

Conceptual legal analysis of restorative justice in Mexico**Análisis jurídico conceptual de la justicia restaurativa en México**

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Abstract

Restorative justice is a new way of achieving justice, derived from the evolution of the criminal justice system, which emphasizes the reparation of harm, reconciliation and social reintegration of both the victim and the offender, with the participation of all parties involved, as opposed to retributive justice, which is based on punishment as a response to the crime and seeks retribution for the harm caused. The implementation of restorative justice varies according to jurisdictions and is supported by various legal frameworks, including international treaties and conventions that promote this figure. The creation of this opinion article was based on a methodology that includes research, analysis and expression of ideas in a clear and persuasive manner. New Zealand stands out as a successful case in the implementation of restorative justice, highlighting the priority given to the reparation of harm and the restoration of relationships in its legal system. In Mexico, it is based on a legal framework that varies according to the states and is supported by international treaties, its application seeks to repair the damage caused and the restoration of relationships between the parties, contributing to a more equitable and effective justice in society. This article was carried out under a qualitative approach due to the theoretical basis of restorative justice, the deductive method was used through the study of general knowledge to particulars, finally, the research technique used was the review of bibliographic sources, as well as local, national and international legislations for the full development and understanding of the same.

Restorative justice, Restorative justice, penal system, Reparation of harm**Resumen**

La justicia restaurativa es una nueva forma de alcanzar la justicia, derivada de la evolución del sistema penal, en la cual se enfatiza la reparación del daño, la reconciliación y la reinserción social tanto como de la víctima como del infractor, con la participación de todas las partes intervinientes, a diferencia de la justicia retributiva que se basa en el castigo como respuesta al delito y busca la retribución por el daño causado. La implementación de la justicia restaurativa varía según las jurisdicciones y se apoya en diversos marcos legales, en los que se incluyen los tratados internacionales y convenciones que promueven esta figura. La creación de este artículo de opinión se basó en una metodología que incluye investigación, análisis y expresión de ideas de manera clara y persuasiva. Nueva Zelanda se destaca como un caso de éxito en la implementación de la justicia restaurativa, resaltando la prioridad dada a la reparación del daño y la restauración de relaciones en su sistema legal. En México, se sustenta en un marco legal que varía según las entidades federativas y está respaldado por tratados internacionales, su aplicación busca la reparación del daño causado y la restauración de relaciones entre las partes, contribuyendo a una justicia más equitativa y eficaz en la sociedad. El presente artículo se realizó bajo un enfoque cualitativo debido a que se fundamentó teóricamente la justicia restaurativa, se empleó el método deductivo por medio del estudio de conocimientos generales a particulares, por último, la técnica de investigación utilizada fue la revisión de fuentes bibliográficas, así como las legislaciones local, nacional e internacional para el pleno desarrollo y entendimiento de este.

Justicia restaurativa, Justicia retributiva, sistema penal, Reparación del daño**Citation:** ORTEGA-SÁNCHEZ, Ruth Irene & DE LEÓN-VÁZQUEZ, Héctor Manuel. Conceptual legal analysis of restorative justice in Mexico. Journal-Public Economy. 2023. 7-13:23-28.

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Introduction

Restorative justice is an alternative to the criminal justice system, which is based on the reparation of harm, with the participation of the intervening parties to achieve reconciliation.

Restorative justice in its strict dimension, referring to the criminal justice system, is defined by the United Nations as an evolved response to crime that respects the dignity and fairness of each person, builds understanding and promotes social harmony through the "healing" of the victim, offender and community. (De la Fuente, 2012, p.1).

It aims to address conflict and crime in a comprehensive but above all problem-solving oriented manner, promoting personal responsibility and the reintegration of offenders into the community, rather than simply imposing punitive sanctions, restorative justice seeks to make the offender take responsibility for his or her conduct and take steps to repair the harm caused to the victim and the community, this may include apologies, community service, compensation and other types of reparation.

Restorative justice involves the active participation of the parties involved in the conflict, the victim, the offender and, in some cases, members of the community, so that all have the opportunity to express their concerns, needs and expectations in order to work together to find solutions.

One of the central goals of restorative justice is to restore damaged relationships, which involves seeking reconciliation between the victim and the offender, where possible, and reintegrating the offender into the community in a way that reduces the likelihood of recidivism.

Restorative justice is also considered a crime prevention tool as it focuses on addressing the underlying causes of offending behaviour and helping offenders to avoid committing future offences; it is a flexible approach that can be adapted to a variety of situations and can generally be used in cases of minor or so-called petty crime, including in cases of domestic violence although the application may vary according to jurisdiction and circumstances.

It uses a variety of processes and methods to achieve its goals, which may include victim-offender conferences, mediation, restorative circles, and other actions that promote dialogue and collaboration.

Origins and evolution of restorative justice

In Mexico, the origins and evolution of restorative justice date back several decades. In the 1990s, restorative justice began to gain momentum in Mexico as various actors, including academics, human rights advocates and justice system professionals, became interested in the possibility of introducing alternative methods to criminal justice, in part due to the perception that the traditional criminal justice system had limitations in terms of effectiveness and access to justice. One of the most significant developments in its evolution was the reform of the Mexican Constitution in 2008, which included important changes to the Mexican criminal justice system, including alternative dispute resolution mechanisms and the introduction of the principle of restorative justice.

In the Political Constitution of the United Mexican States, a third paragraph was added to Article 17, which states:

"The laws shall provide for alternative dispute resolution mechanisms. In criminal matters, they shall regulate their application, ensure reparation of damages and establish the cases in which judicial supervision is required".

Following this reform, restorative justice pilot programmes were carried out in various states of Mexico. These programmes focused on testing restorative justice methods in specific cases and evaluating their effectiveness in conflict resolution and the satisfaction of the parties involved. As a result, several Mexican states began to develop and approve specific laws for the implementation of restorative justice at the local level, which allowed for its adaptation depending on the needs and situations of each state, as well as training and education programmes for the operators of the justice system, mediators or moderators of restorative processes.

Fundamental principles of restorative justice

The fundamental principles that underpin restorative justice are the foundation on which this alternative approach is based, providing the basis and guidance for its implementation. Restorative justice places the victim at the centre of the process, recognizing the suffering and needs of the victim as a priority, seeking to restore the harm caused and allowing victims to express their concerns, needs and interests by providing them with the opportunity to actively participate in the resolution of the conflict.

Similarly, restorative justice recognises the importance of holding the offender accountable for his or her actions rather than simply punishing; it seeks to make the offender take responsibility for his or her actions and face the consequences of his or her behaviour and work to repair the harm caused.

The active participation of the parties involved, the victim, the offender and the community, is essential to the success of restorative justice, as it encourages dialogue and open communication between the parties, which contributes to joint decision-making and the search for mutually acceptable solutions.

It focuses on repairing the harm caused, including material compensation, restitution of property, sincere apology and rehabilitation of the offender, i.e. it aims to restore harmony and re-establish the integrity of the affected parties.

It also seeks to prevent recidivism of the offender through accountability and addressing the causes of the offending behaviour. It promotes a proactive approach to addressing the offender's needs and reducing the likelihood of future offending.

The community can play an active role in monitoring and supporting the process, contributing to the offender's reintegration and the well-being of affected parties.

Restorative justice should be applied equitably and without discrimination, all individuals involved should be treated fairly and respectfully, regardless of their ethnicity, gender, sexual orientation, religion or other personal characteristics, all in accordance with the National Law on Alternative Dispute Resolution Mechanisms in Criminal Matters (2014).

Comparison with retributive justice

Restorative justice and retributive justice are two different perspectives on conflict resolution and the administration of justice. Retributive justice is based on the idea that punishment is a proportionate response to a crime, and its main objective is to impose an appropriate punishment on the offender as a form of retribution for the harm caused to society, this approach tends to focus on the culpability of the offender and the application of penalties proportionate to the seriousness of the crime, as Cardenas (2007) points out. "Retributive justice is what exists in criminal justice, and will continue to exist, and is based on giving a wrong for a wrong, that is, repaying the offender with a punishment", p. 204.

As has been said, restorative justice focuses on repairing the harm caused by the crime and restoring the relationships between the parties involved, including the victim, the offender and the community, instead of punishing the offender, restorative justice seeks that the offender takes responsibility for his actions and participates in a process of reconciliation and reparation, Cárdenas (2007) explains, "Restorative justice involves more parties in response to the crime, instead of giving protagonism only to the State and the offender, it also includes victims and communities." p.204.

Practical implementation

The implementation of restorative justice in particular legal systems involves adopting approaches that prioritise repairing the harm caused by a crime and restoring the relationships between the parties involved, a clear example of how restorative justice has been implemented is in New Zealand, as it is widely recognised as a success story.

In New Zealand, Family Group Conferences are based on the traditional Maori system of conflict resolution, an indigenous ethnic group that is applied primarily in cases involving young people and this approach incorporates Maori cultural and justice values, highlighting the importance of family and community in conflict resolution.

The process involves multiple stakeholders, including the offender, the victim, their families and community representatives by holding a meeting or conference where all parties sit together to discuss the offence, its consequences and remedial measures. Community participation in this process is essential as it provides a broader perspective on the impact of the offence on the community as a whole.

Benefits and criticisms

Restorative justice is an approach that has gained recognition for its potential benefits in the criminal justice system, while at the same time it has faced some important criticisms and challenges.

Among the most prominent benefits of restorative justice is its ability to reduce recidivism by focusing on offender accountability and reparation of harm, i.e. it primarily addresses the causes of criminal behaviour and seeks the transformation of offenders into productive members of society, restorative justice gives an active role to victims, allowing them to express their needs, concerns and desires for reparation, Restorative conferences and dialogues can help rebuild trust and the social fabric in crime-affected communities by offering alternatives to prison and traditional courts, restorative justice can contribute to alleviating the overburdening of the criminal justice system and reducing the costs associated with incarceration.

However, there are challenges to Restorative Justice, one of them being its lack of permanent application throughout the criminal justice system as its implementation is limited or non-existent in some states of the Mexican Republic.

There is also the concern that in some cases victims may feel pressured to participate in processes that they do not want or that it may be traumatising to feel close to or be with their offender or perpetrator again, which is why restorative justice may not be suitable for all types of crimes or for situations where there are significant power imbalances between the parties.

All of this can face challenges in ensuring the inclusion of all those involved in the process, which is why calculating or measuring the effectiveness of restorative justice and its impact on reducing recidivism can be a challenge, making it difficult to obtain clear data on its success.

Legal analysis of restorative justice

The implementation of restorative justice in Mexico and in different jurisdictions is supported by a legal framework that varies from state to state or federative entity, we find a limited legal framework that supports the implementation of restorative justice in Mexico, such as The National Law of the Comprehensive System of Criminal Justice for Adolescents (LNSIIPA), establishes the basis for the implementation of restorative justice in cases involving adolescents who commit crimes in which reparation for harm and the active participation of victims in the process is promoted.

Article 21. Restorative Justice

The principle of restorative justice is a response to the conduct that the law defines as a crime, which respects the dignity of each person, builds understanding and promotes social harmony through the restoration of the victim or offended person, the adolescent and the community. This principle can be developed individually for the aforementioned persons and their respective environments and, as far as possible, among themselves, in order to repair the damage, understand the origin of the conflict, its causes and consequences.

Currently, in Mexico, there are mediation centres dedicated to resolving a wide range of disputes, these centres are a part of the courts and therefore provide their services free of charge. Despite this situation, most states lack legislation on Alternative Justice, nor do they have regulations to supervise the functioning of established mediation centres and their services, as the responsibility for enacting an Alternative Justice Law lies with the local congresses.

STATE OF THE REPUBLIC	ALTERNATIVE JUSTICE BODY	SERVICES IT PROVIDES	DEPENDENT ON:	OPERATES FROM:
Baja California Sur	Centro de Mediación	Mediation, Civil, Family, Criminal and Community Mediation	Superior Court of Justice of Baja California Sur	19/01/2001
Hermosillo, Sonora	Unidad de Mediación Familiar	Family and Community Mediation	Autonomous University of Sonora	16/03/2000
Michoacán	Centro de Mediación	Fundamentally in Commercial Matters.	Superior Court of the State of Michoacán	1997
Monterrey	Centros de Mediación	Mediation and Conciliation in Family and Community, Civil and Commercial matters.	Municipalities of San Pedro de la Garza, García and Guadalupe	
Querétaro	Centro de Mediación	Mediation in Civil, Criminal and Family matters	Superior Court of Justice of the State of Querétaro	Sep/1999
Quintana Roo	Centros de Asistencia Jurídica, zona norte, zona sur.	Amicable composition, Mediation, Conciliation.	Judicial Branch of the State of Quintana Roo.	1997

Table 1 States and forms where Restorative Justice is provided

Source: *Parliamentary Gazette Wednesday 24 August 2005 / LIX/2SPR-17-143/6057*

International Conventions and Treaties:

Mexico is a signatory to international treaties that promote restorative justice and victims' rights, this legal framework supports restorative justice in Mexico, but even so there are challenges and limitations in its implementation, such as lack of resources and adequate training, as well as resistance to changing traditional judicial practices.

United Nations General Assembly resolution 56/261 of 31 January 2002, entitled "Basic principles for the implementation of restorative justice programmes in criminal matters", sets out the restorative justice measures to be adopted to fulfil the commitments made in paragraph 28 of the same declaration, which states that: It can be used at any stage of the criminal justice system, subject to national legislation. It requires sufficient evidence to charge the offender and the voluntary consent of the victim and the offender. The victim and offender must agree on the central facts of the case. Cultural and power differences between the parties must be taken into account. The safety of the parties is a primary concern. When restorative processes are not appropriate, the case is referred to the criminal justice system, with emphasis on offender accountability and support for the reintegration of the victim and offender into the community.

It also mentions its functioning as follows: Member States should consider establishing regulations for restorative justice programmes, including conditions for referral, case management, qualification and training of facilitators, programme administration and operating standards, procedural safeguards that ensure fairness to victims and offenders, such as the right to legal counsel, full information about the process and non-coercion to participate and conversations in restorative processes are confidential, unless the parties agree otherwise or the law so provides. The results of agreements in restorative justice programmes can be judicially supervised and have the same value as judicial decisions, excluding future prosecutions for the same facts, in the event that no agreement is reached between the parties, the case is referred to the ordinary criminal justice system, without the lack of agreement being used in subsequent proceedings. Facilitators must be impartial, respect the dignity of the parties and encourage mutually respectful resolution and must have knowledge of local cultures and, in some cases, receive training before assuming their functions.

Is alternative justice viable or not in Mexico?

However, it is essential to understand that restorative justice does not seek to eliminate legal sanctions, but to focus on the reparation of harm and the responsibility of the offender since traditional sanctions are still applicable in serious cases. Another point of concern is the possible lack of protection of victims, especially in violent crimes, however, restorative justice should be implemented with a focus on the safety and well-being of the victims.

The inequality of power in restorative justice conversations is a valid argument. Because there is the potential for offenders with more resources or communication skills to benefit to the detriment of victims, facilitators should balance power and foster equality in conversations and should ensure fair treatment for all parties.

Successful implementation of restorative justice requires adequate resources and training, which may be a challenge in Mexico due to budgetary and staffing constraints, although it can be challenging, investment in restorative justice can pay off in the long run, reducing recidivism and improving relationships between people.

Conclusion

Restorative justice emerges as a transformative and hopeful approach to the criminal justice system in Mexico and around the world, although this effort has been valuable, challenges remain related to a limited legal framework to support restorative justice throughout the country.

In stark contrast to retributive justice, restorative justice stands out for its emphasis on reparation of harm to victims and reconciliation between the parties involved, rather than the simple imposition of punishment.

United Nations General Assembly resolution 56/261 provides valuable guidance for the implementation of restorative justice programmes in criminal matters. These basic principles emphasise the feasibility of restorative justice at any stage of the criminal justice system, subject to national legislation, and stress the importance of sufficient evidence as well as the voluntary consent of the victim and the offender.

However, in assessing the feasibility of restorative justice in Mexico, it is crucial to address legitimate concerns that offenders may fear avoiding legal consequences, but it is important to remember that restorative justice does not seek to eliminate legal sanctions, but to complement them, focusing on reparation of harm and accountability of the offender, noting that traditional sanctions are still applicable in serious cases.

The lack of victim protection, especially in violent crime, is also a valid concern, however, restorative justice must be carried out with a focus on the safety and well-being of victims, ensuring adequate precautions and support, and it is paramount that restorative justice facilitators have and fulfil the responsibility to balance power and promote equality in conversations, ensuring fair treatment for all parties involved.

References

Cabello P, Gorjón F, Gorjón Gómez, J, Sáenz C, Sánchez A, Steele G, y Zaragoza J. Comentarios a la Ley Nacional de Mecanismos Alternativos de Solución de Controversias en materia Penal de 29 de diciembre de 2014.

De la Fuente, V. (2012), ¿Qué es la Justicia Restaurativa? *Criminología y Justicia*, (4), 6-11. Del Consejo Económico, D. Social de las Naciones Unidas, número 12/2002. "Principios básicos para la aplicación de programas de justicia restitutiva en materia penal". Preámbulo".

Diario Oficial de la Federación, 18, junio, 2008. http://www.dof.gob.mx/nota_detalle.php?codigo=5046978&fecha=18/06/2008

Gaceta Parlamentaria Miércoles 24 de agosto de 2005 / LIX/2SPR-17-143/6057 https://www.senado.gob.mx/65/gaceta_del_senado/documento/6057#:~:text=Actualmente%20se%20encuentra%20en%20v%C3%ADas,%20%20Puebla%20%20Chiapas%20y%20Oaxaca.

Márquez Á. (2007). La justicia restaurativa versus la justicia retributiva en el contexto del sistema procesal de tendencia acusatoria. *Prolegómenos. Derechos y Valores*, X (20), 201-212.

Merino Ortiz, C., & Romera Antón, C. (1998). Conferencias de grupos familiares y sentencias circulares: Dos formas ancestrales de resolución de conflictos dentro del paradigma restaurativo. P.287,288 y 289.