

# Restorative Justice; A New Way Toward Justice

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*People respond in accordance to how you relate to them. If you approach them on the basis of violence, that's how they will react. But if you say, we want peace, we want stability, we can then do a lot of things that will contribute towards the progress of our society.*

*President Nelson Mandela*

### Abstract:

The restorative justice theoretical framework views crime as a violation of people and relationships. These violations in turn create an obligation to make things right. Restorative justice aims to reestablish the balance that has been offset as a result of a crime by involving the primary stakeholders (i.e., victim, offender, and the affected community) in the decision-making process of how best to restore this balance. The focus is on healing as opposed to punishment. Other important principles of restorative justice include offender accountability for wrongdoing, respect for all participants, and the centrality of the victim throughout the process. A fundamental component of restorative justice programs is some form of dialog or interaction between the offender and the victim or a victim surrogate, with some programs extending participation to family and community members. A youthful offender and victim must agree to participate in such a dialog. Examples of programs include Victim-Offender Mediation, Family Group Conferencing, and Sentencing Circles. Possible outcomes of these programs may include holding the youth accountable for his or her actions, the victim feeling that their voice was heard, an apology from the offender (possibly in spoken or written form), restitution, or community service. Furthermore, some routine practices of the juvenile justice system such as restitution, are consistent with a restorative justice principle, and some programs incorporate some aspect of the framework, such as teen courts. The evidence regarding the effectiveness of restorative justice programs for juveniles is mostly positive, although the most recent meta-analyses have come to contradictory findings regarding their effectiveness in reducing delinquency.

*Keywords; Restorative Justice, Justice, Criminal Justice, Alternative Method, Victim, Alternative Dispute Resolution.*

### Introduction:

In today's world, the entire criminal justice is facing numerous problems- delayed trials, false witnesses, non-satisfaction of the victim, increase in the sharp rate of crimes, overcrowding of prisons and it goes on. Neither the victim nor the offender is benefitted in this criminal justice system. An alternative way or method to bring about changes in the criminal justice system becomes very important and restorative justice could be a better alternative method to provide the same. Restorative justice is a way to attain better solutions through the involvement of two parties and through resolving the tussle.

Informal justice is to be understood or it explains the restorative, which reforms the victims, and the offenders, restoring the communities which can be effectively achieved through the participation of the stakeholders. It requires victim-offender mediation, healing circles, and conferencing of the family groups. It is a process where the parties involved in the offense deal to resolve the aftermath of the offense and its future implications.<sup>1</sup> The growing concept of restorative justice indicates and provides an alternative to the failure of the criminal justice system in most parts of the world. It is based on the concept to make the offender realize his guilt and reintegrating him back into society by compensating the victim and also by the involvement of the society in decision making.

The violation of human rights of the accused, delay in disposing of the cases, and the unsatisfied victim has compelled the public to lose faith in the current justice system which paved the way for restorative justice. The reason for restorative justice is to combat the oppression of the state structures. It is also seen as empowering citizens for taking up the responsibilities of the matter<sup>2</sup>. The Suffolk University defines restorative justice as a broad term that institutionalizes peaceful approaches to harm and violations of legal and human rights. Instead of honoring the law, the state, and the professionals, the solutions of the restorative engage with those who are harmed, the offender, and the community which is affected in order to advance repair which will help to re conciliate and to rebuild the relationship. It is a balanced approach for the stakeholders which tries to preserve the safety and dignity of all.

The restorative justice system is also not similar or perhaps it is very different from the adversarial legal system. The ADR (Alternative Dispute Resolution) mechanism takes into its ambit the legal issues and protects the rights of both the parties whereas restorative justice

<sup>1</sup> Tony F. Marshall; "A report by home office research development and statistic directorate"

<sup>2</sup> Braithwaite, J. Restorative Justice & Responsive Regulation 2002, Oxford University Press

goes beyond the legal issues, majorly into fundamental relationships.<sup>3</sup> It is now considered as a global social movement advancing the transformation of the criminal justice system. It is all about putting the problem in the center of the circle rather than putting the criminal at the Center of the criminal justice system. The essential process involved in restorative justice is non-domination and every stakeholder is provided with an opportunity to be heard with respect to what is to be done to restore the victims, the offenders, and the communities in the aftermath of the crime. Restorative justice is also rising because of the reason that it offers a unified approach to justice that does not only center on punishment.

The first victim offender reconciliation Program was started in Kitchener in 1974 and by 1997, the Church Council on Corrections was able to list around 100 cases which were operating throughout Canada which was attempting to bring the victim, offender and communities together to deal after the crime had taken place.<sup>4</sup> It is a compelling and a genuine new idea about justice.

The restorative justice is also not about mediation. Mostly, restorative justice encounters the offender or the wrongdoer admit to some extent the responsibility of the offence and the most vital element of the restorative justice is to name and acknowledge the wrongdoing whereas in mediation there is an element of neutrality which can be misleading for such cases. The restorative justice does not necessarily signify for the first-time offenders or minor offences. Instead, studies have shown that restorative justice has the greatest impact in more serious cases.

It is also clear that restorative justice cannot answer all situations' problems. The question that arises is that should it replace the legal system which is still not clear. Juvenile offenders are very encouraging on this issue. However even if restorative justice is successfully and widely implemented, there is still a requirement for legal systems as a backup option. The legal systems emphasize public dimensions which are based on society's interests. However, this sort of approach ignores the private dimensions. So, by emphasizing the private dimension of crime restorative justice enhances a better balance and there is a better way of experiencing the justice.

### **Jurisprudence Behind Restorative Justice:**

Restorative justice is based on the principle that self-realization is a way to eradicate crime from the society and sinful could be done away with by the peace which is based on an old age philosophy. Justice could be more appropriately achieved through the process of restorative justice than punitive system because it would identify the victim and the offender in their individuality rather than approximating the crime to a legal category and the harm felt by an average victim. The emphasis of restorative justice is more on the right relationships rather than the right rules.<sup>5</sup> The notion of restorative justice derives its basis from the therapeutic, corrective, and preventive theories of punishment. The corrective theory is based on the principle of reformation of offenders through the method of individualization. The basic idea is that the offender does not elapse to be a human being even if an offender has committed a crime. It is based on the concept of the humanistic approach.

This approach stands in opposition to deterrent theory and alternative methods to imprisonment should be tried while deciding on the offence committed by the offender. Through this concept, the offender would get a chance to better his/her life and the factors which led to the commission of the crime are eliminated. It is based on the theory that punishment is not the only way to crime correction, alternative methods should be derived so that disputes are resolved like forgiveness by the victim or the community, mediation between the offender and the victim so that the offender realizes the impact of the crime on victims life and on the community at large, the offender can make good the harm caused by his act, the victim should be given broader role and voice in the criminal justice system, the offender is ready to take the responsibility of his action. Through this concept or by adopting the above-mentioned methods the offender can be prevented to be tagged as a criminal. It can prevent overcrowding of prisons from where offenders who have committed small crimes can many times turn into habitual or big criminals. Participation and motivation can help prevent crimes rather to have a follow-up through the court orders.

Participation can help in seeing the crime as many things at once which was caused due to a variety of reasons and all of these suggest preventive options. Accounting at conferences has the potential the prevention of crime.

The concept of restorative justice is also based on the concept of therapeutic jurisprudence where it reduces the pain on the victim, to overcome the problems of psychological and physical well beings of the stakeholders involved. It further reduces the problem of victimization.

### **Restorative Justice Vs Criminal Justice System:**

The state acts on behalf of the victim or it steps in the shoes of the victim whenever a crime occurs especially in countries like the US, India, and many other countries. Then begins the investigation and the case enters the trial where there is basically fact-finding and the court comes to the inference by applying the rules of evidence and decides on that basis how culpable the offense was and deciding on

<sup>3</sup> Suffolk University, College of Arts & Sciences, Center for Restorative Justice, "What is Restorative Justice?": 2011

<sup>4</sup> Kent Roach, Changing Punishment at the turn of the Century: Restorative Justice on the Rise, 42 Canadian J. Criminology 249 (2000)

<sup>5</sup> Barbara Hudson, Restorative Justice: The Challenge of Sexual and Racial Violence, *Journal of Law and Society* Vol. 25, No. 2 (Jun., 1998), pp. 237-256 (20 pages)

this basis it provides a remedy which could be fine, rigorous imprisonment or death penalty or life imprisonment or simple imprisonment depending and varying from case to case. If a crime is committed against the state, the state, therefore, becomes the punishing authority. The victim in these criminal justice systems does not assume importance as the state steps in the shoes of the victim and the main focus of the criminal justice system is on securing the conviction, the trial, and the offender which is in contrast to the restorative justice system. The criminal justice system primarily focuses on the laws and the rules and bypasses the victim's healing. The victim should be placed in the central position if harm is caused. In contrast to the criminal justice system restorative justice is mainly concerned with healing the victim, and repairing the harm done both physically and mentally, it also signifies the offenders' responsibility and accountability. In the criminal justice system, accountability is thought of as punishment which is based on the concept that the offender should face the punishment for the harm they have caused. There is nothing in the present criminal justice system which makes the offender understand the consequences of their actions or be in tune with the victim. There is incapacitation in the criminal justice system from the victim's side. The victim has no identity other than the witnesses. There is no qualitative contribution to the victim or to the accused and the accused is also not helped. The criminal laws are a reflection of penal policy in a given state. No due attention is paid in the criminal justice system to the victim whereas under restorative justice the core is the victim as the victim is being harmed. There is more emphasis on legal guilt.

The loss to the victim can be made good either by compensation or mentally or emotionally or by restoring the victim back to its original position. There is no victim satisfaction in the present criminal justice system. In the present criminal justice system, it is not based on the victim and it does not serve the victim as there is no victim-oriented justice. The victim suffers from intangible losses. There is only the establishment of legal guilt in the present system whereas the restorative approach provides for truth-finding. The restorative approach primarily focuses on:

- a) There is victim and offender mediation where the victim has a say and his say is given supreme regard in deciding the punishment for the offender.
- b) It aims to serve the needs of the victim which are emotional, restoring the victim, or financially.
- c) Also restoring the offender back into the society by making him accountable to repair the loss to the victim.
- d) Encouragement for an apology by the offender.

The present criminal justice system's main goal was to encourage peace, and harmony and to make the society a better place to live in, which it has not been able to achieve. The principle behind the restorative approach is mainly victim-centric and community-centric and gives prime importance to the victim whereas it is not so in the retributive approach.

The major difference between the restorative justice and the retributive approach can be summed up as follows:

- a) Under restorative justice crime is an act against the community and the individual whereas under the retributive approach crime is an act that is against the state and is primarily seen as a breach of law.
- b) The crime control under restorative justice lies in the hands of the community whereas under retributive justice crime is controlled by the criminal justice system.
- c) The main objective is to repair the harm done and to assume responsibility for the harm under restorative justice whereas punishment is seen as the accountability of the offender under retributive justice.
- d) Under restorative justice crime has social responsibility whereas under retributive justice it is seen as an individual act with the responsibility of the individual on himself.
- e) Punishment is not the only way to deter the offender rather it disrupts or disturbs the peace and harmony of the community and hampers good relationships under restorative justice whereas under retributive approach punishment acts as deterrence and it changes the behavior of the offender.
- f) Victims are given primary importance under the restorative justice approach whereas under retributive approach victim do not have any central role rather the state steps into the shoes of the victim.
- g) The offender under the restorative justice approach is defined as having the capacity to indemnify the damages whereas under the retributive justice the offender is defined as being inadequate or deficient.
- h) The main focus under restorative justice is on what should be done that is to solve the problem. It has more prospective view rather retrospective. Under the retributive justice approach the main focus is on securing the blame or guilt.
- i) There is back and forth communication under restorative justice approach whereas under the retributive justice it is based on adversarial.

### Restorative Justice in India:

Forgiveness, accepting the guilt, and realizing the mistake are some of the essential requirements of restorative justice. There is hardly any form of restorative justice in India in the Criminal Justice System which is a hangover of colonial times. However, some modern concept of justice has evolved which has the nature of restorative justice, which can be listed as follows:

- Plea Bargaining
- Lok Adalat
- Panchayat which is recognized as constitutional body
- Probation

It is seen that courts of most countries encourage alternative methods of resolving the issue in order to not opt for long trials and to get out of the muddle of litigation. In India, there is a history of such methods being practiced from ancient times and are called Panchayats and legally it is called arbitration. Lok Adalat wherein the cases are tried summarily and there is not much emphasis on legal

technicalities.

The seekers of justice approach the Court with pain and anguish and they believe in the Court because they think that they would get justice. However, in reality, the courts take a lot of time in deciding the cases which have physical and psychological harm to both the parties and this leads to a search for alternate dispute resolution for speedy, inexpensive, and less stressful resolution of disputes. Justice delayed is justice denied and the cases should not be disposed rather they have to be decided.

ADR (Alternate Dispute Resolution) mechanism plays an important role in doing away with the delays and clogs in the Courts. This can help victims obtain speedy relief. The parties are more involved in the outcome and have control over the outcome which creates a sense of satisfaction among the parties. The process followed is also flexible and not formal as the rigid procedure followed in ordinary cases. Its aim is to find a solution for both the parties which is acceptable to both the parties, future relationships are also preserved through this process. ADR includes the following:

- Negotiation
- Mediation
- Conciliation
- Counselling
- Lok Adalat

Also, the concept of plea bargaining is presently in place in our procedure and it provides to resolve the cases without going to trial. The stakeholders resolve the issue and settle the outcome between themselves and the judge gives his approval. It is an active negotiation process.

Formulation of practices of Restorative Justice can solve many problems existing in the present Criminal Justice System like long trials, unsatisfied victims and community, etc. The State as a guardian of fundamental rights is bound to ensure speedy justice and avoid any delay which leads to a miscarriage of justice. Sticking to the long process of criminal procedure and the lengthy court process can never make the system fast. Some alternative is required to remedy this. There is also an absence of victim-oriented justice and the idea of an alternative is to reduce victimization and the victim should get as much justice out of the system as the accused.

The next chapter deals with the idea of conciliation in sexual harassment cases in educational institutions and the findings of the research show that conciliation has the potential to redefine the approach to criminal justice in India. The researcher has undertaken an empirical study in order to find out why conciliation is not working and what are the problems, especially in campus areas where the students' futures are at stake. The researcher has also interviewed the members of the ICC committee to understand the long-term impact of the abuse, thoughts on the criminal justice system, and perspectives on restorative justice.

In Juvenile Justice (Care and Protection), 2015, Section 18 provides for outcomes that are restorative in nature however no provision explicitly mentions restorative justice in offenses committed by children. Adding provisions in the Act or the Rules could permit restorative justice practices.

In IPC, the convictions are limited to fine, death, and imprisonment and it is not victim-oriented and it does not include measures to provide reparation, rehabilitation, and restitution and empower victims. There are no measures where offenders should be encouraged and could take the responsibility and restore the victim back to their original position.

In Protection of Women from Domestic Violence Act, 2005 and Rules, contains provisions that are restorative in nature. There could be services provided for counselling and reconciliation services.

It is however observed that practices of restorative justice should be incorporated in various sections of the Code of Criminal Procedure in appropriate cases.

#### **Howard Zehr's Has Defined Three Pillars of Restorative Justice:**

Three pillars or principles of restorative justice deserve a closer look on obligations and engagement, harms and needs.

##### **a. Restorative Justice Focuses On "Harm":**

Restorative justice understands that crime gives impetus to harm done to people and communities. Our judicial system, has its focus on rules, regulations and laws and the view that the state is the victim, often loses sight of this reality.

It is concerned prima facie with making sure offenders get what they deserve, the judicial system considers victims, at best, a secondary concern of justice.<sup>6</sup>

##### **b. Wrongs Or Harms Result In "Obligations":**

Restorative justice emphasizes the offender's accountability and responsibility. The prevailing criminal justice system defines accountability as making sure offenders are punished if the crime is essentially about harm.<sup>7</sup> In the case of the restorative justice system, accountability means offenders must be encouraged to understand that harm. Offenders must begin to comprehend the consequences

<sup>6</sup> Zehr, Howard. (2011), *Transcending: Reflections of Crime Victims*, Philadelphia, USA: Good Books, p. 43.

<sup>7</sup> Christie, Nils and Howard Zehr, (2007), *Limits to Pain: The Role of Punishment in Penal Policy*, Oregon, USA: Wipf and Stock Publishers, p-35.

of their behavior. As we all know that the first obligation is the offenders, but the community and society have obligations as well.<sup>8</sup>

### **c. Restorative Justice, Promotes Engagement and Participation:**

The principle of engagement suggests that, parties affected by crime - victims, offenders, and members of the community - are given significant roles in the judicial process. These "stakeholders" need to be provided information about one another and to be involved in deciding what justice requires in this case.<sup>9</sup>

In some cases, this may mean actual dialogue between these parties, as happens in victim-offender conferences. They would share their stories and come to a consensus about what should be done. In other cases, it may involve indirect exchanges, the use of surrogates, or other forms of involvement.<sup>10</sup>

### **Agenda Of Restorative Justice in Present Time:**

Reflecting, in part, on the different agendas of restorative justice, two types of conceptual expansion have occurred. First, the well-known restorative justice advocate and theorist John Braithwaite has created a far larger, more encompassing project, based on a transformative agenda. His work evolved from more modest beginnings applications to youth crime in the early and mid-1990s by applying the concept of "re integrative shaming" but expanded at the turn of the twenty-first century to include broader mechanisms of regulation and societal transformation<sup>11</sup> Indicative of his vision of "holistic restorative justice,"

Like others, but in a more sophisticated fashion, Braithwaite takes a values orientation to restorative justice. He identifies twenty-four values of three types: *constraining* (specifying rights and limits), *maximizing* (specifying sites and types of restoration), and *emergent* (properties such as remorse, apology, and forgiveness that emerge when restorative justice succeeds, but which cannot be expected to occur).<sup>12</sup>

### **Principles of Restorative Justice:**

Three key principles govern implementation of restorative justice in processes and in systemic reform. Let us consider each of these in turn.

#### **a) Justice Requires That We Work to Heal Victim, Offenders, and Communities Injured by Crime:**

Crime leaves injured victims, offenders, and communities in its wake, each harmed in different ways and experiencing correspondingly different needs. To promote healing, restorative justice must respond appropriately, considering the needs and responsibilities of each party.<sup>13</sup>

- Victims' Perspectives
- Offenders' Perspectives
- Community' Perspectives

#### **b) Victims, Offenders, And Communities Should Have the Opportunity for Active Involvement in The Justice Process:**

Virtually every facet of our criminal justice system works to reduce victims, offenders, and communities to passive participants<sup>14</sup> Because the government is considered to be the primary victim, its virtual monopoly over the apprehension, prosecution, and punishment of offenders seems logical and legitimate.<sup>15</sup> Because victims are not parties of interest in criminal cases, and rather are simply "pieces of evidence to be used by the state to obtain a conviction,"<sup>16</sup> they have very limited control over what occurs and no responsibility<sup>17</sup> to initiate particular phases of the process.

#### **c) The Relative Roles and Responsibilities of Government and Community: In Promoting Justice, Government Is**

<sup>8</sup> Sawatsky, Jerem and Howard Zehr, *Justpeace Ethics: A Guide to Restorative Justice and Peacebuilding*, USA: Lutterworth Press, p. 81.

<sup>9</sup> Harris, K. (1987), "Strategies, Values, and the Emerging Generation of Alternatives to Incarceration" *New York University Review of Law and Social Change*, Vol. 1, pp. 141-70.

<sup>10</sup> Lenman, B. and Parker, G. (1980) "The State, the Community and the Criminal Law in Early Modern Europe"

<sup>11</sup> Gerry Johnstone, (2008), *A Restorative Justice Reader: Texts, Sources, Context*, Cullompton, UK: Willan Publishing, p-72.

<sup>12</sup> Braithwaite, John and Declan Roche, "Responsibility and Restorative Justice" In: Gordon Bazemore and Mara Schiff, *Restorative Community Justice*, Cincinnati, OH: Anderson Publishing Co., p-64.

<sup>13</sup> A. Mestitz, Anna Mestitz and Simona Ghetti, (2005), *Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison Of 15 Countries*, Kluwer Academic Publishers, p-44.

<sup>14</sup> Bryan Gibson and Paul Cavadino, *The Criminal Justice System: An Introduction*, (May 2008), (edition 3<sup>rd</sup>), USA: Waterside Press, p-38.

<sup>15</sup> The justification given for the exclusion of the victim from prosecution scene is stated that the crime by and large is directed against the society as a whole and the state which has taken upon itself to protect the life; liberty and property of individual exercise the police power and its justice delivery system. It is also bound to restrain the individual from taking law into his own hands. Another reason forwarded is that the intervention of victim in prosecution process may vitiate the fairness of trial and open the door-way to retributive and vengeful traits that may vitiate fair trial.

<sup>16</sup> Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice*, (Jan. 2009), (edn. 1<sup>st</sup>), UK: Willan Publishing, p-116.

<sup>17</sup> Louise Ellison, *The Adversarial Process and the Vulnerable Witness*, New York: Oxford University Press, 2001, p.25.

### Responsible for Preserving a Just Order and The Community for Establishing a Just Peace:

Peace requires a community's commitment to respect the rights of its members and to help resolve conflicts among them. It requires those members to respect community interests even when they conflict with their individual interests.<sup>18</sup> It is in this context that communities and their members assume responsibility for addressing the underlying social, economic, and moral factors that contribute to conflict within the community. Order, on the other hand, is imposed on the community. It establishes and enforces external limits on individual behavior to minimize overt conflict and control the resolution of conflict. Both order and peace are appropriate avenues for achieving safety.<sup>19</sup> However, as imposed order increases, personal freedom decreases; hence, peace will be sought in a society that values freedom.<sup>20</sup>

### Key Elements of Restorative Justice :

Having analyzed the restorative justice as unleashed and interpreted by various scholars and jurists the key elements of this system globally must be as follows: -

- (a) Supporting and assisting victims.
- (b) Repairing of relationship.
- (c) Denouncing criminal behavior.
- (d) Encouraging responsibility.
- (e) Focused restoration.
- (f) Reducing recidivism

### Conclusion:

Restorative justice programs and practices focus on restoring the harm done by a criminal act, rather than focusing on punishment. The evidence regarding the effectiveness of these programs in reducing continued delinquent behavior is promising, but given methodological weaknesses of the literature do not allow for a strong positive conclusion. Similarly, non-delinquency outcomes for youth are promising but inconsistent, except for the youth's perceptions of fairness, which were greater for the restorative justice programs. Indeed, its advocates understand that the success of the entire restorative justice project rests crucially upon the extent to which the victim is allowed to become a genuine party to the process. They also accept, however, that victim empowerment proper will have to occur despite the state. This is a crucial insight. It is an insight that founds the theorization of the criminal episode as a private conflict. They consider that re-humanizing the criminal justice system means privatizing our concept of crime. Restorative justice is magnanimous. It is concerned not only to repair the damage that the offender has caused to the victim and the community. It is concerned also with the welfare of the offender himself and delivering him from the clutches of a criminal existence.

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<sup>18</sup> Oliver P. Richmond, (2002), *Maintaining Order, Making Peace*, New York: PalgraveMacmillan, p-116.

<sup>19</sup> *Ibid.*

<sup>20</sup> Joseph J. Fahey and Richard Armstrong, (1992), *A Peace Reader: Essential Readings on War, Justice, Non-Violence, and World Order*, Paulist Press, p-44.

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