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# **The Limits of Restorative Justice**

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Interest in restorative justice has been growing since the early 1990s. In many countries, programs, studies and discussion groups on the subject have proliferated. The failure of the punitive justice model, excessive use of incarceration and the alienation of victims and lack of response to their needs have generated support for this new way of thinking (Roach, 2000; Law Commission of Canada, 2003; Hudson, 2003). In Canada, the emergence of the restorative justice model can also be attributed to the inability of the justice system to find solutions to crime in Aboriginal communities and the problem of over-representation of Aboriginal persons in correctional facilities.

In 2002, Canada played a key role in the adoption of the *Basic principles on the use of restorative justice programmes in criminal matters* by the United Nations Economic and Social Council. The Department of Justice of Canada also contributed to the development of a *Statement of Principles and Values of Restorative Justice* and guidelines on the funding of restorative justice programs.

In the field, the first mediation program between offenders and victims was started in Kitchener in 1974. In the 1980s, more than a hundred mediation programs were established, often by faith communities and volunteer groups. Most of the programs were part of diversion measures, although they could be introduced at different stages of the criminal process. Family conferences also fall into the category of restorative justice practices. They are aimed primarily at young offenders and help engage family and friends of the victim and the offender in a dialogue in order to find the best ways of dealing with criminal behaviour. In many Aboriginal communities, sentencing circles give victims, offenders, elders and other community representatives the opportunity to examine the consequences of the offence, reparation for injuries to victims and reintegration of the offender into the community. Some of these sentencing circles operate within the formal justice system as alternatives to the conventional sentencing procedure and involve justice professionals (Law Commission of Canada, 2003).

In the past decade, practices have become more diverse but are still disparate in terms of philosophy, principles and application. In Canada, restorative justice practices are more established in the English-speaking provinces and Aboriginal communities. In Quebec, the phenomenon has not been embraced to the same extent. Even today, there are misgivings about committing to a movement that is often associated with faith groups. Quebec has perhaps felt less of a need to move toward restorative justice because diversion programs and alternate measures were already firmly established, especially in the administration of justice for minors (Jaccoud, 2003).

Despite the progress that has been made, restorative justice is the subject of much criticism. Organizations that support victims and advocate for their rights have reservations and questions about the model (Reeves, 1989; Roach, 2000). The aim of this article is to present some of the reasons why this model is not immediately accepted as an answer to all crimes or a solution for all victims and offenders. It looks with a critical eye at the principles and practices of restorative justice, particularly from the standpoint of the answers it seeks to provide for victims of crime.

### **An ambitious model of justice**

Compared with the traditional model of justice, restorative justice offers a more positive and constructive approach to restoring ties between the victim of an offence, the person who committed the offence and the community as a whole. It does not eliminate denunciation and reaffirmation of social norms, but it does tend to make justice more compassionate and more sensitive to the suffering of the individuals and communities affected by crime (Roach, 2000; Cario, 2003).

Restorative justice promotes such values as healing for the offender and the victim, community input, respectful dialogue between the parties involved, forgiveness, accountability and fraternity. It is presented as an alternative to the adversarial system of justice and an antidote to punitive policies (Roach, 2000).

The aim of restorative justice is to give victims a bigger role; meet their need for information about the reasons for and circumstances of the offence; allow them to be heard and to obtain tangible or symbolic compensation; and regain the independence and power that the crime took away from them (Law Commission of Canada, 1999, 2003; Roach, 2000). Restorative justice is also meant to have a positive impact on offenders by confronting them with the consequences of their actions and their responsibilities, giving them the opportunity to repair the damage caused to the victim and having them work on finding a solution to their problems (Umbreit, 1994; Fattah, 1998; Umbreit, Bradshaw and Coates, 1999; Law Commission of Canada, 2003).

### **The benefits for victims**

European and North American studies show that victims who have taken part in mediation programs are generally satisfied (Umbreit, Bradshaw, Coates, 1999; Latimer, Downden, Muise, 2001). The same is true of victims who took part in family conferences (Kurki, 2003). Victims describe these processes as being fair and say that, overall, the experience seems to have helped

reduce their fear of crime and the anger they feel toward the offender and increase the likelihood that the offender will make reparations for the injuries caused. Victims and offenders feel they are being given a chance to get a grip on their problems and come up with more constructive solutions.

While the research does show that victims benefit from restorative justice, it must be acknowledged that there are a number of problems that have been brought to light by field experience and various studies. To date, evaluative research has focused primarily on mediation programs. Largely undeveloped across Europe and in North America, mediation programs apply in a minority of cases compared to the total volume of crime, and they mainly target property offences and young first-time offenders (Walgrave, 1993; Dignan and Cadavino, 1996; Fattah, 1998; Weitekamp, 1999; Miers, 2001). Many experts feel that these measures help cast a wider penal net in areas that are not normally within the jurisdiction of the courts and, more often than not, are detrimental to disadvantaged groups (Fattah, 1998; Weitekamp, 1999; Law Commission of Canada, 1999; Roach, 2000; Cario, 2003). They are seen more as ways for offenders to avoid the criminal process, a means of ensuring that the justice system does not become overloaded and an alternate method of solving the problem of dead-end classifications.

Unfortunately, victims are left on the sidelines in the very programs designed to give them a bigger role (Marshall & Merry, 1990; Dignan, 2003). Whether the chosen method is mediation, family conferences or some other practice, too many victims are relegated to the role of facilitator or intermediary or are used as a pretext for pursuing an educational initiative for offenders (Moyer and Axon, 1993, in Roberts and Roach, 2003; Daly, 2003). Victims are sometimes not involved because they were not invited or could not be reached (Dignan, 2003), or because indirect mediation was chosen in order to reach more quickly a resolution that provides financial compensation or to keep the procedure from becoming unduly complicated.

Some of the criticisms of restorative justice also relate to the way conditions aimed at fostering the participation of victims and offenders are set. Too often, the victim's and the offender's status have not been carefully assessed or their needs have not undergone a comprehensive analysis. Time is not always spent providing them with information, preparing them psychologically or allowing them to familiarize themselves with the process and the objectives (Morris, Maxwell, Robertson, 1993; La Prairie, 1995; Hudson, 2003; Daly, 2003). Some studies have shown that victims were pressured to take part in mediation or meeting circles (Dignan and Canavino, 1998; Lajeunesse, 1996, in Griffiths, 1999; Stewart, Huntley, Blaney, 2001, Law Commission of Canada, 2003). They may also be involved at a time when they are not prepared to do so. That is

the case, for example, in diversion programs, where it is important to quickly engage the offender in the process of accepting responsibility and avoid dragging things out. These imperatives do not always take into account the psychological state of the victims or their ability to make a free and informed commitment to the measures they are being asked to take.

There is also a tendency to forget that “restorative” action in its various forms rarely springs from the wishes of the victims themselves or victim support organizations. Most of the time, the action centres on the offender. It is often set in motion by services that work with offenders – minor and adult alike – in the context of probation, alternatives to incarceration or parole. The role of mediator is then assigned to stakeholders whose first mandate is to aid the rehabilitation of offenders. Although responding to the needs of victims is not absent from their concerns, it will not be in the forefront. Many such stakeholders are uncomfortable dealing with victims. Ill prepared to meet their expectations, taken off guard by their reactions, they feel that they are playing conflicting roles and are poorly equipped.

Given that a significant number of stakeholders have little or no experience with victims and rely heavily on volunteers in the community, it is important to remember the importance of improving their knowledge and skills. The implementation of programs that focus on a meeting between victim and offender entails a long period of preparation at each stage and repeated contact with the parties (Miers, 2001). On the one hand, they have to be able to accurately assess the offenders’ motivation and ability to commit to that type of process; on the other, they have to understand the phases of criminal victimization, post-traumatic stress and the way victims work through their loss and grief (Umbreit, Bradshaw and Coates, 1999).

### **Reparation for injury: a bumpy road**

Restorative justice must lean toward reparation for the injury caused to victims. Options range from a simple apology to a request for forgiveness, from tangible compensation to symbolic reparation.

Many programs emphasize compensation for victims, especially in cases of mediation. While many studies show that victims are happy with the agreements reached in that context, it is nevertheless difficult to gauge the results. These studies are not well documented in terms of the type and amount of losses sustained, victims’ claims and the amounts paid by offenders, or problems related to enforcement. Do victims get compensation that is in line with their losses, or is it more a question of symbolic reparation, which, more often than not, consists of community

service or work for third parties? Is it justice based on an arrangement or compromise between the parties? Are the victims satisfied when the reparation is limited to an apology or is geared mainly toward the re-education of the offender? The research does not really provide satisfactory answers to these questions.

In addition to tangible compensation, restorative justice advocates rebuilding the relationship between the victim and the offender. In sharp contrast to the traditional model of justice, restorative justice aims to resolve conflict and restore dialogue between the parties where possible. Is such dialogue desired or desirable in all cases? There are many fine distinctions to be made.

Several studies show that many victims would be willing to meet with the offender if given the opportunity. Getting an explanation of the crime and insight into the person who committed it, being compensated, describing how they were hurt, and making sure that their testimony helps the offender realize what was done and thus helps prevent more offences: these are among the reasons often given to justify the desire to take part in such a meeting (Reeves, 1989; Law Commission of Canada, 2003; Daly, 2003).

A significant number of victims refuse to be part of a meeting (Reeves; 1989; Law Commission of Canada, 2003). Whether or not they want to participate depends on several factors: the type of crime and the repercussions; the time that has elapsed since the crime was committed; the nature of their relationship to the offender; and their perceptions of the offender's ability to understand the scope of the offence and the importance of reform. Many victims feel it is not worth the trouble and question the outcome of a meeting. Fear of retaliation or simply being in the presence of the offender, the importance of getting or not getting answers to their questions and the need to turn the page are some of the reasons on which their decision is based. Some victims have received no help and have not recovered from the incident. Others feel very angry because they have been cast aside by social agencies or the criminal justice system. Still others feel the damage is beyond repair and that they have to move forward. They react differently and are not at the same point in their healing process. The cost-benefit analysis can therefore vary widely depending on their personality, their previous experiences and the experiences resulting from their victimization.

And what about the offenders? In some respects, restorative justice offers them a path that is not always smooth and easy. They are urged to engage in a process that will force them to acknowledge their responsibility toward the people they hurt, abused or assaulted. They will be

asked to prove that they want to change and mend their ways. These are expectations that can make them uncomfortable. Making an emotional commitment, revealing their true selves and dealing with shame and blame are not easy things to do. Offenders are not accustomed to expressing that level of emotion, even with the people closest to them. Many offenders are incapable of seeing the victim as a real person, empathizing with the victim (Fattah, 1998; Hudson, 2003) or showing remorse that is neither feigned nor tactical in order to avoid punishment or get off more lightly. It must be acknowledged that many offenders are able to use restorative justice for all sorts of purposes: avoiding punishment, casting themselves in a better light, playing down their faults, even taking pride in their relationship with the victim (Van Giseghem, 2003; Hudson, 2003).

Even if the parties are willing, there are many questions that should be considered in order to make certain that the parties get something out of a meeting. In what cases is it relevant to encourage a meeting between the victim and the offender? What types of victim and offender are more likely to benefit from a meeting? How and why should they be involved? How can the individual characteristics of each case be taken into account? In what way and at what point in time is the participation of victims desirable and appropriate at the various stages of the penal procedure? Cario (2003), for example, wondered if a meeting is a measure that can realistically be considered at the time of sentencing or when the offender is released. How much time and resources should be allocated to a meeting?

### **A model of justice capable of meeting the needs of victims of very violent crimes**

Using some form of restorative justice in cases of violent crime is a major issue. The public and victims generally support the restorative justice model (Bazemore, 1999), but are very reluctant to accept it in cases of serious crime (Reeves, 1989; Roberts, 2002). Experiments in this area have to date been cautious. They have concentrated on risk-free cases, mainly property offences. In the minds of proponents of this practice, however, this does not mean that restorative justice does not apply to violent crimes. The thinking is that it should be used more in cases where the victim and the offender know each other and their relationship has deteriorated (Umbreit, 1994; Fattah, 1998; Roach, 2000). The argument is also made that many victims of sexual assault and attempted murder and many relatives and friends of homicide victims would, given the opportunity, be willing to meet with the offender in an effort to get answers to their questions and say how they feel about the consequences of the crime. This argument applies broadly to the few experiments that have allowed victims of violent crime to meet the offender who turned their lives upside down (Umbreit, 1994; Roberts, 1995).

It must nevertheless be recognized that many victims of serious crime want nothing to do with the practice. The more they perceive the crime as irreparable, the more significant they view the aftermath of the crime, the less receptive they are to the thought of being face to face with the perpetrator of the crime (Reeves, 1989). That prospect can cause a great deal of stress. It can be hurtful and interpreted as a lack of understanding of what they went through. Our research involving victims of violent crimes who contacted the Canadian correctional system to obtain information, attend hearings or make a statement yielded similar findings (Gaudreault, 2003). These people had lost someone close to them; they were sexually assaulted by a family member or attacked by their spouse. Leery, angry or suffering unduly, they declined any attempt at reconciliation or restoration of their relationship with their attacker or the person who took a loved one away from them. In most cases, the idea was a non-starter because the victims had nothing to say to the offender and felt that a meeting would serve no purpose. More importantly, they had not reached that point and did not feel up to a meeting on an emotional level.

Some crimes cause serious rifts, severing relationships within families and with people outside the family. Many victims will opt for a healing process and measures that will help distance them from the offender (Herman, 1992). In the interest of self-protection, they will refuse to follow the legal process, media coverage of their case, in fact any form of participation in the social reintegration of the offender. The thought of being near or having any contact with the offender could instill a sense of violation or revictimization.

Criminal victimization means a loss of power or affirmation of a lack of power (Baril, 1984, 2002; Hudson, 2003), especially in situations where the offender is repeatedly violent or the relationship with the victim is characterized by domination, tyranny or manipulation. Is restorative justice able in those cases to meet the needs of persons who are in a weaker position because of their age, their relationship, their past or their life history? For whom, in what circumstances and when is it appropriate where persons who have been victimized over and over or whose lives have been filled with acts that have undermined their physical, mental or sexual integrity? If it is true that in a large proportion of interpersonal violent crimes, victims and offenders know each other, in what situations and at what price should those relationships be preserved?

These questions reflect victim support groups' resistance to or criticism of restorative justice. In cases of violence against women and children, this model of justice also elicits strong opposition because of the risk of keeping that type of crime behind closed doors, blaming the victims and

increasing existing power imbalances. The merits of restorative justice will probably have to be proven in less “sensitive” areas before the model gains acceptance in cases involving women and children. Meanwhile, there is still much work to be done to understand reversal of roles and normalization of behaviour in violent situations like those attested to by Aboriginal women in communities in western Canada (Stewart, Huntley, Blaney, 2001).

## **Conclusion**

Restorative justice has not yet changed the basic course of the criminal justice system. It has proven to be a more effective alternative to prison or other forms of punishment, but has produced mitigated results in terms of victim participation and reparation for injury (Bonta, 1998, in Griffiths, 1999). Despite the high level of satisfaction among victims indicated by the research, particularly studies that focused on mediation, we have to be cautious still and refrain from overstating the benefits of restorative justice. Victims’ problems are not resolved once and for all by the solutions made available to them. The objectives of reparation and healing put forward in these approaches must not confine us to a simplistic view of their needs and the complex processes associated with their recovery.

While its objectives may be laudable, restorative justice is nevertheless a disaggregated model. Combining relational justice, participative or consensual justice and transforming or reforming justice, restorative justice has become a catchall concept that has something for everyone. The wide range of practices, the orientation of policies and objectives primarily toward offenders, and the lack of consensus on theoretical principles and its impact fuel the current debate (Marshall, 1999, in Miers, 2001). Lode Walgrave (1993), an ardent proponent of this approach, agrees that the “piecemeal proliferation”, the “mix of good intentions” and the “rampant growth of programs” threaten the value and potential of restoration.

We must be careful not to be hasty in embracing this option and take the time to clearly identify the parameters of the underlying philosophy and the associated practices, implement initiatives in this area gradually and adopt an array of strategies (Bazemore, 1999; Miers, 2001; Roberts, 2002). It is also important to target best practices, gather data on bigger groups and the long-term effect of programs. The research should also make it possible to conduct more thorough analyses in order to get a better understanding of victims’ concerns or their position on issues like forgiveness and reconciliation with the offender (Reeves, 1989; Hudson, 2003). The allocation of resources is a key factor in the attainment of such objectives (Miers, 2001; Law Commission of Canada, 2003; Roach, 2000).

Restorative justice has great potential for the parties involved and for the community. However, it is not the magic solution to all evils. It remains an option for some crimes in some circumstances and under some conditions. It must not be considered a cheap form of justice or pretend justice. Nor must it trivialize the valid demands of victims.

The restorative justice model will gain legitimacy if victims' needs are placed in the forefront and it succeeds in mobilizing all of the players in the justice system, victim support groups in particular (Bazemore, 1999; Roach, 2000; Miers, 2001). Support groups must be actively involved in the design, implementation and evaluation of restorative justice programs. Finally, discussion of the restorative justice approach must not be confined to a small circle of experts. The community will never embrace and participate in restorative justice unless it understands its purpose and its aims.

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