

RESTORATIVE JUSTICE

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**ABSTRACT**

*Restorative justice is a paradigm shift in criminal justice system because it does not focus on punishment as a means to deal with it, but instead on processes that focus on healing, accountability, and community participation. In contrast to the word restorative justice does not emphasize punishment, as opposed to the traditional retributive models, crime is viewed as a breach of the relationships, where the harm is aimed to be restored to the victims, offenders and the communities. The focus of this approach is dialogue, restitution, and reintegration which strives to tackle the underlying causes of criminal behaviour as well as empowering the victims.*

*This paper discusses the basics of justice, giving a description of the different forms of justice, such as retributive, distributive, procedural, and restorative. We explore the concept of restorative justice, a process that entails such procedures and activities as mediation between the victim and the offender, and family group conferences, aimed at developing a sense of empathy and reconciliation. Its historical roots can be traced to pre-colonial activities in societies like the Maori in New Zealand and Native American tribes and turned into modern models as early as the 1970s by the first advocates like Howard Zehr and Albert Eglash.*

*Through how restorative justice has impacted on the law-making systems around the world. In the West, it has influenced legislation in such countries as Canada, the United States or New Zealand, and has included aspects therein, including Canada in its Youth Criminal Justice Act and New Zealand in its Family Group Conferences section of the Children, Young Persons and their Families Act 1989. Although the system is still predominantly retributive in India, the principles of restorative justice are reflected in the Code of Criminal Procedure in Section 265A CrPC in the concept of plea bargaining and in the concept of victim compensation in Section 357A CrPC, and there is increasing judicial support in favour of its application.*

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*This discussion finds that restorative justice would be a humanistic alternative to traditional systems, and the recidivism would be minimized, and the harmony in the society would be enhanced. Nevertheless, must be introduced culturally to enable its use with the aid of strong legislation and without abuse and violations. Restorative practices can transform the justice system and bring it back to be more inclusive and effective, which in the end is a positive outcome to both victims, offenders and communities.*

**Keywords:** Repairing harm, Revival of respect and dignity, Collaborative resolution, Responsibility and accountability, Victim empowerment and offender empowerment, Relationship restorative, Reconciliation, Human rights sensitivity, Humanistic and holistic justice.

## INTRODUCTION

To begin with, I would like to mention that in a way justice is the notion that individuals deserve to be treated justly and earn what they rightfully deserve. It has nothing to do with being prejudiced or biased but ensuring that the law (or anything the law has declared as morally right) was applied equally to all the people. You may perceive it differently- legal justice whereby the law is applied equally, distributive justice whereby the allocation of resources is performed in a fair manner, retributive justice whereby improper actions of the bad person are punished in an appropriate manner and restorative justice whereby the bad person is given a chance to make the evil right.

In a more philosophical aspect, justice is the balancing act of last resort, of the individual right in relation to the general welfare of society. Plato and other ancient philosophers observed a different way of thinking; along the line, justice was a form of harmony, in which each one remained within his or her station, and each received what is due, making a contribution out of their quaint. Today, we observe progress in terms of social justice whereby each individual is granted equal rights and fair treatment in line with the present time human rights agenda

In short, justice is about being fair, treating people fairly, abiding by the law, and the ethical aspect of justice which is to offer a human being what is rightfully his. It is both a massive ideal concept and an actual goal to be accomplished by the law systems and societies, everywhere in the world.

### Types of Justice

Justice may broadly be classified into four different types namely: retributive, distributive, procedural and restorative. Both of the types look at the various aspects of resolving conflicts and fairness.

Retributive justice is concentrated on punishment as a reaction to wrong. It is based on the premise that; offenders have to compensate their offenses either by imprisonment or fine towards their wrongdoing depending on the severity of the offense. This model is based on the theory of an eye for an eye with the objective of deterrence and satisfaction of demands of society to be accountable. As an example, in most legal regimes murder will mean life imprisonment or death to commensurate the damage.

Distributive justice is about equal distribution of resources and benefits in the society. It has to do with the division of goods, opportunities, and burdens based on equity with the priority given to the need, merit, and/or equality. John Rawls in theory of justice as fairness has been an example of this in that we should ensure that the arrangements into which we are bound serve to the advantage of the least privileged.

Procedural justice focuses on the decency of mechanisms that are employed to either end a dispute or distribute the resources. It also works by ensuring that: the decision arrived at is based on transparent and nonbiased means where all parties are heard. When processes are accepted as fair, individuals will accept the results, even in case they are bad.

Restorative justice, which is the centre of this article, puts consideration on the concept of repair instead of punishing. The concept does not only consider crime as a reward of law but rather as a restore manifestation of damage to individuals and relationships aiming at a recovery through dialogue and reconciliation.

Restorative justice is a method in which the stress is laid on reparation of the damage committed by a crime rather than punitive treatment. The system entails uniting the victims, the offenders, and the community members to enable them to discuss the causes of the crime and seek options of reconciliation. “According to the definition in use internationally, it is explained as a process through which stakeholders to a particular offense collaboratively determine how to respond to the consequences of the offense and its future implications to occurrence or non-occurrence respectively to those concerned no matter their intentions or actions”.<sup>2</sup> The premise of this model

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<sup>2</sup> Howard Zehr, *The Little Book of Restorative Justice* 37 (Good Books 2015).

is that social conditions and broken relationships are the cause of crime and that participants need a flexible, participatory response to fulfil the needs of the participants.

The most important are the perception of each crime as a crime against people and relationships, focus on the victims and communities in decision-making, and hold offenders to account by imposing such measures as restitution or community service. Contrary to retributive systems with emphasis on guilt and pain, the success of restorative justice is more often evaluated by the extent in which the damage and relationships are recreated. It enables the victim, provides an avenue through which the offenders can be held responsible in manners that matter and engages the community in the prevention and support.

**There are several DESTs of Restorative Justice:**

Restorative justice has a host of practices, with each context-specific:

1. Victim-Offender Mediation: A facilitated two-person conference between the victim and the offender in which they discuss outcome of the crime and come up with restitution as an apology or restitution.
2. Family Group Conferencing: Practical In this model, the juvenile court, the offender and the community help in the development of a plan of accountability and support, which is known commonly in youth justice systems, such as that in New Zealand and other legal systems.
3. Circles (Sentencing and/or Peace-making Circles): This is pre-formed sparked of indigenous traditions, and in a broader context of the stakeholders, applied in a format of a talking-circle to discuss harm and encourage healing.

**HISTORICAL CONTEXT**

Community Reparative Boards members convene into panels that hear cases and prescribe restorative actions, which emphasize reintegration. Such varieties are focused on encounter (dialogue), repair (restitution), and transformation (long-term change) and, thus, restorative justice can be used in many cultural and legal contexts recommendation was made to the manager to supply him with a deeper report on the financial analyst's calculation and the methods applied to formulate it. It was advised to the manager to provide him with a more detailed account of how the financial analyst made his calculation and the procedures used to make the calculation.

Restorative justice began nearly fifty years ago in the group research conducted by Professor Neil Braithwaite at the Faculty of Law in London, UK. Restorative justice has much older roots,

and the concept of restorative justice belongs to antiquity and aboriginal traditions before the formalization of the concept in the legal field. Although the term "restorative justice" developed in the middle of the 20th century, its concepts find reflections in the practices across the various cultures where the emphasis was made on healing the community, rather than punishing a person according to state regulations.

Forms of restorative justice have been observed among indigenous people across the world over centuries-long. In their case, Maori people of New Zealand employed a system called Utu, which ensured the social stability by means of restitution and reconciliation, keeping persons and the integrity of the group safe. Likewise, the Native American tribes in North America also used peace making circle, the community members explaining their harms in front of their peers and mending their relationships. Sin in most African and Asian cultures was regarded as a social problem, collectively everyone was to remedy the wrongdoer instead of isolating him or her.

The colonial authorities usually suppressed these practices, imposing retributive state centred systems. One of the prominent actors in the field, Howard Zehr observes pre-colonial justice to have been interpersonal and restitutive; in comparison with the formal legal structures that have materialized with nation-states. This transition of the community justice to the legal justice consolidated power and substituted the idea of negotiations with the concept of punishment.

Contemporary conception of restorative justice started to form in 1970s. The term was coined by Albert Eglash in 1977 in contrast to the retributive (punishment-based) and distributive (therapy-based) justice, focusing on restitution involving the input of both victims and offenders. In his article, Nils Christie 1977, titled Conflicts as Property, he argued that a state is not the owner of conflicts, therefore, communities' own conflict and that it is time to give them back out there.

During the 1980s and the 1990s, restorative justice was experimented in both North America and Europe. The concepts of victim-offender reconciliation programmes used by Canada and replenishment of Maori practices by the New Zealand in young justice initiatives were milestones. In the late 1990s, it was being spread in the world by the organization United Nations Office on Drugs and Crime so sensitive to all natures which acknowledged the origins of this drug within the traditions of communities. Restorative justice is currently viewed as a confirmation of history-repressed values of the indigenous and provides an addition to the retribution framework that predominates in Western systems. Its development is related to the

combination of ancient wisdom and modern requirements and how to overcome the constraints of punitive justice in the more and more interconnected world.

Historical background of restorative justice in the medieval and modern period indicates that there existed a shift in the community-based and victim-based system of resolving conflicts to a centralized state-controlled system of justice with the modern period witnessing a rekindled and formalization of the restorative practices that were motivated by the dissatisfaction with the traditional justice systems of punishment.

### **Medieval Period Context**

Restorative justice formed a significant component of the legal process during the medieval period especially in Anglo- Saxon England (5 th century to the Norman Conquest of 1066). Justice was typically victim-oriented and culminated when settling lawsuits through material compensation and swearing of oaths. Based on what I recorded, it appears that so much so that this system was frequently referred to as feud centred, and with an injury done to an individual or a relative, had to be returned in kind unless a negotiated amendment was achieved. The system was a balance between reparation and deterrence, and the status was another determinant of those benefiting or those who suffer in this context. This is not unfamiliar to us in our lectured sources on the social functions of early law.

These practices were gradually encroached by monarchical authority that regulated and restricted feuds, proclaimed royal peace, and redistributed compensation to the ruler. The readings describe how it played a catalyst towards transitioning the conception of victim and the concept of justice based on kinship to that of the state. Yet, during the medieval period, the work concerning the reviving practices following the settlement and peaceful relations retain the strong undertones of the resources connected with the partnership of forces and the notions of good and evil instead of autonomous ideas of kindness and forgiveness promoted in the present era.

### **Modern Period Context**

Restorative justice resurfaced in the modern period and from the 1970s onwards as a formal challenge to the traditional criminal justice system as a system that focused on punishment and retribution. As the literature, particularly the North American case studies and the indigenous justice principles, demonstrates, modern restorative justice evolved majorly in North America and subsequently in the entire world under the influence of the principles of indigenous justice, as well as, the experiment of trials with the programs of victim-offender reconciliation.



During this timeframe, relations destroyed by crime are to be rebuilt which encompass conversation among the victims, the offenders and the community agents. It is based on accountability, healing, and reintegration rather than the previous perception of crime as a crime against the state, and that crime damages people and relationships. The contemporary restorative justice movement is regarded as a reaction to the shortcomings of punitive justice that emphasized rehabilitation and victimisation contentment combined with minimized recidivism. Overall, a revitalizing force of the kinship and feud traditions, which was gradually supplanted by the state in the medieval period, is being consciously recovered and reused in modern criminal justice to deal with the more societal and emotional consequences of crime.

### **LEGISLATIVE FRAMEWORK: INDIAN AND WESTERN LAW**

Restorative justice had a profound impact on the legal frameworks such that retributive models have on a global scale been overshadowed by the soft aspects of healing and making peace as an element of restorative justice. Although its acceptance is mixed, its influence on the laws in Western and Indian arenas has manifested itself through mediation, compensation and community participation provisions.

#### **Western Laws:**

Restorative justice has come to be adopted in statutes in Western jurisdictions, including on juvenile and minor cases, influenced by indigenous trends.

Family group conferencing in New Zealand was formalised under the Children, Young Persons and their Families Act 1989,<sup>3</sup> an Act following Maori customs as a form of restorative justice. According to this act, youth offenders are compelled to hold conferences, which include parents and victims in developing reintegration plans, which minimize the court interference and recidivism.

Youth Criminal Justice Act of Stemwork, 2002<sup>4</sup> in Canada focuses more on restorative principles such that extrajudicial options such as community service and mediation are given in the Sections 4 and 5. It relies on accountability and rehabilitation that reflects the practices of the indigenous circles.

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<sup>3</sup> *Children, Young Persons and Their Families Act 1989* (N.Z.).

<sup>4</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1 (Can.).

The United States has different states that have implemented the restorative aspects. Minnesota Restorative Justice Act<sup>5</sup> (Minnesota Statutes Section 611A.775) is one example of an Act that grants victim-offender conversations and compensatory plans. The federal Juvenile Justice and Delinquency Prevention Act<sup>6</sup> promotes correctional aimed restoration programs, but it is state-proposed.

The European Union facilitates restorative justice to victims by providing prescribed restorative processes such as mediation by authorising restorative process others (member states) under the Victims' rights Directive 2012/29/EU (Article 12),<sup>7</sup> which stipulates that the victim give his or her consent and safe environment.

Such laws are restorative in nature by emphasizing, healing laceration, needs of the victims, and reintegration of offenders, frequently referring to tenets of UN Basic Principles on Restorative Justice (2002).

### **Indian Laws:**

Legal system in India is to a great extent based on the retributive approach and deals with the laws introduced during the period of colonization such as the Indian Penal Code (IPC) 1860 and the Code of Criminal Procedure (CrPC) 1973. Nonetheless, it is also apparent that restorative justice has taken effect especially in the provisions regarding victims and judicial interpretations. In Chapter XXIA of the CrPC (Sections 265A to 265L) having been introduced in 2005, plea bargaining has provided opportunity to all defaulting offenders to come in with cutting-edge reduced sentences, sometimes with compensation to the victims. This is similar to restorative reparation but it only applies in the offenses that have a maximum of seven years imprisonment. Under Section 357A CrPC, the states are required to provide victim compensation schemes, which facilitates financial compensation to repair harm, which is compatible with restorative concept of restitution.

Protection of Children Sexual Offences Protection of children sexual offences (POCSO) Act 2012<sup>8</sup> (in force), contains ingredients to think restoratively in Section 33 giving child victims a chance to take part sensitively in proceedings, and through Section 19 rehabilitation.

<sup>5</sup> *Minn. Stat. § 611A.775* (2023) (Restorative Justice Act).

<sup>6</sup> *Juvenile Justice and Delinquency Prevention Act*, 34 U.S.C. §§ 11101–11103 (2023).

<sup>7</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, art. 12, 2012 O.J. (L 315) 57.

<sup>8</sup> *Protection of Children from Sexual Offences Act*, No. 32 of 2012, India Code.



Juvenile Justice (Care and Protection of Children) Act 2015<sup>9</sup> delineates that it strongly encourages restorative methods of dealing with juveniles such as counselling as well as community service under Section 18, guided by the international models.

The Supreme Court is judicially seen to have supported restorative justice in such cases as matrimonial battles under Section 482 CrPC, termination of proceedings due to a mutual settlement.

These provisions are not completely codified; however, these provisions are based on the influence of restorative theory in promoting balance between punishment and healing. Cultural resistance, inconsistent application and occasionally, lack of awareness are all difficult but expanding awareness indicates a possibility of wider integration.

### JUDGEMENTS AND CASE LAWS

Restorative justice has been cited in court rulings both in England and in India, where the Supreme Court has been striking a balance between retributive and restorative aspects. Presidentiable cases are analysed in this section with footnotes to Supreme Court Citations (SCC).

In the case of *Firoz vs. State of Madhya Pradesh* 7 SCC 443 2022,<sup>10</sup> death was overruled by the Supreme Court and commuted to serve a term of 20 years imprisonment against a heinous crime of rape and the subsequent murder of a minor. It was noted by the bench, headed by Justice U.U. Lalit, that restorative justice gives parole to offenders who, once penalty is over, can emerge as socially responsible citizens stressing rehabilitation over extended imprisonment. Such a decision pointed to a necessity to balance between retributive justice and the restoration opportunities, adding that maximum punishment is not the sole means of ensuring that the psyche will be mended.

The Court in the case of *State of UP vs. Sanjay Kumar* (2012) 8 SCC 537,<sup>11</sup> gave emphasis to personalised sentencing with an added touch of restorative justice such as proportionality and the needs of the victims. It noted that unnecessary sympathy is a way of sabotaging people and justice can heal the situation of offenders and their victimization, leading to discretion on punishment.

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<sup>9</sup> *Juvenile Justice (Care and Protection of Children) Act*, No. 2 of 2016, India Code.

<sup>10</sup> *Firoz v. State of Madhya Pradesh*, (2022) 7 SCC 443 (India).

<sup>11</sup> *State of Uttar Pradesh v. Sanjay Kumar*, (2012) 8 SCC 537 (India).

In *Gian Singh vs. State of Punjab* (2012) 10 SCC 303,<sup>12</sup> the Supreme Court struck down criminal prosecution in compoundable offences, on mutual settlement, just like the restorative mediation. It was observed that, such resolutions heal relationships and help the judiciary to relieve congestion, as long as they do not concern heinous crimes.

The mitigating factors which had been raised by *Bachan Singh* were reiterated in *Shatrughna Baban Meshram vs. State of Maharashtra* (2021) at 1 SCC 596,<sup>13</sup> which promoted restorative factors in a death penalty case. The Court noted that socio-economic reasons should be handled with leniency in line with restorative conceptual perspectives of crime as a social process induced.

*Sunil Batra v. Delhi Administration* (AIR 1978 SC 179): Referring to this principle as a fundamental usage of restorative justice in Indian judiciary, Justice Krishna Iyer stressed on retributive policy must pay way to reformative option and consideration including rehabilitation and benign treatment of prisoners.

*Rattan Singh v. State of Punjab*: The Court emphasized the necessity for victim restitution and pointed out shortcomings in Indian criminal law pertaining to victim rights and that restorative justice techniques should be resorted to.

Western cases such as the Canada case,

Canada - *R. v. Gladue* were able to affect the discourse globally by enforcing a restorative option to sentencing coupled with taking into account the indigenous backgrounds.

United States – A couple of states (Vermont, California) have incorporated restorative justice in juvenile and Balanced Restorative Justice Initiatives 189 adult sentencing and mob's atrial systems, reducing the role of the victim, local involvement, and the offender answerable before a panel, by mediation, and through community correctional work.

European Union and UK: Restorative justice is becoming more and more a program in Europe with various programs that focus on mediation, victim-defendant discussions, community restorative programs as another/additional forms of criminal proceedings.

These determinations serve as an example of the shifting nature of restorative justice, whereby SC observations suggest that restorative justice can be utilized in humanizing the system and in the process making the system accountable.

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<sup>12</sup> *Gian Singh v. State of Punjab*, (2012) 10 SCC 303 (India).

<sup>13</sup> *Baban Meshram v. State of Maharashtra*, (2021) 1 SCC 596 (India).

According to the observations of a number of SCC volumes, restorative justice is compatible with Indian law.

### **How courts frame RJ in opinions – recurring legal themes**

1. Victim-focused remedies - courts resume to compensating victims, providing and granting timely interim relief, and provision of non-monetary support. That is, they continue to elevate the dignity and the needs of the victim to the heart of the justice system (consider the take of Rudul Sah and Bodhisattva).
2. Reformation & rehabilitation as sentencing objectives - even with the more serious offences, the same-time treatment is getting some encouraging pushes, with judges of offenders doing their summative consideration with reference to reformation and long-term integration of the offender. In fact, the news reports on a small number of commutation cases in which that has been the special attention
3. Cultural/contextual sentencing Databases show that Gladue in Canada formally incorporated cultural analysis into the sentencing of indigenous offenders, and this practice has become a standard in what we are now required to think of as compulsory restorative action.

### **Practical comparison – Indian and western practice**

Statutory incorporation: New Zealand and youth law Nailed down restorative justice in fact the Gladue principles and youth law in New Zealand have been given a good legal foundation. It is more fragmented and the UK has statutory provisions as well as national pilots underway. Still the Indian practice is rather case-based and scattered - courts largely award money or make an indication but there is no robust legislation on RJ.

Domain: The FGC model in New Zealand is a sequential, comprehensive youth process. The Gladue in Canada is applied in the sentencing scenario of Indigenous offenders. RJ in India does not appear as a system, primarily as victim compensation or rare community sentencing recommendations.

Judicial language: Western judgements often describe RJ as an analytical, nearly indispensable element of the analysis. The proposed RJ remedies are given by Indian courts are a court quid pro quo remedies, which do not fall under the product of courts.

## CONCLUSION

Restorative justice comes out as a more attractive alternative to powerful system of punishments that encourage healing and responsibilities that retributive models have mostly neglected. It reverses the use of prohibition to fight illicit beer by invoking ancient indigenous forebears to contemporary practice by engaging the offender in the process of transforming the penalty into harming and repairing relationships, which is crime it treats as an offense to relationships.

Its impact on law, in the case of the conferencing models in New Zealand, or in the compensation schemes in India of victim compensation, reflect the flexibility in cross-cultural contexts. Even a hearing in a Supreme Court that is judicially endorsed is a pointer of the move towards balanced justice where punishment is balanced with rehabilitation.

Restorative justice is an important paradigm shift to modern-day criminal jurisprudence, presenting an alternative to the retributive paradigm that prevailed over the history of modern laws. The model can result in acceptance of the victim, punishment aimed at recovery of the criminal and social integration through the participants coming to restorative justice which has been shown to increase satisfaction of the victims, increase the likelihood of the convicted criminal reforming as well as lead to the build-up of social group capital hence compensating the drawbacks of punitive models of justice.

The experience of other jurisdictions, such as Canada and New Zealand, demonstrates that restorative mechanisms can and should be institutionalised in legal texts, including statutes and rules, and by judicial declaration, the early signs of this appear in India under institutional legislation such as Sections 265A and 357A of the Code of Criminal Procedure, 1973, and in an emerging common language of the law, as felt in *Mohd. Firoz v. State of Madhya Pradesh* (2022). This climate affirms that the increased role of restorative practices in the wider criminal system is being embraced in a slow but steady manner, especially with considerable hesitation.

Yet to make restorative justice an effective operationalised concept there must be a cultural contextualisation, backed by elaborate legal changes, and protection against any likelihood of abuse or coercion and most importantly bringing communities, civil society, and justice institutions on board with helping to create the culture of empathy and poor reconciliation of the past.

Finally restorative justice does not ultimately aim to replace the conventional system with an alternative one but aims at complementing the current system by humanising its processes of

justice and ensuring justice is more concerned with restorative than retributive. When adopted with care and diligence, it can change criminal justice into a more accommodative, human, and a more efficacious process, a system that will gain the interests of victims, offenders, and the society broadly.

## SUGGESTIONS

### **1. Policy Integration**

To legally embed the concept of restorative justice into their laws, governments must formally make it a policy of supplementation to the existing criminal justice regime, not substitution. Establish specific criteria used when it is applied (i.e. minor offenses, youth offending, community disputes and a couple of serious offenses where the victim agreed to it).

### **2. Capacity Building**

Train judges, attorneys, police, social workers, and restorative practice mediators. Establish specially-designated restorative justice facilities within the community to hold remedial justice talks between victims and the offenders.

### **3. Victim Support**

Provide psychological, emotional, and financial support to victims during the procedure. Participation should be voluntary with the victims having the right to withdraw at any time.

### **4. Community Involvement**

Increase the participation of community leaders, schools, and other local organizations in restorative efforts. Carry out sensitization of the population to reduce stigmatization of criminals and reconciliation.

### **5. Diversity in Schools and Workplaces:**

Restorative justice can overcome bullying violence and discrimination by resolving school and workplace disputes. Create restorative circles and peer mediation to impart skills of empathy and resolution of conflicts at an early age.

### **6. Monitoring and Evaluation:**

Establish objective measures (recidivism rates, victim satisfaction, trust in the community) to understand effectiveness. Conduct periodic reviews and modify programs to align with culture, social and law aspects.

### **7. Reinstatement of Justice on Severe Crimes.**

## LEX MENTE

Restorative approaches can be also adapted to both serious violence cases provided victims agree to it, although with a substantial number of precautions, as they are more sophisticated. Such programs must be based on telling the truth, recognizing damage and long-term healing to the victims and communities.

