
CRIMINAL LAW AS RESTORATIVE DOCTRINE

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ABSTRACT

Restorative justice has advanced significantly since the early 1960s, and it now plays an important role in and alongside the criminal justice systems of a number of countries around the world. Though the idea that 'restorative justice' can be used to combat crime has piqued the interest of criminologists and policymakers worldwide, it has been difficult to obtain a factual picture of the effectiveness of this doctrine due to failures and not being assessed sufficiently systematically and comprehensively. Unlike retributive and rehabilitative justice, restorative justice focuses on preventing the offender from repeating their actions. In fact, restoration can take place without the involvement of the offender.

Even if the perpetrator is not apprehended, partial justice is served by attempting to restore or compensate the victim in order to restore the public's trust that justice will be served. 'Restorative justice has been defined as 'every action primarily oriented toward doing justice by restoring the harm caused by a crime'¹. Thus, the doctrine played an important role because it offers a new practical strategy for combating injustice and stigma based on moral intuitions with enormous resonance.

The purpose of this paper is to provide an analytical exploration of Restorative Justice and the goals, guiding principles that should govern it, its appropriate scope of application, its social and legal context, its practice and impact in the present context, and its relationship to traditional criminal justice conceptualizations.

Keywords: Restorative justice, victim, crime, morality, stigmatization.

¹ Bazemore and Walgrave, 1999

What Exactly Is Restorative Justice?

In essence, restorative justice tries to resolve gaps in viewpoints in the legal system beyond those of perpetrators and victimising parties in order to repair harm done to the community and help reform the community to do a better job of providing social justice². As a result, Restorative Justice tries to make amends for harms done to the victim and his immediate environment, such as property damage, emotional anguish, and community resentment, as well as skepticism about the legal order and the authorities' authority to maintain public safety. Thus, Restoration of justice thus does not limit itself to resolving torts pursuant to civil law, but also focuses on the resolution of crimes, which are public events.

Restorative justice is not clearly understood as part of other victim-focused initiatives, creating confusion regarding its definition, principles, and practices. The phrase is commonly used to refer to a range of victim-offender mediation and conferencing procedures. Restorative techniques have progressed from victim-offender mediation to family group conferencing, circle processes, and different sorts of citizen panels in recent years. They all have one thing in common: the transfer of some decision-making authority from the government to victims and offenders, their families, friends, and other supporters, as well as members of the community. They include establishing victim support organisations, victim compensation schemes, and offering victims to give testimony at trial. There are a variety of judicial sanctions that may be imposed on offenders, in addition to community service and financial compensation.

Restorative justice, like victimology, has several tendencies and schools of thought that have evolved over time. Against this backdrop, defining restorative justice appears to be an impossible task, as many attempts have been made in the past, none of which have proved universally acceptable. The following definition was developed by an early proponent of restorative justice.

“Restorative justice refers to a method of handling the aftermath of a specific crime

*and the implications for the future by parties who have a stake in that crime”*³

Instead of attempting to define restorative justice, it may be more useful to examine it through

² Restorative Justice by John Braithwaite, Read more at-
<http://johnbraithwaite.com/wp-content/uploads/2021/07/Restorative-Justice2.pdf>

³ Tony Marshall (1999: 5) also see Goggins (2004: 10)

the lens of an analytical framework⁴. To be effective, such a framework must be able to accommodate the restorative justice movement's wide range of philosophical, practical, procedural, and political differences while still allowing distinctions to be made between approaches that are coherent with the restorative justice tradition and other victim-focused approaches that aren't.

A wide range of approaches have come to be known as "restorative justice", which possesses three important characteristics. One is concerned with the purpose of redressing the harm inflicted by a crime. The second is a balanced focus on the offender's personal accountability to those who may have been damaged or affected by an offence – which could include individual victims and, perhaps, the larger community – as well as the latter's right to reparative restitution. The third is a non-coercive, inclusive decision-making procedure that encourages essential individuals to participate in selecting how an offence should be dealt with. The analytical framework is built on these three elements: goals, focus, and method.⁵

Punishment as a Means, Restoration as an End

The leading proponents of restorative justice see offender cooperation as a critical component of the process⁶, and they advocate for informal voluntary settlements as essential to the restoration process. The offender demonstrates his understanding of the harms caused or wrongs committed, as well as his willingness to make amends, by accepting responsibility for the harms caused or wrongs committed. Observing such gestures has a greater restorative value than simply complying to avoid further trouble.

Cooperation, on the other hand, does not stand alone as a determining factor in and of itself, but rather as a means of increasing the chances of restoration. Compulsion may be required for a number of reasons, including when agreement cannot be reached or what is agreed upon is insufficient. In such cases, legal intervention is required. Restorative justice also entails judicial

⁴ A different form of analytical framework has been proposed by Paul McCold (2000: 401), who has devised a Venn diagram to differentiate between various different sets of ostensibly restorative practices on the basis of the scope they provide for participation by the three principal sets of direct stakeholders: victim, offender and community.

⁵ Van Ness, 1996: 23

⁶ Marshall, 1996; McCold, 2000

procedures and sanctions in its maximalist framework⁷.

The restoration of damages is accomplished through imposing formal restitution or compensation, paying a fine, or providing services for the benefit of victims. It is an act of power used to express disapproval and, possibly, to enforce compliance, but it is completely agnostic about which value systems it enforces. Restorative sanctions, on the other hand, may be enforced through one or more deprivations of liberty, such as an enforced stay in a closed facility, to ensure compliance with sanctions or to deter offenders who are deemed detrimental to the public.

Legal Principles For Restorative Justice

There are some similarities and significant differences between a restoration-oriented justice system and a traditional criminal justice system. Restorative justice and criminal justice both have clearly defined social tolerance limits, and the law holds the offender accountable for his behavior and, when necessary, uses coercion.

The gravity of the crime committed must be considered when determining the proportionate punishment in penal justice. The seriousness of the harm caused is the criterion used in restorative justice to determine the maximum amount of restorative effort that is reasonable⁸. The severity of punishment or compensation is determined by a number of factors, including the individual's comprehension capacity, available resources, the premeditated nature of the act, and the specific context. Such elements are obvious to be taken into account more thoroughly in deliberative settings, such as voluntary processes, but they are equally important in judicial sentencing as well.

The following principles dictate how a judicial procedure for restoration differs from a traditional criminal procedure.

1. The victim and those affected by the crime must be able to participate in the restoration justice procedures. With this information, it is critical to define the extent and type of harm and to determine the best possible restorative outcome. However, due to legal

⁷ Restorative justice, as defined by Bazemore and Walgrave (1998), is oriented towards achieving justice through restoration. A more sophisticated criminal justice system would eventually replace the existing punitive and rehabilitative ones

⁸ Walgrave and Geudens, 1997

rights, these actors may be unable to influence the outcome;

2. Coercive interventions should be used sparingly at all stages of restorative justice procedures, while voluntary, informal responses to crime should be made available. Diversion should be used whenever possible. If the prosecution is decided in court, it must be justified by positive arguments rather than simply a violation of the law. Because authority must be intruded only minimally, a voluntary agreement provides a higher level of restorative quality;
3. Furthermore, as previously stated, the sanction would not link the severity and nature of the crime to a proportionate punishment, but rather to the maximum amount of reasonable reparative effort;
4. A criminal investigation seeks to determine the harm, suffering, and social unrest caused by the offence, in addition to establishing the facts and guilt. In addition to examining possible 'diversion' options, the report will advocate for possible restorative sanctions if diversion is not possible.

Assessing The Limits Of Restorative Justice

Restorative justice promotes values such as healing for both the offender and the victim, community involvement, respectful dialogue among the parties involved, forgiveness, accountability, and fraternity. It is positioned as a counterweight to punitive policies and an alternative to the adversarial court system⁹. Restorative justice is also intended to have a positive impact on offenders by confronting them with the consequences of their actions and responsibilities, allowing them to repair the damage done to the victim, and requiring them to work on finding a solution to their problems.

It's crucial to comprehend not just whether Restorative Justice logical theories are capable of providing useful assistance, but also how they work. A number of issues are identified in the internal critique, which are summarised here:

1. ***Inexact standards for assessing the damage:*** Restorative Justice programmes are evaluated using a variety of criteria, including participant satisfaction and recidivism rates. These criteria, on the other hand, are rarely stated in relation to the objectives that

⁹ Roach, 2000

must be attained.

This is unsurprising given the multiple and imprecise stated purposes.

2. ***Dispositional criteria are very few or none at all:*** There is typically a lot of leeway in Restorative Justice proceedings—it is up to the group conference or other decision-making body to decide what is best for the individual. Aside from the stated minimum requirements, there may be some jurisdictional constraints, such as the participants' consent to the proposed outcome. In practice, however, a Restorative Justice conference is generally free to pursue any resolution goal (including a fairly traditional one, such as deterrence), and to use practically any means to accomplish this goal.
3. ***Uncertainty and multiple goals:*** Those who support Restorative Justice argue that a state must accomplish a number of goals, including restoring the victim, convincing the offender of his wrongdoing, healing the schism between victim and offender, restoring community trust, and enforcing community rules to prevent future offending¹⁰.
 - a. Frequently, the goals are expressed clearly but are ambiguous: for example, the goal is to "repair harm" without defining whether the repair should focus primarily on the consequences of the conduct or include some kind of normative response; or a number of objectives may be proposed concurrently, without specifying their relative priorities¹¹.
 - b. Furthermore, Restorative Justice is said to restore damaged relationships, but no explanation is given as to what kinds of relationships have been damaged or how they are to be restored. Restorative Justice concepts are unable to provide sound guidance due to their broad scope. The command to use all available means to achieve a variety of vaguely defined ends tells us little about how specific goals should be pursued and achieved.

Restorative Justice Evaluation in Practice

Current restorative justice practice assessments concentrate on the following broad issues:

¹⁰ http://www.antoniocasella.eu/restorative/Zedner_1994.pdf

¹¹ Ibid 2

participant satisfaction, procedural justice, restorativeness, and outcomes. Participant satisfaction typically includes general measures of satisfaction with the overall experience of the restorative scheme. Procedural justice metrics are usually more specific and refer to many dimensions of fairness, such as other people's respect and treatment, the fairness of the agreement, the facilitator's impartiality, and so on.

Restorative measures, such as genuine remorse, consensus, apology, expression of feelings, and reintegration, are in high demand¹². So far, outcome measures have tracked the effects on victims and offenders, specifically the reduction of victim anger and fear and the reduction of offending or improved quality of life among offenders.

The most common type of restorative practice is victim-offender mediation. Crime victims and offenders meet with trained mediators to devise a reparative plan, though reaching an agreement is frequently seen as secondary to emotional healing and growth. Victims consistently report that being able to talk to the offender and express their feelings is the most important aspect of mediation.

Similarly, offenders frequently report that being able to explain what happened is more important than the restitution agreement. If cases are mediated, there is no doubt about short-term success: most victims and offenders are satisfied with the process and outcomes, an agreement is reached in almost all cases, and offenders complete the vast majority of restorative plans. Mediation provides victims with relief from anger, anxiety, and worry about re-victimization and overall fear of crime, according to several studies.

A State-Centred Versus A Human-Rights Based Approach To Crimes

Until we shift paradigms from an approach based on state-centered rules to a human rights-based approach, it will be impossible to fully integrate victims' rights into criminal law. Criminal law is one of the most important human rights systems in the world.

According to traditional conceptions, criminal justice is a conflict between the state and the offender, with the state represented by the police, prosecutors, and courts. The term "public" is commonly used in reference to both the general population and all of the people who occur in a defined location. The word "public interest" in criminal law refers to a broadly organised and

¹² Evaluating Restorative Justice: A Guide for Practitioners, Nakee Yalon Holloway- Read more at: <https://opus.govst.edu/cgi/viewcontent.cgi?article=1239&context=capstones>

integrated community as a whole, rather than each individual and their interests individually.

As an example of this perspective, for instance, the prosecution is discontinued when an offender pays an amount of money to the state or a charity. Sometimes, tight statutes of limitations force prosecutors to close their files before the case has even begun. A variety of factors makes it possible for individuals to enjoy impunity, including amnesties, pardons, and immunities.

All of these instances enable the state to dispose of criminal cases with little regard for the rights and losses suffered in accessing proper justice, or the legitimate interest of all individuals living on a state's territory in ensuring that offenders are held indiscriminately. Offenders have rarely been given the opportunity - which could be considered a right - to make amends. When they do, however, they are not given much credit since it is seen as punishment, something unpleasant that has been inflicted on them, rather than reparation, something they have done to repair the damage caused by their offence.

Thus, the primary function of criminal justice to consistently and reliably defend human rights against severe violations can be compromised through state-enacted legislation. The victim—the one who was injured, or robbed—is, in this perspective, no more than a prerequisite of the situation in which the crime occurred¹³.

Indeed, most of the restorative justice literature has tended to characterise the new restorative justice approach and the existing criminal justice system as "polar opposites" in practically every manner. As a result, a crime should be defined as a wrong done to the victim, but it is also a public wrong because it violated the victim's human rights, calling into question a crucially important status that the victim shares with all others.

Thus, in this traditional view, criminal justice is directed against the offender; the offender is the state's adversary, whose possible resistance must be overcome. It places the offender outside of criminal justice and in opposition to it. And because the state is the true victim of crime, the offender must be punished.

Conclusion

¹³ Penny J. Green and Tony Ward, 'State Crime, Human rights and Limits of Restorative Justice' - Read more at: <https://www.jstor.org/stable/29767193>

Restorative justice has not yet altered the fundamental trajectory of the criminal justice system. It has evidenced to be a more effective alternative to prison and perhaps other forms of punishment, but the outcomes in terms of victim participation and injury reparation have been tempered. As a consequence of the progressive evolution of restorative justice over the past twenty years, it has become a fundamental alternative to doing justice after a crime has occurred. However, its reach is unclear. Restorative justice is sometimes limited to voluntary settlements, leaving traditional justice to deal with the hard-core reactions to crimes. Some restorative practices are reinterpreted into new punishments.

As a final point, this article argues that the state should return the case to the victim, and under what conditions. Even so, we may show that restorative justice contributes more productively to social life and relations if it is regarded as promoting social ethical attitudes like respect, solidarity, and taking responsibility more than retributive justice does. Offences are normative conflicts between the victim and the offender within a community of law. Traditional viewers believe that crimes are public issues and should be conceptualized without regard to the rights of the individuals involved.¹⁴

Plausibly, while advocating victim's rights, the most crucial point is understanding what constitutes a criminal offence. It is questionable how a state can hold rights over its citizens and can be viewed as reflecting an outdated view of states as polities and their citizens as separate entities who have competing interests, the state pursuing public interests, private interests, and their own interests.

It is increasingly felt that victims of crime can legitimately expect some reaction demonstrating that the community of which offenders and victims are part, distances itself from the offender's conduct and sides with the victim. There are advantages to using consent-based procedures rather than coercion whenever possible in criminal justice. The process could also be oriented toward displaying more concern for the victim.

In this context, it has been demonstrated that criminal justice should become a public service rather than talking only to itself in its own courtroom, in which it acknowledges its responsibilities to various parties, including victims, offenders, and wider communities and shows how it is related to their concerns.

¹⁴ Journal of National Human Rights, Vol 17, 2018 available at: https://nhrc.nic.in/sites/default/files/JOURNAL_V-17_2018.pdf

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