
THE SIGNIFICANCE AND NEED OF RESTORATIVE JUSTICE

Ishaan Deepak Joshi, MIT-WPU, Faculty of Law

ABSTRACT

The System of Restorative Justice has become a new and important perspective of thinking and looking at the field of crime in recent times. The system of Restorative justice has addressed the consequences of criminal actions as its aim by encouraging offenders and victims to communicate and engage into a discussion about the harm caused by the crime relevant to the particular case. There are many evidence-based arguments on critical thinking and social reform with regards to the criminal justice system contemporary to the times and the effectivity and ethos behind the principles of restorative justice. The new movement of restorative justice is operational on a global scale and is a presentation of new initiatives, programs, and projects specially aimed to restore victims. The aim of this research article is to understand the jurisprudence, theories and history of restorative justice, look into the true definition and meaning of restorative justice, to understand its values and familiarize oneself with the Restorative Justice philosophy. Furthermore, the Indian Perspective and position on restorative justice and the relevant Legal Provisions will also be delved into.

Introduction & Scope

The speed with which the concept of restorative justice and strategies related to it have caught the attention and imagination of the reformers of the justice system is noteworthy. As of now, the concepts and themes associated with the principles of restorative justice are as follows:

- Victim-Offender Interaction
- Reparative Sanctions
- Community Participation

A firm part of the priorities of the mainstream system of Justice

Restorative justice aims to address the consequences of criminal acts. Simultaneously, it focuses on encouraging victims and offenders to engage in a dialogue. In most of the cases, restorative justice is facilitated by way of direct and indirect negotiation between the perpetrator of the crime and the victim of the crime; however, restorative justice also includes within it support networks and also has a history of in some cases involving and enlisting the help of professionals such as judges, lawyers, the police, prosecutors, social workers and the community itself at large.

Theoretically, the victim of the crime is the central participant in the restorative justice system and the victim's restoration in terms of the harm done is the foremost concern. In practice however, many questions arise as to whether victim is really actively involved in the process, what are the needs of the restoration process, and whether or not there exists a requirement to understand the risk of a secondary victimization and what is the probability of a victim to be at the heart of a restorative response in the truest sense, or whether offender remains the point of focus and attention throughout the process.

Restorative Justice: Defined

Restorative Justice is not just a concept, but an innovative movement in the areas of criminology and victimology. Giving recognition to the fact that injury is caused to people and the society as a whole due to acts of crime, restorative justice insists that justice should repair such injuries and the parties are to have the legitimacy to participate in the process. Therefore, the programs of Restorative Justice enable the victim, the criminal offender and the members of the community affected by the crime to have a direct involvement in the response to the crime.

In the Criminal Justice System, the offender and victim become the central points, with legal and governmental professionals working as the system's facilitators, aiming towards reparation of victim, offender accountability and full participation of the offender, victim and the community.

Restorative Justice is a theory of justice that lays emphasis on repairing the harm revealed or caused by the criminal. The goals of this system are best accomplished by way of a cooperative process that includes all the stakeholders.

The process of restoration is any process wherein the offender and the victim, and in appropriate situations, other individuals or members of the community affected by the crime participate actively and together in the resolution of the matters that arise from the relevant crime, usually with the help of a facilitator.

Tony F. Marshall in the definition he provided states Restorative Justice to be a process through which all the stakeholders in a particular crime come together with the view to collectively resolve the method of dealing with the aftermath of the crime and its future implications. Providing a definition for restorative justice can be an elusive endeavor due to it being a philosophical framework. According to some thinkers, the concept of Restorative justice is best understood as a thought process towards conflict and crime, instead of a distinct system or model of law. The concept goes beyond our usual way of looking at crime and conflict, transitioning to how we think of ourselves in a communal sense, our reactions to crime and the ways of restoring balance post commission of crime.

The Procedure of Restorative Justice

The process of Restorative justice involving all stakeholders, often in meaningful and direct meetings, is a very powerful way when it comes to addressing not only the physical and material injuries, but the psychological, social and other related injury caused by the commission of crime.

Across many countries, there has been an enjoyment of great consensus when it comes to the theme of community participation. In most developing and under developed countries, the practices of Restorative Justice see their application through the modes of customary and traditional law. The adoption of restorative approaches will help serve in strengthening the capacity of the prevalent justice system. The fundamental challenge in front of a participatory justice system is finding ways to mobilize the involvement of the local communities

effectively, while simultaneously safeguarding the interests and rights of the victims and offenders of the crime.

The Significance of Restorative Justice:

Restorative Justice principles are essential readings for students and academics involved in the study of victimology, social work, legal studies and justice. Having the knowledge of Restorative Justice proves to be useful for professionals such as lawyers, conciliators, mediators and social workers, as well as the policy makers.

A Comparative Analysis of Existing Justice System and Restorative Justice

In the Existing Justice System, the following features are observed:

- Crime is seen as the violation of the criminal law and as a harm to the State.
- The role of the victim, offender and the community at large is an inactive one.
- The System is under the control and administration of the state and professionals.
- The idea of Forgiveness and regret is barely and rarely given any consideration.
- An offender is made liable, stigmatized and served punishment.
- The outcome is always a win-loss one for the victim and offender respectively.

In the system of Restorative Justice, the following features are observed:

- Crime is seen as the harm done to the victim and community at large.
- The victim, offender and the community at large participate actively in the resolution.
- The System is usually driven by the local communities.
- The themes of forgiveness and regret are central and are encouraged.
- There is a focus on the offender's reintegration into the community and the preservation of his dignity.
- The outcome for both the victim and the offender is a win-win situation.

Multi Method Usage in Restitution of the process of Justice

The position and role of the victim in the practices of restorative justice should be considered by putting the focus on organizational, institutional and legislative frameworks of offender and victim mediation, and local level conferencing programs, along with the personal experiences and needs of the victims. On taking seriously the concept and practice of restorative justice, we

find that a different way of thinking is involved with regards to the traditional notions of rehabilitation, crime prevention and deterrence.

The Historical Background of Restorative Justice

The theme of restorative justice is one of the most important developments in human thinking grounded in the traditions of justice systems from ancient Greek, Roman and Arab Civilizations wherein a restorative approach towards crime was accepted. In India, (6000 – 2000 B.C.) during the time of the Vedic Civilization, some aspects of Restorative Justice were being observed. The Sulha – The restorative justice institution of the ancient Palestinian times is till today in force in the Galilee Region.

Values and Principles of Restorative Justice

The approach of the restorative justice system also implies transforming the very foundations of the knowledge of Criminal Justice. There is a necessity for change in the present system of criminal justice due to the growing prominence of the restorative justice systems. In Criminal Justice however, a predominant theory in the said terms finds it necessary for it to be complemented by even more involvement of attention to detailed theoretical explanations regarding why and how alternative and conventional criminal justice interventions function the way they do.

The question from time immemorial regarding the issue of criminal and crime is to determine what is a just and fair response to a criminal or wrongful act. As per traditional wisdom, the fair and just response to an act of criminal nature is determined best by a system of criminal justice and its affiliated professionals. The major demerits of such an approach are discussed below as follows:

Inevitably, bureaucrats and professionals of criminal justice function with procedural and bureaucratic priorities that most usually are at failure due to being unable to reflect the needs of justice of the primary stakeholders of the matter. As a result to this, resolutions and outcomes imposed by professionals turn out to be unhelpful, and in some cases even counterproductive for persons who are already under considerable distress and serious trouble who have the most at stake to gain or lose by the reaction of criminal justice.

No matter how competent in their areas of expertise, professionals typically lack the appreciation and detailed knowledge that is a requisite for the successful addressing of the

specific justice i.e., the needs and welfare of the principal stakeholders i.e., the offender and victim in the criminal justice. Only the stakeholders themselves and family members, friends possess the required in-depth knowledge of their personal circumstances and needs to develop a truly adequate and constructive solutions and responses to any particular criminal incident, its many consequences and causes.

The processes used traditionally in the criminal justice system have the characteristic of disempowering both the parties in conflict and creating a sense of unnecessary alienation and isolation between them, resulting in the exacerbation of the feelings of anger, fear, hatred and helplessness which in turn make everyone's plight much worse on both sides.

The parties enjoy no rights over outcomes and responses that are forced upon and decided by others.

Criminal Justice Systems of the Traditional kind have a history of responding to victims requiring justice with either too little or just too late.

Customarily used criminal justice processes are usually at failure when it comes to the acknowledgement that gravely wrongful and criminal acts are in nature the violation of particular persons, i.e., the victims of any crime and not prima facie the state.

Over the last decade, we have observed a rapid and speedy proliferation of interventions with regards to restorative justice all around the globe.

The theme of restorative justice may be a new wisdom that such interventions operate on, bringing to us the very opposite of the old and critical decisions of a criminal justice response towards prevention, justice and welfare are made best by the principal stakeholders i.e., the offender and the victim themselves, preferably engaging in a dialogue with each other in presence of the respective communities of each party. The process of restorative justice is in general is inapplicable.

Where the victim is of an unidentified nature.

Where there is a dispute regarding the responsibility for the offence.

The parties to criminal dispute i.e., the victim and offender have the will to take part in a meeting with an attempt to bring the matter to a settlement through a process of negotiation and discussion in ways that are right and meaningful for them, on the condition that the

resultant agreements fall within the purview of law and are of not any obvious harm to the interest of the public.

Only on the not meeting of one or more of these conditions, or failure to come to an agreement that is mutually satisfactory to both the parties, should a case be dealt with through the application of traditional processes of the system of criminal justice.

Moral Psychological & Emotional Healing

Two criminologists by the names of Scheff and Retzinger have observed that in a system of restorative justice, there is a simultaneous occurrence of two processes. They are as follows:

- Material Reparation Process
- Symbolic Reparation Process

The Material Reparation Process

This process of restitution of material nature helps result in a final settlement between victim and offender, typically comprised of specific agreements in terms of victim's compensation, community service, etc.

The Symbolic Reparation Process

This process of symbolic reparation is the less visible one of the two processes. It is comprised of expressions and gestures of courtesy, pardon, regret and respect.

As per Scheff and Retzinger, core sequence of the process of restorative justice consists of apology by the offender and forgiveness by the victim. It is crucial to decreasing chances of reoffending, reconciliation and satisfaction of the victim.

The Restorative Values

The notions of restorative justice as a model to bring together all stakeholders in a dialogue about the consequences of injustice and to decide upon what is to be of their rights is extremely important, with the use of restorative justice being one as an alternative to traditional punitive justice. Hence, there is a difference of values in both the systems of justice.

With regards to restorative justice the core values are that the process should win restorative values where the result of the restorative process does not involve human rights and

fundamental rights being breached. As per John Braithwaite, the values of restorative justice include the values that form the basis of international human rights. They are as follows:

Restoration of Injury

Restoration of Human Relationship

Restoration of caring and compassion

Restoration of self-determination and empowerment

- Restoration of sense of citizen's duty
- Restoration of Peace
- Restoration of Freedom
- Restoration of Property
- Restoration of Human Dignity

India and Restorative Justice

In our country, the procedures of settlement have their roots to village and panchayat settlements which made the parties involved in a matter to come to dispute, informally make their case and based on their own conventions and customs, decide upon it.

However, restorative justice with certain exceptions in India's criminal jurisprudence is more so of a redundant nature. The reason behind this is the criminal justice system in India is unfavorable for the victim.

No such separate law exists in India that enables the victim to have any say with regards to the criminal justice process. The restoration, compensation and restitution are still in real practice, uncommon.

The primary reason for this is probably the lack of scope for these practices to be followed due to the procedural law. Few restricting and inadequate provisions are available in the Criminal Procedure Code, 1973 with regards to compensation in the form of sections 357, 357A, 357B and 358.

CRPC Section 357: Order to pay Compensation

When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole/any part of the fine

recovered to be applied-

in defraying the expenses properly incurred in the prosecution;

in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who, under Fatal Accidents Act, 1855 (13 of 1855), are entitled to recover damages from person sentenced for loss incurred by them from such death;

when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property having reason to believe it's theft, in compensation to any bona fide buyer of property for loss is restored.

If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed/if appeal is to be presented, before decision of appeal.

When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by compensation, amount as per order.

An order under this section may also be made by an Appellate Court/High Court/Court of Session when exercising powers of revision.

At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Criminal Cases and Compounding

The effect of offences being compounded is being voiced popularly in recent times as possibly one of the ways to make the mechanism of restorative justice a successful one. In accordance with Section 320 of CRPC, 1973, Offenders can come to a settlement regarding the matter. The basic meaning of compounding is a process by which the victim and the offender come to terms in the form of an agreement to end a litigation. The CRPC, 1973 Section 320 allows the parties to compound cases as a recourse in terms of certain offences without the court's consent and in particular cases with the court's approval.

Plea Bargaining

Under the Criminal Procedure Code's Chapter XXI A, a procedure has been established for plea bargaining in India in the form of provisions under Sections 265A to 265L. However, there is a list of reasons as to the existence of plea bargaining, or the jurisprudence and motive of the law makers to include the provision for plea bargaining in cases of criminal nature. The main inspiration for such an enactment is the success of the United States of America's Plea-Bargaining System.

Conclusion

In my opinion, the theories of restorative justice are indicative of being able to provide resolutions that can be sustained for the long term with regards to dealing with criminal behavior. However, there is a true need of understanding the success or failure of any particular criminal justice intervention. The use of Restorative Justice seems to work towards providing emotional support and moral psychological healing from the resultant trauma of the particular criminal incident through the interaction and dialogue between both the parties and symbolic reparation. I however firmly believe that the entire system and theme purely works on the goodwill and willingness of the victim to interact with their wrongdoer. As this is a discretionary right of the victim, it is unlikely in most circumstances to work out harmoniously. Not all criminals, or dare I say most criminals cannot be properly reformed or reintegrated as a member of society. The mentality through which most victims react to their offender is one of demanding justice by putting the offender through the best possible punishment. I firmly believe that though prima facie meritorious, the system is a very fragile one, and can also result in more trauma, abuse and disadvantage being taken by the offender. The victim too can misuse their position to toy with the offender. Both the parties, apparently hoping to come to a settlement, run the risk of [potentially increasing their peril at any given point of time. There is a necessity to understand the loopholes of the restorative justice system to develop it further and make it foolproof. However, the chances of restorative justice replacing punitive justice are slim, if next to none.

References

Handbook of Restorative Justice Programs, United Nations Publication, United Nations New York, 2006

G.S. Bajpai, Victim in the Criminal Justice Process: Perspective on Police and Judiciary

Mehak Bajpai, Advancing of Restorative Justice in Criminal Law in India and Germany, Journal of Victimology and Victim Justice 2018, NLU Delhi, SAGE Publications

Social Bonds. In B. Galloway and J. Hudson (Eds). Restorative Justice: International Perspectives, Monsey, NY: Criminal Justice Press

Experiments in Restorative Policing: A Progress Report. Canberra: Law Program. Research School of Social Sciences. The Australian National University. Von Willigenburg, T, 1996

Bandura, A, 1990. Mechanisms of Moral Disengagement in Origins of Terrorism. W. Reich (Ed.). Cambridge: Woodrow Wilson International Center for Scholars and Cambridge University Press.

John Braithwaite, Restorative Justice and Responsive Regulation, Oxford University Press, NY, 2002

V.N. Rajan: Victimology (Allied Publishers, 1981)

Upendra Baxi: Social Change, Criminality and Social Control in India, in Essays of Crime and Development (1990)

Paul W. Tappan: Crime, Justice and Correction