

A Plea for the Systematization of Restorative Justice for Juvenile Offenders

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ABSTRACT

There has been a rise in restorative justice practices since the second half of the 20th century due in part to ineffective traditional justice mechanisms. Notably, such measures have been successful in juvenile cases. In 2014 there came a turning point for the integration of restorative justice measures in France, as this was the first time that these measures were recognized within the French Code of Criminal Procedure, Article 10-1. Through this new normative restorative justice legal framework comes the advent of practices such as mediation between the perpetrator and the victim, consent of all parties involved, the acknowledgement of the facts and confidentiality of exchanges (with several exceptions). These measures have been shown to foster (particularly for juvenile perpetrators and victims) better communication, mutual understanding between the perpetrator and victim and have helped to re-build the confidence of victims, an important factor in the success of their future. Nevertheless, improvements are still to be made. This includes the need for ongoing training, experimentation, communication, evaluation and support. Both financial support and support through the collaboration of all key players involved in restorative justice in France are vital for the future success of restorative justice projects.

Keywords: Restorative justice, juvenile delinquency, criminal justice system, Protection Judiciaire de la Jeunesse, Code de la Justice Pénale des Mineurs, mediation, victims' rights, communication, improved relationships

Un llamado a la sistematización de la justicia restaurativa para menores infractores

RESUMEN

Ha habido un aumento en las prácticas de justicia restaurativa desde la segunda mitad del siglo XX debido en parte a mecanismos de

¹ Civil servant in the Ministry of Justice. V. *La justice restaurative au bénéfice des mineurs : une utopie en marche*, Ed. L'Harmattan, 2023, p. 135.

justicia tradicionales ineficaces. En particular, estas medidas han tenido éxito en casos de menores. En 2014 se produjo un punto de inflexión para la integración de las medidas de justicia restaurativa en Francia, ya que fue la primera vez que estas medidas fueron reconocidas en el Código de Procedimiento Penal francés, artículo 10-1. A través de este nuevo marco jurídico normativo de justicia restaurativa llega el advenimiento de prácticas como la mediación entre perpetrador y víctima, el consentimiento de todas las partes involucradas, el reconocimiento de los hechos y la confidencialidad de los intercambios (con varias excepciones). Se ha demostrado que estas medidas fomentan (particularmente para los perpetradores y víctimas juveniles) una mejor comunicación y comprensión mutua entre el perpetrador y la víctima y han ayudado a reconstruir la confianza de las víctimas, un factor importante para el éxito de su futuro. Sin embargo, aún quedan mejoras por hacer. Esto incluye la necesidad de formación, experimentación, comunicación, evaluación y apoyo continuos. Tanto el apoyo financiero como el apoyo a través de la colaboración de todos los actores clave involucrados en la justicia restaurativa en Francia son vitales para el éxito futuro de los proyectos de justicia restaurativa.

Palabras clave: Justicia restaurativa, delincuencia juvenil, sistema de justicia penal, Protection Judiciaire de la Jeunesse, Code de la Justice Pénale des Mineurs, mediación, derechos de las víctimas, comunicación, mejora de las relaciones

呼吁对未成年罪犯实行恢复性司法制度

摘要

自20世纪下半叶以来,恢复性司法实践有所增加,这部分归因于无效的传统司法机制。值得注意的是,此类措施在青少年案件中取得了成功。2014年,法国恢复性司法措施的整合迎来了一个转折点,因为这是这些措施首次在《法国刑事诉讼法》第10-1条中得到承认。通过这一新的规范性恢复性司法法律框架,迎来了一系列实践,诸如犯罪者和受害者之间的调解、所有相关方的同意、承认事实、以及保密交流(有几个例外)。这些措施已被证明能促进犯罪者和受害者之间更好的沟通和相互理解(特别是对于青少年犯罪者和受害者),并有助于重建受害者的信心,这是他们未来成功的重要因素。然而,仍然有许多有待提高的方面。这包括需要持续的培训、实验、沟通、评价和支持。无论是财政支持,还

是“通过参与法国恢复性司法的所有主要参与者的合作”提供的支持，对于恢复性司法项目的未来成功都至关重要。

关键词：恢复性司法，青少年犯罪，刑事司法系统，青少年司法保护，青少年刑事司法法典，调解，受害者权利，沟通，改善关系

The Beginnings of Restorative Justice

Restorative practices are ancestral. They can be found in all great civilizations. The State's confiscation of penal responses to crime at the turn of the first millennium, and successive colonizers' attempts to destroy these practices, have never led to their eradication. The crises experienced by most democratic, massively repressive criminal justice systems encouraged their (re)discovery in the second half of the 20th century. In this sense, the best-known of the first restorative experiments took place in 1974, in Kitchener, Ontario, Canada. It is a prime example of the benefits that restorative justice could offer to all juveniles in the Protection Judiciaire de la Jeunesse system. It involved two drunken teenagers who, over the course of one night, vandalized 24 cars, 22 properties, a store, and a church. The probation officer in charge of the case suggested to the judge the possibility of the minors coming face to face with the victims of their numerous misdeeds, so that they would acknowledge their responsibility, become aware of the harm caused and make reparation for the acts committed.² The magistrate, faced with the ineffectiveness of traditional justice in preventing recidivism, accepted the proposal. And so, the meeting between the two perpetrators and the victims took place. It was not an easy experience for the teenagers. Nonetheless, they made up for all the harm done to them by the victims, leading the judge to sanction them with 18 months' probation.

Years went by when, one day, Russ Kelly, one of the teenagers at the time, attended a conference of a local association entitled *Community Justice Initiatives*. During her speech, one of the associations' members accurately recounted Russ and his friend's experience, noting that her team was looking to contact the two authors on the occasion of the association's 25th anniversary. Afterwards, Russ said: "I was overwhelmed and my heart was pounding so hard I couldn't take notes. After much hesitation, I decided to say who I was. Twenty-eight years later, I chatted with the probation officer in his office. This made such an impression on me that I joined Community Justice Initiatives. Since then, I've been trained in mediation and work for the association. My role is mainly to promote the philosophy of restorative justice [...] I'm not proud of what I've done. However, I am very proud of

² GAILLY Philippe. *Restorative Justice*, 2011, pp. 135-136.

what has come out of it. I am amazed that something so negative could result in something so good, which has transformed many lives in a positive sense.”³

The Advent of a New Restorative Model in France

This initiative illustrates how juvenile justice can become one of the starting points from which the full potential of restorative justice can flourish. In France, following the first *Rencontre Détenus-Victimes* set up at the *Maison Centrale de Poissy* in 2010 with the participation of Robert Cario as a community member and Paul Mbanzoulou as a facilitator, the entry into force of the law of August 15, 2014, marks a decisive new turning point for the integration of French restorative justice. This new practice is, for the first time, officially recognized and institutionalized within Article 10-1 of the Code of Criminal Procedure, in a subtitle II, of the preliminary title of the general provisions of the Code of Criminal Procedure entitled “*De la justice restaurative..*” This law applies to both adults and minors. A restorative justice measure is defined as “any measure enabling a victim as well as the perpetrator of an offence to participate actively [...] in repairing the damage of any kind resulting from its commission..” In this sense, unlike the traditional criminal justice system, in which the protagonists are in a passive posture, the restorative process, without encroaching on the magistrates’ competences with regard to the consequences of the crime (sanction, compensation and enforcement of sentences), offers them this possibility of actively participating in the regulation of the repercussions that persist since the conflict of an offending nature. Restorative justice measures thus involve, in the first instance, the victim and the perpetrator linked by the same offence, within the framework of “restorative mediation.” But some measures also offer the possibility for the parties to invite their loved ones and members of the community affected by the crime to “restorative conferences.” Participation in a meeting place requires compliance with several essential, non-negotiable conditions, since they guarantee respect for human rights.

The Normative Framework of Restorative Justice

Firstly, “the requirement of acknowledgement of the facts”⁴ is essential. Secondly, potential participants must be fully informed about the measure in which they wish to engage, including how the process works, the guarantees available to them, the possible consequences and also the positive effects and limits of their potential participation.⁵ Following this information phase, the participants’ consent to the restorative measure must be obtained. This step is essential, as it demonstrates the participants’ willingness to commit to the process. However,

3 LECOMTE Jacques. *The Multiple Effects of Restorative Justice*, April 2014, p. 17.

4 LEGIFRANCE, *Eod,loc.*

5 CARIO Robert, *Restorative Justice*, 2022, p. 26.

this consent can be revoked at any time, should one of the protagonists wish to stop the process, with no effect on his or her situation. Thirdly, the presence of an independent, multi-party third party is then required. The facilitator cannot be the professional in charge of monitoring one of the participants. He or she is bound by the principle of confidentiality. The training of this third party is imperative and inevitable, and “such training cannot be improvised.”⁶ It provides solid disciplinary skills specific to the implementation of the process and the facilitation of the restorative encounter. Restorative workshops⁷ must be organized systematically. During these exchanges, its role is to: “avoid any form of secondary victimization of the parties concerned, instrumentalization of restorative justice measures, or drifts in the assessment of the repercussions for the future and the possible ways of taking them into account.”⁸ Lastly, judicial control is a strict conformity control. In other words, magistrates, in the name of the principle of confidentiality of the restorative justice measure, cannot access information that explains in detail the progress and content of the restorative measure.⁹ For this reason, the facilitators (in the broadest sense of the term) are not empowered to pass on information to the judicial authorities, such as the parties’ position on the facts. Although the law guarantees the confidentiality of exchanges, there are several exceptions. The first is that the participants (the minor offender, the victim or one of the persons they have appointed) can inform the judge responsible for the minor offender of their participation in a restorative justice measure. In this way, it is possible to share with the judge the beneficial effects of the restorative process on the minor’s own family, educational, professional and criminal situation. The second exception concerns educators working for the Protection Judiciaire de la Jeunesse, who have civil servant status. Under Article 40, paragraph 2 of the Code of Criminal Procedure, they are required to notify the public prosecutor of any crime or offence brought to their attention during the course of the restorative measure. However, by virtue of article 434-1 of the French Penal Code, this obligation to denounce also applies to all non-civil servants. This rule in no way excludes the principle of confidentiality when restorative measures are implemented.

Restorative Justice for Minors in France

The new Juvenile Criminal Justice Code (Code de la Justice Pénale des Mineurs, CJPM), which came into force on September 30, 2021, establishes restorative justice as one of its main emblems through the creation of article

6 CARIO Robert, *Ibid.*

7 CHARBONNEAU Serge, ROSSI Catherine, *La médiation relationnelle*. Ed. L’Harmattan, 2020, p. 90.

8 CARIO Robert, *Ibid.*

9 The exception would be, on the one hand, in cases where the parties themselves wish to inform the magistrate, and on the other hand, in cases where “a higher interest linked to the need to prevent or repress offences that have been committed, are in the process of being committed or are about to be committed and present a danger to people,” CARIO Robert, *Restorative Justice*, 2022, pp. 93, 169.

L13-4 within the Preliminary Title. This stipulates that “restorative justice may be proposed to the victim and the perpetrator of the offence, in accordance with Article 10-1 of the Code of Criminal Procedure, on the occasion of any proceedings concerning a minor and at all stages thereof, including during the enforcement of the sentence, provided that the facts have been acknowledged.” The discernment and maturity of the minor must be established beforehand, and the parents’ agreement is in principle required.¹⁰

Following on from this article, the juvenile criminal justice code is enriched by giving a more prominent place to victims, by reinforcing their rights. For example, victims will be able to claim compensation more quickly and receive greater consideration before, during and after their criminal trial. New legislative provisions have been incorporated under the heading of “judicial educational measures”: mediation, for example, makes it possible to “establish or re-establish dialogue and calm relations. It seeks a resolution to the dispute arising from the commission of the offence but does not aim to provide financial compensation for the damage caused.”¹¹

Under no circumstances can restorative measures be ordered by a magistrate. If the victim wishes to become involved with the minor offender in a restorative justice measure, he or she must be referred to specially trained educators. It is important to carefully select the restorative justice measures best suited to the needs of minors, such as restorative conferencing and restorative mediation.¹² However, the final choice depends on the will of the participants and not on the wishes of the practitioners. It is worth defining them briefly.

Restorative mediation builds on the achievements of the first victim-offender mediation, which was tried out in the early 1970s in Kitchener, Ontario, Canada, but is not ordered by a magistrate. However, it is more structured and professionalized. It involves a voluntary meeting between the victim and the perpetrator of a serious offence, in the presence of a mediator. In this way, the parties can discuss the repercussions of the conflict and work together to find solutions that will enable them to resolve it.

Restorative conferencing is inspired by the “Whanau” practices of the Wāgā Maoris in Australia and New Zealand, and by the Polynesians of the Pacific Islands. These indigenous peoples attach great importance to the role of the family in regulating offences committed by minors. These conferences can be found in Australia, the United States, Canada, Northern Ireland, the United Kingdom, and

10 V. *Contra*, CARIO Robert, Droit pénal des mineurs et justice restaurative : des interprétations et des confusions très dommageables, *In Petites Affiches*, 2024-1, pp. 30-38.

11 Référentiel des pratiques éducatives de la Protection Judiciaire de la Jeunesse (Ministry of Justice SG/DICOM), 2022.

12 Prisoner/convict-victim meetings, extra-judicial restorative circles or restorative circles are also appropriate.

Belgium. They are aimed at both minors and adults, particularly in the context of family disputes. They involve the perpetrator, the victim and their families. But they can also bring together all those with an interest in resolving the conflict. Given the large number of participants (from ten to twenty people), they can be likened to extended restorative mediation.

Potential and Benefits of the Restorative Approach for Minors

The participation of juvenile offenders and victims (and their families and/or close relations, any trusted persons, or even community members in prisoner/offender-victim encounters) in a restorative justice measure enables them to re-establish communication that has been broken off by their problematic situation. The restorative workshops (preparation of the participants) and/or the plenary meeting are opportunities for them to exchange ideas once again, thus fostering mutual understanding in an attempt to resolve, in a differentiated way, the repercussions of the offence committed/submitted (mainly of an intimate, family, cultural and/or social nature), in order to live better in the future. They thus leave to the judicial authorities the settlement of the penal consequences of the offence (punishment and compensation), which are focused on the part of the person at fault. In restorative conferencing, for example, participants can be supported throughout the process by trusted persons of their choice. When they reach an agreement, they feel a strong sense of satisfaction, having co-constructed and found the practical means of regulating their conflict themselves. They feel they have been treated fairly, which increases their sense that justice has been done fairly. These measures can help to re-establish a peaceful relationship. More generally, this relational reparation helps to rebuild the social fabric, restoring the victim's confidence in the future, while the perpetrator, empowered, (re)finds his or her place in society.

Reflections and New Proposals for an Ideal Juvenile Justice System

This new legal framework is the cornerstone and compass for those involved in juvenile justice, as it enables them to better appropriate and dissociate the principles, objectives and aims of each of these measures. Nevertheless, there is still a need for further reflection and debate, both legally and institutionally, on the place of restorative justice within the juvenile justice system, and on the reference framework governing these educational practices. At present, an *imbroglio* persists, linked to the fact that restorative justice is only defined within the reparation module of the judicial educational measure, despite the very relevant presence of the comparative table between the reparation, mediation and restorative justice measures. Moreover, the mediation measure is characterized as “*an educational and restorative approach*.”¹³ As a result, it is essential that it be given

13 *Référentiel des pratiques éducatives de la Protection Judiciaire de la Jeunesse* (Ministry of Justice

its rightful place in article L13-4 of the CJPM. Restorative justice measures are autonomous from mediation and reparation under article L112-8, and do not constitute a procedural act. In the same vein, it would be necessary to clearly specify the protocol to be followed by restorative justice facilitators within establishments and services wishing to implement such measures. Such an initiative could avoid confusion for all those involved in juvenile justice.

The work of restorative justice can only continue to flourish and become sustainable through an ongoing process of training, experimentation, communication¹⁴ and evaluation. This far-reaching transformation of practices cannot succeed without considerable support from all those involved in the Ministry of Justice, and without eminent institutional support at all levels. The Protection Judiciaire de la Jeunesse guidance note dated September 30, 2014, stresses the interest for interregional and territorial Directorates to create and drive new modalities by involving the minor (and his or her family) more in the decision-making process in order to make him or her a player in his or her care. To achieve this, they must help to diversify the innovative educational responses available to minors as they progress through the system, in particular through the individualization and adaptability of their care, an essential guarantee of its quality. They also play a key role in public policies for minors in the fields of health, delinquency prevention and child protection. Restorative justice is fully in line with the guiding principles so dear to the Direction de la Protection Judiciaire de la Jeunesse. What's more, the experiments that have been carried out and those still to come should enable us to go even further in the light of the latest evaluation report drawn up by the Department of Evaluation, Research and Control in February 2022.

For all these reasons, the allocation of financial, human and material resources dedicated to the deployment of restorative justice to each PJJ establishment and service should be urgently enacted. Without these ambitious transposition and awareness procedures for all the key players in the beating heart of the Ministry of Justice (who define the doctrine and the allocated budgets), the implementation and acculturation of this new restorative paradigm will unfortunately be very long and slow.

These new restorative projects will not be possible without the pursuit of collective reflection and solid multi-partner, transdisciplinary and inter-institutional coordination and collaboration with, in particular, the courts, bar associations, restorative justice associations, victim support associations, the authorized associative sector, the national education system, the police, the gendarmerie, and

SG/DICOM), 2022, pp. 93, 169.

14 It includes the right to information for victims and perpetrators, such as the creation of information leaflets on RJ and its inclusion in the welcome booklet for users, RJ awareness days created each year by the DIR, DT, PJJ services and establishments, film-debates, a time for talking scheduled within the civic training course, essentially.

members of the community. This wonderful synergy should enable the creation of new inter-regional and/or territorial steering committees and project groups within the establishments and services that are committed on a daily basis to highlighting and developing new practices and innovative resources within their territory. In the long term, this collective effort could lead to the creation of autonomous services dedicated to restorative justice, with educators becoming RJ mediators-facilitators for better care of victims and perpetrators.