

Understanding Diversion and Restorative Justice: Setting the Context.

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1. Some introductory remarks/history.

In very general and historic terms one could argue that the establishment of juvenile courts and the related separate juvenile justice system in the USA in 1899 was by itself the first and fundamental diversionary measure. Its objective was to divert juveniles in conflict with the penal law from the adult criminal justice system. As Miriam Waters, a juvenile judge in the USA observed in 1925: “The first idea that should be grasped concerning the juvenile court is that it came into the world to prevent children from being treated as criminals”. This idea led to an emphasis on probation and community-based supervision which fits nicely in the diversionary justification for juvenile courts. In essence juvenile justice is by nature restorative.¹

Since the early years juvenile justice became an integral but separate part of almost all criminal law systems around the world. Important new developments arose from the adoption of international documents, starting with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice

¹ Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of the Juvenile Courts*, in Margaret K. Rosenheim et alia (Eds.), *A century of Juvenile Justice*, 142 – 157. Chicago and London: The University of Chicago Press 2002.

(Beijing Rules) adopted in 1985, followed in 1989 by the adoption of the UN Convention on the Rights of the Child and in 1990 by the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) and the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).

Diversion as we know it today is firmly based in the Beijing Rules and the CRC and the concept of restorative justice is meant to contribute to the core objectives of juvenile justice: the reintegration in the society of the child in conflict with the penal law and promoting that this child assumes a constructive role in society.

Some further remarks on both Diversion and Restorative Justice in the context of juvenile justice.

2. Diversion.

Already in 1985 the Beijing Rules state that consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority (Rule 11.1.). This rule became a legal obligation for all 193 States parties to the CRC in article 40, para 3 under b.

They shall, whenever appropriate and desirable, take measures for dealing with juvenile offenders without resorting to judicial proceedings, with the important condition that human rights and legal safeguards are fully respected.

In its General Comment No.10 the CRC Committee has provided the States parties with more concrete guidance and recommendations for the implementation of this provision in article 40, para 3.²

A summary of these recommendations:

A, the full respect for human rights and legal safeguards.

- diversion only when there is compelling evidence that the child committed the alleged offence;
- the child voluntarily admits responsibility without the use of intimidation or pressure to get this admission;
- the child's admission will not be used against her/him in subsequent legal proceedings; in other words in such proceeding the child is presumed to be innocent until proven guilty according to law (art. 40, para 2, (b) (i)).
- free and voluntary consent of the child in writing to the diversion based on adequate and specific information on the nature, content and duration of the measure and on the consequences of failing to cooperate, carry out and complete the measure. States may consider to require additional consent of the parents for children below the age of 16.
- the law should define the cases in which diversion can be applied and the powers of the police, the prosecutors and/or other agencies to use diversion. The Committee is of the opinion that the use of diversion should not be limited to

² The Committee took into account the provisions in Rule 11 of the Beijing Rules, for instance regarding the consent of the juvenile and her/his parents.

minor offences such as shoplifting or other property offences and/or first-time child offenders.

- the child must be given the opportunity to seek legal or other appropriate assistance for assessing the appropriateness and desirability of the diversion offered.

- completion of the diversion should result in a definite and final closure of the case and the confidential records of the diversion should not be considered as “criminal records”.

B. Diversionary measures.

It is left to the States parties to decide on the exact nature and content of diversionary measures. From the States parties reports it is that as diversionary measures a variety of community based programmes have been developed, such as community service, supervision and guidance by social workers or probation officers family conferencing and other forms of restorative justice, including reparation to and compensation for the victim.

C. Implementation.

It is rather easy to include in the law a provision which allows specified authorities, such as the police and/or the prosecutor to use diversion as a tool to avoid formal legal proceedings. But in quite a number of countries the major challenge is the implementation of this provision. The implementation of diversion requires a well trained service such as a probation or social work service. But such services often don't exist and if they do, they often have to

develop diversionary measures such as community service, supervision and restorative justice programmes. Furthermore rules have to be developed on the responsibilities of these services, e.g. for controlling the completion of the diversionary measures, the cooperation with agencies involved in community service carried out by juvenile offenders and the reporting to the competent authority (police/prosecutor).

Many countries do have experiences with the practice of diversion and, as the Committee said, other States parties should benefit from these experiences. For instance experiences in my country, The Netherlands, show that of all the cases of alleged offences by children, 40% is diverted by the police and that of the remaining 60% 2/3 is diverted by the prosecutor and that ultimately only 20 of every 100 juvenile offenders are dealt with by the juvenile court.

But benefitting from such experiences is easier said than done. It would be helpful if for instance UNICEF and Penal Reform International would produce a Guide for the development and implementation of diversion, based on a rather representative sample of experiences in different States Parties.

Diversion is meant to avoid that the child has to be dealt with and sentenced by the juvenile court. In other words diversion is and should be a matter of the police, the prosecutor or another competent body and not of the court.

This is one crucial difference with restorative justice programmes; Such programmes can be used in all stages of the juvenile justice process.

3. Restorative Justice.

3.1. A brief history and the emerging of restorative justice

Restorative justice, that is the idea that justice should be done by restoring/repairing harmed relationship between the offender and the victim and/or community has a long history.

Ancient times (before around 1200): damaged caused by a crime/offence was dealt with by the families of the offender and the victim, negotiating the arrangement of satisfactory reparation of or compensation for the damage done; possible contribution to reconciling families. But negotiating also failed and was often followed by full blown revenge (the eye for an eye approach).³

Middle ages: emerging of national, regional or city governments led to a process in which the authorities took control over responses to crimes (also because of the often violent ways families responded to crimes). Interventions regarding crimes became a matter of the state (or similar public bodies) and the offender and the victim disappeared from the negotiations.

Primary goal became maintaining public order and that was done by punishing the offender (often in very cruel ways) after a process between state officials (prosecutors) and the offender and decided by a judge or a jury.

In the course of the 19th and 20th centuries growing attention was paid to development of fair trial, introducing rules protecting the position of the offender vis a vis the power of the state. In addition the responses to crimes were increasingly focusing on the offender and less on (the seriousness of) the crime

³ See e.g. E. Weitekamp, The History of Restorative Justice: in: Gordon Bazemore and Lode Walgrave, Restorative Juvenile Justice: repairing the Harm of Youth Crime, 75 – 102. New York: Willow Press Inc. 1999

with a view to rehabilitate the offender and thus prevent recidivism (move from general prevention to special prevention). This development was strengthened and supported by the increasing importance of Human Rights after WW II. (UDHR 1948 and the adoption of the ICCPR and the ICESCR in 1966 + regional convention in Europe, the Americas and Africa). The victim disappeared completely from the picture of criminal justice.

Emerging of Restorative justice: Factors contributing to this emerging:

Growing dissatisfaction regarding the effectiveness of criminal justice. In particular imprisonment was not only quite expensive but did barely contribute to the prevention of crimes. Persons who had served their imprisonment recommitted crimes and responses to crimes were stigmatizing and did not contribute to re-integration into society of the offenders.

Growing attention for the position of the victim. Victimology became a new area of discussion and research. Services were established (1975 in the Netherlands) to provide victims with counseling and practical support to overcome the trauma's suffered from the crimes committed against them.

Furthermore legislative measures were taken to improve the possibilities for the victims to get compensation and to allow them to play a more active role in the criminal justice process.

These developments resulted in efforts to avoid criminalisation of offenders and to strengthen efforts for a better reintegration of offenders while at the same time improve compensation for the victims. In many countries this led to the

development of alternatives, in particular DIVERSION and later also the introduction of RESTORATIVE JUSTICE.

In the introduction of restorative justice the way indigenous people were and are dealing with crimes, the Maori in New Zealand, the aboriginals in Australia, the Inuit (first nation people) in Canada and indigenous groups in Africa and Asia played an important and inspiring role.

For instance victim offender reconciliation programmes were introduced in the USA and in other countries.

3. 2. What is restorative justice?

In the Basic Principles on the Use of Restorative Justice adopted by ECOSOC (Res. 2002/12) the restorative process is defined as:

“ Any process in which the victim, the offender and/or other individuals or community members affected by a crime actively participate with the help of a fair and impartial third party. Examples of restorative justice include mediation, conferencing and sentencing circles”

The core elements or purposes of restorative justice are: Responsibility, Restoration and Reintegration.

Crime is a violation of an existing norm and the offender has to take responsibility by actively participating in seeking a solution for the harm he has done. This activity should aim at restoration or compensation for the harm done to the victim as a respectful recognition of her or his position. Successful

restorative justice thus results in a reconciliation not only with the offender but also with society and in reintegration of the offender in society.

The offender and the victim are central in the restorative justice process and thus it is different from the traditional criminal justice practice in which reprisal/retribution, punishment and general prevention are the core notions.

Restorative justice and diversion are often linked with each other but they are different concepts.

Diversion is dealing with an offence without resorting to the juvenile justice proceedings (divert the juvenile from the criminal justice process; art. 40 (3) CRC) and does not necessarily imply an active interaction between the offender and the victim for the purpose of compensating the victim.

Restorative justice can be, but is not always, an alternative to prosecution as diversion is. It can be part of the sentence by the juvenile court or it can lead to an agreement between the offender and the victim as an alternative for a sentencing by the court.

3. 3. How to establish restorative juvenile justice?

Develop and implement a national policy or strategy for the introduction of restorative justice as an integral (and not just a marginal) part of the juvenile justice system. This should include the promotion of a culture favourable to the use of restorative justice and requires thorough and systematic information, via special courses, about the concept and meaning of restorative justice and its proper use for law enforcement, judicial and social authorities.

It should also include the establishment of restorative justice programmes to be carried out by either an existing service (e.g. probation service, social service, an NGO with experiences in dealing with cases of juvenile delinquency) or the creation of a new service if necessary of course provided with the necessary resources.

Furthermore facilitators for conducting restorative justice processes should be trained and clear criteria must be established for their qualifications in terms of required professional education (psychology, social work) and experiences in the field of criminal justice.

Rules for the use of restorative justice should be set by law or by regulations to ensure that the process is voluntary and fair to the offender and the victim. This would include inter alia:

- conditions for the use of restorative justice. For instance: in all stages of the juvenile justice process, and for all crimes (?); sufficient evidence to charge the offender; free and voluntary consent of the offender and the victim and the right to withdraw the consent at any time during the process; Agreements should contain only reasonable and proportionate obligations (for the offender); power imbalances and cultural differences among the parties (offender, victim and their respective families) should be taken into account;
- victim and offender have the right to consult with a legal counsel and a juvenile has the right to be assisted by a parent or a guardian;

- before agreeing to participate the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;
- coercion to participate is forbidden;
- discussions in the restorative process are confidential and should not be disclosed except with the agreement of the parties involved;
- if the restorative process results in an agreement this should be incorporated into the judicial decisions and judgements. The agreement should have the same status as any other judicial decision and precludes prosecution in respect of the same facts.

For discussion: This rule is disputed: some are of the view that an agreement does not necessarily mean that the case is closed and that the court cannot issue a sentence. In that case it is argued that the court should take into account the agreement and e.g. give a conditional sentence which will be executed if the agreement is not implemented. But at the same time the Basic Rules state that the failure to implement an agreement should be referred back to the restorative programme and that a decision on how to proceed should be taken without delay and that the failure cannot be used as a justification for a more severe sentence.

- when an agreement is not reached the case should be referred back to the established juvenile justice process. The lack of an agreement should not be used in subsequent juvenile justice proceedings.

For discussion: What does this mean? Initiating a restorative justice process requires that the offender admits that he committed the offence. So no need to

prove that he is guilty. Or can he deny that he committed the crime?

Participation of the offender shall not be used as evidence of guilt in subsequent legal proceedings (Basic Rules para 8). No more severe punishment because of the failure to reach an agreement? An how to prove that this is not the case?

- facilitators must perform their duties in an impartial manner with due respect for the human dignity of the parties.

Finally, and different from diversion, restorative juvenile justice is not yet an activity that exist in many States parties to the CRC. There are experiences with different forms of restorative justice such as Family Group Conferencing and Victim- Ofender mediation , for instance in Argentina, Belgium, Brasil, New Zealand, Northern Ireland and South Africa. In some countries restorative justice is an integral element of juvenile justice (New Zeland, Belgium) but in other countries it is a rather marginal activity with difficulties to survive and offering sufficient restorative services (e.g. The Netherlands)