
CONVERGENCE OF RETRIBUTIVE AND RESTORATIVE PRINCIPLES OF JUSTICE

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ABSTRACT

Justice as a value and an achievement has always been a tricky field as it deals with both moral and political philosophy. The two principles of justice viz. Retributive and restorative have been in existence since long though the latter gained popularity as an alternative to the former in the 1970's. Justice is incomplete without the two principles acting together and even that requires a careful examination of each and every case because any excess or absence of any one principle might result in anything but justice.

Keywords: Retributive, Restorative, Justice, Convergence.

Introduction: Conceptual Framework

Justice as a concept is rooted in morality but it also projects itself dominantly in the political realm so it also becomes a subject of political philosophy. The quest of justice is always to look for a righteous path and a just course of action to achieve just ends. Justice does not concern itself with a good path it concerns itself with the right path. The distinction becomes important because justice as a value is placed at the crossroads of political and moral philosophy. It is imperative that it remains politically sharp and morally focussed for it to remain just. Justice always has to deal in absolute terms of either right or wrong it can't tread on a path where it is some right and some wrong and together it forms more right and less wrong.

It is beyond the scope of justice to consider part right and part wrong as an overall part of just outcomes. For justice to even exist it has to be in the form of truth, just like a statement, if it is true it is absolutely true similarly an outcome is just if it is absolutely just there is no scope of adulteration. Justice represents a dichotomy where a slightest addition of a negative part makes the entire outcome negative, partial justice is no justice and some justice is also no justice. The concept of good and bad is unable to explain just and unjust because good and bad represents a continuum where some part is bad but most of it is good makes a decision good. Justice on the other hand is absolute, if it is right it is just if it is wrong then it is unjust (Gaubha, 2017).

Retributive justice as a philosophy deals with the crime and the punishment as an action - reaction concept. It is like punishment is given for every wrongdoing. The earliest references of such a principle has been found in the Eastern Civilisations of Mesopotamia and Babylonia. The codes of Hammurabi (1750 BC) is one prominent example. All these codes understood a crime as an act of committing a wrong against the other person. The problem of punishment to the guilty and compensation to the victim was given prominence in these codes. The most literal meaning that retribution as a principle represents is the concept of *lex talionis* - The law of retaliation (The code of Hammurabi).

Retributive justice as philosophy gives importance to two important facts of any crime committed and they are *Actus reus* and *mens rea* (Encyclopedia Britannica) that is a guilty act and a guilty state of mind respectively. In order to establish a crime both of these elements must be present only a guilty act won't suffice to prove a guilt similarly the guilty state of mind is no condition to establish any crime worthy of punishment. It is also equally important under this system that a crime is committed and no punishment is given otherwise. It is not according

to the rules of retribution to mete out punishment for the sake of creating a deterrence. Retributive principles does not favour punishments which seek to hide inadequacies of the institutions.

Retribution takes into the account the circumstances of a crime and the principle of *mens rea* is inalienable part of it. A children committing a crime is treated differently than a man of full mental and physical vigour with malicious intent. It forbids the punishment to mentally unstable individuals because they are not capable of choosing their actions rationally and thus the principle of *mens rea* can't be applied. The code of Hammurabi though declares restoring the damage caused to a victim as an obligatory requirement even if the crime was not committed with an intent to cause harm. One of the defining features of retributive principle is that it forbids to let the individual go unpunished because it considers punishment as an earned anti-reward for the wrong action.

Retribution philosophy is not always about capital punishment or killing an individual for any wrong committed it seeks to restore balance in its own particular way. It considers a wrong doer as an individual acting out of his free will which puts the society, whose members decide to follow the law, at a disadvantage, by breaking the law. Retributive justice never allows offender to go unpunished because it seeks to remove the unethical advantage that an offender gains relative to the law abiding citizens. Its way of restoration is different where every case is decided according to its intent and the extent of damage done and the punishment for every wrong doing serves as a device to remind the society as whole to not indulge in any act which contravenes the law.

Restorative justice is a dialogue driven approach that tries to bring together the victim, the offender and the community to restore what has been lost by the respective parties. It seeks active involvement and cooperation from each stakeholder and limits the role of the state. It tries to establish a channel of direct communication between the effected parties and its focus is not on punishment but trying to recover the lost balance through active engagement and communication among the relevant people. Its focus is on the harm caused, by whom and who is going to be held responsible to correct that harm. The restorative principles removes the state from the centre stage and keeps individual as the primary stakeholders as it views a crime not as an activity breaking the laws but relationships among the people of the community.

As opposed to guilt it tries to identify the obligations created as a direct result of violations of other people's rights. It seeks to do the right thing by identifying the nature of harm and how the harm could be undone by the one who is responsible for it at the first place. It views justice as an attempt by the victim, offender and community members working together in the effort to make things right. The responsibility for the crime and the wrongdoing must be accepted before any meaningful process of restoration can begin. The most basic principles of restorative justice are:

1. Holding the wrongdoer directly accountable for the individual victim and the specific community affected by the wrong act;
2. Requiring the wrongdoer to take direct responsibility for making "things whole again" to the degree that this is possible;
3. Providing the victim(s) purposeful access to the courts and correctional processes, which allows them to assist in shaping the wrongdoers' obligations; and
4. Encouraging the community to become directly involved in supporting victims, holding wrongdoers accountable, and providing opportunities for wrongdoers to reintegrate into the community (Leung 1999).

The goal of restorative attempts are distinct with each case and it also depends on the cultural and social context but these principles elucidate the important roles played by the victim, the wrongdoer and the community in arriving at a restorative solution. Restoration never asks for returning to the status quo as existed before the conflict, it means in the context of restorative justice, the process of righting wrongs or healing wounds. This means different things for the different parties. Victims may use the process to restore a sense of control over their lives, to obtain answers for questions about the incident, or to express their anger over the wrongdoing and the impact the event has had on them. For offenders, restoration means accepting responsibility for their actions by repairing the harm they have caused and addressing the issues that contribute to their propensity to engage in harmful behaviour. In the case of the community, the process of restoration includes denouncing wrongful behaviour and reaffirming community standards. Restoration also means successful reintegration of the offender into society, particularly in situations where the victims and offenders live in the same community (*ibid*).

Convergence of the two principles of justice

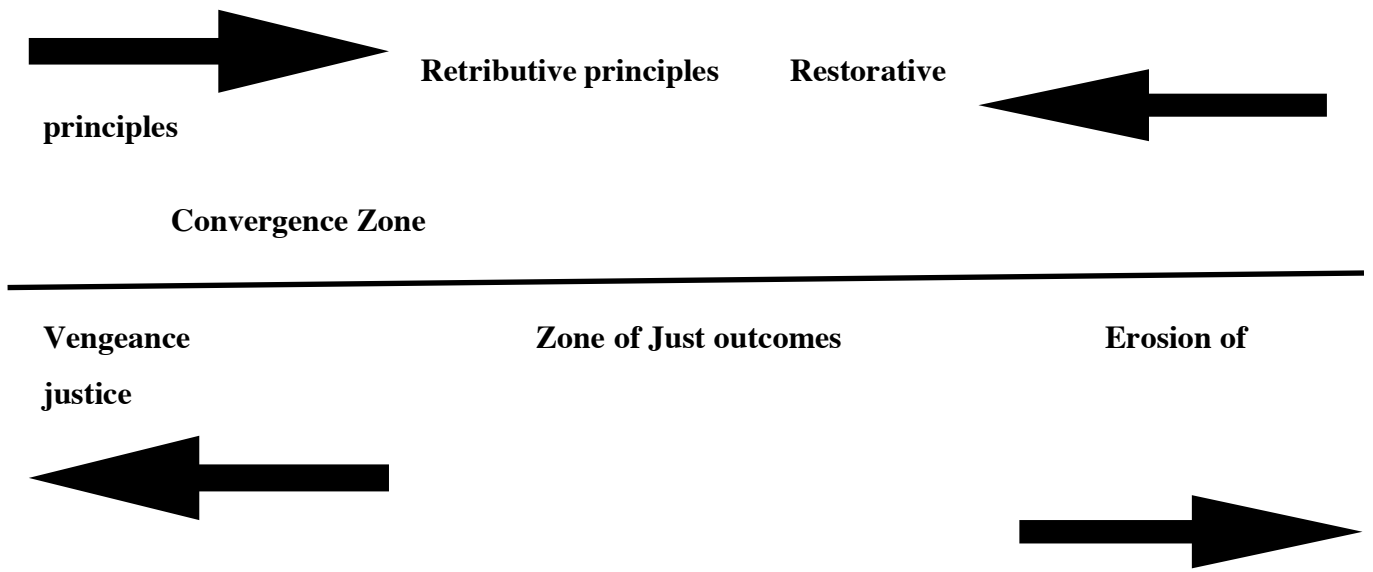


Figure 1. Depiction of the movement of proportions of retribution and restoration and their outcomes.

The said set up describes the an area where justice prevails, it lies somewhere in the middle of an understanding between the restorative and the retributive components. Retribution and restoration are not the polar opposites of each other. It is a commonly held myth that these two are mutually exclusive and always result in conflicting views as t what constitutes justice. Justice is not an infinite sphere where any point represents a satisfactory outcome it is an exclusive zone which results in equal satisfaction for all the parties. Any excesses in the name of retribution or restoration is fatal to the idea of justice and results in its terrible fall.

Justice is realised when a hybrid arrangement of both retribution and restoration as its intrinsic components are adjusted in the final verdict. Anything going too much on the left side of the zone results in brute feelings overpowering the notion of justice and replaces it with the idea of vengeance. Similarly any arrangement which looks too much at restoration and moves east results in the breakdown of faith in the legal process and hopes of the community at large. The issue of proportions of these components must be looked on a case to case basis as there exists no formula or calculating mechanism to quantitatively decide which component to be used in what proportion to arrive at a perfect and just outcome.

Even this arrangement is not capable to a perfect recommendation but gives a watch for excesses either side. What truly defines the proportions of each principle is the specific case and it has to be judged on a case to case basis as to which one should be applied as primary remedy and which one be used as secondary. One thing exists for sure is that both the principles are equally important and none can be ignored. It is/ should be at the discretion of judges who oversee the proceedings in a courtroom that no victim feels neglected or left out with the final outcome. The method should be such that the sanctity of the institution is upheld so does the hopes of the people and the society.

There is a need of both the retributive and restorative components to actually arrive at a just solution to any problem in a society. The retributive aspect invokes fear and acts as a deterrent the restorative part focus on the reconstruction of the societal bonds between the victim and the culprit. It is an attempt to sensitise people on the whole to avoid the negative and stay together embracing positive values of togetherness. The factor of fear associated with retributive justice is based on punitive measures which results in a system of counter measures forever wrong doing, severe the crime severe the punishment- this direct system of reactionary measures is employed which invokes the principle of 'necessary control over actions' among the members of the community.

It does not allow the people to think rationally and develop their conscience to understand and sensitise themselves to the pain of others. It just acts as a thick fear inducing wall which prevents them, most of the time, from usurping the rights of others. It is an external device to keep a check on the whims of the people and though such laws which deal with the punishment according to the crime are necessary it is equally necessary for laws to exist which allows people to communicate with each other, laws which replace punishments with actions which can lead to value addition to the society.

Justice as value addition to the society

While deterrence is important the values of being good, doing good and staying good are equally vital. It is pertinent for an individual to question himself and his actions before they become his reality and ultimately a social reality. This can happen only when an environment is created where a person, from early on in his life, has been trained and sensitised to value the rights and space of others. This value addition is not just a part of education but a part of life. The concept of restoration deals with these natural values which must be paid heed to by each

and every member of the community. The basic tenets of restoration deals with any wrong doing as a wrong doing among people which is witnessed by the community and must be solved at that level so that the enmity is replaced by understanding.

Any crime involves two hostile parties one is the victim and the other is a culprit. The similar hostility is transferred to the community in general where people tend to form opinions and take sides. It is one of the basic tenets of human nature to refuse the conciliatory efforts and go for a brute definition of justice, the idea of blood for blood. The restorative attempt, as the word implies, tries to rise above hate and tap the human potential to realise the higher self and restore peace as it prevailed before any mishap. Let's understand the case of the both principles in further detail using hypothetical case studies.

The case of Restorative Justice

Let's understand the concept of restorative justice from a crime committed against a person A. He is the sole breadwinner for his family of four including himself his wife and 2 children. One fine day he is returning back from work with his entire month's remuneration. Someone noticed this and decided to snatch it away from him at all costs and in the scuffle that ensued the other person ends up killing A.

In this case it's not just A who lost his life it is his entire family which will suffer because of the fate that he suffered. To understand it more clearly we need to look at his family consisting of kids deserving a father and a wife deserving a husband and had it not been for some persons ill will A would have been with his family catering to their demands and fulfilling his responsibility. Now arises the question of dealing with this crime, what should be the reaction of the institutions or what is the reaction of the family of A ? Obviously the instantaneous human nature will ask them to demand this person's life because he killed A but is it desirable or should this person be hanged just like that ?

The fate of this person should not be decided by keeping retributive thoughts in mind but looking at how this person could make the life of the deceased person's family better, the same family whom he left to suffer because of his actions. The state can provide lump sum amount to the family but that won't suffice as a steady source of income is required for a long time so that kids get all the necessary stuff to get capable enough to fend for themselves. It is also the duty of the state and the respective institutions to restore what has been lost from the community

because of this incident. Hanging the accused will not serve the purpose as it will put up a precedence of seeking revenge in the society and a case law for the institution to deal with such cases in a similar manner.

The restorative principle would want to look at this person in a different manner. It would direct the institutions to make him responsible for what he has done and do the right thing for the family and the entire society. The state would want to give this person a second chance at life and make him duty-bound by law to fulfil the role of a caretaker for the family, to look after the material needs of family even if that means allowing his fruit of labour for the family's needs. This way the man will be held liable to the society at large and his labour will result in a better upbringing for A's kids who would otherwise have been forced to undertake hardships at a young age.

Surely this arrangement isn't capable of giving a father back to the kids or a husband back to a wife but the kids will get a decent chance to acquire capabilities for their life ahead. This arrangement which adds value to the society in terms of kids finally getting assimilated in the society as educated adults being sensitised to value their own rights and duties as well as other people's rights is always better and preferred over that arrangement in which all that a family cares about is avenging the death of their loved one.

At the societal level this arrangement will put an alternate view of arriving at a just end where vengeance gives way to mutual understanding and vendetta gives way to development of capabilities. It also helps in associating justice with value addition rather than a mere mean to achieve and fulfil the momentous emotional rage of the people to seek blood of those who wrongs them. It gives people a chance to look develop foresight and look at the future. In this example the biggest achievement is that the kids transformed into adults who are not only having capabilities and values but are also wary of how one action can lead to a spiral of consequences and hence their conscience will always ask them to follow the leads of their father and not someone because of whom they suffered as kids.

The case of Retributive Justice

To further understand the concept we must put an example of how principle of retribution views a wrong doing. In this case let us take an example of a kid who has nothing to scheme against anyone, she is just a regular kid of five years of age. One fine day this kid, whose

name is K is playing outside her house and some man comes to meet her father looking for an accommodation as a tenant. Somehow things don't work out because of some differences related to rent and the deal is off. But the man decides to teach this man a lesson who refused him the property. He abducts the daughter, rapes her and kills her just to prove a point.

In this case the person who is committing a crime is an adult and mentally stable and able to plan and scheme such a derogatory plan. In his quest to prove his point to a person stooped down to such a level that he decides to molest and kill a child who is not even distantly related to any of the things which took place between her father and the man. There is not a single piece of evidence which shows that the happening took place unintentionally or the offender was not aware of what he was doing. In this the institutions decides to invoke the retributive principles once the case becomes clear that the person indeed planned the entire thing and it was his sole aim to inflict pain to the father of K and decides to hand out the harshest of the punishment.

The person is handed a death penalty. This is an attempt by the court to uphold the retributive principle which was needed in this case but also an attempt to invoke the restorative principles but this time it was about restoring the faith of the community in the legal and institutional system, to prevent distrust among the members of community towards the institutions and the state.

Is it possible that this could have ended separately, that the court could have given him a chance to live his life while he took everything from a small girl, not just her life but her dignity too? We need to look at this case as a separate case from the one discussed above, it was a murder for money which was random and this was a rape and murder systematically planned to teach a father a lesson. These two cases present entirely different facts and circumstances. The first one provided a chance to the offender to do some right after doing some wrong because his intent was to rob a man off his earning not to kill that man while in case the entire thing was planned to extract vengeance and the vessel of that revenge was a kid having a future.

There is no way that K could be brought back and even the circumstances warrant for a punishment which must deter such beastly souls to not plan and execute a crime with such intent. In this case the restorative aspect plays its part at the level of the state not the individual and its the limit of this aspect in this case beyond it the principle of retribution should/ must be put to use. Any attempt by the institution to plead for the offender's future will result in loss of

credibility because giving life to the offender even if he is put behind bars for a decade or two won't guarantee that he will change or he won't repeat such a crime of passion once he serves his sentence. This will lead to a loss of faith at the societal level in the institutions and since no institution can guarantee reform with even 1% of purity it is a huge risk for such a person to get free in the name of his future life. On the other hand giving out a capital punishment will act as a tough deterrent to all such people who are potential, vengeful and passionate offenders.

Critical Appraisal

When Mahatma Gandhi said "Hate the sin not the sinner" (*The story of my experiments with the truth*, 1929), he was pointing to a moral principle of necessarily staying away from any negative thought or action which can potentially harm fellow human being. These words were relevant back then they still are relevant and will remain for the time to come but they are not absolute in nature. The relevance must be placed in the context to understand the true meaning of these words. To put in simple words, if a child steals it is told to him that stealing is a sin and he must not repeat it and become a good person. The child is not scheming or planning to steal deliberately it was his instantaneous reaction to get hold of a thing he liked and keep it because he is developed mentally to decide between right and the wrong.

As opposed to this if a person who is mature enough to understand the right and wrong and still he decides, in a fully conscious and right state of mind, to further an act which is not only harmful to his future but also to the other person or a group of people towards whom that act is directed then we need to revisit the principle of morality which asks us to hate the sin and not the one who is committing it. There are two explanations and views to look at this case. The first view is restorative in nature which asks the society to deal with this person in a manner so that he realises that he committed a mistake and it is his job to fix it without delay and he must not repeat it in future. Such an approach will give a person a chance to reincarnate his character and work for the betterment of his victim.

But what if the person who as we know is fully conscious of his actions and in his right state of mind committed this crime with an intent to harm or cause discomfort and repeats the crime one after the other despite given a chance by the entire community. Is such a person worthy of restorative attempts, is it really the sin which matters or in this case the sinner himself becomes the sin ? In order to answer this question we need to look at the 'principle of intent'. The thing which separates a mistake from a crime is the intent and unknown circumstance. A wrong

committed unintentionally and unknowingly must be dealt with in the most compassionate and restorative manner.

While on the other hand if a wrongdoing is planned with an intent of harming others causing grief and pain to the others then the principle of restoration alone fails to account for such actions. To put it simply, when a person himself starts defining sin it becomes a social imperative to invoke fear in his mind to deter him from causing further harm. In this case we can not afford to allow him to have the privilege of restoration and engaging with him at the level of community will result in further damage. When a person is deliberately having an intent to harm the community we can not ignore that intent with a simple plea to restore him back to where he belongs i.e the community. Giving such a person a blanket protection of a morally infused perception of 'humane treatment to every sinner' won't work.

Every person in his individual capacity is a member of the community at the first place. It is their actions which further decide if they are going to remain there or not. A person committing an error unintentionally always has the potential to join the ranks of the community because he/ she has a pure conscience and can be talked into it but the one with mala fide intent is not fit to be assimilated back into community using the simple device of restoration. The one who is willing to realise the value of other's lives, not willing to let his conscience become sensitive enough to understand other's suffering is not worthy to live with other's efforts to retract him back.

It is possible to talk to a human being and reason out things but it becomes difficult for someone who deliberately wants to act beastly by engaging in acts that are detrimental to the society. It is under such circumstances that the retributive aspect of justice comes handy and becomes essential for the institutions to consider the methods which normally must be and should be avoided. Such individuals represent the extreme case of ill will that a human being may possess. The prism of restoration fails to account for the activities and it is incompatible with the nature of things that are at play in the cases of intentional and deliberate scheme to hurt others.

Retributive justice taps the most basic of human emotions to deter people from engaging in any form of anti social behaviour, that emotion is fear. As much as humanity, sympathy and empathy are reality of human existence so is the love for chaos and inhumanity. It is because of these reality that it becomes necessary to imbibe in theory of justice the two broad ends of behavioural spectrum of human beings where retribution stands for the rarest of the rare cases

where restoration fails to have any answer. This does not mean that restorative and retributive principles are mutually exclusive they are both necessary for justice and most of the time it is at the balanced use of these principles which leads to a healthy just outcome. For justice to prevail it sometimes becomes necessary to look at theoretically equal human beings unequally owing to their understanding and perspective regarding justice, so that equality in terms of justice prevails.

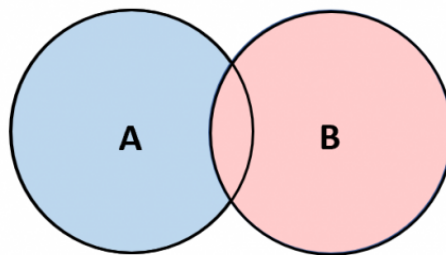


Figure 2. Depiction of mutually inclusive nature of retributive and restorative principles

The above diagram represents a balanced approach to both the principles where A represents retributive justice and B represents restorative justice. The common myth which has been created that restoration and retribution can't stand together is not true. In fact these two when used together results in the most comprehensive definition of justice. No single strand of thought is capable of giving results as too much retribution spoils the outcomes with revenge taking the primary seat and too much of restoration makes justice look like a foolish man's paradise.

Conclusion

Justice is one of the most debatable issue to ever come across human beings in terms of it being objective and subjective. It is objective in the sense that the institutions i.e the law courts only look for facts and evidences which are admissible while looking at a particular case. It is subjective in the sense that every case has different people as victims and offenders and their realities and perception of justice is different. The offender naturally has bias for the softest of the punishment s that the courts could give while the victim is biased towards the strictest of the punishments for the wrong done to him. It is the job of justice as a value to remove biases, to create a balance between the the two extremes of outcomes and also to decide the outcomes

as such on the basis of subjective facts rather than focussing on the any objective lens whatsoever.

As brilliantly put by Friedrich Nietzsche - “Justice and Objectivity have nothing to do with one another”. Justice is a value as well as a device to keep the society up and running in particular manner. Objectivity in justice leads to subjective facts of different people ignored which might lead to community fractures. One case might demand restoration as a principle element while the other might call for tougher actions on retributive front. The definition of justice remains the same that is to arrive at just and moral result but what constitutes moral and just is dynamic, it changes with circumstances and people.

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