

Restorative Justice in France: Standards and their Deviations

A previous edition of this paper has been published in "Grandeurs et vicissitudes de la Justice restaurative en France", coll. Controverses, L'harmattan.

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ABSTRACT

There are multiple definitions of restorative justice.² The Methodological Guide on Restorative Justice, published recently by the Ministry of Justice uses the definition of the ministerial Circular of March 15, 2017. It "aims to restore the social link damaged by the offence, through the implementation of various measures involving the victim, the perpetrator and society. It is designed to apprehend all the personal, family and social repercussions linked to the commission of the acts and thus participates, through listening and the establishment of a dialogue between the participants, in the reconstruction of the victim, the empowerment of the perpetrator and appeasement, with a broader objective of restoring social peace."³

Keywords: restorative justice, penal system, normative framework, workshop, relational approach

1 The opinions expressed in this article are solely those of the author and not of the Institute he founded in 2013 (IFJR).

2 See in particular. R. Cario, *La justice restaurative: vers un nouveau modèle de justice pénale ?* 2007-9, pp. 372-375 ; R. Cario, *La justice restaurative. Principes et promesses*, Ed. L'Harmattan, 2nd ed. 2010, p. 74 et seq. ; R. Cario, " Justice restaurative", *In Encyclopédie juridique, Répertoire de droit pénal et de procédure pénale*, Ed. Dalloz, 2018, 42 p. ; See also *Handbook on restorative justice programmes*, Ed. Unodc, 2nd ed. 2020, p. 4: " Restorative justice is an approach that offers offenders, victims and the community an alternative pathway to justice. It promotes the safe participation of victims in resolving the situation and offers people who accept responsibility for the harm caused by their actions an opportunity to make themselves accountable to those they have harmed. It is based on the recognition that criminal behaviour not only violates the law, but also harms victims and the community.

3 justice.gouv.fr/publications-10047/professional-guides-10048, Nov. 2020, 55 p. and Appendices, spe. p. 5.

Justicia Restaurativa en Francia: Estándares y sus Desviaciones

RESUMEN

Existen múltiples definiciones de justicia restaurativa. La Guía Metodológica de Justicia Restaurativa, recientemente publicada por el Ministerio de Justicia, utiliza la definición de la Circular ministerial de 15 de marzo de 2017. Tiene como objetivo “restaurar el vínculo social dañado por el delito, mediante la implementación de diversas medidas que involucren a la víctima, perpetrador y sociedad. Está diseñado para aprehender todas las repercusiones personales, familiares y sociales vinculadas a la comisión de los hechos y así participar, a través de la escucha y el establecimiento de un diálogo entre los participantes, en la reconstrucción de la víctima, el empoderamiento del perpetrador y el apaciguamiento, con un objetivo más amplio de restablecer la paz social.”

Palabras clave: justicia restaurativa, sistema penal, marco normativo, taller, enfoque relacional

法国的恢复性司法：标准及其偏差

摘要

关于恢复性司法存在多种定义。法国司法部近期出版的《恢复性司法的方法论指南》(The Methodological Guide on Restorative Justice)使用2017年3月15日部长通函中的定义。其“通过执行一系列将受害者、犯罪者和社会包括在内的措施，致力恢复由犯罪行为破坏的社会联系。恢复性司法的设计旨在理解一切与犯罪行为相关的私人、家庭及社会影响，并因此通过建立和聆听参与者之间的对话，进而参与由受害者、犯罪者赋权以及绥靖行为组成的重新建构过程，以达到恢复社会和平这一更大的目标”。

关键词：恢复性司法，刑罚制度，规范框架，研讨会，关系方法 (Relational approach)

Serge Charbonneau and Catherine Rossi define restorative justice, in their book on relational mediation, as “a mode of social reaction (or a philosophy in how to respond) to a disturbance (crime, conflict, offence, tension) in which this disturbance is taken and analyzed from the point of view of the harm it causes to people, rather than from the point of view of its cause (the offender, his act, or the context that allowed the crime to occur)”¹.

More commonly, restorative justice aims to offer the concerned individuals a new space intended for dialogue, to consider the expectations of each person following the repercussions of the offence. The measures it promotes, based on a rigorous protocol, take place within restorative² workshops, with various modalities: restorative mediation, restorative conference, judicial restorative circle, encounters between inmates and victims, extra-judicial restorative circle. At this stage of its implementation in France, these restorative workshops require the presence of the perpetrator and the victim and/or their relatives and/or members of their community³. Depending on the situation, it does not matter if the protagonists are linked, or not, by the same case. It does not matter if criminal proceedings have been initiated or not. The seriousness of the offence must be considered in terms of both its objective and subjective seriousness.

The origins of restorative justice are intertwined linked with the history of our humanity. The monopolization of justice by the Nation-State was not inevitable. At the turn of the first millennium of our era, its first intention was only a precise territorial political domination but more secondarily the search for an ideal of justice. Despite the resistance testified by the “infra-justice” until the end of the 18th century at least, when most of the inter-personal criminal conflicts were regulated by the interested parties themselves⁴, the imposition of repressive criminal law continued in the Western countries. It has been aggravated over the last few centuries, notably through colonialist policies, sweeping away all the customary practices of subjugated and oppressed countries, in order to better plunder their wealth for commercial and geopolitical reasons, in defiance of their multi-millennial cultures. The genocides and ecocides thus committed still ruin the harmonious and independent development of these conquered countries, in a completely

1 See in particular. S. Charbonneau and C. Rossi, *La médiation relationnelle. Rencontres de dialogue et justice réparatrice*, Ed. L'Harmattan, coll. *Criminologie*, 2020, p. 20; see also p. 27.

2 Expression borrowed from the title of J. Faget's book, *Médiations: les ateliers silencieux de la démocratie*, Ed. Erès, 2015, 419 p.

3 V. H. Zehr, *The little book of restorative justice*, 2015, p. 40 et seq., 5 (2nd signpost); *La justice restaurative. Pour sortir des impasses de la logique punitive*, Labor et Fides Ed., 2012, p. 54 et seq.; 65 (2nd principle); *Changing lenses. Restorative justice for our times*, 25th anniversary ed., Hérald press, 2015, p. 235 et seq.

4 V. not. B. Garnot, *Histoire de la justice. France, XVIè-XXè siècle*, Ed. Gallimard, 2009, p. 353 et seq.; see also M.-S. Dupont-Bouchat, *Le crime pardonné. La justice réparatrice sous l'Ancien Régime (XVI e -XVIII e siècles)*, in *Criminologie*, 1999-32-1, pp. 31-56.

illegitimate way, all over our planet earth⁵. The growing dissatisfaction of surviving indigenous populations has led social workers over the past fifty years or so to interrogate the history of criminal sanctions and the regulation of criminal conflict⁶. Simultaneously, the (re)consideration of victims, thanks to the relevant work of feminist victimology emerging at the same time, has led to the reappraisal of the most integrated responses possible in order to meet their expectations, which are insufficiently taken into account by the criminal process. Since purely repressive responses offer very few guarantees of reintegration for some individuals and reparation in the broad sense for others, experiments in face-to-face encounters between perpetrators, victims or their survivors, linked by the same offence, have been set up. France is beginning to embrace such a promising approach to dealing with the repercussions of crime, albeit in a still timid manner.

As it has just been pointed out, restorative justice has never ceased anywhere in the world. Contemporary experiments have popularized them to the point of suggesting that Restorative Justice is an invention of modernity. Beyond the doctrinal quarrels and/or the divergences between the designers as to the minimalist or maximalist strategy to be developed, it appears that the first records of encounters between offenders and victims began to be popularized at the end of the 1970s and, consequently, have become “emblematic” of the (re)discovery of restorative philosophy and the measures it promotes, all too often omitting the founding work of Albert Eglash⁷. A few of them can be briefly mentioned here. The Columbus, Ohio project in 1969⁸, the Kitchener, Ontario (Canada) experience in 1974⁹. Experiences such as the *Victim Offender Reconciliation Programs (VORP)* have been generalized in the United States since 1976 through the Elkart County (Indiana) project¹⁰. These encounters programs between perpetrators and victims have also continued to develop in Canada and in many English-speaking countries, as they

5 V. not. N. Rouland, *Anthropologie juridique*, Puf, 1988, p. 346 et seq. ; J. Pratt, *Colonization, power and silence. A history of indigenous justice in New Zealand society*, In B. Galaway, J. Husdon, *Restorative justice: international perspectives*, Kluger pub. 1996, pp. 137-155; H. Zehr, *The little book of restorative justice*, 2015, p. 54; A-C. Martineau, *La justice pénale internationale, l’Afrique et le refoulé colonial*, In *Champ pénal*, 2016-XIII, <https://doi.org/10.4000/champpenal.9300>

6 R. Cario, C. Rossi, *Justice restaurative. Principes et promesses*, Ed. L’Harmattan, new ed. 2021, forthcoming.

7 He was the first to develop the very concept of *restorative justice* and to envisage dialogue programs between the protagonists of the offence. See for example. “Creative restitution: a broader meaning for an old term”, in *Journ. crim. Law, criminology and police science*, 1957-1958-48-6, pp. 619-622; *Ibid*, Creative restitution: its roots in psychiatry, religion and law. In *British Journal of Delinquency*, 1959-10, 114; *Ibid*, Beyond restitution: creative restitution, In J. Hudson, B. Galloway (Eds.), *Restitution in criminal justice*, Lexington books, 1977, pp. 91-129.

8 V. J.-P. Bonafé-Schmitt, *La médiation pénale en France et aux États-Unis*, LGDJ, *Droit et société*, 1998-3, 103-120.

9 See in particular. D.E. Peachey, *op. cit.* pp. 14-26; V. Kelly Russ, *This is my story... my life*, restorativejustice.org/10fulltext.

10 J.-P. Bonafé-Schmitt, *Ibid.* pp. 108-110.

have spread to Europe at the beginning of the 1980's¹¹. Today, there are thousands of similar programs, which are called *Victim Offender Mediation* (VOM), *Victim Offender Dialogue* (VOD) and *Victim Offender Conferencing* (VOC)¹².

The same was true for the reintroduction of *Sentencing Circles* in Canada¹³, *Family Group Conferencing* in New Zealand and Australia during the 1970s¹⁴ and 1980s, and later in the countries of the old continent. More recently, the encounters between prisoners and victims, and then encounters between convicted persons and victims (during probation) have made it possible for people who are not involved in the same case to enter into the same dialogue space¹⁵. In other situations where public action can neither be introduced nor continue, or when it is extinguished, Restorative Dialogue Encounters are now being implemented¹⁶.

As far as France is concerned, after an initial experiment at the *Maison Centrale de Poissy* in 2010¹⁷, the Law of August 15, 2014 provided for the generalization of the use of restorative justice in all criminal proceedings, at all stages of the process. Restorative mediation, encounters between inmates and victims, and, in the near future, restorative conferences and encounters for restorative dialogue, are the main tools used in this regard. A few *Circles of Support and Accountability* or *Accompaniment and Resources Circles*, despite the reservations expressed above, have also emerged¹⁸. More recent texts complete its scope of application,

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- 11 See in particular. *Victim-offender mediation in Europe*, Samenleving criminaliteit & Strafrechtspleging, 2000-20, 382 p.; T. Peters, Victimization, mediation and reparation-oriented practices, in R. Cario, D. Salas (Dir.), *Œuvre de justice et victimes*, Vol. 1, Ed. L'Harmattan, 2001, pp. 203-254, esp. p. 234 et seq.; C. Pelikan, T. Trenczek, VOM and restorative justice. The european landscape, In D. Sullivan, L. Tiffit (Eds.), *Handbook of restorative justice*, Routledge ed. 2008, pp. 63-90.
 - 12 On these programs, see in particular. M.S. Umbreit, Violent offenders and their victims, In M. Wright, B. Galaway (Eds.), *Mediation and criminal justice*, Sage ed. 1989, pp. 99-112; M.S. Umbreit et al, *The handbook of victim offender mediation: an essential guide to practice and research*, 2001, Jossey-Bass Inc, 425 p.; *Handbook on restorative justice programmes*, United Nations Office on Drugs and Crime, multigraph, 2008, pp. 17-20; *Handbook on restorative justice programmes*, 2nd ed. 2020, pp. 24-27.
 - 13 Not to be confused with *Healing Circles*, see in particular. M. Jaccoud, Les cercles de guérison et les cercles de sentence autochtones au Canada, In *Criminologie*, 1999-32-1, p. 79-105.
 - 14 D.B. Moore, T.A. O'Connell, Family conferencing in Waga Waga: a communitarian model of justice, In G. Johnstone (Ed.), *op. cit.*, pp. 212-224; D. Edwards, K. Parkinson (eds.), *Family group conferences in social work*, Policy press, Univ. Bristol, 2018, 256 pp.
 - 15 See in particular. R. Cario (Dir.), *Les rencontres détenus-victimes. L'humanité retrouvée*, Ed. L'Harmattan, 2012, 164 p.
 - 16 See in particular. R. Cario, *La justice restaurative en France. Une utopie créatrice et rationnelle*, Ed. L'Harmattan, 2020, p. *Ibid.* 2020, pp. 80-82.
 - 17 Les rencontres restauratives en matière pénale. De la théorie à l'expérimentation des RDV «, In *AJ.pénal*, 2011-6, pp. 294-298.
 - 18 *Circles of Support and Accountability* (reserved for sexual offences only), as well as *Circles of Support and Resources* (other types of offences), although drawing their roots from the humanist restorative philosophy, do not constitute restorative measures because they are exclusively centred on the accompaniment of the offender, by voluntary persons from the community, with a view to regaining his or her personal and social autonomy, in the broadest sense; V. R. Cario, *Ibid.* pp. 82-84.

notably by extending it to minors in delinquent situations (I).

It is important that these restorative workshops respect a rigorous protocol in order to avoid re-victimizing the participants. Structured around essential phases, they now benefit from a solid methodology thanks to the “relational approach” in restorative justice, experimented by Serge Charbonneau for many years and theorized more recently by Catherine Rossi (II).

Nevertheless, despite the conditions clearly laid down by the law and the existence of well-established protocols for the implementation of restorative workshops, liberties, characteristic of accommodations and distortions, are all too frequently observed in pseudo-restorative programs¹⁹, at the risk of distorting the philosophy and legitimacy of restorative justice, and even leading to new victimizations of people who have wished to participate in these restorative workshops (III).

I - The normative framework of restorative workshops in France

Restorative justice is undergoing remarkable development in our country²⁰, both in terms of the multiplication of restorative programs backed by partnership agreements (Justice, Prison Administration, Judicial Protection of Youth, Victims’ Aid, mainly), the training of facilitators and the implementation of restorative workshops under various modalities. The legislator consecrated it in 2014, in a generic and generally applicable text. Other texts have come to consolidate its insertion in professional practices dedicated to adults as well as to minor offenders.

A - The Law of August 15, 2014

With regard to the imperative transposition of the Directive of October 25, 2012²¹, the law dedicates a new article 10-1 to restorative justice, applicable on October 1, 2014. *“On the occasion of any criminal proceedings and at all stages of the proceedings, including during the execution of the sentence, the victim and the perpetrator of an offence, provided that the facts have been acknowledged, may be offered a restorative justice measure. A restorative justice measure is any measure that allows a victim as well as the perpetrator of an offence to actively participate in the resolution of difficulties resulting from the offence, and in particular in the reparation of prejudices*

19 V. not. H. Zehr, *The little book of restorative justice*, 2015, pp. 53ff, 70.

20 La justice restaurative: vers un inévitable consensus, in *Recueil Dalloz*, Point de vue, 2 mai 2013-16, pp. 1077-1078.

21 See in particular. R. Cario, L'article 10-1 du Code de procédure pénale français à l'aune des textes internationaux et européens, in I. Corpart et al (Dir.), *Université et prétoire*, Mélanges Lienhard, Ed. L'Harmattan, Coll. Droit privé et Sc. crim, 2020, pp. 293-316.

of any kind resulting from its commission. This measure can only be taken after the victim and the offender have been fully informed about it and have expressly agreed to participate. It is carried out by an independent third party trained for this purpose, under the supervision of the judicial authority or, at the request of the latter, of the prison administration. It is confidential, unless otherwise agreed by the parties and except in cases where an overriding interest related to the need to prevent or repress offences justifies that information relating to the progress of the measure be brought to the attention of the public prosecutor”.

This possibility is reinforced by informing the victim of an offence of his or her right to obtain compensation for damages by any appropriate means, including participation in a restorative justice measure, from the beginning of the criminal proceedings. In accordance with the requirements of this same 2012 Directive, the law of August 17, 2015 introduced a subtitle III, entitled “Victims’ rights” within the preliminary title of the code of criminal procedure: “*The officers and agents of the judicial police shall inform victims by any means of their right: 1° To obtain reparation for their harm, by compensation for it or by any other means, including, if appropriate, a restorative justice measure; [...]*”. As a result, any penal institution or service that receives a public victim must now be able to offer complete information on restorative justice and the measures put in place in its jurisdiction. By implication, the same should apply to institutions or services that receive offenders. It is important to add that the request to be offered a Restorative Justice measure belongs to anyone who considers the measure relevant in a particular offence situation : actors in the penal chain, victims, offenders, relatives, in particular (see Circular of March 15, 2017, art. 4.3 and 5.2). This is a right for the victim and henceforth for the offender, including during the execution of sentences (C. pr. pén., art. 10-2, 707 IV, 2°). In the same vein, the Methodological Guide on Restorative Justice states very clearly that “the RJ measure is not part of the judicial procedure, it is not ordered by the judicial authority and therefore does not constitute a decision relating to public action”²².

Restorative justice participates in the reparation of the consequences and repercussions of all kinds resulting from its commission. While it is the sole responsibility of the criminal judge to determine the nature, quantum and regime of the sanction (in other words, the consequences of the crime), the participants are now likely to consider the diversity and characteristics of the repercussions (without direct links to the offence), depending on the stage at which the encounter takes place. The presence of professionals seems unavoidable, as much to avoid any form of secondary victimization of the persons concerned, instrumentalization of restorative justice measures, as to avoid any drift in the assessment of the repercussions for the future and possible ways of taking them into account (mainly in the present). Contrary to the criminal trial (with a vertical process, generally

22 V. Methodological Guide, *op. cit.* p. 8.

confiscatory of the word of the protagonists themselves, too often passive), the restorative process, without encroaching on the prerogatives of the actors of the criminal chain, offers an integrative dynamic (with a horizontal process) to all those who personally wish to find/bring answers to these repercussions still impacting on their lives after the crime suffered/committed.

Restorative measures thus provide, within the criminal trial, a particularly secure space for speech and dialogue. Identifying and expressing the suffering suffered by each person, encouraging mutual understanding of what happened (why?) and seeking together for available solutions to remedy it (how?) leads much more effectively to the most complete restoration of people.

In order to ensure that the work of justice is carried out with respect for human rights, Article 10-1 of the Code of Criminal Procedure imposes a series of guarantees conditioning the use of a restorative justice measure. The requirement of recognition “of the essential facts of the case” (Dir. 2012/29, art. 12) by all is formal. However, it should not be considered with a judicial or extrajudicial confession or self-incrimination but with an absence of denial. The generalization of the caesura of the criminal trial, leading to the rapid delivery of a legal decision on the guilt of the person prosecuted, would have made it possible to remove any resistance to the respect of the presumption of innocence from the investigation stage. Long demanded by criminal lawyers, it is now part of the criminal trial of minors²³. And the earlier the recognition of the offender’s guilt comes, the more the victim feels that she has been listened to, heard, believed and understood.

Logically, full information on the planned measure must be given to potential participants: the course of the process and the guarantees available to them; possible consequences and limits to their participation. This concern, to explain the content of the measures available, is particularly innovative in positive law²⁴.

The expression of consent of the participants in the chosen restorative measure, which is essential for its proper implementation, is the guarantee of their active participation. It is constant throughout the process and can be revoked at any time. Consequently, participation in a restorative workshop is voluntary and disinterested²⁵, and can in no way be imposed by the judicial authority²⁶. The respect of such non-negotiable conditions requires that they be collected by an inde-

23 Introduced by the Law of July 1, 1996, this separation is clearly confirmed in articles L 521-7 et seq. of the Code of Criminal Justice for minors.

24 On the importance of information, see in particular. T. Van Camp, J.-A. Wemmers, Victim’s reflections on the protective and proactive approaches to the offer of restorative justice: the importance of information, *In Canadian Journal of Criminology and Criminal Justice*, 2016-58-3, pp. 415-442.

25 See, however, the Recomm. CM/Rec (2018)8 on restorative justice in criminal matters, which invites, among other things, Member States to take into account participation in a restorative workshop when imposing a sanction and when individualizing the sentence; V. R. Cario, *In Ajpén*. 2019-2, pp. 87-88.

26 V. Methodological Guide, *op. cit.* , p. 20.

pendent and impartial third party trained for this purpose. Such training cannot be improvised. It is imperative that facilitators (in the broadest sense) supplement their basic training with knowledge specific to restorative processes²⁷.

The last condition set forth in article 10-1 of the Code of Criminal Procedure requires that the confidentiality of exchanges be respected not only during the preparation of the potential participants but also during the course of the measure applied. The control of the judicial authority or, at its request, of the prison administration consists of verifying compliance with the conditions laid down in article 10-1 of the Code of Criminal Procedure and not on the progress of the measure, with regard to the confidentiality surrounding it. It is therefore a simple but essential compliance check. To offer the above-mentioned supervisory authorities a control of opportunity over access to the measure, and the conditions of its implementation in particular, would render the very philosophy of the text meaningless, since the conditions of recognition of the facts and of consent are, at the very least, manifestly fulfilled.

However, such control is subject to the respect of confidentiality, which cannot be further restricted, except in cases of “agreement to the contrary by the parties and except in cases where there is an overriding interest related to the need to prevent or repress offences” that are about to be committed or that are in the process of being committed (art. 10-1 *in fine*). Several clarifications are necessary. First, any person involved in the program who is a public official must inform the public prosecutor, without delay, of any knowledge of a crime or offence (art. 40, para. 2 C.pr.pén.), of which one of the participants in the restorative workshop may have been/is the perpetrator or victim: members of the Steering Committee, of the project group, facilitators, people from the community, coach or supervisor, mainly. The same obligation to denounce also applies to these same people, even though they do not belong to the public service. Indeed, “anyone” who has knowledge of a crime whose effects can still be prevented or limited, or whose perpetrators are likely to commit new crimes that could be prevented, must inform the judicial or administrative authorities, except for the two sets of exceptions provided for in article 434-1 C.pén.²⁸. The obligation to denounce also rests, in the third place, on “anyone” who has knowledge of offences committed against particularly vulnerable²⁹ persons. In the same spirit and lastly, the obligation to provide help

27 V. the integrated training program for restorative justice facilitators proposed under a tripartite agreement between the Ecole Nationale d'Administration Pénitentiaire, the French Institute for Restorative Justice and France-victimes, signed in July 2015.

28 The first are direct relatives and other family members of the perpetrator or accomplice (art. 434-1, para. 2). Also excluded (art. 434-1, para. 3) are persons bound by professional secrecy (art. 226-13); see also art. 434-2 C.pén. concerning attacks on the fundamental interests of the nation and acts of terrorism.

29 The obligation to inform the judicial or administrative authorities or to continue not to inform these authorities until the offences have ceased concerns “deprivation, ill-treatment, assault or sex-

and assistance to a participant (in the broadest sense) engaged in a restorative workshop, in “danger” or in “peril”, applies, if necessary, to the facilitators³⁰.

The corollary of confidentiality is the prohibition of relying on the participation in a restorative encounter, including in the event of failure, in the context of subsequent criminal proceedings³¹. All other information given during restorative workshops (preparatory interviews and/or plenary encounters) may not be revealed to anyone, as the facilitators may be considered, in accordance with the jurisprudence applicable under the Old Penal Code, as “necessary confidants”. The provisions of article 226-13 should now allow them to invoke, in the case of a request for disclosure of secret information, a “missionary secret”³².

B - Circular of March 15, 2017

Of merely interpretative value, this circular on the implementation of restorative justice, of immediate application, sets out the links that must unite the contemporary criminal justice system and restorative justice measures³³. The complementarity between criminal trial and restorative justice is, in the first place, recalled very clearly and legitimately, in coherence with the Law of August 15, 2014, which registered restorative justice in the Code of Criminal Procedure³⁴. Such a choice

ual abuse inflicted on a minor or on a person who is unable to protect himself because of his age, illness, infirmity, physical or mental deficiency or state of pregnancy”, except for persons bound by professional secrecy (art. 226-13 C.pén.).

- 30 Art. 223-6 C.pén. obliges “anyone” who, being able to prevent by his immediate personal action, without risk to himself or to third parties, or by provoking help, “either a crime or an offence against bodily integrity”, voluntarily refrains from doing so, exposes himself to a criminal conviction; see also art. 226-14-1°; V. J.P. Rosenczveig, P. Verdier, C. Daadouch, *Le secret professionnel en travail social et médico-social*, Ed. Dunod, 6th ed. 2016, p. 75 et seq.
- 31 V. B. Sayous, R. Cario, La Justice restaurative dans le réforme pénale : de nouveaux droits pour les victimes et les auteurs d’infractions pénales, *In AJpén*, 2014-10, pp. 461-466.
- 32 “The revelation of secret information by a person who is in possession of it either by status or profession, or by reason of a function or temporary assignment, is punishable by one year’s imprisonment and a fine of 15,000 euros”; see on this point, J.P. Rosenczveig, P. Verdier, C. Daadouch, *op. cit.* p. 34 et seq.; M. Boudjemai, *Secret et discrétion professionnels. Le partage d’informations dans le champ social et médico-social*, Ed. ASH, 2015, 200 p. ; M-O Grilhot-Besnard, *Secret professionnel et travail social : garantir le respect des droits des usagers* ESF éd., 2è éd. 2019, 191 p.
- 33 Circ. JUST1708302C/ SG-17-007/13.03.2017 : Implementation of Restorative Justice applicable immediately following articles 10-1, 10-2, 707-IV-2° of the Code of Criminal Procedure, resulting from articles 18 and 24 of Law No. 2014-896 of August 15, 2014 and article 7 of Law No. 2015-993 of August 17, 2015.
- 34 Such complementarity is inevitable in the field of offences, unless we decriminalize on a massive scale acts of maladjustment delinquency, which do not present any serious character with regard to persons, morals, property and authority. Thus, the unmitigated opposition between criminal justice (accused of all the evils) and restorative justice (praised for all its qualities) would be less of a caricature. See in particular. K. Daly, La véritable histoire de la justice restauratrice (2002), *in La justice restauratrice*, Textes réunis et traduits par P. Gailly, Ed. Larcier, 2011, pp. 305-322; D. Roche, Rétribution et justice restauratrice (2007), *Ibid.* pp. 325-345; G. Johnstone, A Critical Look

in no way prejudices the implementation of restorative workshops when the public action cannot be introduced or endure. In the same vein, there is nothing to prevent them from being activated in the context of intersubjective conflicts that have not—yet—been penalized, in order to prevent genuine criminal acts.

The implementation of the programs, regardless of the measures (face-to-face or in anonymous groups), is under the control of the judicial authority or, at the request of the latter, of the prison administration (art. 5.3). This control of compliance with the conditions laid down in article 10-1 of the Code of Criminal Procedure is thus exercised at all stages of the procedure, including during the execution of sentences³⁵. In disregard of the principles of restorative justice and in addition to the provisions of article 10-1 C.pr.pén., the Circular specifies that, at the pre-sentence stage, the assessment of the conditions for the use of a restorative measure is left to the discretion of the competent magistrates. Although it does not seem useful to recall that all offenses are concerned (including those in respect of which public action cannot be initiated or continue), it is nevertheless advisable to watch out for any possible revictimisation, or even over-victimisation, of either of the persons involved, particularly with regard to minors (art. 2.2 c). Another aspect of this complementarity can be seen in the invitation to set up a referral magistrate for restorative justice in each judicial court, at the prosecutor's office and/or at the seat of the court (art. 5-1, a).

Secondly, the autonomy between criminal proceedings and restorative justice is clearly stated. The circular indicates that restorative justice measures are *ad hoc* measures and do not constitute, in any case, procedural acts. Therefore, they are not subject to the guiding principles of criminal procedure set out in the preliminary article of the Code of Criminal Procedure. Participation in a restorative measure does not affect the decision whether or not to prosecute, the determination of the perpetrator's guilt, the choice of sentence or the manner in which it is carried out. The participant is free to leave the process at any time and cannot be blamed for withdrawing from the restorative process. No document relating to the restorative encounter will be placed in the participant's file (art. 3.1)³⁶. Autonomy still comes from the specialized training that future facilitators and community members must justify today (art. 4.4, 5.1 c and 5.2 of the Circular of March 15, 2017).

C - The September 11, 2019 Ordinance

Since the publication of the Law of August 15, 2014, a lively, sterile debate has been going on between a part of the doctrine and the Judicial Protection of Youth (PJJ)

at Restorative Justice (2011), *Ibid.*, pp. 349-370; J. Shapland, Implications of growth: challenges for restorative justice, *In Intern. Rev. of Victimology*, 2014-20-1, pp. 111-127.

35 V. Guide méthodologique, *op. cit.* p. 32, 34; cf. p. 32, where it is inappropriate to refer to a control of "legality" of a constitutional nature (Art. 72).

36 V. Methodological Guide, *op. cit.* noting pp. 6 and 29.

(both at the level of its Management and its field actors)³⁷. After 39 reforms of the Ordinance of February 2, 1945, everything is back in order with the adoption of the Code of Criminal Justice for minors, applicable on October 1, 2020³⁸. For various reasons, the effective date of entry was postponed for the first time to March 31, 2021 and has just been postponed a second time to September 30³⁹. Article L 13-4 provides, in this sense, that “*it may be proposed to the victim and the perpetrator of the offense to resort to restorative justice in accordance with Article 10-1 of the Code of Criminal Procedure, on the occasion of any procedure concerning a minor and at all stages thereof, including during the execution of sentences, provided that the facts have been recognized.* This right to restorative justice can only be implemented “*if the minor’s degree of maturity and capacity for discernment allow it, and after having obtained the consent of the legal representatives*” (para. 2). It should be noted that this article is included in the Preliminary Title of the Ordinance⁴⁰, in the same way that article 10-1 of the code of procedure has been introduced into the general provisions of the code of criminal procedure (applying by definition, from 2014, to all offenders, both adults and minors)⁴¹. Such a positioning deserves to be emphasized, thereby consecrating the predominant place that the legislator now recognizes for restorative justice. It should be remembered that the conditions set out in article 10-1 are to be assessed by the specially trained facilitator, after referral by the competent magistrate, depending on the stage of the proceedings, by a professional or at the request of the persons concerned or any other person. Compliance monitoring of the judicial authority thus relates to the effective complete information of the protagonists, their recognition (even partial) of the facts of the case, the collection of their express consent and the respect of the confidentiality of the exchanges (at the time of the preparation, of the modalities of exchange as well as the plenary encounters).

However, article L 112-8 maintains, within a “Reparation Module”⁴², not only the traditional penal reparation, but also the mediation between the minor

37 V. R. Cario, Justice pénale et Justice restaurative : entre complémentarité et autonomie assumées. À propos de la circulaire du 15 mars 2017, *In A.J.pén.* 2017-6, p. 252.

38 Ordinance 2020-950 establishing the legislative part of the juvenile criminal justice code, JORF, Sept. 13, 2019; See also Recommendation of the Committee of Ministers of the Council of Europe of Oct. 3, 2018, *on Restorative Justice in Criminal Matters*, (2018)8, noting art. 24. 2. Of the General Principles of Juvenile Criminal Justice, Chapter III, Common Provisions.

39 The choice to proceed by ordinance constitutes for some a denial of democracy, as a quality debate could not take place in Parliament. The lack of means (in personnel and the absence of additional funding) is still underlined by others. The short deadline for the implementation of the reform and the training of professionals were still put forward by some. When it was not a question of purely and simply cancelling this reform of the criminal law of minors in particular.

40 General Principles of Juvenile Criminal Justice, Chapter III, Common Provisions.

41 Part I, Legislative, Preliminary Title, General Provisions, Subtitle III, Restorative Justice.

42 Book 1, Educational Measures and Punishments, Chapter 2, Educational Measures, Section 2, Modules of Judicial Educational Measures, Subsection 2.

and the victim, the former with the agreement of the victim concerned, the latter at the request or with the agreement of the latter.

Several remarks are in order. First, it should be remembered that restorative justice measures are not judicial educational measures. There is a risk of confusion in their respective application. If their combination is possible in theory, practical difficulties in their implementation are to be feared, particularly in relation to the reparation measure and the newly introduced mediation. Even more damaging is the potential drift towards the pure and simple assimilation of the measures of Art. L13-4 by art. L112-8 would be truly counterproductive⁴³. The restorative emblem could, in fact, lead field workers, by pure opportunism based on their reluctance to evolve towards a position of specially trained facilitator, or even by fear of being dispossessed of the follow-up of “their” minor or of being “judged” by the latter with regard to the relational methodology (mainly through the strategy of attentive listening specific to communication workshops) applied by the facilitators, and, consequently, to reject any restorative program.

Secondly, the assessment of the concepts of maturity and discernment set out in article L13-4 CJPM, has always been delicate⁴⁴. Maturity is a state of the person evaluated according to his age. It is considered as acquired at adulthood, according to the most consensual definitions. Maturity implies a great deal of certainty in judgment and in reflection⁴⁵. On the other hand, immaturity attests to a great weakness in the face of all the temptations that present themselves to a person⁴⁶. The notion of discernment, which is essential in the criminal law for minors, corresponds more clearly to an ability to judge right and wrong, to the capacity to act with intelligence and will. More generally, discernment leads to the understanding that the contemplated act constitutes an offense and the desire to commit it⁴⁷. It also implies that the minor perceives all the consequences from a processual point of view. These notions of maturity and discernment go beyond the simple recognition of the facts, which is an indispensable condition for the implementation of restorative workshops, whatever the measures chosen. Once again, it is important to emphasize that restorative measures are not procedural

43 V. *Contra* J. Filippi, La justice restaurative des mineurs en France : entre tendance maximaliste et minimaliste, *In Cahiers de la sécurité et de la justice*, Hors série «Cahier de la recherche», De la théorie de la prévention à ses applications numériques, la trajectoire d'une idée humaniste (From the theory of prevention to its digital applications, the trajectory of a humanist idea), 2021, pp. 37-47, spe p. 45.

44 It is worth noting that article 11-1 of the CJPM only requires “capacity of discernment” to declare minors criminally responsible for offences of which they are found guilty.

45 V. Center National de Ressources textuelles et lexicales, cnrtl.fr ; Comp. E. Marc, Le mythe de la maturité, *In Gestalt*, 2010-2-31, pp. 33-46, cairn.info/revue-gestalt.

46 See in particular the Grand Larousse encyclopédique.

47 See in particular. Ph. Bonfils, A. Gouttenoire, *Droit des mineurs*, 2nd ed. 2014, Précis Dalloz, n° 1366; and the abundant case law that followed the Laboube decision of 13 December 1956, *Bull. crim.*, 1956, n° 840.

acts and are subject to their own conditions, without any reference to substantive or formal common criminal law. In these senses, the Circular of March 15, 2017 (V. *Supra*, B) clearly states that participation in a restorative measure does not affect the determination of the perpetrator's guilt, which must be proven by the Public Prosecutor. Moreover, discernment must be distinguished from guilt, which is a condition for attributing an act to a person, whereas discernment allows for the imputability of these facts to the offender in order to establish his or her criminal responsibility, which is indispensable for the pronouncement of a judicial educational measure or a sentence⁴⁸.

In the same way, and finally, the question arises as to whether the agreement of their legal representatives is required when minors admit to the acts of which they are accused. Insofar as article L13-4 Cjpm explicitly refers to article 10-1 C.pr.pén., it is up to the trained facilitators to ensure that its conditions are indeed met, in particular the recognition, even partial, of the facts by the minor concerned. Therefore, the agreement of the legal representatives is not necessary, as the restorative measure does not constitute a procedural act. All the more so when the request to be offered a restorative measure is in the best interest of the minor⁴⁹. On the other hand, if the minors concerned so wish or if their legal representatives so desire, the latter may participate in the restorative measure envisaged, after preparation by the facilitator in charge of the restorative measure. The Methodological Guide of the Ministry of Justice follows the same line of thought, reminding us that, insofar as the consent of the participants is required, in accordance with the provisions of article 10-1 C.pr.pén., it is necessary to involve the holders of parental authority in order to inform them, well in advance of the potential implementation of a restorative workshop, of its characteristics⁵⁰.

D - The Decree of December 21, 2020

Logically, article D1-1-1 appears in the general regulatory provisions (simple decrees), within the Preliminary Title, chapter 1 bis, of the code of criminal procedure ("Restorative justice"), immediately after those concerning public and civil action⁵¹. It is therefore applicable to all persons subject to trial, both adults and minors.

48 See in particular. J.-J. Yvorel, Le discernement : construction et usage d'une catégorie juridique en droit pénal des mineurs. Etude historique, *In Recherches familiales*, 2012-1-9, pp. 153-162; cairn.info/revue-recherches-familiales.

49 V. P. Mukwabuhika Mabaka, Le discernement de l'enfant dans les conventions internationales et en droit comparé, in *Recherches familiales*, *op. cit.* pp. 143-152; cairn.info/revue-recherches-familiales; See art. 40 Convention on the Rights of the Child, Resol. AG/ONU 1989 44-25 of 20 Nov. 1989; art. 3 European Convention on the Exercise of Children's Rights, rm.coe.int.

50 V. Methodological Guide, *op. cit.* , p. 21.

51 V. Decree 2020-1640 Strengthening the Efficiency of Criminal Proceedings and the Rights of Victims, not. art. 7 on Provisions Relating to the Rights of Victims and Especially Victims of Domestic Violence.

“In addition to the case provided for in article 10-2, the possibility for the victim or the perpetrator of an offense to participate in a restorative justice measure under article 10-1 shall be proposed to him or her, when this measure seems feasible: “ 1° By the public prosecutor or the public prosecutor’s delegate, during the implementation of an alternative to prosecution or a penal composition, at any time during the procedure; “ 2° By the investigating judge, at any time during the investigation, and in particular when he receives the victim’s complaint with civil party status or when he proceeds with the examination of the person prosecuted ; “3° By the president of the trial court, at any time during the hearing and after having rendered a decision on the public prosecution and on the civil action; 4° By the sentence enforcement judge in application of 2° of IV of article 707.

This new article legitimately extends the right of the persons concerned, victims (art. 10-2 C.pr.pén.) and henceforth offenders, to be offered, by any means, a restorative justice measure. These provisions are applicable when the measure “seems feasible”. Legal arguments, which are not insurmountable, seem to justify it, particularly in the case of a ban on contact or relations with the victim, or other specific obligations (for example, assignment times)⁵². On the other hand, it is to be feared that reasons of opportunity, based on the nature of the offense, are retained by the competent magistrates, at the various stages of the criminal proceedings. The Circular of March 15, 2017 evoking this possibility must nevertheless bow to the conditions of control by the judicial authority or, at its request, by the prison administration, laid down in article 10-1 C.pr.pén. This is in fact a simple control of compliance (see *above*, b).

It is also important to remember that the right to be offered a restorative justice measure belongs to the protagonists of the offense, whether or not they are involved in criminal proceedings. In this sense, a perpetrator who has been dismissed or acquitted may ask to participate in a restorative justice measure if he or she acknowledges the facts. In the same sense, the victim of a time-barred offense or an offense committed by an unidentified perpetrator can initiate a similar application for participation⁵³.

In the same way, all persons who feel concerned by the facts because of their relationship with one or other of the protagonists can request a restorative justice measure or be associated with it, even if they are not parties to the criminal proceedings (parents and family of a minor, legal representatives; collateral victim, relatives of the victim in the family or social sphere)⁵⁴.

This decree explicitly refers, moreover and the remark is essential, to the Law of July 30, 2020 ⁵⁵which prohibits the use of a criminal mediation mission in

52 V. Methodological Guide, *op. cit.* , p. 17, 6.

53 V. Methodological Guide, *op. cit.* , p. 15, 1.

54 V. Methodological Guide, *op. cit.* , p. 15, 3.

55 No. 2020-936 of July 30, 2020 to protect victims of domestic violence, art. 6 mod. art. 41-1 of the

“cases of violence within the couple falling under the article 132-80 of the penal code”. This means that restorative mediation can be proposed as a main option, without being coupled with any alternative to prosecution.

F - Dispatch from the Minister of Justice of 23 February 2021

In a dispatch concerning the treatment of sexual offenses likely to be time-barred, the current Minister of justice, Keeper of the Seals, notes the strong liberation of the word of victims of sexual assaults by a close adult (family, churches, education, sports, media, culture, in particular) when they were minors. The painful revelation of the facts at the very moment when they were taking place and the consequences that it was likely to entail in their entourage, often aggravated by the secondary victimization coming from the actors of the penal chain not to believe the child’s statements or in the concern to spare the presumed perpetrator, led many victims to live for years with this trauma buried deep inside of them. To the point of being confronted with the statute of limitations of public action, recently extended to 30 years⁵⁶ and which some would like to be perpetual⁵⁷. The desire to put a sword of Damocles, “forever”, on pedophiles comes up against this inescapable difficulty of the testimony too long after the facts, litigation always prejudicial to the concerned victim because the complaint ends generally by a dismissal, an order of non-lieu or an acquittal, the doubt benefiting moreover to the accused.

Certainly, the treatment of statute-barred facts calls into question the judicial treatment. This is why the Dispatch from the Minister of Justice recommends that public prosecutors open a preliminary investigation in such situations. The reality of the statute of limitations will thus be verified during the hearing of the complainant. It will also make it possible to question the environment of the accused person and to hear him/her on the accusations made against him/her. When the facts are clearly prescribed, the victim will be informed directly by the public prosecutor or through a victim assistance association. Finally, the Dispatch reminds us, very pertinently, that if the conditions of article 10-1 C.pr.pén. are met, a restorative justice system can be envisaged. It is important to remember that, in order to remain consistent with the aforementioned texts, the information of the persons thus involved is mandatory. The restorative encounter will take place, according to the wishes of the parties, validated by the facilitators (in the broadest sense), either face-to-face or anonymously.

C.pr.pén.

56 See art. 222-23 to 222-31-1 C.pén.; art. 7 al.2, 706-47 C.pr.pén.

57 V. not. G. Moréas, Atteintes sexuelles sur mineurs : bientôt la fin de la prescription, *In lemonde.fr*, 13 Jan. 2020 ; Y. Jeanclos, Pour l’imprescriptibilité des crimes sexuels commis sur des mineurs de 16 ans, *In lemonde.fr*, 18 Feb. 2021 ; Pour une imprescriptibilité des crimes sexuels, Manifeste, *In www.memoiretraumatique.org* ; V. *contra*, R. Cario, La prescription de l’action publique. Au-delà du victimaire et du sécuritaire : le souci de la restauration des personnes, *In Rec. Dalloz*, 2007, pp. 1798-1799.

Although they are well established in the official texts relating to restorative justice, their implementation is nonetheless subject to deviations likely to diminish their potential benefits, or even to pervert their main objective, namely to offer a space for dialogue to the direct protagonists, their loved ones and/or the communities to which they belong. Inspired by “good practices” scientifically evaluated abroad⁵⁸, the protocols established jointly by the French Institute for Restorative Justice (IFJR) and local actors involved in the development of an authentic restorative culture of conflict regulation aim to avoid any revictimization of participants⁵⁹. And the relational approach offers a lot of guarantees in that sense.

II - The relational approach in restorative workshops

With regard to the doctrine and practices available, the relational approach, practiced and theorized by Serge Charbonneau and Catherine Rossi in Quebec, appears to be the most relevant and promising. Most of the following developments are directly inspired by their recent book: “La médiation relationnelle. Rencontres de dialogue et justice réparatrice”⁶⁰. It is important to underline that this model is intended to be applied in the field of prevention, in the course of proceedings and during the execution of sentences (both during probation and imprisonment). In order to fully appreciate the richness of the relational model, which is part of a rigorous protocol (A), it is necessary to present the principles on which it is based (B). Its structuring presupposes the implementation of “communication workshops” based on an accomplished methodology (C).

A - Standard Restorative Workshop Protocol

The request to participate in a restorative workshop belongs to any person directly impacted by the crime: the protagonists themselves and/or their relatives. The professionals who accompany them and the judicial authorities involved in the criminal proceedings may also suggest that they participate in a restorative workshop. The implementation of a restorative workshop by specially trained facilitators is based on a rigorous standard protocol, regularly validated by feedback, but with variations depending on the measures chosen by the participants.

Three phases are generally identified, with sometimes significant variations depending on whether the measure is retained in the pre- or post-sentence phase. 1°) The *preliminary phase* consists of the signing of a “Partnership Agreement” between all the actors (Steering Committee) wishing to become involved in a restor-

58 See not. C. Rossi, R. Cario, Restorative justice: Acknowledged benefits versus emerging issues “, *In Int. Journ. on criminology*, Vol. 4-2, 2016, pp. 131-154; J. Lecomte, La justice restauratrice, *In Rev. du Mauss*, 2012-40-2, pp. 223-235.

59 V. R. Cario, *op. cit.* 2020, p. 84 and following.

60 *Op. cit.* pp. 77 ff.

ative program: Justice (now represented by the magistrate in charge of restorative justice within the judicial court), probation officers, Victims' Services, Bar Association, Judicial Protection of Youth and any other relevant organization. In order to operationalize the provisions of the Steering committee, a smaller "Project Group" is then designated with the purpose of raising awareness among the services receiving victims and perpetrators with a view to referring them to the trained facilitators. They will also have to draw up detailed "specifications", with the support of the IFJR regional branches (number of four) if they so wish. 2°) The *preparatory phase*, which is essential, leads the facilitator (in the broadest sense) to receive the referred persons during several "communication workshops". In a position of attentive listening, he invites them to explore their motivations and expectations as well as to script the characteristics of the potential exchange. He checks the lack of vulnerability of the persons in order to avoid any secondary victimization. 3°) The *operational phase* is the place for exchanges between the participants. This dedicated space for dialog, which is theirs to use, makes it possible to discuss the expectations of each person, their emotions and feelings, and more generally the questions of "why" and "how" that have been nagging at them because they have not been answered until now. "Why": why me; why you; what did I do to make it happen; what should I have done to avoid it, in particular. "How? "How to live with what destroyed my beliefs in a safe, meaningful society in which I participate; how to regain my self-esteem; how to live again with my family; how to regain power over all the aspects of my life that the crime has profoundly disrupted, mainly⁶¹".

These exchanges, respectful of the dignity due to each participant, lead, in the vast majority of cases, to the recognition of the humanity of all, to mutual empathy in a posture of authentic empowerment. The principles and methodology that characterize the relational approach are therefore crucial for the progress of the persons concerned.

B - The principles of the relational approach in restorative workshops

The relational approach is based on four intangible principles. Its sole objective is to promote the eventual "dialogue" between the victim and the perpetrator. Any other ambition (compensation, penitentiary, clinical, etc.) must be excluded and reserved for pre-existing specialized programs. Mixing the various types of interventions available would lead to unacceptable deviations and would ruin them all.

The method for achieving this single objective is, secondly, "dialogue". Without knowing their expectations well, the people involved will have difficulty in expressing their feelings and emotions clearly, in a way that is intelligible to the

61 See in particular. R. Ross, Pour une justice relationnelle ", in *Les Cahiers de la justice*, Ed. Dalloz, 2006-1, pp. 127-142.

facilitator (in the broad sense of the various measures) and, even more certainly, to the other party. With a strong symbolic value, the word socializes the possible revenge, without prohibiting the manifestation of strong emotions such as anger, fear, sadness or joy. Everyone can invest in dialogue, fully assuming their right to speak and their duty to listen, thereby promoting the mutual understanding of all.

Fostering such a dialogue is a profound part of the recognition of the person, a fundamental ethical posture, rarely offered during the criminal trial, for all, and even, during the execution of the sentences, for the offender. To recognize is to consider the victim and the offender as individuals, suffering. Now, through the intersubjective catastrophe experienced, both are projected into the abyss dug by the inhumanity of the crime. Their re-birth appears well then as the only way of nature to allow them to become again a human, a desiring and lively person. Indeed, coming from others, recognition creates humanity for each other. It is by the glance of the other that the humanity is realized, it is by the grace of the you that the self awakes again⁶². In other words, "...to be recognized means to be considered in front of the other - or the other in front of us - as a free being, deserving respect, capable of challenge and capable of response. To exist as a human being is to offer and demand this respect"⁶³.

The third principle, which is also essential, requires the "preparation of participants" within "communication workshops". This preparation consists of the facilitators accompanying the participants, scrupulously taking into account the modalities of their approach and the outcome they may perceive. Accompanying means joining someone to go where he or she is going, together with him or her, the only one who knows what he or she is suffering from, subjectively, for having experienced the crime, the only one who knows the direction in which to look, what his or her crucial problems are in order to face them and try to solve them all. At a pace that spares physical and psychic fatigue, because "to repeat is to do it again... is to live again".

The facilitator's posture is the fourth principle of the relational approach. It is undoubtedly the most delicate to embrace. Specialized training is inevitable. It must be irreproachable and constantly updated. Sharing practices with peers, and even regular supervision of implementation, is absolutely necessary, because each encounter is unique, each person is different. The facilitator is invited to consider himself as "incompetent" with regard to the way in which each person making up the restorative dyad has experienced the offending event. As the designers of the relational approach happily put it, "his brain is in airplane mode". It is "pluripartial" and is entirely attentive to the person. He is therefore neither an "expert" nor

62 V. E. Fiat, De la dignité du vieillard : réflexion éthique, *In* J.J. Amyot et M. Billé (Dir.), *Vieillesse interdites*, Ed. L'Harmattan, Coll. La gérontologie en actes, 2004, pp. 123-143.

63 V. M. Hénaff, La dette de sang et l'exigence de justice, *in* P. Dumouchel, *Comprendre pour agir : violences, victimes et vengeances*, Ed. L'Harmattan/ Les presses de l'Univ. Laval, 2000, pp. 31-64.

an influencer. Once again, the program belongs only to the people concerned and the decision as to the potential exchange will be “collegial”: victim, perpetrator and facilitator.

C - The structuring of restorative workshops

The “communication workshops”, intended to prepare people as adequately as possible, are led by one or two facilitators (in the broad sense of the various restorative measures). In view of the above, the use of traditional listening and interviewing techniques used in social work (in the broad sense) is inadequate. Equally imperative, the use of clinical programs in these communication workshops would be contrary to relational ethics and deontology⁶⁴. The facilitator has three specific tools at his disposal. First of all, attentive listening is necessarily privileged. It is not to be confused with active listening⁶⁵, nor with reflective listening⁶⁶. Attentive and benevolent listening invites the facilitator to “never leave the person”, to remain in “airplane mode”. If necessary, he/she can use open questions (and never closed questions) to obtain information or clarification that is useful for understanding what the person wants to say and how he/she will say it to the other person during the eventual exchange. He will always refrain from reformulating (whatever the modalities of the reformulation) the words of the person in dialogue with him, at most and very sparingly, the echo.

The second tool then leads the facilitator to invite the person to “explore”, “in depth”, about his or her experience and expectations with regard to the restorative process undertaken, in a very exhaustive manner. This disclosure, as precise as possible, is essential, on the one hand, to allow the person to decide for him or herself whether he or she wishes to go ahead with the exchange or to stick to this dialogue, which is sufficiently restorative in his or her eyes, with the facilitator. On the other hand, the person will be able to choose freely, after reflection, what he or she really wants to share with the other person.

The third and final tool is the “scripting” of the potential exchange in order to allow the person concerned to “project himself into a possible reality”. Even if some aspects of the potential exchange have been discussed during the exploratory dialogue, the facilitator then invites the person to project himself or herself more precisely on how the exchange could take place. First of all, in terms of form, depending on whether or not the people involved are linked by the same case. In the first case, a face-to-face encounter can be envisaged or other forms of exchange

64 See in this sense, R. Cario, *op. cit.*, 2021.

65 V. *La relation d'aide et la psychothérapie* (1942), ESF éd., 2005, p. 93 et seq.; *Le développement de la personne* (1961), Ed. Dunod, 1998, p. 27.

66 See in particular, W.R. Miller, S. Rollnick, *Motivational Interviewing. Helping the person to engage in change*, 2nd ed. 2013, InterEditions, 434 p., esp. p. 13 et seq.

(mainly a letter, a telephone call, an audio or video recording, or a remote encounter by video). In the second case, encounters between people who have committed or suffered similar offenses, but who do not know each other, can nevertheless take place, in the presence of volunteers from the community if necessary. In both cases, the preparation of potential participants will be the same. In terms of substance, the person considers the words he or she wishes to use during the exchange, signifying as clearly as possible the expectations formulated and adjusted during the exploration, the results he or she expects, mainly. It may seem delicate to project oneself into the concrete reality of the upcoming exchange. While the facilitator must always listen attentively, it is nevertheless possible to accompany the person by “scripting in the negative” with him/her, by inviting him/her to imagine, based on his/her own words, that he/she may not get what he/she wants and, therefore, how he/she would react.

At the end of the “communication workshops”, when exploration and scripting seem to have been completed, the facilitator will question, alone this time but respecting the words of the person, whether an exchange with the other protagonist is relevant. “Reconnecting with his or her expert skills, the facilitator must solve the “global equation”, the elements of which require a combination of congruence between the expectations of each person and the concordance of the exchange with the “values promoted by restorative justice”.

In a posture of great benevolence and unconditional acceptance, the facilitator will listen attentively to the people who have been referred to him or who have contacted him directly. Several “communication workshops” will be useful so that the formulation of expectations is as clear and intelligible as possible. If the purpose of these workshops is an exchange between the protagonists, it presupposes the respect of conditions that no facilitator can ignore. As Serge Charbonneau and Catherine Rossi, designers of the relational approach, specify, the exchange between people, whatever the measure envisaged, is always possible “[...] but not at any price”. The finesse of the construction of their model is still expressed around the acronym that brings together these conditions: M.A.I.S., “M” for Me, “A” for the other (« Autre »), “I” for information and “S” for Security. It is important to emphasize that the elements of M.A.I.S. will be addressed by the individuals in the order of their choice, according to the importance they give them during the dialogue with the facilitator. But these four “pillars of preparation” will have to be explored and scripted throughout the communication workshops, the number of which is not predefined.

Considering the person’s “self” consists of exploring their expectations, knowing in detail what repercussions the offense has had on their daily life and their environment since the event. By listening attentively, the facilitator creates a climate of trust with the person, which is essential for him or her to authorize the facilitator to accompany him or her in the restorative process, regardless of the

type of exchange he or she may choose. The “traces” that the event has left in the person’s life, in terms of feelings, emotions and suffering (both physical and psychological), must be expressed freely, without any constraint or judgment, in the most precise way possible, in order to make them known to the other party.

Concern for the “other” should not lead to “putting oneself in his or her place” or to “understanding” him or her. The person making the request for restorative encounter, as well as the person receiving the request, are invited to imagine the reasons why the other party wishes to have this space for dialogue, and to express the formulations and methods of exchange. It is also a matter of scripting the reactions of each party to the request and to the response to be given to it. Above all, it means considering with the interested parties, in the most exhaustive way possible, all the potential scenarios of the exchange in order to avoid any surprise, especially “bad” ones, or even a revictimization.

Offering “information” is a right, before orientation to the facilitators, as during the preparation workshops. This information must necessarily concern the system, the quality and skills of the facilitator, the way it is run, the absence of direct benefits in terms of sentence adjustment or calculation of compensation for damages suffered, the rights of the other person with regard to his or her possible participation, the right to leave at any time, confidentiality, mainly.

Finally, “safety” permeates all restorative encounters. Three sub-dimensions characterize it. First, the person must consider “the protection mechanisms available to him or her on a daily basis”, always through attentive listening, exploration and scenario-building: support from loved ones, mobilized services, personal, professional and social situation possibly linked to his or her investment in the process. Secondly, the facilitator must take into account the “potential external hazards” to which the person may be exposed during the process, without a direct link to the offense: death of a close relative, material domestic annoyance, health problems, for example. Finally, the facilitator must verify “the concordance and coherence of expectations”. He/she “reconnects to his/her expert skills” at the end of the communication workshops. The congruence of the expectations of the people involved in a restorative encounter, first of all, supposes that they are in agreement, that they coincide and fit together as perfectly as possible. “Concordance” then refers to the adequacy, the conformity of expectations with the principles of restorative justice, what encounter can offer them and the specific protocol of restorative encounter. At the end of this careful examination, the facilitator puts together the “complete equation” based on the notes that he or she was able to write at the end of each communication workshop, respecting “word for word” what was exchanged. He proposes it to each person, according to the same. Together they decide on the nature of the exchange.

At the end of each exchange between participants, the facilitator and, if applicable, community volunteers) receive each person’s impressions of how they

experienced the exchange and how they relate to their daily lives. At a distance from the last exchange, depending on the restorative measures implemented, the facilitator will meet with the participants, individually or collectively, in order to share one last time, with the same attentive benevolence, what the exchange has brought them.

Although well established in the official texts relating to restorative justice, their implementation is nonetheless subject to vicissitudes likely to diminish their potential benefits, or even to pervert their main objective, namely to offer a space for dialogue to the direct protagonists, their loved ones and/or their communities. Inspired by scientifically evaluated “good practices” abroad⁶⁷, the protocols established jointly by the French Institute for Restorative Justice (IFJR) and local actors involved in the development of an authentic restorative culture of conflict resolution aim to avoid any revictimization of participants⁶⁸.

III - The deviations of the restorative workshops in France

A vailable evaluative research points out that the implementation of restorative workshops, through the various existing measures, can lead to accommodations with the official texts on the part of the actors in the penal chain (A). More concretely, it is not uncommon to see practices developing in France that distort the restorative philosophy as much as the conditions set out in article 10-1 of the Code of Criminal Procedure, or even good practices, while often claiming to be restorative (B).

A - Accommodations to the official texts

The risks of accommodation, or even misuse, of restorative justice measures by judicial institutions and organizations “authorized to carry out justice” is real and already palpable in some active programs in France.

Today, measures are abnormally qualified as restorative, such as socio-educational judicial control (C. pr. pén., art. 137 f.), reparation to the victim (C. pr. pén., art. 41-1, 4^o), sanction-reparation (C. pén, art. 131-8-1), community service (C. pén., art. 131-8; Ord. 2 févr. 1945, art. 20-5; art. 121-4 3^o Ord. 2019), penal reparation for minors (art 12- 1 Ord. 45; art. L112-8 to 112-10 Ord. 2019) mainly⁶⁹.

67 See not. C. Rossi, R. Cario, Restorative justice: Acknowledged benefits versus emerging issues, in *Int. Journ. on criminology*, Vol. 4-2, 2016, pp. 131-154; J. Lecomte, La justice restauratrice, in *Rev. du Mauss*, 2012-40-2, pp. 223-235.

68 V. R. Cario, *op. cit.* 2020, p. 84 and following.

69 V. M. L. B., Mesures socio-judiciaires : vers un modèle de Justice restaurative ?, *In ASH*, 2016-2944, p. 15; M. Crémère, Justice restauratrice : une voie trop ignorée, *In Journal du droit des jeunes*, 2014-334-4, pp. 9-15; M. Wagner, D. Broudeur, Justice restauratrice en France : de la loi à la pratique, *In Le Monde du droit*, 2020, ucl.y.fr; comp. S. Bellucci, R. Cario, P. Pottier, Restorative Justice aims to

To be convinced of this, it is simply important to note that they do not sufficiently involve, if at all, the victims, their relatives and/or their communities. In other words, they do not respect the conditions set out in article 10-1 of the Code of Criminal Procedure. Above all, restorative justice cannot be accompanied by any form of insidious, let *alone* direct, coercion. In this sense, socio-judicial measures are incompatible with a restorative justice measure, both pre- and post-sentence⁷⁰. The enthusiasm for these innovative practices must not, under any circumstances, lead to the balancing of the budgets, which are certainly clearly insufficient, of the organizations authorized by the justice system. The State's responsibility, as well as that of the citizens in a democracy, are, from this point of view, clearly engaged, with regard to the personal profiles characteristic of very great vulnerabilities (in the broad sense) of the protagonists of the crime⁷¹.

In the same order of observation, while article 10-1 expressly provides that restorative justice measures can intervene at all stages of the criminal procedure, the circular of March 15, 2017 devotes important developments to the prosecution phase, in the capacity of alternatives to prosecution. It is advisable to bring such a reality to the way in which has been diverted, since its adoption in 1993, the restorative character of the penal mediation⁷². It can now only be implemented at the "request or with the agreement of the victim" (C. pr. pén., art. 41-1, 5°, mod. Law of 13 Apr. 2016), including for minors (art. L 112-10 al. 3, mod. L. 26 Feb. 2021). The "agreement of the parties", a symbolic restorative expression if ever there was one, is no longer envisaged. Insofar as the most accomplished scientific evaluations agree in recognizing that the more serious the facts are, the greater the progress towards appeasement of the participants, thanks to the exchanges on the repercussions of the crime, favored by the space for dialogue, substantial to restorative measures, it is necessary to be rigorous as to the choice of the eligible disputes. In the same way, penal reparation for minors has lost its restorative character because in the field, victims are only exceptionally involved throughout the process. This situation can also be observed elsewhere. Indeed, depending on the restorative measures, the actual presence of the victim is highly variable; it is observed, for example, in only half of the restorative conferences, in the broadest sense⁷³.

appease the perpetrator and the victim, *In ASH*, 2016-2953; Comp. Freins et leviers de la Justice restaurative, S. Abdellaoui, N. Amadio, P. Colin (Dir.), 2017, gip-recherche-justice.fr., *Synthèse*, 2017, p. 14.

70 Comp. M. L. B., Mesures socio-judiciaires : vers un modèle de Justice restaurative ?

71 On these profiles, see recently A. Hachet, *Nouvelles figures de l'acte criminel. Du monstrueux au familial*, Ed. In press, 2015, 160 p. ; D. Zagury, *La barbarie des hommes ordinaires. Ces criminels qui pourraient être nous*, Ed. de l'Observatoire, 2019, 199 p.

72 V. P. Mbanzoulou, La médiation pénale en France à l'aune de la loi du 9 juillet 2010, in R. Cario, P. Mbanzoulou (Dir.), *La Justice restaurative*, *op. cit.* pp. 9-32.

73 V. J. Filippi, *Droit pénal des mineurs et Justice restaurative. Approche comparée France/Fédération Wallonie-Bruxelles*, Ed. du Septentrion, 2021, forthcoming.

In the same sense, the evaluations indicate that the offender and the victim do not always have the opportunity to make an informed choice when the “additional” restorative measure is proposed. For the former, the alternative to traditional criminal proceedings is often decisive. For the latter, it may be the only option available to avoid immediate dismissal of the case. The question of the extremely high cost in relation to the expected benefits, in the context of petty crime massively dealt with by the public prosecutor’s office, must be well understood. When the facts are minor and the damage (in the broadest sense) low, a restorative justice measure is not adapted.

Of course, it is not so much the intrinsic (objective) seriousness of the act that should lead to proposing participation in a restorative measure, but rather its extrinsic (subjective) seriousness in terms of repercussions for the future of the individuals. Moreover, victims need time to talk and to overcome the trauma caused by the crime. Partnership agreements, drawing up terms of reference, preparing potential participants and setting up encounters are time-consuming and therefore costly. It is therefore disproportionate to favour the implementation of restorative measures at the prosecution stage. It is also to be feared that this is merely a “punitive” addition, an extension of social control (*net widening*), the trivialization of serious crimes (particularly against women) and the instrumentalization of the victim in the management of intersubjective conflicts.

The accommodations with restorative justice are still observed, in a curious way, by the observation that the professionals involved too often tend to present themselves as experts in the situation. As a result, some overprotect victims (by determining their needs, in their place), others guide offenders (by determining the desired trajectories, in their place). If the clinician and the lawyer, in the broadest sense, are experts on the situation of individuals in traditional procedures, in restorative justice, the individual is the only expert on his or her situation⁷⁴. In the post-sentence context, it is mission impossible to base a restorative measure on a sanction that includes various obligations to do or not to do. How can we confuse informed consent and adherence to an obligation? The first implies that the person concerned gives his or her full and complete agreement to an action or measure voluntarily, expressly, with full knowledge of the facts, without any obligation and/or, where applicable, without any compensation. The second leads the person concerned to agree to an action or measure within the framework of a concomitant obligation, without having, objectively or subjectively, the choice not to subscribe to it.

Such an ambition empties of its substance the very notion of voluntariness, a *sine qua non* condition for the legislator. The absence of any direct consideration

74 V. not. J. Filippi, Sensibilisation des éducateurs français aux démarches de la Justice restauratives (JR) : de la réticence à l’acceptation de la victime, *In Journal du droit des jeunes*, 2016-353 (Belgium), pp. 50-55.

whatsoever sheds light on this need for free consent. In the same way that the restorative measure is not an act of procedure in all its phases, it cannot become a method of taking charge of the person prosecuted, still less a method of enforcing the sanction. Above all, the risk of instrumentalizing the victim is perceptible, since most of these measures are much more directly concerned with the (re) socialization of the offender alone. Finally, how can we reconcile the possibility offered to any participant to leave the restorative system at any time with the concomitant respect of the obligations accompanying the granting of a judicial supervision or a suspended sentence with probation?

B - Denaturations of restorative protocols

Improvisation and haste do not suit restorative justice. The available evaluations unanimously emphasize that the benefits it brings to participants stem not only from the humanistic philosophy that drives it, but also from the rigorous - and admittedly demanding - methodology that frames restorative measures. The protocols, specific to each restorative measure, developed with professionals in the field and validated by trained facilitators, are the best guarantees of⁷⁵ this. This rigor is fully justified by the imperative obligation to never (re)victimize people during encounters. Restorative workshops, whatever their modalities, presuppose, first of all, that a significant amount of time be given to the professionals, specially trained, who wish to invest in this approach. It appears that, in a very worrying way, the principles of restorative justice taught to practitioners are not necessarily applied in the field and lead to major drifts. Inadequately prepared, the individuals concerned are likely to be influenced by the professionals in charge of their follow-up and/or the facilitators (in the broadest sense)⁷⁶. Secondly, they require that substantial financial means be available, as everyone is aware of the high return on investment (in terms of judicial, psychological and social gains, in particular)⁷⁷. Failing this, the law of August 15, 2014 will become a dead letter. If not, the temptation to adjust the protocols specific to each restorative measure becomes very (too) great. The lack of hindsight in relation to the implementation and evaluation of authentically restorative measures appears, in the same sense, as an invitation

75 See in particular. R. Cario, *La justice restaurative en France*, *op. cit.* p. 84 and following; justice restaurative.org.

76 V. J.J. Choi, M.J. Gilbert, D.L. Green, Patterns of victim marginalization, *In Crime law and social change*, 2013-59, pp. 113-132; A. Saulnier, D. Sivasubramaniam, Effects of Victim Presence and Coercion in Restorative Justice: an Experimental Paradigm, *In Law and Human Behavior*, 2015-39-4, pp. 378-387.

77 V. H. Strang et al, Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review, *In Campbell Systematic Reviews*, 2013-10; See also S. Maruna, Lessons for justice reinvestment from restorative justice and the justice model experience, *In Criminology and public policy*, 2011-10-1, p. 21.

to qualify as “restorative” programs that are not restorative at all, by “normative arrangements”^{78,79} or practical opportunism. There is no question of questioning such programs, which are undoubtedly relevant in themselves, subject to their evaluation. It is simply a question of affirming that they are moving away—sometimes in a very problematic way—from restorative measures, as conceived by the law and operationalized by specially trained facilitators⁸⁰.

In this sense, the discussion groups, even if they introduce at some point in their development a person who has been a victim (or who takes care of victims) cannot constitute a restorative measure⁸¹. The Sycamore program, as relevant as it is, cannot be considered as mainly likely to “repair... the crime”⁸². It is a discussion group for the sole benefit of the perpetrators who invest themselves in it. The biblical reference to Zacchaeus does⁸³ not confirm its restorative character. Indeed, “Sycamore Tree”⁸⁴ (also called “Building Bridges”) takes place over six two-hour encounters, gathering about twenty participants, within the prisons. One or more victims are invited during the third and last encounters to express the repercussions that the crime has had on their emotional, family and social life. The accountability of the offenders can undoubtedly result from these discussion groups, but they can also lead to “regrets, forgiveness [...] to those who can benefit from it”⁸⁵. This is something that restorative workshops never aim at, especially since the participants are not bound by the same case. Thus, the Sycamore program is much closer to a recidivism prevention program (PPR) that has been implemented for a long time by the professionals of the Correctional Services.

The desistance sponsorship program is also intended for people under judicial supervision only, and is aimed primarily at changing their behaviour. This program appears to be a very watered-down version of the Circles of Support and Accountability (CSR) without, however, respecting the demanding protocol and the conditions for benefiting from it: perpetrators of sexual offences, assessed as being at high risk of re-offending and exposed to very great social isolation on

78 See in particular. H. Zehr, *op. cit.* 2015, p. 69 ff.

79 V. Freins et leviers de la Justice restaurative, S. Abdellaoui et al, *op. cit.*, gip-recherche-justice.fr. , *Synthèse*, 2017, p. 10.

80 V. W. Wood, M. Suzuki, *Four challenges in the future of restorative justice, in Victims and offenders. An international journal of evidence-based research, policy and practice*, 2016-24-1; V. S. Charbonneau, C. Rossi, *op. cit.* , pp. 26-27.

81 It is important to underline that the discussion groups set up by the association “L’Ange bleu” since 1998 cannot, in any way, be assimilated to any restorative practice. Informal, non-professionalized, non-evaluated, they “confront, once a month, ‘abstinent’ or ‘ex-criminals’ pedophiles with former victims, with the aim of telling their story and helping each other”; ange-bleu.com.

82 See in this sense L. Rossignol, *In Télérama*, 3702-3703, 23 Dec. 2020, pp. 26-30.

83 V. Gospel according to St. Luke, III, 1-, 1-10; bibleenligne.com.

84 V. Center for justice & reconciliation. A program of Prison Fellowship International, restorativejustice.org; justice-restaurative.fr.

85 See justice-restaurative.fr ; See also *Infra*.

leaving prison⁸⁶. This program is offered without any assessment of the risk of recidivism, regardless of the type of offense. The sponsored person, who is in a “fragile situation” and has had a “significant offence history”, is monitored on a weekly basis by a sponsor, a volunteer trained in the principles of the CSR, motivation to change and desistance. Each month, all the sponsors and the sponsored persons meet in a “Circle”, coordinated by the two prison counselors who initiated the program. The volunteer sponsor’s commitment is spread over a period of 4 to 8 months, renewable. An initial evaluation of the program, involving 18 beneficiaries, has been carried out and the initial results are in line with what has already been demonstrated by programs that are more or less similar (Good Lives Model; Risk-Need-Responsiveness). Most importantly, the commitment and readiness for treatment of the offenders involved is highlighted⁸⁷.

The same observation leads to the desire to integrate restorative justice into the justice system in order to promote a new judicial clinic. This is in direct conflict with the non-therapeutic nature of restorative programs, which is the key to their success⁸⁸. The haste to introduce other programs’ methodologies, which are absolutely relevant in themselves, but exclusively focused on the treatment of the offender, contradicts the assessed fact that if the preparation of potential participants for restorative measures, as well as the exchanges that take place in the dedicated discussion spaces, are likely to lead, through dialogue, to a potential appeasement of all, it is precisely because the facilitators, in the broadest sense, do not use these tools, qualified as clinical by their promoters. The processes implemented in this framework do not correspond to the relational approach, particularly adapted to the implementation of restorative workshops, whose sole objective is dialogue and the methodology for facilitating it is solely dialogue⁸⁹. Motivational

86 See in particular. R. Cario, *La justice restaurative en France, o)p. cit.* p. 82 ff. and references cited; S. Hannem, Experiences in reconciling risk management and restorative justice: how circles of support and accountability work restoratively in the risk society , *In Intern. Journal of offender therapy and comparative criminology*, 2013-57-3, pp. 269-288.

87 V. E. Dieu, Programme de parrainage de désistance (PPD) et cercle de soutien et de responsabilité (CSR) : synthèse des ressemblances et dissemblances pour une Justice restaurative adaptée en France, *In RICPTS*, 2018-3, pp. 351-362 ; E. Dieu, L. Merchat, Le programme de parrainage de désistance (PPD) : une mise en lien concrète française de la Justice restaurative et de la désistance, *In Les cahiers de la sécurité et de la justice*, Hors série «Cahier de recherche», De la théorie de la prévention à ses applications numériques, la trajectoire d’une idée humaniste, 2021, pp. 17-26 ; E. Dieu, R. Palaric, A. Maillot, Pratique restaurative et processus de désistance identitaire : le Programme de Parrainage de Désistance, *In Ricpt*, 2020-2, pp. 220-235.

88 See, for example. G. Woessner, On the relationship between restorative justice and therapy in cases of sexual violence, *In E. Zinsstag, M. Keenan (Eds.), Restorative responses to sexual violence: legal, social and therapeutic dimensions*, Routledge ed., 2017, pp. 248-265.

89 According to this approach, the posture of the mediator, and of the “facilitators” more generally, is particular: he is not an expert, he neither influences nor pushes people to change, he avoids any suggestion, and he is transparent about the work he does with people. During the preparation of the people within the “communication workshops”, he has several tools at his disposal: listening attentively to the people, exploring their expectations and scripting the real exchanges to come. Using

interviewing, for example, is “a collaborative style of conversation to strengthen a person’s own motivation and commitment to change”⁹⁰, a “therapeutic work”⁹¹. Moreover, “reflective listening”, which is necessarily “selective”, as well as “advice”, are counterproductive in the course of restorative workshops. Motivational interviewing, finally and essentially, in order to be a “way of being with people”, integrates specific clinical know-how available for the follow-up of persons placed in the hands of justice or taken into account by victim support services⁹².

In the same sense, the cognitive-behavioural theories that underlie the “Risk-Need-Responsivity”⁹³ and “Good Lives Model of offender rehabilitation” programs are⁹⁴, once again, in total contradiction with the restorative approach. Any form of suggestion in the direction of well-being for the participants directed towards the facilitators, specially trained to decentre themselves from their usual professional practices and postures, risks undermining the voluntary and informed nature of their participation. Specially dedicated to the global rehabilitation of convicts only, they carry risks of confusion with care, therapies must be clearly distinguished from interventions to fight against recidivism⁹⁵. It is also important never to forget that the expectations formulated by the persons concerned to participate in a restorative measure are differential and there is no way of affirming that they will be satisfied at the end of the program⁹⁶. Most importantly, such cognitive-behavioural programs are based on addressing and treating the needs of individuals in custody. Restorative justice measures, on the other hand, are based

open-ended questions, the expectations of each person are explored around the acronym MAIS: M. for me, A. for the other, I. for information and S. for safety; for more details, see S. Charbonneau, C. Rossi, *op. cit.* p. 77 and following.

90 See in particular. W.R. Miller, S. Rollnick, *Motivational interviewing. Aider la personne à engager le changement*, 2è éd. 2013, InterEditions, 434 p., spé. p. 13 et s. ; J. Braithwaite, Motivational interviewing and restorative justice praxis, In B. Pali, K. Lauwaert, S. Pleysier (Dir.), *The praxis of justice. Liber amicorum Ivo Aertsen*, Eleven Intern. Pub. 2019, pp. 33-40.

91 V. M. Purvis, T. Ward, G. Willis, The good books model in practice: offence pathway and case management, In *Intern. Journ. of probation*, 2011-3-2, pp. 4-28.

92 V. not. H. Lefebvre et al, *op. cit.* p. 334 et seq.

93 See, for example. J. Bonta, D.A. Andrews, A Model for the Assessment and Rehabilitation of Offenders Based on the Principles of Risk, Need, and Responsivity, *Report to Her Majesty the Queen in Right of Canada*, 2007, 2006-2007, p. 1 et seq.; J. Bonta, D.A. Andrews, *The psychology of criminal conduct* (1994), Routledge ed., 5th ed. 2016, p. 175 et seq.; J. Bonta, D.A. Andrews, *Le comportement délinquant. Analysis and intervention modalities*, Les Presses de l’Enap, 2018, 750 pp.

94 See, for example. T. Ward, Good Lives and the rehabilitation of offenders: promises and problems, In *Aggression and violent behavior*, 2002-7(5), pp. 513-528; T. Ward, S. Maruna, *Rehabilitation. Beyond the risk paradigm*, Routledge Ed., 2007, 216 p.; goodlivesmodel.com.

95 V. not. O. Vanderstucken, D. Garay, N. Letto, M. Benbouriche, L’introduction du *Good Lives Model* en France : un risque de confusion avec le soin, In *Ajpén.* , 2018-1, pp. 13-18.

96 V. E. Dieu, «Pourtant, ça pourrait répondre à vos questions et vous faire du bien». La question du lien entre l’entretien motivationnel et la Justice restaurative, In *Annales médico-psychologiques*, 2020-178, pp. 117-122.

solely on taking into account the expectations of participants⁹⁷. The difference is notable because the expectations of people who wish to participate in a restorative workshop are always marked by their experiences of the offence committed/suffered. These are generally expressed around feelings, emotions that are not sufficiently taken into account during the criminal trial or the execution of sentences. Whereas the expression of a need is based on a requirement of a nature to lead to its satisfaction. The concept of needs still refers to everything that seems to be necessary for a person, whether this necessity is conscious or not⁹⁸. Wishes and requirements are in no way compatible.

In restorative workshops, the mode of communication with individuals is dialogue, which cannot be thwarted by the use of listening and interviewing techniques in clinical interviews⁹⁹. Active listening cannot be developed in restorative justice any more than reflective listening^{100, 101}. Reformulation is the essential technique and is manifested in several ways, mainly through mirroring, which consists in repeating the person's words in a more concise way without distorting the thought. The use of mirroring, suggestion, validation, synthesis, contradiction, and instructions in particular, must be proscribed in restorative communication workshops (preparatory or plenary). On the other hand, rephrasing, echoing, and summarizing can be used with caution and always very briefly.

Refusing to invest fully in a successful partnership between all the actors in the penal chain, by involving trained volunteers from the community, and by refraining from any objective (nature of the offence) or subjective (personality of the potential participants) discrimination, will lead to the same splintering strategies when dealing with people affected by the crime. In this sense, distortions of the restorative model are illustrated here and there in the country. Some of these distortions are due to local contingencies, while others are the result of haphazard simplifications of protocols that have been developed and implemented in full collaboration with the actors in the field. Moreover, many restorative measures

97 See in this sense not. A. Buonatesta, G. Kellens, Instilling a culture of mediation in criminal proceedings, in M.A. Beernaert et al (Dir.), *Loyalty, Justice and Truth. Liber amicorum Henry-D. Bosly*, Ed. La Chartre, 2009, pp. 211-218; S. Charbonneau, C. Rossi, *op. cit.* S. Charbonneau, C. Rossi, *op. cit.*, pp. 66-71.

98 Comp. G. Coco, S. Corneille, Quand la Justice restaurative rencontre le *Good lives model* de réhabilitation des délinquants sexuels, 2009, erudit.org/fr/revues/pv/2009-v9-n1 ; M. Purvis, T. Ward, G. Willis, The good books model in practice, *Ibid* ; J.-J. Urvoas, Lettre du Garde des Sceaux adressée à un futur ministre de la Justice, Dalloz actualité, 2017, p. 36, dallozactualite.fr.

99 V. not. E. Josse, *Les techniques de communication dans la relation d'aide psychologique. La reformulation (active listening)*, 2019, resilience-psy.com; J. Barus-Michel, E. Enriquez, A. Lévy, *Vocabulaire de psychosociologie. Positions et références*, Ed. Erès, 2nd ed. 2013, pp. 360-369.

100 V. W.R. Miller, S. Rollnick, *Ibid.* , p. 36.

101 V. *La relation d'aide et la psychothérapie* (1942), ESF éd., 2005, p. 93 et seq.; *Le développement de la personne* (1961), Ed. Dunod, 1998, p. 27; R. Mucchielli, *L'entretien de face à face dans la relation d'aide* (1966), ESF éd., 17^e éd., 2002, p. 11 et seq. S. Charbonneau, C. Rossi, *op. cit.*, p. 81 ff.

cannot be implemented because of the delay in signing the indispensable Partnership Agreement by some members of the steering committee. The high *turnover* of judicial personnel should not create any break in the implementation and tacit renewal of restorative programs. Some encounters between inmates and victims took place without the two members of the community, whose role of listening to and accompanying the emotions that invade the participants is essential. Elsewhere, the facilitators were referents for one or other of the participants. Reluctance, even resistance, to refer the people they are following or who wish to be offered a restorative measure was observed. Sometimes the complete information of the applicants leads to the beginning of preparation interviews, even though when the conditions of article 10-1 of the C.pr.pén. are before hand fulfilled, the orientation towards the facilitators is automatically imposed because they are precisely the only ones trained to appreciate, according to the expectations of the persons and in the respect of their free choice of the measure, their integration in a restorative process. It also happens that the individuals' preparation is abused. More seriously, self-training or inadequate training of facilitators can expose potential participants to serious risks of misunderstanding the restorative process and even revictimization.

Among the multitude of writings on restorative justice (from academics or practitioners), two expressions seem to have become consubstantial with the implementation of restorative justice measures. It is important to note that these are either conceptual aberrations or dangerous pragmatic misunderstandings. As previously mentioned, "forgiveness" is not an objective of restorative justice¹⁰². It is even counterproductive, particularly for victims or their relatives who, in the vast majority of cases of serious crime, exclude any idea of explicitly forgiving the offender. The fact that they show, after the restorative encounter, a regaining of control over their emotions linked to the repercussions of the crime, a better feeling of well-being, a better understanding of the act and/or an acceptance of the offender's enduring humanity, cannot be assimilated to an implicit forgiveness on their part¹⁰³. "Healing", secondly, is to be treated as forgiveness. The application of this concept to restorative justice comes from indigenous terms¹⁰⁴ that use the

102 V. S. Jacquot, *Pardonner l'irréparable. Pour une nouvelle justice*, Ed. Salvador, 2018, 165 p., not. p. 93 et seq.; E. Jaffelin, *Apologie de la punition*, Ed. Plon, 2014, pp. 268-274; the "Sycamore tree" program, recently experimented in France, leads to the same reservations, restorativejustice.org/we-do/sycamoretree-project; J. Anderson, Introducing and theorising an in-prison restorative justice programme: the second-generation Sycamore tree project, *In The international journal of restorative justice*, 2018-1-2, pp. 210-229; See also P.S. Anderson, When justice and forgiveness come apart: a feminist perspective on restorative justice and intimate violence, *In Oxford journal of law and religion*, 2016-5-1, pp. 113-134.

103 See in particular. J. G. Murphy, *Getting even: forgiveness and its limits*, 2003, Oxford University Press; comp. justice-restaurative.fr; S. Charbonneau and C. Rossi, *op. cit.* pp. 26-27.

104 V. C. Rossi, The myths and biases surrounding restorative justice: some explanations, *In Open Doors*, 2015, pp. 6-10.

word to refer to social (social and spiritual group) healing and not to refer to the outcome of individual therapy. Such a metaphor can have harmful consequences for those who are victimized or offended. Furthermore, facilitators (in the broadest sense), who are not especially knowledgeable, may use the promise of healing to lure people into restorative action¹⁰⁵.

In summary, it is important to remember, as Catherine Rossi points out¹⁰⁶, that the participants *are* the program and only go there for their own reasons. Everyone (victims and offenders, family members, members of their communities, citizens) invests in it in the way they want, asks the questions that are important to them, and commits to it to the extent that they feel capable of. They are - and this is a fundamental point - the only masters of the development of these programs. Although at all times a strict framework of animation is necessary, in essence, each moment is controlled, directed, decided by the participants themselves (the victim/s as much as the offender/s). In such a way that their place, their actions and claims, their speech and their freedom remain acceptable and respected throughout the restorative process. The facilitators, in the broadest sense, are the guarantors of this.

The legislative and regulatory texts relating to restorative justice are coherent and sufficiently clear in their interpretation. In order to offer flexibility, they nevertheless condition the proposal of participation made to the persons concerned. The protocols are precise and operational. The use of the relational approach during the facilitation of restorative workshops is a real asset. The first evaluations are very encouraging in these respects¹⁰⁷. So, why divert them by adding an incompatible constraint or by limiting their field of action to a few infractions? So why use programs strictly for offenders or victims at the risk of corrupting restorative workshops¹⁰⁸? Numerous scientific evaluation studies emphasize that want-

105 V. K. Daly, Les mythes concernant la justice restauratrice, in P. Gailly, *op. cit.*, «Mythe n° 2», pp. 310-314.

106 V. C. Rossi, R. Cario, *Les bienfaits de la Justice restaurative*, thyma.fr, p. 19 ; T. Van Camp; J-A. Wemmers, La justice réparatrice et les crimes graves, *In Criminologie*, 2011-44-2, pp. 171-198 ; J. Lecomte, La justice restauratrice, *op. cit.*, pp. 227 et seq. ; A. Coignac, Justice restaurative : la réparation les yeux dans les yeux, *In Dalloz actualité*, 30 Jul. 2018, dallozactualite.fr.

107 V. Interim evaluations conducted by IFJR, *National Evaluation of Restorative Justice Programs*, 2018, multigraph, 39 p., coordinated by E. Matignon and B. Sayous; *National Survey of Perpetrator and Victim Participants in Restorative Justice*, 2019, supervised by E. Matignon, multigraph, 49 pp.

108 V. not. A. Garapon, Enjeux d'une justice de l'intime, in *Rev. Esprit*, 2021-1, pp. 139-150. "Justice as a framework for recognition" (p. 143 et seq.) must not only concern the victims but also the perpetrators, their respective relatives and, more broadly, all those affected by the crime. According to A. Honneth, the structure of social recognition relationships is organized around three characteristics: love (a vector of self-confidence), rights (a vector of self-respect) and social solidarity (a vector of self-esteem). Undoubtedly, such recognition must benefit all these people, *In The Struggle for Recognition* (1992), Ed. La découverte, 2012, pp. 53-54.

ing to introduce and consider as restorative programs intended to benefit only offenders is likely to lead to real dissatisfaction on the part of the victims, who are not fooled by their instrumentalization, or even by an authentic betrayal, a source of revictimization¹⁰⁹. The question thus arises as to what is the point of such a hybridization of programs that are relevant in themselves—but with clearly different objectives—at the risk of distorting them all?

In full development today in France, it seems essential to emphasize that the vast majority of programs implemented scrupulously comply with the philosophical principles of restorative justice, the official texts, the *modus operandi* and the tools of the relational approach¹¹⁰. It is on the respect of these requirements that the generalization of restorative workshops for the benefit of all persons suffering from the repercussions of crime depends. And if their implementation still seems impossible for many actors of the penal chain, it is possible to affirm, paraphrasing Seneca's beautiful quotation, that it is because citizens and their representatives in a democracy do not dare to promote restorative justice that it encounters difficulties in blossoming¹¹¹.

109 See in particular. H. Mika, M. Achilles, E. Halbert, L. Stutzman Amstutz, H. Zehr, Listening to victims. A critique of restorative justice policy and practice in the United States, *In Federal probation. A journal of correctional philosophy and practice*, 2004-68-1, pp. 51-62; J.J. Choi, G. Bazemore, M.J. Gilbert, Review of research on victims' experiences in restorative justice: Implications for youth justice, *In Children and Youth services rev.*, 2012-34-1, pp. 35-42

110 Built and theorized from decades of practice within the "Equijustice" restorative justice and citizen mediation network, equijustice.ca. V. S. Charbonneau, C. Rossi, *op. cit.*, 195 p.

111 V. Seneca, *Letters to Lucilius*, XVII, 104-26: "It is not because it is difficult that we do not dare; it is because we do not dare that it is difficult", "Non quia difficilia sunt non audemus, sed quia non audemus difficilia sunt".