



Restorative Justice

Contextual and cultural considerations

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This Knowledge Note explores the current literature and practice in the area of restorative justice, specifically looking at its contextual considerations and its links to Indigenous justice and peacekeeping custom. This Knowledge Note supports Synexe's mediation activities, of which restorative justice is a core area.

The importance of context

With any conflict or dispute, context plays an essential role in determining the best way to proceed to achieve resolution or justice.

Stakeholder identification is critical in any dispute resolution intervention or restorative justice remedy. McCold (2000), in the context of juvenile restorative justice approaches, identifies *micro-communities* and *macro-communities*, each with separate needs and roles within the justice system. *Micro-communities* include people who may have suffered because of the nature of their relationship with the victim or offender (known as *secondary victims*), as well as *communities of support*, who may not be directly linked to the offender, the victim, or the offensive act, and therefore have less emotional connection to the offense, but still have an ongoing concern. Alternately, *macro-communities* include a broader stakeholder group of neighbors or local government representatives. These *macro-communities* are often not accounted for in other mechanisms of justice (Hill 2007). Restorative justice works to reconcile values across the broader community, through redress at both the *micro-community* and the *macro-community* level. When exploring whether or not it is appropriate or

beneficial to engage these concentric layers of community (figure 1),¹ the nature of the offense, the conditions and dispositions of those involved, and any actual or potential risks must be carefully assessed.

Figure 1: Diagram representing concentric communities that may be engaged in restorative justice



¹ It should be noted that the concept and definition of community is debated extensively in the restorative justice literature.

Cultural context also determines what is appropriate or inappropriate in terms of pursuing justice. In the South African Truth and Reconciliation Commission, the spirit of *Ubuntu* provided a foundation for the nation's restorative justice process. The spirit of *Ubuntu* refers to the "healing of breaches, the redressing of imbalances, and the restoration of broken relationships"(Roche 2006).

Aside from the South African context, restorative justice's most effective implementation is found in New Zealand, where family conferencing approach, modeled on both traditional Maori and contemporary practices has evolved into a mandatory model for juvenile justice (Maxwell & Morris 1993). In these family conferences, the juvenile offender, teachers, social workers, family members, victims, and others join together to agree upon and establish payments, mandate service, articulate apologies, and develop behavioral plans, often as an alternate to incarceration.

The purpose of the conferences or circles is not to find guilt or to place blame. Rather, the participants work to determine how to best compensate or rehabilitate the victim, and to consider how to treat and reintegrate the offender. Power, in these instances, is not located in a single judge, and the remedial approaches are decided upon collectively, with less emphasis on formal rules, standards, or precedents. Some conferences or circles may refer the situation to more formal legal proceedings if the victim is not satisfied with the redress, or other jurisdictional authorities (Indian tribes, for example) as required (Menkel-Meadow 2007).

These family conferences are not without its critics, and criticisms relate to whether or not the context is optimal for this approach. Specifically, Delgado (2000) explores how coercion may be used in the conferences or circles, and how family conferencing may reduce criminal defendant rights in countries with strong civil liberties protections. Marshall (1998) provides evidence that there may be an increased risk of flight from the community where family conferences are used in smaller, homogenous contexts. He argues that these contexts are perceived as more oppressive than even the state legal system.

Depending on context, restorative justice may be practiced in a variety of manners. Reconciliation, confrontation, and communication may be either direct or indirect between victims and offenders. Certain serious crimes may make things worse of cause too much pain to allow for direct, face-to-face approaches (for example, in the case of crimes such as murder or rape). Restorative justice may also be private and confidential, or require public participation, such as is the case with Truth and Reconciliation Commissions (Menkel-Meadow 2007).

Restorative justice in an Indigenous customary context

The 1840 Treaty of Waitangi between British and Maori groups in New Zealand's north island is often described to illustrate diverging systems of justice (Mac Ginty 2008, Gibbs 2009). This Treaty ceded vast amounts of land to the British, although the Maori chiefs who signed the Treaty had little understanding of either property ownership or even the concept of sovereignty. For the Maoris, war served the purpose of making peace and was *utu*, or remedy following insult or offense. The British went to war in order to access or protect resources. With war and peace meaning different things to the Maori and the British, they found themselves fighting different wars and waging different peace. Once colonial rule was established, Indigenous people became subjects of the Crown, and were no longer perceived as opponents worthy of engaging in peacemaking.

In New Zealand's settlement of Waitangi process, which has been taking place over the past 30 years, the emphasis of the settlement is on the restoration of tribal *mana* (tribal power, prestige), *rangatiatanga* (chieftainship), and *turangawaewae* (a place to stand) as opposed to lands and resources (OTS 2002, Gibbs 2009). In practice, the focus is not on the full restoration of Maori land or financial compensation. Instead, the settlements take into account apology, the restoration of the tribal economic base, and the return of significant sites and other forms of cultural remedy (ibid). The settlement process provides a mechanism for the ongoing relationship between the Maori and the State, in that the *mana* of the Maori must be restored before it can engage as an equal with its Treaty partner (Gibbs 2006). Again, the emphasis on relationship emerges: reconciliation and the restoration of dignity take precedent over material gains or allocation of resources.

The application of the principles and the philosophy behind restorative justice in the context of historical injustice involving Indigenous people (as has been done in New Zealand), allows for Indigenous worldviews to be recognized and legitimized. As with the example provided by the settlement process of the Treaty of Waitangi, this has allowed for better outcomes from the perspective of Indigenous victims.

New Zealand's instance of diverging worldviews and notions of justice is not unique. The European concept of "crime" is viewed by the Navajo tribes of North America as "disharmony". In the Navajo customary system of justice, the victim, and more importantly the offender, must be restored to a state of harmony (Yazzie 1994). The emphasis is on finding the causes behind the injustice, as opposed to laying blame, in order to address the root causes of the disharmony (ibid).

Along the same line of thought, the concept of human rights is decidedly a Western one, where an individual is allocated a specific legal status (as opposed to an extended family, community, or language group). In regards to restorative justice, understanding the cultural context of the group where the offense has been committed may assist in developing an appropriate intervention, as group-based rights systems may have much more resonance in non-Western or Indigenous contexts (Mac Ginty 2008).

Evidence supports that Indigenous people are more likely to engage in justice approaches that apply the philosophy of restorative justice (Meyer 1998). Aboriginal Australians, who have rejected the mainstream legal system imposed upon them, have embraced the restorative justice family conference system, as well as sentencing and healing circles (Moore 1996, Blagg 1997, Aboriginal Justice Advisory Council 2000,). Restorative justice is recognized as having value in being able to repair systemic harm in inequitable societies, such as Indigenous communities, because restorative justice resonates with social and cultural norms and social sanctioning elements that form the core of many Indigenous justice systems (Daly 2000).

Concluding remarks

This paper explores the fundamental concepts and the application of restorative justice, and serves as a starting point for a conversation about the contextual and cultural considerations that must be addressed. As an approach, restorative justice, has far-reaching implications and potential. It represents, in some cases, an opportunity for Indigenous values and understanding to gain internationally recognized legitimacy and application. The success of restorative justice initiatives remains context-dependent, and numerous considerations must be taken into account to ensure successful outcomes.

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