

EXPERT CONSULTATION ON RESTORATIVE JUSTICE FOR CHILDREN BALI INDONESIA JUNE 2013

Paper 1 - THE DIVERSION PROCESS IN THE FORMAL JUSTICE SYSTEM

Good morning!

I feel greatly honored to take part in this meeting.

I would like to thank the United Nations and the government of Norway and Indonesia for giving us **and** the world this opportunity.

I come from Brazil. I've been a Judge for 23 years. I dedicate all my career, and also my volunteer work, to Children and Youth Justice.

In my experience, the diversionary procedures became more relevant, and took on a new meaning, after I learned about the restorative justice paradigm.

Before that, we focused just on avoiding young people from being exposed to the impacts of a coercive system.

Many times the cases was solved without giving them any opportunity to reflect on the fact, or on its consequences.

Showing limits is a duty of presence in the adult world.

It is also the adolescent's psychological need. A need which cannot be neglected. We many times act that way, though. Our diversion procedures oscillated between being neglecting or permissive.

Nevertheless, doing that was still better than when we promoted punitive solutions, though milder, as a way of avoiding the judicial procedure.

So, we sometimes gave up accountability as a way of not punishing. Other times, to avoid a judicial proceeding, we ended up punishing, although mildly.

That ambiguity, besides being of little educational effect, always brought a lot of dilemmas which have been reasonably overcome with the advent of Restorative Justice.

Based on those principles and practices we can now adopt diversionary procedures which offer limits and promote accountability, but doing so in a gentle and respectful way.

We have taken a step forward in learning to use less coercive resources without giving up accountability.

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To me, that is the whole point.

Another thing to be considered is that we have traditionally promoted “diversion” with the focus on avoiding contact with the coercive justice, considered undesirable per se.

The novelty is that even when a judicial procedure or a coercive measure is inevitable, there is the possibility of giving space to a positive experience of justice along with and inside the coercive process.

Comparing that to a conventional solution, a restorative practice taking place along with a judicial proceeding can represent a relevant diversionary solution, alleviating the harmful effects of the experience, regardless of the judicial effects that that practice brings to the proceedings outcome.

It is surprising to the people - and it is subversive to the system - when a judge has the possibility of opening the door of his courtroom of bringing a facilitator in, and giving a new direction to the lives of the people involved in that conflict.

In my Court we have such a door, which our facilitators call , affectionately, “the door of hope”.

A service which allows, in real time, an interaction among the Judge, the other judiciary professionals in the proceedings, the stakeholders, the witnesses and the services professionals can also become a kind of powerhouse to spread Restorative Justice into other application contexts.

In the Courts there are always cases to deal with, as there is the power to mobilize resources and people.

That is the reason why those practices in the judicial environment may also become an important diffusion factor for this model.

From that starting point, the people who take part in those meetings, especially the professionals from the services network, can also become great allies in the diffusion of the idea.

We should also consider that Judges, Prosecutors, Public Defenders and lawyers can understand the benefits of that proposal better when they see it applied to the very proceedings they have been working with. And, once they understand, they may become important allies. We do need their power of decision as well as their power of influencing.

Thus it is possible to use the power of the formal system to promote the practices, not only as a way to better solve the cases, but also as way of **pushing** that power of making justice out of the system. To show that it is possible to do it differently. To show that justice can really become a power of the communities.



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As I see it, the institutional applications and the community applications feed back into each other. That's why they must be thought of together because they will be side by side. I need then to say something about that complementarity.

Community spaces where children and youth gather must promote restorative environments. That requires norms of behavior based on a restorative discipline and teams trained to facilitate conflict situations.

When a community needs the help of outside agents, such as policeman, those agents must have been trained to apply restorative practices in the very place it occurred.

For conflicts which cannot be overcome in the local community, there should be help from specialized centers where there are more sophisticated methodologies and greater capacity to articulate solutions integrated with other protection services.

In the dividing line, when the case is registered, the police officer must also be authorized, at least in less serious cases, to redirect the case to restorative centers in the community.

It should be possible to redirect the case even when it is at the Prosecutor's desk, giving him the option of not judicializing it.

When there is already a judicial procedure going on, if we have both a judicial restorative center and a community one, the Judge can then decide which center would be more advisable to handle the case.

It should also be possible that the Justice System could send the approach to solving the conflict through restorative practices **back** to the very community where it originated.

This is a possible design with a systemic restorative architecture plan.

In many of our legal frameworks the Law does not allow the authorities to **not** consider the traditional flow which requires that the conflicts be registered by the police and become judicialized.

In those cases, legal changes will have to be adopted.

As Restorative Justice is still not widely known and here we are talking about a proposal that transfers responsibilities and dislocates powers, we need very objective and pragmatic norms so that we will not depend on discretionary interpretations or conjunctural arrangements.

My hope is that by the end of our three days together we may have advanced towards this goal.



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Thank you.

Paper 2 - RESTORATIVE JUSTICE IN BRAZIL

Good afternoon!

I would like to start this second talk expressing my gratitude to the colleagues who organized this meeting.

Chaos theory has demonstrated that the flutter of a butterfly's wings in Australia can cause an avalanche in Alaska.

With that image in mind, I would like to greet each one of you that are here representing the flutter of restorative butterflies' wings in Indonesia, and around the world.

It is with absolute reverence to this interdependent context that I begin my account of the restorative butterfly's journey in Brazil.

Brazil incorporated the norms of the UN Convention on Children's Rights, the Beijing Rules and the Riyadh Guidelines to its national legal code with a new law in nineteen ninety.

According to this law, children under twelve years old don't have any kind of penal responsibility. Between twelve and eighteen, they will respond by their crimes with a special kind of sanction, under the jurisdiction of the Juvenile Justice System.

This new law opened a space for a vigorous social movement in favor of Children's rights. Its implementation has produced very important cultural and institutional changes.

It was in that context that the ideas on Restorative Justice began to be heard in Brazil.

Brazil is a rich country, but we face very serious social and economical inequality. Those inequalities result in conflict, social disorder, generalized crime and violence.

That destructive social context echoes in the Children and Youth Justice environment. Some of our main concerns involve the following problems:

- (1) The instability at schools regarding coexistence, which has been undermining the learning process,
- (2) The disruption of families where there are drug-addicted adults, particularly crack addicts, who are negligent or impose maltreatment on their children,
- (3) Drug-addicted youth, most notably crack addiction, and their frequent involvement with trafficking and other related crimes,



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(4) The urban gangs through which the youth assert their identity and spend their time vandalizing, involved with disorders and violent confrontations,

(5) The escalation of the serious crimes profiles in which youth take part, their involvement in armed robbery, homicides, murders with intention to rob are becoming more and more common.

I have under my jurisdiction a regional juvenile detention center. Our region comprises 44 towns. It is an industrialized and touristic region, of European settlement, a pretty prosperous one. We are ranked among the best HDI in the country. Even so, last March, when we had 63 adolescents in detention, 59% of them were there for armed robbery, 29% for homicide or homicide attempt, 9% for committing murder with intention to rob, and 3% for larceny.

Professor Howard Zehr has taught us that, the greater the pain, the greater the restorative potential the case will have. And it is in that painful environment that Restorative Justice has flourished among us, like a lotus flower that blooms from the mud. We face a tragic reality to which we must respond with wisdom and enlightenment.

The first texts on Restorative Justice in Brazil appeared in 1999. They were disseminated throughout the country by the Children and Youth Magistrates, Prosecutors and Public Defenders Brazilian Association.

In 2005, Restorative Justice was officially introduced in Brazil THROUGH a partnership between our Ministry of Justice and UNDP which made three pilot projects possible. All of them led by judges and having their own Courts as the basis to implement the practices.

I was responsible for one of those projects which took place in Porto Alegre, capital city of the State of Rio Grande do Sul, the southernmost State in Brazil, bordering Uruguay and Argentina.

That Project is named “Justice for the 21st Century” and took on the responsibility for testing and disseminating Restorative Justice practices in the resolution of conflicts and violence involving children and adolescents.

It is an initiative of the Rio Grande do Sul Judges Association and of the Magistrates’ School with the support from our State Court of Justice.

The fact that we are Judges who volunteered for the project, with the support of our official institutions, gives us much credibility and makes the articulation with other institutions easier. At present it has made it easier for the Restorative Justice process to be absorbed by the Justice System institutions themselves.

The Magistrates’ School has been our headquarters for the Restorative Justice courses. Since 2005 we have trained over four thousand people, RJ leaders and



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facilitators. Many of them are ordinary citizens without much formal education who are now studying about Justice at the same school where new Judges are prepared. The certificates issued by the Magistrates' school empower and value these citizens from different backgrounds as equals.

Along this process, we counted on a University as our partner who was responsible for the monitoring and evaluation of the experience. (OK)

In different occasions we also counted on UNESCO as well as on our National Human Rights Secretary, that provided us with the technical and financial support.

The articulation between international agencies, government agencies and the Justice System institutions were decisive to leverage the pilot projects. And they became a reference for the progress of RJ in the country.

In these few years in Brazil the restorative butterfly has shown a great potential in promoting avalanches of change.

The main ones are those related to the legislative sphere and to a strong process of institutional absorption. I must confess I feared that absorption.

But I have seen that it can occur without compromising the integrity of the concepts when it comes from the bottom up, in relation to the hierarchies and to the legislative process, and from inside out, in relation to the transference of power and to the democratization of the relationship between the system and the communities.

Since January 2012 we have a new law for Juvenile Justice, which contains provisions that can legitimate and leverage Restorative Justice.

That new Law establishes the principle of "the exceptional nature of the judicial intervention and the enforcement of those measures and instead favoring collectively generated solutions, a principle that associates the diversionary procedures to restorative practices, as the preferred means.

We also have a principle of primacy, where the law establishes "the primacy of practices that are restorative and meet the victims' interests".

And there is a proposition, that goes even further because it gives us orientation for the building, in practical terms, of a true Juvenile Restorative Justice system. It has to do with the provision that establishes an essentially restorative concept of accountability as one of the three goals of enforcing the penalties applied to youth offenders.

Our law for juveniles states that those measures have the objective of promoting the disapproval of the behavior of the adolescent and supporting his or her social integration. That is more or less traditional.



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More or less, because the insertion of that concept of disapproval, which has to do with the legal concept of behavioral crime disapproval, generated a decade of passionate debates around the legal concept of the measures.

For us, the understanding that the penalties imposed on youth are a form of penal constriction, although they have a pedagogical intention, it comes as a condition for the success of the proposed restorative practices.

In case that is not clear: first, we cannot ensure the guaranties of the due legal process. Secondly, we will not be able to apply a doctrine rooted in the criticism to the retributive penal system, as is the case of Restorative Justice.

Maybe because we lack an intermediary term, many among us still support that the measures should have the promotion of social integration as their sole objective. But that means defending an incomplete and permissive social control model, as illustrated by the social discipline windows of Ted Wachtell and Paul McCold.

That is why the most relevant innovation of our law, the part projecting towards the future, is about the objective of promoting "the adolescents' accountability regarding the consequences of the harm performed, promoting reparation as much as possible". A clear principle of active accountability.

It will be around those three goals – disapproval, social integration and accountability – that an individualized plan for sentence enforcement will be structured, establishing the goals the adolescent should reach.

Thus, all the orientation to youth offenders should aim at this restorative accountability concept. Consequently the whole system operation should be submitted to restorative lenses.

Besides this National Law of 2012, since 2010 we have had a norm from the National Council of Justice which requires that all Courts in the country create Judicial centers for Mediation and Conciliation working for civil and family proceedings. In 2013, that norm was altered and now criminal proceedings can be officially sent to that center provided restorative practices are applied.

I presently work in Caxias do Sul, the second biggest city in our State, with a population of around 500,000 (five hundred thousand) people. Besides being the Juvenile Court Judge I am also the Coordinator of one of those Judicial Centers for Conflict Resolution.

In our city, our Court of Justice has authorized a new pilot project, in collaboration with the local City Hall.

With that experience we will finally go from localized testing to enter a new unprecedented phase: the institutionalization and incorporation of Restorative Justice in the scope of public policies – both in the judiciary and in the municipal spheres.



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This new pilot project provides an intertwining of the judiciary policy of collectively generated solutions with a municipal public policy of restorative pacification. We have been creating a very complex institutional engineering. The project is anchored in four institutions: the judiciary, the City Hall, an University and a private foundation.

Our goal is creating a services structure which won't absorb all the demands, but which will use those demands to show alternatives and to strengthen local communities.

We have a Central Unit responsible for the management and technical coordination, and three Restorative Pacification Centers. One Center for conflicts which have turned into judicial proceedings. Another Center will be a diversionary alternative for situations involving children and adolescents. And a third Center to attend to neighborhood and family conflicts as well as issues of interest for the local community.

Regarding the methodologies, between 2005 and 2010 we worked with Non-Violent Communication, based on Marshall Rosenberg theory.

From 2010 on we have been working with Peacemaking Circles. That methodology has really enraptured us and has been widely applied. We had successive trainings with Kay Pranis in 2010 and 2012, and now in 2013 she is in Brazil again.

This year we will also have a training based in the Wagga Wagga model with Jean Schmitz, our partner in this meeting. We want to test conferences facilitated by police officers in charge of assisting schools and police officers doing community policing. We have also been training facilitators who work with Health, Social Services and Education as well as independent volunteers. They will be applying variations of the Peacemaking Circles in their own work and in the communities.

Because besides doing circles for crime and offenses we have also been using them for several different conflict situations. I'm going to give you some examples:

- Circles to avoid families going through difficulties losing their children's guardianship.
- Circles to help families get the guardianship back for their children in foster care.
- Circles to hear the wishes of the children about a decision in a proceeding they are involved in.
- Circles to help adopting families welcome their adopted child, particularly when the child is older.
- Circles to strengthen family ties and create cohesion in families in supporting recovery for drug-addicts with serious addiction.



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- Circles to elaborate the plans for youth fulfillment of correctional measures in a participative way.
- Circles to deal with rivalries between adolescents in detention centers.
- Circles to reintegrate young people leaving the detention centers.

Our experience is built on certain points I would like to emphasize.

The main thing is we have to think about the process to diffuse Restorative justice involving several dimensions.

Regarding the understanding of the process, we have a pragmatic dimension in relation to resolution of cases and pacification of conflicts, of helping people facing difficult situations. For those we have a very effective potential.

A second dimension refers to the potential those ideas have to promote critical reflections and leverage movements of social change, opening ways to build a culture of peace. We can start from the concrete, doing what Braithwaite calls “transforming personal troubles into public issues”. That is a political potential to be stimulated.

But there is a third dimension. One that we seldom talk about. That third dimension helps to explain the contagious power these ideas have. It shows when someone takes part in a restorative meeting, or when that person takes part in social movements inspired by Restorative Justice.

It is about awakening a level of awareness which has not been present in the academic and political world in the last centuries. The restorative meetings promote uncommon opportunities to access the collective dimensions of human intelligence, to experience an ethical rationality that goes beyond standards of traditional rationality because it is rooted in the sensitive hemisphere of the brain. That is a spiritual potential that can mean hope for a new humanity.

Regarding the articulation of advances, I would like to point out our concern in making sure the philosophical content of Restorative Justice may resonate in favor of a wide process of organizational and cultural changes which encompass the structure of the judiciary power, the dynamics of public policies and the communities political capacity – always from an experience of those new approaches in the conflict resolution practice and the stories we can tell after them.

Now let’s put all that into movement in an integrated way. If we act with the understanding of our operational potential, but also with our political and our spiritual potential, and having strategies to propose in order to change the judiciary world, the public policy world and the community world, what is not evident in this process is the opportunity to be founding a new stage in the civilizing process.

We must be aware of that every time we sit in circles to make justice.



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Summarizing, my testimony is about the potential that the formal justice system has to induce dislodgings of the power axis that works over social control, promoting institutional changes which favor the creation of a systemic restorative architecture.

Forgive me if this account has taken a witness tone. We want to advance from concept to realization, and I have a pragmatic state of mind. Besides talking about my country, I wanted to bring a little of my own practice.

I learned that with the Russian poet Tchecov: "if you want be universal, sing your village" . I am not a great singer, but I hope I have conveyed my village in a good way.

Thank you!

Resumé

Leoberto Brancher, 51, has been a Judge for 22 years and is now working as the Regional Juvenile Court Judge in Caxias do Sul, the second biggest city in the State of Rio Grande do Sul, Brazil, a District where he has also been the Coordinator for the Judicial Conciliation, Mediation and Restorative Justice Center.

From the beginning of his career, he has specialized in the Childhood and Youth Field, an area in which he has been leading several innovative projects both at the jurisdictional and community levels in collaboration with different State and National institutions, especially the ones related to Justice, Education, Social Work, as well as with international agencies such as UNICEF, UNESCO and UNDP.

Judge Leoberto was in charge of the Regional Children and Youth Court installation in Caxias do Sul (1995-1998), designed to apply the Law 8.069/90, the Brazilian Child and Youth Statute, which was a milestone in the implementation of the UN Convention on Children's Rights in Brazil.

After that, he worked in Porto Alegre, capital city of Rio Grande do Sul State, for ten years also as the Juvenile Court Judge. In that position he led projects such as the reorganization of that Court, the municipalization of the correctional measures without freedom restraint and the systematization of routines and procedures in a pioneering way on the enforcement of the measures. It was also from that position that he introduced the Restorative Justice Practices as a means to divert trials as well as into the correctional measures, in a pioneer way in Brazil, generating a set of important contributions which were, most of them, incorporated in the Law 12.594/2012, a new legal milestone in Brazil, which disciplines the enforcement of correctional measures applied to youth in conflict with the law with a restorative bias.

Regarding the institutional and associative level, Brancher has held the offices of Citizenship Director (1994/1995) and Social Communications Director (2004/2005) in



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the Rio Grande do Sul Judges' Association, and the position of President of the Brazilian Association of Magistrates, Prosecutors and Public Defenders for the Child and Youth Courts (1999/2001).

In 2004 Brancher started the Magistrates' School Center of Studies in Restorative Justice in Rio Grande do Sul, with activities involving study groups, supporting research on the field, workshops and regular courses on Restorative Justice at the Magistrate's School. He was the Center Coordinator from 2004 to 2012.

In that area he is also the founder and the Coordinator of the Justice for the 21st Century Project, an initiative of inter-institutional articulation led by the Association of Judges in Rio Grande do Sul - AJURIS, which aims at implementing the Restorative Justice principles and practices in the pacification of violence involving children and adolescents. From 2005 on, that Project has been one of the main references for the introduction of Restorative Justice in Brazil.

After working in the State Capital, Brancher returned to Caxias do Sul in 2009. He first took up a Civil Court and in 2011 he was again the head of the Regional Court for Child and Youth. Since July 2011 he has also been the Coordinator for the Conciliation, Mediation and Restorative Justice Center of the District Court in Caxias do Sul.

At present, Brancher has been leading a local Project that brings together the Judicial System, the Caxias do Sul City Hall, the University of Caxias do Sul, and Fundação Caxias, a non-governmental organization related to the city entrepreneurial sector, as well as local communities, aiming at implementing the first Brazilian experience applying Restorative Justice as a local pacification public policy.

At the national level, Brancher continues engaged in the diffusion of Restorative Justice through the Justice for the 21st Century Project, notably in the political articulation before Judicial System and Governmental institutions, and as a speaker invited by those institutional actors, mostly for the areas of Education and Social Services, as well as teaching at other Magistrates' Schools in the Country.



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