recent years attracted a great deal of attention at an international level. Indeed the UN has long emphasised the increasingly important role of the restorative justice approach in addressing the problems associated with crime. As noted in its *Handbook on Justice for Victims*,

The framework for restorative justice involves the offender, the victim, and the entire community in efforts to create a balanced approach that is offender-directed and, at the same time, victim-centred. Victim compensation has become a key feature of restorative justice in many developed countries but could well be revived in developing countries, where it has largely been abandoned with the introduction of alien justice systems.<sup>46</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 programmes. 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 programmes. 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 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

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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, paragraphs 27-28.

46 United Nations Office for Drug Control and Crime Prevention, *Handbook on justice for victims: on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York, 1999:42-3.

Parliament endorsed a proposed European Network of National Contact Points for Restorative Justice.<sup>47</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. Thus to help victims and witnesses deal with the judicial process the Statute provides for the creation of a victim and witness unit which will provide 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>48</sup>

#### 4. Assessing the effectiveness of restorative justice programmes

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 programmes are found to be as compared to conventional criminal justice processing. Comparing restorative justice with mainstream criminal justice processing in reference to types of offences and offenders and considering their respective effectiveness in terms of crime prevention is, of course, important. However, relying on recidivism as the sole measure of success of the restorative justice approach cannot give us the full picture as regards its potential. Besides the issue of recidivism, it is important to consider the other potential benefits of restorative justice programmes to victims,

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47 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.

48 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.

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 programmes suggests that victims are in general satisfied with the relevant process and its outcomes.<sup>49</sup> Community members who have participated in such programmes in support roles have also expressed high levels of satisfaction with the restorative process.<sup>50</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 he deal face-to-face with the offender, involves the risk of further emotional harm.<sup>51</sup>

Now, with respect to offenders, evidence from a number of studies suggests that participation in restorative justice programmes, especially conferencing, leads to desistance from further wrongdoing and a possible decrease in recidivism.<sup>52</sup> The relative success of these programmes in preventing re-offending has much to do with the fact that offenders are more likely to respond

49 Similarly, in evaluations of the reactions of victims who had taken part in restorative justice programmes using mediation in the USA, Canada and England, researchers found higher levels of satisfaction, as compared with victims in unmediated cases. See Umbreit 1992. See also Braithwaite 1999:20-6.

50 See, e.g., Burford and Pennell, Family Group Decision Making Project: Outcome Report Volume 1, Family Group Decision Making Project, School of Social Work, Memorial University of Newfoundland, Newfoundland, Canada, 1998. Consider also P. McCold and B. Wachtel, Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing, draft report 1998.

51 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, 1996 and 1998; Strang and Sherman 1997. The results of the study carried out in New Zealand showed that 49% of victims were satisfied with Family Group Conference outcomes, whilst 31% were not satisfied at all. Of those who expressed dissatisfaction, most said that they felt worse as a result of attending the conference. It is worth noting here that the relatively low levels of satisfaction expressed by victims (as compared with those expressed by offenders) are somewhat bemusing when viewed in light of the fact that 95% of the Family Group Conferences in the study were recorded as having concluded with an 'agreed' outcome. Surprisingly, this issue has not been addressed at any length in the literature, although this inconsistency might be taken to indicate that, in practice, the role of victims in Family Group Conferencing is not as important as it appears to be in theory and that the relevant process does not entirely achieve the restorative justice aim of restoring victims. Having said this it cannot be forgotten, however, that nearly 50% of victims did express satisfaction with the outcomes of Family Group Conferencing and this is an improvement on levels of satisfaction expressed by victims following regular court proceedings and sentencing.

52 Consider on this Braithwaite 1999; Maxwell and Morris 1999.

positively to their justice experience when they perceive the relevant process to be equitable and fair.<sup>53</sup> And there is clear evidence that offenders view 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>54</sup>

## 5. Concluding remarks

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 programme 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>55</sup> It has been asserted, moreover, that restorative justice programmes 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>56</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 programme entails. Commentators remark that restorative justice programmes 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

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53 A position supported by psychological research in the field of procedural justice. For a closer look see Tyler 1990.

54 See, e.g., 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 and Maxwell 1998.

55 See LaPrairie 1995:78-99.

56 McCold 1995:5.

takes places 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>57</sup> the protection of the privacy of those participating in a restorative justice programme and the status of the information provided by the participants.<sup>58</sup> 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.<sup>59</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 programmes should be independent of mainstream criminal justice because their objectives and guiding principles are different.<sup>60</sup> Others look for ways

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57 See on this White 1994.

58 Such as, for example, a confession by the offender of a separate crime.

59 New Zealand practice provides a useful model for how this could be achieved because of the role of the judiciary both in ordering that a conference be held in certain cases and in ratifying conference outcomes in such cases — a role recently confirmed by the New Zealand legislature. Under s. 8 of the Sentencing Act 2002 'In sentencing or otherwise dealing with an offender the court ... must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.'

60 See, e.g., Marshall 1990; Marshall and Merry 1990.

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>61</sup> But most hope that, provided that the evaluative research continues to show encouraging results, restorative justice programmes 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 programmes, 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 programmes 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.

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61 See, e.g., Walgrave and Aertsen 1996.



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