

EUROPEAN JUDICIAL TRAINING NETWORK

THEMIS COMPETITION

Semi-Final A : European Union and European Criminal Procedure

Restorative justice, the longed-for procedural art of mending ties between offenders, victims and society



Allegory of Restorative Justice with European colors – watercolor made by Emma BALLIET, student of the French National School for the Judiciary

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*‘Punitive justice is embedded in the heart of our criminal justice system.’¹ Thus, making restorative justice an essential part of criminal procedure in Europe seems to be a major challenge. Yet this model of justice appears to have many advantages, as highlighted by Desmond Tutu who, in the context of the transitional justice system set up after apartheid in South Africa, insisted on the fact that *‘there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships - with healing, harmony and reconciliation.’**

In fact, transitional justice refers to post-conflict justice - established after a war, genocide, war crimes or state crimes - that aims at responding to past crimes and preventing future ones.² Its goals include national reconciliation and peacemaking.³ Its four pillars are the search for truth, material or symbolic reparation for the harm suffered by the victim, the non-repetition of crimes, and the right to justice.⁴ This type of justice was recently used in the post-apartheid Truth and Reconciliation Commission in South Africa under the presidency of Nelson Mandela.⁵ It was also implemented by the *Gacaca* courts in Rwanda after the 1994 genocide.⁶

Broadly speaking, restorative justice comprises any process which enables those directly or indirectly harmed by crime, as well as those responsible for that harm, to actively participate in the resolution of matters arising from the offense. For this resolution, all parties must freely consent to take part. The help of an appropriately trained and necessarily impartial third party, known as the facilitator, is required.⁷ While adjudication and arbitration entail the imposition of an agreement by a third party, restorative justice consists of outcomes which the parties have suggested themselves, through a dialogue in which the facilitator only makes limited suggestions.

It encompasses not only restorative justice measures adopted at the time of the judgment and the execution of sentences, but also mediation that can occur at the early stages of criminal proceedings, before any recognition of guilt. Although its practice is still limited, interest in

¹B. Deymié, ‘La Justice Restaurative : Repenser la Peine et le Châtiment’, *Études* (2016), at 42.

²P. Morvan, *Criminologie* (3rd ed., 2019), at 390.

³*Ibid.*

⁴*Ibid.*

⁵D. Darbon, ‘Autopsie du Miracle Sud-Africain, le Cas de la Truth and Reconciliation Commission’, *Revue Française de Sciences Politiques* (1998) 6.

⁶V. Rosoux, ‘Réconcilier, Ambition et Piège de la Justice Transitionnelle. Le Cas du Rwanda’, *73 Droit et Société* (2009), at 613-633.

⁷Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, Appendix to Recommendation CM/Rec(2018)8,II,3.

restorative justice has blossomed over recent decades in many legal systems, whether national or international.

On a global scale, the United Nations broadcast a wide range of tools early on to promote restorative justice. First of all, it published the UN Basic Principles on the use of Restorative Justice Programs in Criminal Matters in 2002.⁸ It then expanded through the UN Office on Drugs and Crimes Handbook and Training Manual on Restorative Justice (2006).⁹ These tools lay the legal foundations for this topic, but it is important to emphasize that restorative justice was originally thought of as a solution regarding juvenile offenders.¹⁰ In order to illustrate this, it is enlightening to look at the 1997 Declaration of Leuven (Belgium), then at the 2009 Lima Declaration on Restorative Juvenile Justice, followed by the 2016 Ibero-American Declaration on Restorative Juvenile Justice.

In Europe, numerous national systems have deployed considerable efforts in the introduction of restorative justice, with varying results. Indeed, the Council of Europe has tried to raise awareness among its Member States regarding restorative justice, firstly in 1999 with mediation in criminal matters¹¹, then enlarging it in 2018 to restorative justice in criminal matters¹², and suggesting *‘a cultural shift able to transcend the dichotomy between traditional criminal justice and restorative justice.’*¹³

In the European Union, restorative justice is part of a wider reflection on the creation of an area of freedom, security and justice, in which the question of victim support is raised; firstly through the 2001 Council Framework Decision¹⁴, and above all in the 2012 Directive¹⁵ which constituted the first binding legislation in the European Union on restorative justice.

According to Robert Cario, a French Professor of Law who specialized in the study of restorative justice, the main objective is to provide a new penal response to dissatisfaction or

⁸ECOSOC Res.2012/12, 24 July 2002.

⁹UNODC Tools and Programs on Restorative Justice, available at: https://www.unodc.org/documents/justice-and-prison-reform/English_book.pdf#page=106.

¹⁰J. Moyersoer, ‘Chronique d’une Justice Restaurative au-delà des Frontières’, 59 *Les Cahiers Dynamiques* (2014), at 96-103.

¹¹Recommendation No. R (99)19 of the Committee of Ministers to Member States concerning Mediation in Penal Matters.

¹²Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters.

¹³I. Marder, ‘The New International Restorative Justice Framework : Reviewing Three Years of Progress and Efforts to Promote Access to Services and Cultural Change’, *The International Journal of Restorative Justice* (2020).

¹⁴Council Framework Decision 2001/220/JHA, OJ 2001 L082.

¹⁵Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57.

persistent questions that perpetrators or victims might ask, tending to explain the origin and outcome of an offense. Indeed, the care given to offenders and victims may help them regain self-esteem and convince them of their much needed role in society.¹⁶ Restorative justice can thus provide a safe space for dialogue between the different persons involved, through the professionalization of facilitators, surrounded by specific conditions imposed by legislation, and placed under the control of a judicial authority. In this case, the judge does not oversee the content of the measure, but rather verifies that the main conditions and principles of restorative justice are in force.

Nevertheless, despite its visionary aspect and the many advantages offered by restorative justice, many contributors regret the slow speed at which restorative justice is currently developing. It seems that cultural setbacks, uneven progress from one country to another and even the lack of willpower in many countries and international systems are amongst the causes that lead to the endless adjournment of its establishment within criminal proceedings.¹⁷

How does restorative justice appear to be a sustainable solution to contemporary issues regarding the increasing importance of victims, the commission of crimes and the prevention of recidivism, and to what extent can it be implemented and guaranteed within various legal systems?

The main purpose of this paper is to outline how restorative justice has been misread. Despite the distrust that it faces, restorative justice introduces a new path to addressing peculiar crimes (1) and leads to its progressive growth in contemporary legal tools (2).

Key words: Comprehensive compensation for the victim ; Criminal recidivism ; Facilitator ; Resocialization ; Restoring social peace ; Secondary Victimization.

¹⁶Robert Cario, interviewed by Pauline Antier, Léonore Fassi, Julie Batani and Virgnie Vandesomple, students of the French National School for the Judiciary (2021).

¹⁷I. Marder, *supra* note 13.

1. The Call for Restorative Justice as a New Path to addressing Peculiar Crimes

In many countries around the world and in Europe, as a complement to or outside the traditional penal system, restorative justice is developing. Its rise stems from criticism of the criminal justice system, which includes not only the disappointment of victims and the failure of repressive policies and, in particular, of imprisonment, where prisons are mostly seen as schools for criminals, especially for juvenile offenders, but also the length, complexity and excessive cost of judicial procedures and, lastly, the overburdened court system.¹⁸

A. *Why Restorative Justice? Why Is it more Efficient than the Traditional and Retributive View of Justice?*

1. *The Social and Anthropological Explanations to the Rise of and Need for Restorative Justice*

(a) *The Meaning of Restorative Justice: the Needs of the Parties before the Punishment of the Offender*

The term ‘restorative justice’ is evocative of its purpose. Other terms are frequently used to designate the same concept such as ‘reparative justice’ (e.g. Canada, Italy, sometimes France), ‘transformative justice’, ‘reconstructive justice’, ‘comprehensive justice’ and ‘participatory justice’.¹⁹ The adjective ‘restorative’ refers to the idea of monetary reparation, which is not the primary goal of restorative justice, whose main objective is to heal.²⁰ Thus, restorative justice goes further than the traditional criminal procedure, and does not seek to punish, but to cure. Indeed, in most legal systems, the offense is considered as an act against the state. The justice system focuses exclusively on the responsibility of the offender in order to apply the sentence prescribed by law.²¹ The criminal procedure is thus reduced to a technical matter.²² The philosophy of restorative justice analyzes the crime as a damage to people and interpersonal relationships.²³ Therefore, restorative justice aims at meeting the needs of each party, by promoting reparation, active participation, accountability and dialogue. The concrete

¹⁸J. Lecomte, ‘Les Multiples Effets de la Justice Restauratrice’, 334 *Journal du Droit des Jeunes* (2014), at 17-23.

¹⁹M. Rostaing, ‘Etude Comparative de la Justice Restaurative à travers la Mise en Place des Rencontres Détenus Victimes en France et au Canada’ (2019), thesis on file at the *Université Laval* and *Université I Toulouse Capitole*, available at: <https://corpus.ulaval.ca/jspui/bitstream/20.500.11794/38200/1/35726.pdf>.

²⁰B. Deymié, *supra* note 1.

²¹R. Cario, ‘Justice Restaurative : Principes et Promesses’, *Les Cahiers Dynamiques*, n°59, 2014, at 24-31.

²²*Ibid.*

²³*Ibid.*

responsibilization of all leads to the search for consensual solutions, geared towards the future and intended to repair all harm.²⁴

Restorative justice seeks to remove the feeling of injustice and impunity in the population: it is thus considered as a way of reconnecting with the retributive function of punishment by renewing it.²⁵ Retribution is generally defined as the reward or punishment, material or spiritual, that a person or a community receives for their actions. This concept, transposed to criminal law, means that when an individual commits a crime, he/she causes an injustice to society and to the victim, which must be repaired. Criminologists explain that the retributive function of the sentence is neglected in the traditional criminal trial. Restorative justice is therefore a new form of criminal procedure aimed at restoring the feeling of justice in the heart of the victim, the offender and the community.

(b) The Inclusion of the Community: Restorative Justice is a Comprehensive Approach to Justice

Restorative justice was inspired by the ancestral practices, such as sentencing circles, of certain indigenous peoples in Africa, New Zealand (Maoris) and North America (Indians), whereby the whole community dealt with the implementation of justice. Nowadays, restorative justice measures involve not only the offender, the victim and the facilitator, but may also include the victim's or offender's family and community representatives, for instance a religious minister or school principal. The involvement of the community in the pursuit of justice is a first step toward the successful resocialization of the offender. Its role is to encourage discussion, reintegrate the offender into the community and, more broadly, restore social peace. In this respect, restorative justice must be understood in the light of the reintegrative shaming theory of John Braithwaite.²⁶ According to this theory, the way the community communicates shame about crime is crucial.²⁷ If it is aimed at the offender, it is a stigmatization that will likely lead to recidivism.²⁸ On the contrary, if shame is directed at the act, it encourages the offender to desist.²⁹

²⁴*Ibid.*

²⁵H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990).

²⁶J. Braithwaite, *Crime, Shame and Reintegration* (1989).

²⁷J. Braithwaite, *supra* note 26.

²⁸*Ibid.*

²⁹*Ibid.*

(c) Restorative Justice is a Way to Overcome the Absence of the Victim in the Criminal Trial

Restorative justice is very much linked to the protection of the victim. It is no coincidence that the 2012 Directive introducing restorative justice in Europe is also the one that gives a definition of the victim. It takes up the definition given at international level by the United Nations General Assembly, which states that '*victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power.*'³⁰

Indeed, restorative justice comes from victimology, which promotes the involvement of the victim in the criminal procedure and proposes solutions to avoid secondary victimization.³¹ Restorative justice seems to be a good way to achieve these goals because it seeks to meet the needs of the victim by providing him/her relief, answering his/her questions, putting him/her in a position to forgive the offender and giving him/her a sense of empowerment. Thus, in France, a study of restorative justice³² found that victims interviewed identified several benefits to restorative justice:

- the feeling of having been listened to, heard and understood,
- fewer feelings of shame, guilt and fear,
- the feeling of becoming actors of their own life again.

In the traditional criminal proceedings as well, the attention given to the victim has increased. While originally excluded from criminal procedure, the victim has recently acquired many rights. This is evidenced by various national legislative reforms and European jurisprudence. For instance, in a recent case,³³ the European Court of Human Rights held that, given the reasoning in the judgment, the judges failed to protect the victim from secondary victimization.³⁴ In fact, the Court considered the comments regarding the applicant's sexual

³⁰GA Res. 40/34, 11 December 1985.

³¹G. Lopez, *La Victimologie* (3rd ed., 2019), at 3-5

³²*Institut Français pour la Justice Restaurative, Enquête nationale sur la justice restaurative* (2020), available at: <http://www.justicerestaurative.org/wp-content/uploads/2021/04/EN-2020.pdf>.

³³ECtHR, *J.L. v. Italy*, Appl. no. 5671/16, Judgment of 27 May 2021, decision available at <https://hudoc.echr.coe.int/fre?i=002-13282>.

³⁴M. Bouchard, 'La Vittimizzazione Secondaria all'Esame della Corte Europea dei Diritti dell'Uomo', *Diritto*

orientation, her relationships and casual sexual relations prior to the events in question unjustified.

(d) Restorative Justice Encourages the Offender to Desist by Helping him/her Regain Confidence in himself/herself and the Future

The importance of restorative justice is often emphasized for the benefits it brings to victims of crime. In reality, however, the original goal of restorative justice was to resocialize offenders, particularly juveniles. Indeed, the first Western restorative justice experiment, carried out in Ontario, Canada in 1975, involved two juvenile offenders of vandalism and their multiple victims.³⁵ A victim/offender mediation process was initiated by a probation officer, Mark Yantzi, who succeeded in convincing the judge, Gordon Mc Connell, who was tired of the inefficiency of justice in preventing recidivism, to allow the minors to benefit from it.³⁶ The two juveniles then met with the victims to work out a reparation plan. This measure was successful, to say the least, since some thirty years later, one of the two young offenders took a mediation course and joined a restorative justice association, where he now works as a community development and public relations assistant.³⁷

The above-mentioned study on restorative justice³⁸ reveals that offenders also benefit from it, because it allows them to:

- increase their self-esteem,
- project themselves in the future,
- take responsibility for their actions,
- be aware of the repercussions of their acts in the lives of the victims and their relatives.

Restorative justice needs to be assessed constantly in order to improve the practices. A restorative measure ends with feedback on the experience. Generally, feedback shows great satisfaction on the part of the participants who went through the process to the end. Many declared that they felt recognized and grateful to have the opportunity to express themselves

Penale e Uomo, June 9, 2021.

³⁵J. Moyersoen, *supra* note 10., at 96-103.

³⁶J. Lecomte, *supra* note 18, at 17-23.

³⁷*Ibid.*

³⁸*Institut français pour la justice restaurative*, *supra* note 32.

and be truly listened to. Furthermore, people usually described their experience in court as overly expeditious or too short to express their feelings. The main interest of the assessment resides in the fact that the virtues described are significantly similar for both the perpetrators and the victims.³⁹

2. *How is Restorative Justice a Means to Reduce the Rate of Repeat Offenses?*

The prevention of criminal recidivism is one of the main objectives of restorative justice. Almost three-quarters of the studies found a reduction in recidivism compared to the outcomes achieved through traditional criminal justice.⁴⁰

	<u>The victim</u>	<u>The offender</u>	<u>The community</u>
Main objectives	<ul style="list-style-type: none"> ● Avoidance of secondary victimization ● Access to justice ● Psychological recovery 	<ul style="list-style-type: none"> ● Accountability ● Reintegration ● Desistance 	<ul style="list-style-type: none"> ● Reduction of the rate of repeat offenses ● Restoration of social peace
Expected benefits	<ul style="list-style-type: none"> ● Active participation in the process ● be heard ● have answers ● find relief ● have access to more information on the offense and the offender 	<ul style="list-style-type: none"> ● Creation of empathy through awareness of the victim's suffering ● develop new social skills ● to be reintegrated in the community ● to be useful and regain self-confidence 	<ul style="list-style-type: none"> ● have a more accessible justice system ● criminality prevention

³⁹Robert Cario, interviewed by Pauline Antier, Léonore Fassi, Julie Batani and Virgnie Vandesomple, students of the French National School for the Judiciary (2021).

⁴⁰J. Lecomte, *supra* note 18, at 17-23.

B. How Has Restorative Justice been Implemented so far?

1. The Impossible Implementation within International Criminal Justice

The scope of application of restorative justice principles needs to be restricted to some types of crime. It has indeed been very beneficial in cases of street group violence, where the healing properties of restorative justice are perceivable at the scale of a neighborhood.⁴¹ However, when it comes to mass violence and mass victimization that is consubstantial with international criminal law, the very same principles encounter a stumbling block.⁴² In this very specific field, where the trial depends upon the recognition and centralization of victims, one would expect criminal justice to be an ideal candidate to ‘*embrace restorative practices*’.⁴³ Yet, while restorative justice aims primarily at first-time offenders, low-level crimes and juveniles⁴⁴, international criminal justice is a ‘*product of discontinuity, upheaval and political ruptures*’.⁴⁵ Hence, domestic justice and international criminal justice have paradigms whose scales are too different for restorative justice to be evenly applied in both systems.

Firstly, in international criminal justice, victims have very few opportunities to encounter the offender, since they are both represented at court by legal representatives who are in charge of proving or disproving the offender’s guilt.

Secondly, as far as the offender’s acknowledgment is concerned, in only a few cases have defendants admitted their guilt. Most of the time, the accused tend to challenge the legitimacy of the trial process and they reject offers to demonstrate or declare remorse. When they do, it is only in mitigation in order to receive a more lenient judgment.⁴⁶ At the trial of Biljana Plavsic, indicted for genocide, crimes against humanity and violation of the laws or customs of war by the International Criminal Tribunal for the former Yugoslavia, the defendant accepted her responsibility and expressed her remorse. It is said that this statement helped her

⁴¹I. Marder, ‘Waves of Healing: Using Restorative Justice for Street Group Violence, Restorative Justice’, 2:1, at 103-106 (2014), available at: [10.5235/20504721.2.1.103](https://doi.org/10.5235/20504721.2.1.103).

⁴²A. Cuppini, ‘A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimera?’, *International Criminal Law Review* (2021), at 313-341, available at: <https://doi.org/10.1163/15718123-bja10041>.

⁴³M. Findlay, ‘Activating a Victim Constituency in International Criminal Justice’, 3 *International Journal of Transnational Justice* (2009) 183–206, at 203.

⁴⁴A. Cuppini, *supra* note 42, note 67, at 325 ; M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status (Institute for Human Rights Åbo Akademi University, Turku, 2004)*, note 18, at 37; K. Clamp and J. Doak, ‘More Than Words: Restorative Justice Concepts in Transitional Justice Settings’, 12 *International Criminal Law Review* (2012) 339–360, at 346.

⁴⁵A. Cuppini, *supra* note 42, note 68, at 325 ; D. J. Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’, *Georgetown Law Faculty Working Papers* (2008) 1–26, at 8.

⁴⁶A. Cuppini, *supra* note 42.

receive a lighter sentence.⁴⁷ However, years later, the restorative process that could have started at her conviction was jeopardized by the withdrawal of her statement of remorse.⁴⁸

Thirdly, when trying to achieve an agreement between the parties involved in the process, the interests of justice are more likely to be served when there is a visible punishment of the perpetrators, instead of employing a collaborative conflict-resolution approach.⁴⁹

Finally, material or symbolic restoration is unable to undo the effects of serious and traumatic events. Meanwhile, attempting to use restorative justice to achieve reconciliation in conflict-affected communities would be inappropriate.⁵⁰

Therefore, the process of international criminal law should remain that of a retributive process, focused on the accountability of the accused. The socio-political context is too sensitive, and primarily seeks peace between communities traumatized by mass atrocity, rather than mediation and meetings between offenders and victims.⁵¹

2. *The Feeble Development in European Countries*

Even though the European Union has made progress in the development of restorative justice through its directives, its concrete application has met with difficulties. Indeed, it is clearly inefficient to promote such a measure to victims if the service proposed by professionals does not exist in their own countries. While many countries missed the 2015 deadlines for the implementation of a restorative justice process, others respected it. However, the budget, human resources and training needed to enable agencies to operationalize were not compatible.⁵²

With regards France, restorative justice was imported rather late compared to other member states. Indeed, even though the victims in criminal proceedings managed to occupy a greater place in the criminal process, restorative justice as such only began to appear in law from August 15th 2014 within the framework of the individualization of sentences and the reinforcement of the effectiveness of criminal sanctions. Following this law, French criminal

⁴⁷*Ibid.*

⁴⁸*Ibid.*, note 95, at 300 ; J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at the Hague', 36 *Southeastern Europe* (2012) 39–59, at 48.

⁴⁹*Ibid.*

⁵⁰*Ibid.*

⁵¹A. Cuppini, *supra* note 42.

⁵²I. Marder, *supra* note 13.

procedure took restorative justice into consideration and two articles were dedicated to it (Art.10-1 and 707) in the code of criminal procedure. Nevertheless, reading those two articles shows the reluctance of the French legislator to impose restorative justice. This reluctance may be illustrated by several factors, such as the fact that it is described as a fully autonomous measure regarding the traditional criminal response and cannot be taken into account by judges and any national data.

Ultimately, a circular dated March 15th 2017 attempted to restore momentum to the scheme. This text is entitled ‘implementation of restorative justice applicable immediately following articles 10-1 ...’. It specifies that all litigation, regardless of its seriousness, may benefit from this complementarity, in particular road traffic offenses, property offenses and interpersonal violence. Nonetheless, the text reminds us above all that the proposed measure is ‘complementary’ and ‘autonomous’ of criminal procedure, even though it may be initiated by a prosecutor. This circular was partially reinforced by the law of March 23rd 2019.

Since 2010, the Poissy penitentiary has experimented with discussion circles and mediation processes linking victims and offenders. The first experiment took place with four offenders and four victims. The key question from victims was ‘how does one human kill another?’ Following this questioning, Alain Ghiloni, the father of a twenty-year-old teenager who was shot to death on his way home, decided to face the unimaginable and enter into a restorative justice process.⁵³ This initiative emerged more than twenty years after the crime. Indeed, even though the trial and mourning were long over, he realized that some questions had never been answered. Meeting offenders guilty of similar or different crimes helped him to identify the human shape of criminals. The French Institute for Restorative Justice was created in 2013 after this first experimentation by Robert Cario, Benjamin Sayous and several other practitioners.

In Italy, Marco Bouchard, former judge and current president of *Rete Dafne*, the Italian victim support association,⁵⁴ has been interested in restorative justice since 1991. He was a children's judge in Turin at the time. At this time, restorative justice was only known through criminal mediation. Mr Bouchard learned about it at a congress on the fight against crime in the suburbs organized by the French National School for the Judiciary when initiatives in criminal

⁵³Alouti, ‘A Poissy, Détenus et Victimes Se Rencontrent: “Comment Peut-On Tuer Un Autre Humain?”’ *Le Monde* (2017), available at: https://www.lemonde.fr/police-justice/article/2017/09/03/a-la-maison-centrale-de-poissy-l-epreuve-salvatrice-des-rencontres-detenus-victimes_5180287_1653578.html.

⁵⁴M. Bouchard, personal communication, 18 March 2022.

mediation were being conducted by the courts of Nanterre and Valence. The first criminal mediation offices, exclusively for juvenile offenders, then appeared in the Italian cities of Turin, Milan and Bari before extending to the whole country. Marco Bouchard believes that the first example of restorative justice for adults in Italy dates back to 1999 when the role of Justice of the Peace was created to respond to less serious crimes. He identifies a new step in the implementation of restorative justice in the Italian penal system with the reform of the traffic code in 2010, which created an absolute novelty in Italy in the form of community service sentences. Then, in 2014, the creation of probation was another step toward the implementation of restorative justice. Above all, the implementation of restorative justice in Italy has made considerable progress since Marta Cartabia, a judge, became Minister of Justice. Indeed, she became passionate about restorative justice, in its extra-judicial applications, thanks to the publication of a book⁵⁵ that caused a big stir in Italy, describing meetings between victims of terrorism and former members of the Red Brigade. Italy is preparing to transpose the 2012 Directive through a delegated law of 2021.⁵⁶ In paragraph 18 of the single article of this law, the legislator enjoins the government to: *‘introduce, in compliance with the provisions of the European Parliament and Council Directive 2012/29 EU of 25 October 2012, and internationally acknowledged principles, an organic restorative justice discipline in terms of notion, main programs, access criteria, safeguards, people eligible to participate, methods of carrying out the programs and evaluating its incomes, in the interest of the victim and the offender.’* It covers restorative justice broadly, encompassing all stages of the criminal process and applicable in all possible cases. It also provides for the definition of the victim in accordance with the 2012 Directive, the modalities of access to restorative justice programs, safeguards, the training path for the mediator, who must obtain accreditation from the government, and the criteria for a successful outcome of the measure. Restorative justice services are expected to be established at regional level. For Marco Bouchard, this reform goes deeper than the French ‘*Taubira*’ Law of 2014, but still points out some deficiencies in the Italian law such as recourse to a mediator and not a facilitator as foreseen by European rules.

⁵⁵A. Ceretti, *Il Libro dell’Incontro. Vittime e Responsabili della Lotta Armata a Confronto* (2015).

⁵⁶Legge n° 134 del 27 settembre 2021 *delega al Governo per l’Efficienza del Processo Penale nonché in Materia di Giustizia Riparativa e Disposizioni per la Celere Definizione dei Procedimenti Giudiziari* (Law of 27 September 2021).

C. The Current Setbacks to the Implementation of Restorative Justice

1. The Criticized and Uneven Progress in most Systems

Even if restorative justice is an old concept, its real application in most countries is quite recent. The first temptation is to calculate the benefits of such a process through the collection of data. However, is it possible to measure the effectiveness of restorative justice?

One of the dangers is to make quantity prevail over quality.⁵⁷ Some information regarding the number of workshops set up by regions or countries is available but it has to be observed with great caution. In the area of the effectiveness of traditional justice, for example, it is obvious that efficacy cannot be computed through the point of view of the number of convictions.

As for France, many judges and prosecutors who decided to dedicate a part of their time to restorative justice improvements deplore the lack of access to the training of main stakeholders. Indeed, an effective process of criminal mediation requires the coming together of a large number of professionals ranging from penitentiary staff to the facilitator (a third person, outside the conflict) and including prosecutors. Even if the school in charge of training penitentiary staff (the National School of Penitentiary Administration) offers the opportunity to participate in such classes, it is not mandatory and it does not attract all the students. Despite this, between 2011 and 2018, more than 1, 339 people followed training on restorative justice and 309 facilitator certificates were delivered in total (not only in the state school of penitentiary administration).⁵⁸ This training course lasts sixty hours and covers many themes such as codes of practice and basic principles of restorative justice. The lack of publicity or information regarding the benefits of such a course is probably the milestone of its defects. Most of the experiments carried out so far have been conducted by volunteers from the professions, with the help of volunteer organizations. This is why the Council of Europe encourages its member states in the Venice Declaration to ‘*consider restorative justice as an essential part of the training curricula of legal professionals, including the judiciary, lawyers, prosecutors, social workers, the police as well as of prison and probation staff and to reflect on how to include the principles, methods, practices and safeguards of restorative justice in university curricula and other tertiary level education programs for jurists, while paying attention to the participation*

⁵⁷Helena Soletto Munoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, 18 March 2022

⁵⁸*Institut français pour la justice restaurative, Enquête Nationale des Programmes de Justice Restaurative* (2018), available at: <http://www.justicere Restaurative.org/wp-content/uploads/2019/11/Enquête-nationale-JR.pdf>.

of civil society and local and regional authorities in the restorative justice processes.’⁵⁹

2. Cultural Obstacles

Restorative justice is more developed in common law countries than in their civil law counterparts. The main explanation for this resides in the cultural customs of conciliation and ‘out of court’ discussions upwind of the judicial process. Still, justice professionals do not think that culture is a real hindrance to the implementation of a form of restorative justice. The problem sometimes resides more in the semantic aspect than a real cultural rejection.⁶⁰ This may be applied everywhere because culture is fully a part of conflictual solutions in every society even if it is not alluded to. More than culture and sociology, everything depends on the attitude of the parties, their needs and their interests.

2. The Growth of Restorative Justice in Contemporary Legal Tools

A. What Safeguards must be Outlined? / What do all Legal Tools Have in common?

The goal in implementing a unified international conception of restorative justice is to provide a comprehensive and coordinated measure to avoid partial or inconsistent solutions which may give rise to secondary victimization.⁶¹ To achieve this, three main points stand out as the most important.

1. Information and Access to Restorative Justice Services:

The European Union Directive has been criticized for its limited references to restorative justice: a victim has to be informed about the possibility of restorative justice if the services already exist.⁶²

The European Forum for Restorative Justice, which forms a part of the evaluation of the Directive on victim’s rights, has also identified this problem. It stresses the importance of this text for the development of restorative justice in Europe and for victims, but also focuses on its limitations. More particularly, the European Forum for Restorative Justice focuses on the fact

⁵⁹Council of Europe, Declaration of the Ministers of Justice of the Council of Europe ‘Crime and Criminal Justice - the Role of Restorative Justice in Europe’, 13 and 14 December 2021, 15. iv., available at: <https://rm.coe.int/venice-ministerial-declaration-eng-4-12-2021/1680a4df79>.

⁶⁰H. Soleto Munoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, 18 March 2022.

⁶¹Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at para 46.

⁶²I. Marder, *supra* note 13.

that ‘*an equal access to restorative justice services needs to be guaranteed for all victims of crime*’. In the course of the evaluation of the Directive, the Forum conducted a survey, from which emerged the fact that there is a ‘1 - *lack of awareness of restorative justice of referring bodies and organizations coming into contact with victims (e.g. police, judicial authorities, victim support services)*... 2- *lack of information provided to victims on available restorative justice services; low quality of information provided to victims on restorative justice*.’⁶³ Consequently, it suggests acknowledging the right to information about available restorative justice services and ensuring that the information is clear and understandable for victims. This could also be carried out by making restorative justice a topic in European Union awareness campaigns on victims’ rights.

Many have pointed out the ignorance that victims and offenders face when it comes to restorative justice. The main reason for this ignorance is the initial lack of information in the majority of countries. Ideally, the parties’ free consent to the measure should be obtained after having had access to an individualized assessment process, in which an experienced practitioner helps them make an informed decision.⁶⁴

To be accessible and readily used, restorative justice should indeed be publicized by means of media, in a manner which should be clear and understood by all parties, through the use of simple and accessible language.⁶⁵ The information should be accessible at any time and in any case, delivered in all geographical areas of their jurisdictions, with respect to all offenses and at all stages of the criminal justice process.⁶⁶ To ensure the respect of these prerogatives, some European texts have mentioned a right to be fully informed⁶⁷, although specific guidelines to the implementation of such a right have yet to be developed.

2. The Emphasis on the Facilitator, his/her Recruitment and Training:

The success of restorative justice relies mainly on a third party, known as the facilitator. The latter is responsible for ensuring that all safeguards are respected throughout the process. He/she also provides the neutrality that is indispensable for the success of the measure and

⁶³European Forum for Restorative Justice, Position Paper on the EFRJ Evaluation of the Restorative Justice Provisions of the Victims’ Rights Directive (2021).

⁶⁴Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, (25) and (26).

⁶⁵ Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at para 21.

⁶⁶Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, (18) and (19).

⁶⁷Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at chapter 3, para 12.

helps the victim feel secure.

The recruitment of said facilitators should be from all sections of society, as long as they have a good understanding of local cultures and communities, as well as the capacity to utilize restorative justice in intercultural settings. They should also be imparted with sound judgment and possess interpersonal skills.⁶⁸ This type of recruitment is highly beneficial to the measure itself, since it offers recruitment from all origins and social classes. In practice, many facilitators seem to have past experience in a specific association, in the judiciary or in a penitentiary. In France, the few measures of restorative justice have indeed mostly been carried out by probation officers, social workers for underaged offenders, or specific associations geographically divided into counties.

Hence, once recruited, the training of facilitators must reflect the important role that is given to them. Both initial and on-going training must be suitable and adequate, a specific psychological training is even encouraged.⁶⁹ This ensures that victims are treated with respect, sensitivity and in a non-discriminatory way. Moreover, this specific training should ideally be extended to any officials involved in criminal proceedings or likely to come into contact with victims. This includes police services, court staff, lawyers, prosecutors, judges and practitioners who provide victim support or restorative justice services.⁷⁰ The purpose of this wide inclusion of all officials is to fortify the cultural shift that tends to include restorative justice as an evident part of criminal proceedings.

3. The Freedom of all Parties and the Confidentiality of the Process:

Since restorative justice is mostly a dialogue between parties, and for the measure to be a success, their respective freedom must be respected, either to enter into or withdraw from the measure.⁷¹

To respect and guarantee the freedom of the parties, the confidentiality of a restorative justice measure is necessary. Given the specificities of restorative justice, confidentiality allows both parties to choose freely and without any reservation to take part in the experience, since they

⁶⁸Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, at para 40.

⁶⁹ Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at para 61.

⁷⁰*Ibid.*

⁷¹*Ibid.*, chapter 3.

are guaranteed a safe space where the facilitator is the guardian.

The only exceptions that might betray this freedom and the confidentiality that accompanies it are, firstly, the agreement of the parties to unveil the measure and, secondly, an overriding public interest.⁷² The facilitator and parties should indeed still comply with domestic laws. As a result, the facilitator should disclose any information that appears to be a threat and convey to the appropriate authorities any information about an imminent or a serious crime which may come to light.⁷³

B. Accessing Restorative Justice, an Emerging Facet of the Right to a Fair Trial?

1. The Potential Creation of an International Right to Access Restorative Justice as Part of the Right to a Fair Trial?

While the Council of Europe has stated that restorative justice should be a generally available and inclusive service, which can be denied only under exceptional circumstances⁷⁴, it did not take the opportunity to erect a binding right to access restorative justice.⁷⁵ Perhaps its attempt to mainstream restorative justice did not intend to give rise to unprecedented actions before the European Court of Human Rights, at a time where its member states did not have a sufficient time to implement restorative justice.

Article 6 of the European Convention on Human Rights sets out the different components of a right to a fair trial, in civil and criminal procedures. Concerning the latter, the Article is applicable throughout the entirety of proceedings for the determination of any criminal charge, including the pretrial stage of proceedings⁷⁶ and the execution of sentences.⁷⁷ With this in mind, one might consider that restorative justice could fall within the scope of that Article, be it at the time of pretrial mediation or the post-trial execution of a sentence, as long as the measure happens within the time of the execution of the sentence.

Indeed, raising restorative justice as part of the right to a fair trial would imply an obligation

⁷²Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, (49).

⁷³Commentary to Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, at 11.

⁷⁴Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning Restorative Justice in Criminal Matters, (18) (19) and (27).

⁷⁵I. Marder, *supra* note 13.

⁷⁶ECtHR, *Dvorski v. Croatia*, Appl. no. 25703/11, Judgment of 20 October 2015, available at: <http://hudoc.echr.coe.int/>.

⁷⁷ECtHR, *Phillips v. The United Kingdom*, Appl. no. 41087/98, Judgment of 12 December 2001, available at <http://hudoc.echr.coe.int/>.

for member states to provide a unified regime of restorative justice, accompanied by safeguards and minimum standards through specific guidelines.⁷⁸ Those numerous safeguards could include equal access to restorative justice services, specific guidelines and pathways for victims to complain about a restorative justice process, and perhaps financial support for restorative justice services.⁷⁹

Dedicating a new right to restorative justice seems to be a good way to develop it further, although some professionals have sounded the alarm on the risks of too many regulations. Indeed, even if some people from the legal world believe that they can regulate it, it can be risky to regulate too much. Elected officials somehow have a theoretical vision of the concept and by regulating, they run the risk of restricting it. Flexibility in the implementation of the justice process is an advantage, as long as it is followed up with human resources and funds.⁸⁰

2. *The Crucial Role of the Judicial Authority in the Development of Restorative Justice*

Although restorative justice might be presented as an alternative to traditional criminal proceedings, it should not deprive judges and prosecutors of their original authority. On the contrary, the participation of judges and prosecutors in the implementation of restorative justice could be the most important lever to its development. The Council of Europe has indeed stated in its recommendation that the conditions, procedures and infrastructures necessary to refer cases to restorative justice must be carried by the judicial authority of the state.⁸¹ Likewise, once an agreement has been reached between parties before conviction or sentencing, the future developments are reserved to the judicial authorities.⁸² Finally, if a restorative justice agreement has been reached and completed, only the judicial authority can decide whether the criminal proceedings against the same person may be discontinued, and it is the intervention of the judicial authority that bestows on the agreement its full legal value.⁸³ Restorative justice should therefore not be viewed as a loophole tending to avoid any contact with the judiciary, but rather as a tool improving the current system and offsetting the stiffness of traditional

⁷⁸European Forum for Restorative Justice, 'the EFJR Contributes to the Evaluation of the EU's Victims' Rights Directive', 27 October 2021, available at: <https://www.euforumrj.org/en/node/11/efrj-contributes-evaluation-eus-victims-rights-directive>.

⁷⁹*Ibid.*

⁸⁰H. Soletó Muñoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, 18 March 2022

⁸¹Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, art. 28.

⁸²*Ibid.*, art. 32.

⁸³*Ibid.*, art. 34.

criminal proceedings.

Nevertheless, it is incumbent upon each state to incorporate into its national criminal procedure the appropriate interconnection between judges and prosecutors and other restorative justice stakeholders. In Belgium, in proceedings for underaged offenders, the prosecutor must examine an attempt at mediation before any other measure. If a mediation agreement or an intention statement has been established, it is submitted to the validation of a judicial authority, which can modify the statement only if such an agreement is a risk to public order.⁸⁴ If the prosecutor chooses to proceed otherwise, he/she must justify this with circumstantial evidence, the lack of which would entail any following act to be declared null and void, resulting in the procedure not being submitted before a judge.⁸⁵

In Spain, prosecutors also have the main role regarding young offenders. Almost 20% of legal proceedings for juvenile delinquents are stopped by the implementation of a restorative justice measure as an alternative. Prosecutors promote it and create the referrals, but it is only intended to be set up for petty crimes (non violent crimes carrying less than three years' custody). Teams then work with psychologists, social workers and educators. As far as adults are concerned, the decision to resort to restorative justice before a lawsuit remains with the investigating judges. At the sentencing enforcement stage, it is in the mind of the judges in charge.⁸⁶

The judicial authority is thus entirely intertwined with the process of restorative justice, not only to inform parties of the possibility of restorative justice, but also to actively take part in its process. The cases of Belgium and Spain are two amongst many of the various paths through which judges and prosecutors may be involved in restorative justice and include this procedure within the majority of proceedings.

Therefore, in order for restorative justice principles to be fully enforced and applicable in most judicial systems, its evolving approach must be taken into account by the judicial authorities and all legal practitioners.⁸⁷ For judges and prosecutors, this means grasping its benefits and multiple mechanisms during both their initial and in-service training. At the French School for

⁸⁴Décret du 18 janvier 2018 *portant le Code de la Prévention, de l'Aide à la Jeunesse et de la Protection de la Jeunesse*, art. 97, §4 (Decree of 18 January 2018).

⁸⁵*Ibid* art. 97 at para 7.

⁸⁶ H. Soleto Munoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, March 18 2022

⁸⁷K. Schweber, *Student Voice : Integrating Restorative Justice into Judicial Training*, February 18 th 2021, available at: <https://www.vermontlaw.edu/blog/restorative-justice/student-voice-judicial-training>

the Judiciary, such apprenticeship has been included for some years in lectures dedicated to the place of victims within criminal proceedings.⁸⁸ Instilling restorative justice principles in the training program of future judges and prosecutors thus seems to be the desirable and inevitable path to delve into, so that restorative justice is bound to spread and take its rightful place in any judicial system.

Conclusion

During its presidency of the Council of Europe's Committee of Ministers, the Italian Government decided to make restorative justice a priority. After two sessions in December 2021, the forty Ministers of Justice of the member states of the Council of Europe unanimously adopted the Venice Declaration on the Role of Restorative Justice in Criminal Matters. The latter is another significant sign that restorative justice is becoming a central concern in Europe, with the need for many tools for its development, including interagency cooperation nationwide, adequate legislation and appropriate funding. Most importantly, it calls for the consideration by national authorities of a new goal that is the recognition of the right to access appropriate restorative justice services, for all the interested parties, if they consent. Although the clear creation of this right, not to mention its enforcement, is still a thorny subject, one can hope for it to become a forthcoming debate in Europe and, eventually, a success.

*'The truth hurts but silence kills.'*⁸⁹

⁸⁸*Ecole Nationale de la Magistrature*, Conférences sur les Victimes dans le Procès Pénal, 22 september 2017, available at: https://www.enm.justice.fr/actu-25septembre2017_Conferences-sur-les-victimes-dans-le-proces-penal.

⁸⁹*D. Tutu* at the Truth and Reconciliation Commission in South Africa