

RESTORATIVE PRACTICES AND JUSTICE: A NEW PARADIGM FOR POST-CONFLICT IN COLOMBIA (PART I)

Restorative justice is a new paradigm which has entered the discussion on what our modern legal system should look like over the last 20 years, in counterpoint to the retributive paradigm. In addition, due to its overlapping objectives and principles with transitional justice, restorative justice has grown as a form of positive language in post-conflict scenarios around the world. With this in mind, the recent Peace Accord between the Government of Colombia (GOC) and the FARC-EP guerrilla group included restorative justice as a guiding principle. This two-part Spotlight takes as its starting point the clarification of the concepts of restorative practices and justice (Part I), and goes on to examine the role this new paradigm could play in the implementation of the Peace Accord, as well as the broader peacebuilding context in the country (Part II).

WHAT ARE RESTORATIVE PRACTICES AND JUSTICE?!

Restorative practices are a social science which seeks to improve and repair relationships between people and communities.² A key difference between restorative practices and restorative justice is that the latter plays a reactive role, that is, it is only activated once an offense occurs to break community ties. Indeed, restorative justice is defined as a process through which all parties involved in an offense are brought together to collectively decide how to deal with its aftermath and implications for the future³ Restorative practices, on the other hand, have a broader perspective and are seen as preventive in terms of the offence, and proactive in terms of creating a peaceful culture of conflict resolution. From this angle, restorative justice would only be one dimension of the many that make up restorative practices.

A second difference, according to academic literature, lies in the fact that restorative justice is more theoretical, while restorative practices are oriented towards praxis. In fact, restorative practices involve a series of community encounters and experiences, which fall along a continuum according to the (in)formality of their

methodology. Thus, restorative practices go from active listening and empathy, as a model of communication aimed at increasing understanding; to restorative questions, which are designed to trigger contextualized reflections on the impact of my actions on my life and that of others; and restorative circles and meetings, as structured participative spaces with specific protocols and scripts prepared and implemented by a facilitator.⁴

However, restorative justice can also be practical, as it seeks to include restorative practices within a specific legal system. Specifically, it seeks to intervene in situations in which the retributive paradigm has traditionally prevailed, from criminal justice systems (with an emphasis on adolescents) to school communities mediated by coexistence manuals. Thus, transitional justice processes have been identified as a privileged site for the implementation of restorative justice, as they are settings in which retributive justice has been most questioned due to its punitive tendencies (a discordance where theoretical discussions converge), which often represent obstacles to negotiation and peacebuilding processes.⁶

RESTORATIVE PRACTICE SPECTRUM OR CONTINUUM⁵



RESTORATIVE AND RETRIBUTIVE JUSTICE PARADIGMS

In short, the objectives and basic principles which restorative practices and justice have in common are the most important elements in understanding what could be considered a restorative paradigm. As noted above, the latter is constituted in counterpoint to the retributive paradigm, and a systematic comparison is therefore instructive. On the one hand, the punitive lens has its origins in the rational conception of crime promoted by the European Enlightenment of the 18th Century, and has remained in vogue in Western societies for more than 200 years. Although the retributive paradigm originally constituted a significant advance in the humanization of justice, at the end of the 20th Century concerns around its rationalist abstraction led to the construction of a paradigm which is closer to communities' real living conditions: the restorative paradigm.⁷

It is pertinent to note that the victim is not a passive subject of the process as in the punitive system; they are not considered a recipient of the crime but rather as an agent of change, building their own reparation or restorative process. Thus, victims are offered more than procedural rights; they are offered active participation in the process and an integrated care route, rather than judicial truth. While in the retributive paradigm the State and legal operators act as protagonists (prosecution, defense, trial, and sentencing, among others), under the restorative lens all parties directly affected by the offense are invited to participate and decide how to restore the social fabric.¹² Thus, we move beyond a conception of crime as a legal phenomenon, towards one where offenses are social phenomena.

However, the restorative paradigm has a much older provenance, with roots in the traditions of Indigenous peoples and their forms of communal justice.⁸ In Colombia, the traditional Indigenous justices recognized by the Political Charter are an example of this model, where the restoration of offences is built from the strength of community ties and collective values, which are more important than individual needs.⁹ In fact, for the restorative paradigm, an offence is understood as a breakdown of people and social relations, and not as a crime committed against the State and its institutions. Thus, its scope for action goes beyond the "criminal against the court" to focus on victims' needs and the reparation of the crime's negative impacts on the community. The focus is therefore on holding the perpetrator responsible for their actions, and not on punishment imposed by the system; the perpetrator is encouraged to evaluate their actions, recognize the harm caused, build empathy with their victim, as well as assume the costs and measures agreed to redress the offense.¹⁰

RESTORATIVE JUSTICE SCOPE OF ACTION¹¹

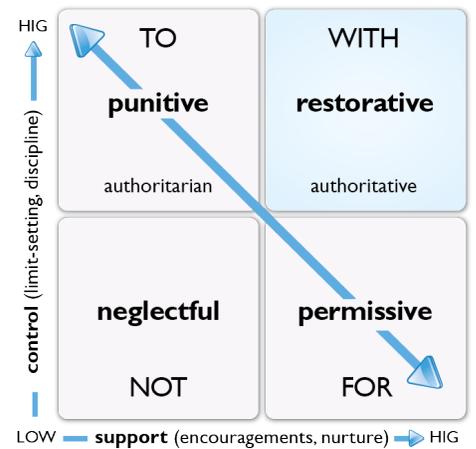


In addition, the aim with regards the perpetrator is pedagogical and not punitive, as custodial sentences are not considered capable of fulfilling resocialization objectives; on the contrary, they create stigma that ruptures offenders' social and affective bonds.¹³ Therefore, in order to reestablish societal and emotional ties, restorative justice seeks to reintegrate the offender back into the community, which is why non-custodial sanctions are privileged, and the real objective is to offer new life projects beyond recognized routes to criminality. Thus, it is a question of repudiating the offence, promoting reflection on who, how, and why the harm was done, rather than repudiating or marginalizing the offender. The hypothesis indicates that, if positive opportunities for change are offered, human beings are more cooperative, productive, and happy, that is, if we work with them and not against them, the process will have a greater impact in favor of reintegration.¹⁴

Thus, the restorative justice paradigm's objectives could be summarized in three interrelated aspects (the so-called three Rs): the offender's responsibility, their reintegration into the community, and the restoration of the social fabric through the reparation of the offense against the victim and the affected community nucleus.¹⁶ It is important to note that different contexts play a fundamental role in the restorative process, and that the ideal is to draw on cultural traditions and roots. The idea is to target the point where community social agreements and life forms reflect legal norms, those places where the norm is shared and understood. Thus, autonomous processes within the social fabric are strengthened, leading to compliance with the norm due to its interiorization within the cultural value system, beyond the fear of legal sanction. In other words, the aim is to capitalize on social conflict by promoting the ethical development of the community through a joint response to harm.¹⁷

Lastly, the disjuncture between the retributive and restorative paradigms remind us of a fundamental consideration: how justice is conceived defines the behavior, decisions, and process of dealing with conflicts in society. Just as our societies have changed significantly over the past 200 years, the justice model's institutions and values also need to live up to our times. This does not only implicate the restructuring of the system and the way justice operates, but also a change of mentality, a reevaluation of our understanding of violence and social conflict, as well as the way we confront and resolve them. The restorative lens offers new values that promote coexistence, a culture of peace and non-stigmatization as real guarantees of non-repetition of disruptive violence.

SOCIAL DISCIPLINE WINDOW¹⁵



THE OBJECTIVES OF RESTORATIVE JUSTICE



JUSTICE PARADIGMS¹⁸

PUNITIVE LENS	RESTORATIVE LENS
The crime is defined in legal terms, without considering its social, moral, and political dimensions.	The crime is understood as a societal phenomenon and is examined according to its broader social, moral, economic, and political context.
The offence is committed against the State and understood as a conflict (attack) and an abstract debt to the system; the inter-personal dimension is not considered.	The offence is harmful to other people, as well as the community, as social relations are broken; the value of inter-personal conflicts are recognized.
The trial has as its starting point a relationship of opposites or adversaries who seeks to subject the enemy to a normative legal process, thus dividing the people involved and resulting in dissatisfaction.	The process establishes dialogue and negotiation, brings people together and can re-establish social ties through restorative punishment.
Focused on the criminal's guilt, reproach, and punishment, seeking to deter and prevent recurrence; often leads to stigmatization (there is no co-responsibility).	Encourages the offender to take responsibility and establishes obligations; the solution is in the reparation of all parties; can lead to reconciliation and reintegration (there are multiple co-responsible parties).
Passive participation of offender and victim (marginalization of the community); the process is conducted by legal operators in their own language, which is not shared by the directly involved parties.	Active participation of the offender and victims (including the community); the directly involved parties express themselves in their own language, which is fundamental to the process.
Privileges looking to the past.	Seeks to look to the past, present, and future.
Victims' needs are not enquired into and are difficult to satisfy.	Victims' needs are at the center of the process and are empowered.
The management and administration of justice is monopolized by the legal operator, is exclusively in the hands of governmental officials.	The construction and implementation of justice, that is, the response to the offence, is a participative process in which the directly involved parties are the protagonists.
Based on a behaviorist vision of human beings and their conduct in society, where the negative incentives of punishment and the confinement of criminality are prioritized; the competitive spirit and individual values are promoted.	Based on a relational vision of human beings centered on their behavior within the community, where responsibility and the reconstruction of the social fabric are privileged; reciprocity and community values are encouraged.

¹ The different sections of this Spotlight are based on the different papers presented during the "IV Congress on Restorative Practice and Justice," organized in Bogotá between 10 and 12 October 2018.
² McCold, P. & Wachtel, T. (2003). *En busca de un paradigma: una teoría sobre justicia restaurativa*. Bethlehem, USA: International Institute for Restorative Practices.
³ Marshall, T. (1999). *Restorative Justice: An Overview*. London: Home Office.
⁴ Costello, B., Wachtel, T. & Watchel, J. (2009). *The restorative practices handbook for teachers, disciplinarians and administrators*. Bethlehem, USA: International Institute for Restorative Practices.
⁵ *Ibid.*
⁶ Clampa, K. & Doak, J. (2012) *More than Words: Restorative Justice Concepts in Transitional Justice Settings*. *International Criminal Law Review*, 12, 339-360.
⁷ Ordoñez, J. & Brito, D. (2004) *Justicia Restaurativa: Un modelo para construir comunidad*. *Criterio Jurídico*, 4, 231-240.
⁸ Patiño Mariaca, D. M. & Ruiz Gutiérrez, A. M. (2015) *La justicia restaurativa: un modelo comunitarista de resolución de conflictos*. *Revista de la Facultad de Derecho y Ciencias Políticas – UPB*, 45 (122), 213 – 255.

⁹ Ordoñez & Brito. *Op. cit.*
¹⁰ UNODC (2006) *Manual sobre programas de justicia restaurativa*. New York: Naciones Unidas.
¹¹ Ordoñez & Brito. *Op. cit.*
¹² UNODC. *Op. cit.*
¹³ Gómez-Velásquez, A. & Correa-Saavedra, J. (2015) *¿Sobredimensión de la tensión entre justicia y paz? Reflexiones sobre justicia transicional, justicia penal y justicia restaurativa en Colombia*. *International Law*, 26, 193-247.
¹⁴ McCold, P. & Wachtel, T. *Op. cit.*
¹⁵ Wachtel, T. (2013). *Definiendo Qué es Restaurativo*. Bethlehem, USA: International Institute for Restorative Practices.
¹⁶ Brito, D. (2005). *Justicia restaurativa: una mirada desde la perspectiva de género*. Cali: Universidad Javeriana de Cali.
¹⁷ Brito, D. (2010) *Justicia Restaurativa. Reflexiones sobre la experiencia de Colombia*. Colección Cultura de la Paz. Ecuador: Universidad Técnica Particular de Loja.
¹⁸ Wachtel, T. y Ordoñez & Brito. *Op. cit.*