

## **"An Introduction to Restorative Justice"**

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In the past, justice was always characterized by its hierarchical and oppressive attitude towards criminals or alleged offenders. Those, in turn, have always considered Judicial Authorities as abstract entities having but a scarce respect for the people involved – either offender or victim – due to the repressive attitude of the justice system.

This verticality is now turning towards a more balanced connotation, both in the civil and in the criminal field, especially when children are involved.

Judges are abandoning their prescriptive attitude, though maintaining their authoritative role, and are committed to find solutions which take into account both the community reaction and the victim-offender relationship, which was prejudiced by the perpetration of a crime or by the breach of a pact. Today, the positive social effects of conflicts resolution are widely acknowledged when compared to the traditional punitive course, ending with a winner and a loser, of the past centuries.

In **Restorative Justice (RJ)** the offender, the victim and any other interested party meet with the help of a neutral facilitator to find a participatory solution to the conflict in which they are involved. This process aims at positively unwinding ("loosening") problematic situations, thus allowing the parties to find a new way of managing social problems, developing options and evaluating alternatives, in order to come to an acceptable and mutually satisfying settlement.

The need to develop alternative dispute resolutions other than the traditional sanctioning system is grounded on some very irrefutable and manifest phenomena in Western societies. The gradual political and cultural change occurred in the Western world in the last 40 years determined – *inter alia* – a gradual shifting from either a *repressive* or a *rehabilitative* attitude towards offenders to a *restorative* approach. This resulted from a new concept of penal measures, which preserves the idea of personal liability while highlighting a series of proposals and opportunities for the offender's behavioural change as well as a better understanding of the victim's interests. **RJ** can therefore allow all parties, if adequately supported, to take part in the resolution of offence-related conflicts, instead of having to simply comply with an external judgment.

A further consequence of the ongoing political and cultural change is that offenders' social integration, rather than their segregation, should inform any action aimed at preserving public order, as more and more sources now seem to indicate. Segregation solves no problems while the resumption of social ties and the community mobilisation to produce social inclusion generate security (as it proved the management of epidemics by isolating infected people instead of appropriately treating them and preventing new dissemination).

The need for a different justice derives also from the failure of the traditional conflict-solving systems based on classical punitive responses. In fact, courts often work slow due to their "congestion" and, at best, they consider victims as beneficiaries of a mere compensation, whereas the offence-related prejudice entails not only a material loss, but also individual, psychological suffering. **RJ** programmes essentially develop the idea that offending means not only breaking the law, but also perpetrating an attack both against the victim and the community as a whole. The aim of these programmes is to represent an opportunity for victims (and their community) to express their feelings and have their uneasiness heard in terms of emotions and experiences of fear and rage, within a protected and neutral context for both the parties involved.

**RJ** programmes can also be intended as a social practice fit to tackle a wide series of conflicts – not only those qualified as offences –, and to build the conditions to improve life quality in general. I would also like to add that they proved to be particularly useful in circumstances involving young offenders, for whom it is paramount to promote socially shared values and personal skills.

Therefore, in the case of young offenders, beyond addressing the victim's prejudice and needs, **RJ** can achieve an educational effect by redressing the harm.

In the written version I recalled the main EU legislative sources providing frameworks and guidance to harmonize domestic practices and calling for the adoption of RJ programmes, but here I leave them out and wish to outline only their principles.

*Among the main sources, I wish to mention the **Recommendation (EC) No. R (92) 16 of 19 October 1992 on the European Rules on community sanctions and measures**, providing that such measures develop the offenders' awareness of their liability towards community and especially their victims; **Recommendation No.***

**R (99) 19 of the Committee of Ministers of the Council of Europe on Mediation on Penal Matters** defining mediation as “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)”; the **Declaration of Basic Principles on the use of Restorative Justice Programmes in Criminal Matters** adopted by the United Nations Economic and Social Council in December 2002, which provides an important set of guidelines for policy makers, community organisations and criminal justice officials involved in the development of RJ programmes. The **Declaration of the 11<sup>th</sup> United Nations Congress on the prevention of crime and the treatment of offenders** made in 2005 invites Member States to acknowledge the importance of further developing **RJ** policies.

Some specific sources deal especially with my own field of action, i.e. juvenile justice – such as the **Minimum Rules for the Administration of Juvenile Justice** (November 1985), known as **Beijing Rules**, which call for the need to “use alternative measures” at all stages and levels of proceedings in order to avoid the “negative effects of proceedings in juvenile Justice administration” by orienting the child offender towards restorative and reparative responses; **Recommendation (EC) n° 87 (20) on social reactions to juvenile delinquency** (September 1987) specifically encouraging “the development of diversion and mediation procedures at public prosecutor level [...], in order to prevent minors from entering into the criminal justice system and suffering the ensuing consequences”.

In the civil field I wish to mention the **European Convention on the exercise of children’s rights** (Strasbourg, 25 January 1996) providing that “in order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement”.

As you can see, the request made by the Council of the European Union within the **Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings** is grounded on a series of law sources. By proclaiming the assistance to and protection of victims of crimes such **Decision** defines “mediation in criminal cases” as the search, prior to or during criminal proceedings, for a negotiated solution between victim and offender, mediated by a competent person, and encourages each Member State to accordingly promote mediation in criminal cases for those offences which it considers appropriate. Each

*Member State was to bring into force the relevant provisions by 22 March 2006 to comply with the above Framework Decision.*

These sources had a strong influence on all experiences made in the different countries which seem inspired to a common core of directions set forth in the above international instruments. First of all, European sources stress that participation in any **RJ** practice shall be absolutely voluntary; parties must be thoroughly informed before consenting and have the right to withdraw any time: it is clear that any coerced participation would lead to the failing of the relevant experiences.

It is furthermore reaffirmed that any **RJ** proposals shall be clear and free of charge. The texts speak of a "general access" to such measures at all stages and degree of the justice system. Generally speaking, there are within the criminal justice system four main stages at which a **RJ** process can be initiated: 1. at the police level (*pre-charge*); 2. at the prosecution level (*post charge, but pre-trial*); 3. at the court level (*either at the pre-trial or sentencing stage*); 4. at corrections (as an alternative to custodial measures, as part or in addition to a non custodial sentence, *during detention or upon release from prison*). At any one of these stages an opportunity for officials (or citizens in general) shall be created to refer offenders to a **RJ** programme. For instance, at the pre-charge level – which includes also cases not coming to the attention of the criminal justice system - referral can be acted either officially (by the police) or informally (by neighbourhood, relatives, teachers, friends...); at the second level, referral are mainly the prosecutors, while at the third is the Court Judge who refers people to RJ programmes. If a RJ programme is initiated at correction level the referrals are probation or correction officers and Parole Agencies.

European legislation underlines the need to establish standard criteria and terms, also by adopting ethic guidelines to guarantee homogeneous access.

Considering the political and social implications of RJ practise, the European Committee of Experts on Crime Problems of the Council of Europe decided that such programmes shall be funded "through public (state and/or municipal) budget and be accounted for as public expenses". The provision of a public financial support assures the necessary level of quality control and competence in the delicate field of criminal justice which directly affects individual rights. Besides, the development of public ethics is encouraged and promoted to safeguard this field from profit- and competition-based appetites.

International legislation underlines another aspect of all **RJ** practices, that of confidentiality: unless the parties otherwise agree, the contents of each meeting shall

not be disseminated. This private character of mediation allows to handle any conflict and its implications in an unconditioned context as well as to foster the free expression of the parties involved as to the topics at stake. The only exception to this principle of confidentiality is recognized in paragraph 30 of *Recommendation (99) 19* of the Council of Europe which obliges the mediator *"to convey any information about imminent serious crimes , which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned"*.

Furthermore, European legislation sets out the principles underlying mediators' actions. Whereas practitioners are not requested any specific qualifications (i.e. they can be recruited from all social groups), they shall initially receive theoretical and practical training aimed at *"providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and knowledge of the criminal justice system"* (art. 24, *Racc. 99 (19)* ). In many countries personal ability (or suitability) is considered the most important criterion for recruitment. A basic course (about 30 hours) is initially provided, then mediators receive continuous tutoring from professionals.

Few ethical principles are provided to regulate actual practice: practitioners are requested to act impartially, independently and bias-free. Mediators are therefore responsible to choose a neutral setting where victim and offender can meet and acknowledge each other as individuals. A mediator's main duty is therefore to ease communication, to promote direct and fruitful interaction between the parties, enabling them to voice their experience without imposing its own personality.

To ensure the mediator's equidistance (rather its *"equiproximity"*, as some would say) from both parties, some **RJ** models contemplate a team work with the simultaneous intervention of more facilitators at a time, thus limiting unbalanced conducts.

One important aspect I wish to point out is that **RJ** is applicable (*it should be!*) virtually to any offence. I want thereby to dissipate any misinterpretation of **RJ** as a lesser justice for petty crimes. *"Use RJ for serious, rather than trivial offences"*, proposed Mr. Lawrence Sherman at the International Seminar on Youth Crime held by the Home Office in London in 2002. As a matter of fact, both experiences and research have proved that often **RJ** programmes launched at sentencing stage in cases of serious crimes yield better results with more serious offenders and more positive effects on victims.

Yet, it is generally preferable not to set forth strict criteria to apply **RJ** instruments to cases: flexibility and discretion turn out to be more fruitful, being aware that the relational break caused by the offence is somehow more important than the statutory “objective” seriousness of a crime is than it produced.

**RJ objectives** are therefore targeted for 3 main categories of actors:

1. *offenders*, who are motivated to face the consequences of their actions and the prejudice caused to the victim and the community;

2. *victims*, who are finally conferred an active and more dignified role. Some years ago an Italian research revealed that victims and the justice system have distinct sets of values: the first tend to react emotionally, being most influenced by the negative consequences of the offence (hate, conflict, emotional response); the justice system, on the contrary, acts impersonally, functionally and with a view at its performing task. Researchers suggested the introduction of a new relational model to meet both needs. **RJ** programmes can actually contribute to enhance the victims’ sense of security and self-efficacy, positively influencing their actions: empowerment itself has a restorative effect.

3. *the community*, where new values and models are introduced to overcome ideological and moral conflicts between offenders and victims and focus on deviancy prevention. **RJ** is essentially made of efforts to create common rules and shared values, of the willingness to mutually understand each others, of the processing of individual behaviours and experiences, all of which not only aim at reconciling two different parties (victim and offender), but lay the basis for a wider strategy of criminal policy. In this case, of course, **RJ** interventions would not only aim at rehabilitating those who decided to go against social rules, but they could also try to modify the social need for justice, notably the notion of crime both in the victim’s and in the offender’s minds. This kind of approach leads to a “secularisation” of justice, i.e. a widespread “capacity of deviancy management” on the territory, not easy to implement, yet unavoidable. If the community is to be involved into a more general cultural process of conflict mediation, a common intent in managing deviancy and diversity must be developed, giving up the easy temptation to hand over offenders to authorities with a view of isolating them. In this respect, **RJ** interventions seem the appropriate instrument to definitively overcome those aspects of judicial sanctions solely connected with ideas of control and repression, and encourage the dissemination of community principles and methods into the penal trial.

Already applied and potentially applicable **RJ** programmes vary remarkably in each country according to the different social awareness of conflict and its management. They vary as to their form, how they relate to the criminal justice system, how they are operated, how many parties they involve as well as their main purposes. This is a very positive element, as it allows each country to select the most adequate programme to meet local needs.

**RJ** programmes are usually operated by public bodies or no profit organizations in the community; there are court-based programmes, police-based programmes and community-programmes.

Here is a brief description of **RJ main instruments**: the basic one is *restitution*, which can be defined as the action necessary to remove, both materially and symbolically, offence-related damages. There can be 4 different types of restitution: 1) *monetary compensation*, refunding the victim of the economical damage caused by the offence; 2) restitution in the form of a *service* rendered on behalf of the victim; 3) *monetary compensation* to the community, such as a lump sum paid to a no-profit organization (actually, few examples of this type are registered); 4) restitution as a *community service*, i.e. unpaid service on behalf of the community.

Three main **Restorative Justice** instruments entail the actual meeting between victims and offenders:

- a) *Victim-Offender Mediation (VOM)*
- b) *conferencing*
- c) *peace-making circles*.

a) *Victim-Offender Mediation* can be defined as a settlement between the two conflicting parties with the help of a third, neutral one, the *mediator*, charged with facilitating the negotiation process. The principle underlying mediation is to offer both parties the opportunity to express their own feelings and impressions about the criminal action and help them to reach a restitution agreement. Mediation is generally carried out through direct confrontation between the parties and is usually implemented in the framework of *diversion* programmes, at the stage of the preliminary hearing or upon adjudication.

The VOM comes into being when victim and offender meet with the help of an impartial (or better "*equally partial*") facilitator moderating the meeting who enhance the parties' dialogue. Compared to this initial form of mediation (offender, victim,

mediator), newly developed VOM programmes suggest: a) the attendance of parents when children are involved; b) the involvement of some selected, significant stakeholders; c) the presence of co-mediators; d) the co-participation of more victims and more offenders at a single mediation session.

Mediation sessions traditionally take place according to the following procedure:

1. the mediator illustrates some basic *communication rules* (keep sit, do not interrupt, do not use offensive language, etc.);
2. the mediator explains to the parties that the content will be *confidential*;
3. the mediator describes the *consequences* of a failed mediation;
4. the mediator conducts the session in an *informal style* so as to create authentic *communication* between the parties;
5. the parties describe their *own version of the events* without being interrupted;
6. the parties then participate in a *general discussion*.

b) *Conferencing and Family Group Conferencing* – *Conferencing programmes* were first developed in New Zealand in the late 80's in conflicts concerning young offenders and aborigines and were initially applied to bring together victims, offenders and their families to reach solutions. Unlike the VOM, where victim and offender face each other with the help of a mediator, the *conferencing* technique includes other stakeholders, such as family members and supporters of both conflicting parties (Umbreit, 1998). Family attendance is believed to be fundamental for the child's rehabilitation process. Conferencing programmes were taken up in Canada, in the United States and in Great Britain where they often take slightly different names (such as '*community conferencing*', '*restorative conferencing*'). Conferencing programmes are used within *diversion* programmes and at the post-adjudication stage.

This type of mediation is extended to the victim's and the offender's families as well as to all those who might help the discussion as supporters, given their peculiar bond with either party.

*Family group conferencing* is a form of dialogue carried out in an informal style. The mediation meeting follows a thorough preparation made up of interviews with each party and its own family; the first stage relies on the referential authorities' report and the events description made by the offender or its family; subsequently, the facilitator assesses the financial and psychological prejudice suffered by the

victim; at a third stage, the victim expresses its own feelings as to the prejudice experienced.

Once the offender is aware of the harm caused to the victim, the discussion generally ends with formal apologies; at this stage, the facilitator's task is to work on the offender's repentance to foster its social re-integration (*reintegrative shaming*) through a reparation programme on behalf of the victim or the community.

c) *Peace-making circles* – Circles practice is grounded on values and traditions of Northern American native population and of some aborigine tribes in New Zealand and Australia. Along with *conferencing* practices, *circles* have lately become one of the most efficient forms of **Restorative Justice** especially in the United States and in Australia. The *circles'* and *conferencing's* success derives from their directly involving the community so as to represent the fullest form and model of **Restorative Justice**. Circles are applied in criminally relevant conflicts but also to solve disputes which were not formally reported. In fact, circles are usually institutionalised tools for the analysis and assessment of young offenders' adjustment and healing conditions. In this field, circles are applied by social services, schools or communities, to reach a collective decision on how to handle the victim and the offender of a conflicting event (Van Ness and Strong, 1997). Circles are also used as *sentencing* instruments by judges, Public Prosecutors and Police Forces to offer the enforcing authority the possibility to turn the conviction into a reparative measure (*sentencing circles*).

Any preference to one or the other of the above mediation programmes relies on domestic criminal justice. Specifically, it seems conditioned upon the existence of either *civil law* or *common law* tradition, i.e. whether the justice system follows either the legality principle or that of discretionary prosecution.

It is sometimes believed that **RJ** programmes are easier developed and implemented in *common law* countries, given the wider discretionary power of their Police, Public Prosecutors and Judges. However, practice has shown that such difference is not crucial and that mandatory prosecution itself is not an obstacle to the application of **RJ** practices.

Mediation programmes have rapidly spread throughout Canada, the United States and some European countries since the first experience in 1974: over 1,300 **RJ** programmes are currently under way all over the world. More than 300 Victim-Offender Mediation programmes and over 700 Conferencing programmes are being

implemented in the United States; Canada accounts for the second highest number of **RJ** projects, followed by Australia, New Zealand, France and Germany (Aertsen et al. 2006).

I would like to close my contribution with a small hint at my long, professional experience as a Juvenile Civil Judge, who therefore could collaterally observe the benefits of mediation: I remember situations when the victim's emotions seemed like frozen after ten years from the offence, as if one of the consequences of crime-related conflicts was that of stopping time, blocking it, and keeping rage, fear and frustration alive. I wish to reaffirm that this has nothing to do with the seriousness of the offence: there can be minor offences which generate very persistent emotions. What this "suffering capital" is actually worth in a people-careful society if no time and place are provided to transform such pain into feelings of mutual recognition?

Mediation – or **RJ** programmes in general – can actually contribute to find a new legitimate space for feelings which are denied visibility in trial rooms and red-tape justice. By overcoming the ideas of opposition and sanction to welcome the dimensions of consent and restoration, relations can be re-processed: the inner clock may start again and heal the harm caused by the offence.

In Italy some audacious VOM experiences have been implemented in the past years, despite a legislative vacuum and insufficient public funding. Yet, I feel like reminding this audience involved in such a capital sensitisation project for Southern European countries that **RJ** still manage to apply in Italy in a "creative Italian style".

I became Head of the Department for Juvenile Justice few months ago and I do consider VOM as crucial; a lot of work still has to be done in this field, starting from the passing of *ad hoc* legislation to the organization of international seminars to integrate mediation best practices, passing through the drafting of an ethical code for mediators up to the institution of a national Steering Committee to monitor ongoing experiences and determine quality standards for staff training and service provision.

Next year the Final Seminar on this project will be held in Rome and I really hope that we will show how Southern Europe (and Italy in it) managed to develop **RJ** culture both in its legislation and practice by then.

Thank you for your attention.

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