

**RESTORATIVE JUSTICE FOR YOUNG OFFENDERS:  
AN ANALYSIS OF THE FRENCH CIRCULAR  
CONFRONTING A EUROPEAN AND NATIONAL LEGAL PERSPECTIVE**

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**Abstract:** This article is a critical analysis of the new French circular of the 15 March 2017 ('the 2017 Circular'), which deals with the implementation of restorative justice in France especially in the field of juvenile justice.<sup>1</sup> The analysis of 'the 2017 Circular' is made in comparison with the background of the European Directive on Juvenile Justice and the international literature concerning criminological processes in restorative justice (more precisely the principles of restorative justice). This article will demonstrate that restorative justice and the philosophy it is based on (restorative justice principles) are in line with the European Directive 2016/800, which deals with child participation in juvenile justice and child-friendly justice.<sup>2</sup> However, this European Directive is not mentioned in the French circular. Not mentioning it could be interpreted as a way to make explicit the importance of the welfare model in juvenile justice in relation to the possible ways for a juvenile to participate actively in justice through restorative justice. Then, this article will undertake a critical analysis to identify the gaps between the philosophical principles on which restorative justice is founded and their implementation in the French legal framework and the circular previously mentioned. It will also propose some clarifications in the use of legal terms to better conform to the philosophy and the processes of restorative justice.

### A. INTRODUCTION

This article seeks to provide an analysis of the circular of the 15 March 2017 relating to the implementation of restorative justice measures in France ('the 2017 Circular').<sup>3</sup> This circular was born in the context of an international and social movement about restorative justice. Its passing is a consequence of interrogations from legal practitioners and professionals to better understand the restorative justice processes and the effects of such a process on judicial procedure. Its passing is also an answer to the need for further information about its legal and practical implementation after the establishment of a general legal framework by the law of 15

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<sup>1</sup> *Circulaire du 15 mars 2017 relative à la mise en oeuvre de la justice restaurative applicable immédiatement suite aux articles 10-1 et 707 issus des articles 18 et 24 de la loi n°2014-896 du 15 août 2014*, French circular 15 March 2017 relating to the implementation of restorative justice immediately applicable to the article 10-1 and 707 penal procedure code from the articles 18 and 24 of the French statute n°2014-896 passed on 15 August 2014 ('the 2017 Circular').

<sup>2</sup> Directive (EU) 2016/800 of the European parliament and of the council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1.

<sup>3</sup> The 2017 Circular (n 1).

August 2014 relating to the individualisation of penalties and the reinforcement of the effectiveness of penal sanctions.<sup>4</sup>

The modern restorative justice movement begins in the criminal and juvenile justice arenas. Restorative justice can take place in the criminal justice system. It is a voluntary process and ‘a way of responding to criminal behavior by balancing the needs of the community, the victims and the offenders’.<sup>5</sup> There are different definitions of restorative justice. Tony Marshall considers ‘Restorative justice is a process whereby all parties with a stake in a specific offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future’.<sup>6</sup> Howard Zehr explains ‘Restorative justice is a process to involve to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible’.<sup>7</sup>

This article analysing the French legal circular relies on Howard Zehr’s definition which contributes, on the one hand, to presenting the five key principles and the philosophy of restorative justice, and on the other hand, to observing the differences and common points between restorative justice theory and its legal and practical implementation in a national framework.

Firstly, an analysis is performed on the European legal framework (section B), which includes the Directive 2016/800 of the European Parliament and of the Council on 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (‘the European Directive’). In the discussion of the 2017 Circular, a general context about the restorative justice movement is presented in particular through the international legal framework. The analysis highlights that the 2017 Circular omits the European Directive, although this could have been useful to understand in which context restorative justice emerges<sup>8</sup>.

Secondly, the analysis of the 2017 Circular will be carried out in the light of the academic literature concerning restorative justice and its processes. It will compare the

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<sup>4</sup> *Loi n° 2014-896 du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales*, JORF n°0189 du 17 août 2014 page 13647, French statute No. 2014-896, passed on 15 August 2014 relating to the individualisation of penalties and the reinforcement of the effectiveness of penal sanctions (‘the 2014 law’).

<sup>5</sup> United Nations, Office on Drugs and Crime, *Handbook on restorative justice programmes* (Criminal Justice Handbook Series 2006) 6  
<[https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf)> accessed 14 February 2018.

<sup>6</sup> Tony Marshall, ‘The Evolution of Restorative Justice in Britain’ (1996) 4 *European Journal on Criminal Policy and Research* 21.

<sup>7</sup> Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002) 37.

<sup>8</sup> The 2017 Circular (n 1) 3-4.

philosophy, the principles and goals that restorative justice implies and the extent to which they are reflected in the 2017 Circular and more particularly in the French judicial procedure concerning the field of young offenders (minors).<sup>9</sup> The analysis explains that the use of specific legal terms in the French circular are not precise enough to be as close as possible to the principles and the philosophy of restorative justice. Therefore, it becomes clear that standardising some of the notions in the drafting of the French circular, in particular in some paragraphs which may give rise to doubt when they deal with offences and their recognition by the minor ‘author’, is strongly needed.

Then, in section C, the general analysis of the French circular tries to expose the gaps between the development of the principles of restorative justice, which is rooted in the international literature, and their implementation in the context of French judicial proceedings and more particularly in the field of juveniles. Also, observations will be issued on the practical implementation of restorative justice measures with young offenders (section D). Considering all the points listed above, it seems that restorative justice measures disturb or rather call into question the roles of each person in responding to the criminal offence. We must certainly not forget that criminal and restorative justice are not antagonistic but complementary, since the first is concerned with the restoration of the social order and the second with re-establishing social harmony.

## **B. THE EUROPEAN DIRECTIVE’S OMISSION FROM THE FRENCH CIRCULAR**

The analysis of the circular identifies, in the presentation of the European legal context about the implementation of restorative justice for offender and victims, the omission of any reference to the European Directive.

On 15 August 2014 the penal law related to the individualisation of penalties and the reinforcement of the effectiveness of penal sanction<sup>10</sup> introduced ‘restorative justice measures’ in the Code of Criminal Procedure.<sup>11</sup> Nearly three years later, the 2017 Circular, concerning

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<sup>9</sup> Young people under the age of 18. In the juvenile justice which interest the development of restorative justice, a juvenile can be between approximately 10 to 18 years old. It also depends on the level of maturity.

<sup>10</sup> The 2014 law (n 4). Throughout the article, quotations taken from the circular will be translated into the body of the text and given in their original version as a note.

<sup>11</sup> *Loi n° 2014-896 du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales*; Art. 10-1 Code de procédure pénale (CPP), art. 10-2 CPP and 707 CPP; *Circulaire du 15 mars 2017 relative à la mise en oeuvre de la justice restaurative applicable immédiatement suite aux articles 10-1 et 707 issus des articles 18 et 24 de la loi n°2014-896 du 15 aout 2014*, French statute No. 2014-896, passed on 15 August 2014 relating to the individualisation of penalties and the reinforcement of the effectiveness of penal sanction; arts 10-1 Code of criminal procedure (CCP), arts 10-2 CCP and 707 CCP; French circular 15 March

the implementation of these ‘ad hoc’ measures at all stages of the judicial procedure, came into force. The aims of the circular are to explain and develop how a general penal text introduced by the 2014 law can be applied in professional practices (magistrate, attorney and social worker). In this case, the 2017 Circular explains how to introduce and apply restorative justice measures in the criminal justice system. In the content of the 2017 Circular, the international and European legal framework about implementation and references about restorative justice are exposed. This perspective explains some parallels with the Havana rules,<sup>12</sup> the UN Convention on the Rights of the Child and the European Directive about victims and their participation in restorative justice.<sup>13</sup> Furthermore, the legal context and the main idea it refers to (children’s rights within criminal justice and alternative (non-judicial) proceeding) demonstrate how implementing restorative justice in criminal justice is important, especially in the field of young offenders. Restorative justice in criminal proceedings can allow for juveniles to maintain contact with parents, family, to respect their private life, to help them and avoid measures which could lead to a break with the family or their home environment (detention).

Restorative justice is growing in Europe. Although in the 2017 Circular the European legal context is presented in general terms, the European Directive ‘on the procedural safeguards for children who are suspects or accused persons in criminal proceedings’ (‘the European Directive’) is not mentioned.<sup>14</sup> This omission is surprising.

The European Directive addresses children’s rights in the context of procedures in which they are suspects and the possibility for children’s participation in those procedures. It refers to all the ways that permit a child to participate actively and effectively in a process in

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2017 relating to the implementation of restorative justice immediately applicable to the article 10-1 and 707 penal procedure code from the arts 18 and 24 of the French statute n°2014-896, passed on 15 August 2014.

<sup>12</sup> The Havana rules contain guidelines and minimum standards for the deprivation of liberty, relevant not only to juvenile offenders but also children who are under protection, concern placements in open educational institutions and closed detention center. The United Nations has played a leading role in the development of standards to clarify and enhance the position of children in juvenile justice systems. The Havana rules are ‘soft-law’ instruments and are not legally binding. See United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) UNGA Res 45/113 (14 December 1990) *UN Doc A/RES/45/113*.

<sup>13</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 relating to restorative justice and the rights according to the victims, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57; ECOSOC Res 1999/26 (28 July 1999) UN Doc E/1999/INF/2Add.2.; ECOSOC Res 2000/14 (27 July 2000) UN Doc E/2000/INF/2/Add.2.; ECOSOC Res 2002/12 (24 July 2002) UN Doc E/2002/INF2/Add.2.; ECOSOC Res 2016/17 (26 July 2016) UN Doc E/RES/2016/17; Directive 2012/29/UE of the European parliament and of the council of 25 October 2012 relating restorative justice and the rights according to the victims [2012] OJ L315; ECOSOC Res 2016/17 (26 July 2016) UN Doc E/RES/2016/17.

<sup>14</sup> Directive 2016/800/UE of the European parliament and of the council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1 (‘The European Directive’).

which s/he can be interested: the right to be informed about his/her rights; the right to participate actively in, and to be informed about, the judicial procedure; and the right to be heard, to be assisted, and to be supported. Indeed, it refers more broadly to ‘child-friendly justice’ which is a justice approach that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, focused on respecting the needs and rights of the child – including the right to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.<sup>15</sup> All these rights are also present in the process of restorative justice and can be developed through the process of restorative justice. Links can be made between the European Directive and the 2017 Circular about restorative justice. Mentioning the European Directive in the French circular could also contribute to reinforcing children’s rights and in this sense promote diversion and alternative measures to detention.

By encouraging participation in and understanding of the proceedings, restorative justice allows for offenders to participate actively in juvenile justice and to increase their belief in the justice institution. Although references to restorative justice are watered-down and mentioned *stricto sensu* only once, it can be seen that the European Directive emphasises and highlights the opportunities available to juvenile offenders or juvenile suspects who are the subject of judicial proceedings to know their right to fully participate in a criminal procedure.

Like the 2017 Circular, the European Directive contributes, in a certain proportion, to the development and implementation of restorative justice in judicial proceedings involving minors. So, it will be in the light of the European Directive that the 2017 Circular will be analysed.

Thus, from a general point of view, the European Directive concerns the improvement of juvenile justice in Europe and insists that procedural safeguards ensuring children’s rights are respected, especially when it comes to their effective participation in decisions affecting them during criminal proceedings. Since it addresses the same issues, the various articles mentioned from the European Directive should be relied on in interpreting/implementing the law of 15 August 2014 and the circular of 15 March 2017 concerning restorative justice.

Firstly, the articles from the European Directive concerning access to the rights of minors in all procedures interesting them, including allowing them to appear in person, and participate in a trial addressed to them should be relied on when interpreting the French Law

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<sup>15</sup> Council of Europe programme, *Building a Europe for and with children – Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Council of Europe Publishing October 2011) 51.

and Circular. Complementary to judicial process, restorative justice is a process permitting for offenders and victims to participate actively in the ‘resolution’ of a conflict (offense) in which they are involved.<sup>16</sup> Restorative justice is a voluntary process for its participants: offenders, victims and community can be involved in if they want to be, they are not obliged to participate in. The right for children to be heard, to be informed about their rights, about the judicial process and the ways to participate in it can be linked with the process of restorative justice. It can be observed in this provision: on the one hand, as soon as the complaint is lodged, the information necessary to be able to participate in a restorative justice measure is given to the suspect offender and the victim.<sup>17</sup> Thus, while the EU Directive is not inherently focused on restorative justice, when coupled with the French criminal code on this matter, it can have an effect which is consistent with and/or supports restorative justice. On the other hand, restorative justice measures give to the persons concerned by an offence, the community, the author and the victim the opportunity to ‘participate actively in resolving the difficulties resulting from the criminal offence including the reparation and the compensation for the damages of any kind resulting from its commission’.<sup>18</sup> Also, within the framework of the same European directive, the use of deprivation of liberty and, in particular, detention of children at any stage of the proceedings should be considered as a last resort because of the potential risks and consequences on the physical, mental and social development of the children. However, if they are detained, Member States shall take appropriate measures to ‘ensure access to programmes that foster their development and their reintegration into society’.<sup>19</sup> Although the view of detention as a last resort is a general requirement, restorative justice can contribute to complying with it.

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<sup>16</sup> The European Directive (n 14) art 16: ‘Member States shall ensure that children have the right to be present at their trial and shall take all necessary measures to enable them to participate effectively in the trial, including by giving them the opportunity to be heard and to express their views. Member States shall ensure that children who were not present at their trial have the right to a new trial or to another legal remedy, in accordance with, and under the conditions set out in Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings OJ L65/1, art 6.

<sup>17</sup> *Loi n° 2014-896 du 15 août 2014 relative à l’individualisation des peines et renforçant l’efficacité des sanctions pénales; art 707 Code de procédure pénale (CPP) – French statute No. 2014-896, passed on 15 August 2014 relating to the individualisation of penalties and the reinforcement of the effectiveness of penal sanction; art. 707 CCP 4.*

<sup>18</sup> *Art. 10-1 Code de procédure pénale (CPP) ‘de participer activement à la résolution des difficultés résultant de l’infraction, et notamment à la réparation des préjudices de toute nature résultant de sa commission’.* (Art. 10-1 Code of criminal procedure (CCP) to take an active part in the resolution of the difficulties resulting from the offense, and in particular the reparation for damages of any kind resulting from its commission).

<sup>19</sup> The European Directive (n 14) art 12: ‘*Specific treatment in the case of deprivation of liberty*’.

Restorative justice measures can be a way also to avoid detention for juveniles and can be implemented at all stages of judicial proceedings, including when a sentence is enforced. For example, among the different measures of restorative justice, there are circles of support and responsibility (CSR), or circles of accompaniment and resources (CAR)<sup>20</sup>, which enable the mobilisation of two circles around the offender at the end of a sentence or before his/her release.<sup>21</sup> In case of youngsters, it could be aimed at turning them into emancipated minors or young adults. These circles include members of the community (volunteers and professionals) and coordinators who help to establish links between members of the community's circle and professionals. Such circles allow for the negative effects of repeated breaks caused by placements or deprivation of liberty to be avoided and/or limited. The offender feels less marginalised and more supported by people who belong to the circles and which s/he feels part of.<sup>22</sup> This system adapts its forms and its intensity according to the evaluation of the evolving needs of the children and accompanies her/him toward gradually getting out of exclusion to facilitate her/his reintegration into society.<sup>23</sup>

Lastly, Article 20 of the European Directive refers to the concept of 'restorative justice' and the necessary training of professionals and socio-judicial actors in this field to ensure that children, when they want to be involved in a proceeding, have full knowledge of the mechanisms in which they can participate.

Under the French Law, children with capacity are entitled to be heard, which implies that they may participate in proceedings affecting them. However, considering judicial procedure and legal and professional culture, the emancipatory dimension of this directive and the processes of empowerment<sup>24</sup> that characterise restorative justice create a real discrepancy within the French context,<sup>25</sup> which the next section will explore.

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<sup>20</sup> In English it could also be COSA, Circles of Support and Accountability.

<sup>21</sup> The 2017 Circular (n 1) 15.

<sup>22</sup> Stacey Hannem, 'Experiences in reconciling risk management and restorative justice, How circles of support and accountability work restoratively in the risk society' (2013) 57 International Journal of Offender Therapy and Comparative Criminology 269.

<sup>23</sup> The 2017 Circular (n 1) 14-15.

<sup>24</sup> *Empowerment* can be referred to the 'emergence of the process of appropriation of power'. In French, empowerment can be referred to some various concepts like 'capacitation', 'reinforcement', 'appropriation', and each of this word in English are translated by 'empowerment'.

<sup>25</sup> Although the interests of the minor and his / her needs have recently been brought to the forefront by the publication of the law of 14 March 2016 on the protection of children, while at the same time supporting his rights, much remains to be done to go beyond some of the antagonisms (see further developments) – Law on the protection of children of the 14 March 2016, No. 2016-297, JORF of 15 March 2016, text No. 1 of 77.

### **C. A DISCREPANCY BETWEEN THE PRINCIPLES AND PROCESSES OF RESTORATIVE JUSTICE AND THE RULES OF FRENCH JUDICIAL PROCEDURE**

According to Howard Zehr, four key principles organise restorative justice. It is a process designed: (1) to involve, to the extent possible, those who have a stake in a specific offence, and (2) to collectively identify and address harms, needs and obligations, (3) in order to heal, and (4) put things as right as possible.<sup>26</sup>

The definition provided by Howard Zehr contributed to defining the principles of restorative justice<sup>27</sup> which today serve as a compass for its effective implementation. It is in the light of these five principles and the international literature on its processes that the 2017 Circular will be analysed and compared.

#### ***1. A process which can get out of interested participants' hands***

Restorative justice seeks to involve everyone who has a 'stake in a specific offence'. Offenders and victims, direct or indirect, can be concerned but also the community as a whole can participate in a restorative justice measure. In this case, 'community' can have different meanings. Restorative justice includes several references to the term 'community'. Advocates of restorative justice associate it with different people who can belong also to a legal authority (police, social worker for example) or 'society' in a broader sense of people who feel affected by what happened or see a common interest in participating in such a process.<sup>28</sup>

The term 'community' could denote a police officer, representative of civil society, representative of an institution (school for example); it could also entail people who feel affected by the offence such as parents, family, friends or neighbours. The fundamental idea is that individuals are interconnected within various relational networks such as family, friends and relational networks with other people who share a common interest.

The peculiarities of the French law and the drafting of the 2017 Circular, however, suggest a divergent approach which does not place the same emphasis on 'community'. Furthermore, even if the latest reforms aim at changing the assessment of the status of minors (offenders and victims), it seems that a protectionist, tutelary but also paternalistic logic (the welfare model of juvenile justice) leaves little room for an emancipatory ideology which could

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<sup>26</sup> Zehr, *The Little Book of Restorative Justice* (n 7) 37.

<sup>27</sup> Howard Zehr, *Changing lenses, a new focus for crime and justice* (Herald Press 1990) 280; Howard Zehr, *La justice restaurative. Pour sortir des impasses de la logique punitive* ('Restorative Justice. To break the impasse of punitive logic') (Labor et fides 2012) 98.

<sup>28</sup> Paul McCold, 'What is the role of community in restorative justice, Theory and Practice?' in Howard Zehr and Barb Toews (eds), *Critical Issues in Restorative Justice* (Monsey NY: Criminal Justice Press 2004).



lead to an emancipation process such as restorative justice for juveniles. Restorative justice should be an intervention, not to punish or to re-educate, but to set the conditions for the restoration of the participants of this process caused by the offense. But in the 2017 Circular, a juvenile is considered as a person who is not ‘capable’ fully to take her/his ‘accountability’, so s/he should be subject to education and to socialising.<sup>29</sup> These points are discussed in turn below.

*a) Restorative justice community assimilated to the civil society*

As noted above, it is important to include all persons who have a legitimate interest in resolving the conflict crystallised by the offence, in order to redress and correct the harm done to the victim, the community and the offender (principles 1 and 2).<sup>30</sup>

In the 2017 Circular, the first two principles are, to a certain extent, represented. Restorative justice is a dynamic process of inclusion and collaboration involving all those who feel interested, the offender (even if it is a prescribed offence)<sup>31</sup> and the victim.<sup>32</sup> However, it should be noted that the presence of the community or a representative of the community is not included in the circular, which instead refers to civil society. The ‘community’ in the sense of restorative justice and ‘society’ can be distinguished as to their definition and their role.

In the process of restorative justice, conflicts belong not only to the offenders and the victims but also to all the people who feel interested in them. Community is an essential pillar of restorative justice theory and practice and should be distinguished from ‘communitarianism’. But how to involve the community in mainstream criminal justice practice? How many people – and which people – should be involved in the restorative justice process and what role do they endorse? As McCold said, ‘Different views of community have led to conflicting goals and divergent practices’.<sup>33</sup> Community is an openness to others supposed to create, first of all, a relational space in which individuals feel united by bonds of solidarity. Society’s place and role does not focus on interpersonal relationships but is more concerned with respecting the rules and rights of all and the safety of its members and their well-being.<sup>34</sup>

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<sup>29</sup> See section C.2. ‘From an empowerment process supposed by restorative justice to an educative intervention dimension for juvenile offenders in the 2017 Circular.’

<sup>30</sup> The numbers refer to the five principles of restorative justice mentioned by Howard Zehr (n 7) 37.

<sup>31</sup> The offender is suspected to have committed an offence, but his culpability is not recognised.

<sup>32</sup> The 2017 Circular (n 1) 14-15 mentions direct or indirect victims, as well as prescribed or substitute victims.

<sup>33</sup> McCold (n 28) 157.

<sup>34</sup> Zehr, *Changing lenses, a new focus for crime and justice* (n 27) 52.

Rather than community, the 2017 Circular refers more to civil society, which refers to non-governmental organisations of general interest. Civil society defends the interests and values of its members or others, and supports vulnerable people in their socialisation and/or reintegration. But even if this could help some of them, it is difficult for people who are extremely vulnerable and marginalised to mobilise this kind of sociability network.

In the 2017 Circular, the term ‘community’ is totally absent. There is no reference to it and it is not included as a participant as presented in the principles of restorative justice. As it is explained in the 2017 Circular, ‘civil society’ has an important place and role in restorative justice. One of the most important roles is to ‘support’ (to shape restoration plans) and ‘hear’ the offender and/or the victim before and during the process of restorative justice.

This approach is very restrictive and represents just one of the numerous forms of community which can exist in restorative justice (which also include, for example, mediation, family group conference, circles of accountability).<sup>35</sup> The community identifies groups of belonging, and the interests and proximity arising from them. But, more broadly, theoretically the sense and ‘role’ of ‘community’ belong to the participants. The community can also be chosen by the participants, because they have strong links with these people. But, in the French legal framework, the ‘civil society’ referred to instead of the community concerns people who are trained in restorative justice, and they must stay neutral in the relations that they can bear with the participants. Often, in the case of an offence, ‘civil society’ refers to organisations and associations and its mobilisation is felt in a context of constraints, of obligations ordered by the judge or the prosecutor. The judge or prosecutor can ask the offender to visit some organisations to access care, help, support, but after a penal sentence and outside a judicial framework it is difficult for offenders and / or victims to remobilise this network.<sup>36</sup> Conversely, in restorative justice process as conceptualised in the academic literature, the ‘community’ supports participants in light of their needs without any constraint. Offenders and victims can mobilise it when they want. Community at this stage, during the process of restorative justice, can be resources for the offender. Then, after a measure of restorative justice, participants of this process (offender and victim) can remobilise the network they ‘build’, when they need it.

*b) A tutelary and protective logic at every stage of the process*

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<sup>35</sup> See section D.

<sup>36</sup> Martin Goyette and Marie-Noële Royer, ‘Interdépendance des transitions vers l’autonomie de jeunes ayant connu un placement : le rôle des soutiens dans les trajectoires d’insertion’ (2009) 8 *Société Et Jeunesse En Difficulté* <<http://journals.openedition.org/sejed/6434>> accessed 14 February 2018.

While restorative justice is supposed to belong to all those who feel that they are interested in the conflict (Zehr's principle 1), the full participation of children who are suspects or accused in criminal proceedings in restorative justice measures, can be threatened by the presence and control which may be exercised by the legal representatives of the minor (perpetrator or victim) and the judicial authority. Even if children may be interested in them, the process of restorative justice can elude them.<sup>37</sup> In order to reduce this risk, clarifications are necessary in the drafting of the 2017 Circular.

Concerning the intervention of legal representatives, the 2017 Circular mentions that The implementation of restorative justice measures should be adapted to the status as minors of offenders or victims and to involve parents in the process [...] Furthermore, for minor victims, special attention must be paid to the implications and impact of such a measure, involving legal representatives.<sup>38</sup>

While parents are referred to, it seems that a mention of how practically/concretely parents should be involved is missing. Instead of mentioning 'parents' in the text, reference should be made to 'the legatees of parental authority', which refers more generally to persons with a set of rights and duties whose ultimate purpose is the interest of the child. Parental authority is defined by its purpose: it ensures the protection of the child in her/his safety, health and morals, in order to ensure his or her education and enable her/his development with respect for her/his person. The final decision therefore rests with the parents or those with parental authority, and the reference only to parents is too limited. The reference to 'parental authority' in relation to parental involvement would be relevant since the texts provided for in the Civil Code in 'Chapter 1: Parental authority in relation to the child as a person'<sup>39</sup> emphasises the interest of the child as well as her/his association in the decisions that concern her/him according to her/his age and her/his degree of maturity.<sup>40</sup> The child's interest, a polymorphous notion, refers to

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<sup>37</sup> Aurore Dachy, *L'application de la concertation restauratrice en groupe en Fédération Wallonie Bruxelles* (Ministre de la Jeunesse et de l'Aide à la Jeunesse de la Fédération Wallonie-Bruxelles 2013) 194 <[http://www.huytebroeck.be/IMG/pdf/Rapport\\_CRG\\_avril\\_2013.pdf](http://www.huytebroeck.be/IMG/pdf/Rapport_CRG_avril_2013.pdf)> accessed 14 February 2018. Implementation of family group conference in Wallonia-Brussels Federation (Minister of Justice Youth and protection of Wallonia Brussels Federation 2013) 194.

<sup>38</sup> The 2017 Circular (n 1) section c the particularities related to the state of minority, section c les particularité liées à l'état de minorité. 'Il convient d'adapter la mise en œuvre des mesures de justice restaurative à l'état de minorité des auteurs ou des victimes et d'associer les parents au processus [...]. Par ailleurs, pour les victimes mineures, une attention particulière doit être portée aux implications et impactes d'une telle mesure, en y associant les représentants légaux'.

<sup>39</sup> 'Chapitre 1<sup>er</sup> : De l'autorité parentale relativement à la personne de l'enfant'. 'Chapter 1: Parental authority in relation to the person of the child'.

<sup>40</sup> Art. 371 Code civil (C.civ) then 371-1 C.civ, Livre 1<sup>er</sup>: Des personnes, Titre IX : De l'autorité parentale, Chapitre 1<sup>er</sup> : De l'autorité parentale relativement à la personne de l'enfant, 1st Book: People, Titer IX Parental authority, Chapter 1, The parental authority relating to the person of the child.

her/his well-being, her/his needs and her/his rights and duties. The Court of Cassation has pointed out that, once the child's interest has been ascertained by the trial judge's investigation, this takes precedence over the balance of parental rights.<sup>41</sup>

It seems likely that, in the event that one of the two legal representatives agrees on the principle of the involvement of a minor in a measure of restorative justice and the minor also finds an 'interest' in participating in it, such a measure will continue. In the event that legal representatives do not wish the minor to participate, but the minor wishes to, the decision initially envisaged can be reviewed by legal representatives, thus allowing the minor's involvement in the restorative justice process. From a practical point of view, in measures affecting juvenile offenders and either juvenile or adult victims it is rare for those having parental authority to refuse the participation of their child in a restorative justice measure.<sup>42</sup>

In the light of these elements and in the context of the 2017 Circular, preference should be given to using the notion of 'parental authority', in which case the decision to participate or not in a restorative justice measure rests with the legal representatives but would be animated primarily by the interest of the child.<sup>43</sup> By clarifying the term used and its precise legal meaning, it could be ensured to some extent that the expectations and needs of the primary stakeholders in the restorative justice process are taken into account. To support this, several clarifications should be carried out in the legal text. Firstly, the terms 'legal representatives' and 'parents' should be replaced by 'parental authority'. Secondly, the rules should be changed so that the entire signification which is behind this notion is known by the judges who have the control in the proposition of these measures.<sup>44</sup> Finally, participants, who are at the beginning of the judicial process since the complaints, should be informed of the possibility to participate in restorative justice measures.

However, even if the interest of the child and her/his needs are highlighted in the impetus and the possibility for her/him to participate in a restorative justice measure, their degree of influence is reduced by the central role played by the judicial authority. the 2017 Circular envisages different ways of control and 'dispossession' of the measures to the

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<sup>41</sup> French decisions, Cour de Cassation, (Première chambre civile), Arrêt n°14-24.84 du 13 avril 2016, 1 ECLI:FR:CCASS:2016:C100418  
<<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032414938>> accessed 13 March 2018. Court of cassation, (1<sup>st</sup> civil division), Judgement n°14-24.84 13 April 2016.

<sup>42</sup> Dachy (n 37).

<sup>43</sup> Based on application of the relevant chapter of the Civil Code (n 40).

<sup>44</sup> At this level, awareness and training programs for professionals are very important (police officer, prosecutor, magistrate, social worker, and psychologist). Also, in practice, the service in charge of the implementation of restorative justice measures should have to be proactive and present the processes and the outcomes of participation in restorative justice.

participants. The judicial authority then plays a major role in the impulse and in the qualitative evaluation of the measures of restorative justice at all the stages of the judicial procedure.

According to the stages of the judicial procedure, at the level of the public prosecutor's office,

The restorative justice measure is proposed to the parties by the judicial authorities [...] the magistrate determines the moment when this measure can begin [...] the files for which this measure shall be the subject of careful selection by the public prosecutor [...]. When it receives a request for the implementation of a measure originating from an association, it shall exercise an appropriateness review and give its prior consent.<sup>45</sup>

At the investigative stage of the judicial procedure, the magistrate must be informed by the service that is in charge of the development of restorative justice, about the implementation of the measure.<sup>46</sup> It may obtain 'her/his prior agreement, with regard to issues of the proceedings',<sup>47</sup> in front of an examining magistrate. For a minor as for a major, the restorative justice measure:

may be inadequate because of the risk of interaction between the parties [...] it is important at this stage as at the initial examination stage to preserve the word of the victim and not to compromise the conduct of the judicial investigation.<sup>48</sup>

The precautions presented through the circular are essentially based on two aspects. The first relates to a concern for protection, first and foremost for the participants and more particularly for minors when the facts have occurred in the family sphere. The second aspect refers to compliance with procedural rules (presumption of innocence, evidential rules for manifestation of culpability). These two elements, presented separately, nevertheless remain intrinsically linked by the judicial process. In light of what has been stated above in relation to the impetus given by the judicial authority, there is a risk of conflict between the legal protection culture of the judicial authority in specific situation (like family cases) and the restorative justice processes. Theoretically, restorative justice measures can happen in all cases.

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<sup>45</sup> The 2017 Circular (n 1) 11: 'La mesure de justice restaurative est proposée aux parties par les autorités judiciaires [...] le magistrat détermine le moment où cette mesure peut débiter [...], les dossiers pour lesquels cette mesure est proposée doivent être l'objet d'une sélection attentive par le magistrat du parquet [...]. Lorsqu'il est saisi d'une demande de mise en œuvre d'une mesure émanant d'une association, il exerce un contrôle d'opportunité et donne son accord préalable'.

<sup>46</sup> The Service of judiciary protection of youth is in charge of the development of restorative justice, about the implementation of the measure.

<sup>47</sup> The 2017 Circular (n 1) 11: '[...] son accord préalable, au regard des enjeux de la procédure'.

<sup>48</sup> *ibid*: '[...] peut se révéler inadaptée en raison du risque d'interaction entre les parties [...] il est important à ce stade comme au stade de l'enquête initiale, de préserver la parole de la victime et de ne pas compromettre le bon déroulement de l'information judiciaire'.

Although the right to participate permits a child to be involved in such a process, the legal authority can ‘stop’ it because of ‘the word of the victim’ and in order ‘not to compromise the conduct of the judicial investigation’.<sup>49</sup>

The drafting of the 2017 Circular may suggest that the role of initiation and control of the magistrate, because it is not detailed, leaves enough room for those interested in the process to appropriate it. But, to give it a full and effective place, it is essential that legal professionals have complete information on the practices and processes of restorative justice.

By the rules of respect and safety, the protection of the participants (offenders, victims and community) is guaranteed. The assessment of the participants by legal professionals during preparation for restorative justice measures is fundamental. The current position creates a risk that, if one of the participants did not respect or went against one of the principles of restorative justice, this participant would, of course, get out of or be excluded from the process. Assessment and preparation are crucial and allow to refine exchanges that take place between the participants as well as the modalities when implementing the process. By ensuring confidentiality, restorative justice is neither a means of investigation which seeks to recognise or not to recognise the guilt of the suspect, nor a process which interferes with the search for truth: ‘it is important [...] to preserve the word of the victim and not to jeopardize the proper conduct of the judicial investigation’.<sup>50</sup> Article 10-1 and the 2017 Circular have repeatedly referred to this guarantee of confidentiality of the participants’ exchanges and the safety and security of the process. If this guarantee is effective, then the outcome of the restorative justice process could then be referred to in more formal criminal proceedings.

Moreover, in the light of the rules of judicial procedure, the freedom of speech in restorative justice proposed in a criminal justice proceeding could be contrary to the principles of presumption of innocence and to Article 6 of the European Convention of Human Rights. By participating in a restorative justice measure, offenders and victims may return to ‘their point of view’, not in relation to the ‘facts’ or ‘the offense committed’<sup>51</sup> defined by the justice system, but defined by their own perception of the events which led to the deed in question and about the events surrounding the offence event.<sup>52</sup> In a restorative justice process, under the

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<sup>49</sup> The 2017 Circular (n 1) 11.

<sup>50</sup> *ibid*: ‘Il est important [...] de préserver la parole de la victime et de ne pas compromettre le bon déroulement de l’information judiciaire’.

<sup>51</sup> The triggering of a measure of restorative justice presupposes a minimum recognition of the facts by the author of the offence or the person suspected.

<sup>52</sup> Andrew von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing 2003) 360.

rules of respect and confidentiality, speech is freer between the participants. All what is happening in restorative justice process stay in this process and nothing can be taken up, used by the lawyer or the participants in other proceedings. In the hypothesis, where an information from the restorative justice process is transmitted in the formal penal justice, this information won't be considered by the judge. By contrast, in the context of formal penal justice, lawyers and advocates of the offenders and/or the victims do not reveal everything about what happened in the interest of their client, because of the stakes such judicial procedures entail and the interests they defend.

Actually, it may be possible that, at the end of a restorative justice measure, by listening to the participants, the circumstances leading to the offence and the causes that led to it, the perceptions and the feelings shared by the participants involved in the process about what happened can be heard, and possibly understood.<sup>53</sup> The objective of restorative justice is not the *a priori* manifestation of the truth establishing who is guilty, which belongs to judicial proceedings; rather, it is to take an interest in the harm suffered by the participants (victims, community and offender). The offence is the departure point, but restorative justice focuses more on the repercussions and consequences of the offences for the participants in order to be able to repair them, which implies an interest in the damage and the causes of this damage. The first objective is to establish social harmony.

While the 2017 Circular should allow for a 'wide ownership' of the process by the participants, it nevertheless remains in the most serious circumstances under the authority of the magistrate. It is undeniable that the circular drafted by the Minister of Justice will, by some lack of precision, allow a wide potential appropriation of the process by the judicial authorities, the professionals and / or the participants of the restorative justice process.

However, this lack of precision could lead to the opposite effect in view of the many reservations and issues of concern listed and expressed in this article, bearing in mind the principles of the French judicial procedure and the protection of the participants in the process. Without definition or precision, the magistrate could control all the propositions of restorative justice measures for juveniles when s/he considers that the offence is too serious. By his/her control and assessment of opportunity of restorative justice, this situation could lead to a marginalised implementation of such a process and a voluntary process which can be taken out of the control of the participants. Unfortunately, in this situation some restorative justice

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<sup>53</sup> See the second part of this section: From an empowerment process supposed by restorative justice to an educative intervention dimension for juvenile offenders in The 2017 Circular (n 1).

measures could be limited to less severe cases and may be proposed in criminal offences that did not take place in the family setting and most of them take place in the post-sentencing phase. Restorative justice could offer benefits for participants beyond this if the process is proposed at all stages of procedure and for all types of offence. From the moment the participants wish to enter a voluntary process, they can leave at any time without any consequence for the outcome of the legal proceedings. Considering such a process is supervised and evaluated by a mediator trained in restorative justice, the assessment of a magistrate is not necessary.

## *2. From an empowerment process supposed by restorative justice to an educative intervention dimension for juvenile offenders in the 2017 Circular*

As part of the the 2017 Circular, the promotion of responsibility and accountability of the participants is highlighted. The notion of responsibility appears first and foremost for the offenders, and here, a reservation can be made when admitting the offence: ‘The term offender must be understood in a wide sense, to include all persons who have admitted to committing an offence’.<sup>54</sup> As such, the idea is not so much that the offender has to admit, i.e. “recognise” s/he has committed an ‘offence’ but rather that s/he must recognise that ‘facts’ have taken place. It is not a question of obtaining an admission of guilt on the active participation in the commission of the facts but admitting the facts that have occurred. Thus, a standardisation and generalisation of the concepts used could be helpful as a change to the 2017 Circular, and the notion of ‘recognition of facts’<sup>55</sup> should be preferred to ‘recognition of an offence committed’,<sup>56</sup> in order that recognition of events by the offender which cannot be ‘used as a judicial or extrajudicial confession’.<sup>57</sup> Based on these changes to the legal terms, the process of restorative justice would be highlighted, and this process would not be seen as competing with the juvenile justice system but something that could be more complementary to it.

In another passage concerning the accountability of minors, this dimension of a competing system rather than a complementary one can be identified by the indication that the action does not involve ‘a judicial but educational issue’.<sup>58</sup> Moreover, the implementation of restorative justice measures must be adapted to offenders and victims’ status as minors: ‘It is

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<sup>54</sup> The 2017 Circular (n 1) 5: ‘Le terme d’auteur doit s’entendre dans une acception plus large, afin d’inclure toutes les personnes ayant reconnu avoir commis une infraction’.

<sup>55</sup> *ibid* 7: ‘Reconnaissance des faits’.

<sup>56</sup> *ibid*: ‘Reconnaissance d’une infraction commise’.

<sup>57</sup> *ibid* 6: ‘Etre utilisés comme aveu judiciaire ou extrajudiciaire’.

<sup>58</sup> *ibid* ‘Un enjeu judiciaire mais éducatif’.



therefore essential to assess the adolescent's ability to measure the effects of her/his act on the victim and his willingness to engage in a restorative justice process'.<sup>59</sup>

This provision leaves a number of questions unanswered, such as: who is responsible for 'assessing the adolescent's ability to measure the effects of his or her act'?<sup>60</sup> What is meant by 'the evaluation of the measure of the effects of his act on the victim' in the 2017 Circular?<sup>61</sup> Are we not concerned with the appreciation of the capacity of the minor (capable of understanding) and therefore to some extent with her/his accountability?

Within the framework of restorative justice, a minimal recognition of the facts may be sufficient to initiate the process. The feelings and the perceptions of the minor concerning actually performing an act may depend on the past and circumstantial events that s/he passed through. Although a juvenile may initially fail to 'evaluate the extent of the effects of her/his act', it is by the gradual returns and comments of the members of the community and/or the victim(s), that the measurement of these effects occur and s/he may assume the consequences. For the perpetrators, restorative justice can contribute to their accountability by repairing the harm done to the victim(s) (lesser or more serious). The community can thus support and accompany the perpetrator in the redress of the harms caused. Beyond the offence and its 'recognition' by the offender, restorative justice offers the possibility to the interested parties to find a discussion space (accountability and empowerment) but also the opportunity to develop the best solutions to go beyond the conflict in order to repair and restore each other.

Knowing that restorative justice is primarily a voluntary process, and that it is not necessary to 'motivate' a minor to participate in it because the latter voluntarily adheres to the measure, suggests that their interest and their commitment depend on what they want (expectations and needs) and their capacities. The 2017 Circular mentions that is necessary to assess the willingness of the participants to engage in a restorative justice process. What should also be understood as part of 'measuring [...] the willingness to engage in a restorative justice process'?<sup>62</sup>

The assessment of the implementation of a measure of restorative justice can only be done in this sense by a professional trained in restorative justice, who is a mediator and intervenes in parallel to the judicial process. In the context of restorative justice, the sense of responsibility should not be understood as a situation where the perpetrator is obliged to assume

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<sup>59</sup> *ibid* 6: 'Il est donc primordial d'évaluer la capacité de l'adolescent à mesurer les effets de son acte sur la victime et sa volonté de s'engager dans un processus de justice restaurative'.

<sup>60</sup> *ibid*: 'L'évaluation de la capacité de l'adolescent à mesurer les effets de son acte'.

<sup>61</sup> *ibid*: 'L'évaluation de la mesure des effets de son acte sur la victime'.

<sup>62</sup> *ibid*: '[...] mesurer [...] la volonté de s'engager dans un processus de justice restaurative'.

the consequences imposed by the system but rather a responsibility in which the offender ‘actively assumes the relationship between himself and the act’.<sup>63</sup> S/he becomes aware of being accountable for the offence in this latter, less legalistic sense and will actively participate in the social reaction to her/his act (obligations). The offender, faced with the consequences of her/his act and the resulting responsibility, is invited to assume the consequences//repercussions thereof by contributing to the search for solutions to ‘repair’ her/his fault.

In the light of these various proposals and points of concern, we are finally confronted with what has animated us during the previous paragraphs; transcribing principles of restorative justice in the field of juvenile justice is very complex. In fact, we can see a substantial number of gaps between the philosophy of juvenile protection and in parallel the process of empowerment proposed by measures of restorative justice. We can see, going through the whole of the 2017 Circular, the presence of legal authority in the assessment and the control of the process. By this approach, the child’s interest is ensured through such control and assessment of the restorative justice process. This approach of control by a magistrate and legal representative could be linked to a dimension of protection of the child’s best interest.

#### **D. A FORM OF RESTORATIVE JUSTICE MEASURES OUTSIDE THE EXPECTATIONS AND NEEDS OF PARTICIPANTS**

Although the forms of its implementation are not specified, restorative justice measures are chosen by professionals:

‘It is up to the magistrates and the services in charge to follow this person<sup>64</sup> to exercise a particular vigilance in the choice of the measure, in particular when direct meetings between complainant and accused are envisaged’.<sup>65</sup>

Annex 1 of the 2017 Circular goes further and describes the various forms of restorative justice in relation to specific offences, at different stages of the judicial procedure and in the direction of various objectives, in particular, managing recidivism. The presentation of the different measures announces and highlights the main restorative justice measures for specific

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<sup>63</sup> Lode Walgrave, ‘Un modèle de responsabilisation active des mineurs ayant commis un délit : le Hergo (ou Herstelgericht Groepsoverleef)’, in Françoise Digneffe and Thierry Moreau (eds), *La responsabilité et la responsabilisation dans la justice pénale* (Bruxelles Ed Larcier 2006) 282. Lode Walgrave, ‘A model of active empowerment of minors who have committed an offense: the Hergo (or Herstelgericht Groepsoverleef)’, in Françoise Digneffe and Thierry Moreau (eds), *Responsibility and accountability in criminal justice* (Brussels Ed. Larcier 2006) 282.

<sup>64</sup> The offenders.

<sup>65</sup> The 2017 Circular (n 1) 5: ‘Il appartient aux magistrats et aux services chargés du suivi de cette personne d’exercer une vigilance particulière sur le choix de la mesure, notamment lorsque des rencontres directes entre plaignant et mis en cause sont envisagées’.

levels of judicial proceedings, for specific offenses and for participants targeted, characterised or assessed as having a high risk of recidivism.

However, it should be stated that restorative justice measures are not limited to certain forms in their implementation and this precision should be added in the 2017 Circular. In this regard, the forms given to the measures of restorative justice in the Circular are too limited. Through the whole analysis of the French Circular we observed that measures of restorative justice could be limited first to specific offences. Restorative justice can be carried out through different forms such as mediation, family group conference etc., maybe supposing a meeting between offenders and victims. However, in cases of high level crime (such as murder, rape, sexual assault or terrorism), this possibility to participate in a process of restorative justice could be limited because of the role of magistrate who assesses this opportunity. Also, the proposition of restorative justice could be limited in its application to specific levels of the judicial procedure, for minor offences and at the level of prosecution. For example, mediation could be proposed at the level of prosecution for minor offences. In the 2017 Circular, the proposal for form of restorative justice measure for offenders can be limited to certain offences, and even to certain situations. If its implementation is limited in this way, the potential of restorative justice could not have any effect, precluding the process of empowerment it supposes.<sup>66</sup> In the academic literature on restorative justice, the forms depend above all on the expectations and needs expressed by the participants and/or evaluated by the professionals. In practice, when a restorative justice measure is presented to the participants (in general terms), their needs and expectations in relation to this process are discussed during interviews, in particular through the evocation of the harms suffered, ie the consequences and repercussions of the criminal offence they were subjected to.<sup>67</sup> The forms of restorative justice depend essentially on participants in the process.

Lastly, restorative justice is reduced in the Circular to an objective of 'limiting recidivism'. It would be incorrect to view the 'limitation of recidivism' as the only or main goal in restorative justice. As explained before, the philosophy of restorative justice is a way to find a path to social harmony and to support victims.<sup>68</sup> Even if reducing recidivism tends to improve social harmony and participating in a restorative justice process contributes to limiting

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<sup>66</sup> See quote (n 24).

<sup>67</sup> The consequences and impact of the offence as well interested people perpetrators, victims or communities of belonging. Consequences and implications must differ. The implications are not necessarily in direct and immediate link with the criminal offence, they are personal, family, professional, cultural, and/or social order.

<sup>68</sup> Shadd Maruna 'Desistance and restorative justice: it's now or never' (2016) 4 Restorative Justice: An International Journal 289-301.

recidivism, the goals should be conceptualised more broadly as including desistance from crime.<sup>69</sup>

Desistance and the limitation of recidivism are two different approaches. Studies on desistance assess all the processes which could lead to a change related to the end of a life-course persistent delinquency. There are two processes in desistance: primary desistance, which designates a more or less long interruption of delinquency which can be marked of episodes of reiteration; and secondary desistance, referring to the process of change in the former offender's identity.<sup>70</sup>

Studies about the limitation of recidivism establish a link between a treatment and no recidivism whose definitions vary considerably from one study to another. This last approach focuses on one dimension of 'recidivism'; conversely, the desistance approach focuses more broadly on the processes of changes with the participants.<sup>71</sup> Furthermore, even if the evidence from the general literature indicates that restorative justice measures can have an impact on offender recidivism, much of this research focus on the views and satisfaction level of the participants.<sup>72</sup> This last point refers more to processes of desistance about the changes of cognitions and representations of the participants about each other and themselves (secondary desistance).<sup>73</sup>

By considering and taking into account feelings, emotions and expectations, the needs of the participants are then defined. Theoretically in restorative justice literature, it is with regard to the latter and according to the agreement of the participants, that the form of the restorative justice measure<sup>74</sup> should be considered in order to redress the situation as best as possible. The experiments of restorative justice for minors, in which an approach is already predefined, will allow a full response to the principles of restorative justice in some situations. It is through mobilising the principles of restorative justice and more particularly by evaluating and recognising the expectations and needs of the participants in the process that the form of the restorative justice approach should be defined.

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<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> In Belgium, in francophone community, in public policy a change of paradigm from the 'limitation of recidivism to a 'process of desistance'.

<sup>72</sup> Maruna (n 68).

<sup>73</sup> Shadd Maruna and Stephen Farrall 'Desistance from crime: A theoretical reformulation' (2004) 43 *Kvlnner Zeitschrift fur Soziologie und Sozialpsychologie* 171.

<sup>74</sup> Mediation (direct or indirect), the restorative conference or conference of the family group, the restorative circle, circles of support and accountability.

This suggested harmonisation of the form of the measure about expectations, needs and resources of the participants would contribute, on the one hand, to a real appropriation of the process by the offenders, victims and communities and brings, on the other hand, all the benefits it promises for them.

## E. CONCLUSION

The analysis of the 2017 Circular highlighted the existence of a discrepancy between the principles and the processes observed by the academic literature about restorative justice and their effective implementation in the context of the French judicial procedure concerning minors.

This gap is present in the juvenile justice system and its administration, and more widely within the framework of the criminal juvenile (legal texts about juvenile delinquency). Restorative justice disrupts the conception of the penal response. The ideology of the criminal juvenile law and the juvenile justice system, oriented towards the protection, responsibility and education of minors, seems *a priori* to enter into ‘confrontation’ with the ‘active’ emancipatory and empowering dimension of accountability offered to the participants through the process of restorative justice. Restorative justice as presented before is in the line with the different resolutions and European Directive about children’s rights and child-friendly justice.<sup>75</sup> In restorative justice, the process should belong to the participants under the vigilance of the facilitator. The voluntary participation and collaboration of the various participants and professionals in the justice sector in the restorative justice process, all within a confidential framework, is essential to implement the best solutions for the restoration of social harmony.

By virtue of the confidentiality of such a measure, autonomy with regard to criminal proceedings is ensured and whatever the outcome of the process, the 2017 Circular ensures that participation in a restorative justice measure is devoid of any repercussions on the consequences of the judicial proceedings, whether for the offender or the victim. It thus constitutes a proposal to the participants that is optional and with no consequence on the course of the judicial proceedings which are carried out in parallel.

Since, through these processes, the restorative justice process ensures respect for the principles of judicial procedure and also ensures the protection of the participants and their interests. Unfortunately, the precedence given to principles of judicial procedure limits compliance with restorative justice principles.

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<sup>75</sup> The European Directive (n 14) and (n 13).