



# The global three: A Malaysian lens on the challenges and opportunities facing restorative justice planning and implementation

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## ABSTRACT

From the rise of restorative justice to evidence-based approaches to reducing recidivism, the intellectual landscape of criminal justice has seen considerable change in recent decades. The result is that an increasing number of countries have tackled the task of shifting preexisting political institutions to confirm with these new understandings. This is, of course, no easy feat. A great number of challenges confront willing policymakers, a reality that often puts philosophy at loggerheads with practicality. Moreover, the political process of change is subject to the influence of cultural and institutional norms. In this paper, we look at one particular case study – that of Malaysia's juvenile justice system – to understand the challenges faced in changing criminal justice policy. We identify three primary categories of challenges and elucidate their shape and impact through the Malaysian example. We also briefly analyze potential opportunities to mitigate and overcome these challenges. Furthermore, we also conclude with several implications for future research that we deem are important to be taken place. In sum, we argue that criminal justice reform must be undertaken with an eye toward important societal and institutional norms, each requiring thoughtful analysis of complex local cases.

## 1. Background

Despite a historical focus on punitive approaches, the Government of Malaysia has acknowledged the need to explore restorative justice within its juvenile justice system (Arukesamy, 2011). This move comes in light of an increasing body of evidence showing the efficacy of restorative justice in reducing recidivism rates (e.g., Angel et al., 2014; Bouffard, Cooper, & Bergseth, 2017; Bradshaw & Roseborough, 2005; Bradshaw, Roseborough, & Umbreit, 2006). In Malaysia, this shift has included the introduction of community service orders in 2007 (Jabatan Kebajikan, 2009). After a preliminary introduction for offenders between ages 18 and 21 (Abdul Rahim, Tengku Zainudin, & Roslan, 2013), the program was deemed successful and expanded to youth offenders in the recent amendment of the Child Act 2001.

But not all reform proposals and planning face so little resistance. It has been observed that policies fitting outside the range of viably mainstream political opinions – the so-called “Overton window” (Russell, 2006) – are less likely to be implemented, due to fear of public backlash (Ministry of Women, Family & Community Development, Malaysia & UNICEF, 2013). Even for policies that achieve implementation, efficacious use is oftentimes hampered by reluctant officials. Malaysian police, for example, rarely use mediation to settle

minor crimes and conflicts, despite the availability and demonstrated efficacy of the option. This has led researchers to suggest that societal factors, such as the cultural norms we will discuss in detail later on, may pose significant barriers in implementing novel policies (Cheah, 2016), and that these barriers may be further heightened by bureaucratic reluctance (Fox, 2015).

Of course, skepticism of the novel is often rational. Changes in socially significant policy warrant scrutiny. However, the fear of the unfamiliar in face of evidence, can indicate a lack of education and awareness. In Malaysia, for instance, a proposed Social Workers Act was shelved because it was reported that some in the public errantly assumed legislating *social workers* meant legislating social welfare *volunteers*, even though the regulation applied only to professional social workers (Anand, 2017). There are many other examples in Malaysian justice politics, and those are just the overt cases. However, as widely criticized as these cultural prejudices and misconceptions are, there are few efforts to understand their origins. There are fewer analyses yet that focus on how they vary between societies and contexts. We believe that these considerations are crucial to effective policy implementation.

In Malaysia and other places, the convergence of political will and evidence has shifted the question; no longer is it “*should* restorative justice be implemented?”, but rather “*how* will restorative justice be

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implemented?” (Wemmers, 2002). This simple question contains multitudes. The question of *how* varies considerably through cultures and legal systems. One question that various restorative justice scholars have asked is where to situate restorative justice (e.g., Gavrielides, 2007; Shapland et al., 2006). The objective of this essay is not to model an answer to that complex question. Instead, we argue a more basic point — that a country cannot simply adopt the implementation process as undertaken in other contexts. Restorative justice may have cross-societal applicability (Mohammad & Azman, 2014), but given that Malaysian society is still fundamentally different than other countries that have undertaken implementation, we argue that it is important that an understanding of local context be a part of effective implementation.

Despite this need, there is still a limited literature discussing the influence of these contextual variables in implementing criminal justice reform. Although parallel issues have been extensively discussed, including whether reforms like restorative justice should be “situated” within existing systems or alongside them (Joyce & Keenan, 2013), these discussions sometimes focus on philosophical and structural challenges. We believe societal variables warrant focus, too. Restorative justice may have cross-cultural applicability (Mohammad & Azman, 2014), but given that Malaysia is culturally different than other countries with well-implemented restorative justice programmes, it is important to consider the import of cultural and other local variables. Especially given that restorative justice implementations have occurred in countries with cultural similarities to Malaysia, such as Indonesia, there is reason for optimism in these efforts.

We seek to contribute to the growing literature that analyzes the challenges and opportunity of planning and implementation of justice policies. Wood and Suzuki (2016), for instance, categorized the challenges of planning and implementing restorative justice in the future into four: 1) problems of definition; 2) problems of institutionalization; 3) problems of displacement; and, 4) problems of relevance. Garbett (2017) commented extensively on challenges related to victim participation. Some authors have even investigated cultural factors; especially pertinent to our study is Islam, Suzuki, Mazumder, and Ibrahim, (2018), which assessed criminal justice reform in Islamic contexts. This literature is an important start, but given the pivotal importance of these considerations in policymaking, more consideration is warranted.

To that end, this essay uses the Malaysian example to illustrate the challenges that may arise during criminal justice reform. We highlight three categories of tension that may emerge. These are *legal norms*, whether they be preexisting statutes or conceptualizations of the role of the state in the justice process; *cultural norms*, those that involve cultural conceptualizations of “right” or “just” conduct in cultural systems; and *individual norms*, which include internalized concepts of self and social roles that govern individuals’ behavior and evaluation of others’ behavior.

Although these umbrella categories cover a broad range of potential challenges, we use the Malaysian example to highlight how specific and serious these challenges can be. We also use the Malaysian example for another reason. While Malaysia’s status as a frontier nation for restorative justice means that Malaysia-specific academic literature is limited, it also makes it a compelling case study. Frontier nations are likely to have had slower or lesser implementation of restorative justice because their norms vary in ways that impede or impact restorative justice implementation. That makes Malaysia a strong example of why a framework of varied norms is important.

Indeed, any thorough analysis of these concerns needs to go beyond surface definitions. As restorative justice and other reform efforts become viable in an increasing number of nations and cultures, the need for locally-tailored implementation of restorative justice will only grow. As our lens on Malaysia demonstrates, the challenges of locally-tailored implementation should not be neglected – but neither should the opportunities.

## 2. Legal norms

In framing our discussion of legal norms as a source of barriers to planning and implementing new justice policies, we concur with the points raised by other scholars, such as Garbett (2017); Suzuki and Wood (2017), and Wood and Suzuki (2016). The challenges discussed by these scholars – such as legal barriers to victim participation, and the best way of ‘situating’ restorative justice in respect to preexisting systems – can often be affected by the rigidities of bureaucracy (Fox, 2015). Bureaucracy promotes inflexibility, and inflexibility makes it difficult to implement reformist projects like restorative justice. Furthermore, innovative implementation may face legal barriers because people in the organization usually resist to change (Klein & Knight, 2005). It is little surprise, then, that successful restorative justice implementations often “co-opt” the legal norms of preexisting criminal justice systems. This may allow restorative justice to be implemented, but co-option may also circumscribe or circumvent effective aspects around reform.

Co-option is evident in come of the examples cited by Suzuki and Wood (2017). In their article, they described a case where Family Group Conferences that depended on public funding. That dependence left the Family Group Conference subject to direct and indirect pressures that pushed the process away from victim-centered model towards one focusing on the offenders and the secondary stakeholders, much like traditional punitive justice. This undermines one of the central premises, and promises, of restorative justice – the focus on the needs of primary stakeholders, including the victims. Suzuki and Wood’s example is a microcosm painted in sharp relief. The issue of legal co-option warrants special attention, given the central role of processes in the criminal justice system and their potentially distortive effect on reform implementation.

Not all legal challenges are so rooted in statute or philosophy; some are rooted in the conventions and attitudes surrounding legal processes. When a new justice policy is introduced within legal systems, one of the most common reactions may be a lingering hesitation about going “outside the box.” Many people working for public agencies are trained to rely on preexisting statute and legal conventions as guiding lights in decisionmaking – perhaps not explicitly moral documents, but a “north star” to help them navigate the ethical paths of their professional life. As such, current law can become normative. In Malaysia, for instance, the existence of preexisting “alternative” models – community service orders and good-behavior bonds – have been used to argue against further reform (KPWKM and UNICEF 2013). *Why*, some justice personnel ask, *would we need additional programmes?* Here, adherence to existing norms can hinder acceptance of reform among those charged with implementing justice policies, creating resistance. This is not specific to Malaysia; resistance towards restorative justice initiatives by justice personnel has been observed cross-culturally (Wadhwa, 2015). However, as a relatively traditionalistic and collectivistic society, the Malaysian system provides an excellent example of the calcifying effects of legalist convention.

There are many factors that contribute to this resistance. One is the state-centered nature of bureaucratic retributive justice (Fox, 2015). In adversarial systems where the state “stands in” on behalf of the victim and/or society, the state also “stands in” for others’ preferences. In the vast majority of adversarial systems that are also punitive, the state presumes the victim and society have – or should have – punitive preferences. Umbreit (1989) argued that the state assumes a retributive system is preferable to the unfiltered wrath of the victimized. However, this assumption ignores findings that victims often have non-retributive preferences. By setting up a false dilemma – centering victims versus centering a reflexively retributive state – legal norms can frame retribution as normative, or even merciful.

This dynamic may also affect the behavior of victims within the legal system. The State is empowered with most normative judgments, even those that might be reserved for victims. By assuming to

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