

# Victim-Offender Mediation on Family Relationships: A Possible Application

## Mediación víctima-infractor en las relaciones familiares: una posible aplicación

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**Abstract:** Victim-offender mediation is a restorative-justice driven approach in dealing crime that has been shown to be beneficial to both the victims and their offenders in various aspects. However, in many implementations of victim-offender mediation in the past, focus has been given on the direct victim – ignoring other types of individuals that may be affected by the crime. When an offender commits a crime, the offender’s family members are also effectively victimized in various ways, including ostracization by the public, deterioration of relationship, and stress. This makes them a part of victimhood circle that should also be addressed. Furthermore, the involvement of family members in the rehabilitation of offenders is also crucial for the rehabilitation to be effective. These arguments are the basis of this article’s thesis – that family members can be situated on the ‘victims’ side in a victim-offender mediation. However, this article also acknowledges the concerns of past scholars who brought up the possibilities that many restorative-justice driven approaches of crime that are adjusted to a particular context may violate the essence of restoration.

**Resumen:** La mediación entre víctimas y agresores es un enfoque basado en la justicia restaurativa para abordar delitos que ha demostrado ser beneficiosa tanto para las víctimas como para los agresores en diferentes aspectos. Sin embargo, cuando se ha implementado en varias ocasiones en el pasado, la mediación víctima-infractor se ha centrado en la víctima directa, dejando de lado a otros tipos de personas que hayan podido verse afectadas por el delito. Cuando un agresor comete un delito, los familiares del mismo también se ven victimizados efectivamente de distintos modos, entre los que se encuentran el ostracismo por parte del pública, el deterioro de las relaciones y el estrés. De esta forma, se encuentran en el círculo de victimización que se debe abordar. Por otra parte, la implicación de los familiares en la rehabilitación de los infractores es también crucial para que la rehabilitación sea eficaz. Estos argumentos son la base de la tesis del presente artículo, es decir que los familiares se pueden situar del lado de las ‘víctimas’ en un caso de mediación víctima-infractores. Sin embargo, este artículo reconoce también las preocupaciones de expertos que han propuesto en el pasado que las posibilidades de que muchos enfoques basados en la justicia restaurativa del delito que se ajustan a un contexto concreto pueden ir en contra de la esencia de la restauración.

**Keyword:** Family relationships, restorative justice, victim-offender mediation, Malaysia; Recidivism.

**Palabras clave:** relaciones familiares, justicia restaurativa, mediación víctima-infractor, Malasia, reincidencia.

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## Introduction

The process of the traditional justice system often marginalizes offenders. This is one of the reasons why the acknowledgment of community-oriented measures that the traditional system often lack is a welcomed change of scenery (Rea, 2012). In addition to addressing concerns around victims' rights, restorative justice offers a more effective and holistic approach to dealing with the aftermath of crime, which includes improving rehabilitation rates among the offenders (Doerner & Lab, 2012).

The protocol of many programmes operating under the restorative justice model involves positing the offenders and their victims as the primary stakeholders in the criminal process (Zehr, 2015). Whereas the traditional perspective assumes that the State has the most prominent role in a criminal process, restorative justice seeks to empower all participants. A stakeholder framework as proposed by McCold (2000) is helpful in understanding the division of stakeholders. His model asserts that when a crime is committed, two levels of stakeholders emerge: Primary (i.e., the victims, the offenders and their respective families); and secondary (i.e., the indirectly affected parties such as the community and the State) stakeholders. Through this framework, a proper measure of intervention can be designed which addresses the needs of the involved more effectively.

Writings done by Azman and Mohammad (2012), Van Ness (2005), and Van Ness and Strong (2014) have underlined programmes that use the concept of restorative justice such as victim-offender mediation and family group conferencing. In this article, we do not argue of the effectiveness of restorative given the plethora of other articles highlighting this. Instead, the practice of mediation is emphasized where we argue that the victims-offender mediation usually conducted between offenders and their victims is applicable on the offenders and their family members with arguments below.

## Our Argument: Applying Victim-Offender Mediation into a Family Context

The effect of crime goes beyond the offenders and their direct victims themselves; often the families of the offenders, too, experience some changes in their lives due to the crime. Some studies have shown that crime deteriorates family relationships between the offenders and their own family members (Stewart, Simons, Conger, & Scaramella, 2002; Thornberry, 1987; Thornberry, 1991). These effects may affect the family's quality of life (De Neuilly Rice, 2008). The disruption is not just caused by the offender committing crime, but also by the subsequent incarceration and detention. This has important implication on the offenders themselves since the quality of the offenders' relationship with their family is inver-

sely correlated with the likelihood of repeat offence (Austin & Hardyman, 2004; Rosansky, 2010). Therefore, families of offenders are an important part of the effective rehabilitation of offender.

Furthermore, families of offenders may also have to deal with the backlash of the crime that someone in their families committed. Sharp (2015) noted that because society often considers offenders' family members to be 'vicarious offenders,' they face covert and even overt ostracisation that disrupts the family system. Some families still keep in touch with their incarcerated family members, while some others try to minimize the contact with the latter due to the shame caused by the ostracisation. While still acknowledging the experience of the families of the victims of crime, Sharp invites the readers to extend the courtesy to also acknowledge that the families of the offenders are also effectively victimized (albeit indirectly) by their family member's commission of crime.

The experience of the direct victims of crime as the primary stakeholders of a criminal process is undeniable. However, as we contend, the circle of victimization goes beyond the direct victims. The families of offenders also belong in the category of victims due to the negative experience that they experience post-crime (De Neuilly Rice, 2008). Sharp (2005) highlighted that one of the ways they are victimized is the stigma that they experience. This stigma is faced just because they are associated with the offenders as family (Breen, 2008; Ofori-Dua, Akuoko, & de Paul Kanwetuu, 2015). Based on these points, the families of offenders are considered as the 'tertiary' victims after the direct victims as the primary victims and the families of the direct victims as the secondary victims (Standing Committee on Community Services and Social Equity, 2004). As 'tertiary' victims, other than the ostracisation, the families of offenders also face financial constraints, and shifts of roles and responsibility that may disrupt the well-being of the families.

Naturally, some advocates may argue what should be deemed more important: the families of the offenders or the families of the victims. Michael Radelet explained in his foreword in Susan Sharp's (2005) *Hidden Victims*, 'While the two groups (i.e. families of offenders and victims) invite comparison, the bottom line is that pain is pain, and the question «Who suffers more?» quickly becomes irrelevant' (p. ix). Improving the well-being of the victim's family and the offender's family is not zero-sum. And, indeed, there will be fewer victims in the future -- and fewer victims' families to suffer -- as research shows that if we improve relationships between criminals and their families, it reduces recidivism accordingly (Henggeler, et al., 1986; Mills & Codd, 2008). This is consistent with the idea that the rights of the victims should not be in competition with the rights of the offenders -- they can exist together in the same system.

One positive development in the Malaysian juvenile justice system is the recognition that family plays an important role in the prevention of recidivism of juvenile offenders. Malaysian studies have acknowledged the roles played by family institutions in shaping future behaviors of adolescents (e.g. Kassim, 2006; Nasir, Ahmad Zamani, Khairudin, & Latipun, 2010). In practice, policy makers also make an effort to integrate family institutions into the different stages of juvenile rehabilitation. This is manifested through some policies of juvenile institutions in Malaysia where family members are expected to get involved through visitations and participation in counseling (Abd Rashid, Hussin, & Hassan, 2006).

### The Juvenile Offenders and Their Families and the Use of Victim-Offender Mediation

The earlier discussion points to the importance of improving relationships between the juvenile offenders with their family members as a pivotal part in the rehabilitation process. This approach has been employed in various countries. In the US, several prisons have incorporated programmes with families as part of the rehabilitation process (Jeffries, Menghraj, & Hairston, 2001; Rosansky, 2010). Programmes such as FamilyWorks, Fathers and Children Together, Long Distance Dads were implemented where inmates are encouraged to improve their relationships, especially as parents.

One valuable characteristic of these programmes is that there are efforts to look into the effectiveness and feasibility of these programme in achieving the intended objectives. A report documents on various forms of efforts (e.g. external evaluator, pre- and post-evaluation, individual interviews, etc.) that informs others on whether the programmes are useful in helping offenders and their families heal strained relationships that may be caused by the crime (Jeffries et al., 2001). However, many of these programmes and evaluations focus much on healing family relationships when it is the parents who get incarcerated. However, there is also an alarming amount of juvenile cases where children are put in detention and require understanding and effective rehabilitative interventions (Bochenek, 2016).

As discussed, family engagement is helpful for reducing recidivism (Austin & Hardyman, 2004; Rosansky, 2010), but there is a claim that this acknowledgment still requires further research to understand in what ways family's engagement can start to be helpful (National Research Council, 2013). This is also true in the Malaysian setting. Recognizing the importance of family involvement, the Malaysian juvenile policies also implement programmes that involve the families in the process. In Malaysia, '*Bengkel Interaktif*' is offered in the Malaysian Child Act 2001 for the purpose of restoring the social functioning of a family system (Jabatan Kebajikan Masyarakat, 2013). *Bengkel Interaktif* brings family members

together to undergo various stages of sessions that include counseling and personality testing. While *Bengkel Interaktif* is theoretically sound in that it integrates families in the scope of juvenile delinquency, there is no systematic effort to observe the effectiveness of the programme in healing family relationship that is critical to reducing recidivism.

As emphasized, more research is needed to assess the effectiveness of specific programmes in improving the offenders' relationships with their family members (Jeffries, Menghraj, & Hairston, 2001; National Research Council, 2013). This is important as different programmes adopt different approaches even when their focus is similar – family relationships. Furthermore, many focus on when the parents themselves are incarcerated (e.g. Hairston, 1988; Sandifer, 2008), and there seems to be no research investigating the dynamics and experiences of the family relationships when the detained is the child.

We, then, would like to revisit our earlier argument – that the families of the offenders should also be considered as victims due to the crime committed by their own family members. Hence, they may also benefit from the many interventions and measures that are designed to help the primary victims of crime in achieving higher quality of life post-victimization. One such measure is restorative justice that has been demonstrated to be effective in addressing what both the victims and the offenders need (Bradshaw, Roseborough, & Umbreit, 2006; Umbreit & Bradshaw, 2003). The scientific support that backs up the effectiveness of restorative justice is a good foundation for including the families of offenders in victim-oriented measures which fills in the gap of evidence of the programmes that involve both the offenders and their families.

However, in what way is this possible? Victim-offender mediation, a programme driven by restorative justice value, puts together offenders and their victims together for a dialogue session that is mediated by a professional (Mullane, Burrell, Allen, & Timmerman, 2014). It can be noted from many studies of victim-offender mediation that they use the word 'victims', they are primarily referring to the primary victims. In this context, if a theft was committed, the primary victim would be the person who had the material loss due to the act of stealing. However, the crime of theft committed would still impact the family members of the offenders, which would mean that they are also «victims» although it is not referenced extensively in the literature. Based on our earlier proposal that the family of the offender is a part of the victimization circle as emphasized by Sharp (2005), they should also be eligible candidates to be situated in the 'victims' side of a victim-offender mediation. Accordingly, the differences of experience that may happen between the 'original' victims and the families of offenders suggest a new avenue for future research.

This article also would like to point out the possibility of an additional objective if a victim-offender mediation is applied into a family context. In many reports of victim-offender mediations conducted across the world (as effectively reported by Umbreit and colleagues, 2004), the positive outcomes reported are observed on the direct victims and their offenders that constitute satisfaction, the perception of fairness, and reduced recidivism. Applying victim-offender mediations into family contexts, there should also be a focus on healing family relationship, a focus that many family-oriented rehabilitative programmes share in common.

However, to bring into the programme an additional objective would require us to consider the issue of power imbalance that can sometimes often be observed in the original form of victim-offender mediation (Saxon, 2013). Power imbalance is also already existent in many families (Day, 2014) and it may also occur when they are situated in a victim-offender mediation. Therefore, cautiously, if an offender and his or her family members were to be situated in a victim-offender mediation, and if the objective of healing family relationship were to be achieved, this power imbalance needs to be addressed first. According to Saxon (2013), in a victim-offender mediation, power imbalance can be moderated by a skilled mediator who has the competency to identify and address power imbalance if they do occur.

Given that we propose a new application of victim-offender mediation, we, too, acknowledge the possibility of victim-offender mediation applied in family relationships to cease functioning as a programme it is designed to be. This concern is based on the concern voiced by Zehr (2015) and Johnstone (2013) who argued that implementation of restorative justice programmes such as victim-offender mediation is challenging due to misunderstanding around the concept. This is supplemented by the situation where restorative justice programmes often have to 'earn its place' in criminal justice systems, often sacrificing key elements in order to fit into current regimes (Daly & Immarigeon, 1998). This is especially true in Malaysia where the issue of culture becomes a prominent issue in implementation (Azman & Mohammad, 2012). In order to shift the paradigm in the Malaysian criminal justice system toward truly restorative justice, we must ask: What kind of cultural aspects that may be involved that help or hinder the implementation?

In conclusion, this article would like to get to the idea where victim-offender mediation, a restorative justice programme, should be applicable within a family context based on the idea that family members of the offenders are also a part of the victimhood circle. Therefore, to introduce this family approach to victim-offender mediation may require the implementer to risk introducing a new restorative justice programme that may not be truly restorative (Zehr, 2015), and having restorative justice to adapt to the current justice

system of a country (Azman & Mohammad, 2012; Daly & Immarigeon, 1998). However, this article argues that, basing on the argument that restorative justice is about the relationships between the offenders, the victims and the community, and the reparation of harm that may be caused by the crime (Daly & Immarigeon, 1998), the idea where victim-offender mediation applied into family context may be a useful new approach of restorative justice that addresses juvenile delinquency effectively.

### **Possible Implementation of Restorative Justice in Malaysia and Its Application on the Family Context**

Juvenile delinquency is a prominent issue in Malaysia. Statistics by the Social Welfare Department, Malaysia have shown a decrease of the number from 5153 cases in 2014 to 4669 cases in 2015 (Jabatan Kebajikan Masyarakat, 2015). However, it is interesting to note that recidivism rates increased from 371 cases in 2014 to 417 in 2015. Looking at this number, we suggest that strategies and interventions that work for reducing first-time offenders may not be as effective to address recidivism. In Malaysia, several measures have been employed to reduce recidivism – ranging from giving a warning to institutionalizing the offenders. These measures are written in the Malaysian Child Act 2001, Section 91. The section states that a convicted juvenile offender must undergo one of eight orders which were: 1) release with a warning; 2) release under bond; 3) placement under the care of a relative or other capable person; 4) payment of a fine, compensation, or cost; 5) imposition of a revocable probation period; 6) imposition of residency in a related school; 7) punishment with lashes; and 8) imprisonment. However, as of 2016, the Act underwent a revision where punishment with lashes is alternated with an order of community service.

Our main thesis here is that the hike in recidivism rate implies that measures of rehabilitation should be carefully considered by policymakers. In the section mentioned above of Child Act 2001, three of the orders involve the use of institutionalizations, and they are Asrama Akhlak (juvenile probation hostels), Sekolah Tunas Bakti (juvenile schools) and Sekolah Henry Gurney (prison schools). Our analysis from the statistics by Jabatan Kebajikan Masyarakat (2016) pointed that institutionalizations seemed to be one of the most common outcomes of a juvenile criminal process where 1228 out of 4669 cases in 2015 (26.3%) were given an order to be put in a probation hostel or probation school. However, these statistics only reported the number of juvenile delinquents being detained in juvenile probation hostels and schools. There are juvenile offenders imprisoned at a prison school, hence the number of juvenile offenders being institutionalized may be higher.

Unfortunately, our analysis cannot confirm if the juvenile offenders being institutionalized are the same delinquents who reoffended – which is an important data. Regardless, scholars and advocates argued institutionalizations may exacerbate the problems (Ministry of Women, Family and Community Development, Malaysia and UNICEF, 2013). However, we would argue that the heavy dependency on institutionalization may contribute to the increasing number of recidivism cases.

On a positive note, these eight orders are a reflection that the modern Malaysia has adopted the philosophy that juvenile offenders should not be treated just like adult offenders (Samuri, Mohd Kusrin, Omar, Mohd Awal, & Md. Sham, 2012). This is supported by a provision in Section 91, Child Act 2001 of Malaysia, where the word hukuman which means ‘punishment’ or ‘sentence’ cannot be used to describe the outcome of a juvenile offender’s trial. Furthermore, putting community service in place of lashes points to the Malaysian Government’s effort in acknowledging that punishments do not work.

Even so, some scholars have pointed that in whatever form the ‘order’ (the word ‘order’ is used instead of ‘punishment’ or ‘sentenced’) takes place, the practice of juvenile justice system in Malaysia always reverts back to being punitive (Dusuki, 2010; Samuri et al., 2012), and we believe that their arguments is supported by the heavy use of institutionalization in addressing juvenile crime. In addition, this can be observed through the reports of some parties where the juvenile offenders were put in the same jail as adults during detention and some of them even reported of being abused mostly to garner confession.

Due to the heavy emphasis on punishments and institutionalization, it is crucial to see if the measures in Malaysia work in addressing juvenile crime. To answer this, there is a plethora of discussion on institutionalization and some effectiveness indicators such as recidivism rates and compliance with judicial orders. Basically, the basic findings of various studies highlight that institutionalization does not reduce delinquency (Leve & Chamberlain, 2005) and that institutionalization also does not reduce recidivism (Mat Saat, Idrus, & Nor Hamid, 2013).

While we do not argue against institutionalization, in light of these serious questions, it is time to discuss alternative approaches to addressing juvenile crime. One promising option is the use of programmes based on the philosophy of restorative justice (Daly & Immarigeon, 1998). Restorative justice is an approach that has been shown by studies to have benefits on both the juvenile offenders and their victims such as an increased quality of life, reduced rates of recidivism (Bradshaw & Roseborough, 2005; Bradshaw, Roseborough, & Umbreit, 2006; Choi, Green, & Gilbert, 2011).

It has been a few years that the Malaysian government has called for the introduction of restorative justice in the country (Arukesamy, 2011; The Star, 2011). Under this new initiative, The Ministry of Women, Family and Community Development will set up a taskforce to look into the restorative justice-based programmes. This is in line with their aim to uphold the rights of children as agreed upon in the Convention on the Rights of the Child when the juvenile delinquents are given the platform to have a voice and be humanized in the process. However, some argue that while this intention is noble, this call by the Malaysian government does not fully conform the philosophy of restorative justice where the victims should be a part of the stakeholders in a criminal process (Azman & Mohammad, 2012).

Zehr (2015, p. 3) has expressed concern over abandoning the focus on the victims and further elaborated,

«...restorative justice efforts have been motivated mainly by a desire to work with offenders in a more positive way. Like the criminal system it aims to improve or replace, restorative justice may become primarily a way to deal with offenders.»

In the Malaysian’s government case, the lack of focus on the victims may be due to the lack of strong definition of who the victims are. This is reflected in the first restorative justice-based programme introduced by the Malaysian government – community service (Jabatan Kebajikan Masyarakat, 2009). Other than the victims not being central to the implementation and process, this community service provision may not align with the principles of restorative justice because in restorative justice the community is only the secondary stakeholder of the criminal process (Bright, n.d.).

Along with the abandoned focus on the victims of crime, it has been argued that state bureaucracy often conflicts with the flexible nature of restorative justice (Johnstone, 2013). Johnstone describes an ideal way of encouraging state implementation of restorative justice by emphasizing its benefits, and highlighting successful case studies, until the idea becomes normalized. This may be what Malaysia needs. Therefore, we argue that a highly bureaucratic system in Malaysia perhaps would benefit from a slow and gradual introduction that does not ‘shock’ the system.

This means that the early look at introducing restorative justice in Malaysia, we argue, should take into consideration the ‘norms’ of current Malaysian criminal justice system. What are the norms that should be considered? Currently, victims are still not considered as one of the core stakeholders in the criminal justice system as reflected in various recent developments such as introducing community service in the juvenile justice. Therefore, this article attempts to answer

the question: If the norm is that the victims are not considered as the main stakeholders of the justice system, how should restorative justice be introduced, taking the norm into consideration?

### **Challenges and a Reflection**

Generally, Malaysians are ready for the implementation of restorative justice (Mohammad, 2015). But the readiness may be theoretical where restorative justice norms come into conflict with culture, personal attitudes and the preexisting justice system (Azman & Mohammad, 2012). This article was written contemporaneously to a pilot project of victim-offender mediation intended for its original objective – mediation between the offenders and their direct victims. At this time, the project team members faced resistance from various stakeholders and also complication from the bureaucratic nature of the system when the term ‘restorative justice’ was attached to the project. These challenges forced the team members to revise the aim of the project.

The implementation of restorative justice requires a collaborative effort between agencies that are consistent and in sync with each other (Daniels, 2013). Therefore, the diverted objective of victim-offender mediation as argued by this article is based on aiming a new crime policy into a system while conforming to the patterns of the system. As Johnstone (2013) suggested, a slow and gradual introduction of restorative justice into a system may be more realistic. In the case of Malaysia, this slow and gradual introduction requires a diverted objective – an application into a family context – in its pilot implementation.

### **Conclusion**

This article first discusses on the reality of juvenile delinquency in relation to the system’s punitiveness and what studies have said about it. In Malaysia, while the system is still punitive, certain parts of the juvenile justice have incorporated elements that ensure the rights of the juvenile offenders upheld in the criminal processes. These elements include the prohibition of the use of the word *hukuman* to describe the outcome of the trial and the philosophy of not treating juvenile offenders as adult offenders. This positive progress towards more rehabilitative approach to addressing juvenile delinquents is a reflection that Malaysia may be more open to other approaches such as restorative justice.

Restorative justice programs have been supported by numerous studies to be effective in addressing the needs of both the victims of crime and their offenders. Given the evidence of effectiveness, the Malaysian Government has made the right call for restorative justice. But thus far, their efforts lacked the important element of incorporating the rights of the victims in the criminal process. Given this situation, this article argues that while it is necessary to introduce restorative justice in the Malaysian system given the general readiness and the evidenced effectiveness, the introduction has to take into consideration the general attitude of not just the public, but also policy makers and cultural factors that may influence implementation.

This article is in lieu of the pilot project of the victim-offender mediation in Malaysia which faced several challenges in its run. The project was forced to divert its aim in implementing victim-offender mediation with the original objective of connecting offenders with their direct victims to a diverted objective of connecting the offenders with their own family members. This is based on the argument that family members of the offenders are also effectively victimized by the crime. While some scholars have raised concern over innovative restorative justice programmes that may have gone astray from the true restorative ideology, this article argues that this is still restorative in concept as the family members of offenders are still affected by the crime and whose needs have to be addressed too.

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