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A Cultural Critique of  
the Globalization of  
Restorative Justice

by

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the Globalization of  
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## **Dedication**

This paper is dedicated to world travelers of any profession; that their travels, studies, and professional lives be constantly pursued with the utmost regard for cultural differences ...and similarities.

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the Globalization of  
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The University of Texas at Austin, 2007

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Restorative justice is a major international movement that is currently pursuing a more extensive globalization of its philosophy and practice. This work provides an overview of restorative justice and a number of theoretical and practical considerations surrounding the efforts to globalize the movement. There is a regional focus on Latin America, but examples from other parts of the world are also included. The paper first critiques some of the Eurocentric assumptions within restorative justice philosophy that can affect its international practice and implementation. Secondly, a list of cultural and institutional distinctions are presented and explored as necessary considerations for the exportation of the movement to individual countries. The final body chapter includes an analytical case study of Costa Rica. Each consideration is explored in the context of Costa Rica, and through this, a systematic process is developed that can be applied to any country. The intent of the work is to provide the basis for an improved approach to the globalization of restorative justice.

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Template for Analysis of Cultural Considerations for Restorative Justice

## **INTRODUCTION**

This past April, I had the opportunity to attend the inaugural class on restorative justice being taught at the John F. Kennedy University of Argentina. It was a course being offered to doctoral level law students by a Fulbright professor from the United States. The professor gave a wonderful overview of the basic principles behind restorative justice, and presented the philosophy in a legal judicial framework for the students. His presentation lasted for about an hour and a half, was haltingly translated from English to Spanish, and included some unfortunately poorly subtitled video clips. When he concluded and offered for questions, I feared that the long silence indicated that either the subject matter or translation difficulties had lost the interest of the students at least an hour ago. Finally, one simple question came from the middle of the room – “How does restorative justice apply in other cultures?”

This question is precisely what has driven me in my research. The past thirty years have seen restorative justice work its way into justice systems, community organizations, and religious groups all over the world. Dissatisfaction with inadequate

criminal justice processes, the global neoliberal emphasis on civil society, and the “rediscovery” of community have all fueled the international spread of the restorative justice philosophy. Restorative justice has so much positive potential, especially on an international level, but the manner in which its philosophies are disseminated must be examined. Yes, the basic principles have universal application, but oftentimes the specific methodologies and/or assumptions about social behavior are not universal.

In this work I will examine some of the underlying assumptions in current restorative justice thought and practice, and point out some of the philosophical hurdles that must be faced when exporting the ideology. I will also provide sets of cultural and institutional differences that must be confronted as restorative justice continues its global spread. Because of my own background and research focus, most of my international examples pertain to Latin America, but I also incorporate examples from other world cultures.

The first chapter includes a general overview of restorative justice, and the recent efforts towards globalization of the movement. Chapter 2 analyzes some of the theories and assumptions behind the philosophy that may affect its practice. The third and fourth chapters discuss cultural and institutional issues that should be considered when exporting restorative justice. Finally, in chapter 5, I conclude with an in-depth analysis of each cultural consideration as it pertains to my case study in Costa Rica. I create a framework by which restorative justice can more successfully proceed as a global movement. It is a rather new philosophy (at least in its modern applications), and much effort has been put into the viable insertion of the methodology into customary practice.

Now, as we seek to export restorative justice and the positive results we have seen made our own societies, more must be done to create cultural applicability. This work should be taken as a first step on the road to creating a new global approach to crime that allows for and appreciates an unlimited number of cultural differences.

## **CHAPTER 1**

### **BACKGROUND**

#### ***What is Restorative Justice?***

Part of the nature of restorative justice is that it is commutative. That is, the concept does not have a set format or definition. As the process is commonly understood, it is a movement that began in the 1970s, but is in many ways based upon indigenous and traditional practices (Zehr & Toews, 2004: 341). Many see restorative justice as a revival or modernization of these ancient beliefs and the goal of the modern movement is to integrate restorative practices into contemporary approaches to crime.

Restorative justice is not simply the opposite of retributive justice. It is not a mediation program, and its goal is not forgiveness or the pardoning of crime (Zehr, 2002). Restorative justice is a concerted effort to “put right” the relations between the victim, the offender, and the community in which they both live. Howard Zehr, often considered the foremost authority on the subject, offers this definition: *Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address the harms, needs, and obligations, in order to*

*heal and put things as right as possible* (Zehr, 2002: 37). Another one of the main voices in the movement, Mark Umbreit, describes it as, “*a victim-centered response to crime that gives the individuals most directly affected by the criminal act – the victim, the offender, their families, and representatives from the community – the opportunity to be directly involved in responding to the harm caused by crime*” (Umbreit, 2001: xxxvii).

Most often the process involves a face-to-face meeting between the stakeholders in the crime (Johnstone, 2004: 6). These stakeholders include the victim, the offender/victimizer, the community, and in many cases the justice system. Some of the key points include putting decisions in the hands of the victim, getting the offender to realize the affects of his/her crime, reaching community satisfaction with the process, reducing future offenses, and above all the redress of harms.

The three basic principles of restorative justice are that (1) crime is a violation of people and of interpersonal relationships, (2) violations create obligations, and (3) the central obligation is to put right the wrongs (Zehr, 2002). The process primarily works to address the needs of the victim, and places a lesser focus on punishment for the offender. Crime of any sort takes away something from the victim and from the community; restorative justice seeks to give control of the situation back to the victim. The victim must feel comfortable and be in agreement with every step of the restorative process. Though restorative justice often creates an atmosphere in which forgiveness happens, it is my no means the goal. One could more appropriately see empathy and respect as the main values. Zehr says, “If I had to put restorative justice into one word, I would choose respect: respect for all, even those who are different from us, even those who seem to be

our enemies” (Zehr, 2002: 36). By emphasizing respect, there is less room for revictimization and blame, and a better atmosphere for the creation of empathy. When the victim and offender can see each other as real people with real feelings, they begin to understand the effects of the crime and the effects of their actions upon each other and the community. The creation of empathy is the basis for restoring relations after a crime and for preventing future criminal actions.

The modern restorative justice movement began rather simultaneously in Canada, the United States, New Zealand, and Australia in the 1970s. The indigenous traditions in each of these countries, and the growing dissatisfaction with their existing criminal justice systems were/are some of the main contributors to the spread of the movement. Today, restorative justice comes in many forms, some more fully restorative than others (Zehr, 2002: 55). Some of the most popular and widely-used models are victim offender conferences, family group conferences, and peacemaking circles. Victim offender conferences, often due to restrictions on prison visitations, typically involve only those two actors. After being counseled individually, the victim and offender and, if possible, supporting family members or friends are brought together with a mediation facilitator to discuss the facts of the crime. The hope is that the two parties can achieve a better understanding of what happened, and begin to feel a sense of empathy for each other. Often, the process concludes with a signed restitution agreement and the beginnings of a sense of healing or restoration, especially for the victim. These restorative processes can occur at many different points in the justice process – prior to or as a part of sentencing, or after incarceration.

Family group conferencing is most extensively used in New Zealand and Australia, and is the standard response for juvenile offenses in New Zealand (Zehr, 2002: 48). In this model, the participating stakeholders include the victim and offender, but there is a greater emphasis on community participation; many more individuals are in attendance for a conference. Often, the focus is on reforming the behavior of the offender, and so the support and guidance of the community and family members plays a much greater role. Family group conferencing can also include the participation of law enforcement officials and/or judicial representatives. In Canada and New Zealand, this type of process can be mandated by the judge, and whether by mandate or not, the outcomes of the conference are taken into consideration upon sentencing.

Circles, also called peacemaking circles (especially in Canada), can be used in many different contexts (Raye & Roberts, 2007: 215). This process often has more to do with spirituality and ritual than do other processes of restorative justice. The facilitator, or “circle-keeper,” begins the dialogue by establishing some basic values to be used during the process. Respect is a major value to be kept within the circle; a “talking piece” is usually used to facilitate dialogue and to create a sense of equality and participation. Circles can include any combination of actors affected by the offense, but the opinions and experiences of each member of the circle are always given full respect as having been affected by the crime, and as instrumental in the resolution of the incident. Circle processes are not only used in criminal cases; there are “healing circles (sometimes used as preparation for sentencing circles), circles to deal with workplace conflicts, even circles designed as forms of community dialogue” (Zehr, 2002: 50). Circles can also be

used for the prevention of crime, but within the realm of restorative justice, are most often used to help heal the effects of crime. The origin of the process itself is often attributed to the First Nations communities in Canada, but the concept is and has been employed worldwide as a useful tool for the resolution of conflict (Raye & Roberts, 2007: 215).

Another practice of restorative justice that often receives great attention are Truth and Reconciliation programs – most notably in South Africa. The first Truth Commission was formed in Uganda in 1974, and in the past thirty years Commissions have been used in over thirty countries (Brahm, 2004). Truth and Reconciliation Commissions are organized as a response to incidences of mass violence, genocide, governmental or military violence against a people, or any form of major injustice that has affected a community. The primary goal of a Commission is to uncover and make known every possible detail of the event so that questions can be answered and a more complete understanding of the incident can be gained. Truth and Reconciliation Commissions are often government based, but can also emerge as a community initiative. Participants, victims, and those with any pertinent knowledge regarding the event are encouraged to speak freely to the Commission without fear of prosecution. The decision to forgo criminal prosecution is essentially a trade-off that the community has agreed upon in order to gain more information. “Truth and reconciliation promotes the belief that confronting and reckoning with the past is necessary for successful transitions from conflict, resentment and tension to peace and connectedness” (Greensboro Truth and Reconciliation Commission, 2006). Truth and reconciliation does not necessarily fall

into the traditional restorative justice concept of face to face meetings between victims and offenders, but it is nonetheless considered to be a restorative process.

### ***Indigenous Influences***

The ties between indigenous cultures and the basic principles of restorative justice are many, and more importantly, are frequently used to promote the philosophy itself. Though restorative justice is not explicitly an indigenous invention, much care is usually taken to recognize the roots of the movement in the practices of certain indigenous groups. This indigenous link is especially important to the globalization of the movement, but it should be recognized that the emphasis placed on this traditional link too often creates the assumption that restorative justice is already an international philosophy, and all that is needed is encouragement for the revitalization of the practice. “Proponents cite existing programmes and practices with deep roots in long-standing Western and non-Western cultural traditions” (Winfrey, 2002: 285), but it is important to realize that not all indigenous cultures use restorative principles, and that introducing them around the world may prove quite challenging. This point will be further discussed in the next chapter.

Perhaps coincidentally, those indigenous communities most often referenced in the literature happen to be located in the same countries currently experiencing the most success with the implementation of restorative justice programs. First Nations communities in Canada, American Indian groups in the United States, and the Maori people in New Zealand have traditionally employed social justice practices that are

central to the restorative justice philosophy. Practitioners and policy makers in all countries of the world are seeing the positive reactions to the process in the United States, Canada, New Zealand, etc., and are seeking to incorporate the practices in their own communities. It is hoped that a “more complete understanding of restorative justice lies in the indigenous values that originate, support, and orient them” (Winfree, 2002, p. 287). One of the necessary steps in this process is an examination of the cultural and indigenous influences in each country in order to determine the ways in which restorative justice might be applied in their own societies.

### *Maori*

Of all the countries experimenting with the incorporation of indigenous practices into state justice systems, the Maori traditions in New Zealand have perhaps had the greatest influence on the institutionalization of restorative practices. The Children, Young Persons and their Families Act of 1989 provides for the resolution of juvenile offenses through processes of family group conferencing, and the Sentencing Act 2002 and the Victims Rights Act 2002 allow judges in adult criminal courts to refer cases to a restorative justice conference (Maxwell and Hayes, 2007). These changes in state practice stem directly from the influence of the Maori peoples.

The Maori are the largest group of indigenous peoples in New Zealand and make up approximately fourteen percent of the total population (ICPC, 2003). As described by Edward Shortland in 1856, Maori justice is based on compensation rather than punishment for crimes. Achieving honor and satisfaction are major aspects of the Maori conception of justice. As a way of redressing the harm done to the victim, the

community would traditionally hold a hearing to “...investigate the matter and try to restore the balance that had been disturbed” (Consedine, 1995, p. 87). Following the hearing a variety of means, including forced raids and even death, were employed to secure compensation for the victim.

Though the 1840 Treaty of Waitangi between the British crown and the Maori peoples clearly stated that Maori laws and customs were to be maintained, this agreement went largely unhonored. “The prevailing belief among 19<sup>th</sup>-century government officials and settlers was that the British system was the best in the world. They never actually sought to understand the different goals and processes of Maori justice. The Treaty of Waitangi was soon forgotten” (Consedine, 1995, p. 93). As a result, national policies worked toward assimilation of the Maori into the retributive Western system of justice. Ironically, now 150 years after the indigenous processes of restoration were rejected, some of their basic principles have been incorporated into the national youth justice policy. The 1989 Act introduced radical changes into the former retributive system. Judge F. W. M. McElrea, Youth Court liaison for Auckland defines these changes as, “...the transfer of power from the state to the community, the use of the family group conference as the mechanism for producing a negotiated community response, and the involvement of victims as key participants, making possible a healing process for victim, offender and the community” (Consedine, 1995, p. 99).

The traditional forms of justice are to a great degree still being used in Maori communities today. “Despite the strongest efforts of the ‘one law for all’ brigade, there obviously has been a parallel system of justice operating alongside the dominant English-

derived system” (Consedine, 1995, p. 81). In many cases, situations of crime or wrongdoing are dealt with on the local level by elders. The offender is required to admit his/her guilt, and a collective decision is made as to penalty and compensation for the victim.

Marae justice<sup>1</sup> is set up to meet victims’ needs. It is not about squashing the offender into the dirt. It is about recognizing who got hurt – to hell with people saying society is the victim: it was *me*, not society, that got hurt. Marae justice takes the responsibility away from the victim and places it where it belongs – with the offender (*Inside New Zealand*, 1994).

These basic tenets of the Maori marae justice system fall in line with the major requirements of a modern restorative justice process. According to Howard Zehr’s foundational *The Little Book of Restorative Justice*, some of the necessary ingredients in the process are that offenders must admit some level of responsibility for the act, victims and the needs of victims are of special concern, an emphasis on offender accountability and restitution, and community involvement (2002).

The changes in New Zealand’s justice system were directly influenced by Maori practices (Olsen, et al. 1995: 47).

For example, family group conferences were arguably designed to heal the damage caused by an offender’s behaviour, restore harmony between those affected by their behaviour, encourage the participation of those who have a direct interest in either the offender or the offence (Maxwell & Morris, 1993), empower the victim, and positively ‘reintegrate’ the offender within the community (Stewart, 1996).

Olsen, Morris and Maxwell argue that the restorative conferencing that has been incorporated into the national policy of New Zealand shows the ability of “...indigenous

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<sup>1</sup> *Marae justice* is the Maori justice system. Marae is a spiritual meeting place where Maori issues are discussed in a spiritual and culturally appropriate manner (Yeboah, 2000: 19).

justice processes to adapt to modern times and successfully modify Western justice models” (Olsen et al, 1995: 60).

### *First Nations*

First Nations is the term commonly used to describe the indigenous peoples of what is now Canada. They comprise approximately three percent of the country’s population and are primarily located in the provinces of Manitoba, Saskatchewan and Alberta (ICPC, 2003). Similar to the Maori peoples, the First Nations communities value a balance of harmonious relations. A member of the Mashantucket Pequot Tribal Nation, James J. R. Guest, describes aboriginal societies as horizontal structures. “When a crime is committed it results in the creation of an inequality between the victim and victimizer” (Guest, 1999). In this philosophy, the offense has been committed against the victim, not the state, and it is the job of the community to determine what should be done to right the wrong.

The most often utilized restorative practice among First Nations communities is peacemaking circles. Some researchers say that some form of this circle process is at the heart of all cultures of the world (Baldwin, 2004), but their modern cooptation by restorative justice practitioners is generally attributed to the influence of First Nations peoples. Peacemaking circles as they have been incorporated into the practice of restorative justice, typically include the offender, one or two relatives or friends of the offender, the victim and one or two supporting individuals, a judge or lawyer, a social worker, a justice official (police officer), and the facilitator known as the circle-keeper. Each participant will be given the opportunity to speak freely and uninterrupted each time

that the “talking piece” reaches them. In contrast to the traditional judicial system where the state and the prosecutors are on one side and the defendant on the other, a circle creates a sense of community and equality among all participants.

As used in the modern Canadian justice system, circles enable a judge to develop a more detailed view of an offender and of an offense. It allows for a more open conversation between the judge and the persons involved in a crime, and alternatively allows for an offender to hear from those who are concerned and wish for a change in his or her behavior. A sentencing circle in the Canadian system can also be used to help inspire alternatives to incarceration, especially with Aboriginal offenders (Rudin, 2005). “Circles are used to determine sentences, but they are also used to address conflict and to assist victims and offenders in their reintegration” (Van Ness, 2007, p. 511).

In Canada, a major focus of the past twenty or so years is the incorporation of indigenous communities into the criminal justice system. This takes a step farther from simply implementing traditional indigenous ideas into the state structure, and seeks to directly target the involvement of Aboriginal peoples in the system itself. Mirroring a global trend, the Canadian indigenous populations are disproportionately represented in the prison populations and are more likely to be involved in crime (as victims or as offenders). A report by The International Centre for the Prevention of Crime (2003) entitled *Crime Prevention and Indigenous Communities: Current International Strategies and Programmes* provides these statistics:

- Aboriginals represent some 3% of the Canadian population, but 17% of the federal and provincial prison populations.

- In Northwest Territories, crime rates are three times the national average, and youth are responsible for a high proportion of property and drug-related offenses.
- Rates of violence, sexual assault, spousal homicide, and child witnessing of spousal violence are all higher among indigenous than non-indigenous populations. (p. 19)

As a means to combat these appalling rates, the Canadian national crime prevention strategy launched in the 1990s targets indigenous communities and seeks to build healthier and safer lifestyles (ICPC, 2003). Acknowledging the failures of the Western justice system, there has been an increasing focus on the “development of strategies and initiatives *by* Indigenous communities themselves, rather than *for* them, and the development of much more in-depth and full community consultation” (ICPC, 2003).

Similar to recent changes in the New Zealand judicial system, Canada’s Youth Criminal Justice Act of 2003 and the Correctional and Conditional Release Act 1992 provide for restorative alternatives and approaches for juveniles and indigenous offenders and their communities (Van Ness, 2007). Because of a concentrated effort on the part of the Canadian government, “restorative principles have taken root in legislation and official government endorsement for both minor and serious crimes” (Van Ness, 2007, p. 518). For example, section 718.2(e) of the Canadian *Criminal Code* states that,

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Canadian Supreme Court case *R v. Gladue* (1999) determined that judges must consider circumstances of Aboriginal peoples in both the *processes* and *outcomes* of sentencing:

The background consideration regarding the distinct situation of Aboriginal people in Canada encompass a wide range of unique circumstances, including most particularly:

- (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
- (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (Cunneen, 2007: 125).

These major legal decisions have effectively served to reinforce and promote the use of indigenous and restorative practices in the state judicial system. Circle sentencing has come to be seen as an appropriate method for resolving offenses, particularly when an indigenous person is involved.

### *American Indian*

The influence of American Indian traditions in the United States has also contributed to the restorative justice movement, but has been somewhat less influential upon national policy. Many tribes including the Lakota, Dakota, and Navajo use traditional means for dealing with crime that are rooted in the principles of community restoration. L. Thomas Winfree explains some of the basic characteristics of American Indian philosophies: most basically, all tribal members are treated as equals. There is no hierarchy in tribal structure and decisions and responses to negative situations are made according to a sense of tribal will. “The solutions flowed from the Creator in the form of customs and traditions, but it was up to the tribe as a whole to apply them” (Winfree, 2002: 289). Related to this philosophy is the idea that individual interests are inseparable from tribal interests. Power over others is never to be vested in any one individual or group of individuals; actions to be taken for the good of society are decided upon by all (Winfree, 2002).

The Navajo is one of the largest and most studied tribes in the United States, and the restorative principles of the Navajo justice system are frequently included in the restorative justice literature. Partially as a result of years of blending of Navajo and Western traditions, the Navajo Peacemaker Court was created in 1982. In 1991, the Navajo Nation Code of Judicial Conduct which encourages the use of Navajo “ethics and values regarding consensual agreement through discussion to conduct informal hearings” was adopted (Winfree, 2002: 296). As a result, the Navajo Peacemaker Courts have come full circle in employing traditional values and methods to restore community justice.

Like many other indigenous traditions, the Navajo worldview relies upon balance and harmony of nature. “Disharmony occurs when things are not as they should be, and includes any form of conflict, injuries, slights or other wrongs” (Winfree, 2002: 296). The basic purpose of the Peacemaker Courts is to restore balance and harmony within the community. Navajo justice also specifically targets victims’ rights; ensuring that to the greatest extent possible, the victim be made whole after an injury. A Court ceremony typically lasts between four to six hours as it proceeds through a series of stages. First, an opening prayer calls for the aid of the supernatural. Then, the diagnosis stage recognizes the source and effects of the disharmony in the community. Finally, a plan is developed and the session is closed with another prayer ceremony (Winfree, 2002).

Clearly, many of the Navajo and other groups of American Indians’ principles of peacemaking are closely related to those of restorative justice. But, likely due to the fact that American Indians comprise less than one percent of the population of the United

States, their practices have not greatly influenced the criminal policies of the state. Unlike the national programs of Canada and New Zealand, most of the restorative justice initiatives in the United States are being pursued at the level of individual states. “A survey of state juvenile justice policies found that only six states did not explicitly refer to restorative justice in statutes, policy statement, mission statement, programme plans, and/or evaluation measures” (O’Brien, 2005: 4). Since the 1970s, restorative programs have been developed and spread throughout the United States at an astounding rate, but on a rather small scale (i.e., community programs and local initiatives as opposed to national legislation).

### ***Globalization of Restorative Justice***

Growing dissatisfaction with ineffective traditional justice systems and the desire for something more reparative has provided for the international acceptance of the ideas of restorative justice (Parker, 2002: 24). The United Nations has become one of the largest and most politically credible organizations promoting the practice. In 1985, the UN publicly called for the use of informal methods for dispute resolution including “customary justice, mediation, and indigenous practice” (Declaration of Basic Principles, 1985). Within the past ten years, UN involvement in the global spread of restorative justice has played an important role; its promotion of the practices has inspired a sense of introspection within many global communities. Due to their public support of the philosophy, in 1999 the Economic and Social Council (ECOSOC) requested that the United Nations begin to establish a set of standards for the international use of restorative

justice practices. In 2002, the UN publicly stated that all countries should use restorative justice whenever possible. That same year, an international expert group was assembled to develop an official set of principles to be made globally available. They published the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters which was to be used by member countries in the implementation of restorative justice programs (Wachtel, 2007).

Although it took four years, the *UN Handbook on Restorative Justice Programmes* was published in 2006. Assembled by a team of experts, the handbook is a publication of the United Nations Office on Drugs and Crime (UNODC) as, “one of a series of practical tools developed...to support countries in the implementation of the rule of law and the development of criminal justice reform” (*Handbook*, introduction). Justice reform is a major project of the United Nations, and the establishment of the rule of law is widely regarded as a necessary step for all developing countries. One of the greatest strengths of the UN Handbook is its emphasis on providing information, “and referring to examples that will be useful in the development of new programmes *in a variety of social, cultural and legal contexts*” (*Handbook*, introduction, emphasis added). Because of the desire to make the document universally applicable, its creators chose to illustrate it with a variety of examples from restorative justice programs around the world. “Throughout the Handbook emphasis is placed on the need for flexibility and adaptation to local differences, including the nature of the crime, local tradition and culture” (Wachtel, 2007). The Handbook itself was written by two Canada-based scholars, and

reviewed by the team of experts. Published copies are available at the United Nations' twenty-two field offices around the world.

The United Nations has made it a public mission to promote the use of restorative justice in all member countries, but the dissemination of written information has not been completed. Despite the 2006 publication and subsequent distribution of the UN Handbook on Restorative Practices, it has still not been fully translated into a language other than English. It has been put upon member countries themselves to do the translating with virtually no assistance in the interpretation of terminology. For example, the Czech Republic prepared its own unofficial translation in order to begin to train local probation officers and mediators (Wachtel, 2007). In Costa Rica, the United Nations Latin American Institute for the Prevention of Crime and the Treatment of the Offender (ILANUD) has had one translator working on the project since its publication. There are still entire chapters and key sections missing from the translated work.

Furthermore, issues basic to language and translation are occurring. U.S. restorative justice scholar Wonshé writes that,

Language not only expresses *what* we think; it shapes *how* we think. I am concerned that both justice systems people and restorative justice people use language characterized by naming, categorizing, generalizing and stereotyping. This language presents biases and worldviewing as universal truths....Language, including that of restorative justice, often has subtle and not so subtle punitive overtones....As practitioners, we clearly need to challenge ourselves to be more creative and consciously develop a language that corresponds to the values and principles of restorative justice and authentically express them (Wonshé, 2004: 257-8).

If these types of critiques can be made of the language of the restorative justice movement in English, what other issues might arise when the ideas are translated, let

alone the differences in expression between Germanic and Romance languages? Indeed, many indigenous and Eastern languages are so uniquely constructed that certain concepts cannot be interpreted.

Costa Rican officials feel that the most troublesome term to translate from English to Spanish is that of the “circle-keeper.” One of the most popular restorative processes is the peacemaking circle. The trained facilitator of the circle is referred to as the “circle-keeper.” In English, this term implies guardianship and custodianship, while in Spanish it implies leadership or directorship.<sup>2</sup> The closest approximation to circle-keeper in Spanish is *facilitador(a)*, yet even this term can have unintended implications that may negatively affect the restorative potential of a circle. In her discussion on cultural fluency, author Michelle LeBaron writes about the challenges related to written translations:

Imagine a poem written in exquisite Spanish that you have been asked to translate into English. Can you substitute words with the same literal meaning and get a good result? Not likely. To translate a poem – carrier of images, feelings, sensations – you have to make sense of it, feel its tone, get inside the way the author made meaning. Only then can you make a translation that approaches the original in aesthetics and feelings (LeBaron, 2003: 41-42).

The intricacies and emotions necessary in restorative justice are similar to those expressed in poetry. Restorative justice itself is a very delicate process that often cannot be perfectly defined. The task of translating written restorative justice materials is immense and extremely difficult. The United Nations’ decision to not simultaneously

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<sup>2</sup> *En inglés se utiliza la palabra “keeper”, que literalmente significa guardián o custodio. En este [caso] se opta por “facilitadores” por tener connotaciones más afines a la función, aunque no se debe olvidar el sentido de la palabra en inglés, la cual lleva implícita la función de cuidado hacia el círculo. (Pranis, 200?: 5).*

publish translated versions of the Handbook will likely lead to lingual misinterpretations and/or conceptual distortions of the restorative justice principles.

One of the largest international non-governmental organizations (NGO) promoting the restorative justice philosophy is Prison Fellowship International. PFI maintains partnerships with numerous national governments, has over one hundred national affiliates, and has a consultative status with the UN Economic and Social Council (UNESCO) and is an active participant in the UN Alliance of NGOs on Crime Prevention and Criminal Justice. PFI's criminal justice branch is encompassed in its Centre for Justice and Reconciliation. Its primary purpose is to expand the use of restorative justice around the world. The Centre operates two programs internationally: the Sycamore Tree Project, and Communities of Restoration (APAC). The Sycamore Tree Project is an in-prison program that brings together victims with surrogate offenders for the purposes of understanding the effects of crime. Communities of Restoration are full-time prison programs that are designed to reduce offending behavior through character-focused programming. Because PFI is a Christian organization, faith is an integral part of each of its programs. In addition to these programs, PFI also secures funds and donations for special projects such as creating facilities for children of inmates or for in-prison occupational and practical training (Prison Fellowship International, 2007).

Prison Fellowship International has local directors and project managers in each of its country locations that are able to recognize and provide for social and cultural differences. But the program's Christian foundation could be seen as sidelining the

unique beliefs and social systems of many world cultures. PFI does seek to be trans-denominational, but obvious conflicts of interest are bound to occur. Prison Fellowship United States has recently been sued for not respecting the national edict of separation of church and state. A Texas district court judge ruled against PFI's InnerChange Freedom Initiative program, and ordered them to return \$1.5 million the state paid for them to provide secular job training classes (the Baltimore Examiner, *Editorial: Court must uphold freedom of religion*, Mar 21, 2007).

### ***Conclusion***

Restorative justice is a major social movement that has achieved a great deal in a short amount of time. It can exist in many different forms and occurs through many different models and practices. Its positive achievements in dealing with the effects of crime, and its historical roots in the traditional practices of a number of the world's indigenous customs have created a truly global movement. Pioneered and promoted for the most part by citizens of North America, Australia and New Zealand, restorative justice has even become a part of the mission of the United Nations. The full potential of the philosophy and practice has certainly not yet been realized, but efforts are being made on many fronts to reach this goal.

It is the argument of this work that one of the preconditions for the globalization of restorative justice is an international sense of social and cultural understanding. The standard philosophy and practice cannot be simply placed into other countries and other realities. Great care must be taken to contextualize restorative justice. In the chapters

that follow, a number of considerations will be presented to this effect. The theory behind and assumptions often made of restorative justice are examined in chapter 2, and a number of cultural and institutional considerations presented in chapters 3 and 4.

## **CHAPTER 2**

### **THEORY AND ASSUMPTIONS**

#### ***Theoretical Background***

Restorative justice as a viable strategy for dealing with criminal matters is closely tied to ideas about government and social order. French philosopher and theorist Michel Foucault has written much on the role and functions of modern government, and many of his views have distinct ties to a number of issues in the restorative justice movement. In his essay *Governmentality*, Foucault expounds on the Machiavellian definition of government as ‘the right disposition of things, arranged so as to lead to a convenient end’ (1991: 94). He then points out that ‘things’ are to include both territory and inhabitants, and that the goal of the governor should be the protection of common welfare of these ‘things.’ This idea of the common good most clearly refers to a common obedience to the law. According to this definition of government, Foucault elucidates that, “with government it is a question not of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics –

to arrange things in such a way that, through a certain number of means, such and such ends may be achieved” (1991: 95).

The ‘convenient end’ sought by good governance is the same conclusion sought in restorative justice processes. Foucault writes that, “ ‘the common good’ refers to a state of affairs where all the subjects without exception obey the laws, accomplish the tasks expected of them, practise the trade to which they are assigned, and respect the established order so far as this order conforms to the laws imposed by God on nature and men” (1991: 94-5). Restorative justice seeks to repair harms caused by incidences of non-compliance with the laws, and to reintegrate both victims and offenders as productive participants in their communities.

Restorative justice is an approach to justice and the maintenance of order in society that focuses on the community. Regulating the actions of the members of a community in accordance with the law is one of the primary functions of any government. Operating under the assumption that justice and social order are community values, institutionalizing a restorative justice approach to crime is a manner of orienting social goals with state and legal goals. As the restorative justice ideology is increasingly being promoted by practitioners, government officials, and even multilateral international organizations, it has become, in certain instances, an effective part of modern governance.

As Foucault looks at governance, he often describes it as ‘the conduct of conduct;’ a concept that refers to the ability of the government to shape, direct, and guide the actions of its population in accordance with desired social behaviors. Sociologist

Nikolas Rose states that, “such studies of government would address that dimension of our history composed by the invention, contestation, operationalization and transformation of more or less rationalized schemes, programmes, techniques and devices which seek to shape conduct so as to achieve certain ends” (1999: 3). In his discussion of restorative justice, he calls it a philosophy that is, “certainly consistent with communitarian principles....Here, as elsewhere, government is not a matter of the realization of a programme so much as of the complex construction of assemblages that will link up rather general ethical rationalities to very specific, local and technical devices for the conduct of conduct” (Rose, 1999: 190). The modern institutional promotion of restorative justice can be viewed as the state conducting social conduct.

One of restorative justice’s leading critics, George Pavlich, engages with the ideas of Foucault, Rose, and other social theorists in his book *Governing Paradoxes of Restorative Justice*. In his discussion of governmentality and the conduct of conduct, Pavlich describes the subtle arrangement of “background settings to produce subjects who think and act in ways that do not require direct coercion” and

suggests how many of the values championed by proponents of restorative justice (e.g., healing, restoration, individual empowerment, etc.), and the techniques used (e.g., mediation, conferencing) could be seen as indirect attempts to shape the motivations (and actions) of subjects somehow involved in criminal events (Pavlich, 2005: 9-10).

He then goes on to analyze what he calls ‘restorative governmentalities’ by looking at who and what are governed, who governs, and what appropriate governing should look like.

Instead of governing crimes, a restorative governmentality would govern harms. As Foucault seeks the ‘right disposition of things,’ this restorative approach seeks to manage the effects of crime and the harms created by it – to reestablish the correct order of things as they were (or were desired to have been) before the incident occurred. Additionally, restorative governmentality involves not just the offender, but also the victim and any other stakeholders in the crime. Restorative justice is often described as a victim-centered approach to crime, and one of its inherent goals is to restore right relations within a community. Here related, the ‘governors’ involved in the restorative justice system are the participants themselves. In contrast to the traditional system where professional lawyers, judges, and officials “deal with” and “handle” crimes, a restorative process gives this control primarily to the victim, but also empowers the community and allows the offender’s voice to be heard. With regards to ‘appropriate governing,’ Pavlich emphasizes a forward-looking process. “As opposed to the criminal justice system that reactively focuses its adversarial methods on past events to determine guilt, restorative processes govern by helping stakeholders to define, and develop ways to heal, the harms of crime, [thereby using]...problem-solving governmental techniques [that] are directed to governing the future” (2005:13). In this sense, restorative justice can be seen as a process that is both reactive and proactive to crime and criminal behavior.

It can certainly be (and most often is) argued that the state would promote restorative practices out of benevolent interest for its citizens, but the counter, Foucault-inspired view would see the ‘conduct of conduct’ through traditional restorative practices as a means of social control. Perhaps both perspectives are true. In taking such a critical

stance on the institutional promotion of restorative justice, one would be remiss to acknowledge that the goal of criminal justice has always been to regulate the actions of citizens. Whether focusing on punishment as a deterrent to crime, on rehabilitation for criminal behavior, or on the complete removal of violent individuals from society, the traditional justice system has been constructed to at least ideologically align law-breakers with more acceptable forms of social conduct. Pavlich points out that the idea of governmentality should be concerned with the shaping of human nature, and not correcting (normalizing) or judging (punishing) individuals. Restorative justice has emerged as an alternative to the limitations and failures of the current system. As an institutional agenda it is a form of social control, but it is a method of control that involves more than correction and judgment. Restorative justice is a more holistic, voluntary, and ideologically effective method for the reestablishment of ‘the common good.’

### ***Eurocentric Assumptions about Restorative Justice***

#### *The Principles and Philosophy*

Restorative justice is based upon a holistic view of crime. This understanding of wrongdoing translates into the “principles of restorative justice.”

- Crime is fundamentally a violation of people and interpersonal relationships.
- Violations create obligations and liabilities.
- Restorative justice seeks to heal and put right the wrongs.

These principles are assumed to be universal. For example, Zehr introduces them with this acknowledgement:

Restorative justice is based upon an old, common-sense understanding of wrongdoing. Although it would be expressed differently in different cultures, this approach is probably common to most traditional societies. For those of us from a European background, it is the way many of our ancestors (and perhaps even our parents) understood wrongdoing (2002: 19).

Even though Zehr is one of the most effective practitioners in understanding his own personal and cultural biases, the caveat he includes here actually stems from this bias. He first recognizes the Eurocentrism of the restorative justice philosophy, but then assumes that most indigenous cultures have similar worldviews and opinions on the effects of crime, and that this basic understanding of wrongdoing is universal. Hence, these basic principles of restorative justice are conceived through a Western lens. “For example the emphasis on individualism, competition, taking action, rational linear thinking, ‘Christian principles and Protestant work ethic,’ may to a large extent reflect values of the dominant U.S. white culture, but not values particularly shared by all whites, let alone persons of other cultures” (Umbreit & Coates, 1999).

Amongst the restorative justice principles themselves, certain assumptions are made. First of all, the conception of ‘crime’ itself is rather narrow; the wording used in the principles seems to imply that crime is a direct human to human violation. A robbery, for example, would typify a crime in which individuals and interpersonal relationships are damaged. On the other hand, structural violence – the effects of institutionally created and maintained inequalities – certainly violates people, but the ‘offender’ in this case is not an individual, but rather the system itself. This type of wrongdoing could be

conceptually reworked to fit with the principle, but in reality sits outside the assumptive framework.

The second principle, that violations create obligations, is rather universally accepted. But, the kinds of obligations created will certainly vary from culture to culture. The traditional Western justice system treats crime as an injury to the state, while the restorative justice framework looks at the direct harm to the victim. Restitution, whether for our own crimes or for those of others (as in the case of wars or slavery), is a major focus in the Anglo world. The Western culture emphasizes the individual, and restorative processes that stem from this culture also seek first to help the victim. Circle processes and mediation conferences always seek to put control back into the hands of the victim. Repairing the harm to the community is also emphasized, although socially to a lesser degree. Stated within the principles is the obligation of the community to support the victim's needs, give offenders opportunities to make amends, and create an atmosphere for the prevention of future offenses. The assumptions behind this principle are that the obligations of all three stakeholders are fulfilled, and that individual needs are met. Not necessarily recognized is the fact that in many cultures the individual is far less important than kinship networks, the community itself, or even the natural order of the universe. Many indigenous groups and religious traditions find human value in one's ability to be a part of the natural world or the universe itself. Ideas of self-worth and self-fulfillment are only acknowledged as contributing to the greater whole. The intentions of restorative justice to attend to individual needs may be viewed in certain cultures as rather unimportant when compared to the universal imbalance created by the offense.

## *Multiculturalism*

Along with the Eurocentric focus of the actual principles, there are similar issues within the field itself. The myopic cultural lens in restorative justice has been recognized to a certain extent, but even this recognition has its own biases. A number of writers and thinkers within the restorative justice field have expressed concern with the practitioner recognition of cultural differences. Morris Jenkins writes about recognizing the effects of racism, classism, and sexism amongst African-American communities (2004: 315-328), and Barbara Raye (2004: 329-340) has looked at these issues within a variety of North American minority groups. For the most part though, the intercultural issues being discussed are still a part of the Western framework. Most writings on the topic assume that the practitioner will be dealing with a variety of subcultures, usually existing in the United States and Canada, and much of the discussion focuses on the distinct ways of demonstrating respect among Hispanic, Asian, African-American, indigenous, and urban and rural communities. For example, Mark Umbreit and Robert Coates have, in their article on the Multicultural Implications of Restorative Juvenile Justice, adapted a list of necessary cultural skills for counselors created by D.W. Sue and D. Sue,<sup>3</sup> and presented them as the necessary skills needed by effective restorative justice practitioners:

### Cultural Skills for the Restorative Justice Practitioner

1. The culturally skilled restorative justice practitioner is one who has moved from being culturally unaware to being aware and sensitive to his/her own cultural heritage and to valuing and respecting differences.
2. The culturally skilled restorative justice practitioner is aware of his/her own values and biases.

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<sup>3</sup> It should be noted that Sue and Sue's book *Counseling the Culturally Different* is often considered the multicultural authority in its field, yet it primarily focuses on multiculturalism *within* the United States.

3. Culturally skilled restorative justice practitioners are comfortable with differences that exist between themselves and their clients in terms of race and beliefs.
4. The culturally skilled restorative justice practitioner is sensitive to circumstances (personal biases, stage of ethnic identity, sociopolitical influences, etc.) that may dictate referral of the minority client to a member of his/her own race/culture or to another counselor.
5. The culturally skilled restorative justice practitioner acknowledges and is aware of his/her own racist attitudes, beliefs, and feelings. [Sue and Sue, 1990: 167-168] (Umbreit & Coates, 1999).

Again, certain assumptions are made even in these very relevant guidelines. For example, the third cultural skill assumes that the practitioner has a full understanding of the culture with which or in which they are going to be working. This kind of cultural fluency can take months or years to learn. Practitioner cultural fluency and training is especially relevant as restorative justice quickly becomes more global. In her book entitled *Bridging Cultural Conflicts*, Michelle LeBaron describes the importance of cultural fluency:

We can be most effective in addressing conflict by developing fluency with culture: living culture; culture as a series of starting points; culture as a range of currencies; culture as pattern, form, and symbol; culture as ways we see, know, decide, and draw lines between ourselves and others; culture as an underground river that influences the course of conflict. As we become familiar with cultural dynamics, we learn ways to bridge differences that yield synergy not confusion (LeBaron, 2003: 32).

A worst case scenario of the lack of cultural fluency can be seen in the story of an Australian restorative justice practitioner who, based on his previous international work, was asked to speak at a conference in Thailand. He explains how he arrived completely unprepared to speak to a room of hundreds of Thai lawyers, and due to his lack of knowledge on Thai culture says, “I am sure that I totally botched that opportunity” (personal communication, June 2007). Even the most professional field experts can quite

reasonably have difficulties with cultural fluency. At a restorative justice conference in June of this year, Howard Zehr was quoted as saying of his role as an American promoting restorative justice in other countries, “Restorative justice always has to be contextual. The best thing I can be is a catalyst” (personal communication, June 25, 2007).

Just as great care is always taken to ensure that the restorative process is a respectful and comfortable experience for the victim and all participants, so must we strive, as these examples show, for those same levels of respect and positivism when exposing any individual to restorative justice for the first time. When it comes to developing countries, the mandate is even larger because of the need to recognize our own assumptions *and* become educated in more than one global and cultural reality.

### *The Indigenous Link*

There are an estimated 300 million indigenous people in more than 70 countries across the world (Cunneen, 2004: 346), yet the literature on restorative justice seems to overwhelmingly focus on the Maori, First Nations, and American Indians as representatives of all indigenous groups. But, as Chris Cunneen asks, “Why should we expect commonality between distinct indigenous societies from Africa and the Middle East, across South, Southeast and East Asia to the Pacific, South America, North America and the Arctic circle?” (Cunneen, 2004: 346). Only due to a unique set of historical factors did extant indigenous communities even survive colonization until modern times. The politics of colonization and decolonization have much to do with restorative justice’s potential in developing countries.

Often the claims which link restorative justice practices to indigenous peoples are trivializing and patronizing. They deny the complex effects of colonial policies which have, at various times, sought to exterminate, assimilate, “civilize” and Christianize Aboriginal peoples. This colonization has occurred through warfare, the establishment of reservations, the denial of basic citizenship rights, the forced removal of children and forced education in residential schools, the banning of cultural and spiritual practices, and the imposition of an alien criminal justice system. They also deny the complexity and variations in indigenous dispute resolution processes. (Zellerer and Cunneen, 2001: 246-247)

Those indigenous communities that do exist today have almost all suffered some sort of ethnic persecution, attempted extermination, and/or cultural hardships in their recent pasts. Tribes in Africa were often artificially divided or even created by the colonizers and may have lost many of their historical traditions. Indigenous groups in many parts of Latin America were the targets of state sponsored violence and so marginalized that any social organization they may have had has been long since forgotten. Many other countries of the so-called “Third World” continue to struggle with the establishment and maintenance of the rule of law, such that an attempt to implement a “Western”-style restorative justice program would seem superfluous in the face of such a basic lack of social order.

One particularly pertinent example of indigenous oppression is in Guatemala, where the indigenous Maya comprise over fifty percent of the country’s population. During the civil war that marked most of the second half of the twentieth century, Mayans were systematically targeted for extermination by state policies. Because they live primarily in small villages in the western highlands, and speak over twenty-one different languages, the various Maya communities are not particularly well-connected to

each other. Modern Mayan justice systems are not especially well documented, and the people are virtually unable to benefit from state judicial structures.

The impact of colonialism was to take away first the right, and then often the ability, of Aboriginal communities to maintain order. Taking away this vital function (along with the other functions essential to governance) the colonial experience told individual Aboriginal people that they were not worthy and they were not capable of looking after themselves. In order to give back to individual Aboriginal people the knowledge and understanding that they do have the ability to take responsibility for their lives, Aboriginal communities need to be given the tools to meaningfully respond to incidents of disorder (Rudin, 2005: 95-96).

Even if Guatemala were to implement a national or even local restorative justice program, the likelihood that it would be accepted by Mayan communities is slight. Language and communication are still major issues in Guatemala, and the general distrust of the Ladino-led government effectively alienates the Maya from Guatemalan government and justice. In this case, it could be argued that the indigenous communities of Guatemala require recognition of their basic human rights, an end to their cultural persecution, and overall the chance to reestablish themselves as their own community before they can even begin to look at restorative processes.

In addition to the issue of relevance due to the impact of colonization, restorative justice's claim of indigeneity can prove troublesome when one begins to examine indigenous societies that have practices and traditions vastly different from the Maori, First Nations, or American Indians. One example, recently popularized by a book and film both entitled *End of the Spear* by Steve Saint, is that of the Waodani people who live in the jungles of Ecuador. The book describes the Waodani justice system in which an appropriate punishment for one who has committed an offense is a bloody death by

spearing. As a revenge for the spearing, the family or tribe members of the deceased could return and kill again in the same manner. This cycle of death and spearing without trial or tribal adjudication could continue for decades until one side simply tired of the killing. Saint writes that it is rare for a Waodani child to have a living grandparent (Saint, 2005). Though the book goes on to describe the success of generations of missionary work in stopping the killings amongst the Waodani, it is still hard to imagine the success of a restorative justice program in a society so entrenched in vindictive and retributive systems of justice.

Zellerer and Cunneen write that, “there may be aspects of indigenous justice that are seen as inappropriate to a restorative model. Restorative justice has had a tendency to romanticize indigenous dispute resolution and avoid mention of the use of physical sanctions or processes that involve social avoidance or banishment” (2001: 246). It must be recognized that the Maori, First Nations, and American Indian examples do not represent all indigenous groups, and the concept of restorative justice as an “indigenous” process must be rethought. There is a certain temptation to characterize the cultures of the above mentioned groups as a shared experience with all indigenous groups, but distinctions must be made. Chris Cunneen writes, “The Yolgnu people of Arnhemland in Australia and the Inuit of the Arctic Circle may have quite similar historical experiences of colonization and subsequent social and political marginalization, but their traditional social processes of resolving disputes are not necessarily ‘restorative’ simply because they are indigenous peoples” (Cunneen, 2007: 115). Because restorative justice so carefully strives to recognize the influence of particular indigenous cultures and traditions

on its own practices, there is a tendency to equate restorative justice with indigeneity, when, as these examples demonstrate, many of the world's Aboriginal groups have their own systems of social justice which may or may not fall in line with the principles of restorative justice.

On the other hand, the main concern of many other indigenous groups is the fight for their recognition as such in the contemporary world. It would be highly presumptive to assume that a community that has been systematically stripped of any sense of social cohesion, its traditions, culture, land, and other basic human rights would even have the luxury of its own community justice program as stipulated by the United Nations. Like the Mayas in Guatemala who for centuries have been persecuted and socially and spatially marginalized, their daily struggle to survive likely supersedes any opportunities for restorative practices. Furthermore, for the restorative justice philosophy to be introduced from the outside, as it is promoted by the United Nations and other international agencies and practitioners, could be challenging, unwelcome, and even possibly offensive.

An appropriate use of the restorative principles would need to recognize the systemic violation of marginalized peoples and their inter- and intra-social relationships. There must be a proactive acceptance of the notion that these wrongs need to be righted by the violators themselves. Without peace, community justice cannot work. "Without peace, state inquisitors may be the only means of enforcing the law" Glaeser & Shleifer, 2002: 1209). All of these factors must be effectively dealt with before "dropping a justice programme into a[ny] community..." (Rudin, 2005, p. 100). Restorative justice is

not indigenous justice and indigenous justice is not universal to all indigenous people, and recognition of this commonly made assumption is essential to the successful globalization of the movement.

### *Democracy*

Another major assumption in the movement is that we are exporting restorative justice to democratic societies. The popular idea of a justice system is one under a strong democratic government with high standards and good practices. Democracy is characterized by a respect for the rule of law, strong legal and governing institutions, and a respect for human equality. Restorative justice, as it is currently understood and practiced, operates under these assumptions. Respect and equality are some of the most basic tenets of the philosophy, so is the expectation that crime will be officially recognized as such. In a society where none of these prerequisites exist and/or cannot be created, restorative justice will encounter major difficulties.

What is to be done then, in weak democracies, or even in fully non-democratic countries? Is restorative justice as an official state strategy even possible in communist countries? What can be done about rampant government corruption? Restorative justice is a very delicate process that must be approached with a high degree of professionalism, usually a sense of confidentiality, and overall trust. When one has no faith in their own justice system, how can restorative justice help? When an entire population is being systematically oppressed and even exterminated by its own government, is there any hope of restoration?

How is the practitioner to achieve the goals of restorative justice in an undemocratic state? Is his or her job to instill general respect for the rule of law before beginning a restorative process? Is it the job of restorative justice to create legitimate governing and legal institutions? Where and what is the hope for restorative justice in lawless and undemocratic societies?

Democracy has been strongly equated with development for at least the past fifty years, and a strong rule of law is one of the major indicators of both. “Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law” (Hayek, 1944: 80). Legal development assistance has been a major focus for aid to developing countries since the end of World War II. It was ideologically justified as “a rational and effective method to protect individual freedom, expand citizen participation in decisionmaking, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life” (Trubek & Galanter, 1974: 1063). This justification is very close to some of the goals of restorative justice. Restorative justice seeks to put decisions back in the hands of those who were harmed and to give citizens the ability to control events and shape their lives. It also promotes community participation in the responses to crime or expands citizen participation in decision-making.

On the other hand, both the democratization/rule of law movement and restorative justice have come under some of the same criticisms. Trubek and Galanter created a list

of ethnocentric qualities of the development and democratization efforts in 1974 that are very similar to some of the challenges being faced by the restorative justice movement:

Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political system. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important. (1974: 1080-1).

In the case of Latin America, these ‘ethnocentric considerations’ are especially true. Social stratification in the region is one of the highest in the world.<sup>4</sup> A long history of marginalization and elitism has created enclaves of local community control. Latin America’s economic and governing structures are so centralized that many rural communities have virtually no access to government or the justice system – thereby indicating that in these areas “courts are neither very independent nor very important.” Elitist and corporatist rule have created systems in which rules are imposed on the many by the few, and high levels of corruption throughout the region exemplify these rules being honored more ‘in the breach than in the observance’.

When it comes to restorative justice, in this case, one could argue that the lack of access to state judicial systems has created ideal situations of community cooperation and

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<sup>4</sup> According to 2007 statistics from the InterAmerican Development Bank, Latin America is one of the most unequal regions of the world with 10% of the richest of inhabitants possessing 48% of income and 10% of the poorest just 1.6%.

participation. Additionally, institutional neglect and legal non-enforcement have created a space for restorative communities. Such is the case in Tierra del Fuego, Argentina – the province is located so far from the capital that local groups have formed their own community responses to crime. Elsewhere in Argentina, the justice system is completely controlled by the state, but in the town of Tolhuin there is no court, judge, or prosecutor. The lack of state control or regulation has allowed for the creation of a rather successful locus of restorative justice. Tolhuin recently opened its own community dispute resolution center, *Casa de Justicia* (House of Justice). Because of its extreme isolation both physically, and institutionally, researchers have called Tierra del Fuego the “model for community-based justice in Argentina” (Price, 2007).

Tierra del Fuego is an incredible restorative justice success story, but it is unique. The momentum for the creation of the Tolhuin *Casa de Justicia* came from within the community itself and was a recognized social need. When we attempt to spread restorative justice to communities that have not to a similar extent predetermined a lack of social justice, there will likely be resistance. In her paper “The Standardization of Law and Its Effect on Developing Economies”, Katharina Pistor argues that imported legal ideas may hinder the development of effective legal systems. She states that, “the imposition of rules from the outside – not a new experience for most developing countries as the history of colonization exemplifies – may also lead to domestic resistance” (Pistor, 2002: 99). Though the goal of the restorative justice movement is to promote a more holistic approach, and does not seek to impose any legal standards, Pistor’s argument still applies. Development philosophy has primarily come in the form

of Western-developed models being imposed on the Third World. The recent backlash to (especially United States) Northern intervention (whether as a part of U.S. agenda or benevolent “neighborly” interest) as seen in the growing support for Hugo Chavez’ anti-imperialist Latin America movement, certainly indicates regional resentment of imported development models. Restorative justice, in this politically charged post-9/11 global atmosphere, must be especially careful of the impression it gives. Because of the turbulent history between the United States government and most of the developing world, it is even more important that restorative justice purport itself and be seen as completely separate from the state from which it comes.

### ***Conclusion***

The basic theories and principles behind restorative justice are so vital to the practice itself that they are rarely critiqued. The movement began and has most widely spread in Anglo countries of the developed world, and the foundations of the philosophy fit well within this context. Now, as we seek to globalize restorative justice, these fundamental principles must be reexamined for cultural applicability. They must perhaps be widened or more broadly defined so as to ensure successful transnationalization. The role of restorative justice in social and political order must also be analyzed. Its intent, like that of any justice system, on the ‘conduct of conduct’ must be acknowledged and used to direct the spread of the movement.

Furthermore, restorative justice has to insert itself into both domestic and international multicultural realities. The movement needs to shift its current focus on

ethnicities and subcultures in the Western world to a broader recognition of situations in which those subcultures represent the dominant cultures. Indigenous groups must be recognized as participants in the restoration and justice systems, without the ideology being simply equated with indigeneity. A multicultural view is necessary for the variety of traditions and cultures amongst the indigenous peoples of the world.

Finally, the existence of a democratic state cannot be held as the global norm. Variances in democratic practices, abuses of its principles, and instances of its outright rejection must all be considered. Restorative justice and democracy are very closely linked, but not necessarily reliant upon one another. For the philosophy to reach individuals in other countries in other parts of the globe, democracy cannot be assumed, nor must it be a precondition. Each global reality must be recognized, appreciated, and in some cases deconstructed before restorative justice can truly reach all peoples in all corners of the world.

## **CHAPTER 3**

### **CULTURAL ISSUES**

#### ***Culture Clashes***

When we consider implementing a restorative justice program (as it is currently conceived) in a non-Western country, many cultural factors must be taken into consideration. Much has been written on the importance of culture with regards to subcultures existing within a more mainstream culture, but each of these has been looked at within a Western framework. Some of the countries of the world that have the most prominent and arguably most successful restorative justice programs are the United States, Canada, Australia, New Zealand, Great Britain, and some notable programs in Germany, Scandinavia, and other parts of Western Europe. When cultural sensitivity is discussed, it is always within the context of these assumed locales. One could conclude that the practice of restorative justice is something always assumed to be taking place in a “developed” country. It is worth wondering if, “restorative justice, as it is conceptualized in the West, runs the risk as a globalizing force of trampling over local custom, and crushing the very thing it claims to be” (Cunneen, 2002: 34).

Culture is arguably the most important influence on politics, economy, social life, and within these, the justice system in a country. The ways in which people act and comport themselves have a great effect on the way in which their society functions. “Culture is one of the most common words in our vocabularies and one of the most challenging to understand....Culture is integral to understanding conflict. It cannot be separated from conflict, but neither does it cause it....Though culture often goes unnamed and undetected, it is a vital influence in our lives. Culture is central to our identity and the ways we make meaning” (LeBaron, 2003: 3-4). Because restorative justice is such a delicate and personal process, its operation and understanding are inextricable from culture. Gerry Johnstone and Daniel W. Van Ness write that, “Restorative justice conceptions and schemes – like the criminal justice systems they seek to supplement, reform and partially displace – are strongly conditioned by the wider cultures within which they emerge, even while they challenge certain aspects of those cultures” (2007: 446). Much emphasis is placed on the indigeneity and traditions behind restorative justice practices; all of these ideas are related to culture.

As the restorative justice ideology reaches more and more parts of the globe, its close ties to culture must be honored. Legal educator Morris Jenkins calls for the creation of a culturally-specific restorative justice approach in which the following should take place:

- (1) Use of culturally-specific theories to explain crime and social harms and develop a culturally specific response to the harm.
- (2) Redefinition of community.
- (3) Assurances that the “State” is not a dominant participant in the process.
- (4) Education and training on the issues of race and racism that include alternative theories.
- (5) Active research on these issues using non-European methodologies (Jenkins, 2004: 317).

Key to Jenkins' list is the emphasis on non-European frameworks because without the recognition and incorporation of these frameworks, difficulties will likely arise when we try to take a Western framework abroad. In recognizing the need for a culturally-specific restorative justice approach, some general topics can be examined. In particular, any examination of restorative justice and a specific culture must include its concept of community, social stratification, and the lasting effects of colonial legacies.

### ***Community***

#### *Varied Purposes*

In traditional restorative justice practice, after the victim and the offender, the community is considered to be the third major stakeholder. This emphasis on community has important implications when it comes to restorative justice in developing countries. Colonization arranged the conceptual world order into 'us' and 'them', or, in development and political theory, into center and periphery. 'We' are typified as industrious, civilized, individualistic, etc., while 'they' are stagnant, uncivilized, and communal. This post-colonial mindset tends to create not only patronizing perspectives of the developing world, but also to homogenize its peoples. What this means for restorative justice is that the expectations of and for the community are much greater. As such, the community's role as a stakeholder is often seen as the embodiment of culture and values. Post-colonial theory would argue that the community then supersedes the victim and the offender as the central body of the restorative process. Care must be taken

not to embody the community or to value it over the harm done to the individual, but to understand it as an amorphous participant in the restorative justice process.

The traditionally understood third stakeholder most directly applies to the micro-community -- the individuals who were secondarily harmed, but the macro-community -- the geographic or membership-based group, also plays a major role (McCold, 2004: 155). Aside from the macro- and micro- distinctions, to truly define 'community' is challenging. Lode Walgrave calls community a "mirage of what we are craving for in the desert of fragmentation and individualism, but which we cannot really make concrete" (2002a: 75). He goes on to describe how "we all belong to several such communal networks or webs, differing in content and in intensity [Braithwaite 1993; Bell 1993]. The degree and the way in which such networks or webs are stakeholders in a restorative process also are different" [Van Ness and Heetderks Strong 1997; McCold 1999] (Walgrave, 2002a: 74). On the surface, the idea of the community as a major stakeholder seems clear, but when we deconstruct the notion many different dimensions are exposed.

Sociologist Amitai Etzioni views 'community' as defined by two characteristics: "First, a web of affect-laden relationships among a group of individuals, relationships that often criss-cross and reinforce one another...and second, a measure of commitment to a set of shared values, norms, and meaning, and a shared history and identity -- in short, to a particular culture" (Etzioni, 1997: 127). John Braithwaite calls community a "dense networks of individual interdependencies with strong cultural commitments to mutuality of obligations" (Braithwaite 1989:85). Each of these definitions emphasizes, and, again here, very nearly defines community as the embodiment of culture. They also describe a

multi-dimensional network that is connected by shared obligations and customs. Shared customs and a sense of communal obligation are some of the basic ideas of restorative justice.

In Western criminal justice systems, the role of the community is minimized in favor of the individual. Restorative justice is an alternative, inclusive, and more reparatory approach to the creation and maintenance of social order, as well as a means to protect the rights of citizens. “From the micro-community perspective, restorative justice is a process that brings together those directly affected by a specific crime to collectively determine how best to repair the harm. In contrast, the primary goal of restorative justice on a macro-community scale, is to repair the aggregate effect of crime and limit the potential threat posed to society by the offender’s future behavior” (McCold, 2004: 158). Traditional justice systems do help to protect the community from future harmful behavior, but they do not tend to the needs of the micro-community. Restorative justice seeks first to repair the harms, and then to deter future crimes.

### *Conceptions of Community*

Political philosophy also sees the ‘conduct of conduct’ as something to be guided by the shared moral virtues of a community. Aristotelian theory, Rose argues, suggests “the need for some equally select, authoritative and agreed table of virtues to be promulgated, acquired and lived out within a unified moral community” (1999: 170). When it comes to coordinating the efforts of civil society and the state, i.e. governmentality, the restorative justice approach has clear advantages. In order to heal the social fissures created by a crime, restorative justice seeks to work with the

relationships between individuals and to reestablish and recreate a commitment to the shared values and norms that create the ‘unified moral community.’ Whether seen as a strategy for the containment of civil unrest (and dissatisfaction with the state justice system) and social control, or as a “transformative agenda to create more just and humane societies” (Goett, J., personal communication, April 2007), restorative justice is a philosophy of which the inherent goal is to heal. It focuses on interpersonal relations and human emotions in the struggle to repair the individual and collective harms caused by crime.

The fact that restorative justice is so centered upon the idea of community arguably has much to do with the simultaneous ascent of civil society as a major political actor. Since the end of the twentieth century, society has been paying increasing attention to the concept of community. Community-based initiatives seem to be an integral part of every government, social, development, and even economic strategic plan. Rose describes the rise of the community as a third space with the potential to solve conflict:

Since perhaps the mid-1960s, the community was proclaimed to be the appropriate locus for crime control, punishment, psychiatric services, social welfare and much more: community care, community correction, community architecture, community policing, community safety... (170).

In the neoliberal context, the community is conceptualized and expected to be a strong, cohesive, and highly participatory entity that can achieve what institutions alone cannot. As community has become such a positive and hopeful modern concept, it stands to wonder if we have overly romanticized it. Polish sociologist Zygmunt Bauman writes,

The word ‘community’...feels good: whatever the word ‘community’ may mean, it is good ‘to have a community’, ‘to be in a community’. Company or society can be bad; but not the *community*. Community, we feel, is always a good thing... (2001: 1-3).

In addition to the critique that community has been adopted as a panacea for the perceived failures of the state, perhaps a more critical issue is the basic assumption as to the actual existence of a community. Lode Walgrave notes that, “building on communities for developing restorative responses to crime, as many do, presupposes that a community really exists, and this is not self-evident” (2002a: 76). Many neighborhoods have been torn apart by crime and gang violence, or also in instances in the undeveloped world, by genocide, mass murders, and government sponsored terror. In cases such as these, a collective identity, or sense of community, may have actually formed around the violence and terror itself. A community based on crime might not exactly be the ideal participant in a restorative process, as it is popularly conceived.

Communities can be defined politically, socially, culturally, ideologically, and overall, spatially. Furthermore, communitarianism has distinct implications depending on the realm of conceptualization. Marxists, Western (capitalist) societies, traditional cultures, etc., all view communities distinctly. Often, communities are defined by their physical space and territorial boundaries. Aside from the community membership pluralities that are often discussed in restorative justice literature, globalization has created sets of transnational communities that must be recognized. Each existing conception of community must be taken into consideration in the restorative justice process. Furthermore, the historic formation and cohesiveness of (especially indigenous) communities must be included in the process. “For example, many indigenous

communities have formed directly as a result of policies of the forced relocation of tribal groups....Colonial policies were directly responsible for constructing community in the interests of the colonizers” (Cunneen, 2004: 350).

Also, the community(ies) to which one claims membership often do not fit into the Western conception of community. Though an individual may live in a certain geographical area, the group to which they most closely identify could be located in another part of the world altogether. The restorative justice principle of inclusivity that brings together the offender(s), victim(s) of a crime, other affected members of the community, and key legal officials, therefore may not be met when the concept of community is examined through the lens of culture and belonging. Let us take for example, the case of René, a fictional young Haitian migrant to New York City charged with stealing from the grocery store in which he works. A victim-offender mediation is arranged. The offender, the store owner, the arresting officer, and two employees who witnessed the event are invited. These participants were chosen because they comprise the typical members of one’s micro-community. “Advanced restorative justice practitioners appear to be able to determine ‘intuitively’ the community which is affected by a concrete crime and to ‘sense’ whom they should invite to participate in the process” (Walgrave, 2002a: 73). As a result of the session it was agreed that René will no longer be employed at the grocery store, but he will not be deported, and an arrangement is worked out in which he will cover the costs of the stolen goods. In the view of the facilitator, the mediation was a success and a sense of order and peace has been returned to these community members.

What was missing from this process? First, though René has lived in New York City for five years, he still feels closely tied to the small coastal town where he grew up. A part of his monthly earnings are sent back to his mother and two sisters in Haiti. Because of the financial assistance they receive, René's family has been able to start a small business with a neighboring family. The baked goods that they sell in front of their home bring in enough income to pay the electricity bills and to send the children of both families to school. Now that René has lost his job and can no longer send remittances, another set of victims has been created who are never touched by the traditional restorative process. The two families never receive justice and René does not have the opportunity to make amends with the community to which he considers himself to belong.

Along with the victim and the offender, the community is the third participant in restorative justice processes. But, like many other “basic tenets” of the philosophy, the idea of community has too often been conceptualized through a Western mindset. Not only are all communities not the peaceful and supportive groupings that restorative justice assumes them to be, but in some instances do not exist, or exist on different terms. As the restorative justice philosophy continues to spread and to become ever more global, a less narrow vision of community must be incorporated. Just as practitioners are trained to respect diversity among victims and offenders, so must the community – the third stakeholder – be re-understood in each and every circumstance.

### ***Stratified Societies***

Political and sociological philosophers often opine about human nature and the social and hierarchical relationships between people. Societies that have formed as a result of British influence largely share the same political, philosophical, and religious views about human interaction. The British legacy tends to emphasize individualism and political equality, and usually has a Christian background. The Protestant work ethic and principles of democratic equality are some of the basic foundations of these societies. Populations that have been formed around other religious philosophies or under the influence of other colonizing forces often do not share these same beliefs. Many countries, especially those in the developing world, are still heavily influenced by indigenous traditions and beliefs. In other countries, as in much of Latin America, indigenous culture has been virtually replaced by Catholicism and corporatist politics.

One of the cultural structures most difficult to reconcile with the principles of egalitarianism endemic to restorative justice is the belief in a system of social hierarchy. These inequalities can be manifest in a caste system, a communal acceptance of human or child slavery, or as part of religious teachings. It is hard to imagine creating a respectful restorative encounter between members of hierarchically different castes in India. Likewise, the idea of repairing the harm caused to a slave by a master seems somewhat naïve. That is not to say that either of these situations is impossible, only that it would take a real social transformation for the traditional restorative justice model to be truly successful. The basic ideas of respect and equality which are so essential to restorative processes may not be so easily expressed or felt in hierarchical cultures.

In the case of Latin America, for example, fully eighty percent of Latin Americans define themselves as Catholic, and the region is home to almost half of the world's believers (Sanchez, 2005). Because in most instances the colonizers and missionaries were one and the same, the Church is very strong in Latin America, both socially and politically. The church itself is arranged hierarchically, and its long influence in the region has transferred some of these principles to society itself.

The relationship between religion and politics is a complex one. Strong religious communities help set the value structure of a society by stating what is important in life. In doing so religious values help frame what the citizenry expects out of their lives and therefore on one level what they may expect from government authorities. For example, traditional Roman Catholic teaching, which emphasized the glories of eternal salvation rather than the material pleasures of one's current life, seemed to dampen the expectations of the citizenry and therefore reduce the pressure on the political authorities to provide for the good life in the here and now (Vanden & Prevost, 2002: 128).

Along the lines of Marx' famous edict that religion is the opiate of the masses, Catholics are taught that suffering is a part of life and that it will be rewarded in Heaven. Latin American culture, and even the Spanish language itself,<sup>5</sup> are often described as fatalistic. "[People brought up in the culture of paternalism and commiseration] are invited to perceive themselves and others as 'victims' of their situations, duties and obligations" (Claudet, 1992).

In a culture where a majority of citizens have a rather passive attitude toward negative situations, the active posture of restorative justice may find tension. The Catholic Church believes in punishing crime as a means of defense and for the protection

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<sup>5</sup> The subjunctive is used more extensively in most languages to express doubt or uncertainty. Phrases that are expressed as certainties in English are not always spoken as such in Spanish. For example, in Spanish "I will call you when you get home." translates to "*Te llamaré cuando vuelvas a casa.*" The verb *volver* (to return) is in the subjunctive implying uncertainty about arriving home.

of society, but the idea of repairing harms to the victim is primarily reserved for the afterlife.<sup>6</sup> In contrast, the Protestant tradition rejects the hierarchy of the Catholic Church and believes that the individual has direct access to God (Benham & Barton, 1996: 623). This active ability to forgive and be forgiven has more congruence with restorative justice than the Catholic belief in suffering as the path to Heaven.

What does this mean for the international spread of restorative justice? For the most part restorative justice is respectful of religious beliefs, but religion affects more than faith. Social and political hierarchies and cultural outlooks on life are often based on religious tradition. For the practitioner, therefore, these distinctions go beyond typical religious sensitivities.

### ***Colonial Legacies***

The legacy of the former colonizers has great influence on the cultures of today, especially in “Third World” cultures. Contemporary religious beliefs, social hierarchies, and government and legal systems were often directly transplanted from the colonizing country. The process and effects of decolonization have clear relationships with restorative justice today. Some of the most basic tenets of the movement are shaped and differently conceptualized by the cultures in which they are conceived. The ideological goal of colonization was religious conversion by means of cultural ‘cleansing.’ “In its most rudimentary sense it [colonization] is a process of uprooting one thing and replacing it with something else. For example, conquerors may try to uproot (if not clear-cut!) a

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<sup>6</sup> Liberation theology is a Latin American movement for the earthly liberation of the oppressed. In this case I am referring to traditional mainstream Roman Catholic beliefs.

people's culture – their language, religion, spirituality, ritual and art – and replace it with their own” (Wonshé, 2004: 256). The social and ethnic groups whose beliefs were maintained, or were formed by colonial policies face the challenge of asserting their values in the face of more dominant theoretical and cultural frameworks. This local challenge is quite similar to the ideological challenge of restorative justice. Gerry Johnstone and Daniel W. Van Ness write that, “Restorative justice conceptions and schemes – like the criminal justice systems they seek to supplement, reform and partially displace – are strongly conditioned by the wider cultures within which they emerge, even while they challenge certain aspects of those cultures.” (Johnstone and Van Ness, 2007: 446) Minority cultures and the restorative justice movement share similar difficulties in asserting their principles and philosophies against the dominant framework. Taking this relation into consideration, and remembering the ties between restorative justice and indigenous cultures, the two would seem to comprise a formidable pair.

On the other hand, the effects of colonization and imperialism can also work to divide the two. Colonialism occurred through a mentality of superiority and domination, and also (in the minds of the colonizers) of “civilizing.” The hierarchies and institutions subsequently created all stemmed from this unequal power relationship. The colonial period was marked by exploitation and often violence, and was followed by a postcolonial period in which the power relationships evolved into policies of neglect and still more violence. In many cases colonization virtually destroyed indigenous cultures and traditions. Minority and indigenous communities in virtually every country of the world continue to feel the effects of the colonial legacy and struggle against the now

ingrained power disparities. These disparities, if deep enough, can negatively affect restorative justice's reparative potential. Colonization and its after effects could have so marginalized certain ethnic groups such that their ability to organize and to be incorporated into a restorative justice program would be severely limited.

The term decolonization is often used to refer to the post-1945 movement towards independence and the "need to 'rethink' institutions outside of the context of colonization. Chris Cunneen writes that decolonization and postcolonialism have "particular relevance to restorative justice given that, historically, the institutions of the criminal justice system have been so instrumental in the colonial project of delegitimizing the social institutions and political aspirations of colonized peoples" (Cunneen, 2004: 35). This notion is key to restorative justice for two reasons. First, the restorative justice philosophy itself is often recognized as stemming precisely from those indigenous traditions that colonialism destroyed and dismantled. This circumstance raises issues about whether this 'repackaged' approach to justice can be brought back into the same communities from which it was first conceived? Secondly, in the spirit of restoration, we must look at the unrepaired harms that continue to exist for the victims of colonization. In this case, the offender is the West –ironically the ultimate source of modern restorative justice philosophy and practice. This circumstance raises issues about whether Europeans and North Americans can export their restorative philosophy to formerly colonized nations and the receptivity of colonized peoples to a restorative justice approach.

Because the process of colonization and the subsequent challenges of decolonization created countless injustices that can never be changed, the spread of the restorative justice philosophy to formerly colonized countries must be approached with caution. The ways in which communities are structured and understood are often the result of colonialism. In fact, as George Pavlich argues, ‘community’ is also fundamentally about *exclusion* (Pavlich, 2001). Development theory often looks at the idea of a center-periphery world order in which the colonizers are the center, and the developing countries are located on the periphery. This view establishes former colonies as excluded entities and as comprising their own community. As Cunneen points out:

Theories about globalization also alert us to the fact that we need to situate the growing interest in restorative justice somewhere within the shifting boundaries of relations between the First World/Third World, the colonized and the colonizer. This is particularly the case when much restorative justice talk presents *itself* within the context of the Other, as the alternative narrative on justice... (2004: 34).

As the philosophy spreads, this tension between colonial legacy and restorative justice must be carefully examined. The creation of these unequal power relationships and oppressive structural frameworks in the developing world has resulted in a host of injustices and large scale harms. The effects of historic and ongoing imperialism must be dealt with before achieving international cohesion over restorative justice. The practitioner must be able to educate him or herself in the history of the area in which he is going to be working, and to recognize circumstances in which communities might still be struggling with some of the effects of colonization and post-colonization. The struggle for the movement is to find a way to deal with these injustices, establish a sense of reconciliation, and to locate itself within the realities of formerly colonized countries.

## ***Conclusion***

Clashes between cultures have created strife throughout history. On the other hand, finding and/or creating peaceful cultural congruence is one of the greatest challenges of our time. There are so many facets that combine to create culture that it is nearly impossible to fully understand even one's own background and sets of traditions. Issues such as cultural understandings and uses of community, social structures and hierarchies, and colonial legacies must be taken into consideration. As community is such a central aspect of the restorative process, a full understanding of its composition and role in another society is necessary. Also, social stratification or the arrangement of social and human interactions can greatly affect the practice of restorative justice, and may even reorganize some of the basic principles behind the philosophy. Consequently, in developing countries, restorative justice must recognize its own potential to heal the harms created by colonization, while at the same time realize that as a movement stemming from the North, it may not necessarily be welcome.

If restorative justice is to succeed in its global mission, cultural understanding must be the first step in the process. The encounter between restorative justice and the world, like that between a victim and offender, should be carefully planned and orchestrated so that all participants are comfortable and willing to participate. Reaching a reasonable degree of cultural understanding is the first step in this process.

## **CHAPTER 4**

### **INSTITUTIONAL ISSUES**

#### ***Different Legal Systems***

Restorative justice, whether it is conceived as a project that will work along with or as an alternative to the traditional criminal justice system, is still to a certain extent reliant upon the institutional structure in which it exists. Obviously, just as governments and laws vary from country to country, so do justice systems. Because restorative justice programs are most prevalent in Western, British-descendent countries, they are largely conceived within those legal structures. England, the United States<sup>7</sup>, Australia, New Zealand, and Canada (except Quebec) operate under adversarial justice and common law systems, while a majority of the rest of the world uses civil law. Each of these legal traditions is constructed on a binary, whether it be prosecution versus defense or state versus accused, and aims to find the “winner” between the two. Restorative justice, on the other hand, does not seek to create winners and losers, but to the greatest extent possible repair the harms created by crime. Though the ultimate goal is quite different, some of the philosophies, constructions, and structures used in restorative justice are

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<sup>7</sup> Like Quebec, the state of Louisiana is somewhat unique in its usage of a mixed civil and common law system.

similar to those used by modern legal systems. The aim of this section is to examine some of these structures, and to create linkages between the systems that may be important considerations in the globalization of restorative justice.

### *Adversarial System – Common Law – Jury Tradition*

Adversarial justice relies upon advocates for the prosecution and the defendant, as well as an impartial participant whose job it is to judge the facts and find the truth in the case. The role of the impartial adjudicator may also be taken by a jury of peers. “The key advantage of juries is that they reflect the preferences of the community, not those of the king [or state]” (Glaeser & Shleifer, 2002: 1201-2). Today, juries are designed to represent the community in which the alleged crime took place, but who have not been directly affected by the incident. Adversarial justice largely developed out of common law custom, and is most often found in common law systems, but not always. Common law is generally more reliant upon tradition, custom, and above all, precedent (*stare decisis*) (Glaeser & Shliefer, 2002: 1220). Lawyers have the ability to argue a case using prior legal decisions, and judges are obliged to rule according to previous decisions made by other judges. One of the original intents of common law was the provision of compensation for the victim of a crime because, “at the core of the accusatorial system is a notion that every wrong is a private [personal or individual] wrong” (Salas & Rico, 1993: 17). A victim has the right to demand monetary or other forms of compensation without this being part of the legal statute – it is a part of common social practice, and therefore a reasonable expectation within the common law system.

Perhaps not coincidentally, many of the basic tenets upon which common law is based are similar to the traditions that form restorative justice. First, the fact that the adversarial system assumes innocence until guilt has been proven (and decided upon by the community), shows a less aggressive and more empathetic position toward the offender. Though many countries have historically moved toward more and more punitive reactions to crime, the original design of the adversarial tradition does not emphasize such highly punitive measures, which may, in fact, foster more understanding. This fits with one of the main goals in a restorative process which is the creation of understanding and empathy for all stakeholders.

Secondly, restorative justice's roots in indigenous and traditional cultures are similar to the community-based customary traditions of the common law system. The first juries reached their decisions by applying local customs and traditions to the case. Also, the application of punishments became reliant upon local precedents. When one considers this foundation behind the jury tradition, the role of the jury in an adversarial court case has direct connections to the integral role of the community in a restorative justice process. Though juries are composed of citizens who were not directly affected by the crime, the opposite is true in restorative justice philosophy. Juries establish the idea that communities are expected to participate in at least the judicial aspect of a crime. In restorative justice the community is the third major stakeholder (but not the decision-maker as is the case of a trial), just as the jury is the third participant in the courtroom. Though their actual functions are very different, the major connection between restorative justice and the jury system is that the juridical involvement of peers creates a common

understanding that the community is expected to participate in justice. Just as in the United States all citizens acknowledge the fact that they may be asked to sit on a jury, so should all community members be prepared to participate in a restorative justice process.

Restorative justice is often described as the opposite of retributive justice, and many of its proponents conceive of it as a major deviation from the current system. I argue here that, just as we seek to reestablish the ties between the modern practice of restorative justice and the ways of indigenous peoples, so must we seek to reexamine the customary legal traditions in our own British-descendant cultures. Just as some of our most basic political and economic concepts (e.g., democracy and capitalism) have so spun out of control as to be virtually unrecognizable, so have the original intents of our adversarial common law justice system. Some of the foundational concepts and structures of the common law system are very similar to those of restorative justice. As we strive to spread and embed restorative practices in global communities and in our own, part of the challenge will be to revive, or possibly devolve to the basic principles upon which our society is based. Restorative justice is not such a far cry from the ideals of what we have today; we simply require a reassessment of our current practices.

#### *Inquisitorial Process – Civil Law*

The civil law system, the legal process used by most countries of the world, is based on a system of codes and statutes that are reinterpreted according to the facts of each individual case. These codes came to be firmly established in conjunction with the creation of the nation-state. Outside of Western Europe, the Germanic legal codes were adopted in much of Asia, and the French Napoleonic codes incorporated in Latin

America. Civil law's avoidance of precedent and previous legal decisions could be interpreted as a less personal approach to justice. Glaeser and Shleifer assert that "civil codes are basically collections of rules intended to restrict the actions of the participants in the legal system" (2002: 1211). The decisions in each case are reached by applying abstract legal principles, and the rulings are typically rather short and formal. Civil law systems, in their most basic and theoretical form, also lack a presumption of innocence, although most countries have since adopted the principle in practice.

The civil law system is closely linked to the inquisitorial legal process. This legal structure does not view the court as an impartial arbiter but rather as a participant in determining the facts of a case. "The civil law proceeding eliminates the notion of private wrong,...and makes this an action in which the State [is the accuser]" (Salas & Rico, 1993: 17). The judge, representing the state, actively investigates, collects evidence, and makes interrogations in criminal proceedings. In the inquisitorial tradition, the court is not required to notify a defendant of the accusations made against them, and testimony gathered relating to the case can be kept secret. Traditionally, there is no oral trial, no separation of prosecution and sentencing, and above all, a rather marginalized level of participation by the parties directly involved in the case. The systemic marginalization of the stakeholders in the inquisitorial system takes away some of the agency of the victim and hinders empathetic emotions from all stakeholders on all sides of a crime. Also, the lack of an impartial jury arranges criminal proceedings on a binary. This makes the restorative justice principle of community participation and involvement much harder to socially ascertain. Indeed it is likely that the slow spread of restorative

programs in non-Western countries could arguably be the clash with civil law and inquisitorial traditions.

### *Latin American Examples*

Latin America is a real-world example of some of these difficulties. The region inherited both the civil law and inquisitorial systems from the colonizers, despite vastly different social and cultural traditions. Today, as Latin American countries struggle with major development issues, the legal system and the establishment of rule of law have proven to be distinct challenges. Numerous studies of various Latin American justice systems have identified certain areas of concern. In general, all of these systems are heavily dependent upon incarceration, lack alternatives to the court system, experience an overall lack of access to the justice system for citizens, and have a degree of tension between the goals and efforts of the state and civil society. Argentine lawyer and legal scholar Roberto Gargarella has written of the Latin American legal system, “The judiciary was originally conceived as a body separate from the people...and was founded on principles of distrust of the political and intellectual abilities of common people to take care of their own affairs” (Gargarella, 2002). Additionally, crime in Latin America has drastically risen in recent years; crime rates doubled in the 1980s and tripled in the 1990s.<sup>8</sup>

In the 1990s, growing concern for these issues led to a series of legal reforms and modernization processes in the region. International development agencies began to put

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<sup>8</sup> A 2001 study of the continent found that 25 of 26 Latin American and Caribbean countries for which there was data had overcrowded prisons in 1999. The remaining country was at 100% capacity” (Carranza, 2001: 9).

an emphasis on lowering crime and creating good governance; the Alternative Dispute Movement (ADR), encouraged by the Organization of American States (OAS), spread throughout the region; the aftermath of many state conflicts led to a growing recognition of the needs and rights of victims of crime; and the efforts of numerous civil society groups began to effect change in the region. Argentina, Brazil, Chile, Costa Rica, and Mexico have all amended and/or rewritten portions of their civil and criminal codes to reflect the change in attitude and provide for alternatives to the traditional criminal system. One of the legal shifts in many countries has been a movement toward the adversarial system, and what many researchers in the field are saying is that Latin America must first establish an adversarial tradition before it can reach restorative justice.

Despite these major institutional obstacles, restorative practices have taken hold in some Latin American countries. They are certainly not as widespread or as commonly practiced as in New Zealand or Canada for example, but are quite promising. Lynette Parker, a justice initiatives specialist for Prison Fellowship International, has published her findings on restorative justice in Latin America, detailing developments in Argentina, Brazil, Chile, Costa Rica, and Mexico. Her paper discusses justice system reforms on a structural level, the Alternative Dispute Resolution (ADR) movement, and the growing recognition of the needs and rights of victims of crime. Many of these new governmental and social foci have taken the form of mediation programs. It should be noted that while mediation is not necessarily restorative justice, it does fall within the continuum of restorative practices. Likewise, the ADR movement, while a very positive step in judicial

transformation in Latin America, can be considered a restorative practice, but is not restorative justice.

Argentina began to introduce mediation in civil cases in 1992, and expanded this program with a legal reform in 1995. Eventually, the program was expanded into penal mediation cases, and in 1998 the Alternative Dispute Resolution Project pilot program was launched in Buenos Aires. Within this program, mediation can be requested by either the victim or offender, and a choice is offered of mediation, conciliation, or a moderated conciliation conference. Mediation is the simplest option, while conciliation is used in cases where apparent social inequalities exist, where there is a poor climate for communication, where there are many layers of conflict, and when more than one person is involved on each side. The conference option is used when the victim and offender do not agree on the facts of the case. This entire program was launched with changes in the criminal law codes, and is offered by the government in conjunction with the NGO Fundación Libra.

Brazil has taken a multifaceted approach to restorative justice by introducing programs in public schools, the justice system, the prison system, and the community. Because of the success of the *Projeto Jundiai* program in schools, its principles have been extended to the youth justice system which now gives judges the discretion to suspend legal prosecution in cases of first time offenders of less serious crimes. The traditional justice system now has formal programs of penal mediation and conciliation.

The Brazilian prison reforms are of particular interest. Developed by the Association for Protection and Assistance to the Convicted (APAC), Brazilian prison

officials have created a unique prison management system that has since expanded into many other Latin American countries. The APAC methodology strives to “create a strong community environment among prisoners and volunteers that fosters spiritual, behavioral and lifestyle changes” (Parker, 2002: 13), with a focus on unconditional love, human valorization, evangelization, and spiritual transformation. The program also allows for differential interpretation of its methodology for a better translation across cultural and religious traditions. It is ideologically very much like faith-based restorative justice programs in the United States, and has been incorporated as Communities of Restoration as a special program of Prison Fellowship International.

Restorative justice in Chile has been approached through the combined efforts of the government and civil society. The country is working to place a greater emphasis on victims’ issues, create community mechanisms for dealing with conflict, introduce mediation projects into schools, and include reparative agreements in the new criminal law codes. In conjunction with the Catholic University of Temuco, a Center for Alternative Dispute Resolution has been created and is available for use as an alternative to the traditional system. Also of note are the community Assistance Units for Victims of Violent Crimes.

Costa Rica’s efforts at creating a more restorative justice system are largely coming from government institutions. A 1994 outside evaluation of the state system critiqued a lack of access to justice, and a lack of alternatives to the court system. Since, a number of legal reforms have been enacted including the Law of Alternative Conflict Resolution and Social Peace. A new governmental focus has been placed on judicial

transparency, the improvement of services, streamlining of the system, and the NGO-driven restorative focus aimed at reintegration and societal transformation. During the summer of 2006, Costa Rica held a national conference on restorative justice, and has since adopted a plan similar to Brazil in which they are aiming at creating restorative practices in the schools, legal system, and prison system.

Mexico is a little farther behind in the institutionalization of restorative practices, but has made some significant reforms. Efforts are being made in the creation of alternative criminal conflict resolution measures, and a law passed in 2001 officially identified restorative justice and recognized the need for victims' rights. The NGO Foundation Center for the Attention of Victims of Crime (CENAVID) has created a Center for Conflict Resolution and is working in select parts of the country including one of the most violent neighborhoods in Guadalajara.

### ***Involvement of Civil Society***

Civil society is most often thought of as the third participant (next to political institutions and the economy) in democratic governance. Civil society includes social and political organizations as well as religious groups, and if not actually sharing the same meaning, civil society and community are very closely linked. Just as community is the third stakeholder in restorative justice, the church groups, volunteer organizations, and countless other types of NGOs that make up modern civil society are of utmost importance to the success of the restorative justice movement. Indeed, these groups often represent the community as the third stakeholder in a system of tripartite representation.

Because of the sensitive and case-specific nature of most restorative justice practices, the process cannot be left to government institutions alone – the involvement of the community is the key. “Civil society is of importance to the restorative justice debate because of the pessimism criminologists have that any single state intervention in a delinquent life can turn it around” (Strang and Braithwaite, 2001: 6). As restorative justice is incorporated into the justice system, the participation of both government institutions and civil society therefore is necessary.

Civil society values of healing and reintegration, as well as the desire to transform Latin American society from a culture of violence to a culture of peace, are moving those reform efforts in a restorative direction. This duality is characterized by a tension between State and civil society efforts. While government driven reform will lean heavily toward rehabilitation and easing the strains of the justice system, the goals of healing and transformation voiced by civil society groups increases restorativeness. (Parker, 2002: 24)

The governmental institutions serve to standardize, legitimate, and facilitate restorative processes while civil society groups are needed for much of the individual support and volunteer activities that are so crucial to the process.

Just as community is central to the success of restorative justice, civil society’s role in the creation and maintenance of democracy is well established. Democracy, restorative justice, and civil society/community are all linked and rely upon each other. The maintenance of social order is the goal, and as LaFree concludes, “Crime can seriously undermine a society’s social capital” (1998, 72). In this sense, it must be the combined effort of government and civil society along with restorative justice to create a strong democracy. Heather Strang and John Braithwaite write about a “virtuous circle”

where restorative justice, civil society, and state authority all create and support each other (Strang & Braithwaite, 2001: 9-10).

As discussed in chapter 2, democracy and development have shown to be very closely linked both practically and ideologically. Allowing for citizen participation in governance, and creating more effective avenues for peace are basic ideas of both democracy and development, and restorative justice. “Just as restorative practices and the values of restorative justice have a useful contribution to make to peace in the world, so they have something to offer the sustainable development that is one of the conditions for that peace” (Braithwaite, 2002: 211). In another vein, it is important to see the close ties between civil society and culture. It is the political and social culture of a society that provides for the active participation of civil society in governance. Because it is shaped by and so closely linked to culture, this active participation is instrumental to the international application and adaptation of the restorative justice methodology.

The search for community, politically understood as the activism of civil society, says much about modern Western society. The fact that it is something to be sought out or created indicates that it may not necessarily be an intrinsic part of our lives. On the other hand, for many indigenous groups and non-Western societies, community is a major part of their very existence. Not only as we export the restorative justice philosophy, but also as we seek to build it in our own societies, the practical and conceptual issues with regard to community must be examined. We must examine how civil society interacts with the government and the justice system, and how community is defined and understood by many different groups of people.

## ***Conclusion***

Restorative justice is usually considered a non-institutional approach to crime, focusing more on the community members and individuals harmed. But, because of modern social expectations and the pervasiveness of the established legal tradition, the restorative justice movement finds itself working with and/or within the legal system. The theological and practical differences between restorative justice and the traditional system are many and constantly come into conflict, especially in the United States. As the movement grows and spreads and becomes more global, these institutional considerations must be incorporated. Not only must restorative justice insert itself into public consciousness, but it also must find its place amongst laws, judicial traditions, formal state structures, and legal histories.

Fortunately in Latin America the procedural mindset is shifting. The status quo of violence and insecurity is being challenged, the legal frameworks are being adjusted, and a more balanced approach to victims and victimology is becoming established. Political and economic modernization is the current focus in the region, and popular support for positive reforms is increasing. Restorative justice, acknowledging these changes, must work with and within local institutions to achieve its goals.

## **CHAPTER 5**

### **INTERNATIONAL APPLICATIONS**

Thus far I have discussed hypotheticals and generalities that may affect the global spread of restorative justice. In this chapter I am going to use the considerations presented in the previous chapters, and apply them to Costa Rica in order to provide a case study example of how cultural differences might affect the implementation of restorative justice in a foreign country. What I have created here can be looked at as a sort of cultural rubric for the globalization of restorative justice. Each consideration is to be compared and placed within the cultural reality to assess the potential challenges and adjustments that may be necessary for the successful implementation of restorative justice methodology. Each of these considerations has relevance and can be examined with regard to the realities of any country or culture. Costa Rica is by no means an extreme example (as might be India, Haiti, or sub-Saharan Africa), but it is the country in which I have the most experience. It is also institutionally close with the United Nations, and most importantly is currently pursuing a multilateral restorative justice initiative.

### ***Background on Restorative Justice***

As a result of the plans made at the 2006 national convention on restorative justice, and according to the recommendations of the United Nations, Costa Rican officials are spearheading a campaign to implement programs of restorative justice in the national education, prison, and justice systems. The Costa Rican initiative is part of a larger ILANUD project called the Creating Restorative Justice in Latin America Program (*Programa Construyendo la Justicia Restaurativa en América Latina*). The website describes the Costa Rican program as a joint venture between ILANUD (Latin American Institute of the United Nations for the Prevention of Crime and the Treatment of the Offender - *Instituto Latinoamericano de la Naciones Unidas para la Prevención del Delito y el Tratamiento del Delincuente*), the Prison Fellowship International, the Costa Rica Commission for the Betterment of Justice, the Costa Rican lawyer's college, the law department at the University of Costa Rica, the University of La Salle (Costa Rica), and a non-profit called *Círculos Asesores y Consultores*. Their mission is to create awareness, to support the creation of legislation and to create strategies and national restorative justice programs on both national and regional levels. ILANUD and their cooperating institutions are working to facilitate, investigate, and provide technical assistance to interested parties - particularly civil society, governmental, and non-governmental groups.

The ILANUD website provides a detailed description of the objectives of the Latin American restorative justice project:

*General Objective:* Contribute with Latin American countries in the execution of the goals of the United Nations with regards to the prevention

of crime and criminal justice, developing and promoting the creation of a culture of restorative justice that works with the reduction of violence and delinquency, to the consolidation of systems of criminal justice administration that are more efficient and effective, to the respect of human rights and fundamental liberties and to the promotion of strict norms of equity and humanity.

*Specific Objectives:*

1. To identify experiences and systemize and share the knowledge gained from successful restorative justice programs in Latin American countries.
2. To promote and facilitate the discussion, the exchange of knowledge and training on the topic of restorative justice.
3. To support national initiatives oriented toward the creation of legislation and public policies or the implementation of specific restorative justice programs.
4. To promote political conditions in countries that favor the development of national and regional initiatives on the topic.
5. To foster the increased participation of civil society, governmental organizations, and non-governmental organizations interested in restorative justice. (my translation)

According to the official conclusions and plan of action from the 2005 conference,<sup>9</sup> Costa Rica is taking a three-part approach to the implementation of the philosophy in the country: they are aiming to create restorative practices at the judicial, prison, and education systems. The conference concluded with a Costa Rican Declaration on Restorative Justice in Latin America, and a national plan of action which includes:

*The development of activities such as:*

the publication of the report  
spread Restorative Justice by means of mass communication  
create a website for Restorative Justice at the national level  
spread Restorative Justice by means of the Lawyer's College radio program

*Sensitization:*

To convince the employees of the national judicial system to break with traditional ideas

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<sup>9</sup> See appendix for the 2005 Costa Rican Declaration on Restorative Justice in Latin America.

To convince communication media not to let sensationalism dominate

*Training:*

Develop training programs about restorative justice for the formation of facilitators and trainers of these processes directed at:

Members of the judicial system

Law students

Directors and administrators in the education system

Students of education, teaching, psychology, guidance, social work, sociology, and in general for all those professionals who are involved in the education of children and adolescents

Employees of NGOs, public entities that work for human rights and attend to the needs of vulnerable communities

*Pilot Programs:*

In particular, it is important to create and support programs such as:

Programs of reconciliation and mediation in judicial processes

Programs of transformation and resolution within the prison system, in particular it is important to support the APAC program being used in the Old Cartago Prison

Programs to support prisoners completing their sentences

Programs of conflict resolution in the education system using restorative practices, peace circles, cohabitation simulations, peace education, networks for violence prevention, and other programs that share the basic fundamentals for the creation of harmonious relations between the diverse actors in the education community: directors, administrators, students, and parents.

## ***Cultural Issues***

### *Community*

One of the most well known facts about Costa Rica is that it is a stable democracy with no standing military. Costa Ricans celebrate the fact that they are a peace-loving people and have a long history of the democratic resolution of conflict. This stability and harmony is often attributed to the relative cultural homogeneity of the population (Biesanz, M. H., Biesanz, R., & Biesanz, K. Z., et al., 1999: 5). Today indigenous peoples comprise only one percent of the country's population; 94 percent is considered

white or *mestizo*. Roman Catholicism is by far the most practiced religion with roughly 80 percent claiming themselves believers. Costa Rica also has a rather large, healthy and well-educated middle class. Health care is provided free to all citizens and education is highly valued throughout the country.

Socially, Costa Ricans are known to be extremely polite and conscientious toward others. “Raised voices are seldom heard, fights rarely seen, and Ticos will nod or say “*si*” even when they don’t mean it simply to avoid conflict” (Biesanz et al., 1999: 7). Curiously, despite a cultural tendency toward compromise and negotiation, in political polls a majority of Costa Ricans show little trust in their compatriots (Clark, 2001: 85). Mavis, Richard, and Karen Biesanz write:

This *si pero no* (yes but no) attitude allows Ticos to find ways out of difficult situations by means of compromise. Decisionmaking *a la tica* means constant bargaining in an effort to avoid conflict, even though the problem may not really be resolved. Decisions are postponed indefinitely and, once made, may never be implemented. Some Ticos scorn this behavior as *palanganeo*, evoking an image of riding the waves unsteadily in a *palangana*, or basin, tilting from side to side, getting nowhere. Others call it achieving consensus. (1999: 7).

The Costa Rican tendency toward compromise and away from conflict has contributed to the country’s reputation as a peaceful democracy. On the other hand, the critique that Ticos are not particularly proactive does have merit. This “general passivity...often translates into a lack of initiative. At government levels, politically contentious issues go unresolved for years” (Baker, 2001: 89).

Despite Ticos desire for social peace, they are highly individualistic. Costa Rican essayist Abelardo Bonilla has written that citizens of his country have a “negative attitude toward all forms of association and collective enterprise...the Tico is such an

individualist that he plays soccer only by a miracle” (Bonilla, 1971: 281). Incorporated into Costa Rican individualism, is the extreme importance of family. So much so, that most intimate relationships are formed only within the family, and foreigners have a difficult time making close Tico friends.

These Costa Rican traits of individualism and peaceful compromise would appear socially antithetical, but they seem to work well together insofar as national cohesion and development. With regards to restorative justice, Ticos place a high importance on their acceptance by the community and the desire to *quedar bien* – to leave a good impression.

The Biesanz’ write of a 1993 crime illustrating this desire for social acceptance:

The masked gunmen who trapped Supreme Court magistrates in the court building for several days in 1993, demanding ransom, were assumed at first to be Columbians involved in narcotics traffic. When their speech betrayed them to be Ticos, wrote Dery Dyer, editor of the *Tico Times*,

we suspected the jig would soon be up....It’s one thing to be up against an unknown, unpredictable menace represented by anonymous masked men of undetermined nationality; it’s quite another when you know you’re dealing with a couple of *majes* [ordinary guys] from Tres Ríos....Costa Rican cultural *idiosincrasia* is so strong, it...supplied the government with its most powerful weapon to use against them. Once unmasked, [the kidnapers] deflated like leaky balloons, reverting almost immediately to their Tico selves....The members of the “Death Commando” were real terrorists as long as nobody knew who they were. Once their identities were revealed...the kidnapers found themselves facing the dreaded disapproval of family, friend and countrymen. They wrote a letter pleading for understanding: Guillermo, they explained, was desperate to get a liver transplant he believed he needed, but they would never have hurt their hostages. They pleaded for their families’, friends’ and society’s forgiveness and apparently felt they had regained the right to re-enter its loving embrace: outcasts no longer, they were Ticos among Ticos, civilized, peaceful and gentlemanly. So thoroughly had they slipped back from terrorist into Tico mode that they ended up trustingly laying down their weapons and walking wide-eyed into a police trap (Dyer, in Biesanz, et al., 8).

Despite Costa Ricans' perceived individualism, their desire to be an equal and accepted member of community lends itself well to restorative justice practices. In the kidnapping case, the offenders appealed directly to the community, seeming to place greater importance on the judgments of and harms to their community than to the judicial authorities.

A second example of restorative communities in Costa Rica can be seen in the support of the operation of the prison systems. The country operates thirty-two facilities all operating at or over capacity. There are over 8,000 incarcerated individuals and this number has almost tripled in the past fifteen years. The prisons themselves are quite different from their United States counterparts. One facility I visited, Cororí (the oldest in the country) looked more like a country residential facility than a prison. There were flower beds lining the walkways, horticulture and agriculture projects, and a new building under construction – all inmate projects. Many detainees at Cocorí were training and working on the manufacture of arts and handicrafts. On weekend visitation days, not only family members, but other community members would visit the prison to purchase the products. Prison director Ricardo Calvo described a very positive relationship between the prison and the surrounding community. One San José university even sells the prisoner's crafts at their own art festival in the capitol.

I was able to visit another facility at the Old Cartago Prison (*Antiguo Carcel de Cartago*). This building housed only forty inmates and was operating under the faith-based APAC (Communities of Restoration) philosophy. The program is multifaceted and has been proven extremely successful in rehabilitation and restoration in many Latin

American countries. One of the program requirements is inmate family support. The prison director explained that for those inmates who did not have family or whose family lived at a great distance, surrogate families were used to create communities of care. Here I was particularly impressed by the voluntarism of the community and their willingness to be a part of the rehabilitation process of an unknown prisoner.

It has been said that Costa Ricans are perhaps *too* fond of democracy, “painstakingly hearing all points of view and voting to make decisions....Costa Rican political culture also promotes compromise and consensus. Parties to a dispute tend to seek mutually acceptable solutions...permitting compromise and face-saving on both sides” (Booth, 1999: 446-7). Costa Ricans are known for their desire to “do what is right” and for valuing politeness and propriety in all situations. With a population of near 4 million, these social norms actually contribute to a sense of national community. The role that community plays in restorative justice is very like its social understanding in Costa Rica. These social tendencies seem to indicate an ideal situation for restorative justice.

### *Nicaraguan Migration*

The situation of migration, primarily from Nicaragua into Costa Rica is a major social issue, and a black mark on the claim of Tico hospitality. Foreigners living in Costa Rica represent about 10 percent of the country’s population, 8 percent of those Nicaraguans. Of those, 80 percent are living below the poverty line and 44 percent live in extreme poverty (Sandoval García, 2004: 434-5). As the beacon of peace and democracy in Central America, Costa Rica is a popular destination for immigrants, but

increasing levels of xenophobia and racism make the country a rather hostile environment for resident foreigners.

Many of Costa Rica's endemic political and economic issues are being blamed on immigrants and immigration. "Rampant anti-immigrant sentiment entered into the mainstream to an unprecedented degree, in part facilitated by renowned intellectuals' discourse on immigration as a threat to national identity which linked together previously disparate negative images" (Sandoval García, 2004: 437). Not only are Nicaraguans not socially accepted in Costa Rica, they are the victims of systematic oppression. Undocumented immigrants are excluded from obtaining health insurance or credit, and are less likely to report abuses and claim their rights.<sup>10</sup> These vulnerable populations have no guaranteed access to the basic social services provided by the Costa Rican state, are racially criminalized and targeted by the police, and are systematically excluded from protective labor laws of the system in which they are employed (González Alvarado & Sánchez, 2002:104).

These intense anti-immigrant sentiments in Costa Rica will present a challenge for restorative justice. First, just as undocumented migrants are impeded from participation in the current system, so would they likely be excluded from a national restorative justice program. Also, because the Costa Rican and Nicaraguan migrant communities are kept so separate, a restorative conference in which members of both actively participate would be difficult to obtain. The xenophobia and racism that exist in Costa Rica, and the

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<sup>10</sup> Immigrant rights in Latin America are protected under the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and as a stipulation in the process of establishing the Free Trade Area of the Americas.

violations and crimes that may result could very easily be likened to hate crimes. Restorative justice and hate crimes have historically held a tenuous relationship (Kelly, 2002).

Although it is generally agreed that the process can be used in crimes motivated by racism and hatred, its successful application in this area has been restricted to a select few. In November of 2005, Natividad Canda Mairena, a slightly mentally impaired Nicaraguan man was attacked and killed by guard dogs in the Cartago repair shop where he had on previous occasions been allowed to take shelter for the night. Shortly after the two rottweilers began their attack, the shop owner and neighbors arrived at the scene. The attack was caught on film and watched by a number of spectators; it went on for two hours until police officials finally turned water hoses on the dogs to stop them. Canda died minutes after finally being hospitalized. Officials were never penalized, the shop owner was allowed to keep his dogs and his livelihood, and to this day the vast majority of Costa Ricans see nothing wrong with the events related to the incident.

Where might be the potential for restorative justice in this case? If, as is the intent, a national restorative justice program were in effect, would it be applied to the Natividad Canda case? Restorative justice cannot happen if the offender does not admit his or her guilt. Because of its racial nature, Costa Ricans overwhelmingly do not see this incident as a crime, and none would admit malicious compliance. Despite the existence of an alleged Tico peaceful identity, Nicaraguans are completely excluded from this phenomenon. Restorative justice has great promise in Costa Rica, but its potential is effectively restricted only to those perceived to be members of mainstream society.

## *Indigenous*

Indigenous peoples comprise only one percent of the Costa Rican population, but their beliefs and traditions should also be considered as a part of the national restorative justice initiative. The Bribri, Boruca, and Cabecar tribes are the most cohesive groups of the country's eight existing indigenous societies. All are located in the most remote locations of the country, and are largely ignored by the state. Boruca leader José Carlos Morales says, "When the moment arrives for CONAI (National Commission for Indigenous Affairs) to stand up for the indigenous people, they don't dare. They duck down behind their desks and wait for their paychecks to arrive" (Baker, 2001: 87). Likely due to their dwindling numbers, the social organization of Costa Rica's indigenous groups is not well documented. Most groups are organized into clans, and in some circumstances tribal leaders have been named by the state (although their authority is left mostly unrespected).

Though Costa Rica's indigenous population is proportionally small, their political and cultural influence is actually increasing. Granted citizenship in 1991, and included under the United Nations Treaty on Indigenous Populations and Tribes, the indigenous visibility in Costa Rica has grown in recent years. There is an increasing national tendency to speak of "our indigenous ancestors" and to value this traditional heritage.

Recently, a restorative circle was organized by members of *Círculos* and the National Commission for the Betterment of Justice in an indigenous Boruca community. A twelve year property dispute amongst members of the primarily subsistence community was the topic of the circle. United States practitioner Kay Pranis was the

facilitator, and the proceedings had to be translated through three languages (from Gnöbe to Spanish to English and back). Including the individuals directly involved in the dispute, there were approximately thirty people present, not including the countless community members that observed the circle from outside the pavilion area. In contrast to typical circle processes in which confidentiality is an important value, in this case the publicity of the experience played a very positive role. “In reaching a resolution to the conflict, the participants knew that they were creating an example for the observers and, therefore, felt largely responsible for the success of the circle” (Castillo & Tello, 2006). During the nine hour process, restorative justice achieved the peaceful compromise to a dispute that had seemed impossible for years. Here, the importation of a restorative model worked well. It is possible that because the circle process is so basic and rather universal, that it was a good fit for this community. On the other hand, Conte Burica is very isolated and is almost a day’s journey from San José., and it is possible that in the months since the circle, the agreements reached in the circle have not been upheld, and that the dispute has actually continued.

Because the populations are so small and not much is known about their internal peacemaking processes, it would be hard to apply the oft equated indigenous traditions and restorative justice to Costa Rica. On the other hand, the heightened recognition of indigenous culture, and the highly publicized restorative circle in Conte Burica, indicates that a national restorative justice program should incorporate indigenous traditions as much as possible.

### *The Catholic Church*

As in most of Latin America, the Catholic Church plays a major role in daily life. “Costa Rica’s Catholic Church is, in the absence of an army, the strongest traditional organized institution after the state. It is also among the most respected” (Biesanz et al., 1999: 232). Unlike the United States which places great importance on their separation of church and state, Costa Rican politics are very closely tied to the opinions of the Church. Tico writer Hugo More Poltronieri has called the Catholic Church the fourth power of the government, and points out that taxes paid by non-Catholics help support it (1992).

This virtual non-separation of church and state in Costa Rica has bearing on the restorative justice initiative. Typically, restorative justice practitioners whether they choose to take a religious approach or not, are forced to draw a distinct line between their operations and any religious connections. It is often remarked that spirituality has an integral part in the restorative justice process (Bender & Armour, 2007), yet religious groups are often kept from actively participating in state or national programs. In this respect, the close ties between the state and religious groups could be extremely beneficial to the restorative justice movement, but it also runs the risk of alienating the non-Catholic portion of the population.

When I was working with the Costa Rican NGO CEFEMINA, the task was to compile a list or network of all local restorative justice programs in order to incorporate them into the national initiative. I asked about whether I should separate faith-based and secular local restorative justice programs, and the director gave me a curious look as if to

say “Why?” For me, my question was an example of how easy it is to assume that our Western beliefs cross borders. Something so ingrained into our culture and way of thinking as separation of church and state is seen as completely unnecessary in Costa Rica. This is an area of which Western practitioners must be aware and ready to adapt United States practice to local realities.

### *Colonial Legacy and Imperialism*

Unlike the majority of developing countries, Costa Rica did not have a particularly violent colonial or independence period. The land and peoples were not seen as valuable to the colonizers, and settlement and development were not priorities. A feudal *encomienda* system, so prevalent in colonial Latin America, was never established in Costa Rica. This is allegedly from where the Tico identity was born. The popular phrase is that with no historical hierarchy, all Costa Ricans were *igualitos y hermaníticos* (equals and brothers). Despite Spain’s neglect, there had been no substantial independence movement, and the country’s sovereignty was granted almost by surprise in 1821.

The only major war ever fought in Costa Rica or by Costa Ricans was against United States invader William Walker. In the mid 1800s, Walker’s manifest destiny mission led him to seek political control of Central America. For a period of about fifteen years, Walker attempted to conquer and create a confederacy of southern American states. In 1856 he was defeated by Costa Rican soldiers. Walker threatened more invasions of Costa Rica before being killed by a firing squad in Honduras in 1860. The experience of William Walker is one of the most important international events in

Costa Rican history<sup>11</sup>; one historian has called it more important than independence from Spain (Rollins, 1945).

Costa Rica is one of the infamous “Banana Republics”, a fact that symbolizes imperialism and dependency. The United Fruit Company, founded in 1899, brought both infrastructure and oppression to Costa Rica.

[It was] a new form of business enterprise: the multinational company...in many instances more powerful and larger than the host countries in which it operated...United Fruit bought protection, pushed governments around, kicked out competition, and suppressed union organization.

[In the host countries] the United States Government and the Octopus [the UFC] whose interests and policies that government nurtured were seen as one and the same: brutal, monolithic, oppressive (McCann, 1976: 160).

The impositions of the United Fruit Company are likely the most intense and directly oppressive instances of historical U.S. imperialism in Costa Rica. But, the United States does still have quite a history of “meddling” in the country. Costa Rica has become a popular tourist and ex-patriot destination, and the cultural influence is significant. Economic disparities and elite enclaves have emerged in recent years, and the Tico proclivity toward U.S. products is noticeable. The recent political and economic negotiations over CAFTA (Central American Free Trade Agreement) are also influenced by the United States. During the past year there has been much contention in Costa Rica over the terms of the regional trade agreement. Citizens are concerned that CAFTA will give preferential terms to the United States, and not equally value Costa Rica as a trading partner.

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<sup>11</sup> Coincidentally, the U.S. Ambassador to El Salvador from 1988 to 1992 was named William G. Walker. He received a degree of opposition throughout Latin America as a result of the bitter feelings toward the colonial conqueror.

Though Costa Rica has never suffered a U.S. sponsored coup, oppressive military rule, or great ethnic conflict, the effects of imperialism and colonial legacy can still be felt. Unlike certain other Latin American countries where ideological and political tension with the United States seems to dictate opinions and policies, Costa Rica's relations with the United States have always been relatively positive. Despite this perceived convergence of values, it would still be advisable for the practitioner to consider colonial legacy as a part of modern reality. There will exist a certain degree of tension between citizens of any developing country and the West. In many instances the West represents everything that the developing world does not have. It is into this cultural and social atmosphere that the restorative justice movement is trying to spread. Participants in the movement should certainly keep in mind the growing anti-American feelings in Costa Rica, and to consider what some of the cultural responses might be to the perceived importation of restorative justice from the North.

### ***Institutional Issues***

#### *Democracy*

Costa Rica is Latin America's longest-standing and most stable democracy. "When asked about their preferences in political regimes, 80 percent of Costa Ricans responded that democracy was preferable to any other form of government" (Clark, 2001: 76). Unlike other Latin American countries, Ticos actually believe in and participate in Costa Rica's democratic system. The government is unique in Latin America for its system of checks and balances and its separate institutional branches, but it is similar to

other countries in the region for its centralization. “The Costa Rican state is unitary, dominated by a highly legitimate central government. The powers and attributes of the nation’s seventy-five municipal (county) governments are modest; the provincial governments are ephemeral” (Booth, 1999: 442-3). The hierarchical centralization of the state government may result in rural neglect, as in the Argentine case. Despite laws that require criminal cases to be heard within six months, judicial backlogs mean that it often takes years for a case to reach the judge. This discouraging reality, coupled with the lack of political power outside of the capitol, may cause citizens to find their own responses to crime. Perhaps this could explain the unresolved dispute in the Boruca community, and their willingness to use alternative means.

Crime is a major issue in Costa Rica. “Measured in terms of crimes per 100,000 inhabitants, most types of offenses have risen steeply since the 1980s. Between 1987 and 1996, property crimes increased 25 percent; and between 1985 and 1996, violent crime rose 44 percent, homicides 25 percent, and sex offenses 40 percent” (Clark, 2001: 88). Within a generation, San José has virtually fenced itself in; every home is separated from the street by an 8-foot padlocked fence. Statistics show that Costa Ricans believe the main priority of a democracy should be to combat crime. According to survey figures, fighting crime is more of a democratic priority than electing officials, distributing wealth, and protecting minorities. Of particular concern is the popular opinion on crime fighting tactics: “57 percent of Costa Ricans said that the authorities should try to punish delinquents even if that meant not abiding strictly by the law” (Clark, 2001: 88). These statistics seem to indicate a social distinction between criminals and incarcerated

individuals. Public opinion favors punitive measures for law breakers, but supportive environments for prisoners. This perceived difference may challenge the traditional restorative justice model.

### *Legal System*

The Costa Rican national restorative justice plan created at the 2005 conference states the desire to institute restorative programs in schools, prisons, and the judiciary. Two years after the conference, there exists only a framework for a pilot program for the education system (written by a U.S. ex-pat). The director of CEFEMINA told me that they hope to develop the plan for the prison system soon, but she's not sure about the judicial branch of the project. She said, "I don't really understand that legal stuff," and left it there.

Costa Rica, like its Latin American neighbors, operates under a civil law system inherited from Napoleonic and Spanish traditions. And, like most colonial strategies, "Spanish colonial criminal procedure was characterized by reliance on laws predicated on inequality of subjects and protection of the Crown's property and economic interests" (Salas & Rico, 1993: 12). Most Latin American countries directly transplanted the legal codes of their colonizers.

Latin American codification largely began by copying from European countries rather than reviewing and adapting the achievements of their neighbors. Commonly, its authors were the privileged few who could study in European universities or traveled to professional meetings and brought back the newest code for adoption in their country. This blind copying, oftentimes using poor translations, has continued to the present and led one reviewer to conclude that the process of Latin American codification could be characterized as "legislation by tourism and correspondence" (Salas & Rico, 1993: 13).

Regardless of whether the codes are country or regionally appropriate, European-inherited legal traditions are the norm in Latin America, and certainly contribute to the regional difficulties in responding to crime.

Costa Rica shares this legal history with its regional neighbors, but today has one of the more modern judicial systems. Since 1973 the country has operated under a mixed inquisitorial and adversarial system (CEJA, 2002-3: 9). Also, the National Commission for the Betterment of Justice is included as a branch of the judicial system, and its mission is to constantly evaluate the efficacy of the country's judicial system and to propose improvements (CEJA, 2002-3: 7-8). In recent years, Costa Rica has undergone some major judicial reforms. Most central to restorative justice is the 1993 institutional Modernization Plan, in which one of four components was the development of alternative dispute resolution (ADR) methods. The judicial modernization program culminated with the passing of a national law for the promotion of ADR. The alternative methods primarily center upon mediation, and all lawyers are required to inform their clients of the available methods for dispute resolution (CEJA, 2002-3: 14).

In 2002, a loan from the Inter-American Development Bank allowed for the articulation of new focal areas for the Modernization Plan. These emphases seem to indicate a movement toward restorative practices, and include:

- promoting out-of-court settlements of disputes
- improving the relationship between the police and the community
- a focus on assistance for victims of crime
- generating policies for promoting non-judicial resolutions. This segment includes formulating proposals for promoting out-of-court settlement for lawsuits where judicial intervention is not justified (CEJA, 2002-3: 16-7).

At the same time, the Costa Rican Supreme Court approved a 2000-2005 Strategic Plan for the judicial branch (CEJA, 2002-3: 18). Optimizing methods of alternative dispute resolution and dejudicialization were again included in the program.

On paper<sup>12</sup>, Costa Rica has been ready for restorative justice for many years. They have created space in their national judicial systems, and on more than one occasion declared their desire and intent to promote alternatives to the judicial system. A Dispute Resolution Unit now exists within the judicial academy, and pilot projects in mediation, conciliation, and arbitration have been created. In response to the CEFEMINA director's misgivings and unfamiliarity with the judicial system, I would argue that Costa Rica is more than institutionally ready for restorative justice. The motivation, interest, and framework already exist for judicial alternatives. During the ADR resolution of the 1990s, the program trained over 3,500 individuals in methods of alternative dispute resolution (CEJA, 2002-3: 14). To incorporate restorative justice into the current national program would require little more than the proper training.

### *Civil Society*

Although Costa Ricans are often characterized by their individualism and their aversion to forming or joining social groups (Biesanz et al., 1999: 270 & Booth, 1999: 445), recent years have seen an increase in the activism of civil society. “[M]any such associations have been formed in the past few decades – a common trend in ‘developing’

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<sup>12</sup> It would behoove the reader here to note a number of authors' views on the Tico persona. “Costa Ricans tend to be formalistic and legalistic as well as conservative. They pass laws, create agencies and institutes, and hold meetings and symposiums to ‘solve’ problems – often only symbolically” (Biesanz et al. 1999: 11). “[For Costa Ricans,] Saying is more important than doing, announcing than acting” (Naranjo, 1977: 105).

societies, where many new wants arise and where older means of satisfying those basic needs,...have become less adequate” (Biesanz et al., 1999: 270). These civil society groups also include political participation and organizations. “The absence of a standing army greatly strengthens the authority of civil government, and extensive and generally respected social, economic, and civil guarantees provide a framework that facilitates citizen political participation” (Booth, 1999: 442). Levels of Costa Rican political participation are significantly higher than in other Third World or Latin American countries (Booth, 1999: 445).

Along with the numerous international organizations and NGOs that take residence in San José, a number of local NGOs take very active roles in Costa Rican society. CEFEMINA (The Feminist Center for Information and Action – *Centro Feminista de Información y Acción*) emerged during the women’s movement of the 1970s, and today also promotes the national restorative justice initiative<sup>13</sup>. The operation of the APAC prison in Cartago is a joint effort of the prison system and Prison Fellowship International. PFI’s local branch, the *Confraternidad Carcelaria de Costa Rica* provides the APAC program and facilitates the implementation of the faith-based program.

Another NGO *Círculos: Asesores y Consultores S.A.*, in operation in Costa Rica for the past two years, is directly working to promote restorative justice both locally and internationally. According to their website, *Círculos* is an international organization and states that:

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<sup>13</sup> For further reading on the relations between restorative justice and feminist theory, see Daly & Stubbs (2007).

Its purpose is to offer mediation and conflict resolution services through methodologies such as circles, restorative conferences, Alternative Conflict Resolution (ACR), offering innovative solutions to promote a culture of peace in Latin America....*Círculos: Asesores y Consultores, S.A.* offers a specialized service in conflict resolution using restorative justice methodologies and alternative conflict resolution. *Círculos* seeks to serve private schools, NGOs, churches, corporations and government agencies. Initially, the focus of *Círculos* will be in Costa Rica but will extend services to other countries in Latin America (*Círculos, 2007*).

Aside from offering their services to individuals involved in disputes, *Círculos* periodically conducts training workshops for circle facilitators. The seminars typically include five to ten people who, over the course of two days, are trained in restorative justice philosophy and circle processes.

### ***Conclusion and Analysis***

Many factors make Costa Rica a rather ideal location for the spread of restorative justice. The project has already been incorporated into a national plan of modernization, and many local and international groups are involved in the initiative. The social norms of compromise and accommodation can be expected to be highly receptive to the principles of restorative justice. The contemporary effects of colonization are relatively minimal, and relations with the developed world are largely positive.

Xenophobia and racism are major issues that restorative justice must consider. It also must establish a working relationship with the Catholic Church, and work to promote the principles amongst the general public. In the chart below each of my considerations has been aligned with Costa Rican cultural realities, and with the corresponding expected implications for restorative justice. This is by no means a complete analysis of Costa

Rica, nor does it include all the cultural considerations necessary for the successful implementation of restorative justice. This breakdown is meant to provide a procedural foundation for the movement toward the globalization of the philosophy. Each of these considerations can and should be applied to each and every society in which restorative justice seeks to spread. The following are my conclusions for Costa Rica:

*Table 1:*

**Template for Analysis of Cultural Considerations for Restorative Justice**

<b>Cultural Consideration</b>	<b>Cultural Reality (Costa Rica)</b>	<b>Implications for Restorative Justice</b>
<ul style="list-style-type: none"> <li>• Sense of Community</li> </ul>	<ul style="list-style-type: none"> <li>• Peace loving society that prefers compromise and social order</li> </ul>	<ul style="list-style-type: none"> <li>• Extremely receptive to the principles and the desire to avoid and repair harms.</li> </ul>
<ul style="list-style-type: none"> <li>• Indigenous and Minority Influence</li> </ul>	<ul style="list-style-type: none"> <li>• Major antagonistic issues with Nicaraguan migration, extreme marginalization of immigration and indigenous populations. Very little indigenous influence on mainstream society.</li> </ul>	<ul style="list-style-type: none"> <li>• Little to no indigenous linkage. Will be very difficult to overcome deep-seeded racist and anti-immigrant sentiments.</li> </ul>
<ul style="list-style-type: none"> <li>• Religion</li> </ul>	<ul style="list-style-type: none"> <li>• Close ties with Catholic Church. Little to no separation of church and state. Cultural proclivity for hierarchy, inspired by church structure.</li> </ul>	<ul style="list-style-type: none"> <li>• Good potential for faith-based restorative programs. Possible challenges with social hierarchies.</li> </ul>

<b>Cultural Consideration</b>	<b>Cultural Reality (Costa Rica)</b>	<b>Implications for Restorative Justice</b>
<ul style="list-style-type: none"> <li>• Colonial Legacies</li> </ul>	<ul style="list-style-type: none"> <li>• Historically mostly positive relationship with colonizers and the imperialist North. Increasing anti-imperialist sentiments surrounding tourism and migration, and economic and political linkages with the United States.</li> </ul>	<ul style="list-style-type: none"> <li>• A somewhat minimal, but increasing, degree of anti-Americanism. Perceived political and economic influence from other countries may be stronger than that of the United States.</li> </ul>
<ul style="list-style-type: none"> <li>• Political Systems</li> </ul>	<ul style="list-style-type: none"> <li>• Long history of democracy. Centralized government. Rapidly increasing crime rates.</li> </ul>	<ul style="list-style-type: none"> <li>• Democratic principles dominate. Centralization may actually allow for alternative methods to be promoted in rural areas. Increase in crime necessitates a more effective justice system.</li> </ul>
<ul style="list-style-type: none"> <li>• Legal and Judicial Systems</li> </ul>	<ul style="list-style-type: none"> <li>• Civil law system with a major focus on reform and modernization. Judicial improvements and alternative dispute resolution are other national foci.</li> </ul>	<ul style="list-style-type: none"> <li>• Ideal conditions for creation of restorative justice programs. Government and legal professionals are already in support of the initiative.</li> </ul>
<ul style="list-style-type: none"> <li>• Civil Society</li> </ul>	<ul style="list-style-type: none"> <li>• Recent increase in civil society participation. Active NGO community, particularly in the area of the promotion of restorative justice.</li> </ul>	<ul style="list-style-type: none"> <li>• Ideal conditions. Many community actors are already in support of the initiative.</li> </ul>

## **CONCLUSION**

Restorative justice is based upon many universal values, and its modern applications must also be conveyed as global possibilities. Its ultimate goal of repairing the harms caused by crime is truly an international necessity. Restorative justice has achieved much in a short amount of time, but it still has much farther to go. The past few years have seen a great international interest in the practice, and its promotion by the United Nations has done much to publicize the potential of restorative justice.

Today we are at the start of the full-scale globalization of the movement, and we must go about it carefully. If we, with the best of intentions, strike out to spread the philosophy, and forget to take into consideration the often major cultural and institutional differences that may exist, we are doing a great disservice to the movement. Developing countries should never be given the task of trying to adapt yet another Western practice to their own unique circumstances, all the while hoping that its implementation will actually prove effective. If we, as respectful global citizens, and we as the creators and supporters of the United Nations' guidelines and encouragement for the adaptation of restorative

justice, truly want to see the globalization of the philosophy, we must strive to recognize our own assumptions *and* become educated in more than one global and cultural reality.

As we saw in chapter 2, the popular theories and assumptions behind restorative justice are in need of analysis. Each component of the philosophy has its own biases and contextual application, and the role of restorative justice in governance can vary distinctly between societies. The quest for appropriate governing strategies and the rule of law is a major modern global focus, and restorative justice must assert its role within the dominant framework.

Chapter 3 examined the myriad of cultural considerations that can prove vital to the spread of the movement. Culture is a delicate concept that encompasses numerous aspects of personal interactions and coexistence. Restorative justice will surely take distinct forms and levels of effectiveness in different world cultures. It is imperative that a strong understanding of culture is included in any restorative practice, especially when being introduced into a new society. Old wounds like colonization and oppression, as well as new cleavages like the growing anti-American sentiments surrounding CAFTA are all important manifestations of culture. As promoters and practitioners of restorative justice work to internationalize the movement, the inherently different global traditions and cultures must be included into their frameworks.

Modern restorative justice, especially on an international scale, maintains a close working relationship with the state and the current justice system. All governments and local legal traditions are distinct, and as we explored in chapter 4, can have a great effect on the implementation of restorative practices. It will be left to further research to

determine whether or not civil law traditions and restorative justice are compatible, but it has been noted, perhaps coincidentally, that the countries having the most success with the philosophy operate under common law systems. Furthermore, the participation of civil society is invaluable to both good governance and restorative justice. The globalization movement must recognize this fact and determine whether favorable conditions already exist or must be created.

Finally, chapter 5 presented us with an analytical framework for the spread of restorative justice to individual countries. As we are in the initial stages of the global promotion of the philosophy, it remains to be seen how well the traditional restorative justice model will translate. It is the assertion of this paper that an analysis like that of the Costa Rican example presented here must be conducted on each country and society as restorative justice moves around the world. We must take care not to become so immersed in our own realities that we neglect to acknowledge global cultural differences.

Creating a safe atmosphere of understanding and acceptance is the first aim of restoration. This goal is not limited to one country or culture – it is universal. As our practitioners spread restorative justice to Argentina, to Taiwan, to Costa Rica, they must be prepared with the necessary cultural tools. Great care must be taken to present the philosophy and the common practices used in a context that is realistic and culturally appropriate for each society. When asked the question, “How does this apply in other cultures?” the practitioner will have the answers.

### ***Implications for Practice***

This paper has attempted to set the groundwork for a more effective approach to the globalization of restorative justice. The movement is truly just beginning its foray into new countries and other parts of the world, and it is critical that this be done with sensitivity and understanding. The experts of restorative justice are traveling the globe with great regularity to promote the philosophy and to encourage foreign development of restorative practices. When the U.S. State Department sends ambassadors abroad, they must first undergo an intensive training program in which they are educated on the politics, history, and culture of the country in which they are going to be working. This is done to avoid cultural misunderstandings and to make the ambassador's time abroad more productive and valuable to both countries. Imagine the possibilities for restorative justice if its ambassadors had the luxury of such training. An analysis similar to the one provided here should be made, if not as a requisite, as a general recommendation for practitioners traveling abroad. Further development of my considerations and my model will surely help to avoid any more "botched opportunities".

### ***Implications for Research***

In this work I have tried to show that aside from the stated principles of restorative justice, there are a number of unstated and assumed values. The existence of democracy, a strong rule of law and legal system, and general amenities and mindsets that are present in 'developed' societies are just some of these assumed principles. These ideas must be explored in the quest to globalize the movement. If they are indeed

prerequisites for restorative justice to succeed, this will create the need for major adjustments in philosophy and practice.

Additionally, I believe that there is merit in my hypothesis about the discord between civil law and restorative justice. It is possible that the movement has been able to so successfully flourish in English-speaking, Anglo countries because of their histories with the common law system and philosophy. More research needs to be put into the links between standing legal systems and restorative justice to determine if there is indeed a positive or negative affect of one on the other.

Finally, the analytical model I have created here is a preliminary outline of the type of tool needed in the restorative justice movement. Because I have written with a Latin American focus, certain considerations may prove to be more or less critical in other contexts. The addition of other considerations, those that may have more application in other regions, is also necessary. For example, the effects of religion and belief systems on restorative justice are not as strong in Costa Rica as they may be in India or Pakistan. The democratic government and society that exists in Costa Rica may be much more closely aligned with the principles of restorative justice than say those in communist China. Further development of my model and the possibilities for its application in other regions is needed.

## **APPENDIX**

### **Declaración de Costa Rica: Sobre la Justicia Restaurativa en América Latina**

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Reconociendo como fundamento la declaración de Aracatuba, Sao Paulo, Brasil y la resolución del Consejo Económico y Social de las Naciones Unidas del 13 de Agosto de 2002 y con el fin de promover procesos de Justicia Restaurativa, además de sostener estos procedimientos mediante información y comunicación a través de los medios a la sociedad civil y propiciar Programas de Justicia restaurativa que incluya todos aquellos que utilicen procesos restaurativos y busque resultados restaurativos,

#### **Considerando:**

1. Que América Latina sufre los mayores índices de violencia, de encarcelamiento, exclusión social y limitaciones.
2. Que lamentablemente se usan maneras distintas de aplicar justicia para ricos y pobres.
3. Que a pesar de existir herramientas de justicia restaurativa, las sanciones retributivas, en especial el encarcelamiento sigue siendo la sanción mas utilizada.
4. Que los procesos restaurativos, incluye la Asistencia a las víctimas, la mediación penal, y todos aquellos que busquen resultados restaurativos.
5. Que los programas de JR garantizan el pleno ejercicio de los derechos humanos y respeto a la dignidad de todos los intervinientes.
6. Que su aplicación debe extenderse a los sistemas comunitarios judiciales y penitenciarios.
7. Que se debe favorecer un proceso de sensibilización ante los organismos internacionales con la finalidad de modificar la legislación penal en favor de la justicia restaurativa como complementaria adoptando los principios e instrumentos restaurativos.
8. Que los principios y valores de la Justicia Restaurativa pueden contribuir para el fortalecimiento de una ética pública como paradigma de una sociedad más justa en los países Latinoamericanos.

#### **Esta Declaración Recomienda:**

**Artículo 1o:** Es programa de JR todo aquel que utilice procedimientos restaurativos y busque resultados restaurativos.

Parágrafo 1o: Procedimiento Restaurativo significa todo aquel en el cual víctima y ofensor y cualquier otro individuo miembro de la comunidad participe cuando sea adecuado juntos a la ayuda de un colaborador en la búsqueda de la paz social.

Parágrafo 2o: Podrán incluirse entre los resultados restaurativos respuestas de arrepentimiento, perdón, restitución, responsabilización, rehabilitación y reinserción social, entre otros.

**Artículo 2o:** Son postulados restaurativos los basados en principios y valores restaurativos tales como:

1. Garantía del pleno ejercicio de los derechos humanos y respeto a la dignidad de todos los intervinientes.
2. Aplicación en los sistemas comunitarios judiciales y penitenciarios.
3. Plena y previa información sobre las prácticas restaurativas a todos los participantes de los procedimientos.
4. Autonomía y voluntad para participar en las prácticas restaurativas en todas sus fases.
5. Respeto mutuo entre los participantes del encuentro.
6. Co – responsabilidad activa de los participantes.
7. Atención a la persona que sufrió el daño y atención de sus necesidades con consideración a las posibilidades de la persona que lo causó.
8. Participación de la comunidad pautada por los principios de la justicia restaurativa.
9. Atención a las diferencias socioeconómicas y culturales entre los participantes.
10. Atención a las peculiaridades socioculturales, locales y al pluralismo cultural.
11. Promoción de relaciones ecuanímes y no jerárquicas.
12. Expresión participativa bajo la observación del Estado Democrático de Derecho.
13. Facilitación por personas debidamente capacitadas en procedimientos restaurativos.
14. Uso del principio de la legalidad en cuanto al derecho material.
15. Derecho a la confidencialidad de todas las informaciones referentes al proceso restaurativo.
16. Integración con la red de asistencia social de cada país.
17. Integración con el sistema de justicia.

**Artículo 3o:** Las estrategias para implementar las prácticas restaurativas son:

1. Concientización y educación sobre Justicia Restaurativa

Abrir el diálogo sobre Justicia Restaurativa en las Universidades  
Implementar Programas de JR en todos los niveles educativos.  
Promover metodologías de la JR en la resolución de conflictos.  
Promover un cambio de cultura por medio de los diferentes medios de comunicación que muestren los beneficios de la JR

2. Promoción de la JR en las comunidades

Usar procedimientos restaurativos como herramientas para la resolución de conflictos.

Aplicar programas de JR

3. Aplicación de la JR en el sistema penal

Derivar casos judiciales a programas de JR

Usar la prisión como último recurso buscando soluciones alternativas a la misma.

Aplicar JR en el sistema penitenciario.

4. Legislación y políticas públicas

Aplicar con la legislación vigente de cada Estado políticas que apliquen la JR y además Desarrollar legislación según los postulados de la JR para eliminar o reducir barreras sistemáticas legales para el uso de la JR, para incentivar el uso de JR, para crear mecanismos que proveen dirección y estructura a programas de JR, para asegurar la protección de derechos de victimarios y víctimas que participen en programas restaurativos y para establecer principios guías y mecanismos de monitoreo para adherirse a dichos principios.

**Santo Domingo de Heredia**

**COSTA RICA**

**SEMINARIO CONSTRUYENDO LA JUSTICIA RESTAURATIVA EN**

**AMERICA LATINA**

**SEPTIEMBRE 21 AL 24 DE 2005**

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