COREPOL

Conflict Resolution, Mediation and
Restorative Justice and the Policing of
Ethnic Minorities in Germany, Austria and Hungary

D2.1

Catalogue of Restorative Justice approaches, practices and tools

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SEVENTH FRAMEWORK
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1. Preface

This paper aims at giving the reader a comprehensive, generally valid overview about the Restorative Justice approach. First of all it encompasses theoretical explanations about the definitions (chapter 2) and objectives (chapter 3) of Restorative Justice– things they have in common and aspects in which they differ. The following chapter four focuses on the roots of Restorative Justice and gives a brief outline of historical developments of this approach.

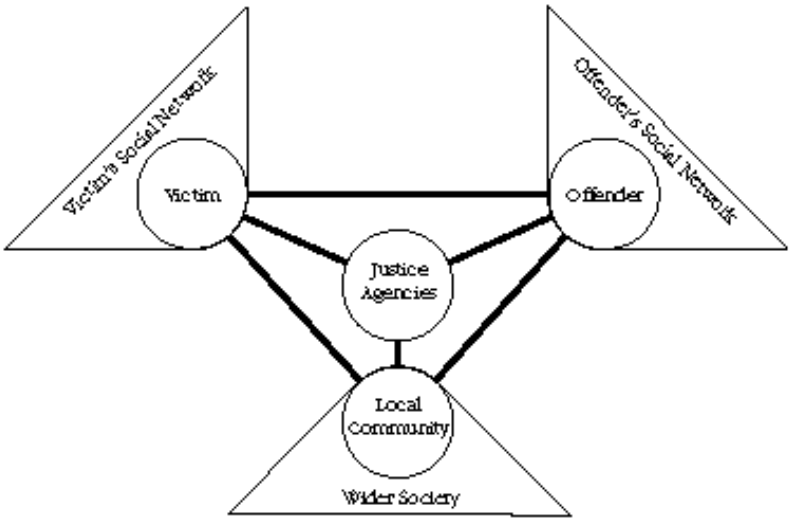
The fifth section is to be understood as more related to practice: after giving an overview of the wide spectrum of possibilities for implementing Restorative Justice into practice the most common used methods of this broad and heterogeneous approach are presented. Before concluding the brief introduction into Restorative Justice some of the limits, risks and criticism of this approach are discussed in chapter 6.

2. Definitions of Restorative Justice – and what Restorative Justice is NOT

Although there are various models and programs of Restorative Justice, most of them refer to a few definitions such as the one from Tony F. Marshall (1996, 1999, 2003). He emphasises the aspect of participation as the key feature of the approach:

> *"Restorative Justice is a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies. (…) Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future." (Marshall, 1999, 5)*

The different (main) stakeholders can be visualized as follows:



(ibid.)

The graphic shows four different categories of interest: the victim and his/her social network, the offender and his/her social network, the local community with its embeddedness in the wider society and at the interface between these three interest groups the justice agencies.

Declan Roche refines Marshall's definition and explicitly includes the element of consensus:

> *"(…) Restorative Justice brings together all the parties affected by an incident of wrongdoing, to decide collectively on a consensual basis how to deal with the aftermath of an incident." (Roche, 2008, 30)*

Roche also regards the ideal of participation as *"absolutely critical to Restorative Justice"* (ibid.). Furthermore he stresses the importance of accountability mechanisms in Restorative Justice processes: When the various decision-makers are expected to explain and justify their decisions, *"this may improve the quality of their performance in a number of ways"* (ibid., 46). And, as Roche argues, accountability potentially enhances the legitimacy of a decision-making process (ibid., 48).

Howard Zehr describes the *"skeletal outline"* of Restorative Justice as follows: *"Restorative Justice requires, at minimum, that we address victims' harms and needs, hold offenders accountable to put right those harms, and involve victims, offender, and communities in this process."* (Zehr, 2002, 25) He identifies respect as the basic value of Restorative Justice: *"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. Respect reminds us of our interconnectedness but also of our differences."* (ibid., 36) Zehr's *"working definition"* of Restorative Justice additionally refers to the aspect of healing:

> *"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 harms, needs, and obligations, in order to heal and put things as right as possible." (Zehr, 2002, 37)*

The definition of Christa Pelikan and Thomas Trenczek is based, inter alia, on Zehr's specifications: *"Restorative Justice is seen as a broad approach oriented at repairing the harm caused by crime as far as possible."* Furthermore, the authors point out, that *"in 'modern', 'western' societies the criminal*

justice system defines crime in terms of violation of the state law" (Pelikan and Trenczek, 2006, 64). The Restorative Justice approach, however, is based on a specific understanding of wrongdoing:

> *"The problem of crime (…) is that it represents a wound in the community, a tear in the web of relationships. Crime represents damaged relationships. In fact, damaged relationships are both a cause and an effect of crime. (...) this view of wrongdoing implies a concern for healing of those involved - victims, but also offenders and communities." (Zehr, 2002, 20)*

The UN-definitions of Restorative Justice as formulated in the *"Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters"* (UN Economic and Social Council, 2002) or the *"Handbook on Restorative Justice Programmes"* (United Nations Office on Drugs and Crime, 2006) name this understanding of wrongdoing explicitly:

> *"Restorative Justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community. Restorative Justice programmes are based on the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community. (...) Restorative Justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus." (United Nations Office on Drugs and Crime, 2006, 6)*

In order to realise a fully restorative process, the UN-Handbook identifies at least four critical ingredients: 1) A victim must be identifiable. 2) The victim needs to participate voluntarily. 3) The offender has to show some readiness to accept responsibility for his/her criminal behaviour and 4) his/her participation should be non-coerced *(ibid., 8)*.

The UN-Handbook also provides a specification about what could be regarded as a *"restorative outcome"*:

> *"A 'restorative outcome' is an agreement reached as a result of a restorative process. The agreement may include referrals to programmes such as reparation, restitution and community services, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender. It may also be combined with other measures in cases involving serious offences." (ibid., 7)*

Despite different definitions and interpretations the few definitions selected above point out key factors that can be found in most Restorative Justice approaches (at least in theory): Direct involvement and participation of various stakeholders, ideally direct and consensus-oriented communication between them, mutual respect, consideration of individual and community needs, accountability, restoration of the integrity of the persons affected. Further on, it is important to mention explicitly that *"although the implementation of Restorative Justice mechanisms can be promoted by top-down measures (...) a main characteristic of Restorative Justice is the voluntary participation of the parties."* (Rohne, Arsovska & Aertsen, 2008, 19)

Notwithstanding the integration of Restorative Justice's aspects in the legal system has a positive impact it has to be added that in the context of large-scale, state-based conflicts and mass

victimisation some of the constituent elements of the Restorative Justice approach need to be reconsidered and broadened up. Holger-C. Rhone, Jana Arsovska and Ivo Aertsen (2008) explain with reference to transitional justice, an approach with the objective of building effective and just states in a post-conflict area:

> *"The direct or indirect involvement of stakeholders in genocidal events for example, the non-reaction of the silent majority and the indifference of the international community will result in different notions of 'responsibility' and 'accountability'. In cases of collective conflicts and mass victimisation the notion of 'restoration' will have a particular meaning as well, referring to different levels of restoration encompassing both, the interpersonal or micro-level and the collective or macro-level. The same counts for the Restorative Justice principle of 'active participation', which requires some (practical) rethinking."* *(ibid., 20)*

Although transitional justice mechanisms are commonly inspired by the Restorative Justice paradigm, they *"often carry a notion of being a top-down instrument applied on a societal level and implemented as an alternative or supplement to criminal justice response as another top-down instrument."* (ibid., 19) Such instruments do not necessarily imply a voluntary process. In spite of the fact that minority-police problems in Austria, Germany and Hungary cannot be regarded as large-scale conflicts in the proper sense, it could be worthwhile considering the mechanisms of conflict solving used in transitional justice.

In addition, to define Restorative Justice is also to clarify what is NOT Restorative Justice. Zehr outlines the differences between Restorative Justice and the *"traditional"* criminal justice systems in modern societies on the basis of three different questions about criminal justice and Restorative Justice:

> *"Criminal justice:*
>
> - *What laws have been broken?*
> - *Who did it?*
> - *What do they deserve?*
>
> *Restorative Justice:*
>
> - *Who has been hurt?*
> - *What are their needs?*
> - *Whose obligations are these?*
>
> *Restorative Justice answers differently, focusing first of all on needs and associated obligations." (Zehr, 2002, 21)*

Claudio Domenig (2011, 2) regards Restorative Justice as a theoretical fundament as well as practical tools which enable an integrative approach towards crime. In this way it offers an alternative to an exclusionary criminal justice system. Dennis Sullivan and Larry Tifft express the difference between Restorative Justice and the common legal system in a more emotional way: *"Restorative Justice sees the pain and suffering of all as worthy of our collective attention while the state discriminates between those worthy of the community's attention and those not."* (Sullivan & Tifft, 2006, 2) However, it should be specified that the relation between Restorative Justice programs and the criminal justice system differs from country to country. Moreover, it has to be considered that

Restorative Justice approaches are not positive in themselves. Partially they operate on the basis of a powerful informal social control with the potential for totalitarian tendencies, for instance (Domenig, 2011, 6). They have to give evidence of their integrative and future-oriented abilities in dealing with criminal offences.

Further on, Zehr specifies Restorative Justice not to be primarily about forgiveness or reconciliation. Though, he puts into perspective: *"It is true that Restorative Justice does provide a context where either or both might happen. (...) However, this is a choice that is entirely up to the participants."* (Zehr, 2002, 8)

Another clarification of Restorative Justice refers paradoxically to the polymorphism of the approach. According to Zehr, Restorative Justice is NOT defined as a particular program or a blueprint, because the Restorative Justice models are culture-bound:

> *"There is no pure model that can be seen as ideal or that can be simply implemented in any community. (...) Also, all models are to some extent culture-bound. So Restorative Justice should be built from the bottom up, by communities in dialogue assessing their needs and resources and applying the principles to their own situations. Restorative Justice is not a map, but the principles of Restorative Justice can be seen as a compass pointing a direction. At a minimum, Restorative Justice is an invitation for dialogue and exploration." (Zehr, 2002, 10)*

A culturally sensitive realisation of the Restorative Justice approach increases the societal acceptance. Such a societal acceptance and legitimacy, for example due to culturally rooted peculiarities in informal conflict resolution mechanisms *"are of crucial importance"* (Rohne, Arsovska & Aertsen, 2008, 22).

Mediation connected to Restorative Justice is still often the subject of discussions. According to the Council of Europe (CoE-R 99-19), mediation in general can be described as follows:

> *"The term 'mediation' in a general sense (i.e. not specific to a penal context) is normally reserved for a process of conflict resolution, involving intervention by an impartial third party with the intention of encouraging voluntary agreement between the parties.*
>
> *In the Recommendation, mediation in penal matters is defined as a process whereby the victim and the offender can be enabled, voluntarily, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party or mediator. The reference only to the victim and the offender as parties does not exclude other persons (legal and physical) participating in the mediation." (Council of Europe, 1999, 16)*

Howard Zehr doesn't equate Restorative Justice with mediation, because the former is not limited to an encounter and the latter often uses a *"neutral language"* which may not always fit with problem-solving in criminal cases:

> *"In a mediated conflict or dispute, parties are assumed to be on a level moral playing field, often with responsibilities that may need to be shared on all sides. While this sense of shared blame may be true in some criminal cases, in many cases it is not. (...) an important component of such programs is to name and acknowledge the wrongdoing.*

The neutral language of mediation may be misleading and even offensive in many cases." (Zehr, 2002, 9)

Nevertheless mediation can be considered as a common technique in different consensual models of conflict resolution. This consensus of movements in conflict resolution *"has been variously described as community justice, Restorative Justice, informal justice etc., but in practice it is most often referred to by means of the technique which most models have in common, which is 'mediation' as distinct from legal adjudication."* (Council of Europe, 1999, 8) However, regard should be paid to the fact that this statement primarily refers to the European context.

3. Objectives of Restorative Justice

While completing the definition of Restorative Justice, the objectives of this approach or, even better, of these approaches should be summed up. The UN-Handbook of Restorative Justice Programmes identifies the following key elements referring to this:

a) *"Supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance*. (...)

b) *Repairing the relationships damaged by the crime, in part by arriving at a consensus on how best to respond to it.* (…)

c) Denouncing criminal behaviour as unacceptable and reaffirming community values. (...)

d) *Encouraging responsibility taking by all concerned parties, particularly by offenders*. (...)

e) Identifying restorative, forward-looking outcomes. (...)

f) Reducing recidivism by encouraging change in individual offenders and facilitating their reintegration into the community. (...)

g) Identifying factors that lead to crime and informing authorities responsible for crime reduction strategy. (...)" (United Nations Office on Drugs and Crime, 2006, 9pp)

However, some of these objectives are controversial discussed or need to be specified in detail: Domenig, for example, criticizes an indiscriminate orientation towards restoration in the Restorative Justice approach. He argues that partly a change of the prevalent conditions is desirable or in some cases a restoration would not be possible. In fact, Restorative Justice should unfold transformative effects in order to support the development of more inclusive and just communities (Domenig, 2011, 10).

Howard Zehr emphasizes the transformative dimension of Restorative Justice as well. According to him, Restorative Justice programs aim to:

- *"put key decisions into the hands of those most affected by crime,*
- *make justice more healing and, ideally, more transformative, and*
- *reduce the likelihood of future offenses." (Zehr, 2002, 37)*

However, Zehr states at the same time that Restorative Justice is NOT primarily designed to reduce recidivism:

> *"Reduced recidivism is a by-product, but Restorative Justice is done first of all because it is the right thing to do. Victims' needs should be addressed, offenders should be encouraged to take responsibility, those affected by an offense should be involved in the process, regardless of whether offenders catch on and reduce their offending." (Zehr, 2002, 10)*

An important aspect of Restorative Justice is its promise which *"lies in the inclusion of victims, offenders, and community members who have been touched by the crime"* (Van Ness & Heetderks Strong, 2010, 118) always taking the normative values of active responsibility (taking the initiative to help preserve and promote restorative values and to make amends for behaviour that harms other people), peaceful social life (responding to crime so that harmony, contentment, security and community well-being can be built), respect (regarding and treating all parties to a crime as persons with dignity and worth) and solidary (experience of support and connectedness) into account (ibid., 48p).

In regard to the victims' inclusion in the criminal justice system Van Ness and Heetderks Strong (ibid., 121pp) distinguish between four possible strategies:

a. The victim has to be informed of what is happening in his/her case and about the services and rights he/she may expect (information about crime victim compensation, victim services, steps in a criminal prosecution, contact information, victim's right during the criminal proceedings). Further on the status of criminal proceeding has to be transparent.

b. As a result of advocacy by victim rights organisations the victim has the right to observe (voluntary) the proceedings as spectator.

c. The victim can make a formal presentation in court through means of a victim impact statement. The judge has only to listen to the victim. This means that the legal right of the victim is entirely procedural (to speak). There is no requirement that the judge has to use the information from the victim for further steps.

d. The victim has the right of full participation in the criminal justice process which leads to the recognition that crime is an offense against the victim and a distinction between the legal interest of the victim and the government.

Restorative Justice builds on the concept of amends whereby Van Ness and Heetderks Strong (2010) distinguish between apology, changed behaviour, restitution and generosity as ways to make amends:

Apology on the part of the person responsible for the damage is connected with acknowledgment *("I did something wrong"),* affect *("I am troubled by what I did")* and vulnerability. It can be understood as an exchange of shame and power between the offender and the victim. In offering an apology, the offender himself who has previously exerted power to the disadvantage and shame of his/her victim, feels ashamed and gives the victim power to accept or reject the apology.

In comparison to apologies, strategies for changing behaviour aim at a change of the environment, learning new behaviour and reward positive changes. The latter can be done in so called follow-up meetings taking place after many encounters, in which offenders receive positive reinforcement of their efforts to satisfy the agreement.

A prime way for the justice system to respond restoratively to the harm done by the offender to the victim is restitution whereby a differentiation must be made between material and immaterial restitution. Material reparation does not necessarily lead to further restoration - but it can indeed constitute a basic form of restoration. Restitution requires a compensation for the harm sustained and is often made by returning or replacing property or by financial payment (ibid., 85pp; Rohne, Arsovska & Aertsen 2008, 29).

When talking about generosity Van Ness and Heetderks (2010) want to detect what is beyond the demand of justice and equity. Generosity can be the offer of services that do not necessarily benefit the victim and only tangentially relate to any debt to the community as a whole. In this understanding the offender can for example agree to provide music lessons for a community centre or to take part in a renovation project for a family/person in need (Van Ness & Heetderks Strong, 2010, 85pp).

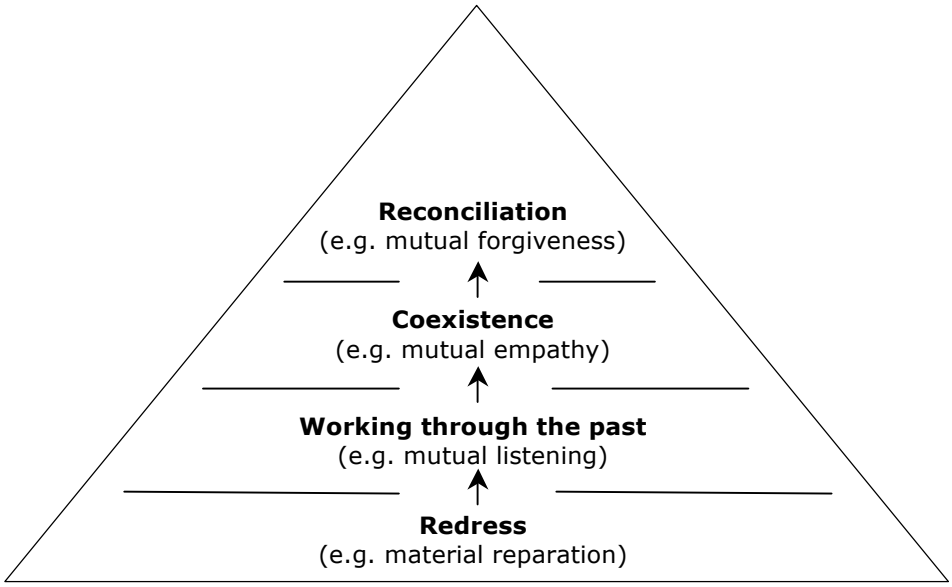
Furthermore, it should be marked that *"Restorative Justice aims to repair a victim's loss in ways that will also facilitate an offender's reintegration."* (Roche, 2008, 28). This means that not only the victims in crises feel isolated and disoriented and have difficulties in reintegrating into *"normal life"* but also the offenders: Victims, on the one hand often need support and understanding in overcoming the trauma caused by the offence and in coping with the resurgence of crises symptoms from time to time. Especially a stabilizing family or community in which the affected person feels secure and cared can be an environment in which the victim is able to come to grips with the fears following victimisation. Here a redefinition and redirection of the victim's life can take place.

On the other hand released prisoners can experience rejection, hostility or even violence when they return to the community, especially if there are still unresolved conflicts or community members are afraid of the offender now being released. Further on former offenders are confronted with discrimination by society and have big problems finding employment. As a consequence of high expectations from community members and public distrust released prisoners often get isolated from their community. There are many projects aiming at supporting offenders in different ways such as finding a job, retraining literacy, education, relationship counselling, drug or alcohol counselling, etc. (Van Ness & Heetderks Strong, 2010, 100pp; Marshall, 2003, 34pp).

These matters ask for specific complaisance by all the parties involved, according to Braithwaite (1989): Mutual respect for one another and commitment to another are significant, further on rejection of deviant behaviour on the one hand but also a certain understanding for it on the other hand. Both, the one reintegrated and the community have to feel safe from harm. This is possible only if the victim and the offender as well as the community members involved take over some responsibility for assisting with the necessary reintegration (Van Ness & Heetderks Strong, 2010, 114).

According to Holger-C. Rohne, the wide spectrum of objectives can be characterised by their degree of relational restoration (Rohne, Arsovska & Aertsen, 2008, 27pp). The following model involves the

different steps, whereas *"each of the ascending category typically includes elements of the previous categories adding a further relational aspect to it"* (ibid., 28):



Rohne et alii describe the different steps as follows:

> *"(...) material reparation does not necessarily lead to further restoration - but material reparation can indeed constitute a basic form of restoration.*
> *A higher degree of relational restoration is constituted by a process that is based on a mutual listening to each other's perceptions. It requires a considerable willingness to work through the past together and to understand the causes and effects of the incident.*
> *(...) 'coexistence' (...) describes a higher level of restoration in which the parties are moving towards each other by not only exchanging perceptions and emotions but also sharing them in an empathetic way. It does not, however, necessarily mean that they want to interact with one another in future. The latter requires the highest degree of restoration, namely the reconciliation of the parties." (ibid., 29)*

The four level model of objectives developed by Rohne is an useful analytical instrument to evaluate the various practice of Restorative Justice in relation to the intended and attained aims.

4. Historical development of Restorative Justice

In the development of Restorative Justice as a social and legal reform movement there are two main currents. Initially, both have developed independent of each other but in between there has been some overlapping, and the currents have joined each other as alternatives to the formal criminal justice system.

One current goes back to the conflict solving rituals and mechanisms of indigenous populations. In the case of Restorative Justice most prominently to the Maori population of New Zealand, and the

North American native population of the Navajo nation. Of a more recent origin, some of the religious denominations with an agrarian community who migrated to the American continent in the early phase of European settlement practiced methods of conflict solving that could be subsumed under the paradigm of Restorative Justice, respectively conferencing or healing circles. Howard Zehr, one of the influential authors of the Restorative Justice movement, comes from a Mennonite background. Similar to the Amish, Mennonites as Protestants with a communitarian and agrarian heritage, left their homelands in Europe (Switzerland, Southern Germany, Frisia) to found villages in North America.

Basically at the same time as some Maori communities decided to refer their problems of juvenile crime and family violence to the traditional family conferences, a criminologist of Australia's National University in Canberra wrote a much acclaimed study about *"reintegrative shaming"*(Braithwaite 1989). John Braitwaite used Japan's low rates of reported crime as the main proof for his claim that "shame cultures" with a social control system based on non-exclusionary forms of shaming for deviance and wrong-doing have lesser problems with crime in their societies than their Western counterparts. Braithwaite's argument concerned the failure of Anglo-American criminology to come up with a solution for the crime problem. He also criticized the lack of useful theories to explain for the variations in crime rates between modern industrial societies, most significantly for the Japanese rates being so much lower than those of the United States or Australia. The Maori move towards traditional forms of tribal/ clan conflict resolution was due to the utter failure of New Zealand's criminal justice system, to cope with the increasing rates of Maori juvenile and family violence. At that time, the conviction and incarceration rate of Maori New Zealanders was significantly higher than the rate of the non-Maori populations of the islands. At present the over representation of the conviction rate amounts to 3.5 times (Marie 2010). The same was true in Australia where the overrepresentation of Australian Aboriginals (Koori) was more than 15 times higher than those of non-Aboriginal Australians. Adding to the problems was an extremely high rate of Aboriginal death in custody which led to an investigation of a Royal Commission (Kersten 1987).

Braithwaite's culture of reference, Japan, had indeed very low figures of reported property crime as well as similarly low rates of crime against the person. In the late 1980's this and Japan's status as the world's leading manufacturer of cars and electronic products made the far Eastern culture a projection screen for Western academics, because it apparently offered a remedy for the ailments of Western economies and societal problems like exploding crime rates. Japan as a *"miracle"*, as a *"model"* for solving all kinds of problems was a popular topic of best-selling books.

Braitwaite's *"shaming theory"* and the very idea of Japan's status as a culture of shame can be traced back to the dichotomy of guilt vs. shame and to the very influential work of Ruth Benedict "The Chrysanthemum and the Sword" (1946). The research on Japanese culture took place in the last years of the Pacific War between the Western allies and Imperial Japan. The cause for this research was that Americans needed to find reasons for the extraordinary forms of Japanese brutality in the occupied parts of Asia and in the country's warfare against the American troops in the Pacific. Another conundrum was the behaviour of Japanese prisoners of war. Their attitude could change from servile, polite co-operation to unpredictable murderous attacks on the soldiers and guards followed by seppuku (suicide).

Paradoxically, the theory of shaming used by Braithwaite ought to explain the low propensity of Japanese culture towards criminality while it originated from the need to explain the brutality of Japanese soldiers. In retrospective, the construction of "shame cultures" as the opposite, or "other" of "guilt cultures" is one of the major misconceptions of cultural anthropology[1].

This somewhat peculiar tradition of a *"shame-guilt"* dichotomy served as the fundament for Braithwaites early theory of reintegrative shaming (Kersten 1991 and 1993). But it was not the enthusiasm about Japan but the insight into the failure of *"retributive justice"* that gained the interest of the scientific community. Retributive justice and reintegrative shaming/ Restorative Justice were constructed as exact opposites. One could say that one flawed theoretical concept (shame vs. guilt) led to the next (retributive justice vs. Restorative Justice). Braithwaite's book won several prestigious awards and was celebrated as the new *"grand theory"* of criminology.

So, in the early 1990s there was a practical reform movement in New Zealand and independent of Maori conferencing an academic discourse on the reform of society's reaction to deviance and criminality. In its focal concern Braithwaite's approach, namely to argue the standard reactions to juvenile and adult crime in Western societies, Braithwaite's theorizing was seen as a major step forward and created an academic and social movement towards informal procedures of conflict solving and the prevention of what was the subject of decades of criminological research: criminal careers. Restorative Justice and Conferencing were conceived of as victim-friendly, community-oriented, and *"ecological"* alternatives to business-as-usual criminal justice. Reintegrative shaming became the starting point for a new criminological discourse and criminal justice reform movements in North America, Australia, and to a lesser extent in some European countries.

Although criminology had investigated crime and the criminal justice system for so many decades, the outcome was disappointing. The very short standard formula for the results of research and practice of criminal justice was: Nothing works. Here, Restorative Justice promised a radical new perspective. It was a new view on the whole system, and all it needed was empirical proof that Restorative Justice, conferencing, circles et cetera DID work.

In Australia (Wagga Wagga) the first programs were carried out under the new paradigm. K. Daly, one of the early scholars involved in the evaluation, described a *"substantial gap"* between the practice of Restorative Justice and the academic discourse (Daly 2002, p. 56). In a research based critique of the *"myths"* about Restorative Justice she states that despite the fact that "*the idea of Restorative Justice has proved enormously popular with governments"* (ibid., p. 57), the practical

[1] Ruth Benedict who defined Japanese culture as a *"shame"* culture (cf. Geertz 1988; cf. also Geertz 1973) was assisted by Margaret Mead who co-operated with a British child psychologist, Geoffrey Gorer. Both of them claimed that the toilet training of Japanese children was the cause for a cultural propensity for excessive violence. Additionally, Mead and Gorer tried to argue that Japanese mothers weaned their babies at the earliest possible time after giving birth to them. Neither Benedict, nor Mead or Gorer had ever been to Japan. None of them had any knowledge of the Japanese language. While Benedict interviewed Japanese prisoners of war and watched Japanese films, Mead and Gorer used anecdotical and flimsy evidence for their theory. After the war it transpired that Japanese babies were breastfed longer than American babies and the claim of early toilet training proved to be without any substance as well. In her later career Margaret Mead who became the icon of American feminism, published her seminal work on sexually peaceful adolescence in Oceania, a theory which was equally based on questionable evidence.

programs cover a variety of measures in social welfare, education and criminal justice. The term had turned into a *"one size fits all"* description for a variety of activities at very different points of criminal justice proceedings, some of them connected to the system and others as a diversion from the usual processing of crime and offenders. In her analysis of the practical and the ideological aspects of Restorative Justice programs (in Australia and New Zealand) Daly uncovered a series of myths connected with the idea, among them the notion that Restorative Justice *"is the opposite of retributive justice"* (ibid., p. 58). In the light of what has been discussed above, we discover a renaissance of old and flawed dichotomies: bad court, good conferencing. In the academic and political ideologies Restorative Justice turned into something of a superior quality, while criminal justice business as usual was perceived as the bad version of dealing with crime and criminals. Daly quotes some of the mythical perceptions of the biblical roots of Restorative Justice, and the equally idealistic claim (Daly calls this an *"origin myth"* of a *"premodern past"*, p. 63) that pre-colonial Maori justice was in harmony with man and nature. In a broader view such origin myths can be classified as the criminological version of the *"noble savage"* myth of Western philosophy. Daly sums up her criticism of these myths in suggesting that a reform of criminal justice responses to conflict and crime in indigenous communities should be culturally sensible and *"appropriate"* (p. 63). This – in the opinion of the CPREPOL team – could be fully applied to what we try to achieve with our project.

5. Models of Restorative Justice

Both the social acceptance in a country and the national legal system play an important role in applying Restorative Justice programs. To illustrate the differences the following table cited from the Handbook on Restorative Justice Programmes (United Nations Office on Drugs and Crime, 2006, 16) demonstrates the wide spectrum of possibilities for implementing Restorative Justice into practice:

Table 1.
Varying characteristics of existing programmes

Position of programme in relation to the criminal justice system				
Outside of the system as an alternative to formal response		Part of formal diversion programme		Integrated into the justice system's response
Formality				
Very informal		Somewhat informal		Very formal
Position of programme in relation to the use of punishment				
The process takes place inaddition to punishment		Punishment is one of the outcomes of the process		The process and its outcome are a substitute to punishment
Arbitration involved				
Does not involve any arbitration		Involves an element of arbitration		Is essentially a process of arbitration
Involvement of legal counsel				
No legal counsel involved		Role of legal counsel limited (e.g. to ensure informed consent of offender)		Legal counsel involved
Involvement of criminal justice officials				
None		Limited involvement of criminal justice professionals (e.g. primarily for referrals)		The programme is operated by criminal justice officials
Community involvement				
Full community participation	Only family or small element of community involved		Limited community involvement	Essentially no involvement of community
Involvement of victim				
Central participant	One of many participants	Indirect involvement	A surrogate victim is used	Little or no involvement
Provision of victim assistance				
No or little assistance provided		Provision of some assistance		Primary focus on victim assistance
Programme delivery mechanism				
By independent NGOs and voluntary sector		By voluntary sector with funding and/or direction from government agency		By government agency
Focus on offender rehabilitation				
Almost none		One of many aspects of the process		Main focus on offender rehabilitation and recidivism recidivism prevention
Focus on reparation				
Central and essential focus on reparation		Reparative measures are included in the outcomes, but mostly incidentally		Limited focus on reparation for the victim

When it comes to a Restorative Justice program, the inclusion of victims, offenders and community members as well as the (graveness of the) offence have to be taken into account. The best known element and centrepiece of Restorative Justice is the voluntary meeting between the offender and the victims and - depending on the method - other persons affected by the crime such as family and friends, or other supporters, community members and various professionals such as judges, police, teachers and social workers. During the encounter participants decide on a consensual basis how to deal with the aftermath of the offence (Roche 2008, 2; 9; Van Ness & Heetderks Strong, 2010, 75pp).

Before presenting the practical implementation of the mainly used models of Restorative Justice approach (United Nations Office on Drugs and Crime, 2006, 14p) namely victim offender mediation, conferencing, sentencing circles, and community boards and panels in the following chapter, it has to be mentioned that the facilitator who should be a neutral person *"between"* the offender and the victim plays an important role in all these settings. It is difficult to draw one single picture of this role as his/her qualifications and tasks vary. This becomes clear when it comes to the facilitator's educational background or training requirements that do not only differ from country to country but also from process type to process type. Conferencing and circle models for example can involve from professional facilitation toward an 'everybody can do it' approach. In regard to the facilitator's background it seems as if there are no uniform rules in Europe defined yet (McCold, 2006, 34).

5.1. Victim offender mediation programs (VOMs)

With respect to Restorative Justice three different types of mediation are applied: legally based community mediation, faith-based victim offender reconciliation (VORP) and social work-based victim offender mediation (VOM) (McCold 2006, 24pp). The following paragraphs are focused on the latter as it is still one of the most applied mediation forms in the Restorative Justice environment.

Victim offender mediation programs (VOMs) are a widespread Restorative Justice practice using the technique of mediation. Christa Pelikan and Thomas Trenczek define it as follows:

> *"According to the CoE-R 99-19 (Appendix I) we will define victim offender mediation (VOM) as a process which is offered to the parties of a dispute arising from the commitment of a crime, to talk (ideally face to face) about and deal with the offending behavior. With the assistance of a neutral third party (the mediator) the parties identify the disputed issues, develop options, consider alternatives and endeavor to reach a (restitution) agreement." (*Pelikan & Trenczek, 2006, *64)*

Victim offender mediation programs (VOMs) are designed to address the needs of crime victims while insuring that offenders are held accountable for their offending (United Nations Office on Drugs and Crime 2006, 17). These programs were among the earliest Restorative Justice initiatives, they are integrated in the justice systems of the United States, Canada and many European countries since more than 20 years. Especially in the European context victim offender mediation is the most important model, or practice of Restorative Justice (Pelikan & Trenczek, 2006, 64). Supported by a trained mediator who has to ensure a safe and comfortable atmosphere so that a positive exchange and learning experience can take place the victim can tell the offender about the crime's physical, emotional and financial impact. Furthermore the victim receives answers to questions about the crime and the offender and is directly involved in developing a restitution plan for the offender aiming at repairing the harm caused by the criminal act. Victim offender mediation programs where both victim and offender are confronted with each other as an individual person rather than an abstract threat, seek to empower the participants to gain a greater understanding of the crime and to resolve their conflict on their own respectively with the help of a mediator/facilitator in a constructive environment (Van Ness & Heetderks Strong, 2010, 66p; 68; Bazemore & Umbreit, 2003, 225; Marshall, 2003, 33).

The United Nations Office on Drugs and Crime (2006, 18) defines specific mindsets that are prerequisite for implementing the victim offender mediation:

- The offender has to accept or at least not to deny responsibility for the crime;
- Both the victim and the offender must be willing to participate on a voluntary basis;
- Both the victim and the offender must consider it safe to be involved in the process.

Only if both, victim and offender can muster such attitudes victim offender mediation can function in a positive way.

So, the victim offender mediation aims not only at supporting the healing process of victims by providing a safe setting to meet and speak to the offender but also at allowing offenders to learn about the impact of their crimes/behaviour on the victims and taking responsibility for it. Responsible for the referral of cases to victims-offender mediation programs are judges, probation officers, victim advocates, prosecutors, defence attorneys, and the law. In some programs, cases are primarily referred as a diversion from prosecution. (Bazemore & Umbreit, 2003, 226)

For the offenders, victim offender mediation programs provide a chance to take steps toward voluntary reparation to their victims. Such reparation may take several forms:

- *"financial payments,*
- *work for the victim,*
- *work for a community cause selected by the victim,*
- *specific undertakings (e.g. to attend a counselling course), or*
- *a mixture of all these."(Marshall, 2003, 32).*

Normally mediation is performed with both parties present – the victim and the offender - present. This setting is called direct mediation. If the victim is not willing to meet the offender indirect mediation can take place in separate meetings with each party (Council of Europe 1999, 9). Nevertheless it is important to see that the form of indirect mediation compared to a meeting is less personal, is less effective in breaking down stereotypes and increasing understanding and can be less influential in reforming offenders. At the same time some victims may prefer the indirect mediation as they do not desire a direct encounter (Marshall, 2003, 33).

In addition, there are specific programs such as the so called victim offender panel (VOP). It offers a group of offenders who have committed similar offences to meet a group of victims who have suffered from the same type of crime. In this way victims whose own offenders are not caught have the chance to express their feelings and ask questions to the offenders. These specific settings may lack immediacy and personal relevance but still serves as a useful tool for communication and accounting of the crime (ibid., 33; Van Ness & Heetderks, 2012, 71).

In comparison to victim offender mediation programs where *"only"* the two most affected parties are involved other restorative approaches are based on intense community participation – community panels, family and community group conferences as well as circle sentencing. In all three techniques a primary goal is to mobilise informal social control mechanisms by strengthening, creating or restoring healthy interdependencies and by encouraging the development of mature internalized control, or conscience. This is how the harm can be repaired and offenders and victims can be reintegrated and supported. The participation of community members can lead to fostering empathy

and healing as well as to forming relationships. In general community justice is about building perceptions of connectedness to individuals as well as to groups as a way to respond to crime and/or prevent it (McCold & Wachtel, 2003, 296).

The following section describes the three mentioned types of community justice processes:

5.2. Community board

Community boards or panels involve the diversion of criminal cases from the prosecution or courts to community procedures that are more flexible and informal. These processes often contain elements of mediation or negotiation (Council of Europe, 1999, 10). Reparative boards are typically composed of a small group of citizens who conduct public, face-to-face meetings with offenders at court. During reparative boards the offender discusses together with the board members the offence and its negative consequences. In a next step the participants of the board develop a set of proposed sanctions. These penalties are discussed among the board and the offender until all participants agree on the specific actions the offender will undertake within a given time period to make reparation for the crime. The offender has to document his/her progress in fulfilling the terms of the agreement. After the stipulated time has passed, the board submits a report to the court which contains the offender's compliance with the agreed-upon sanctions. This is the point when the involvement of the board ends.

In general, the community reparative boards aim at promoting citizens' ownership of the criminal justice system by involving them directly in the justice process and giving victims and community members the opportunity to confront offenders in a constructive way with their behaviour. In addition, community boards offer offenders the opportunity to accept responsibility for the harm they caused to victims and communities and generate community-driven consequences for criminal and delinquent actions.

When implementing the community reparation boards it should be taken into consideration that the program has to be adapted according to the justice system. Further on the well-trained staff has to be integrated and the victim invited to participate in the process. The process should be comprehensible for all community members taking into account that adequate resources such as space, time or staff is provided adequately. The aim is to succeed successful outcomes for all involved parties. Therefore the judge limits the time the offender has to take part in the program and on probation (Bazemore & Umbreit, 2003, 228p).

5.3. Family and community group conferences

Family and community group conferences have been developed in New Zealand by the Maori people *("Whanau conference").* They represent an example of family and/or community participation in the criminal justice system. Similar to VOM in Europe, these kinds of conferences can be understood as an alternative measure programme to which an offender can be diverted from the criminal justice system. Unlike to VOM, not only the victim and the offender are brought together, but also their

relatives and other community support persons as well as certain agencies (such as the police and youth justice). After the facilitator explains the procedure and the incident, the offender tells what happened in response to open-ended questions from the facilitator. The victim describes in a similar fashion his/her experiences. After the victims' families and friends add their thoughts and feelings the offenders' families and friends do the same. Following this phase, the group discusses what should be done to repair the injuries caused by the crime. The victim, the offender as well as their families and friends have the opportunity to state their expectations. The offender and his/her family are expected to produce a comprehensive agreement supported by the trained facilitator, which involves reparation, sanctions and obligations, that is satisfactory to the victim and which they believe will help keep the offender out of further trouble (Council of Europe 1999, 10; United Nations Office on Drugs and Crime 2006, 21; Roche, 2008, 66). Compared to victim offender mediation programs conferencing is facilitated and not mediated whereby the facilitator assists the group and ensures a safe process for all including with minimal if any preparation of the parties (Van Ness & Heetderks Strong, 2010, 28; 67pp; Bazemore & Umbreit, 2003, 231).

The family and community conferences aim at the following (Bazemore & Umbreit, 2003, 231p):

- To give the victim the chance to be directly involved in the discussions about the offence and in the decision progress regarding appropriate sanctions to be placed on the offender
- To increase the offender's awareness of the impact caused by his/her behaviour and giving him/her the opportunity to take over full responsibility for the crime.
- To engage the collective responsibility of the offender's support system making amends and shaping the offender's future behaviour.
- To allow the offender and the victim to reconnect to key support systems.

In regard to these goals conferencing takes the power to decide what should happen from the judge and places it in the hands of the conference participants (Van Ness & Heetderks Strong, 2010, 28p).

Studies about the impact of family group conferencing indicate that this method leads to a reduction in fear for many victims. Furthermore it builds community skills in conflict resolution and participatory decision making (Bazemore & Umbreit, 2003, 233). Offenders involved in conferences indicate that they developed empathy for their victims and that their supporting networks got strengthened, too (Van Ness & Heetderks Strong, 2010, 69)

Conferences provide a place for dealing with wrongdoing throughout society as well as peace-making possibilities in schools, workplaces, communities, youth organizations, college campuses, and other settings. This method of Restorative Justice is used in several non-criminal contexts and has implications for all forms and degrees of wrongdoing (McCold, 2006, 30pp).

5.4. Circle programs

The third community-based process in the Restorative Justice's understanding is the circle sentencing. The holistic re-integrative strategy of circles is designed not only to address the criminal and delinquent behaviour of offenders but also to consider the needs of victims, families and

communities. There are different circle programs such as peace-making with its origin in the South African Community Peace Programme based on the so-called Zwelethemba model. It focuses on problem-solving with respect to an ongoing dispute, in order to find a solution (peace) with respect to that specific conflict. Peace building refers to problem-solving with respect to more generic issues. It also addresses underlying problems in the community, such as poverty and lack of access to services (Rohne, Arsovska & Aertsen, 2008, 17).

Sentencing circle was developed in Australia and Canada: In Australia, since the late 1990s, this practise has been transposed to urban areas with the advent of indigenous sentencing and circle courts. Indigenous people, their organizations, elders, family and kin group members are encouraged to participate in the sentencing process and to provide officials with insight into the offence, the character of victim-offender relations and an offender's readiness to change. With these developments, court processes may have become more culturally appropriate and greater trust may have grown between indigenous communities and judicial officers. Community based informal systems, or as they are sometimes called, non-state justice systems can take many forms and produce different outcomes in terms of access to justice as well as equity and fairness. The outcome, however, is often decided by arbitration rather than mediation and the offender's consent to participate is not always a requirement (United Nations Office on Drugs and Crime, 2006, 29).

In general, the significance of the circle is more than symbolic: Facilitated by the so called keeper, all circle members aim at developing a sentencing plan which addresses the concerns of all interested parties. The keeper can be a member of the community and is responsible to keep the process orderly and periodically sums up the agreements and outcomes. A wide range of issues regarding the crime are addressed, including community conditions or other concerns that are important for understanding what happened and what should be done. This process also includes discussion about issues beyond the immediate issue of the particular crime. A specific attribute of circle sentencing is the approach which allows not only the victim and the offender but all participants to express personal feelings and perspectives about the crime or other issues. Hence, circles lead to creativity in regard to solution finding, promote a shared responsibility and create a constructive environment. Due to this circles can also support and strengthen the community life (McCold, 2006, 27pp; United Nations Office on Drugs and Crime 2006, 22; Van Ness & Heetderks Strong, 2010, 69p; Bazemore & Umbreit, 2003, 232p).

The procedure of circle sentencing typically consists of multiple steps and includes

> *"(1) an application by the offender to participate in the circle process, (2) a healing circle for the victim, (3) a healing circle for the offender, (4) a sentencing circle to develop consensus on the elements of a sentencing plan, and (5) follow-up circles to monitor the progress of the offender" (Bazemore & Umbreit, 2003, 233)*

Circle sentencing aims at promoting healing for all parties affected, giving the offender the chance to make amends and empowering victims, community members, families and offenders by giving them a voice. The procedure also intends to establish a shared responsibility in developing constructive ways of resolution and dealing with the underlying causes of criminal behaviour. Circles tend to build a sense of community and a potential for conflict solving. At the same time they can promote and share the community's values. The success of circle sentencing depends a lot on the partnership

between the formal justice system and the community. Therefore enough time is needed to strengthen this relationship (ibid., 233).

Compared to the method of conferences or victim offender mediation, circles tend to involve wider community participation and are distinctive for their emphasis on ritual. Furthermore circles hold multiple meetings for an offender rather than just a single meeting (Roche, 2008, 66p).

So far little research on circle sentencing and its impact on victims, offenders and community members is available (Van Ness & Heetderks Strong, 2010, 70p).

Although Restorative Justice approach is composed of different methods of encounter such as mediation, circles sentencing and conferencing not all of them are suitable for every case. In contrary, circumstances have to be carefully investigated before types of Restorative Justice processes can be chosen in the particular setting. Also the societal acceptance of particular processes as well as culturally rooted peculiarities in informal conflict resolution mechanisms among the parties concerned are of crucial importance (Rohne, Arsovska & Aertsen 2008, 22p).

6. Limits of Restorative Justice on a general level: Risks and criticism

The presented definitions and objectives of Restorative Justice show that partly the expectations and promises with regard to this approach of conflict resolution are high – perhaps too high, as Kathleen Daly (2008, 137) supposes. *"Thus, a gap arises, in part from inflated expectations for what Restorative Justice can achieve."* (ibid.) Additionally, certain tendencies towards transfiguration and idealization of this approach can be stated. But, as already mentioned in chapter 2, Restorative Justice is not necessarily *"good"* and healing in principle. Declan Roche outlined this in the following way:

> *"Meetings do indeed provide an opportunity for ordinary people to resolve conflict in ways that display some of the best human qualities: the ability to empathize, to reconcile, to apologize and to forgive. The problem, however, is that the very informality which allows people to show their best side provides them with an opportunity to show their worst. Just as people can empathize, reconcile, repair, reintegrate, and forgive, so too can they scold and stigmatize, hector, and humiliate, dominate and demoralize." (Roche, 2008, 2)*

The dangers of informal justice processes must be reflected thoroughly because such processes reopen possibilities *"to the kinds of private vengeance and vendettas which the development of the 'impersonal' modern criminal justice system was designed precisely to restrain and repress"* (ibid., 34).

However, there are far more deep seated reasons for the gap between expectations and practice: The social mechanisms of Restorative Justice build on *"meso-social structures and 'thick' social ties, which are commonly associated with pre-modern (or gemeinschaft) societies"* (Daly, 2008, 137,

emphasis in original) – and these structures and relationships are hardly present in modern Western societies, especially in an urban context. Therefore, the restorative techniques and models need to be adapted so they match with modern society. Perhaps this may explain the dominant form of Restorative Justice in European countries, where victim offender mediation is widespread whereas circles or conferences, models with a greater proximity to pre-modern societies, are hardly implemented. The fact that social structures and relationships suitable for Restorative Justice may not always fit well together with the contemporary societal context must be taken into account in matters of police-minority relations, too: The police as an organizational shaped institution in today's society has little in common with pre-modern social structures and communities.

In addition, a critical discussion of the idea of community as a central element of Restorative Justice approach is needed. The concept of community shows weaknesses in general because it appears to be a fluid and ambiguous notion: *"What finally remains is that the limits of community are mental: what community is and is not is decided by subjective feelings."* (Walgrave, 2002, 74) Especially on the issue of police-minority relations the concept of community must be critically questioned: First the police is not a community but an organization even though the sense of community may be stronger than between the members of the so called ethnic community or rather the ethnic minority. Second the latter must be examined to see to what extend community aspects are observable or not. And third it is necessary to ask if there exists something like a sphere of shared community between police and ethnic minority because *"restorative interventions require a minimum of 'community': victim and offender must at least feel a common interest in settling the aftermath of the crime through constructive dialogue and reparation."* (ibid., 73)

Another limitation for processes of Restorative Justice accrues from the character and experience of the victimization. Based on several empirical studies, Daly concludes that for highly distressed victims *"an Restorative Justice process may be of little help in recovering from crime"* (2008, 141). Further on in some cases, victims have an interest not just in restitution or reparation but in punishment, *"because punishment can reassure the victim that he or she has public recognition and support."* (ibid., 139). It remains to mention that probably any legal process (such as a 'traditional' criminal prosecution) may be of little use to support victims who have been deeply affected by crime (ibid., 142). Concerning the topic of the present study it is of significance to note what types of conflict predominate the respective police-minority relations and, as a result, how the parties of the conflicts or even of crimes experience the offence differently.

7. Summary and prospects of Restorative Justice

Restorative Justice builds on the values of personality, participation, reparation and reintegration (Roche, 2008, 5) whereby the aim of any restorative response to crime is to repair the harm that has been caused by the offender. The dignity and equality of each person is respected and social harmony is built and promoted through the healing of victims, offenders and communities. Restorative Justice is to be understood as an approach that can be used in conjunction with traditional criminal justice processes and sanctions and that encourages an offender to gain insight into the causes and effects of his or her behaviour. Taking over responsibility in a meaningful way is a

central idea of Restorative Justice. In this understanding Restorative Justice deals with the harms and needs of victims and incorporates problem solving. So the underlying causes of conflict are addressed. The restorative approach is variable as it can be adapted to the circumstances, legal tradition, principles and underlying philosophies of established national criminal justice systems. Hence, with its ability to recognize the role of the community as a prime site of preventing and responding to crime and social disorder in many cases it can provide an alternative to the formal criminal justice system and its stigmatizing effects on offenders (United Nations Office on Drugs and Crime 2006, 7p).

With the help of different methods and considering the cases surrounding a specific crime it has to be detected what precisely needs to be repaired and how: for the majority of victims the most serious losses are emotional and psychological, including the loss or damage of dignity, happiness, confidence, security, personal power, and an injured sense of self-esteem (Roche, 2008, 27). Finally, it remains to be said once more that Restorative Justice approaches provide not always and not necessarily the better response to crime and conflicts. It depends on many different aspects and circumstances whether more formally or more informally models of conflict management could ensure a higher level of justice, reparation, integration, and mutual satisfaction. Thus, and in accordance with Walgrave (2007, 575), in this study Restorative Justice is not meant to replace the traditionally criminal justice systems in modern Western societies but rather to provide the latter with new impetus in order to increase the satisfaction for the victims, to reduce exclusionary effects for the offenders and to guarantee good basic conditions for a peaceful coexistence.

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