

## THE MODERN PARADIGM OF CRIMINAL JUSTICE: RESTORATIVE JUSTICE

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**ABSTRACT:** *Restorative justice represents a new paradigm against the criminality, born and developed in the ground of the failure of punitive justice. As such, it brings a new ideology in the fight against crime, revealing a new perception for the offense, upon which takes life the restorative philosophy. The latter brings a very complex mechanism of action, whose ideals are manifested in the restorative programmes. Thus, the restorative justice satisfies its framework, in the theoretical viewpoint, as well as in the practical one, prompting its way to success. However, it remains a new ideology, still not affirmed and therefore it needs more promotion. In this regard, this paper aims to realize a framework of restorative justice, in the theoretical point of view, as well as in the practical one, to further highlight its problems and needs in the future.*

**KEYWORDS:** Justice, Restorative, Philosophy, Programmes, Problems

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### INTRODUCTION

During the last decades, the criminal justice has become subject of great debates and critics because of the crisis in which is involved the actual criminal justice system, crisis which is attributed to the inability of the system to respond effectively to the criminality. The essential conclusion of all the discussions coincides with the necessity of the evolution and adaptation of the criminal justice system, in order to guarantee an effective justice, in accordance with the standards of the rule of law and so, to protect human society.

In this ground, it emerged and developed a new ideology to fight and prevent crime, which reveals a philosophy of action completely different, theoretically able to cope with the current crisis and even to develop a new successful model for the criminal justice. This ideology is represented through the restorative justice<sup>1</sup>.

Restorative justice distances almost entirely from the existing criminal justice. It brings a new perception for the offense, which is based on the social perspective, detaching this way from the rigid view of law. Under this perception, the offense is no longer considered as an action directed against the state, but as an act of an individual (the author) against another (injured), resulting in individual and social relation harm. Consequently, the restorative ideology under the influence of its objectives, moves from the need of legal punishment to the need of social "restore", showing special care, especially for the victim of the criminal conflict<sup>2</sup>.

The above-mentioned ideals, as well as the effective results of its practical implementation, made restorative justice a very important concept for the justice system, ensuring a wide application in a global level. Never the less, it should be noted that still it can not be talked

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<sup>1</sup>Also community justice, positive justice, reparative justice etc.

<sup>2</sup> Restorative justice generally uses the term criminal "conflict" or "dispute" instead of "offense", to demonstrate more clearly its social nature and to avoid prejudice.

about a comprehensive affirmation of it. There is still much need to promote the necessity of its implementation.

In this context, this paper aims to provide an overview of restorative justice, explaining its meaning and philosophy, its mode of action and the programmes through which is reflected the practical implementation, and its tendencies in the future.

### **The origin of the idea and the theoretical framework of restorative justice**

Restorative justice represents a new concept as much as an old one.<sup>3</sup> Thus, its ideals are manifested thousands of years before<sup>4</sup>, although not using the current term. However, the real development of restorative justice comes alive during the 1970s, in Canada, as an idea to facilitate reconciliation between the offender and his victim, to become later one of the most important justice challenges.<sup>5</sup>

It is difficult to identify all the factors that have contributed to a rapid development of restorative justice. Anyway, it can be noted that the crucial factor which determined its development, is undoubtedly the crisis of the criminal justice system and the lack of its effectiveness. Also, a special role is attributed to the shifting of attention to the victim of the offense and his needs, elements which although important in a theoretical point of view, in the current justice system are completely marginalized in the practical one. Likewise, other factors which are attributed the origin of the idea of restorative justice are also necessity for restoring social relations, compensation for damage caused by the crime, evasion of the solid legal structure and sense of prejudice.

But what is restorative justice? There is no formal and exact answer for this question, as no definition has been formalized yet. There is still much debate and discussion about its concept. Above all, the lack of a legal framework hinders more the identification of its meaning. Despite this, the image of restorative justice can be found in the views of its scholars.

So, the advocates of restorative justice conceptualize and define restorative justice in two different ways:

- a) as a process-focused justice;
- b) as an outcome-focused justice.<sup>6</sup>

The *process focused* model relies on the concept elaborated by Tony Marshall, according to which “*Restorative justice is a process whereby parties with a stake in a specific offence*

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<sup>3</sup> “*Restorative justice is a new term for an old concept*”. See the website: [http://www.restorativejustice.org.uk/resource/united\\_nations\\_basic\\_principles\\_on\\_the\\_use\\_of\\_restorative\\_justice\\_in\\_penal\\_matters/](http://www.restorativejustice.org.uk/resource/united_nations_basic_principles_on_the_use_of_restorative_justice_in_penal_matters/) last accessed on 20.11.2015, pg. 4.

<sup>4</sup> For further information, see the website: [http://en.wikipedia.org/wiki/Restorative\\_justice](http://en.wikipedia.org/wiki/Restorative_justice), last accessed on 22.11.2015.

<sup>5</sup> For further information, see the website: [legal-dictionary.thefreedictionary.com/Restorative+Justice](http://legal-dictionary.thefreedictionary.com/Restorative+Justice), last accessed on 22.11.2015.

<sup>6</sup> Dignan, J., “Restorative Justice and the Law: the case for an integrated, systemic approach” pg. 6, article published on the website: [http://www.restorativejustice.org/10fulltext/dignan-james.-restorative-justice-and-the-law-the-case-for-an-integrated-systemic-approach/at\\_download/file](http://www.restorativejustice.org/10fulltext/dignan-james.-restorative-justice-and-the-law-the-case-for-an-integrated-systemic-approach/at_download/file), last accessed on 20.11.2015. See also Braithwaite, J., Strang, H., “Restorative justice and civil society”, Cambridge, UK: Cambridge University Press, 2001, pg. 1.

*collectively resolve how to deal with the aftermath of the offence and its implications for the future*”<sup>7</sup>. This model stresses the need of introducing a process of cooperation and interaction between the actors of criminal conflict, in a voluntary manner, in order to resolve the consequences resulted from the offense, consensually. It also demonstrates two limitations of implementing restorative justice: first, it can act only on appropriate issues for its application, and secondly, it can act only on the basis of the will of the parties.<sup>8</sup>

On the other side, the *outcome focused model* identifies the restorative justice with the restorative outcome, opposing in this way the *process focused model*. In its view, restorative justice should be directed towards restorative results while restorative process should represent only a tool on achieving it.

The controversy between the above models creates one of the most intense debate in view of the meaning of restorative justice<sup>9</sup>, which seems to have roots in another debate, the one about the superiority between two important values of restorative justice, restorative process and restorative outcome<sup>10</sup>. In reality, these two values should not be considered as competing but as complementary to each other, because in order to achieve the successful realization of restorative justice objectives, they must act in chronological succession. So, there can be no restorative outcome without a restorative process and vice versa, simply the realization of the restorative process, without achieving a restorative outcome, entails the failure of restorative justice. In this sense, the restorative justice operates and develops through the implementation of both of its values, the process, as well as the restorative outcome.

Another debate that is worth mentioning to clarify the concept of restorative justice, is attributed to the “stakeholders” that should be involved in, to achieve their needs and interests. In this context, there are identified two possible tendencies:

1. Civilian model;
2. Communitarian model.

According to the civilian model, restorative justice stakeholders should be only the parties directly related to the offense, for only they are directly affected by it, and therefore only they need restoration of the damage suffered. This way, the civilian model favors the application of the method of mediation face-to-face between the parties of the criminal conflict, highlighting the risk of not differentiating the cases in which the damage caused can exceed the individual one (thereby confusing offenses to civil damages).

Meanwhile, the communitarian model emphasizes that personal damages of the people injured directly by the criminal acts are not the only interests to be included in restorative

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<sup>7</sup>See the website:

[http://www.restorativejustice.org.uk/resource/united\\_nations\\_basic\\_principles\\_on\\_the\\_use\\_of\\_restorative\\_justice\\_in\\_penal\\_matters/](http://www.restorativejustice.org.uk/resource/united_nations_basic_principles_on_the_use_of_restorative_justice_in_penal_matters/) last accessed on 20.11.2015, pg 5. See also Marshall, T. “Restorative Justice: An overview”, pg. 5, article published on the website: <http://fbga.redguitars.co.uk/restorativeJusticeAnOverview.pdf>, last accessed on 25.11.2015.

<sup>8</sup> Dignan, J., pg. 7.

<sup>9</sup> However, despite this debate, it should be noted that in each of the two models, the final goals converge on the same point: the creation of a new alternative for the resolution of the criminal conflicts. See Wright, M., Zernova, M., “Alternative visions of restorative justice” in Johnstone, G., Van Ness, D. W.. “Handbook of Restorative Justice”, Cullompton, Devon: Willan Publishing, 2007, pg. 96.

<sup>10</sup>*Ibid*, pg. 99.

justice, integrating in its frame also the interests of the affected community. In this regard, there are different views about the subjects whose interests should be included in the community. According to one of the views, it must include the interests of all parties that are in some way affected by the offense: the injured party and the offender, those related to the offense or its consequences, as well as those who can contribute in any way in the criminal conflict resolution. Meanwhile, according to other views, the content of the community interests, is even broader than that. Anyway, they unite in the fact that they consider the restorative conferences as the appropriate method for the conflict resolution.<sup>11</sup>

Currently, it can not be assessed if one model predominates over the other, because as we shall see below, the restorative justice operates through both of them, adapting to the needs and conditions of the concrete situation. Moreover, mediation, as well as restorative conference, represents the most successful method of restorative justice action.

Finally, an important discussion developed between the supporters of restorative justice, refers to the manner of its application, creating again two tendencies:

1. The separatist model;
2. The integrationist model.

Based on the separatist model, restorative justice programmes should operate entirely outside the current criminal justice system, in a supplementary manner rather than in an alternative one. Analyzing this model, the researchers concluded that despite the advantages that can be derived from such an application, there are enough risks about the success of restorative justice such as: inability to ensure the cases in which it will be applied, as its operation will be limited to the cases referred to; the possibility of "double" punishment or marginalization of its existence in the suburb of the current system of criminal justice.

On the other hand, according to the integrationist model, the restorative justice should act as an integrated part of the criminal justice system, rather than reorganize separately using its principles.<sup>12</sup> However, the application in this way, would violate its independence, opposing the causes that resulted in its birth.

Even about this last debate, there is still no definitive answer, so far as restorative justice results to be applied by both models. Further more, the basic principles or manuals designed for the application of restorative justice do not necessarily require its action in one direction. Instead, they stimulate the implementation of restorative justice, despite its way.<sup>13</sup>

As it can be seen, the discussions presented above bring distinctive perspectives on the concept of restorative justice. In anyway, they reflect how it might be perceived: *as a response to criminal conduct, which operates by balancing the needs of the community, the*

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<sup>11</sup> Dignan, J., pg. 12-16.

<sup>12</sup> Dignan, J., pg 16-23.

<sup>13</sup> See Ecosoc Resolution 2002/12 "Basic principles on the use of restorative justice programmes in criminal matters", point 22. See also United Nations, Office on Drug and Crime, "Handbook on Restorative Justice programmes, New York 2006, pg. 13, 51 published on the website: [http://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf), last accessed on 22.11.2015.

*victim and the offender.*<sup>14</sup> But to better understand restorative justice, should be primarily understood the philosophy on which it operates, which is subject of the following issue.

### **Restorative philosophy and its objectives**

As analyzed before, the crisis of the criminal justice system and its inability to effectively fight crime identified the need for a new philosophy, suitable to the specific conditions and needs of justice. This new philosophy was represented by restorative justice.

The restorative justice philosophy seems to operate on completely opposite principles in respect to retributive justice. This is evident since the definition it brings about the offense, considering it as the action of one individual against another<sup>15</sup>, which consequences should be realized exactly between these individuals (subject of the offense). This way, restorative justice highlights the social nature of the offense, abandoning the rigid interpretation of the law and therefore advocating a social solution.

So, it results that this new strategy for fighting the crime is based on the fact that as the offense occurs in a social environment, it is exactly there that we need to find its solution. In this view, restorative justice seeks to emphasize that the commission of an offense “breaks” the social environment, damaging primarily the social relationship between its subjects, without neglecting the community itself. Consequently, it comes the need of a social interaction, in order to recompose the fractures caused as a result of the criminal action. In this regard, the restorative justice chose to use the mechanism of communication, which represents the basic element of a restorative process. The reason for this choice lies in the fact that the development of communication, helps the parties to clarify the causes and consequences of the offense, serving as the starting point for the regeneration of the damaged connections. Thus, giving the parties the opportunity to present the reality of the conflict not structured in the abstract, but according to their perception, makes possible a kind of reconfiguration of social relations, creating a new form of regulation of the social order, through the use of communication techniques.<sup>16</sup>

In other words, restorative justice seeks to transform the conflict into a source of dialogue and discussion, with the ultimate aim, its resolution. This approach ensures the reconciliation of opposing interests through the compromise of the parties towards the implementation of a consensual final agreement, promoting this way mutual respect and understanding.<sup>17</sup>

To summarize, restorative justice is based on a process of communication, which aims to reach a compromise to resolve the criminal conflict. This is translated as awareness and acceptance of responsibility by the offender for the derived consequences, enabling him to restore the damage caused, and therefore the recomposition of the social fractured relationships. Therefore, the restorative justice philosophy shifts from the dualism of the

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<sup>14</sup> See United Nations, Office on Drug and Crime, “Handbook on Restorative Justice programmes, New York 2006, pg. 6.

<sup>15</sup> While according to the retributive justice, the offense is regarded as an act against the state, which undermines the public interest in general, even though it is committed against an individual. For this reason, the personal interests of the individual directly affected by the offense, will be protected by the “state” (thus, not paying them the due importance).

<sup>16</sup> For further information see: L’Altro Diritto “Capitolo 3. Giustizia Riparativa: Tra l’essere e il dover di essere” published on the website: <http://www.altrodiritto.unifi.it/ricerche/mediaz/maglione/cap3.htm>, last accessed on 25.11.2015.

<sup>17</sup> *Ibid.*

offense with punishment towards the dualism of communication with the restoration, orienting this way toward the social conflict management and settlement<sup>18</sup>, avoiding the legal ones.<sup>1920</sup>

### **Restorative justice objectives**

The reflection of the ideals and innovations presented by restorative philosophy, except of explaining the nature of restorative justice, at the same time identifies also the basic objectives aimed to be fulfilled. Thus, as the term itself derives from restorative justice, its main objective is the restoration of the damage, which is oriented in two levels, individual and social one.

At the individual level, the dimension of the damage consists cumulatively of moral and economic damage. But while the economic damage is measurable, and its restoration does not entail difficulties, the moral damage<sup>21</sup> can not be calculated materially because of its nature, and therefore its restoration is somewhat problematic. In this respect, it is helpful the social nature that restorative justice attributes to a criminal conflict, for only the recomposition of fractured relationships can enable restoration of moral damage.

Meanwhile, in respect of the restoration of damage at the social level, it should be noted that the offense indirectly affects the community and the social environment in which it is incurred. Therefore, as mentioned before, it arises the necessity of restoration of previous relationships in the community, which is implemented in parallel with the restoration of individual relations between the subjects of the offense.

Restoration, as can be easily understood, represents a very complex process, which is made possible due to the interaction of the will of the injured with the awareness and acceptance of responsibility by the offender. The latter constitutes another restorative justice target, which is realized through the mechanism of communication and interaction, that takes place in a restorative process. In other words, while hearing about the damage caused by the offense committed, its author becomes aware of the consequences of the outcome and motivated to accept his responsibilities by taking concrete actions to repair them. In this way, it is silently

<sup>18</sup> It is understandable that this social solution should not come into conflict with the law.

<sup>19</sup> While the law makes absolute the necessity of its application in solving the conflict, the philosophy of restoration goes in another direction, a social one, demanding the reinstatement of the previous situation of society. Consequently, the conflict is positioned in such a context that does not suffer violent law abstraction.

<sup>20</sup> The above analysis justifies why restorative justice is considered a justice that "cures" rather than justice to "punish", and therefore its orientation towards the needs of the victim and the community in which it is experienced the victimization. In this regard, besides the revaluation of the victim's position, the restorative philosophy highlights another innovation, the community involvement, as an essential component of its action. The logic of this innovation relies on a strong arguments bases, as below:

1. The offense is performed in a social environment and as such, the community involvement serves to identify its causes and to prevent it in the future.
2. The Community monitors the realization of the restorative agreement and the integration of the two parties of the offense in it.
3. The Community, as a subject harmed by the offense, represents one of the beneficiaries of the policies of repair.

So, as it can be seen, the community plays a double role. On one hand, it serves as supervisor and regulator, and on the other, it represents one of the beneficiaries of the repair policies, motivating in this way, the need of his involvement in restorative programmes.

<sup>21</sup> Which can be for example fear, lack of confidence, inability of social reintegration etc., who are the main derivatives of the offense suffered.

realized another goal of restorative justice, the elimination of recidivism, as the awareness of the offender, encourages his reflection, avoiding the tendency of his orientation towards crime in the future.

Last but not least, the process of restoration and its outcome, enables the fulfillment of the victim's interests. This conclusion is justified by the fact that on one hand he gets recompense of the suffered damages, and on the other, the offender is held liable for the damage caused, showing that justice is done.

The successful realization of the above objectives helps in the rehabilitation and social reintegration of the two subjects of the crime, as it avoids prejudice of the offender and also makes overcome the fear and uncertainty of the injured party. This would be the final result of the restoration philosophy, "bringing back everything to normality" by shifting the "evil" and replacing the "good".<sup>22</sup>

To conclude, the restorative justice philosophy and targets manifest the effort to overcome the logic of the sentence moving from a logical reading of the criminal phenomenon to a social reading of it. The latter implies a conflict, a special kind of social interaction in which one or more subjects included, are facing a situation incompatible with their intentions or behavior, but that damages the social expectations. Consequently, the criminal conflict is not seen any more in a prejudicial way through the necessity of punishment, but is regarded as a natural harmful or offensive reaction, which requires the activation of methods to repair the damages and restore the relationship, in the same state that they were before the conflict situation.<sup>23</sup>

### **The restorative justice programmes**

All the above said unfolded the ideology of restorative justice, indicating the principles on which it is established, in order to achieve its objectives and to successfully fight criminality. This theoretical framework is manifested in practice through the restorative justice programs (or methods/techniques)<sup>24</sup>.

Restorative justice is not a single method, because as it represents a set of values of the concept of justice, it is translated into a variety of possible methods<sup>25</sup>, designed in view of the suitability with the specific conditions and needs, in order to avoid arbitrariness. To introduce a list of these methods, the following will address to a source with "official" character, such as the preparatory documents of the Tenth Congress of the United Nations.<sup>26</sup> Let's describe the current methods of restorative justice below.<sup>27</sup>

<sup>22</sup> Zehr, H., Gohar, A. "The little book of restorative justice", pg. 33, published on the website: <http://www.unicef.org/tdad/littlebookrjpakaf.pdf>, last accessed on 25.10.2015.

<sup>23</sup> For further information see: L'Altro Diritto: "Capitolo 3. Giustizia Riparativa: Tra l'essere e il dover di essere", published on the website: <http://www.altrodiritto.unifi.it/ricerche/mediaz/maglione/cap3.htm>, last accessed on 25.11.2015.

<sup>24</sup> See Ecosoc Resolution 2002/12 "Basic principles on the use of restorative justice programmes in criminal matters", point 1, according to which: "Restorative justice programme means any programme that uses restorative processes and seeks to achieve restorative outcomes".

<sup>25</sup> See United Nations, Office on Drug and Crime, "Handbook on Restorative Justice programmes, New York 2006, pg. 14.

<sup>26</sup> Mannozi, G. "Problemi e prospettive della giustizia riparativa", pg. 6, published on the website: <http://www.sestaopera.it/DOCUMENTI/ARTICOLI/Mannozi.pdf>, last accessed on 25.11.2015.

<sup>27</sup> See the website:

- 1) Apology (request for pardon). It represents a verbal or written communication to the victim and the community, in which the offender describes his behavior and accepts his responsibility about it.
- 2) Community/Family or Group Conferencing. It consists in developing a meeting in the community of the individuals most affected by the offense, the victim and the author<sup>28</sup>, their families, friends and supporters, in the presence of a trained facilitator, to determine the resolution of the criminal event. This meeting aims to develop discussions on the damages caused by the offense and also on the way to repair them.
- 3) Community/Neighborhood/Victim Impact Statements. The victim impact statement (VIS) represents a description of how the offense has affected his life and his loved ones. It is usually carried out if there is a directly damaged person by the offense, and if not, there are applied the community statements. Its importance lies in the fact that it provides the justice structures the necessary information about the psychological, physical and economic effects of the crime. In the practical point of view, it can be done orally, in a written form, in audiotape or videotape formats, in order to be used by courts as part of pre-sentence investigations and at sentencing, and by paroling authorities as part of pre-parole investigations, parole release, and revocations.
- 4) Community Restorative Board. It represents a small group of citizens, prepared through training, to conduct meetings face-to-face between offenders, sentenced by the court to participate in these meetings. During a meeting, board members discuss with the offender the nature of the offense and its negative consequences. Then board members develop a set of proposed sanctions which they discuss with the offender, until they reach agreement on the specific actions the offender will take within a given time period to make reparation for the crime. Subsequently, the offender must document his or her progress in fulfilling the terms of the agreement. After the stipulated period of time has passed, the board submits a report to the court on the offender's compliance with the agreed upon sanctions.
- 5) Community Sentencing/Peacemaking Circles. They represent a process run by the community, in cooperation with the criminal justice system, to develop consensus on a suitable plan that reconciles the interests of all stakeholders. They are opened-public processes, that deal primarily with serious cases and use traditional circle ritual and structure to involve the victim, the offender, families, judge and court personnel, prosecutor, defense counsel, police and all interested community members. Within the circle, people can speak from the heart in a shared search for understanding of the event, and together identify the steps necessary to assist in healing all affected parties and prevent future crimes.
- 6) Community Service. It represents the work carried out by the offender in the benefit of the community as a formal or informal sanction. So, community service provides a way how the offender can be held responsible to repair the damage caused by his behavior.

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[http://www.restorativejustice.org.uk/resource/united\\_nations\\_basic\\_principles\\_on\\_the\\_use\\_of\\_restorative\\_justice\\_in\\_penal\\_matters/](http://www.restorativejustice.org.uk/resource/united_nations_basic_principles_on_the_use_of_restorative_justice_in_penal_matters/) last accessed on 20.11.2015, pg 14-17.

<sup>28</sup>The participation of the offender is conditioned by his acceptance of responsibility.

- 7) Compensation Programs. They represent programs, which determine the state's obligation to compensate the damage caused to the injured party. They usually reimburse costs for medical and psychological treatment or provide monthly payments to the disabled victims.
- 8) Diversion. It represents a process which empowers authorities to exercise discretion in removing offenders from the formal criminal justice process and is commonly used in conjunction with youth crime. The advantages to this approach are considerable as the early intervention diverts offenders before a criminal pattern has been established.
- 9) Financial Restitution to Victims. It consists in a process in which offenders are responsible for financial losses caused to the injured parties. It represents a sum of money, paid by the offender to his victim, in order to balance the monetary damage. Usually it is determined by the court, taking into account the victim impact statement.
- 10) Personal Services to Victims. They represent services provided directly to the injured parties such as home repair, seasonal jobs etc. They can strengthen personal accountability of offenders, making them directly responsible to the victims.
- 11) Victim/Community Impact Panel. Victim impact panels provide a forum for crime victims to tell a group of offenders about the impact of the crime on their lives and on the lives of their families, friends, and neighbors. Panels typically involve three or four victim speakers, each of whom spends about 15 minutes telling their story in a non-judgmental, non-blaming manner. The victims are not telling their stories directly to those who victimized them, they are addressing other offenders how they were impacted by having been victimized in order to impress upon the offenders present how their behaviors harm people. While some time is usually dedicated to questions and answers, the purpose of the panel is for the victims to speak, rather than for the victims and offenders to engage in a dialogue.
- 12) Victim empathy groups or classes. They represent educational programs designed to explain the offenders the human consequences of an offense. The program is implemented by demonstrating how the offense affects the victims, their families and also the community.
- 13) Victim-Offender Mediation. It represents a process that ensures the interested victim the opportunity to meet the offender, in a safe and structured setting, in order to engage in a mediated discussion between them. So, the victim has the opportunity to demonstrate to the offender the physical, emotional and financial offense impact in his life, to get answers about the causes of criminal reaction and to be directly involved in developing a plan for indemnification of damage. The process is realized through the assistance of a trained mediator, who facilitates the communication between the participating parties.

As it can easily be ascertained, the above methods demonstrate different ways of applying restorative justice, as they differ in the specific characteristics of their performance. So, based on the restorative level of each method, they can be grouped as below:<sup>29</sup>

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<sup>29</sup> McCold, P. "Types and Degrees of Restorative Practice" in L'Altro Diritto: "Capitolo 3. Giustizia Riparativa: Tra l'essere e il dover di essere", published on the website:

- Fully restorative method: restoration includes all those who have been involved in the criminal conflict such as Peacemaking Circles, Family/Community Conferences.
- Mainly restorative method: restoration is realized for most of the subjects involved in the criminal conflict, such as in the case of Mediation, in which are "restored" the offenders and the victims, but is left out the community.
- Partially restorative method: restoration include only one of the parties involved in the criminal conflict, e.g. in the case of compensation schemes.

Also, based on the time of the application, the restorative methods can be grouped as below:  
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- Methods which are applied before the process stage such as Family Conferences;
- Methods which necessarily interfere in the procedural stage, such as Compensation Program or Victim Impact Statements;
- Methods which pertain to the phase after the process or after release.

The categorization could continue upon other different specific features that brings each of the methods individually. However, it should be noted that, despite this, all restorative methods should be subject to the same enforcement principles such as the principle of free will, equality, non-discrimination, security, confidentiality, etc.<sup>31</sup> Further more, the application of each of them should support two basic concepts: the restorative process and the restorative outcome<sup>32</sup>. Both these concepts are so fundamental to the success of each restorative method, that the lack of one of them would bring about its own fail.

### Potential problems of restorative justice

The analyze realized throughout this paper shows that restorative justice promotes a new vision about the criminal conflict resolution, which looks back to the necessity of restoring the damaged relations, focusing primarily on the needs and interests of the victims and the community, rather than on the punishment of the offender. This progressive vision of law, precisely because of these "liberal" ideas to combat crime, faces enough potential problems, which can be detrimental to its success in the future. Let's see the main of them in the following.

First, the most worrying and notable restorative justice problem is the lack of a legal and institutional framework for its regulation. In fact, due to its own nature, which is dominated by the inclusion of social elements, the restoration ideology is characterized by informality,

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<http://www.altrodiritto.unifi.it/ricerche/mediaz/maglione/cap3.htm>, last accessed on 25.11.2015.

<sup>30</sup> L'Altro Diritto: "Capitolo 3. Giustizia Riparativa: Tra l'essere e il dover di essere", published on the website: <http://www.altrodiritto.unifi.it/ricerche/mediaz/maglione/cap3.htm>, last accessed on 25.11.2015.

<sup>31</sup> See Ecosoc Resolution 2002/12 "Basic principles on the use of restorative justice programmes in criminal matters".

<sup>32</sup> According to Ecosoc Resolution 2002/12 "Basic principles on the use of restorative justice programmes in criminal matters", point 2 and 3: "Restorative process" means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. "Restorative outcome" means an agreement reached as a result of a restorative process.

which is regarded as advantage in relation to punitive justice model. But this does not mean that restorative justice does not need a legal and institutional framework for its regulation. On the contrary, in order to make it function efficiently and to achieve effective results, it is necessary to rely on a legal framework, to define the scope, the principles and the general rules of its action, as well as the responsible structures for the implementation and supervision. Therefore, it is a future necessity, to make restorative justice a legal theory, more than just a social one.

Secondly, restorative justice is currently characterized by a limited application, which represents another concern for its affirmation. The restrictive barriers of restorative justice appear primarily in regard of the category of offenses to which it can be applied, including here the offenses of a generally low social danger, but avoiding its application for serious offenses. This limitation is attached to the necessity of mutual will of the parties to apply a restorative process. In this way, the restorative justice risks to turn into an ideology simply existent and possible, but impractical.

Thirdly, another restorative justice problem stems from its "humanitarian" nature. As noted before, restorative justice considers as primar the stabilization of social relations between the subjects of crime and their social reintegration, leaving apart the importance of punishment. This feature often results in an incorrect interpretation, that it reduces the risk of crime. But the reality is not so. Restorative philosophy, through its notable objectives, transmits the need to fight crime, precisely because of its riskiness. So, although it does not focus on a solid legal framework for the offense, it does not diminish the social danger, which is considered in a social framework.

Fourthly, a serious problem, which is evidenced in the practical application of restorative justice, relates to the need for equal and proportional treatment. In fact, because of the restrictions of restorative justice application, it is possible that for the same offense, the same social dangerousness, two different authors may be subject to unequal treatment, if one of them is subject of restorative justice, while to the other is denied this opportunity<sup>33</sup>. In this way, while one of them will be subject of social mechanisms, the other will be subject of legal mechanisms and the respective punishment, highlighting the unequal and disproportionate treatment.<sup>34</sup>

The problems discussed above, represent the main potential concerns of restorative justice and as such, they must be subject to appropriate solutions within a period as short as possible. Otherwise, they can inhibit the effective application and the further development of restorative ideology. However, they are not the only ones. Other problems of restorative justice can be considered also: the possibility of re-victimization, the lack of coordination between the theoretical and practical aspects, the lack of security, etc.<sup>35</sup>

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<sup>33</sup> Due to the unwillingness of the victim for the application of restorative justice.

<sup>34</sup> For further information, see "Potential Benefits and Disadvantages of a Restorative Justice Approach", pg. 422, published on the website: [http://www.lawcom.govt.nz/sites/default/files/restorative\\_justice\\_frtrj\\_pp\\_414-423.pdf](http://www.lawcom.govt.nz/sites/default/files/restorative_justice_frtrj_pp_414-423.pdf), last accessed on 25.11.2015.

<sup>35</sup> *Ibid*, pg. 423. See also the website: [http://en.wikipedia.org/wiki/Restorative\\_justice](http://en.wikipedia.org/wiki/Restorative_justice), last accessed on 25.11.2015.

### **Concluding Remark**

- Restorative justice represents a new approach in the fight against criminality, which shifts from the need to punish the author of the offense toward the need to recompense the damage caused by it and to restore the social relations.
- It brings a new image for the offense, which considers it as an act of one individual against another, not as an action directed against the state. This way, the interpretation of the offense is now placed on a social framework.
- Under this “liberal” interpretation of the offense, it is also developed the philosophy of restorative justice, arguing that as an offense is subject to a social interpretation, even its consequences solution must be searched precisely in this dimension.
- The restorative philosophy seeks to show that first of all, justice should be ensured through communication, change and restoration, and not through punishment, which should be used only as a last resort of criminal justice.
- Justice must provide the necessary support for the subjects of a criminal conflict, promoting a sense of mutual responsibility and helping to reintegrate them into the society, away from the prejudicial and discriminating view.
- The main issue of restorative justice seems to be "What can be done to repair the damage caused by the offense?" Moreover, the context of the term “repair” here does not simply refer to the reducing and balancing the damage in economic terms, but it appears with a valence much deeper and complex than just monetary compensation.
- Despite the innovations, restorative justice is accompanied by many problems which are hampering its final affirmation. Thus, there is still no formal definition for it. There is still no legal framework to define the scope and the manner of its operation, etc. In the current conditions, it appears more like a social theory, which lacks the legitimacy to fight crime.
- It should be noted that currently there are developed many trainings to aware and sensitize about the restorative justice. International organizations are taking care of the globalization of its ideology. In this context, there have been drafted several resolutions and manuals about the principles and the use of its programs.<sup>36</sup> However, it is not enough. It is important to make efforts towards the formalization of this ideology, its principles and its mode of operation, so that the success it guarantees in the theoretical point of view, becomes likewise in the practical view. Only in this way, it will be possible for restorative justice to overcome its problems, and thus to continue the path of success in the future.

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<sup>36</sup> Ecosoc Resolution 2002/12 “Basic principles on the use of restorative justice programmes in criminal matters”; United Nations, Office on Drug and Crime, “Handbook on Restorative Justice programmes, New York 2006, Alliance of NGOs on Crime Prevention and Criminal Justice (New York): Restorative Justice Handbook (1998) etc.

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