

GROUP 2

ISSUES CONCERNING THE INTRODUCTION OF RESTORATIVE JUSTICE PROGRAMMES IN CRIMINAL AND JUVENILE JUSTICE SYSTEMS

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I. INTRODUCTION

This paper aims to briefly present some notions of restorative justice in criminal cases, and it shows the results of the discussions among the participants of the 156th Senior Seminar of UNAFEI.

The definition of restorative justice (“RJ”) programme utilized is the same as in the United Nations Basic Principles on use of restorative justice programmes in criminal matters — restorative justice programmes means any programme that uses restorative processes and seeks to achieve restorative outcomes. Restorative process means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles. Restorative outcome means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

Initially, we present an overview of restorative justice programmes in each participant country, as such, Brazil, Japan, Indonesia, Papua New Guinea and Thailand. After that, we discuss the implementation of new restorative programmes in each participating country. Finally, we show the results of our group discussions about the issues and challenges of restorative justice in an effort to improve the restorative programmes in the participating countries.

II. ESTABLISHED RJ PROGRAMMES IN EACH PARTICIPANT’S COUNTRY

A. Brazil

In Brazil, the RJ programme is handled by Special Criminal Courts — *Juizados Especiais Criminais* — and it was established by Law 9.099 in 1995, which aimed to increase the victim’s satisfaction with the criminal system and also to decrease the population of Brazil’s prisons.

Law 9.009/95 established the restorative process, in which the victim and the offender participate together and actively in the resolution of matters arising from the crime; and the restorative outcome, in which there is reparation and community service as penalties for crimes. Basically, the RJ programme in Brazil adopts just the practice of victim-offender mediation (VOM). There is no participation of the community or the family group conferencing, the circle sentencing or the peace making circles.

Nowadays, the programme is implemented at the Court for adults (persons more than 18 years old), and it is applied to crimes considered petty; in some cases the initiative to begin the criminal process belongs to the victim; in others, to public prosecutors. Furthermore, there is a limit to the application

of the RJ programme — for crimes with penalties that do not surpass 2 years' imprisonment.

Criminal RJ procedure consists of the following: the victims of crime report the facts to the police, who are responsible for investigating the case and making a final report. The whole investigation is then sent to the Court and, depending on the crime, to the public prosecutor or the victims, who start the process. Before the offender presents his defence, there is a conciliation with a facilitator trained by the Court (a civil servant or a law student), in which the victim and the offender try to reach an agreement about the reparation of damages. In case of agreement, it is necessary that the offender confess to the crime, because the Brazilian Federal Constitution presumes the innocence of the accused.

B. Indonesia

There is no formal restorative justice programme in Indonesia. It has occurred as an informal process, and has never been recorded or noticed. This is because such a system or programme has been in conflict with the legal system that has never been revised until now (Indonesia Penal Code, Act number 8/1981). This means that it has been implemented without any formal legal process and will not be upheld. Consequently, restorative justice programmes cannot be implemented formally. However, this does not mean that restorative justice practices have never been applied on a practical basis in the community. These practices have involved traditional ways of resolving disputes, sometimes called alternative dispute resolution (ADR), which involves various parties in the community like elders, religious leaders, academic parties, youth leaders, victims, victims' families, offenders, offenders' families, and even the police and low-level government officials. Restorative justice programmes mostly have been implemented in cases of minor crime such as traffic accidents and theft, with some conditions, among others, being that the cases involve non-fatal injury and less physical or non-physical damage. The conclusion is that there will be no formal system or programme on restorative justice as long as the penal code has not been revised.

C. Japan

In Japan, there are no established RJ programmes based on specific law, but the following two efforts are considered as possibilities of institutionalizing RJ. One of them is "System of conveying victims' feelings" in the probation and parole supervision stage based on the Offenders Rehabilitation Act. This system is not only to convey victim's feelings about the damage inflicted on him/her to the respective probationer/parolee, but also to convey the offender's feelings on the basis of the victim's feelings. The other one is "Education from the victim's viewpoint" for juveniles and adults in Japanese correctional institutions. It teaches inmates how crime harms people and societies, physically, emotionally and financially. It is an opportunity for inmates to improve empathy toward crime victims and other people. It offers opportunities for interested crime victims to be involved in correctional efforts to prevent further victimization in society.

D. Papua New Guinea

In the criminal justice system, RJ is implemented for both adults and juveniles mostly at the presentencing and reintegration stages. It is implemented at this stage because:

- The community must actively participate in the reintegration process;
- The Probation Officers will have to implement programmes for offenders;
- The Correctional Institutions will have to implement rehabilitation programmes for serious offenders; and
- The Organizational committees will have to implement rehabilitation programmes for juvenile and minor crime offenders.

The RJ programmes initiated can only be implemented for adults who committed minor offences and juveniles, and for adults who committed major offences and who are of good reputation and non-dangerous to the community and victims.

E. Thailand

1. Restorative Programme for Juveniles

The restorative justice programme for juveniles is called Family Community Group Conferencing (FCGC), and was conducted by the Department of Juvenile Observation and Protection (DJOP) since 2004. The main objective of the programme is to restore relationships between juveniles, victims, and families. FCGC has been implemented in the presentence investigation stage because the results or the outcomes of this programme might be useful for a non-prosecution order.

In part due to a law supporting this practice, although not drafted for that purpose, this law, the Juvenile and Family Court and Procedure Act, has two relevant articles — Articles 50 and 63 — that facilitate the implementation of FCGC. In 2010, The Juvenile and Family Court and Procedure Act 1991 was repealed; now, there is The Juvenile and Family Court Act 2010: Articles 86 and 87 support the Restorative Programme Procedure.

2. Restorative Programme for Adults

The restorative justice programme for adults, called restore-relationship conferencing, is conducted by the Department of Probation (DOP). It has been implemented in the presentence investigation stage for all crimes and is based on the parties' need(s). The process is used on a voluntary basis. The results of the conference are recorded in the presentence investigation report and are submitted to the court for sentencing. There is no law to support this programme, but the programme is conducted as a matter of policy.

III. POSSIBLE NEW RJ PROGRAMMES IN EACH PARTICIPANT'S COUNTRY

A. Brazil

Undoubtedly, Law 9.099/95 inaugurated a new philosophy in the criminal justice system in Brazil. It encouraged and enhanced the participation of victims in criminal proceedings, as before it was completely ignored, serving only as means to an end. However, the RJ programme in Brazil could be improved and widened for other stages of the criminal justice system.

Realistically, for instance, it is possible to apply the victim-offender mediation in the police station for petty crimes (penalty up to 2 years of imprisonment), because it is the first stage of the conflict and the parties are sensitive about the problem. Then, it could be offered as practical training for the police officers to work as facilitators, helping the parties to reach an agreement together. Nowadays, to apply the RJ programme to all types of crimes, it is necessary to promote some changes in the criminal law, because the Brazilian Federal Constitution adopts the principle of obligation, which blocks any attempt to reach an agreement, because, if the legal requirements are satisfied, the prosecutor must seek indictment.

This practice of RJ could be implemented also for the teenagers (persons 12-18 years old). However, it would be more suitable for persons between 16-18 years old, because they are mature enough to take part actively in the mediation.

At the beginning, there would be some difficulties to get used to this relatively new type of conflict solution, not only for the victim and the offender, but also for the other parties involved, like the police officers. But this initial difficulty can be overcome through many initiatives, like the qualification of the professionals involved and educational and publicity campaigns.

B. Indonesia

FGC is the programme that seems more realistic to be implemented in Indonesia because the traditional system still emphasizes "kinship" and "paternalism". The elders and prominent figures still have influence and important roles among the society even at the governmental level. However, it used to be implemented in the pre-charge (police) where victims usually initially report the crime, and of course only in specific crimes as long as it is not contradicted by the law. On the other hand, the amount of damages is considered (physical and non-physical), as well as the offender's ability to pay damages (with or without family support). We can use RJ for adults, juveniles, and those who do not

deny having committed the crime as long as the offender is able to keep and submit to the substantive goals of the restorative justice programme, such as restoring the victim, repairing the damage and participating in rehabilitation, providing an apology to the victim and her/his family, signing an agreement to commit no further crimes, and to pay compensation to the victim. The police are the most responsible in correlation with their jobs. Police also are the frontline of maintaining security and public order; that's why they have to ensure the situation remains stable, including by providing a suitable settlement, like the restorative justice programme. Regarding the facilitator, it must be a neutral person or party with no unwarranted interest in the outcome, and it must be someone with some influence among the community, like prominent figures or NGO representatives. Some issues that we should anticipate are, first, that the programme does not conflict with the legal system; second, that there will be no complaints in the future, especially from the victim's side; third, that the offender does not feel excessively burdened.

C. Japan

In Japan, Public Prosecutors have great discretion to suspend prosecution of adult-offender cases considering the seriousness of the crime and the situation after the offence, even if there is enough evidence to obtain a conviction. Therefore, with regard to petty crime committed by an adult offender, victim-offender mediation (VOM) may be implemented before prosecution under the prosecutors' supervision. Facilitators should be a third party who has no interest in the offence other than public prosecutors, because public prosecutors should be impartial.

The new programme of education from the victim's viewpoint is called "Message of Life". This is an exhibition held under the auspices of non-profit organizations in Japan. The main exhibits are life-size images of victims and their "shoes" as relics. The shoes are symbols of their lives. On the life-size images of victims, messages are written by bereaved family members. Life-sized images of victims are called "Messengers". Inmates appreciate this exhibition and recognize respect for the lives of crime victims. The Ministry of Justice will hold this exhibition in all prisons and juvenile training schools from 2013 to 2018.

As concerning rehabilitation services, development of the "System of conveying victims' feelings" also may be implemented as one of the feasible countermeasures of VOM-type RJ.

D. Papua New Guinea

Restorative Justice for adults and juveniles emphasizes:

1. Restorative Justice Programmes:

- Embody the values and practices familiar in traditional PNG societies;
- Approach concerns balancing the needs of victims, offenders, and the community;
- Draw on traditional and contemporary international practices to achieve RJ system.

2. Diversion Programmes:

- Key strategies for juvenile justice reform programmes to divert juveniles away from the formal court system towards community-based work programmes and restorative justice programmes;
- The Public Order Act allows community leaders to have the offender work for the community. Mediation, welfare, vocational training, church fellowship programmes that are ultimately aimed at changing the mindsets and behaviour of offenders; and
- Courts used Probation Acts to impose community work sentences in two ways:
 - a) Community work orders for first-time offenders and minor offenders on conditions, instead of imposing court fines; and
 - b) Imposed community work on special condition for serious offenders of normal Probation Order.

3. Under the Probation Act, community work for both adult and juvenile offenders. Supervision is provided by Probation Officers or community-group volunteers.

E. Thailand

Thailand has conducted the Restorative Programme, FCGC for juvenile and restore-relationship conferencing for adults in the presentence stage. So, it is not necessary to implement another programme. But it should be expanded for implementation in all criminal justice organizations for all crimes and all parties on a voluntary basis and based on the parties' need(s). The restorative programme should be done by trained mediators who are personnel within each organization.

IV. DISCUSSION

A. Introduction

In general, RJ can be applied to all crimes at all stages, for adult and juvenile offenders. However, such factors as the intention of the victim, the intention of the offender, the severity of the damages and the relationship between the victim and offender can affect types of RJ programmes and the scope of participants. We find dual purposes for RJ programmes: one is as a diversion (to avoid prosecution and imprisonment) and the other is to restore. Based on this aspect, we discussed the application of RJ programmes to typical types of crime which are common in our countries.

B. Types of Crime

1. Domestic Violence

Definition: any form of violence between family members including physical and psychological damages.

Summary of discussion

In cases of domestic violence, it is possible to apply VOM (victim-offender mediation) or FGC (family group conference), because this offence is more sensitive and the victims and the offender would not feel comfortable with the community's participation during the proceeding.

For petty cases, it is recommendable to fix the problem using RJ programmes as diversion at the pre-charge stage where a mediator can talk with victims and offenders and make an agreement together to avoid prosecution, because they have the possibility to restore their relationship and such victims do not want the offenders to be prosecuted.

On the contrary, in hard cases, for example, causing serious injury, it is necessary to refer the case to a prosecutor who decides whether to indict. In addition, when the offender has a habit of aggression, it is also recommendable to be referred to a prosecutor because these offenders tend to commit other violent crimes against their family members. Therefore, in these cases, RJ programme should be used to promote restoration of family relationships or to facilitate divorce with consent at the post-prosecution stage.

2. Rape

Summary of discussion:

In cases of rape, it is necessary to take account of maintaining dignity, personality and character of victims as well as punishing offenders.

In most rape cases, the suitable restorative justice programme would be VOM, because rape victims do not want to divulge their damages in front of many people. It is important to avoid secondary victimization. In addition, when the rape occurred among family members, it is also possible to use FGC, inviting victim's and offender's immediate social networks, because family members have to restore their relationships as well.

Considering punishing rape offenders and preventing other rapes, rape offenders should be prosecuted. Therefore, basically, RJ programmes should be used as a means to give victims restitution, compensation and an apology from the offender, not as a means of diversion. However, some rape victims do not want their cases to be prosecuted because they are too afraid of having their privacy exposed in criminal court even if they cannot receive any compensation or an apology from the offenders. Considering this situation, applying RJ programmes as a diversion at the pre-prosecution stage would give a good chance to such victims to receive financial compensation.

3. Traffic Accidents

Definition: A traffic accident is an incident that occurred on the street, involving a vehicle, person, motorcycle, property, deliberately or carelessly, and that resulted in fatal/non-fatal casualties and physical or non-physical damages.

Summary of discussion:

In cases of traffic accidents, implementing restorative justice in the pre-charge stage as a diversion is relatively effective and suitable. For example, if the victim has suffered minimal physical or property damages, and if the victim will agree to a financial settlement from the offender, these cases should be settled and should not be prosecuted. On the other hand, if the damage is serious, such as death or serious injury, the case should be prosecuted. At the post-prosecution stage, the result of the agreement or settlement between an offender and a victim can be considered in the process of sentencing and release on parole.

At any stage, VOM and CFGC (community and family group conference) programmes would be suitable.

4. Murder

Summary of discussion;

In murder cases, the bereaved family members become the victims, because the real victim is dead. Implementing restorative justice in the pre-charge stage as diversion is difficult. Offenders should be prosecuted, because protection and maintenance of public security must be the responsibility of the state.

As for murder cases between family members, and where the remaining family members do not want the offender to be punished severely, the victims' feelings can be considered in the process of sentencing. Such offender should serve their sentences in the community under the supervision of his family and community rather than in prison. In such a case, we can use CFGC restorative justice programmes effectively.

Although the ultimate goal of restorative justice is to restore the relationship between victims and offenders, victims and offenders cannot restore their relationships easily in murder cases. However VOM and FGC types of RJ programmes can offer a chance to make offenders recognize the seriousness of the damage that he/she caused to the victim, which is one of the important objectives of restorative justice, and a chance to allow victims to ask the offender what the victims want to know. Restorative justice has to fix society little by little to prevent further retaliation.

C. Mediator

The mediator is a non-party neutral person, who can be an officer or volunteer, with the responsibility of helping the parties involved in the restorative justice proceeding to reach an agreement. To become a mediator, it is necessary to have knowledge about restorative justice approaches, psychology and social work. Moreover, the mediator must be sensitive to understanding and listening to people in different social and economic contexts.

In cases of domestic violence, rape and murder, the mediator must be specifically trained, because he/she has to face difficult issues among parties involved.

V. CONCLUSION AND RECOMMENDATIONS

The implementation of RJ programmes still requires hard work in all of the participants' countries of the 156th Senior Seminar at UNAFEI. It demands, for instance, some change in the national legislation and also in culture about the traditional criminal justice system.

However, RJ is not an entirely new concept. In some countries, similar concepts have already been introduced. There are some communities where RJ has been used as a custom. We should work further to improve our system where offenders try to recover the damages they caused to the victim and to the community. But there are differences from country to country in terms of established systems as well

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as customary practices.

To implement RJ, first, the philosophy of RJ has to be understood, the results of the discussion reported in this paper should be considered and a system that best matches the situation of each country should be implemented. RJ gives rights to the victims, and also gives some duties and responsibilities to the offenders and the community. Law enforcement agencies should support them.