

# **Making It Right: The Place Of Restorative Justice In The Criminal Justice System**

**By**

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## **ABSTRACT**

Restorative Justice (RJ) brings offenders, victims, and the community together as an alternative to the traditional criminal justice system. However, this paper contends that RJ does not have to be implemented in isolation from established criminal justice systems. Recognizing the growing focus on social rehabilitation within European penal policy, the paper explores how RJ can contribute to penal reform by being incorporated at critical stages—specifically during sentencing and post-sentencing. Such integration allows RJ to play a significant role in the rehabilitative process by addressing the consequences of the offense after guilt has been established. Additionally, through a case study, the paper illustrates how RJ provides offenders with opportunities to actively participate in their own rehabilitation, thereby enhancing the overall efficacy of social rehabilitation measures within the criminal justice system.

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## I. INTRODUCTION

In her memoir *Dreams from the Monster Factory*, Sunny Schwartz illustrates the common reality of society's punitive institutions to incarcerate people who commit crimes. She describes the supermax prison system in California and showcases how likely it is that the people the criminal justice system incarcerates will offend again. With the imagery she provides, it is hard not to draw the same conclusion she does. Her message is straightforward: systems that solely punish offenders are unlikely to aid in positive behavioral change. Thus, the communities outside of prison remain unsafe, there will be further victims, and those previously marginalized remain excluded and likely to relapse into a life of crime.

With the aid of other prison staff, Schwartz started a prison program embracing the principles of Restorative Justice (RJ). The program aimed to prompt incarcerated individuals to confront their actions, take accountability, and ultimately strive to "make it right." The common response from participants after being in the program for some months was a collective desire for redemption through restitution. Altogether, Schwartz's compelling initiative underscored the potential of RJ to catalyze meaningful individual change. While the program she installed represents just one approach through which RJ has been conceptualized and integrated into the present criminal justice system, its introduction represents the entrance of RJ into current criminal justice frameworks. Nonetheless, RJ's position remains subject to debate because of the uncertainties regarding its objectives and compatibility with the existing criminal justice processes.

Against this backdrop, this paper analyzes the qualification and place of RJ in criminal legal systems, with a focus on Europe. Initially, the paper endeavors to demonstrate that integrating RJ within criminal justice proceedings is a viable mechanism for facilitating the rehabilitation of offenders, thereby aiding them in

their successful reintegration into society and the adoption of law-abiding lifestyles. Through restoration, the causes and effects of crimes can be addressed, and punishment can be constructive and rehabilitative. As such, RJ can reduce recidivism, help victims achieve closure through dialogue, and overall decrease violence in the community.

Furthermore, the paper delves into the growing importance of the principle of social rehabilitation in European penology and displays how such a justice goal can be achieved through the implementation of RJ. Afterward, the paper analyzes how RJ has been implemented in Spain as a case study to analyze best practices and provide evidence that RJ generates better outcomes for all stakeholders.

Ultimately, the paper seeks to offer insights to reform the traditional criminal justice framework. By adding it to the existing system, RJ can prioritize the inclusion of victims, implement constructive punishment, and break cycles of violence. RJ presents a way to meaningful resolution. By “making it right,” offenders can contribute to the healing process of victims, reintegrate into society, and facilitate social cohesion, safety, and solidarity.

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## II. METHODOLOGY

This paper employs a mixed-methods approach to advocate for the integration of RJ into criminal justice systems in Europe, aiming to enhance social rehabilitation. This hybrid methodology combines doctrinal, comparative, and empirical elements. The doctrinal analysis examines legal texts, including European Union directives, soft law from the Council of Europe, the case of *Vinter and Others v. UK*, and numerous law journal articles outlining the legal framework for social rehabilitation and RJ in Europe. This foundational understanding supports a structured proposal for incorporating RJ into the criminal justice system. In parallel, the comparative method entails the analysis of reports and law articles from different countries to assess RJ practices and outcomes across various jurisdictions, identifying best practices that highlight RJ's potential as a tool for social rehabilitation. This includes empirical research, which adds quantitative and qualitative depth to my analysis and illustrates the positive relationship between RJ and social rehabilitation. This comprehensive approach not only deepens the understanding of RJ's theoretical and practical dimensions but also underpins recommendations for RJ's role in sentencing and post-sentencing processes in Europe.

### III. STATE OF THE ART: Restorative Justice Theories and Practices

Restorative Justice is an alternative approach to the traditional criminal justice system that brings together offenders, victims, and the community.<sup>1</sup> It is not a recent practice, as it has been historically used in Indigenous communities to deal with crime. Nowadays, RJ is viewed as an alternative way to serve justice and to understand crimes and punishment.

Howard Zehr was the first author to highlight the difference between RJ and retributive justice: whilst retributive justice understands crime as an offense against the state, under RJ, “crime is a violation of people and relationships.” Thus, justice is served when all parties search together for a solution that promotes repair, reconciliation, and reassurance. In its purest form, RJ represents an alternative to traditional criminal proceedings. Furthermore, in the traditional retributive system, the victim is the state, even though the harm is caused to a third person. This is evidenced by the fact that the state takes criminal proceedings against the accused. Hence, the real victim and the community are alienated from the process, only partaking as witnesses when necessary. The defendant’s interest and voice are only heard through their defense attorney and virtually excluded from the proceedings. The concept of guilt is commonly perceived in binary terms within the legal framework, wherein defendants are compelled to either plead guilty or not guilty. As noted by Zehr, the legal construct of guilt that underpins the justice system is characterized by its technical nature, often abstracted from lived experiences. This abstraction can inadvertently enable offenders to evade personal accountability for their actions.<sup>2</sup> Conversely, another inadvertent consequence of this conception of guilt is that offenders might, when confronted with the prospect of severe sentences, feel pressured to admit guilt (as a strategy in negotiation with the

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<sup>1</sup> Gerry Johnstone & Daniel W. Van Ness, Introduction, in *HANDBOOK OF RESTORATIVE JUSTICE* 5, 5 (Gerry Johnstone and Daniel W. Van Ness ed., 2007).

<sup>2</sup> HOWARD ZEHR, *CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES* 72 (4<sup>th</sup> ed., 2015).



prosecution) as a means of avoiding trial or mitigating the severity of their punishment. This outcome occurs because the system in certain jurisdictions rewards defendants for pleading guilty by reducing sentences before the trial begins or during the trial proceedings, even if the defendant did not commit the offenses charged. Consequently, our conventional understanding of guilt may not promote genuine accountability. Moreover, the narrow definition of guilt, which focuses primarily on individual behavior, tends to overlook the broader societal and economic factors that contribute to criminal behavior when this context should be addressed to prevent future harm. In the best jurisdiction, they will be considered only as aggravating or mitigating circumstances.

Conversely, RJ seeks to address crime as conduct that harms people and their relationships, whose aftermath creates obligations and liabilities.<sup>3</sup> Consequently, the state does not take a protagonist role, and the concept of guilt is understood differently; it is not absolute but comes in degrees and can be removed through restoration and accountability.<sup>4</sup> The resolution of the offense and its consequences are informed by the context of the situation.<sup>5</sup> Moreover, RJ prioritizes the victim by involving them in the justice process and enabling them to express their needs. These needs can be addressed either by the offender making restitution or by the community supporting the victim and assisting them in their well-being after the harm suffered. The latter generates multiple responsibilities: upon the offender to repair them, upon the community to support both victim and offender in their dialogue, and upon the state to create the opportunity for victim and perpetrator to meet and facilitate healing and reconciliation.<sup>6</sup> Seeking retribution is not the goal. Rather, the goal is restoring the balance and addressing the various

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<sup>3</sup> Tony Ward, Kathryn J. Fox & Melissa Garber, *Restorative Justice, Offender Rehabilitation and Desistance*, 2 *RESTORATIVE JUST.* 24, 25 (2014) (discussing RJ core values).

<sup>4</sup> Zehr, *supra* note 2, at 203.

<sup>5</sup> Zehr, *supra* note 2, at 187.

<sup>6</sup> Grazia Mannozi, *Social Rehabilitation Through Restoration?*, in *SOCIAL REHABILITATION AND CRIMINAL JUSTICE*, 53 (Federica Coppola & Adriano Martufi ed., 2024); See also Jennifer L. Sawin & Howard Zehr, *The ideas of engagement and empowerment*, in *HANDBOOK OF RESTORATIVE JUSTICE* 41, 49-53 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

interests at stake. The victim has an opportunity to articulate and express their needs. Hence, the offender and community are encouraged to take action to help them fulfill these needs. Altogether, RJ is a system that relies on consent, accountability, and voluntariness to succeed.<sup>7</sup>

Howard Zehr maintains that one of the dimensions of the injuries created by the harm is to the offender. He holds that the offender can take accountability if they, too, can access healing; thus, their needs must be considered as well. In this sense, RJ values the relevance of the social context of the crime, but without diminishing a person's responsibility for its commission.<sup>8</sup> Rather, such contextualization enables more empathy between the stakeholders and concludes the dialogue in reparation and, ideally, reconciliation.<sup>9</sup> Thus, there is an agreement among all the parties that is restorative in nature, enabling closure and increasing the chances for the offender's re-acceptance in society.<sup>10</sup>

The goals of RJ include supporting the victim, repairing relationships, upholding community values, denouncing criminal behavior, addressing the responsibility of offenders, achieving restorative-looking outcomes, and preventing recidivism through reintegration.<sup>11</sup> Moreover, RJ also aims at providing the victim with the opportunity to have a say and be heard in the process, as well as encouraging a dialogue between the victim and the perpetrator to foster mutual empathy, the possibility for reparation for the victim, the facilitation of recovery, the reduction of frequency and severity of reoffending, the active involvement of the community, and ultimately more trust with police and authority officers.

Within Europe, RJ has been implemented for some time in certain areas of the criminal justice system. Norway, for example, a pioneer country in this area,

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<sup>7</sup> YVON DANDURAND, *HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES* 6 (2<sup>nd</sup> ed. 2020); Council of Europe regulation 2018, 8).

<sup>8</sup>Zehr, *supra* note 2, at 190-202.

<sup>9</sup> Mara Schiff, Satisfying the Needs and Interests of Stakeholders, in *HANDBOOK OF RESTORATIVE JUSTICE* 228, 231 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

<sup>10</sup> Gordon Bazemore & Sandra O'Brien, The Quest for a Restorative Model of Rehabilitation, in *RESTORATIVE JUSTICE AND THE LAW* 71, 76-84 (Lode Walgrave ed., 2002).

<sup>11</sup> Dandurand, *supra* note 7, at 14.

started to implement RJ by introducing its use for juvenile offenses.<sup>12</sup> Notwithstanding, RJ faces a pervasive lack of support, which has slowed down its wider application overall. Indeed, RJ lacks a systematic arrangement in Europe; some countries have RJ processes being led by offender support organizations and others by victim support organizations.<sup>13</sup> In Finland, RJ programs are normally led by child support services.<sup>14</sup> Different countries have expanded or limited their use of restorative programs and have enacted legislation with the aim of institutionalizing RJ practices.<sup>15</sup> Nonetheless, the existing legislative framework in these Nordic countries may prove insufficient to fully accommodate the implementation of RJ principles.

Furthermore, obtaining information regarding the actual implementation of RJ within individual systems is not always readily accessible, presenting a challenge to the systematic adoption of RJ practices.<sup>16</sup> Many of the groups advocating for the use of RJ are non-governmental agencies such as Victim Rights organizations or Probation and Offender Organizations.<sup>17</sup> As such, these organizations might lack the resources to bring about benefits to offenders, victims, and the community on a wider scale. Despite legislative efforts, states often encounter notable hurdles in achieving effective implementation of restorative programs due to unclear and undetailed legislation. These challenges are further compounded by variations in practices and the absence of comprehensive guidelines. As a result, the accessibility of RJ programs is impeded.<sup>18</sup> Both the EU Commission and the United Nations have stated explicitly that, ideally, RJ processes would be

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<sup>12</sup> Malini Laxminarayan & Emanuela Biffi, Accessibility and Initiation of Restorative Justice, EU FORUM OF RESTORATIVE JUSTICE 15-16 (2012), [https://www.euforumrj.org/sites/default/files/2019-11/accessibility\\_and\\_initiation\\_of\\_rj\\_website\\_0.pdf](https://www.euforumrj.org/sites/default/files/2019-11/accessibility_and_initiation_of_rj_website_0.pdf) (last visited April 22, 2024).

<sup>13</sup> *Id.*

<sup>14</sup> *The Idea of Restorative Justice and How it Developed in Europe*, EU FORUM OF RESTORATIVE JUSTICE, <https://www.euforumrj.org/en/idea-restorative-justice-and-how-it-developed-europe> (last visited April 22, 2024).

<sup>15</sup> *Id.*

<sup>16</sup> Laxminarayan, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

available to both victims and offenders at all stages of the criminal process. Nonetheless, making RJ available has so far proven problematic on a wide scale.

## **IV. DIFFERENCES BETWEEN RESTORATIVE JUSTICE AND CRIMINAL JUSTICE**

### **A. The Goals of Restorative Justice and Retributive Justice**

Early academic analyses of RJ depicted this paradigm as an alternative to the criminal justice system. Hence, the literature supported a dichotomy between the two systems, in which a system can be either retributive or restorative. Accordingly, the incongruence between criminal justice and RJ was such that the criminal justice could not accommodate RJ in any plausible way. In his famous book “Changing Lenses”, Howard Zehr depicted the key differences between the two systems. Notably, Zehr emphasized that the goals of the RJ system are different from those of the current criminal justice system, which is grounded on retributive justice principles.

In the RJ system, the main goal is to repair the trust that diminishes when an offender harms another person, as the victim stops trusting for their safety, and members of the community stop trusting one another.<sup>19</sup> The other main goal is to restore the imbalance caused by the offense. Conversely, the retributive system envisions the goal of punishing those who harmed society. The idea of punishing those who have done wrong in order to uphold the moral order is strictly tied to pain delivery or consequences considered unpleasant.<sup>20</sup> Thus, from a retributive perspective, restoration is perceived as being accomplished through inflicting harm

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<sup>19</sup> Zehr, *supra* note 2, at 37.

<sup>20</sup> Michael Wenzel et al., *Do Retributive and Restorative Justice Processes Address Different Symbolic Concerns?*, 20 *CRITICAL CRIMINOLOGY*, 25–44 (2011).

upon the perpetrator.<sup>21</sup> This approach involves a balancing of moral scales; the pain inflicted by offenders results in a moral imbalance that will only be rectified through the state administering an equivalent level of pain, thereby offsetting the consequences of the offense.<sup>22</sup> Thus, the pain of punishment can only be commensurate or proportionate to the harm that the offender caused.<sup>23</sup> The judicial process through which the punishment is handed out in Western society is handled by the state, with the perpetrator enjoying certain protections, including procedural rights that place limits on the punitive power of the state.<sup>24</sup>

In contrast, RJ views the victim and the offender as playing pivotal roles in a dialogue that would end with the restorative agreement in which the offender repays their debts by performing actions aimed at re-balancing the victims' losses.<sup>25</sup> In a sense, in lieu of achieving such a balance through the infliction of pain, RJ attempts to achieve it through a different pathway. Philosophically, retributive justice and RJ are incompatible in their means but not in their goals. For retributive justice, the suffering of the offender is appropriate to have them pay their debts to society; for RJ, the perpetrator pays such debts upon acknowledging their responsibility and meeting the needs of the victims and the community.

## **B. The Apparent Incompatibility**

A pure RJ system is incompatible with the traditional criminal process. The informality inherent in the RJ process undermines the traditional criminal proceedings because the solution is provided by the members of the dialogue and not the courts. The restorative process would replace state courts with private actors, thereby posing significant risks to fundamental procedural rights.

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<sup>21</sup> H. L. A. Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 232-233 (2d ed. 2008).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Ann Skelton & Makubetse Sekhonyane, Human Rights and Restorative Justice, in HANDBOOK OF RESTORATIVE JUSTICE 580, 581 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

<sup>25</sup> *Id.*

This inherent pursuit of different approaches results in a “tug of war” situation: RJ will loosen procedural requirements and become a hazard to the rights of the defendants.<sup>26</sup> Also, RJ rests upon the parties' consent, which means that RJ processes will not be available when the parties are not willing to interact or are unable to find a common solution.<sup>27</sup> In addition, a pure RJ system poses concerns regarding the need for state intervention to safeguard freedoms in addition to the state's duty and monopoly to maintain order and peace.<sup>28</sup>

### **C. From Retribution to Social Rehabilitation: The Evolution of the Criminal Justice in Europe**

Considering growing concerns surrounding recidivism and public safety, there is a pressing need to reevaluate traditional punitive measures within the criminal justice system, potentially paving the way for the integration of RJ as an alternative approach.<sup>29</sup> The benefits of retributive approaches to crime are no longer evident insofar as they do not address the root causes of crime and ignore the victims whilst perpetuating more violence and pain.<sup>30</sup> The failures of retributivism are also evidenced by the commitment to rehabilitation in different European countries and the explicit mention of rehabilitation in European Penal Policy as a matter of human dignity or a means to increase safety and reduce recidivism rates.<sup>31</sup>

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<sup>26</sup> DEREK R BROOKES, *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: THE CASE FOR PARALLELISM* 9 (Estelle Zinsstag & Tinneke Van Camp eds., 2023).

<sup>27</sup> YVON, *supra* note 7, at 16.

<sup>28</sup> Declan Roche, *Retribution and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* 75, 86-87 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

<sup>29</sup> Jenna Lopes, *There's Got to Be a Better Way: Retribution vs. Restoration*, *OSPREY J. IDEAS & INQUIRY* 52, 59-60 (2002).

<sup>30</sup> Molly J. Walker Wilson, *Retribution as Ancient Artifact and Modern Malady*, 24 *LEWIS & CLARK L. REV.* 1339, 1345-1357 (2020).

<sup>31</sup> Adriano Martufi, *The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?*, 25 *MAASTRICHT J. EUR. & COMP. L.* 672, 673-688 (2018).

Indeed, the evolving criminal justice system is being increasingly informed by the pursuit of human dignity, leading to a reevaluation of the justifications of punishment and possibilities for reform.<sup>32</sup> From a deontological point of view, in the past, punishment and retributive justice were a way to preserve the offender's dignity as a rational and autonomous human being. As offenders choose to offend, they need to receive the same amount of harm as the one inflicted. More recently, the concept of human dignity has been strongly associated with social rehabilitation. A system that respects human dignity is one that provides offenders with the possibility to change and the tools to do it. Within this line of reasoning, prisons should provide inmates with rehabilitation opportunities in respect of prisoners' "capacity to act morally and rationally and to assist prisoners in exercising their own autonomy."<sup>33</sup>

Social rehabilitation is a type of rehabilitation with its roots in criminological research and is strongly guided by a non-paternalistic approach to the self-determination and dignity of those who are punished.<sup>34</sup> This paradigm revolves around providing offenders with opportunities to change and return to society with increased chances to conduct crime-free lives and be provided with socially rich experiences. With successful reintegration as its ultimate outcome, social rehabilitation mandates that the social problems that lead to reoffending must be addressed through crime responses.<sup>35</sup> Moreover, social rehabilitation is grounded in a situational understanding of criminal offending and values the importance of the social context to inform the rehabilitation process.<sup>36</sup> Consequently, social rehabilitation relies upon the principle of self-determination, asserting that though

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<sup>32</sup> Sonja Meijer, *Rehabilitation as a Positive Obligation*, 25 EUR. J. CRIME CRIM. L. & CRIM. JUSTICE 145, 148–162 (2017), [https://brill.com/view/journals/ecl/25/2/article-p145\\_4.xml](https://brill.com/view/journals/ecl/25/2/article-p145_4.xml) (last visited Feb 22, 2024).

<sup>33</sup> *Id.*

<sup>34</sup> Social Rehabilitation is a subtype of rehabilitation, thus distinct from it. See FEDERICA COPPOLA, *THE EMOTIONAL BRAIN AND THE GUILTY MIND NOVEL PARADIGMS OF CULPABILITY AND PUNISHMENT* 168-180 (2021) (specifically holding that “[s]ocial rehabilitation is a non-paternalistic type of rehabilitation that aims for the social reintegration of people facing conviction”).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

individuals exercise volition in their engagement with criminal behavior, this does not imply perpetual criminality; rather, it affirms an intrinsic belief in the human capacity for transformation, thereby renouncing the static view of a person's nature.<sup>37</sup>

Social rehabilitation is a goal and has been construed as such by soft law and constitutional texts, such as Art. 25 of the Spanish constitution.<sup>38</sup> Notwithstanding, there is a lack of legislative efforts in what constitutes the meaning and process to achieve social rehabilitation, including what is needed to allow for their successful reintegration into society as law-abiding citizens. The most popular practices to achieve this goal include work, education, and therapy (when needed)<sup>39</sup>. As mentioned previously, social rehabilitation entails a transformative process aimed at facilitating the reintegration of offenders into society. The offenders embrace change and actively participate in rehabilitative endeavors to reintegrate into the community, leading to their desistance from criminal behavior.<sup>40</sup> Understandably, change is a highly personal experience, one in which responsibility and accountability can play a part, and thus, achieving social rehabilitation is difficult to conceptualize.<sup>41</sup>

Additionally, social rehabilitation emphasizes the power of social relationships to achieve reintegration.<sup>42</sup> Indeed, social support can give the offender a sense of belongingness, psychological stability, and positive social influence, as well as enhance their belief that they can change and facilitate access to social resources.<sup>43</sup> Such social support can decrease the pervasive stigma against returning citizens, thereby increasing employment opportunities and other forms of

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<sup>37</sup> *Id.*

<sup>38</sup> See CE, B.O.E. n. 311, 29 de diciembre de 1978 (ES) ("Punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration.")

<sup>39</sup> Mannozi, *supra* note 6, at 55.

<sup>40</sup> Coppola, *supra* note 34.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Bazemore & O'Brien, *supra* note 10, at 96.



social inclusion and thus increasing the chances of crime desistance.<sup>44</sup> This framework aids in the shift away from criminal behavior by rebuilding trust and relationships within the community. Alongside this, social rehabilitation programs must be available to offenders regardless of the crime committed because of their intrinsic nature as human beings.

As it will be argued over the next sections, when a country envisions social rehabilitation as a goal of criminal justice, it can provide an arena for RJ programs. In this context, RJ must be viewed as a complementary component and not as a replacement for the existing criminal justice system. Notably, RJ complements the criminal justice system by providing means for reparative actions that are necessary for achieving the goals of social rehabilitation and reintegration.<sup>45</sup>

## V. SOCIAL REHABILITATION & RESTORATIVE JUSTICE IN EUROPE

### A. Social Rehabilitation

Presently, within Europe, many countries prioritize social rehabilitation as a goal of their criminal justice systems. Scholars have indicated that the emphasis of European penal law is now transforming to aim towards a rehabilitative end.<sup>46</sup> Penal law is undergoing reform across distinct levels—international, European, and national—underscoring the rising importance of social rehabilitation as a fundamental concept.<sup>47</sup>

From a soft law perspective, the growing support for social rehabilitation and its focus on reintegration is noticeable. The Council of Europe recommendations 2003/22 and 2003/23 clearly state that reintegration shall be an important duty of the prison system. Additionally, *the United Nations Standard Minimum rules for*

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<sup>44</sup> *Id.*, at 98-107.

<sup>45</sup> *Id.*

<sup>46</sup> Martufi, *supra* note 31. See also Meijer, *supra* note 32 at 145.

<sup>47</sup> *Id.*

*the treatment of prisoners* also ensure that there should be resources for the return of offenders to society, having “express references to rehabilitation” throughout the rules.<sup>48</sup> This wording displays that there is a need to help prisoners rejoin society fruitfully. Moreover, Art. 10 of the International Covenant on Civil and Political Rights also expresses a similar opinion by stating that “the penitentiary system shall comprise the treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation.”<sup>49</sup> This provision also emphasizes the importance of human dignity, a principle further elaborated upon in the European Court of Human Rights' evolving rationale for rehabilitation. All the aforementioned soft laws are mentioned and analyzed in the case *Vinter and others v UK* as relevant legal sources to advocate for the rehabilitation of the defendants.<sup>50</sup>

In reference to hard law, several countries in Europe have developed similar laws to guarantee the aim of social rehabilitation through the criminal justice system. Italy and Spain have constitutional provisions pertaining to the aims of reintegration and rehabilitation. The Netherlands and Germany, on the other hand, refer to these goals in their penitentiary laws. Moreover, there is an explicit mention of social rehabilitation in Council framework decision 2008/909/JHA; these guidelines' goal is to “facilitate the social rehabilitation of convicted persons by allowing them to serve their sentence in their home country.”<sup>51</sup> Hence, social rehabilitation is gaining prominence at every legal level.

## B. Restorative Justice

RJ is also gaining visibility in Europe, as the creation of one directive and one council recommendation shows the trend of including more stakeholders in the

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<sup>48</sup> Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1060-1061 (1987).

<sup>49</sup> *Id.*

<sup>50</sup> *Vinter and Others v. United Kingdom* (No. 148), 33-34 Eur. Ct. H.R. (2012).

<sup>51</sup> *Detention and transfer of prisoners*, EUROPEAN COMMISSION, [https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/detention-and-transfer-prisoners\\_en](https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/detention-and-transfer-prisoners_en) (last visited Mar. 8, 2024).

criminal justice process. These are Directive 2012/29/EU (“the Victim’s Directive”) and Council recommendation (2018)8.

Within the Victim’s Directive, RJ is mentioned to emphasize that member states should make RJ practices available. The directive mentions RJ in four different instances: in the recital, in the definition provided for in article 2.1.d, in the provisions for the right to be informed of available programs under article 4J, and finally, in article 12, which outlines safeguards that must be upheld throughout the RJ process.<sup>52</sup> The directive does not call upon the explicit obligation of member states to have RJ programs in their respective jurisdictions and treats RJ as a complementary process or an alternative system.<sup>53</sup> Moreover, the directive presents RJ from the victim's point of view and mentions that RJ can be “of great benefit to the victim.”<sup>54</sup> However, it places less emphasis on the benefits of RJ for the community and the offender.

By contrast, Council Recommendation (2018)8 emphasizes the integration of RJ into the criminal justice system to accommodate the needs of victims, offenders, and the community.<sup>55</sup> Recommendation (2018)8 specifically mentions that RJ can be a tool for rehabilitation and healing, promoting its application. In comparison with the directive, the recommendation calls for “all victims and offenders to have access to a Restorative Justice process.”<sup>56</sup> Beyond proposing more availability of information on restorative processes, the recommendation argues more broadly “for

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<sup>52</sup> Brunilda Pali, Research and Actions on Restorative Justice in the Victims’ Directive, EUROPEAN FORUM FOR RESTORATIVE JUSTICE (Feb. 23, 2017), <https://www.euforumrj.org/sites/default/files/2019-12/plenary-brunilda-pali-vd-rj.pdf>.

<sup>53</sup> Theo Gavrielides, *The Victims’ Directive and What Victims Want from Restorative Justice*, 12 VICTIMS & OFFENDERS 21, 23 (2015).

<sup>54</sup> Directive 2012/29 of the European Parliament and of the Council of 25 October 2012 on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L 315) 57.

<sup>55</sup> Council of Europe, *Recommendation CM/Rec (2018)8 of the Committee of Ministers of the Council of Europe concerning restorative justice in criminal matters*, COUNCIL OF EUROPE (Oct. 3, 2018), <https://search.coe.int/cm?i=09000016808e35f3>.

<sup>56</sup> Tim Chapman, Edit Törzs, & Ian Marder, *Council of Europe Recommendation 2018 Concerning Restorative Justice in Criminal Matters A Briefing For Europe*, EUROPEAN FORUM FOR RESTORATIVE JUSTICE (2019), [https://www.euforumrj.org/sites/default/files/2020-05/EFRJ\\_Policy\\_Brief\\_CoE\\_Rec.pdf](https://www.euforumrj.org/sites/default/files/2020-05/EFRJ_Policy_Brief_CoE_Rec.pdf) (last visited April 15, 2024).

cultural change towards a more restorative approach to crime and criminal justice at all levels of policy and practice.”<sup>57</sup> Thus, this recommendation advocates for the implementation of RJ in the member states and for installing RJ programs when they are not available. Later, in 2021, the Council of Europe member states further emphasized the importance of RJ with the drafting of the Venice Declaration in which the states were called upon to “develop national action plans” for the implementation of Council Recommendation 2018(8) and stimulate wide implementation of RJ practices.<sup>58</sup>

The transition from the tentative language of the directive to the subsequent recommendation from the COE and finally to the heightened emphasis in the Venice Declaration, underlines the significant evolution of RJ in Europe. This progression reflects an increasing dissatisfaction with the conventional criminal justice system.<sup>59</sup> The latter is further evidenced by the growing number of RJ practices within Member States procedures. Particularly, this increase is owed to the need for restitution and the healing nature of RJ to its communities.<sup>60</sup>

### **C. The Overlapping Aspects of Social Rehabilitation and Restorative Justice**

Building upon the increasing regulation of social rehabilitation and RJ in Europe, it becomes apparent that these two approaches share overlapping aspects. RJ is compatible with the goal of social rehabilitation to the extent that it can be a tool to encourage social rehabilitation. Foremost, both paradigms rest on the idea

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<sup>57</sup> *Id.*

<sup>58</sup> Council of Europe, *Declaration of the Ministers of Justice of the Council of Europe Member States on the Role of Restorative Justice in Criminal Matters*, COUNCIL OF EUROPE (Dec. 14, 2021), <https://rm.coe.int/0900001680a4df79>.

<sup>59</sup> Ian Marder & Tim Chapman, *Developing Restorative Justice across Europe*, CONFEDERATION OF EUROPEAN PROBATION, <https://www.cep-probation.org/developing-restorative-justice-across-europe/> (last visited April 30, 2024).

<sup>60</sup> Ivo Aertsen, *The Idea of Restorative Justice and How it Developed in Europe*, EUROPEAN FORUM FOR RESTORATIVE JUSTICE, <https://www.euforumrj.org/en/idea-restorative-justice-and-how-it-developed-europe> (last visited April 30, 2024).

that offenders are capable of change and that the involvement of the community in fortifying social links is a vital component to activating change and desistance from crime. Also, and relatedly, both paradigms envision reintegration and crime desistance as the ultimate outcome for the offender.

RJ is inherently tied to the possibility that the offender can change their attitudes and relies upon the ability to foster empathy between the parties.<sup>61</sup> The offender, within a scheme of RJ, can understand the consequences of the offense. Likewise, social rehabilitation is centered around the fact that individuals can “shift away from crime and live as positive members of the community.”<sup>62</sup> This shift is synergic with the changes that RJ achieves through dialogue. Influential RJ accounts state that offenders should be encouraged to change. Likewise, social rehabilitation emphasizes the dynamic nature of personhood. While social rehabilitation relies on this principle, RJ aims to facilitate such transformations through conferencing and dialogue between all involved parties. This process enhances empathy through the act of making amends.<sup>63</sup> Moreover, RJ contextualizes the offense, and this creates an environment that fosters change; this supportive environment is consistent with Coppola’s understanding of individual change within the context of social rehabilitation and Mannozi’s idea on the transformative effects of RJ through dialogue.<sup>64</sup> Moreover, according to Bazemore and O’Brien, Restorative Justice programs influence offender transformation, thereby facilitating cognitive and behavioral changes that support desistance from crime.<sup>65</sup>

Secondly, social rehabilitation centers around the idea of social support and human connection.<sup>66</sup> By fostering dialogue between the victim, the offender, and the community, the RJ process is inherently balanced upon social relationships.

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<sup>61</sup> Mannozi, *supra* note 6, at 60.

<sup>62</sup> Coppola, *supra* note 34, at 172.

<sup>63</sup> Bazemore & O’Brien, *supra* note 10, at 88.

<sup>64</sup> Mannozi, *supra* note 6, at 56-60; *see also* Coppola *supra* note 34, at 174.

<sup>65</sup> Bazemore & O’Brien, *supra* note 10, at 96-102.

<sup>66</sup> Coppola, *supra* note 34, at 172.

However, RJ does even more to increase the socialization skills of the offender and to prevent social exclusion. In fact, it enhances human connection and social relationships through earned redemption.<sup>67</sup> RJ fosters a sense of community responsibility within the offender, encouraging the development of prosocial behavior.<sup>68</sup> This facilitates a more restorative approach, as the offender seeks to repair the harm inflicted upon the community. By strengthening the relationship between the offender and the community, the offender can earn a place in society and foster their own reaffirmation in the community.<sup>69</sup> Conversely, some scholars have mentioned that if not by participating in restorative practices, reintegration can be burdened by the appearance of the failure to make things right and not contributing to community peace.<sup>70</sup> All of these ideas are also described by Schiff and Bazemore's depiction of a Restorative Relational Model, in which repair is seen as the vehicle through which relationships are built between offenders, communities, and victims.<sup>71</sup> As such, RJ, through redemption, seeks to bring society closer in a way that punishment would not.<sup>72</sup>

Thirdly, and related to the previous point, RJ aids in reintegration and desistance, outcomes encompassed within the concept of social rehabilitation. Unlike conventional non-restorative systems, RJ encourages a situation through which the offender can take responsibility and repair the harm. By acknowledging the victim's suffering, an offender will be able to understand the consequences of their action and decide to take a reparative approach.<sup>73</sup> Ward, Fox, and Garber

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<sup>67</sup> The theory of earned redemption states that offenders can actively partake in their process of rehabilitation and reintegration into society by giving back and thus earning a positive standing within the community. See Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Rehabilitation*, AM. BEHAV. SCI. 41, 789 (1998).

<sup>68</sup> Mannozi, *supra* note 6, at 60-61.

<sup>69</sup> *Id.*

<sup>70</sup> Bazemore & O'Brien, *supra* note 10, at 91.

<sup>71</sup> Gordon Bazemore & Michael Dooley, *Restorative Justice and the Offender: The Challenge of Reintegration*, in RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 101, 115 (Gordon Bazemore & Mara Schiff Eds., 2001).

<sup>72</sup> Bazemore & O'Brien, *supra* note 10, at 91.

<sup>73</sup> Shadd Maruna, *Desistance and Restorative Justice: it's Now or Never* 4, RESTORATIVE JUSTICE: AN INT'L J. 289, 296 (2016).

argue that restorative practices make it more likely for the offender to accept responsibility and can create supportive relationships that result in diminished reoffending. The restoration through accountability will communicate to the offender and the community that all members exist within the same moral universe and thus send the message of inclusion.<sup>74</sup> RJ includes offenders in the community by treating them as both the problem and (part of) the solution. As such, offenders have to be “eligible for care and concern,” spreading the message of belongingness that aids in desistance.<sup>75</sup> Through accountability, the offender will likely be able to promote social support, contribute to reduced reoffending, and embark on the road to reintegration.<sup>76</sup>

Similarly to social rehabilitation, RJ enhances the process of desistance from crime. The latter concept refers to processes leading to the ceasing of criminal activity; it is associated with the adoption of a pro-social lifestyle.<sup>77</sup> Desistance is a complex process influenced by both social and individual factors, such as employment, social support, and personal agency in narrative shifts. Thus, individuals who were previously engaging in criminal behavior manage to break offending cycles and resolve to reintegrate successfully into society.<sup>78</sup> To understand why desistance happens, scholars have been conducting research into the lives of individuals that have interrupted criminal activity to understand the underlying changes that might have resulted in such an outcome.<sup>79</sup> Importantly, crime desistance has been significantly linked with RJ in that RJ processes appear to significantly impact individuals’ decisions to stop committing crimes because the desistance process is intertwined with ideas of social support and successful reintegration into society. RJ contributes to social support and reintegration because it enables offenders to take responsibility and make amends through direct

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<sup>74</sup> Ward, Fox & Garber, *supra* note 3, at 30-35.

<sup>75</sup> *Id.*

<sup>76</sup> Bazemore & O’Brien, *supra* note 10, at 93-97; *See also*: Bazemore, *supra* note 67, at 789.

<sup>77</sup> Ward, Fox, & Garber, *supra* note 3, at 93-97.

<sup>78</sup> Maruna, *supra* note 73, at 291-296.

<sup>79</sup> *Id.*

communication with victims, fostering empathy and moral rehabilitation. RJ serves as a catalyst in desistance processes, as participation in RJ facilitates cognitive and social transformations, fostering the development of a pro-social identity.<sup>80</sup>

## VI. HOW RJ CAN BE IMPLEMENTED IN THE CRIMINAL JUSTICE SYSTEM

The UN Handbook on RJ states that RJ could ideally be implemented at any moment of the criminal justice process, including pretrial, trial, sentencing, and post-sentencing. Likewise, Council Recommendation Rec (2018)8 also emphasizes the applicability of RJ at any point. However, depending on the stage at which it is employed, RJ would aim to achieve different outcomes. For example, at the sentencing stage, RJ can be highly beneficial in exploring the different needs that should be addressed when the court metes out the punishment and the consequences of the offense. Moreover, post-sentencing programs can focus more on the successful reintegration and rehabilitation of offenders rather than on the consequences of the offense since they are implemented when the offender is already complying with their sentence.

Thus, the following question arises: at which stage(s) should European countries provide RJ programs to best facilitate social rehabilitation processes? Addressing this question requires careful consideration of the possible practical implications. RJ has been criticized for its informality, which poses significant challenges to the criminal justice system's foundational principles, such as the presumption of innocence and the right to remain silent.<sup>81</sup> These protections risk being compromised when an offender discusses the offense in RJ settings, where participation often requires a prior admission of guilt. This requirement presents a

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<sup>80</sup> Katrien Lauwaert & Ivo Aertsen, *Desistance and Restorative Justice Mechanisms for Desisting from Crime within Restorative Justice Practices*, EUROPEAN FORUM FOR RESTORATIVE JUSTICE (2015), [https://www.euforumrj.org/sites/default/files/2019-11/research-report-desistance-and-rj-total-doc-24-1-1-final\\_0.pdf](https://www.euforumrj.org/sites/default/files/2019-11/research-report-desistance-and-rj-total-doc-24-1-1-final_0.pdf) (last visited April 30, 2024).

<sup>81</sup> Skelton & Sekhonyane, *supra* note 24, at 81.



dilemma for those who assert their innocence, as consenting to RJ may appear as an implicit admission of guilt.<sup>82</sup> Consequently, RJ can only occur between stakeholders when the offender has taken “at least some responsibility” for the offense to attempt genuine reconciliation.<sup>83</sup> Therefore, the integration of RJ into the criminal process necessitates careful consideration of these rights.

In view of these concerns, RJ should optimally take place post-conviction after the determination of guilt.<sup>84</sup> The placement of RJ after post-conviction follows the Hybrid Model of RJ, an approach that introduces RJ after a specific stage (such as after conviction) in the criminal justice process.<sup>85</sup> Unlike penal mediation, the Hybrid Model integrates RJ into existing legal frameworks to function successively after a determined point in proceedings.<sup>86</sup> Integrating RJ post-conviction implies its use at sentencing and post-sentencing phases, which can overcome the limitations of traditional punitive measures by promoting social rehabilitation and community engagement while ensuring that defendants' rights are protected.

In the upcoming discussion, the place of RJ at sentencing and RJ post-sentencing will be discussed. As for the former, the involvement of multiple stakeholders in sentencing determinations in order to facilitate a deeper understanding of the background of the offense and address the needs of all parties involved in the criminal matter shall be examined. This collaborative process aims to develop a comprehensive plan to mitigate harm and promote healing for both the victim and the community. This resulting plan can influence the judicial sentencing decision, providing an alternative to relying solely on the court's judgment.<sup>87</sup>

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<sup>82</sup> Lode Walgrave, Introduction, in *RESTORATIVE JUSTICE AND THE LAW* 15, 17 (Lode Walgrave ed., 2002).

<sup>83</sup> Joanna Shapland et al., *Situating Restorative Justice within Criminal Justice*, 10 *THEORETICAL CRIMINOLOGY* 505, 507 (2006).

<sup>84</sup> *Id.*

<sup>85</sup> DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* 153-154 (Pam Chester & Ellen S. Boyne eds., 5th ed. 2013).

<sup>86</sup> Daniel W. Van Ness, *Creating Restorative Systems*, in *RESTORATIVE JUSTICE AND THE LAW* 209, 230 (Lode Walgrave Ed., 2002).

<sup>87</sup> Heino Lilles, *Circle Sentencing: Part of the Restorative Justice Continuum*, in *RESTORATIVE JUSTICE FOR JUVENILES* 161, 164 (Allison Morris & Gabrielle Maxwell Eds., 2001).

Following this analysis, there will be an examination of how RJ has been implemented across different jurisdictions.

As for post-sentencing, the use of RJ in prison settings shall be discussed. Although prison may not be a place that is compatible with the pure spirit of RJ, RJ can still be used to offer incarcerated individuals opportunities to repair and restore the victims and the community. First, RJ can promote opportunities for change by increasing accountability and responsibility. Additionally, prison-based RJ gives the offender a better chance of reintegration once they leave the prison. Moreover, there will be a comparative analysis of different countries' prison-based RJ programs to establish best practices.

## **A. RJ in Sentencing**

### **1. Restorative sentencing: sentencing circles, forum sentencing, and pre-sentence RJ**

Criminal sentencing determines the legal and societal consequences of offending behavior.<sup>88</sup> Across different countries, sentencing typically aims to achieve four major goals: retribution, rehabilitation, deterrence, and incapacitation.<sup>89</sup> As more countries focus on rehabilitative outcomes, RJ offers a significant opportunity to promote social rehabilitation within the sentencing process.

RJ at sentencing has taken multiple formats in different countries, such as circle sentencing, forum sentencing, and pre-sentence RJ— all of which are implemented between the conviction and the final sentencing decision. However, all these practices involve a collaborative meeting of all stakeholders—including court officials, victims, offenders, and community representatives—to formulate a sentencing plan that meets the needs of all parties involved. Moreover, another

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<sup>88</sup> Van Ness & Heetderks, *supra* note 85, at 74.

<sup>89</sup> Doris Layton Mackenzie, *Sentencing and Corrections in the 21st Century: Setting the Stage for the Future*, NATIONAL INSTITUTE OF JUSTICE (2001), <https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/1999-MacKenziePaper.pdf> (last visited April 19, 2024).

common aspect is that as the practice happens at sentencing, the offender still has a conviction and criminal record.<sup>90</sup> Additionally, the principle of proportionality usually guides this process, in which the sanction cannot surpass the offense in seriousness or gravity; it must be proportional to the offense.<sup>91</sup> In Canada, for example, conferences are ultimately guided by this principle so that the reparative agreement (sentence proposal) is neither overwhelming nor too lenient.<sup>92</sup>

RJ at sentencing involves stakeholders who were affected by the offense. This collaborative approach facilitates the planning of rehabilitation through reparative actions. Firstly, community representatives participate in identifying the harm done by the crime and devising appropriate responses to address the repercussions of such harm.<sup>93</sup> This stage reportedly results in increased offender accountability and fosters a sense of collective responsibility and solidarity.<sup>94</sup> Secondly, the victim's presence in the conference provides an avenue for restitution to the offender as they are given a platform to address the needs of the victim. Victims have expressed a special interest in the sentencing phase, viewing it as a crucial opportunity for justice and closure.<sup>95</sup> Thirdly, the offender's family and support network can also be present to inform the process. This prevents a failure associated with traditional criminal justice systems, such as the sentence being detached from the offender themselves, failing to address underlying issues, and instead applying a one-size-fits-all approach, such as incarceration.<sup>96</sup>

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<sup>90</sup> Chris Cunneen, *Reviving Restorative Justice Traditions?*, in *HANDBOOK OF RESTORATIVE JUSTICE* 113, 124 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

<sup>91</sup> Julian V Roberts & Kent Roach, *Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE* 237, 254 (Lode Walgrave Ed., 2002); *see also* Susan Sharpe, *The Idea of Reparation*, in *HANDBOOK OF RESTORATIVE JUSTICE* 24, 34-35 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

<sup>92</sup> Julian V Roberts & Kent Roach, *Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE* 237, 254 (Lode Walgrave Ed., 2002).

<sup>93</sup> Lilles, *supra* note 87, at 163-164.

<sup>94</sup> Roberts & Roach, *supra* note 92, at 251.

<sup>95</sup> Van Ness & Heetderks, *supra* note 85, at 74.

<sup>96</sup> M. E. Turpel-Lafond, *Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue*, 43 *CRIM. L.Q.* 34, 40-44 (1999).

The meeting normally concludes with an agreement, usually called the sentencing or intervention plan, that is implemented by the judge and other institutional figures such as probation officers.<sup>97</sup> Heino Lilles states that the goal of sentencing circles is consensus. Thus, the intervention plan is the product of a focused discussion on what is needed for everyone.<sup>98</sup> Additionally, Lilles also states that all participants in the circle are aware that the offender will go back to the community. Thus, the agreement is usually focused on promoting rehabilitation.<sup>99</sup>

Following this agreement, community members and offender relations can help the offender behave in compliance with the reparative agreement.<sup>100</sup> In contrast, ordinary penal sentences, such as incarceration, place the offender in a position of isolation. Furthermore, offenders typically perceive incarceration as a punitive measure intended to express retribution for their actions. As noted by Gerry Johnstone, many offenders interpret this message as implying that enduring imprisonment for a set period absolves them of responsibility. In this context, imprisonment imposes significant suffering on offenders, as well as few expectations or demands beyond enduring the sentence itself.<sup>101</sup>

Alternatively, the sentencing plan places greater demands on the offender, who is then held accountable through a structured support system. This system consists of participation from figures such as relevant community members or parole officers who meet with the offender periodically to ensure adherence to the

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<sup>97</sup> Lilles, *supra* note 87, at 163-167.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Gerry Johnstone, Restorative Justice in Prisons: Methods, Approaches and Effectiveness, COUNCIL OF EUROPE, 9 (Sept. 29 2014), <https://rm.coe.int/16806f9905> (last visited April 30, 2024).

plan.<sup>102</sup> In some jurisdictions, a breach of the plan entails a sentencing review in court.<sup>103</sup>

The continuous interaction between victim, offender, and community and “shared ownership of the sentencing plan” incentivizes the offender to be committed to the agreement.<sup>104</sup> This is evidenced by the fact that “very few offenders who participate in circle sentencing fail to complete their community disposition successfully.”<sup>105</sup>

Benefits of RJ at sentencing include bringing together more stakeholders into a process that usually imposes “ a sanction with little elaboration and rarely any reference to the community, in whose name the censure is being expressed.”<sup>106</sup> The discussions during restorative sentencing extend beyond merely the specific offense, encompassing various aspects such as reconciliation and reparation, as well as the underlying causes of the crime and the impacts on victims, families, and community life.<sup>107</sup> Additionally, the inclusion of the community enriches the process by allowing for more support to the offender, thereby enhancing their reintegration later on.

Moreover, RJ at sentencing empowers the offender by offering them opportunities to actively engage in response to the offense. This involvement allows them to participate in “shaping the sentence plan, thereby taking back a measure of control over their life.”<sup>108</sup> This active participation can be an opportunity to repair and make it right, thereby fostering personal change and desistance.<sup>109</sup> Additionally, the RJ practice expects the offender “to restore themselves” by addressing the

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<sup>102</sup> *Id.*; See also Meredith Rossner et al., *The Process and Dynamics of Restorative Justice: Research on Forum Sentencing*, UNIVERSITY OF WESTERN SYDNEY (2013), [http://www.uws.edu.au/\\_\\_data/assets/pdf\\_file/0004/522625/The\\_Process\\_and\\_Dynamics\\_of\\_Restorative\\_Justice\\_-\\_Research\\_on\\_Forum\\_Sentencing.pdf](http://www.uws.edu.au/__data/assets/pdf_file/0004/522625/The_Process_and_Dynamics_of_Restorative_Justice_-_Research_on_Forum_Sentencing.pdf) (last visited April 21, 2024).

<sup>103</sup> Restorative Justice and the Judiciary Information Pack, RESTORATIVE JUSTICE COUNCIL (Oct. 2015), <https://restorativejustice.org.uk/sites/default/files/resources/files/Restorative%20justice%20and%20the%20judiciary%20-%20information%20pack.pdf> (last visited April 21, 2024).

<sup>104</sup> Lilles, *supra* note 87, at 168.

<sup>105</sup> Lilles, *supra* note 87, at 166.

<sup>106</sup> Roberts & Roach, *supra* note 91, at 242.

<sup>107</sup> Cunneen, *supra* note 90, at 124.

<sup>108</sup> Lilles, *supra* note 87, at 163-168.

<sup>109</sup> See discussion *supra* section V.C.

personal circumstances that contributed to the offending behavior.<sup>110</sup> Consequently, the offender is actively participating in their own rehabilitation.

Finally, through RJ, sentencing becomes a deeply individualized process tailored to address the specific needs and circumstances of the offender with a primary focus on rehabilitation. Sentencing within an RJ paradigm requires a thorough examination of the offender's background and the factors that may have influenced their actions.<sup>111</sup> The discussion plays a crucial role in providing the sentencing judge, who later ratifies the sentencing plan, with a comprehensive understanding of the defendant's situation, including potential influences such as substance abuse, poverty, racism, family breakdown, and community dislocation.<sup>112</sup> By considering these unique circumstances, sentencing aims not only to hold the offender accountable but also to address the underlying issues that may have contributed to their involvement in criminal behavior. This individualized approach reflects a commitment to promoting rehabilitation and reintegration, thereby offering offenders a meaningful opportunity for personal growth and positive change within the justice system.<sup>113</sup>

## **2. Best RJ practices at sentencing**

Some countries provide RJ diversion programs as sentencing following an admission of guilt or a conviction. Among others, the focus of the present discussion will be on the United Kingdom, Western Australia, Canada, and New Zealand. This discussion will allow a deeper understanding of how RJ at sentencing can enhance the social rehabilitation of offenders. These countries have integrated RJ into their sentencing procedures and share several relevant features that could potentially be adopted by other jurisdictions.

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<sup>110</sup> Lilles, *supra* note 87, at 163-168.

<sup>111</sup> Turpel-Lafond, *supra* note 96, at 40-44.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

Canada employs sentencing circles, a practice that emerged in the 1990s in response to the disproportionate incarceration of Aboriginal individuals in the country and marking a shift from punitive measures to a more healing-centered approach.<sup>114</sup> Notably, the Canadian Supreme Court has affirmed the appropriateness of sentencing circles for Aboriginal offenders, emphasizing the need to consider the offender's circumstances to aid in desistance and development.<sup>115</sup>

Following an admission of guilt, offenders engage in a collaborative process involving victims, community members, judges, parole officers, and lawyers.<sup>116</sup> Together, these stakeholders address the offense and explore its underlying causes. The reparative agreement that is created through the circle is later reviewed by a judge who might consider its recommendation to mete out the appropriate sentence.<sup>117</sup> Reparative agreements reached through sentencing circles not only focus on reconciliation but also directly tackle the roots of the offense, shaping tailored sentence plans that address these underlying issues.<sup>118</sup>

Even when sentencing circles do not occur, judges and parole officers have to take into account various background factors of (aboriginal) offenders that contributed to the crime, such as substance abuse, poverty, racism, and community breakdown.<sup>119</sup> This approach cannot ignore goals such as healing, restoration, and accountability.<sup>120</sup> Additionally, the offender will be monitored as they complete the plan and adhere to the rehabilitation plan, which includes counseling and treatment programs.<sup>121</sup> Thus, the Canadian example highlights the specific benefits of sentencing circles in tackling issues that can foster desistance and reduce recidivism rates.

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<sup>114</sup> Lilles, *supra* note 87, at 162.

<sup>115</sup> Turpel-Lafond, *supra* note 96, at 37-38.

<sup>116</sup> Lilles, *supra* note 87, at 162-163.

<sup>117</sup> Cunneen, *supra* note 90, at 124-126.

<sup>118</sup> Lilles, *supra* note 87, at 162-163.

<sup>119</sup> Turpel-Lafond, *supra* note 96, at 40-44.

<sup>120</sup> *Id.*

<sup>121</sup> Lilles, *supra* note 87, at 166.

Likewise, the UK pre-sentence program was also born out of high incarceration rates in the country.<sup>122</sup> The pre-sentence program is focused on empathy-building between all the stakeholders and is conditioned upon a prior admission of guilt by the offender.<sup>123</sup> New Zealand also uses pre-sentence hearings following a conviction or an admission of guilt.<sup>124</sup> Here, the court considers the possibility of an encounter between the offender and the victim so that they can deliberate with other stakeholders of the crime about the consequences the offenders should bear in response to the offense.<sup>125</sup> Both in the UK and New Zealand, the RJ program concludes with a report that the sentencing judge can employ to tailor the criminal sentence to both the offender's and victim's needs.<sup>126</sup>

A similar format is employed in Australia under the name of *forum sentencing*, which is also conducted after an admission of guilt.<sup>127</sup> This RJ program is concluded when all the stakeholders have drafted an appropriate and proportionate sentencing plan, called the Intervention plan.<sup>128</sup> This plan is later presented to the magistrate as a different sentencing plan. The magistrate has to ratify the plan before it can be implemented.<sup>129</sup> Most of the "items" that are outlined in the plan include voluntary community work and counseling, including mandatory substance abuse programs.<sup>130</sup>

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<sup>122</sup> (UK) *Restorative Justice: Time for Action*, IRISH PENAL REFORM TRUST (Sept. 8, 2011), <https://www.iprt.ie/sentencing/uk-restorative-justice-time-for-action/> (last visited April 30, 2024).

<sup>123</sup> *Pre-sentence restorative justice (RJ)*, MINISTRY OF JUSTICE UK (May 19, 2014), <https://www.gov.uk/government/publications/pre-sentence-restorative-justice> (last visited April 30, 2024).

<sup>124</sup> *How restorative justice works*, MINISTRY OF JUSTICE NEW ZEALAND (Dec. 19, 2022), <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works/#before> (last visited April 30, 2024).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Meredith Rossner et al., *The Process and Dynamics of Restorative Justice: Research on Forum Sentencing*, UNIVERSITY OF WESTERN SYDNEY (2013), 8 [http://www.uws.edu.au/\\_\\_data/assets/pdf\\_file/0004/522625/The\\_Process\\_and\\_Dynamics\\_of\\_Restorative\\_Justice\\_-\\_Research\\_on\\_Forum\\_Sentencing.pdf](http://www.uws.edu.au/__data/assets/pdf_file/0004/522625/The_Process_and_Dynamics_of_Restorative_Justice_-_Research_on_Forum_Sentencing.pdf) (last visited April 30, 2024).

<sup>128</sup> *Id.*, at 38.

<sup>129</sup> *Id.*, at 45.

<sup>130</sup> *Id.*, at 48.



Altogether, all the analyzed countries have introduced RJ out of the necessity to deal with crime in a different way. In the UK and Canada, RJ was a means for diminishing the incarceration rates. In New Zealand and Australia, RJ was a means for addressing aboriginal crimes and their root causes. Australia also uses circle sentencing to deal with high incarceration rates in the Aboriginal community; however, they created forum sentencing to expand RJ to other demographics.<sup>131</sup> All these RJ initiatives uphold the voluntary participation of all stakeholders and promote tailored sentencing solutions for offenders, aimed primarily at facilitating the healing process for all parties involved.

At the core of these processes lies the cultivation of the offender's accountability. In fact, all of these programs require that the offender plead guilty and acknowledge the wrongfulness of their actions. This initial step towards rehabilitation is pivotal, as it fosters a commitment to the plans devised during the conference or circle proceedings through in-depth discussions about the offender's responsibility by confronting the victim, who is always invited. Additionally, the offender is prompted to acknowledge the consequences of the offense and delve into the underlying causes motivating their behavior.

All the present stakeholders are involved in the drafting of the report, intervention plan, or sentencing option that is later presented to the court. Thus, everyone is engaged and has a stake in the offender's completion of the sentence through which the offender amends for their actions. The plan can include restitution, community service, apologies, and other opportunities that engage the offender in a positive and constructive way, thus opening up opportunities for personal change. Additionally, by sticking to the plan, the offender can make it right to the community, allowing them to build up their reputation and be more positively held later for reintegration. The offender's presence and contribution, in addition to their support circle, means that they will build their own rehabilitation. They are not only receivers of the aid but also the creators of their own personal change

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<sup>131</sup> *Id.*, at 7-8.

through adherence to the plan. In sum, all these jurisdictions promote the idea of reduced recidivism by allowing the offender to contribute to their own rehabilitation and repair.

## **B. RJ at the Post-Sentencing Stage**

### **1. Is RJ compatible with custodial sentences?**

RJ in prisons has been the highlight of discussion among some RJ scholars. Although RJ might seem incompatible with prison sentences, some scholars have been discussing the possibility of incorporating certain restorative programs within prison settings to achieve the goals set forth by RJ, such as offender rehabilitation and reintegration and victim involvement and restitution.<sup>132</sup>

Prisons are relevant institutions within the criminal justice systems in most countries, yet they are criminogenic in nature.<sup>133</sup> Van Ness specifically mentions that prison culture leads inmates to accept that they are victims of prosecutors and police, which challenges inmates' ability to engage in deep self-reflection and transformation. Moreover, Van Ness states that prison subculture is deviant in nature, making it difficult to renounce such behavior. Finally, physical violence is one of the ways that discipline is enforced; this is an obstacle to peaceful resolution among inmates and staff.<sup>134</sup> The supposed benefits of imprisonment for society are not proven to be concrete, and, in fact, many advocate for prison reform or even for its abolition.<sup>135</sup> Nevertheless, "the reality appears to be that prisons will be with us for some time."<sup>136</sup> Because prisons will not be dismantled and will continue to be

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<sup>132</sup> Daniel W. Van Ness, Prison and Restorative Justice, in HANDBOOK OF RESTORATIVE JUSTICE 312, 312-315 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

<sup>133</sup> Glenn D. Walters, *Are the Criminogenic Effects of Incarceration Mediated by a Change in Criminal Thinking or a Change in Perceived Certainty*, 101 THE PRISON J. 21, 34-36 (2020).

<sup>134</sup> Van Ness, *supra* note 132, at 319.

<sup>135</sup> Dot Goulding et al., *Restorative Prisons: Towards Radical Prison Reform*, 20 CURRENT ISSUES IN CRIM. JUST. 231, 231-232 (2008).

<sup>136</sup> Van Ness, *supra* note 132, at 321.

parts of the criminal justice system in most countries, prison reform is fundamental.<sup>137</sup>

In this part, it shall be discussed how RJ programs in prison can help in rehabilitation by first making the prison environment more peaceful and constructive, second helping offenders make profound reflections that lead to change, and finally, increasing the connection between prisons and the community, which will aid in reintegration once the sentence is over. Lastly, this section will go over certain RJ programs that have been used in prisons to illustrate certain beneficial practices.

## **2. RJ in prison as a socially rehabilitating practice**

As previously indicated, prisons are highly violent and painful experiences with little to no deterrent effect. In fact, it can promote more criminal behavior by increasing criminal thinking in incarcerated individuals.<sup>138</sup> The establishment of RJ programs in prison can counteract these negative effects through the creation of a humane environment. Moreover, RJ in prisons is an avenue for in-depth reflection that leads to personal change. It notably brings prisons and communities closer, which could facilitate offender reintegration at a later stage.

First, RJ in prisons can foster just and humane environments; the change in the prison can decrease violence and increase peaceful coexistence with prison staff to reduce victimization among incarcerated people.<sup>139</sup> Moreover, it ameliorates the way inmates resolve disputes that they have with each other. This is because RJ programs within prisons can be profoundly transformative. The process of restorative conferencing engages inmates in discussions that foster reflection and dialogues.<sup>140</sup> The *Mending Bridges*, a restorative justice program in New England

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<sup>137</sup> Goulding et al., *supra* note 135, at 231-232.

<sup>138</sup> Walters, *supra* note 133, at 34-36.

<sup>139</sup> Karen Ross & Denise Muro, *Possibilities of Prison-Based Restorative Justice: Transformation Beyond Recidivism*, 23 CONTEMP. JUST. REV. 291, 299-306 (2020).

<sup>140</sup> *Id.*

(USA), has resulted in better self-regulation and decreased violent behavior as a consequence.<sup>141</sup> During this program, the inmates became more empathetic when they heard each other's stories and built relationships with each other based on mutual understanding. Consequently, the prison dynamics are affected in a positive way, as the inmates that were previously relating to one another on the basis of criminogenic connections (i.e., gangs) have better chances to establish relationships based on trust and communication.<sup>142</sup> Additionally, the involvement of more influential, older inmates can motivate younger inmates to start the program soon after they enter the penitentiary center. The increased participation in the RJ program incentivizes a change in the prison culture, shifting from a culture of violence and deviancy to a culture that values accountability and moral repair.<sup>143</sup>

Secondly, RJ in prisons is beneficial because it contributes to in-depth reflections that lead to increased responsibility and personal change. RJ programs in prisons are usually designed to push participants to introspection; offenders are taught to identify past traumas that could have led to their offending behaviors.<sup>144</sup> Likewise, addressing these root causes and correlating them with criminal behavior allows inmates to be vulnerable and create systems of support with each other and other stakeholders.<sup>145</sup> The conference leads stakeholders in the program to build empathy and understanding for one another, and this encourages the offender to take responsibility.<sup>146</sup>

Inmates participating in RJ programs are also involved in victim awareness courses, building upon their understanding of the impact of their crimes on victims and accepting responsibility.<sup>147</sup> Increased empathy towards the victim can prompt offenders to reassess their behavior and avoid harm to those they can empathize

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Goulding et al., *supra* note 135, at 238.

<sup>147</sup> Mandeep K. Dhami et al., *Restorative Justice in Prisons*, 12 CONTEMP. JUST. REV. 433, 438-440 (2009).

with.<sup>148</sup> Thus, empathy-building with the victim enhances their ability to feel genuine remorse and accountability, which changes their perception of offending and increases the chances for reparation to the victim.<sup>149</sup>

Moreover, RJ seems to positively affect behavioral and emotional regulation.<sup>150</sup> The connection between their social context and their offending behavior becomes a framework through which inmates can understand the roots of their actions and thus work on personal change that leads to desistance.<sup>151</sup> Moreover, desistance through reflection is consistent with Braithwaite's idea that offenders that are afforded the opportunity to confront their past actions within a supportive environment are less likely to reoffend.<sup>152</sup> Additionally, these changes are also showcased to influence offenders' behavior beyond prison walls. In an interview with inmates who participated in the *Mending Bridges* program, one offender remarked on his improved ability to emotionally regulate, particularly in interactions with his children and younger siblings. He noted that he was able to assist them in resolving conflicts without resorting to physical or verbal violence, acknowledging that his approach prior to the program would have been different.<sup>153</sup>

Finally, RJ programs based in prison can aid in reintegration once the sentence is over because of the involvement of the community in the restorative program. Normally, prisons are ostracized from the community in which the crime occurred, as detained people are meant to pay for their crimes through painful incarceration.<sup>154</sup> Notwithstanding, incarceration is not benefitting the communities that have been harmed because it often increases the risk of recidivism.<sup>155</sup> RJ

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<sup>148</sup> Johnstone, *supra* note 101, at 12.

<sup>149</sup> *Id.*; Mandeep K. Dhami, *supra* note 147.

<sup>150</sup> Marilyn Peterson Armour et al., *Bridges to Life: Evaluation of an In-Prison Restorative Justice Intervention*, 24 *MED. & L.* 831, 842-846 (2005).

<sup>151</sup> Ross & Muro, *supra* note 139.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> David Eagleson, *Old Keys Do Not Open New Doors: Twenty Years of Restorative Justice in Northern Ireland prisons: An Insight into Making It Happen*, 62 *HOWARD J. CRIM. JUSTICE* 221-222 (2023).

<sup>155</sup> Walters, *supra* note 133, at 23.

provides opportunities for the inmates to restore the community, thereby healing offender-community relations and aiding in offender reintegration when the sentence is over.<sup>156</sup> Hence, the community can receive reparation from prisons and obtain reparative agreements that could conclude in symbolic restorative work such as volunteer or community service.<sup>157</sup> Then, the community receives symbolic reparation, which changes the community's perceptions of the offenders.<sup>158</sup> Hence, the incorporation of community representatives into restorative programs within prisons is apt to facilitate smoother reintegration processes.<sup>159</sup> Strong links with the community can be established by having relevant members visit the prison to participate in the restorative activities. Additionally, offenders can leave prison temporarily as part of the reparative agreement to comply with the symbolic reparation, such as volunteer work.<sup>160</sup> Hence, while punitive measures perpetuate violence and separation, RJ promotes rehabilitation and community cohesion, thereby benefiting both inmates and communities. Then strengthening community ties is crucial for the social rehabilitation of inmates, making RJ in prisons an essential tool for accomplishing this goal.

### 3. Best practices of RJ in prisons

This section will discuss common RJ practices in prison programs in Ireland, the UK, Belgium, and the USA (Texas). Collectively, the experiences in these countries strongly confirm the positive effects of prison-based RJ programs discussed above. In Ireland, the UK, and Belgium, the implementation of RJ programs in prisons has notably contributed to fostering a more humane community environment and improving overall conditions. For instance, in an RJ study conducted in Ireland, prison staff highlighted the positive impact of RJ

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<sup>156</sup> Ross & Muro, *supra* note 139, at 300-310.

<sup>157</sup> Dhami et al., *supra* note 147, at 435.

<sup>158</sup> *Id.*

<sup>159</sup> Johnstone, *supra* note 101, at 10.

<sup>160</sup> *Id.*; Dhami et al., *supra* note 147, at 435.

programs on fostering a greater sense of community among both inmates and officers.<sup>161</sup> This outcome was facilitated through circle sessions, which encouraged dialogue on issues of mutual concern, thereby promoting increased openness, honesty, and respect among inmates as well as between inmates and staff members.<sup>162</sup>

All of the programs from the jurisdictions previously mentioned aim to build empathy in the offenders either through surrogate-victim programs, victim-offender panels, or classes in which the victim is presented in the form of videos or pictures. In Belgium, a study commented that the offenders developed an increased empathy towards crime victims as they were prompted to feel remorse for their crimes.<sup>163</sup> In Texas, offenders also commented on the added benefit of seeing all the sides of the crime, stating that "both sides may share and learn from each other instead of believing the bad things they hear."<sup>164</sup> An RJ prison-based pilot project in several European countries under EU funding, *Building Bridges*, indicated that offenders had understood the wrongness and consequences of their crimes.<sup>165</sup>

All the jurisdictions, particularly Ireland, employ RJ programs to enhance the community's receptivity to reintegrating offenders after their release. The effects of an apology made and restitution by the offender to the victim increase the empathy and redemption in the eyes of both the victim and the community, which facilitates the offender's reintegration after serving their sentence.<sup>166</sup> For instance, a restorative meeting between an Irish offender and the mother of the victim allowed for tensions in the local community to diminish through dialogue at the conference. The offender had killed the woman's daughter in a car crash, and the offender had

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<sup>161</sup> Eagleson, *supra* note 154, at 230-233.

<sup>162</sup> *Id.*

<sup>163</sup> Nikolaos Stamatakis & Christophe Vandeviver, *Restorative Justice in Belgian Prisons: The Results of an Empirical Research*, 59 CRIME LAW SOC. CHANGE 79, 105-107 (2013).

<sup>164</sup> Armour, *supra* note 150, at 842.

<sup>165</sup> Esther Klaassen, *Building Bridges: Research and Implementation*, EU FORUM OF RESTORATIVE JUSTICE (2019), <https://www.euforumrj.org/sites/default/files/2019-12/workshop-esther-klaassen-building-bridges.pdf> (last visited April 30, 2024).

<sup>166</sup> Eagleson, *supra* note 154, at 230.

felt remorse and expressed it to the mother; this encounter resulted in the offender being able to “go home without fear of any repercussions.”<sup>167</sup> This outcome showcases the increased reintegration achieved through prison-based RJ programs.

Additionally, prison-based RJ has the potential to decrease recidivism in the communities where the inmates return. A study conducted in Texas analyzed the effects of an RJ program over a five-year period, focusing on recidivism rates following participants' release from prison. The study showed that participants of the program had a recidivism rate of around 12%, much lower than the state's average (31%) and exceptionally lower than the national average (67%). Thus, the study emphasized that the communities were safer because of these programs.<sup>168</sup>

The outcomes of the implementation of RJ in prisons in these countries show what RJ can do to improve social rehabilitation. First, RJ transforms the prison experience into a more humane one through activities that promote trust. These activities not only foster deep reflection among inmates but also encourage them to analyze their personal triggers and responses. Consequently, this reflection enhances inmates' abilities to regulate their emotions, particularly in high-stress situations.<sup>169</sup> Furthermore, training prison staff in the RJ process enhances its effectiveness, as their interest and involvement in RJ tend to positively influence its implementation. Additionally, such training and interest foster more amicable relationships within the prison, both among inmates and between inmates and staff.<sup>170</sup>

Second, RJ in prison enhances the offenders' empathy and their understanding of the consequences of their crimes. Increased empathy and understanding are often achieved through victim-offender panels. These panels can take place both outside of the prison or by bringing surrogate victims inside the prison symbolically in the form of videos. In Ireland, certain in-person panels, which

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<sup>167</sup> *Id.*

<sup>168</sup> Armour, *supra* note 150, at 834.

<sup>169</sup> Ross & Muro, *supra* note 139, at 303.

<sup>170</sup> Eagleson, *supra* note 154, at 233.



were found to be highly effective for reintegration, took place with the agreement of all parties involved. Meanwhile, the use of surrogate victims and videos within the prison also helped to increase inmates' awareness of and remorse for the consequences of their crimes. This finding aligns with discussions from a study on Belgian victim awareness courses.<sup>171</sup> Third, bringing the community and the victims closer to the prison environment can enhance social rehabilitation by improving the offenders' chances for reintegration and desistance. A study in Belgium found that offenders are highly likely to engage in reparative work, which not only aids their reintegration through earned redemption but also fosters prosocial attitudes linked to desistance.<sup>172</sup> Similarly, in a Texas program, interaction with community volunteers provided the offenders with the necessary support to confront the consequences of their crimes, fostering feelings of forgiveness and acceptance by individuals from the 'free world.'<sup>173</sup> Therefore, RJ in prisons, by improving communication between communities and prisons, effectively enhances reintegration, desistance, and, ultimately, social rehabilitation.<sup>174</sup>

## VII. CASE STUDY: SPAIN

### A. Legal Background of RJ in Spain

RJ in Spain has evolved since it was first introduced in 1992. This year, the Ley Organica 4/1992 started to incorporate penal mediation as an alternative way to end proceedings involving underage defendants.<sup>175</sup> The statute allowed for the suspension or delay of a conviction if the Fiscal Ministry allowed so, as long as the

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<sup>171</sup> Stamakis & Vandeviver, *supra* note 163, at 90.

<sup>172</sup> *Id.*, at 98.

<sup>173</sup> Armour, *supra* note 150, at 838.

<sup>174</sup> Diane Crocker, *Implementing and Evaluating Restorative Justice Projects in Prison*, 26 CRIM. JUST. POL. REV. 45, 52-57 (2015).

<sup>175</sup> Silvia María Rosales Pedrero, *La introducción de la justicia restaurativa en el sistema jurídico penal*, LA FUNDACIÓN INTERNACIONAL DE CIENCIAS PENALES, 8 (2017), <https://fiep.es/wp-content/uploads/2017/03/Rosales-Pedrero.-Comunicación.pdf> (last visited April 30, 2024).

minor defendant complied with the restorative agreement. Furthermore, in its early stages, RJ received increased promotion in Madrid through the efforts of an organization called *Asociacion Apoyo en Madrid*. This association focused on working with young offenders who suffered from drug addiction to encourage the use of penal mediation and the restoration of victims.<sup>176</sup>

Later, in the year 2000, the Ley Organica 5/2000 reformed the juvenile penal system. The main objective of this law was to create a preferential mediation and conciliation process for underage offenders. This law notably promoted penal mediation when two requirements were met: that the crime committed was not serious and that the RJ process was congruent with the reeducation goals promoted by the Spanish Penal Code.<sup>177</sup>

Moreover, the Spanish Penal Code has undergone several reforms to incorporate RJ principles. These reforms include the suspension of sentences conditional on reparations to the victim and the performance of community service. The overarching goal of these reforms is to foster greater offender accountability, repair the harm done, and promote the principle of minimum intervention—a cornerstone of Spanish law.<sup>178</sup> These principles are encapsulated in Chapter III, Section 1 of the Spanish Penal Code, 'On suspension of serving of sentences of imprisonment.'<sup>179</sup> Article 80 of the code specifies that the applicable sentence cannot exceed two years. Judges are required to evaluate factors such as the personal circumstances of the convicted person, their criminal record, their behavior post-offense, their efforts to repair the damage caused, their family and social

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<sup>176</sup> *Taller de diálogos restaurativos: Responsabilización y reparación del daño*, GOBIERNO DE ESPAÑA MINISTERIO DEL INTERIOR 29 (2015), [https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/instituciones-penitenciarias/taller\\_de\\_dialogos\\_restaurativos\\_dp-23\\_web\\_126200630.pdf](https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/instituciones-penitenciarias/taller_de_dialogos_restaurativos_dp-23_web_126200630.pdf) (last visited April 30, 2024).

<sup>177</sup> Pedrero, *supra* note 175, at 8.

<sup>178</sup> Juan Antonio Martos Núñez, *El principio de intervención penal mínima*, GOBIERNO DE ESPAÑA BOLETÍN OFICIAL DEL ESTADO 99, 100 (1987), [https://www.boe.es/biblioteca\\_juridica/anuarios\\_derecho/abrir\\_pdf.php?id=ANU-P-1987-10009900134](https://www.boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-P-1987-10009900134) (last visited April 30, 2024).

<sup>179</sup> Chapter III, Section 1 (CP 1995), Art. 80 CP (ES).

circumstances, and the potential effects of suspending the enforcement. These requirements are not absolute: repeat offenders may still qualify for suspension if the offenses are unrelated to previous ones, and those serving up to five years can qualify if their offense was driven by substance addiction.

Another Legislation (Regulation 4/2015) was passed to incorporate the Victims' Directive of the European Union.<sup>180</sup> This new Regulation, titled '*Estatuto de la victima del delito*,' was introduced with the aim of recognizing victims' rights during the judicial process. The regulation allowed for the interruption of the proceedings to give place to restorative practices. Given the limited familiarity with RJ practices, this regulation seeks to eliminate barriers by ensuring that victims are informed about RJ options in the prospect they wish to resolve the crime in this manner.<sup>181</sup>

## **B. Use of RJ in Spanish Prisons**

The main legal norm that regulates Spanish Prisons is the Ley Organica 1/1979 of September 26th (LOPG). Article 1 of this law states that “[t]he penitentiary institutions regulated by the present Law have as their primary purpose the reeducation and social reintegration of those sentenced to penalties and punitive measures depriving them of liberty, as well as the detention and custody of detainees, prisoners, and convicts.”<sup>182</sup> This objective is also echoed in Article 25 of the Spanish Constitution, underscoring that “punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration.”<sup>183</sup>

In penitentiary centers in Spain, RJ began in 2005 with the intention of promoting a better incarceration environment.<sup>184</sup> The processes were designed to equip offenders with better tools for engaging with one another and resolving

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<sup>180</sup> See discussion *supra* section V.B.

<sup>181</sup> See *supra* note 176, at 31.

<sup>182</sup> Ley Orgánica 1/1979, Título Preliminar (LO 1979), Art. 1 (ES).

<sup>183</sup> CE, B.O.E. n. 311, 29 de diciembre de 1978 (ES).

<sup>184</sup> See *supra* note 176, at 32.

conflicts constructively. The goal was to 'pacify relationships' and reduce the inevitable tensions in confined environments.<sup>185</sup> In 2005, RJ began in one prison in Madrid, but the program's success allowed it to expand to other prisons in the country. By 2014, restorative practices to ameliorate conditions and dialogue between inmates had spread to all penitentiary centers in the country.<sup>186</sup>

Beyond the implementation of programs aimed at making prisons more amenable to both offenders and prison staff, RJ has also been employed as a way to repair the harm made to victims through victim-offender mediation practices.<sup>187</sup> Particularly, RJ programs involving the victims in prisons have been described by Cervelló Donderis as aligned with the goals of social reintegration and rehabilitation of offenders established by the LOGP.<sup>188</sup> In line with the above discussion, such use of RJ in prison supports these penological goals by allowing sentenced offenders to empathize with the victim's experiences and repair the damage done by crime, thereby facilitating reconciliation with society.<sup>189</sup>

Particularly relevant accounts from offender and victim mediations come from meetings conducted between former terrorist offenders who had denounced the terrorist group they had belonged to and reached out to victim associations in the Basque Country.<sup>190</sup> Throughout 2011, 13 meetings were conducted, most of which were held in person.<sup>191</sup> These encounters highlighted the way that restorative processes can have a rehabilitative outcome, as the meetings resulted in increased accountability and apologies made to the victims. Stakeholders reported satisfaction with the process.<sup>192</sup> Additionally, similar meetings were held between

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Elena Maculan, *Encuentros Restaurativos, Petición de Perdón y Resocialización: Replanteando los Mecanismos Restaurativos con Condenados por Delitos de Terrorismo* 3, REV. DER. PENAL Y CRIMINOLOGÍA 77, 100 (2021).

<sup>188</sup> Vicenta Cervelló Donderis, *Elementos Restaurativos del Cumplimiento Penitenciario* 7, REV. ELECTRÓNICA DE CIENC. CRIMINOLÓGICAS, 4-5 (2022).

<sup>189</sup> *Id.*

<sup>190</sup> Maculan, *supra* note 187, at 80-82.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

the offender who sold the weapons used in the 11-M terrorist attack in Madrid and one of the survivors. At the conference, the offender demonstrated remorse and empathy towards all the victims of the attack, stating that, given the choice, he would not repeat his actions, thereby denouncing his previous criminal behavior.<sup>193</sup>

In Spain, the adoption of RJ has steadily increased, and this trend is expected to continue. The main programs that have been installed include: "*Construyendo Puentes*" ("Building Bridges"), which started in February 2014; the "*Proyecto Árbol Sicomoro*" (Sycamore Tree Project), with its secular version "*Justicia y Paz*" (Justice and Peace) introduced in 2017; and the "*Taller de Diálogos Restaurativos*" (Restorative Dialogue Workshop), implemented between 2017 and 2019.<sup>194</sup> These programs serve prisons all over the country, including those in Madrid, Sevilla, Huelva, Valencia, Algeciras, Granada, Sevilla, and Malaga.<sup>195</sup>

This growth is largely attributed to the overarching goal of social rehabilitation encompassed in constitutional and penitentiary laws. Recognizing its benefits for both victims and offenders, some penitentiary authorities have embraced RJ as a rehabilitation pathway in conjunction with victims' associations so that both victims and offenders can benefit from the experience.<sup>196</sup>

Spain has been able to implement RJ to foster social rehabilitation and reintegration within its penitentiaries. While Spanish legal frameworks and prison practices have increasingly incorporated RJ principles, demonstrating a commitment to offender responsibility and the repair of harm, RJ is not as widespread as it could be. This is partly due to insufficient dissemination of information about RJ practices and because it is not commonly used in serious

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<sup>193</sup> Esther Pascual Rodríguez & Julián Ríos, *Los encuentros restaurativos en delitos de terrorismo. Una posibilidad para la paz*, UNIVERSIDAD PONTIFICIA DE COMILLAS (N.D.), 2-3 <https://repositorio.comillas.edu/rest/bitstreams/28453/retrieve> (last visited April 30, 2024).

<sup>194</sup> See *supra* note 176, at 34.

<sup>195</sup> *Id.*

<sup>196</sup> *Intervención en Justicia Restaurativa: Encuentros Restaurativos Penitenciarios*, GOBIERNO DE ESPAÑA MINISTERIO DEL INTERIOR 12 (2015), [https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/instituciones-penitenciarias/Intervencion\\_en\\_justicia\\_restaurativa\\_DP-24\\_web\\_126200539.pdf](https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/instituciones-penitenciarias/Intervencion_en_justicia_restaurativa_DP-24_web_126200539.pdf) (last visited April 30, 2024).

cases. Despite this, the successful application of RJ in prisons in cases involving offenders of terrorist attacks underscores its potential as a tool for social rehabilitation. Such examples highlight the need for broader implementation, not only in Spain but also across other European countries where social rehabilitation is a key goal of incarceration.

## VIII. CONCLUSION

In European criminal justice systems, there is an ongoing, noticeable trend in prioritizing the social rehabilitation of offenders. This move underscores the potential for reforming these systems to incorporate RJ practices. RJ serves as an effective tool for social rehabilitation. These practices foster increased empathy among offenders and lead to reparation, thereby promoting prosocial behaviors and enhancing community reintegration. Collectively, these outcomes contribute to reducing recidivism. Consequently, European nations recognizing social rehabilitation as a primary objective should integrate RJ at both the sentencing and post-sentencing stages. Implementing RJ at sentencing allows for a deeper exploration of the underlying causes of criminal behavior and can help evade the criminogenic effects of incarceration by promoting alternatives such as community service and counseling. In the post-sentencing stage, RJ can also play a crucial role by facilitating programs that enhance offender empathy and emotional regulation, thus bridging the gap between prisons and community settings. As showcased in the analysis of RJ in Spain, the instances of RJ in prison have given a place for incarcerated individuals to promote their own rehabilitation through taking accountability with their victims. Hence, by enabling offenders to actively participate in RJ programs, the criminal justice system can make communities safer, provide restitution to victims, and significantly advance the social rehabilitation of crime perpetrators.