

NOTES FROM THE FIELD

Restorative justice in France: some reflections on its current development by the French Institute for Restorative Justice

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Introduction

For many centuries, alternative ideas about justice have been hijacked by a state justice more concerned with sanctioning crimes *in abstracto* than with reintegrating the persons directly involved into their communities. At last, France has joined the wide movement rediscovering universal practices of humanistic conflict resolution and is seeking to align them with the fundamental principles of human rights and the basic rules of contemporary criminal procedure. Restorative justice and the measures it promotes have been integrated into the French penal law reform of 2014, supported by the then Minister of Justice, Ms. Christiane Taubira. The enthusiasm for this new criminal law philosophy continues to increase both with professionals in the criminal justice system and with the direct stakeholders who have suffered or are still suffering from the consequences and repercussions of an offence.

1. The origins of restorative justice

For many centuries, all civilisations have developed practices aimed at regulating criminal conflicts by directly involving the stakeholders: the offenders, the victims and/or their next of kin, or even community members. The takeover by central authorities occurred at the turn of the first millennium, for political reasons of domination rather than to harmonise criminal law practices. This also happened during the colonisation of numerous territories and countries where, under the plea of modernity, continental law (common law or Roman law) was imposed on indigenous populations. The fact remains that in spite of these attempts at domination, ancestral modes of conflict regulation have endured what historians have called 'infra-justice' (as an informal justice phenomenon). Indeed, both the history and anthropology of criminal law have increasingly shown that the use of official institutions occurred only when the crime involved

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a dominant player or when the community regulation could not reach any kind of consensus. Original approaches essentially encompassed different types of 'victim-offender mediations' almost everywhere in the world; Oceania had its 'family group conferences' from the Maori and others; American First Nations had 'sentencing circles'; and France had its 'voluntary settlement' or practices established by 'social peacekeepers'.

2. The reinvention of restorative justice in France

Since the 1970s, the contemporary crisis of our criminal justice systems and the rediscovery of the victim as an inevitable actor of a fair trial prompted the (re)consideration of traditional ways of understanding criminal phenomena in terms of prevention, repression or treatment of people responsible for or affected by crime. In the wake of restorative programmes essentially reintroduced in Anglophone countries, France has seen a similar, though more fragmented, development that continued until recently. To that effect, the exemption of a sentence (Art. 132-58 et seq. of the Penal Code) or a penal measure (specifically for juveniles, Art. 8 Order of 2 February 1945) and the deferral of sentencing (Art. 132 et seq. of the Penal Code) were included in the Code of Criminal Procedure in 1975 under three conditions: the social rehabilitation of the offender, the compensatory damages to the victim and the restoration of social peace. Similarly, a model of 'penal mediation' was adopted in 1993 as an alternative to the prosecution of adult offenders (Art. 41-1,5° Code of Criminal Procedure). The same legislation enshrines 'penal reparation' for the sake of juveniles, which is much more likely to be applied at any stage during the proceedings (Art. 12-1 of the 1945 Order). It should therefore be noted that the latter two modalities rarely respect the founding principles of restorative justice, namely the consent of the parties involved, and the presence of the victim and/or community of care. Moreover, the proposal for these measures is not systematic or motivated by criminal policy issues; instead, it is decided by the 'Procureur de la République' (public prosecutor) case by case. The use of these restorative justice modalities appears to be quantitatively insufficient: 30,000 files annually versus about 650,000 sentences passed by criminal law jurisdictions.

3. The French legislative consecration of restorative justice

At the instigation of various civil society actors (such as the French Institute for Restorative Justice,¹ which offers a new platform at the national level, or the federation 'France Victimes' of victim support services) and public institutions, French lawmakers have recently endorsed restorative justice into positive criminal law. The new legal provision is part of the Code of Criminal Procedure, more precisely Subtitle II of the Preliminary Title devoted to 'La justice restaurative'. To that effect, a new Article 10-1 of the Preliminary Title is introduced by Article 18

1 Institut Français pour la Justice Restaurative (IFJR) (www.justicerestaurative.org/).

of the Law n° 2014-896 of 15 August 2014, which deals with ‘the individualisation of sentences and the strengthening of the efficacy of penal sanctions’. The law resulted from the work of the Consensus Conference on the prevention of re-offending and came into force on 1 October 2014. The new Article 10-1 stipulates:

During any types of criminal proceedings and at any stage of these proceedings, including during the execution of the sentence, the victim and the offender may have access to a restorative justice measure provided the facts of the case have been acknowledged. A measure of restorative justice is one which allows a victim as well as an offender to be actively involved in the resolution of the difficulties² resulting from the offense and more particularly in the reparation of any caused harm. This measure can only be implemented once the victim and the offender have been fully informed about it and have expressly agreed to participate. It is implemented by a purposefully trained, independent third party, under the supervision of the judicial authority or the prison administration upon request. The process is confidential, unless otherwise stated by the parties or when a superior interest, linked to the necessity of prevention or repression of offenses, justifies the fact that the information relating to the implementation of the measure should be brought to the attention of the public prosecutor.³

In an unprecedented way, the participation in a restorative measure (or more generally a restorative meeting) can be proposed to the victims and perpetrators of criminal offences (whatever their status) at any stages of the criminal proceedings. For the victims, the law recognises, first, the right to be informed about the availability of restorative justice measures from the beginning of the criminal procedure (Art. 10-2 Code of Criminal Procedure) and, second, the right to be

2 The word ‘difficulties’ was retained by the legislator in a questionable translation of the word ‘matters’ used in the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

3 Translation by the author. Article 18 of the Law n° 2014-896 of August 15, 2014 reads as follows in the original:

Le sous-titre II du titre préliminaire du livre Ier du code de procédure pénale est ainsi rétabli: Sous-titre II - De la justice restaurative. Art. 10-1. - A l’occasion de toute procédure pénale et à tous les stades de la procédure, y compris lors de l’exécution de la peine, la victime et l’auteur d’une infraction, sous réserve que les faits aient été reconnus, peuvent se voir proposer une mesure de justice restaurative. Constitue une mesure de justice restaurative toute mesure permettant à une victime ainsi qu’à l’auteur d’une infraction de participer activement à la résolution des difficultés résultant de l’infraction, et notamment à la réparation des préjudices de toute nature résultant de sa commission. Cette mesure ne peut intervenir qu’après que la victime et l’auteur de l’infraction ont reçu une information complète à son sujet et ont consenti expressément à y participer. Elle est mise en œuvre par un tiers indépendant formé à cet effet, sous le contrôle de l’autorité judiciaire ou, à la demande de celle-ci, de l’administration pénitentiaire. Elle est confidentielle, sauf accord contraire des parties et excepté les cas où un intérêt supérieur lié à la nécessité de prévenir ou de réprimer des infractions justifie que des informations relatives au déroulement de la mesure soient portées à la connaissance du procureur de la République.

offered the opportunity to participate in a restorative justice measure until the end of the criminal procedure, even during the execution of the sentence (Art. 707-IV, 2° Code of Criminal Procedure).

This legislation is now supplemented by a circular (administrative text describing the technical procedures following the application of a law by the state services) of 15 March 2017. This new text, eagerly expected by judicial authorities in particular, makes the processes of implementing restorative justice measures explicit. It reinforces the autonomous nature of restorative justice with regard to criminal proceedings, although it has been made part of the criminal justice system. Thus, there are ways to propose a restorative justice measure in the course of criminal proceedings, but this proposal has no impact on the content or conduct of the criminal proceedings.

By analysing all the legislative documents, it can be noted that the aim of the new approach to restorative justice is to offer active participation in the 'resolution' of the matters resulting from the offence; in other words, to promote the reparation of any harm resulting from the offence. Whereas it rests upon the penal judge to rule on the nature, quantum and implementation of the penalty, the participants are now in a position to negotiate the diversity and the characteristics of the reparations other than strict compensation. The presence of professionals in the facilitation of the process seems inevitable to promote the effective use of restorative justice measures, as well as to forestall any kind of secondary victimisation or possible excesses in the assessment of the harm or reparation. Indeed, alongside the possible monetary compensation resulting from the offence, other kinds of reparation can also contribute to the regulation of the consequences, whether they are of a personal, familial, professional, relational, cultural or, more widely, social, nature.

4. The conditions of the implementation of restorative justice

As they initially intend to involve the victim and the offender (and depending on the measure, the voluntary participation of members of their communities), the measures of restorative justice aptly break away from the enduring and deplorable tendency in penal mediation to solely require the consent of the victim. Henceforth, the people who during the preliminary interviews choose to take part in a restorative meeting with the competent professional will become the main actors. They will all participate actively and equally in the subsequent phases of the restorative process; discuss the terms and the practical conditions of the meeting (preparation phase); and define the topics to be discussed and the circumstances of the exchange (meeting phase). Depending on the type of restorative justice measure and when participants wish to formalise an agreement, they will negotiate the nature and the practical terms of the fulfilment of their mutual commitments (conclusion phase). They will also be active during the conception of the follow-up of their respective commitments (closing phase). As the participants are considered to be competent to regulate their own case in the presence and with the support of a trained professional (in the broad sense of the word),

the restorative justice measures create a secure environment for speech and dialogue. Identifying and expressing the sufferings experienced by everyone, encouraging mutual comprehension of what happened (and why), and trying to find available solutions together to remedy the problem (how) is most effective in reaching restoration in an inclusive way and ensuring public safety.

In order for the justice process to be completed with due respect to human rights and the principles of criminal law, Article 10-1 of the Preliminary Title of the Code of Criminal Procedure outlines a series of guarantees that condition the use of a restorative justice measure. The acknowledgement of the facts by everyone is formally required. The circular of 15 March 2017 specifies that this condition should not be assimilated to a confession of guilt or self-incrimination, and cannot be used as evidence of guilt in a criminal trial. Instead, the absence of denial forms the condition. However, a fast-track approach does not always allow for restorative justice to take place in an in-depth way. Quite logically, the potential participants must be fully informed about the measure that has been envisaged, the implementation of the process and the guarantees they are offered, the possible consequences, the accrued benefits, and the limits of their participation. The participants' explicit consent to the chosen restorative measure, which is crucial to its smooth implementation, guarantees their active participation. This condition of consent must be ensured throughout the different stages of the process and can be revoked at any time; the latter does not preclude restorative effects of the process itself, given the initial objective of having a personal meeting.

Compliance with these non-negotiable conditions requires a trained 'independent'⁴ third party. Such training cannot be improvised. In order to master the thorough knowledge and skills specific to the subject, the professionals and volunteers of the mediation/facilitation have to supplement their basic training with interviewing and listening techniques, knowledge about group management, and the drafting, implementation and follow-up of the restorative agreements. The voluntary members of the community have to be specifically prepared for their role in the restorative process when their presence is required. The facilitator of the meeting, who is also in charge of the preparation of the participants, establishes the general framework of respect and dignity for everyone, and ensures fairness in the elaboration and implementation of the agreement. He/she is independent from the participants, meaning paradoxical co-partiality and benevolent neutrality. Participation in the restorative meeting is free of charge, which means that there is no economic gain to be made by the facilitator. He/she remains equally independent from the judicial institution and from the mandating administrations. The circular of 15 March 2017 confirms that the independence of the facilitators is not a statutory order but a functional one: the circular confers independence to the facilitator through the mandating administrations or through his/her personal hierarchy.

Neither the law nor the circular specifies what the training of facilitators should look like. However, the circular contains a list of organisations offering training. The training of restorative justice practitioners takes place mainly in

4 'Impartial' third party in terms of Directive 2012/29/EU (Art. 2).

continuing education (throughout their professional life) and was developed in 2015 within the framework of a convention between the French Institute for Restorative Justice, the National Academy of Prison Administration⁵ and the victim support federation 'France Victimes'. It consists of an integrated training course with four modules of 30 hours each. Successfully completed training results in a 'restorative justice facilitator' certificate, and then a 'restorative justice trainer' certificate.

The law also institutes oversight of the restorative measure by the judicial authority, or upon its request, by the Prison Administration. The circular states that this oversight does not include a decision-making competence but has the character of an audit. The audit mainly consists of checking the compliance with the general principles of criminal law, and the rights and interests of the participants throughout the restorative process. This check must be made before and after the meeting. Before the meeting, especially when the case has not yet been judged, the judicial authority verifies that all the legal conditions for the meeting are respected, and that there is no risk of interference with the criminal procedure. This last point, however, which is added to the law by the guidelines, elicits questions. What are considered 'interferences'? Can a judge refuse a person's participation in a restorative justice measure on that sole basis? These issues will need to be resolved by practitioners. After the meeting, this judicial control can cite possible breaches in the formal implementation of the process or breaches of the ethical code by the facilitator who aggrieves a participant.

The final condition for the implementation of a restorative justice measure is that the entire process is confidential. The principle of confidentiality is without exception, unless the parties agree to the contrary, or a breach of confidentiality is necessary to prevent further offences, which may pose a danger to the participants. The public prosecutor is the only recipient of this report. The course and content of exchanges are therefore guaranteed by a high level of confidentiality. As a corollary to this principle, it is prohibited to refer to participation in a restorative meeting, or to a failure to participate, in subsequent debates within the criminal procedure. The guidelines state that recourse to a restorative justice measure is not a procedural act. As a result, no information on the restorative justice measure is included in the criminal file. It again confirms that the restorative justice measure is, from the beginning to the end of the process, entirely confidential.

Thus the law passed on 15 August 2014 demonstrates a real convergence between the objectives of criminal justice and restorative justice. In this sense, the penal intervention is henceforth designed to sanction the offender in several ways:

To promote his amendment, his integration or reintegration to ensure the protection of society, to prevent the commission of further offenses and to restore social peace, while respecting the interest of the victim (new Art. 130-1 of the Penal Code).

5 École Nationale d'Administration Pénitentiaire (ENAP) in French.

The latter are precisely the attributes of the various restorative encounters: empowerment and social reintegration; complete restoration of all the protagonists, their next of kin, and/or their communities; prevention of the commission of new offences in order to lead to social peace.

The practitioners are trained to determine, together with the participants themselves, the most suitable restorative justice measure to be used in a given situation: penal mediation, restorative mediation (following prosecution), restorative conferences, restorative circles, inmate–victim encounters (also possible outside the prison during probation), circles of support and accountability (COSA) (targeted at perpetrators of sexual violence), circles of accompaniment and resources (targeted at all other types of offenders). There is no detail in the law specifying the authority in charge of proposing restorative justice measures. It is therefore up to any professional receiving victims and offenders and their relatives to inform them about the availability of such possibilities, or even to receive their requests, and to refer them to trained facilitators. A partnership is therefore crucial to carry out such a holistic approach to responding to crime.

5. Concrete achievements in France

Even before the law of 15 August 2014 was passed, a number of positive experiments had taken place in France, formally conducted by professional social workers (in a broad sense) in order to address the shortcomings – in kind and diversity – of the measures of penal mediation and reparation. The first experiment took place in 2010 in Poissy, within the context of *Prisoner–Victim Encounters* (RDV: rencontres détenus-victimes), bringing together the National Institute for Victim Assistance and Mediation (INAVEM: Institut National d'Aide aux Victimes et de Médiation, now called 'France Victimes'), the Poissy prison, the Prison Probation Service (SPIP: Service Pénitentiaire d'Insertion et de Probation) of Yvelines, the National Academy of Penitentiary Administration (ENAP: Ecole Nationale d'Administration Pénitentiaire), and founding members of the newly created French Institute for Restorative Justice (IFJR: Institut Français pour la Justice Restaurative). In this pilot project, the six-meeting sessions involved about three inmates and three victims unknown to one another but who shared similarities in the acts committed by the former and suffered by the latter. The second experiment came within the context of circles of support and accountability set up by the Prison Probation Service of Yvelines at the beginning of 2014.

Since 2015–2016 the development of restorative justice programmes has been exponential. While in 2014 there were only three active programmes, four in 2015 and six in 2016, more than 33 programmes were planned for 2017 in the territory of 22 Courts of Appeal in metropolitan France and overseas. Nearly 900 professionals have been trained, more than 200 of whom have been trained as facilitators. It is important to stress the fact that such restorative actions take place within a successfully completed partnership between SPIP, the victim support services (AVV: Associations d'Aide aux Victimes) and the judicial authorities.

It is expected that the juvenile justice service (PJJ: Protection Judiciaire de la Jeunesse), which is in charge of juvenile offenders, will join this restorative movement.

Since its creation in 2013, the role of the IFJR is from these points of view essential in setting up restorative justice programmes in the field. Thus, four newly created 'Regional Restorative Justice Services' (SRJR 'Île de France'; SRJR 'Pyrenées'; SRJR 'Martinique'; SRJR 'Nouvelle-Calédonie') accompany local initiatives. At least four other SRJR programmes are expected to be launched in 2017/2018. The long-term plan is to extend these SRJRs pilot programmes to all 37 courts of appeal of France.

6. Further goals for widening the field of restorative justice

Despite these encouraging developments, some limits are already evident. The financial support now available for the structures involved in the implementation of restorative justice measures in our country is still far from enough. The Ministry of Justice intends to support the programmes but the grants are far below the needs on the ground. While the training of prison and victim support personnel is well underway, the training of juvenile justice personnel, police officers and magistrates remains incomplete.

It is also notable that restorative justice programmes are mainly used for adults after the criminal trial. Restorative justice measures for juveniles are very rare. If there is awareness in the field of judicial protection of youth, there is still much work to adapt the practices of professional educators to restorative justice. However, several pilot projects are being implemented and will lead to more programmes in the future. There is also a certain fear among professionals of initiating restorative justice programmes before the criminal trial. Since restorative justice is not an alternative to the criminal trial, some professionals fear complications regarding the presumption of innocence and confidentiality in the subsequent trial. In this respect, the circular calls for maximum caution while allowing for the possibility of restorative justice measures at this delicate stage of the proceedings.

7. The French Institute for Restorative Justice

Since its creation in spring 2013, the French Institute for Restorative Justice, supported by a network of important and valuable partnerships at the national and international levels (reflected in the composition of its board and by the – mostly voluntary – commitment of its members, who are professionals of the social work or criminological fields), has driven the development of restorative justice in France. The new forum offers a framework for sharing scientific and practical knowledge, and strives to offer all those who wish to be involved in this promising movement a set of practical tools designed to guide their actions and implementation. As said before, the real risks of re-victimisation of participants in restorative justice processes require high levels of professionalism from an eth-

ical and deontological point of view: amateurism, improvisation or precipitation are unsuitable in this matter, which, needless to say, relies on strict protocol.

To that effect, a great many awareness seminars are organised on the mainland as well as in the overseas territories, in various institutions: prisons, probation services, victim support services, prison visitors programmes, chaplaincies, and municipalities, among others. Numerous training sessions on the main restorative justice measures are organised in agreement with 'France Victimes' and the National Academy of Penitentiary Administration. The IFJR also participates in the creation, implementation, follow-up and assessment of many restorative justice programmes including Regional Restorative Justice Services (SRJR). The IFRJ assesses the measures implemented, as well as the programmes, which is an essential condition of their dissemination as best practices.

Thanks to the support of the Ministry of Justice, as well as generous donors, communication tools have been created (film, guides, posters, flyers in particular) to inform a wide audience all over France, including justice professionals, victims, perpetrators and citizens in general. The IFJR, in partnership with the European Forum for Restorative Justice (EFRJ), the International Observatory of Juvenile Justice (IOJJ) and 'France Victimes', organised an International Consensus Conference on 'Restorative Justice in action(s)' at UNESCO's offices in Paris on 18 and 19 January 2017, with financial support of the French Ministry of Justice, the 'Fondation M6' and the France-Québec Cooperation. This conference brought together professionals from sixteen different countries, which allowed international experiences to be put into perspective and compared with the French innovations.

To conclude, the implementation of restorative justice in France since the 2014 law was passed is bound to ensure that the measures that restorative justice promotes will become widespread and perennial. Despite many practices already implemented, and notwithstanding a broad scientific interest in restorative justice internationally and promising evaluations of restorative justice practices, France is still an exception in this regard because of a low interest of the academic community and researchers in the fields of criminology. Notwithstanding these limitations, restorative justice is now well underway in France. Let us give a boost to this promising development by supporting the optimism of action and discarding the pessimism of intelligence. At the same time, let us give ourselves the means of scientifically assessing its effectiveness and efficiency as the time has come in France for criminal and restorative justice to be complementary.

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