Alternative Dispute Resolution


Ethical issues that relate to criminal justice are relevant to all areas of the legal profession, to all those personally involved in the carriage of this area of law, as well as the frameworks for the administration of justice in society. Alternative dispute resolution (ADR) processes are used in the various arenas of the criminal justice system, including policing, corrections, courts, and research. ADR also provides pathways for resolution of disputes outside the court system and takes many different forms. These processes include mediation, conferencing, restorative justice frameworks, and conciliation. ADR processes such as restorative justice and conferencing are used mostly within the criminal justice context, and the many facets and stakeholders involved provide further scope for ethical exploration.

What Is Restorative Justice?

Restorative justice focuses on the reparation of harm caused by (in most cases) criminal actions. It involves the shift from a punitive to a rehabilitative approach. Generally, restorative justice involves the meeting and conferencing of victims, offenders, and their respective supporters, as well as other relevant community members, such as social workers, police, or representatives from a relevant area of the justice system. When this model is applied to situations involving youth offenders, relevant youth workers and youth justice coordinators will be involved. Usually the discussion initially revolves around the offense and its impact before progressing to consideration of the outcome to which the young offender will be expected to commit. Sanctions or reparations may include an apology, monetary compensation, the undertaking of work for the victim or for the community, and attending counseling. The outcome is legally binding.

Restorative justice comprises a variety of practices, which might occur at different stages of the criminal justice process, including initial referral away from court processes, activities that take place concurrently with court processes, and other meetings and conferences that take place at any other stage of criminal proceedings (for example, at the time of arrest or of release from prison). Victim-offender mediation is another process which allows the victim and offender to meet and discuss reparations for the victim of the crime. Both this process and restorative justice are used all over the world in a variety of forms. For example, in Western Australia, Victim Offender Mediation Offices offer what is referred to as “reparative mediation,” which is designed to allow victims and offenders to discuss the type of compensation acceptable to both parties. Restorative justice includes processes as diverse as small group conferencing and truth commissions—these examples being indicative of the vast spectrum along which restorative justice processes can be plotted. Conferencing is a process that is used in criminal justice settings as well as in the workplace. It has been regarded by some as a mediation process; however, it is distinct from a conventional mediation process in that much of the time the goal of this type of conferencing is to resolve a conflict rather than resolve disputes around distinct issues. In some schemes this method of conferencing is referred to as “restorative justice,” “reparative mediation,” and “victim-offender mediation.” In different countries, conferencing is used in different ways, often with vast variations on the models used. For example, the New Zealand model came about with the introduction of the Children, Young Persons and Their Families Act
(1989), which was introduced in response to the concern that Maori youth were offending due to the state’s interference with their traditional systems relating to collective responsibility. As such, the conferencing arising in this instance involved family group conferencing, including the family of the youth offender, the victim, the youth justice coordinator, and a representative from the police, as well as others if necessary. In contrast, the Australian model of conferencing (adopted in the 1990s) involves the police acting as mediators and offenders being made to feel shame for the acts that they have committed. Commentators have noted that this model of police-led conferencing has been adopted for use in many other parts of the world. Most conferencing programs aim to facilitate dialogue between the victims and the offenders, and the primary focus is on how the crime affected the victim and others. Usually the outcomes and remedies include apologies and compensation. Conferencing is sometimes classified as an advisory process due to the prevalence of advice being provided in some circumstances. That is, in some instances, the facilitator has a great deal of input into the process and content of the conference because of his or her role in selecting who will attend and how the conference will proceed. Further, the focus of the conference will often be on the offender (and his or her rehabilitation), rather than on anyone else present at the conference. Other examples of the use of restorative justice or similar ADR processes, especially in the context of young people, can be seen in peer mediation programs used in schools. Most Australian State Schools are involved in School Conflict Resolution and Mediation (SCRAM), which is a mediation competition and provides youth with exposure to ADR processes. In the United States, “restorative” schools have been established that endorse specific communication modes and are designed to encourage particular methods of influencing communications. The International Institute for Restorative Practices is an organization that facilitates restorative practices for victims and offenders in the United States and has had consistently good results in terms of the participants’ perceptions of fairness and their satisfaction with the process and outcomes. There have been evaluations conducted into restorative justice programs, and some of these have influenced decisions relating to legal aid funding in recent years.

**Ethical Concerns**

The diversity of systems used in this area, while positive in its illustration of the customization of processes to ensure appropriateness for any given situation, means that monitoring is important to ensure consistency of treatment for similar offenders. Studies have revealed that though restorative justice and similar processes have been used effectively in many circumstances throughout the world, some attempts to divert offenders from the court system might not have been used uniformly across the jurisdiction. This notion relates to consistency of referrals to a process, and consistency in terms of the actual process undertaken once referral has occurred. For example, in New South Wales, Australia, where a series of warnings, cautions, and conferences are used for youth offenders, the Young Offenders Act (1997) created procedures for youths who commit certain offenses. An example of the inconsistency can be seen in a study undertaken in New South Wales that measured the level of variation across the state in terms of the number of youth diverted from court processes to undergo more rehabilitative processes such as conferencing. These numbers were explored, taking into account the factors that the New South Wales Policy Force’s Local Area Commands must or are able to consider when deciding
which process will be appropriate for the youth offender. The Youth Offenders Act assisted in this instance, providing criteria by which to measure the consistency with which youth were diverted from court processes and providing guidelines for decisions to divert. Some commentators have suggested that restorative justice is an easy path for reconciliation and resolution that does not take real account of the serious retributive and punitive needs of offenders and victims. However, this challenge has been answered with the assertion that restorative justice does not disregard past wrongdoing but seeks to describe it truthfully by gaining the perspectives of both the offender and the victim, and acknowledging that often these viewpoints and the resulting impacts on parties will be vastly different. That is, to the extent that discussions can be had about the (often distressing) truth about the injustices that have occurred, restorative justice encourages parties to discuss culpability and come to a decision about reparation and restitution.

**Historical and International Context**

There are various historical examples of forms of restorative justice implemented in order to rehabilitate offenders and victims in relation to crimes committed. One such example is Abraham Lincoln’s call for reconciliation with rather than retribution against the Confederacy following the injustices of slavery and the Civil War. Likewise in more than 20 countries around the world, including Rwanda, Chile, South Africa, and Argentina, truth commissions have been set up in order to facilitate disclosure of truths about past events, using restorative processes designed to contribute to political reconciliation and national unity. These truth commissions, which were established in relation to large-scale crimes, have the same underpinning rationale as restorative processes designed and implemented in relation to individual criminal acts, endorsing Ernesto Sábato’s notion that “legalism alone cannot achieve the moral reconstruction necessary to restore a broken and divided society.”

**Conclusion**

Exploration of ethical decision making and behaviors within the sphere of criminal justice is applicable to those who design processes, refer and divert people to and from restorative justice or courts, as well as those who administer and facilitate programs and practices. Recent examples have shown that legislation can be instrumental in regulating and providing guidelines for the appropriate and consistent use of restorative justice; however, continual monitoring of processes and outcomes should be of paramount importance in all restorative practices. *Tania Sourdin Naomi Burstyner Monash University*

See Also: Apartheid; Crimes Against Humanity; Forgiveness; Peacemaking and Nonviolence; Restorative Justice.

**Further Readings**


Western Australia Department of Corrective Services.