

## RESTORATIVE JUSTICE IN UKRAINE: A GRASSROOTS APPROACH

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Modernity and thus modern society have often been portrayed as a clash between two conflicting – to some scholars even mutually exclusive – principles, those of liberty and discipline, or subject and reason (see for more details Кутуєв, 2016 Кутуєв П. В. Трансформації модерну: інституції, ідеї, ідеології : монографія / П. В. Кутуєв. – Херсон: Видавничий дім «Гельветика», 2016. – 516 с.).

Modernity has always been a space of a conflict and struggle for recognition among many other things. Although the notion of social progress and the rising levels of humanity are among the most contested issues in the social sciences, we have legitimate grounds to claim that there is at least a tendency towards greater leniency in human societies. Replacing justice based on “tit-for-tat” principle with more humane approaches is a significant step forward for human society. Our treatment of modernity stresses its multiple forms – we are inspired here by the idea of multiple modernities Samuel Eisenstadt and his associates – as well uneven and combined development within broader framework of societal modernization. Given contested and conflicting nature of modernity, the progress of modernization is neither linear, nor guaranteed. It’s rather a step forward and often two steps backward, or zigzag path at best. Modernity unleashed unprecedented creative forces in terms of state capacity, technologies, generation and dissemination of ideas. At the same time these breakthroughs of modernity have often been employed for purposes of destruction, invasion / colonialism, exploitation, ethnic cleansing / genocide and world wars. The 20th century had seen mass repressions and incarceration of enormous scale. After “the Leninist extinction” (Ken Jowitt) Ukraine has struggled to transform itself into a market democracy with a rule of law. Reforming / modernization of the criminal justice system is an essential element of the overall process of modernization. Restorative justice is a burgeoning field of ideas, policies and practices.

Thus, it’s of critical importance to incorporate the best practices of restorative justice into Ukraine’s criminal justice system to make it more humane and efficient. To do so, the interaction between the state institutions and civil society organizations is crucial. Therefore in this paper we are discussing information provided by experts and civil society activists involved onto inculcation of the restorative justice in Ukraine.

The article examines restorative justice – a modern alternative approach to conflict resolution, aimed at restoring justice and reconciling the needs of the victim, the offender and society as a whole. The main

causes (factors) of the emergence and development of restorative justice are identified, the system of values underlying restorative justice is determined.

This form of justice requires community participation to be successful, an element of justice sadly lacking in the Ukrainian criminal justice system.

For advocates of restorative justice, this alternative approach is far more demanding of offenders since they must acknowledge all the ways their crime affected others and become fully accountable for their actions by confronting the victim in a more intensely intimate setting where they can't hide from their shame and guilt and must face their victims in front of others who they know, respect and love in the community. By giving offenders a chance to be ashamed of their actions, and to offer an honest, remorseful apology, they are also given a chance at rebirth, by allowing them to be truly accountable and responsible, by making amends to those around them – a lesson in humility that is far more likely to sink in, in the form of meaningful actions to repair the relationships they've broken, and then to be healed by the experience.

Restorative justice is a global movement that represents an entirely different way of thinking about justice, first emerging from indigenous traditions such as in the Maori tribes of New Zealand and later Native American traditions, to the Truth & Reconciliation Commissions of South Africa, Ghana and Rwanda following genocides, and still later in such far-flung places as Canada, the U.S. and Great Britain. In all its forms, the central feature is, first, the identification of a criminal incident, followed by consultation with a mediator or other official who meets with both the victim and offender to determine if a restorative justice session is appropriate and voluntarily desired by both parties

The authors emphasize the need for further implementation of restorative justice programs in Ukraine.

**Key words:** restorative justice, modernization, mediation, community, conflict.

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Statement of the problem in general form and its relation to important scientific or practical tasks. There is an emerging form of justice in Ukraine, one that has evolved from more ancient, indigenous forms of justice and which has sprouted from between the cracks of our failed modern systems of justice around the world. This form of justice is sometimes referred to as “restorative justice,” and it involves participation from the community (Johnstone 2015; Van Ness and Strong 2006; Zehr 1990). In fact, it *requires* community participation to be successful, an element of justice sadly lacking in the Ukrainian criminal justice system.

Analysis of recent research and publications on the topic, highlighting previously unresolved parts of the general issue addressed in the article. Restorative justice is a global movement that represents an entirely different way of thinking about justice, first emerging from indigenous traditions such as the Maori tribes of New Zealand, to later Native American traditions, to the Truth & Reconciliation Commissions of South Africa and Rwanda following genocides, (Allais 2011; Gibbs 2009; Hand, Hankes and House 2012; Kavuro 2017; Kohen, Zanchelli and Drake 2011; Lubaale 2017; Koska 2016; Maxwell and Liu 2010; Ross 1996; Sharp 1997; Tauri 2016; Van Rensburg 2012) and now existing as a global, international movement where modern versions of this justice have arisen in the form of victim-offender mediation, conflict resolution for teens in schools, teen courts, drug courts, art therapy programs, peacemaking circles, elder abuse circles, hate crime mediation, sex crime mediation, modern genocide and wartime commissions, and even environmental disaster mediation for disaffected communities, just to name a few (Ame and Alidu 2010; Armour 2013; Coates and Vos 2002; Denning 2014; Dunlap 2013; Fulkerson 2009; Groh and Linden 2011; Hilder 2012; Hooker 2016; Kavuro 2017; Laundra, Rodgers and Zapp 2013; Lauwaert Aertsen 2016; Leibman 2015; Littlechild 2011; Llewellyn 2012; Lynn 2018; Marder 2014; McGlynn, Westmarland and Godden 2012; Morrison 2015; O'Mahoney 2007; Pali 2014; Pennell 2014; Pfeffer 2015; Pranis, Stuart, and Wedge 2003; Robinson 2016; Spies 2016; Tsui 2014; Umbreit, Uotila and Sambou 2010; Wadhwa 2017; Zehr 2014).

The purpose of the article – to find out the grassroot approach of restorative justice in Ukraine.

Presentation of the main research material with full justification of scientific results. The main elements of restorative justice exist in other types of alternative criminal justice approaches, but in all its forms, the central feature is, first, the identification of a criminal incident, followed by consultation with a mediator or other official who meets with both the victim and offender to determine if a restorative justice session is appropriate and voluntarily desired by both parties.

Then, a forum or meeting is scheduled, normally conducted as a face-to-face encounter between the victim and offender, as well as members of the community, such as parents, teachers, religious leaders, counselors, law enforcement personnel, or other community members/stakeholders. Usually, this encounter begins with some form of ceremony that serves as an “ice-breaker” for the group that has been assembled. For example, an opening ceremony might be a group prayer, song or game where participants get familiar and comfortable with one another in preparation for the difficult conversation that is about to

follow. The group moderator then established critical guidelines for the session, including a request for respect and dignity for all present, and assurances of confidentiality, physical and emotional safety, trust, and the voluntary participation of all those present. A token object (any object visible to others) is commonly used for the speaker to hold and pass along, symbolizing deference to the current speaker, because it is critical that only one person speaks at a time, and in a respectful tone during these sessions.

Once these guidelines are established, the encounter proceeds with a summary of the crime committed, usually given by a designated moderator such as a counselor, teacher, attorney, or legal representative from the traditional court system that has been trained in the practice of restorative justice. Once given, the moderator then proceeds as a facilitator of the ensuing discussion, where the victim is first allowed to express their feelings toward the offender and to declare what they feel would be a justifiable resolution of the criminal offense, and anything else they would like to say, providing the victim with a chance to confront the offender face-to-face in a sort of therapeutic, cathartic release of the concerns, anger, stress, or trauma caused by the incident. The offender is then allowed an opportunity to begin to repair the relationship by, first, genuinely apologizing for the harm caused to their victim for the harm caused and to declare what actions they think would be appropriate to resolve the offense. Both parties, as well as relevant community members, then discuss the offense, the harm caused to the victim and community, and also the harm caused to the offender themselves. A satisfactory resolution, such as restitution, fines or even prison time is agreed upon by all involved, a decision that is (ideally) sent to the higher courts for ratification of sanctions proposed. In cases where both victims and offenders have shown an honest willingness to confront the incident, and to have this therapeutic moment of honest reflection regarding the criminal act, and where a moderator and community members are present to facilitate the discussion in a safe, open and respectful setting, it can offer victims with something rare – a real experience of resolution, one where their voices are heard and where they can confront their offenders directly (Gavrielides 2014). For offenders who are at least somewhat remorseful for their offense, this type of meeting can provide them with something far more dramatic as well – a chance to experience real guilt and to offer a meaningful apology for the crime they committed.

Of course, not all criminal offenses can be handled in this way, especially where either victims or offenders do not show a willingness to engage the incident in a profound way by truly acknowledging the crime for what it is – a violation of relationships – and not just a violation of state laws. And even though we have seen real success in these sessions for serious, violent offenses such as domestic violence and other sex offenses (Umbreit, 2002) it is more typically administered to troubled and/or delinquent youth who have committed first-time offenses such as vandalism, fighting, or drug use (Tsui, 2014).

In any of these cases, however, and in whatever setting it is conducted, the restorative justice session is a unique opportunity for offenders to recognize how their crime affected others – as a violation against a victim and the community – and to acknowledge the harm caused to these relationships, and to then make a genuine effort to repair these relationships through direct dialogue within those communities (Bazemore, Schiff, 2001). This typically provokes strong emotions in all involved, and sometimes it fails as a result, but by daring to engage in this more intense exchange, it also provides a more powerful opportunity to express sometimes suppressed or underlying feelings and attitudes among victims, offenders and community members involved in a criminal incident, which typically results in greater satisfaction with outcomes of the session, as well as a stronger sense of resolution among those present, *especially* victims (Batchelor, 2017).

In any type of restorative justice session, the crime becomes more than just a legal matter between the offender and the state. This more traditional setting is all too familiar, held in a dispassionate, legal or administrative setting while attorneys confer with judges on legal standing in a stale, bureaucratic contest while the offender and victim are usually on the sidelines, often not even present for the decision or outcome. This is typically also an unsatisfying experience for victims and their offenders who desire nothing more than to express feelings over the incident, to apologize and ask forgiveness, to show remorse, and to participate in the decision-making process regarding consequences for the offender (Baldwin, Rukus, 2014). Just ask yourself: Does an offender really accept responsibility for their crime by merely paying a fine, giving restitution, or even serving a jail sentence when that offender hasn't even been compelled to see their crime as a violation of real people and the true harm that it caused to these individuals and to their community, but just as a violation of an ordinance or law that has no direct meaning to them personally?

For offenders in the business-as-usual, transactional form of *retributive* justice, they were just the unlucky ones who got caught – a lesson to be learned simply for the next crime they intend to commit.

For advocates of restorative justice, this alternative approach is far more demanding of offenders since they must acknowledge all the ways their crime affected others and become fully accountable for their actions by confronting the victim in a more intensely intimate setting where they can't hide from their shame and guilt and must face their victims in front of others who they know, respect and love in the

community. By giving offenders a chance to be ashamed of their actions, and to offer an honest, remorseful apology, they are also given a chance at rebirth, by allowing them to be truly accountable and responsible, by making amends to those around them – a lesson in humility that is far more likely to sink in, in the form of meaningful actions to repair the relationships they've broken, and then to be healed by the experience (Tavuchis, 1991). More importantly, victims are given a voice and a chance to confront the offender in a safe environment, providing an opportunity to express grievances and feelings of anger, distrust, and violation over the experience of being a victim (Acorn, 2017).

Perhaps just as important is the role of community in this decision-making process, since normally those in the community most affected by the crime are also not allowed to participate in the justice process. By empowering parents, teachers, counselors, faith leaders, and other stakeholders to be directly involved in the justice process, they become part owners of their communities and are given a chance to become more active in helping to repair the damage done to a community whenever a crime is committed (Kurki, 2000).

There are many examples of community-based, restorative justice practices already underway in Ukraine, partly as a response to the ongoing Russia-Ukrainian war, where mediators have been on the front lines of the conflict facilitating group sessions to assist, discuss, inform, educate, and mediate when conflicts emerge, particularly when human rights are violated, as instruments of “transitional justice,” which is another approach based in the key elements of restorative justice. In fact, in the earlier Euromaidan Revolution of 2014, when mediators and “dialogue facilitators” engaged in bringing conflicting parties together to discuss the circumstances of, and solutions to, political upheaval, they used the term, “dignity space” to characterize meetings held, to signify the necessary respect and trust that must be given to both sides during any debate or emotionally-charged discussion in order to find satisfactory resolutions for all sides, not unlike the opening salvos during South African or Rwandan Truth and Reconciliation Commissions before them, or the more modern peacemaking and restorative justice circles of today.

It is no coincidence that restorative approaches pair so well with democratically-inspired countries like modern-day Ukraine. Participatory democracies are inherently grassroots and community-based, like restorative justice, in that they both evolve from the bottom-up, from the citizens themselves, and require active community engagement in order to be successful. Both movements also require a healthy respect for multiple, diverse viewpoints and for inclusive dialogue among all participants with the goal of promoting repair, reconciliation, and reassurance for lasting and meaningful resolutions, and outcomes that are more satisfying for all involved.

Lasting reform for a society that is brave enough to confront its core social problems, such as corruption in a closed, preferential, and autocratic judicial system, is the ultimate incentive of such societies. Ukraine, a country that has proven time and again that its citizens are determined to reshape the country into a legitimate participatory democracy – despite the daunting obstacles it faces – is such a country, and restorative justice in Ukraine represents this shifting paradigm, which has sprouted from this grassroots movement.

For example, various non-governmental organizations (NGO's) in Ukraine have been actively promoting mediation and restorative justice programs, most recently in response to the ongoing war with Russia in Eastern Ukraine, following the annexation of Crimea, where they have been focused on reparation of human rights, and reconciliation among conflicting factions of its citizens (Kyselova, 2019). In addition, many of these groups have also been working to restore a sense of solidarity in the country as a whole, by inspiring people to get involve in their communities through education and training in mediation practices – practices such as restorative justice. Take, for instance, the Institute for Peace & Common Ground, based in Kyiv, who provide mediation sessions and educational trainings for staff all across Ukraine in more than a dozen regions, sponsoring programs like Peace Schools, which are mediation programs for teens and young adults run by other NGO's where they learn conflict resolution skills (such as how to deal with bullying) from a trained group of staff in an inclusive, participatory environment, in several regions across Ukraine. And these are just a few examples of the movement in Ukraine today. In addition, several program evaluations and scholarly publications have been conducted on the effectiveness and viability of mediation and restorative justice in Ukraine, which has further inspired this grassroots movement.

Research findings and prospects for further research in this scientific area. This bottom-up approach is the way criminal transgressions were handled for most of humanity's existence, from our ancestors who practiced this form of grassroots justice for millennia, by indigenous people abroad, and by small towns and villages throughout history. We've lost sight of it because we are so immersed in the relatively impersonal, modern, urban environment that surrounds us, one that seems to lack compassion and empathy for others. This is the same kind of impersonal environment we experience when we confront the modern criminal justice system with its emphasis on administrative procedure over the violation of relationships in our community or, more simply, the undue emphasis on *process over people*. Like much of our modern

condition, it is an alienating experience that most of us find to be wholly unsatisfying, even when “justice” is technically served. The offender was caught, and they were punished. But was the victim fully healed? Was the offender genuinely remorseful? Was there any meaningful reconciliation, repair, or restoration for the victim, offender or community? If not, shouldn't we then reconsider our definition of justice in the first place, and begin to ask ourselves how we might do justice better?

Restorative justice offers an answer and a solution. It tells us that justice begins at home, in communities, at the grassroots level, and it suggests we can do justice better by accepting our obligation as a community to deal with crime ourselves, by reconciling, repairing and restoring relationships that are broken every time a crime is committed, and not just handing it over to “the authorities” to deal with.

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**Кеннет Лондра, Федорченко-Кутуєв П., Багінський А., Северинчик О. Відновне правосуддя в Україні: низовий підхід**

У статті розглядається відновне правосуддя – сучасний альтернативний підхід до вирішення конфліктів, спрямований на відновлення справедливості та узгодження потреб потерпілого, злочинця і суспільства в цілому. Відновне правосуддя є альтернативою каральної спрямованості кримінального правосуддя. Виділяються основні причини (фактори) виникнення і розвитку відновного правосуддя, визначається система цінностей, що лежить в основі відновного правосуддя.

Модерн і, отже, модерне суспільство часто зображували як зіткнення двох конфлікуючих – на думку деяких дослідників навіть взаємовиключних – принципів, принципів свободи та дисципліни або суб'єкта та розуму (докладніше див. Кутуєв, 2016 Кутуєв П.В. Трансформації модерну : інституції, ідеї, ідеології : монографія / Кутуєв П. В. – Херсон : Видавничий дім «Гельветика», 2016. – 516 с.).

Модерн серед багатьох інших речей завжди був простором конфлікту та боротьби за визнання. Хоча поняття соціального прогресу та підвищення рівня людства є одними з найбільш суперечливих питань у соціальних науках, у нас є законні підстави стверджувати, що існує принаймні тенденція до більшої поблажливості в людських суспільствах. Заміна справедливості за принципом «око за око» більш гуманними підходами є значним кроком вперед для людського суспільства. Відновне правосуддя зародилося як глобальний рух за зміну підходів до правопорушення та покарання, що передбачає вирішення наслідків злочину безпосередньо сторонами конфлікту та суспільством в цілому, сприяючи ресоціалізації злочинця та зменшуючи кількість кримінальних покарань.

У статті висвітлюються моделі (форми) відновного правосуддя, що склались історично на кшталт програм примирення жертв та правопорушників (відомі як «медіація» чи «посередництво»), кола правосуддя північноамериканських індіанців, сімейні конференції племен маорі Нової Зеландії тощо.

Розглядаються діючі в Україні програми відновного правосуддя на прикладі діяльності громадської організації «Інститут миру та порозуміння» та проекту «Мирна школа», що покликаний сформулювати систему безпечного середовища у шкільній громаді шляхом профілактики насильства та зниження рівня конфліктності в шкільному колективі.

Автори акцентують увагу на необхідності подальшого впровадження програм відновного правосуддя в Україні, як протидії корумпованому офіційному судочинству, максимального залучення до даного процесу громад.

**Ключові слова:** відновне правосуддя, модернізація, медіація, спільнота, конфлікт.

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