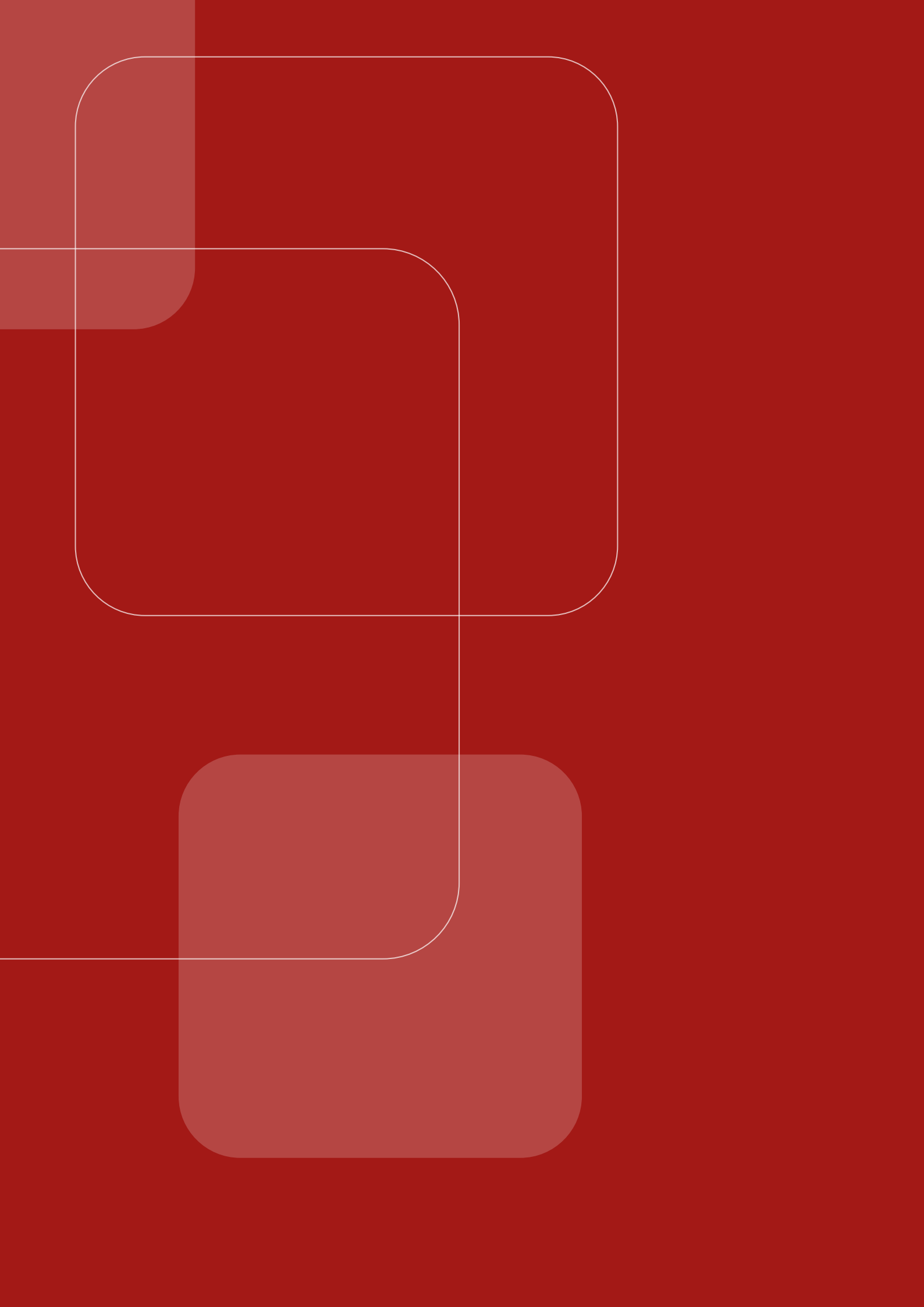


Training Guide on Alternatives to Imprisonment II



Restorative Justice

SERIES FAZENDO JUSTIÇA | COLLECTION ALTERNATIVES TO IMPRISONMENT





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COLLECTION ALTERNATIVES TO IMPRISONMENT

Training
Guide on
Alternatives to
Imprisonment II

**Restorative
Justice**

BRASÍLIA, 2023

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CONTENTS

PREFACE	6
INTRODUCTION	7
1. RESTORATIVE JUSTICE AS A TRANSVERSAL AXIS OF ALTERNATIVES TO IMPRISONMENT POLICIES IN BRAZIL	9
2. RESTORATIVE JUSTICE: WHAT IS IT AND WHEN CAN IT BE USED?	11
3. SPECIFICATIONS OR PRINCIPLES OF A RESTORATIVE PRACTICE	15
4. LEGAL ASPECTS FOR THE APPLICATION OF RESTORATIVE PRACTICES	18
5. RESTORATIVE PRACTICES METHODOLOGIES	22
5.1. Circles	25
5.2. Family group conferencing	27
5.3. Victim-offender-community mediation	28

6. DEVELOPMENT STAGES OF RESTORATIVE PRACTICES IN THE INTEGRATED CENTRES OF ALTERNATIVES TO IMPRISONMENT	29
6.1. Referral and relationship with the Judiciary	29
6.2. People welcoming	30
6.3. Preparation	30
6.4. Pre-meeting	30
6.5. Meeting	32
6.6. Incidents	33
6.7. Construction of the agreement	33
6.8. Referrals	34
6.9. Return of the case to the Judiciary	34
6.10. Follow-up	34
6.11. Returns	35
6.12. Information management	35
6.13. Supervision	35
7. FLOW OF PROCEDURES	36
REFERENCES	39
WORKS ON WHICH THIS GUIDE IS BASED	41

PREFACE

The National Council of Justice (CNJ), in partnership with the Brazilian Ministry of Justice and Public Security (MJSP) and the United Nations Development Program (UNDP Brazil), jointly developed the Programa Fazendo Justiça (Doing Justice Program), which comprises a set of initiatives aimed at addressing systemic challenges related to deprivation of liberty throughout the Criminal and Juvenile Justice in Brazil.

The program aligns with the United Nations Sustainable Development Goals, specifically Goal 16 – Peace, Justice and Strong Institutions, to promote access to justice and strengthen institutions based on social inclusion.

The strategy proposes the creation or improvement of structures and services in the Brazilian Executive and Judiciary Systems, as well as the promotion of professional training, publication of knowledge products, and support in the production of regulations. There are 29 initiatives carried out simultaneously with different stakeholders, focusing on achieving tangible and sustainable results. Among them, the ‘International Articulation and Protection of Human Rights’ initiative seeks to promote the exchange of experiences between Brazil and other countries in the field of public policies on the Criminal and Juvenile Justice.

The program is currently in its third stage, which aims to consolidate the changes made and transfer the knowledge accumulated. The publications bring together the experiences developed and synthesize the knowledge produced during the first three stages, in addition to supporting professional training activities for a broad audience in the field.

Therefore, guides, manuals, researches, and models were created in order to relate technical and normative knowledge to the reality observed in different regions of the country. These resources identified best practices and guidelines, and facilitated the management of incidents.

To share its knowledge and communicate successful experiences to a wider audience, the program translated its main titles into English and Spanish. This strategy also involves promoting events, courses, and training in collaboration with international partners, as well as disseminating these translated knowledge products to spread good practices and inspire social transformation on a global scale.

Rosa Weber

President of the Federal Supreme Court and the National Council of Justice

INTRODUCTION

This guide integrates the didactic material for training and raising awareness of the actors that make up the field of alternatives to imprisonment and is the result of a specialized consultancy by the United Nations Program – UNDP/UN, in partnership with the National Coordination of Alternatives to Imprisonment – CGAP/DEPEN of the Ministry of Justice. It was subsidized by several meetings between experts and public servants who work in the field of the Criminal Justice System in Brazil.

In Guide I, we present the history of the national policy of alternatives to imprisonment based on a critical analysis of incarceration, with conceptual standards of the Management Model in Alternatives to Imprisonment, considering the postulates, principles, and guidelines for alternatives to imprisonment in Brazil and the follow-up of alternatives to imprisonment by the Integrated Center of Alternatives to Imprisonment.

In this Guide II, we present Restorative Justice as a transversal methodology that should permeate the professionals' view in relation to all modalities of alternatives to imprisonment. The establishment of Restorative Justice, despite the lack of legal provision, has been developed in some states of Brazil, and starts to be welcomed to alternatives to imprisonment in a transversal way. The prospect is that it can also find, in the field of alternatives to imprisonment, a fertile ground for its implementation. For this purpose, this Guide presents its essential elements, the main practices, flows, procedures, and work instruments aimed at implementing restorative practices in the Center's operations.

In Guide III, we present the Pre-trial Non-Custodial Measures, indicating the need for the policy of alternatives to imprisonment to constitute qualified teams to work with the detention control hearings, to assist people who have their freedom granted, with or without precautionary measures applied.

In Guide IV, we present the follow-up methodologies to the subsequent modalities of alternatives to imprisonment: plea bargaining for low-level offences, non-custodial penalties, deferred prosecution agreement and suspended sentence. For all these modalities will be presented concepts, procedures of action, workflows and work tools.

The last publication, Guide V, presents the accountability measures for men who commit violence against women, detailing the methodologies, workflows and procedures of the accountability services, such as therapeutic groups, as provided by Maria da Penha Law.

This material systematizes the entire Handbook of Alternatives to Imprisonment Management in a didactic format for the proper understanding and dissemination of alternatives to imprisonment in Brazil, with the key objective of contributing to a minimal, decarcerating, and restorative criminal law intervention in Brazil.

The final result of this work should support the induction role of the National Council of Justice, giving the necessary firmness and alignment, so that the states and civil society are stimulated, guided, and supported for the dissemination and implementation of the policy of alternatives to imprisonment in order to contrast the growing mass incarceration in Brazil.

We wish everyone a good reading! We hope that the references recorded here serve as guidelines for the Public Authorities and also as a beacon for the actions of control and participation of civil society in the processes of formulation, implementation, monitoring, and evaluation of public policies developed in the field of alternatives to imprisonment.



This material was produced from the *Handbook of Alternatives to Imprisonment Management*, published by the National Council of Justice in 2020, now systematized as a Guide for the training and awareness of all institutions and people working in the field of alternatives to imprisonment in Brazil.

In the *Handbook of Alternatives to Imprisonment Management*, you will find more detailed information of each of the topics listed in the guides.

To access the *Handbook of Alternatives to Imprisonment Management* fully, use the QR Code (clickable in the web version).



Restorative justice as a transversal axis of the policy of alternatives to imprisonment in Brazil

Brazil has more than 700 thousand prisoners, being the third country that most incarcerates in the world nowadays, according to data from the National Penitentiary Department (2017). And, as already explained in Guide I, apart from the increase in the application of alternatives to imprisonment in Brazil, this did not contribute to the decrease in incarceration.

On the other hand, extrajudicial practices of restorative justice have been developed, improved, and expanded in recent decades in community initiatives, poorly understood and accepted by the Justice System.

Restorative justice practices, despite barely legal provision, are slowly been accepted in the criminal field, and it is really important that this

movement is done with caution, because the absorption of this instrument by the criminal system must transform it into essence and practice, into an expansive movement to replace penal intervention, respecting the decision-making autonomy of persons involved in a conflict and complying with human rights. The opposite may mean utilitarianism on the part of the State in using such restorative practices to expand more criminal control.

We start from an understanding of the need to consider the readjustment of the State's responses to conflicts and violence, mainly through actions to de-criminalize acts that can and should be regulated in other fields of law. Besides, the State should focus on models of conflict resolution and violence in a consensual manner, based mainly on extrajudicial methods.

Restorative justice practices indicate that social conflicts can and should be resolved outside any criminal instance

Restorative justice practices indicate that social conflicts can and should be resolved outside any criminal instance, with solutions established among those involved. For this purpose, government bodies, the non-punitive justice system or civil society organizations, to curb criminal control and at the same time expand the possibilities of responses to conflicts and violence, must promote programs of this nature.

In this guide we present restorative justice as a transversal axis to the policy of alternatives to imprisonment, in addition to considering the development of restorative programs with the Integrated Centers of Alternatives to Imprisonment, adding an approach that considers methodologies, workflows, work routines and the necessary articulation with the Justice System and partner networks.

When we insert the restorative perspective to the policy of alternatives to imprisonment, all modalities of alternatives to imprisonment must add a restorative approach and move towards the establishment of specific programs of fully restorative practices.

These initiatives of restorative justice programs within the policy of alternatives to imprisonment should also be developed with caution and diligence, especially considering the need for own and specialized team for this purpose.

The transversality of restorative justice is proposed so that the entire policy of alternatives

to imprisonment begins to develop its activities seeking to follow-up the approaches and principles of restorative justice, until the moment when it is possible and appropriate, from a partnership with the Justice System, to develop a specific program of restorative justice.

It is especially recommended the partnership with community institutions that already develop restorative justice programs, in order to enhance such experiences.

Understanding the challenges to the State in the resolution of conflicts and violence, especially since Federal Law n° 9.099/95, and the challenges posed to alternatives to imprisonment, to face incarceration, we affirm the need for non-litigious methods. Therefore we understand the need to accept the principles of restorative justice and add their practices to the policy of alternatives to imprisonment.

With this, we assume the responsibility of looking at alternative interventions maximizing their restorative effectiveness, but aware of the various levels of approach, as advocated by Zehr (2012, p.66) when he presents the level of effectiveness of a method as totally restorative, mostly restorative, partially restorative, potentially restorative, pseudo-restorative.



2

Restorative justice: What is it and when can it be used?

Restorative justice, as established and has been disseminated in Brazil, in the role of concept, philosophy and practice, had its origin during the 1970s and 1980s in the United States and Canada.

After these initial experiences, several others have arisen. From the 1980s, restorative justice was founded, and, within the scope of criminology, it was established from the criticism of the criminal system and the problematization of the role of the victim in the criminal process, relegated to silencing due to the authority granted to the state. For the UN Economic and Social Council, through Resolution 2002/12:



Restorative process

Means any process in which the victim and offender, and, when appropriate, other individuals or community members affected by a crime, actively participate in resolving issues arising from the crime, usually with the assistance of a facilitator.

The restorative justice movement arises from the perception that the traditional way of responding to harmful acts is quite restrictive and does not correspond to the real needs of the parties involved, as well as not considering the effective participation of all people involved in each case.

Restorative justice proposes the expansion of the circle of participation in the resolution of the conflict, involving directly or indirectly affected persons or members of the community, who can contribute to the solution by integrating the trust network or the social network related to the context of the case under analysis.

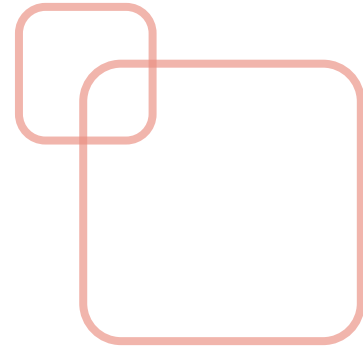
Another important aspect is that restorative justice has a special interest in the needs of victims, who are not being served by the traditional criminal system. Some of these needs are the power to establish, build, and drive the narrative of facts and feelings, the recovery of a sense of

control, and to claim for a repair, with the opportunity to express thoughts and feelings, to make their voices heard, to not be silenced, and to be recognized for their potentialities.

Each individual materializes conflicts based on personal and social values and beliefs, as well as the historical and cultural moment they live. The conflict is materialized mainly through language, not only spoken or written, but also through all the possibilities of expression. Being inscribed in historical times and social contexts, conflicts are necessarily transitory and can be transformed and reframed.

Therefore, it is fully possible and reasonable to promote the transformation of conflicts and the repair of conflicting relationships. In this way, the development of the capacity to transform conflicts should be taken as an instrument of learning within an educational process of citizenship and democracy.





In criminal matters, an offense is not a conflict. An offense is a statement about a probable conduct that is considered a crime. And a crime, according to the Brazilian Criminal Code, is the criminal offense that the law penalizes, that is, it is a quality given to certain conducts. It is a response chosen by the State to deal with situations understood as inappropriate for a particular social group.

A conflict refers to an action or conduct. Even when there are differences in ideas, opinions or beliefs, these can only be considered conflicting from their handling, by the way it is expressed or understood and from the interaction that is established with another person or group.

The same act, in different social groups or historical periods, may not contain any kind of legal obstruction, be regulated by rules of private law or prohibited by criminal law rules. These distinctions are justified due to cultural diversities, but they may also reflect the ability of a group to establish principles of coexistence that dispense formal or criminal controls.

Most social problems, especially those that are defined as illegal by the law, are solved outside any criminal instance. Criminalizing the act and determining a penalty is not the only answer, but one of several possible solutions to deal with social conducts considered unwanted, chosen in a specific historical time.

In the criminal system, conflicts are reduced to practices where the parts are prevented from seeking the roots of the conflict and, in the vast majority of cases, limited to speaking through an interlocutor, in a space where affections and feelings do not fit, where “justice” will be established by a judge through a strange voice, reduced to a sentence that determines two equally passive

poles: a silenced victim and a convicted to whom a sentence is imposed.

In addition, Lola Aniyar De Castro (2005) remarks that Latin American criminal codes give to particular legal interests a certain protection, while maintaining important collective needs without protection. This form of acting characterizes the state’s structural violence by part of the State, which materializes in the types of selectivity established by the criminal system.

One of the benefits of restorative practices is to avoid exacerbating conflicts, revictimization and increase of violence in which people may be involved. It is known that the mere proposition of a criminal lawsuit or even a sentence are incapable, in many cases, to stop conflicts and violence. On the contrary, in many cases state intervention through a criminal process enhances the degree of violence and results in even more serious conduct.

There are many obstacles to ensure access to justice in Brazil. The right to justice does not only mean the formal right to join a lawsuit, but mainly the material right of access to a fair decision, which is not necessarily a result of a lawsuit.

In this sense, restorative justice is a practice developed even before any criminal measures, through community initiatives, but it can also be incorporated from the criminal system in a growing movement for its replacement.

To promote this change in the way of responding to conflicts, it is important to understand the most appropriate type of approach among restorative practices for the specific case, so that they produce satisfactory results for the people involved in each case.

Alternative methods of conflict resolution demonstrate that it is possible to modify the traditional paradigm of justice, promoting measures that avoid the neutralization of the people involved and the expropriation of the conflict by the State.

What we propose is that restorative practices should be accepted as peaceful methods of changing the litigious, hierarchical and arbitrary way in which the criminal justice system has traditionally been established, in order to contribute to the incarceration reduction, resolution of conflicts and violence in Brazil.

For a restorative model, the key players will be the people involved in each case. The State, through its officials, will promote the appropriate scope for people to elaborate, dialogue and transform their divergences, conflicts and rela-

tions, assuring the constitutional rights of all the people involved and also considering the collective interests.

It is also considered, in addition to the main parties, other persons who were not originally and directly involved in the case, but who are invited to restorative practice, such as family members, close people with affection ties, representatives of sectors of the community and the public authority according to each case.

The National Council of Justice (CNJ) took an important step by implementing Resolution 225, of May 31st, 2016, which provides for the National Policy of Restorative Justice within the Judiciary, an instrument that affirms the necessity of paradigm shift and advances indicating the paths to be followed for the implementation and consolidation of Restorative Justice from the Justice System.

In addition to *the Handbook of Alternatives to Imprisonment Management* (2020, CNJ), we also suggest the *Handbook for Circle Facilitators* developed by Kay Pranis (PRANIS, 2009) as a methodological guidance to be followed by the policy of alternatives to imprisonment. This handbook should be considered a constituent part of this Guide for restorative justice initiatives. We also believe that it is essential for the development of restorative practices that the teams access the works presented in the bibliographic reference of this publication.





3

Specifications or principles of a restorative practice

Different authors express several characteristics, such as those presented in CNJ Resolution 225/2016, on Restorative Justice. We resume some of them here, since respecting such assumptions, we seek to ensure the effectiveness of a restorative practice. These principles must be observed in the restorative practices developed by the Justice System and also in the practices developed by the state policies of alternatives to imprisonment, jointly with the Justice System and the Executive through the Integrated Centers of Alternatives to Imprisonment.

Co-responsibility

It presupposes shared responsibility by all people who integrate a restorative practice.

Participation

It corresponds to the importance that all people who are part of a restorative practice have the same condition of participating in the procedure, respected in their manifestations.

Damage repair

It means the quest to restore the damage affected in the conflict. It can be of a material order (such as compensation, repair, devolution, etc.) or emotional (such as active listening about the damage done and apologizing).

Meeting the needs of everyone involved

It requires attention so that all the individuals involved are equally considered in their individualities, autonomy and needs in the face of the case brought to the restorative spherer.

Empowerment

It adds the need for all the people involved to feel equally important, affirming their autonomy to freely express their feelings and vision of the story, in their own way and with the senses they deem necessary. It also presupposes the right to accept or not to participate in a restorative practice, to accept or not the apology or agreement proposed by the other person.



Common Ground

Restorative practice implies the search for a peaceful negotiation and openness of those involved in order to reach a fair and harmonious solution.

Voluntariness

It presupposes the spontaneous participation of all persons, as well as the possibility to interrupt the procedure at any time, being aware of the responsibility for their actions.

Impartiality

It means the attitude that the facilitator must have towards not favoring any of the people. The facilitator must refrain from giving answers or suggesting solutions, which may be interpreted as benefiting someone. Therefore, it is important that facilitators have previous training, so they are provided with communication techniques, ensuring the conduct in an impartial manner.

Confidentiality

It means the protection of the matters dealt within the procedure, considering:

- a) Dialogues conducted at any of the stages of the procedure are considered private and confidential;
- b) Commitment of the parties, facilitators and other persons who may participate, such as support groups and lawyers, to the confidentiality of the matters dealt with;
- c) No fact treated there can serve as justification in subsequent proceedings;
- d) Facilitators or support groups may not be called to testify later in court proceedings regarding the issues presented there, if restorative practice is interrupted.

Interdisciplinarity

It is important to consider the complexity of the problems and the need to address them through convergence, cooperation and the appropriate combination of different views and knowledge, either incomplete or provisional, promoting tolerance of differences and the search for consensus.

Gratuity

Restorative practices that seek to face criminal procedure cannot have financial costs for people, since access to justice is a constitutional right.

Informality

A restorative practice is opposed to the extreme severity of judicial processes, observing the freedom of action and speech of its protagonists and for a consensual style which people seek to relate in favor of a solution to their dilemmas.

Speed

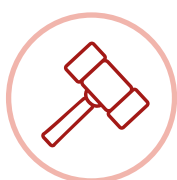
Promoting access to justice within a reasonable timeframe, at the risk of, due to the difficulties inherent in the slowness and extreme bureaucratization of the Justice System, the resolution of the conflict will be hindered or prevented. However, speed should not be considered as an obstacle to restorative practices by requiring a longer time for their development in contrast to judicial procedures considered to be quick, which are usually unable to promote restorative approaches and truly repair conflicts and controversies.

Urbanity

It touches on the need to respect the other in the course of restorative practice, promoting active listening by everyone, the cordiality, and dignity of all the people involved.



Legal aspects for the application of restorative practices



Nowadays there are several national and international instruments that support and seek to disseminate restorative practices instead of the traditional criminal justice system.

Restorative practices can be used before or after the initiation of a criminal procedure. In addition to the openings contained in Federal Law n° 9.099/95, there are now several national and international instruments that support and seek to disseminate restorative practices instead of the traditional criminal justice system.

In the international scope, the UN Resolution 2002/12 stands out and, at the national level, there is the CNJ Resolution 225/2016, which deal with Restorative Justice.



UN Resolution 2002/12

Is an important instrument that seeks to convene Member-States to disseminate restorative justice programs in criminal matters in the development and implementation of this practice in the criminal area. In its sixth article, the Resolution states that restorative justice can be used at any stage of the Criminal Justice System in accordance with national legislation. The resolution presents, in general terms, fundamentals which must be respected when implementing such a program in the criminal field.

Federal Law n° 9.099/95, which addresses Special Civil and Criminal Courts, exposes in its articles 72 and 73 the composition between the parties, and the possibility of using alternative institutes:

Art. 72. At the preliminary hearing, being present the representative of the Public Prosecutor's Office, the perpetrator and the victim and, if possible, the civil guardian, accompanied by their lawyers, the judge will clarify the possibility of a legal remedy and the acceptance of the proposal of immediate application of non-custodial sentence.

Art. 73. Conciliation shall be conducted by the Judge or the conciliator under his or her guidance.

The sole paragraph of Article 74 states that, once the agreement is established, this leads to the waiver of the right of complaint or representation in cases of private or public action subject to representation. In these cases, the jurisdiction is not separated and, if the agreement ceases to be fulfilled at some point, it must be executed in a civil court by the other party. In cases of conditional suspension of proceedings, the law expressly guarantees the implementation of alternative methods, as provided for in Article 89 of Law n° 9.099/95.

Regarding the use of restorative practices in crimes not covered by the law of Special Criminal Courts, experts on the subject have also advocated such possibility.

Despite the obstacles that still exist in Brazilian legislation, it is important to consider the discretionary nature of criminal procedure, the basic principle of restorative justice in the countries that apply it, because this principle ensures, especially to the Public Prosecutor, the right to dispose of the action if she or he considers non-existent the evidence that characterizes criminal materiality or authorship, or if the descriptive action is not considered typical.

It is necessary to ensure that people can choose not to automatically adopt the legal classification of their acts as crimes and start to see them, before that, as annoyances or divergencies capable of being resolved outside the scope of criminal justice (Achutti, p.187, 2014).

The important thing is that the normal course of the criminal procedure shall be suspended so that the restorative method is established and the agreement established between the persons is homologated. It is not up to the judge to apply extra conditionalities or punishments, which would be hurting and invalidating the autonomy granted to the persons in the restorative procedure.

This understanding is provided by the UN Resolution on Restorative Justice, as it was also recently accepted by Resolution 225/16 of the National Council of Justice (CNJ), in addition to being a consensus among the majority of restorative justice experts in Brazil and in the world.



The Justice System should consider the following elements in order to join a restorative justice program developed by the policy of alternatives to imprisonment or by a community initiative:

1

The establishment of restorative justice services must take place outside the judicial environment, in collective spaces, and the referrals must be made from prior partnership with the Justice System. One possibility is that the teams of the Criminal Courts will be responsible for screening, referring to the restorative justice program cases that require such approach.

2

Be guided by UN Resolution 2002/12 and CNJ Resolution 225/2016.

3

In cases where specific restorative justice programs are developed autonomously, a Term of Cooperation must be established, with the determination of the workflows to be followed in terms of referral, service capacity, methodologies, work tools, etc.

4

The referral must be made at the initial stage of the process and the establishment of the restorative justice procedure will only be implemented based on a qualified listening of the people involved by the project teams, respecting the nature of voluntarily accepting the procedure; otherwise, if it is the will of any of the parties, at an early stage or at any stage of the procedure, it may be interrupted to follow the course of the criminal process, without any burden for this decision.

5

Adjustments and/or changes in the agreement established by the persons in the restorative justice procedure can only be made by the Judiciary, exceptionally, if the agreement clearly hurts fundamental human rights and from an effective dialogue with the team that conducted the procedure, so that the discussion on the actual case guides the best solution, respecting the autonomy and ensuring the effective participation of those directly involved in the conflict.



5

Restorative practices methodologies

Restorative practices presuppose the following participations:



Facilitator



Victim



Offender



Community

Facilitator

Being a facilitator is not only focused on holding theories and techniques, but also demands capacity for empathy, sense of balance, non-violent communication, implication, among other qualities that must be perceived and fostered in the capacity building processes. Some elements considered important for the facilitator are: basic notions of human and psychological formation to be minimally self-confident and have access to the meanings of the positions of others, active listening and assertive communication, knowledge and sensitivity to the sociocultural environment of the participants. The facilitator is considered to be one of the most important keys for the procedure to be successful, but he/she can also hinder the experience. Therefore, abdicating the hierarchical superiority is one of the qualities that can determine the success of this person's actions, providing experience and technique to serve the participants in the restorative process.

The restorative practices methodologies are more detailed in the *Handbook of Alternatives to Imprisonment Management*.

We also suggest the *Handbook for Circle Facilitators* developed by Kay Pranis (PRANIS, 2009).

Victim

In order to accept to participate in a restorative practice, the person must feel confident about the method, the facilitators' capacity when conducting the case, the legal and criminal implications, about feeling an active part in the construction of the response, having being his/her voice and feelings respected. The facilitators must understand the imbalances in the relationship between the individuals involved, regarding violence records, cultural differences, and possible insecurities, seeking to prevent the revictimization or the continuity of the cycle of oppression, and here it stands out, in particular, cases of violence against women, elderly people, and sexual offenses, in which it is common, in addition to the explicit violence, a very subtle level of psychological violence, committed through small gestures and glances, that makes it difficult for the facilitator to capture, due to the intimacy of the parties involved. Therefore, for cases in which a history of violence and power imbalance is known, one should evaluate the real possibility of using restorative practices or, at least, seek to build methodological alternatives that exempt the parties from meeting if they claim, in order to equate distances and balance differences, ensuring the safety and comfort of people aiming at the problem solution.

Offender

It is necessary to create a non-adversarial environment, which neither can be a space to perform revictimization or more conflicts or violence. The accountability process is necessary for the offender to participate actively and not passively in the conclusion of the agreement and to take on the possible and necessary reparations without the imposition of a penalty or a decision beyond his/her autonomy. According to Boonen (2011, p. 50), there is a consensus among restorative justice experts that the following conditions are necessary for the offender to integrate a restorative practice:

- a) confronting the act and its consequences, being open to share his/her perspective and welcoming the other;
- b) taking responsibility for the fact;
- c) assuming the consequences of the damage caused;
- d) being open to restoration.

Several studies show that many offenders have been victims of other violence, whether personal or structural/social. This information does not seek to exempt the offender from the responsibility for a conflict or violence, but it cannot also be ignored if it appears in the course of a restorative practice, since many offenders come forward and indeed feel themselves victims. With a restorative practice it is intended to inaugurate a space for these elements to be expressed and dealt with, and each case should be conducted from singular elements.

Community

The participation of the community implies an understanding of the conflicting relations, as well as a purely individual or relational perspective. The participation of the community can take place in restorative practice:

- a) directly, integrating the meetings with the people involved in the case;
- b) indirectly, through the interaction established by the facilitators at times other than the meeting with the people involved in each case.

By community means:

- a) the network of affection (family members, trusted persons) of the persons involved in each case;
- b) representatives of public and/or private institutions.

In order to build a continuous dialogue path capable of ensuring the participation of representatives of public policies and institutions of civil society, it is essential to establish a social network partnership with the restorative justice program.





RESTORATIVE JUSTICE METHODOLOGIES CAN BE:

5.1. Circles:

This format has its origins in aboriginal communities in Canada. Nowadays, it is suitable for a variety of initiatives and projects. The restorative circle is established from some elements that shape its method.

- Participants should sit in a circle;
 - All members of the group also pass an object called a “speech stick” in a circular way, and the person in possession of this object has the speech, thus ensuring that everyone has the right to speak. If the person in possession of the baton does not want to speak, just pass it on;
 - The group begins with the construction of the circle from values that make up the group, such as respect, sincerity,
- listening. The facilitator will be able to make a first dynamic with the stick so that everyone expresses the values they consider important;
- In addition to the people directly involved, there are other trusted people who are also invited to participate, such as family members, public policy professionals relevant for each case, among other institutions and people from the community;
 - The circle is carried out through questions posed by the facilitator, to be expressed individually by the members of the circle from the circular movement of the speech stick. The question is done when the stick reaches the facilitator's hand at the end of each round. The facil-

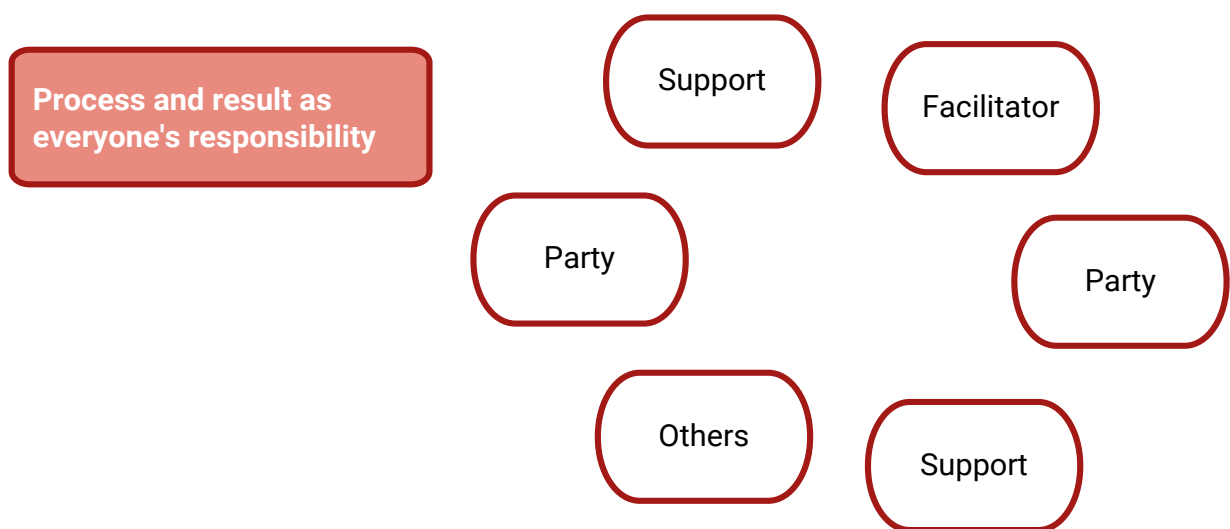


erator is in the circle horizontally, so he/she must also respect the circularity of speech and express himself/herself or ask questions when the stick reaches his/her hands. In each new round the facilitator presents a new question that contributes to the resolution and restoration. According to the need of each circle, the facilitator decides the number of rounds of the speech stick;

- It is common that in each circle there is a facilitator who will develop the circle and a co-facilitator, supporting the facilitator. The co-facilitator can make important notes of the issues presented by the participants, for the elaboration of the agreement;

- In the end, upon agreement, the facilitators must lead the circle to the collective construction of an action plan to repair the damage resulting from the offensive act.

Another important aspect of the circles as restorative practice occurs by aggregating a wider network in the search for solutions. Without diminishing the responsibility of the people directly involved, it is also understood that conflicts are embedded in social contexts and this element cannot be disregarded. Thus, we do not ignore the socio-political aspects of conflicts and seek to build broader networks of accountability. When integrating the community, the response building to each case can be more assertive, mainly seeking to promote access to rights as a condition for access to justice.

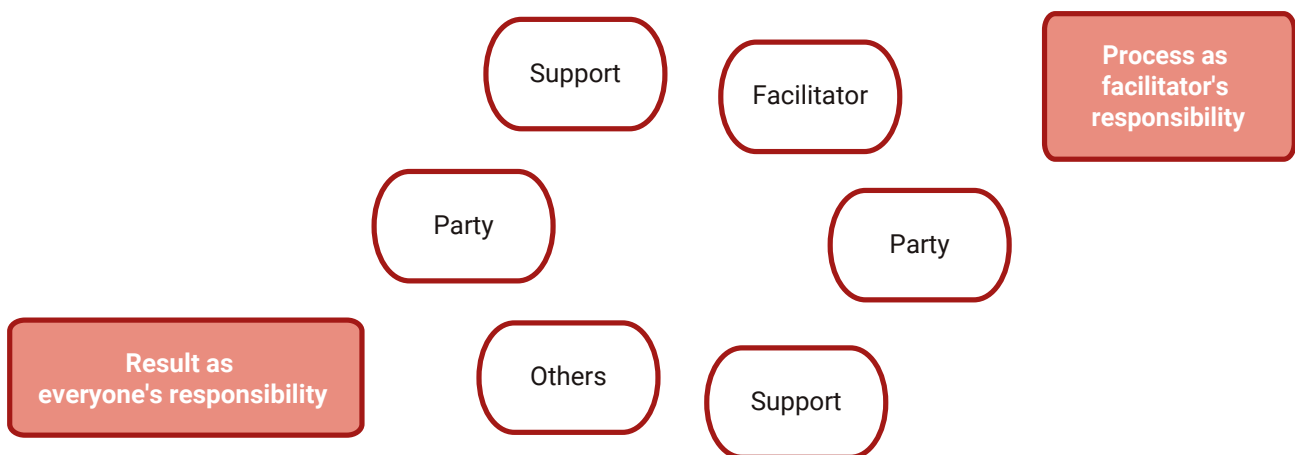


Design of a restorative circle (CDHEP, 2014, p. 41)

5.2. Family group conferencing

In this format, there is the participation of family members or other significant persons for the parties directly involved. This model seeks to build a support network for the offender as a means for him/her to assume the responsibility with the victim, family members, people of his/her affective social bond, also making it possible to build strategies that respond to his/her social needs. Regarding the participation of the victim, it is important to emphasize that it can also take place in a non-face-to-face manner, if this is a condition and request. Their participation may be signed by representation, by letter or by videoconferencing. However, it reaffirms the need for the preparatory phase with each party to be carried out, enabling the facilitators to adequately understand the issues.

Community members may also be invited to participate in this method. The leadership of the groups is built by the facilitators based on the needs of each case, and there is no pattern as structured as in restorative circles. There is progress common to the groups, but each one receives the necessary adaptations to the needs of the case. One of the common elements to most groups is holding a meeting between offender and his/her family to discuss the case and build a proposal that must be presented to the victim. As a result of the group, the facilitators must prepare with the parties a plan that contains reparation and accountability, based on the agreement of all and the real capacity of compliance by the offender.



Design of a conference (CDHEP, 2014, pg 40)

5.3. Victim-offender-community mediation (VOM)



But it is essential that pre-meetings are held with each party, giving the mediators conditions to properly understand the issues and be able to conduct mediation.

The victim-offender mediation can be performed with or without the presence of family members or community, according to the peculiar conditions in each case and the methodology used. The face-to-face meeting between the persons involved may also be replaced by individual meetings in cases demanded mainly by the victim, if this is a condition and request. But it is essential that pre-meetings with each party are held, enabling mediators to adequately understand the issues and be able to conduct mediation.

The methodology of mediation is more open than the circle and does not necessarily have the presence of family members, as in the family circles conferencing, but it is also a procedure that follows the specifications and principles of restorative justice presented throughout this document.

Through mediation, the restoration and repair of conflicts and controversies are sought, through conflict mediation techniques in a safe environment and with the participation of a third party considered a mediator, who should seek to provide support before and during the meeting, facilitating dialogue between people and potentiating the restorative effects of the process.



6

Phases of development of restorative practices in the Integrated Centers of Alternatives to Imprisonment

In administrative divisions where there is already an Integrated Center of Alternatives to Imprisonment, bounded to the state executing agency of the policy of alternatives to imprisonment, the restorative justice project may compose the Center, preferably with its own team and following its own methodology, or if there is already a restorative justice project in the administrative division, the Center may carry out a partnership to attend to cases, based on a joint understanding with the Justice System. The development of a restorative justice program with the Integrated Center for Alternatives to Imprisonment consists of the following methodological actions:

6.1. Referral and relationship with the Judiciary

The policy of alternatives to imprisonment in each state presupposes the prior establishment of a Term of Cooperation with the Justice System, indicating which modalities of alternatives to imprisonment will be forwarded to the Center.

From the Term of Cooperation, the program will have to build appropriate workflows with the Judiciary. One must also seek to hold meetings with reasonable periodicity to discuss workflows and cases, inviting other actors of the Justice

System and Partner Network. The Courts, the program, and the institutions of the network must indicate a technician of each agency to facilitate dialogue and procedures.

Cases pointed for restorative justice should be referred as follows:

- Adequate screening of cases by the Judiciary by qualified staff in restorative techniques;
- Appropriate guidance from the parties regarding the restorative justice program, rights, and hours of service;
- Copy of the minutes of the hearings to be delivered to the program every two weeks;
- Periodic report to the Court informing about the development of cases;
- Criminal procedure shall be suspended until a final decision with the restorative justice program.

6.2. Welcoming people to the program

The person arrives in the program from referral through the Justice System. At the first attendance, the person will be welcomed individually, will be duly informed about the program, and will schedule the date for the first pre-meeting with the facilitators.

The person must be informed that, from her/his attendance, the other party will be invited and, also with him/her, there will be the pre-meetings, from which it is intended to reach the agreement between the persons involved in each case.

Because it is a first contact, the person can arrive with a certain resistance or distrust. Since the first meeting, an effective space for interaction and listening should be established, seeking to build an integral vision of the person, such as: emotional state, social conditions, and interpersonal and family relations. These aspects contribute to build a relationship of trust.

6.3. Preparation

Facilitators contact the case and build the procedure from the following points:

- Understanding the preliminary data that reached the team through judicial referral;
- Becoming aware of who are the people involved in each case;
- Checking if any relevant information is missing before contacting the people involved in each case;
- Checking if there is any impediment to follow the procedure (legal, physical, material, moral, psychic, etc.);
- Establishing the identification and individualization of the ones involved (name, address, etc.);
- Inviting the people, individually, to a private interview, to be done via mail or phone call (if the person has not yet presented itself at the Center), already briefly telling that it is an invitation to a practice of restorative justice.

6.4. Pre-meeting

The pre-meeting phase takes place from private meetings with the people directly involved in each case. This phase values:

- Holding one, or as many meetings as necessary, until the facilitators realize the appropriate time to hold the meeting between the people;
- Being careful in the first meeting that will be held between the people involved, informing about the voluntariness of the procedure, since inadequate guidance on the conduct of the case and on the participation of the people may result in demotivation;
- Prior preparation (of the facilitator, the place, and the invited people);
- Guarantee of the establishment of a pleasant and reliable atmosphere;
- Adequate communication by facilitators (language, tone, clarity, appropriate questions, receptivity and listening);
- A correct presentation of the case:
 - how the case got to the program;
 - adequate presentation of the restorative practice that will be developed (stages, people involved, time of the procedure);
 - participation voluntariness;
 - scope of the agreement and its legal effects;
- Controlling the method by the facilitators and building a relationship of trust (which must be established with each of the people in relation to the method);
- Obtaining information that guides the facilitators in the correct conduct of the restorative procedure (relationship of the other party involved in the case, their expectations, feelings, their attitude towards what has happened, how it is situated and what level of responsibility they are willing to assume, what they think is the right reparation for the conflict or violence);
- Verification with each person the need and desire for other people of their support group (family, friends, public policy agents) to be invited to participate in the case;
- Dialogue about the expectations of each person.

After the preparation meeting(s) with each of the persons involved, the following elements should be considered to verify whether it is possible to continue with the restorative practice:

- Free will of participation of everyone involved;
- If any of the ones involved want to meet, and what would be the opportunity and conditions for this;
- If the person expresses regret or the will/possibility to take responsibility, as well as to repair the damage caused;
- Whether both parties are willing to listen to each other and express their views;
- Ability to provide alternatives and proposals to overcome controversies;
- Absence of any impediment (legal, physical, material, moral, psychic, etc.)

Participation of lawyers

In restorative justice, a paradigm shift is proposed, both to the people involved in the conflict and to lawyers who may participate in the proceedings. In these methods, the people directly involved in the case shall create the solution, with active listening and voice for this, and not represented by third parties. Thus, in restorative practices the participation of lawyers is dispensable, since the facilitators, provided with impartiality and restorative justice techniques, have the responsibility for conducting the procedure, especially considering the necessary active listening of the parties.

6.5. Meeting

This phase promotes the meeting of the people involved in the case. One or more can be done, as many as needed. The meetings are developed from the specificities of the type of restorative practice adopted, considering:

- **Circles**
- **Family group conferencing**
- **Victim-offender-community mediation (VOM)**

It is suggested that the following elements are observed, especially in the early stages of restorative practices:



a

Presentation of the people involved

- The facilitators;
- The ones involved in the case;
- The support groups.

b

Presentation of the practice adopted

- Its stages, characteristics, principles and range, and its legal consequences;
- The confidentiality pact and the behavior agreements during the procedure course (respect for the other's speech, active listening, avoiding aggression, not using coarse words, among other agreements that have been or will be agreed or related to the method to be developed).

Exploring the problem

- Through questions asked to each of the persons involved, the facilitator begins to build a common narrative about the case, always trying to sustain his/her speech from what it is heard. The facilitator should seek to rework the discourses eliminating the negative connotations and stressing the positive aspects that can serve to build the solution of the conflict, through communicational and restorative techniques, so that people see possibilities of overcoming obstacles and building common solutions;
- Through a restorative practice, the layers of the conflict are reduced and reveal previous causes that in many cases do not appear in the first report or in the criminal investigation, and these elements cannot be disregarded;
- From the elaboration of the problem, the facilitators must follow the specificities of the restorative practice adopted, with its own dynamics and procedures;
- From the elaboration of the problem, the facilitators should collaborate to achieve solutions and agreement;
- Work schedule: in many cases it is impossible to reach an agreement on the first date. So an agenda is set for the next meeting(s). If necessary, further private meetings are also held.

6.6. Incidents

An incident is any situation that interferes with the regular course of the procedure. The most common is the non-attendance of one of the people on a previously scheduled date. Faced with each incident, the team must look into reasons, justifications, and evaluate the procedures to be taken in order to build the best solution.

6.7. Working towards an agreement

When the facilitator realizes that there is a common narrative and the parties are open to work towards an agreement, he/she should ask the people directly involved in each case to make their proposals of agreement for a possible solution to the problem. Each party must speak, first listening to the victim. The speech of both is important to characterize everyone's position in building the solution.

The facilitator may not rule out or disapprove a request for an agreement made by either party. If you notice that it is a request that is unable to create consensus or that may harm the rights of the other person, or that it is impossible for the other person to comply, you should, always using questions, request clarification, seeking to highlight points of consensus until an agreement can be reached.

The individual interviews will have been important to know the socio-economic, family and housing conditions of the parties, which gives the facilitator conditions to understand the construction of realistic and possible agreements.

The facilitator must read the agreement and ask if it pleases both parties. It may happen that they ask for the appointment of a last meeting for the signature, which must be respected by the facilitator.

The facilitator must write the final agreement, with conditions and deadlines. This document must contain:

- the place and date(s) of realization;
- every participants' information, including facilitators;
- briefly, the principles governing the procedure;
- all the points clearly and precisely agreed, guarantees and consequences against non-compliance;
- a way of following-up of the meeting, including subsequent appointment(s) and/or telephone contacts with the parties;
- the signature of all those who participated in the procedure, including support groups and facilitators.

6.8. Referrals

Referrals are made by the team according to the demands presented by the people involved before, during or from the agreements signed in the restorative practice. It should be noted that for the referral to the network or in cases where the need for treatment is found, these will always be voluntarily.

A large part of the public arriving at the programs present social vulnerabilities, and referrals to the partner network aims to minimize these vulnerabilities.

After any referral to inclusion services in the network, the team must follow the progress: whether or not the person has accessed the service, what the reasons for doing so or refused to do so, as well as inquire about how he/she was welcomed.

6.9. The return of the case to the Judiciary

The document of the outcome of the proceedings, including the agreement or non-agreement, must be forwarded to the source of the criminal procedure, for the:

- Approval of the agreement by the Judiciary;
- Resumption of the criminal procedure, if necessary, in case of non-agreement.

If the facilitators consider important, a face-to-face meeting can be arranged with the Judiciary to discuss the case or specify the agreement or non-agreement.

6.10. Follow-up

As a guarantee of compliance with the agreement concluded, one should:

- Attach the agreement to the court case, whenever cases are referred by the Judiciary;

- Establish telephone contact or contact with the parties separately to verify compliance with the agreement;
- In cases of partial or non-compliance, a new meeting can be held between the parties or separately, to reaffirm the agreement and reestablish the deadline, if possible;
- In the event of non-compliance with the agreement, if the case comes from the Justice System, the information should be attached in the case, and the parties should be advised about the possible consequences of non-compliance, so that appropriate measures can be taken, such as follow the criminal process; execute the debt (if there was a specific payment), among others.

6.11. People’s return to the program

The returns to the program will be made from the step-by-step restorative practice adopted, with appointment of meetings established in a consensual manner, and according to the development of each case.

6.12. Information Management

The documents of each case must be properly filed, ensuring confidentiality, and the proper management of information.

6.13. Supervision

The program should be evaluated on an ongoing basis, if possible, with external consulting. This supervision should consider.

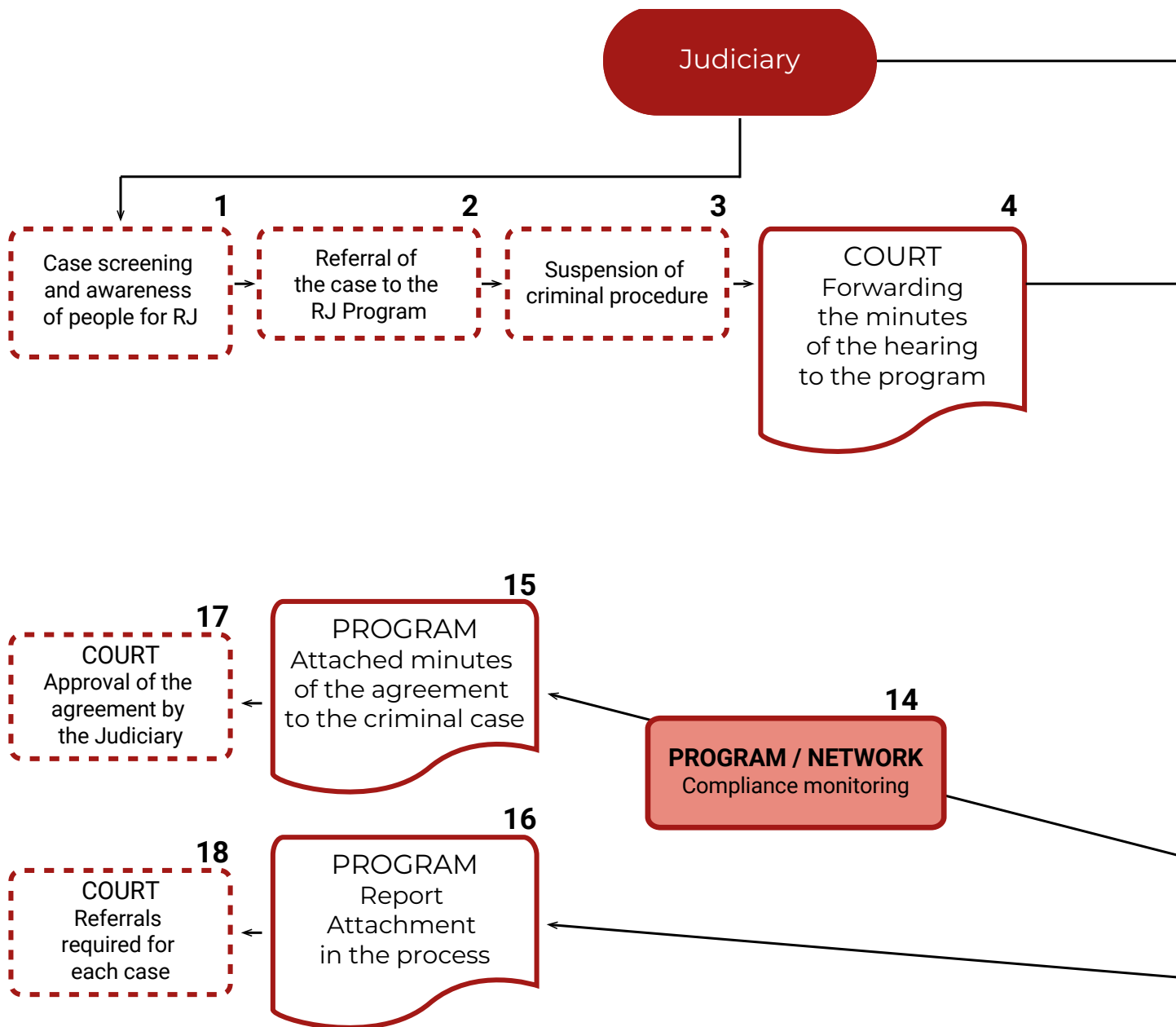
- continuing training of facilitators;
- case studies;
- monitoring the quality of the services provided;
- continued evaluation of the project;
- methodological supervision and adequacy;
- supervision and adequacy of workflows and relationship with the Justice System;
- supervision and adequacy of workflows with the network partner to the project.

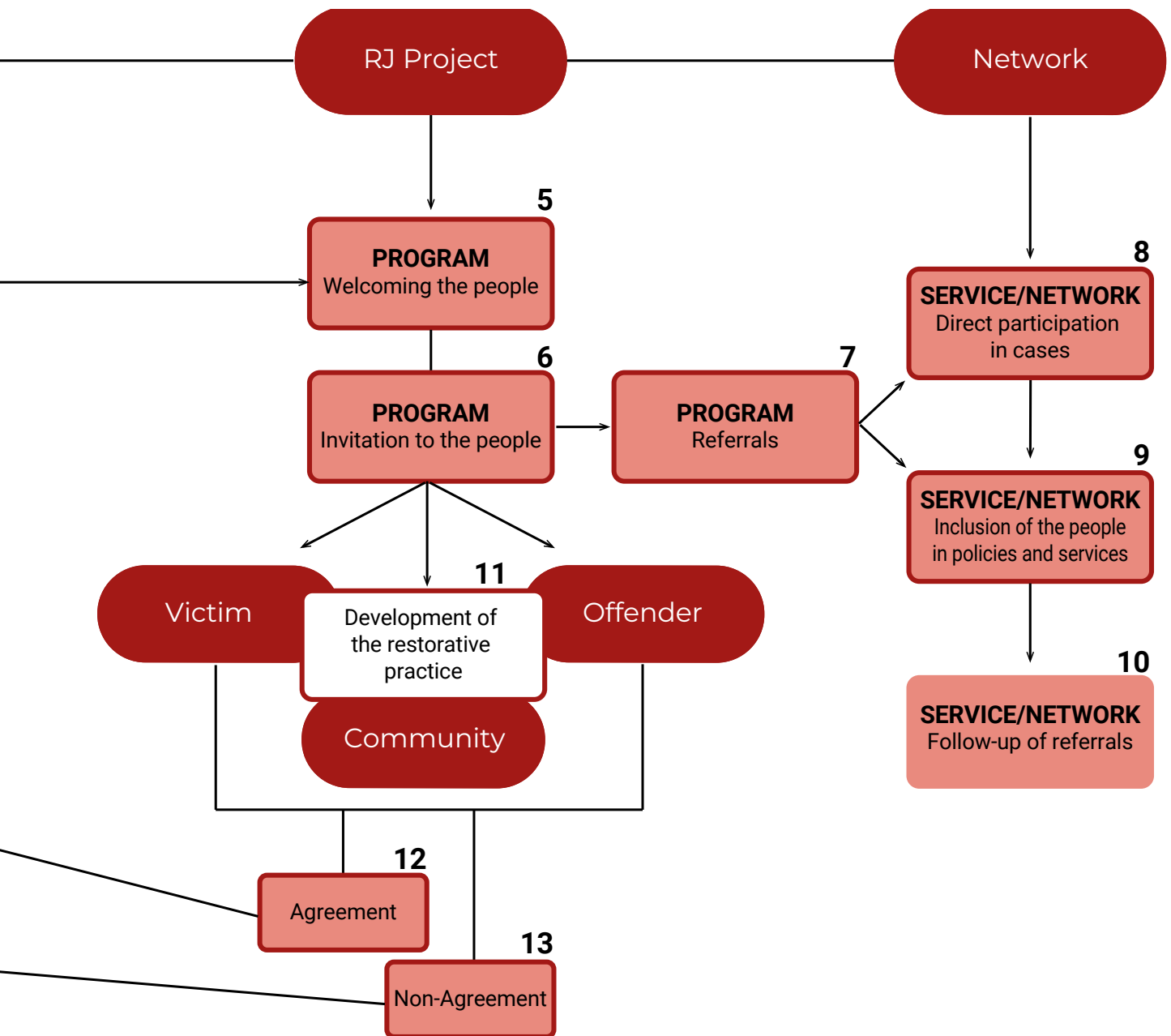
In cases that do not reach an agreement, the final report to be forwarded to the Judiciary should contain only the data of the participants and the information that the procedure was initiated without an agreement being reached. The document must be concise, and without under any circumstances it should set out what was discussed or the reasons why no agreement was reached.



The detail of each of the procedures highlighted in this guide, as well as the working instruments (forms, terms of cooperation, tokens, etc.) for use by the team are fully published in the *Handbook of Alternatives to Imprisonment Management*.

7. PROCEDURAL FLOW





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- Guia de Formação em Alternativas Penais II – Justiça Restaurativa (English and Spanish translation)
- Guia de Formação em Alternativas Penais III – Medidas Cautelares Diversas da Prisão (English and Spanish translation)
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- Guia de Formação em Alternativas Penais V - Medidas Protetivas de Urgência e demais ações de Responsabilização para Homens Autores de Violências Contra as Mulheres (English and Spanish translation)
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- Manual de Proteção Social na Audiência de Custódia: Parâmetros para o Serviço de Atendimento à Pessoa Custodiada (executive summaries in Portuguese / English / Spanish)
- Manual de Prevenção e Combate à Tortura e Maus Tratos na Audiência de Custódia (executive summaries in Portuguese / English / Spanish)
- Manual sobre Algemas e outros Instrumentos de Contenção em Audiências Judiciais: Orientações práticas para implementação da Súmula Vinculante n. 11 do STF pela magistratura e Tribunais (Handbook on Handcuffs and Other Instruments of Restraint in Court Hearings) (executive summaries in Portuguese / English / Spanish)
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- Relatório de Monitoramento da Covid-19 e da Recomendação 62/CNJ nos Sistemas Penitenciário e de Medidas Socioeducativas II
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