

Restorative justice system: A comparative analysis

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Abstract

Restorative Justice generally talks about criminal offences. Basically it is a process which can be used as a method or cure to prevent the conflicts between the parties and build a healthy relationship by the method of communication to repair the harm more effectively and wisely. It seeks to resolve some very basic questions i.e who has being hurt, what are their needs. Restorative questions cannot be answered without the active involvement of the one who is hurt or affected. Involving those affected is the cornerstone of restorative justice. Restorative justice focuses on weakness of offenders, it attempts to draw the strength of these individuals and their capacity to openly address the need to repair the harm caused. It denounces criminal behavior.

The concept of restorative justice rests on certain common values such as respect, responsibility, inclusion, empathy, honesty, openness and most important of all accountability. International, National and Local Justice system and correction departments along with victim advocate develop policies to be more responsive to the needs of crime victims and the community. It is basically healing in the process of creating justice and promoting accountability are part of social reform movement that has been developing through the world.

This paper is will be discussing the meaning and growth of the concept of restorative justice. What is the international scenario with regard to restorative justice and various treaties dealing with restorative justice. This system is followed in USA, UK, Canada, new Zealand, Afghanistan, Palestine etc. as a indigenous practice. It will also discuss in detail the UN basic principle on the use of restorative justice programmes in criminal matters. Further the paper will discuss the stakeholders involved and their desired comfort level. this paper talks about the functioning of restorative justice which talks about the division of functions between state, victims, offenders and communities and for greater emphasis upon procedural safeguards and substantive limits in the pursuit of the apparently beneficent goals of restorative justice. Thirdly will trace about the need for adopting restorative justice in twenty first century and why the concept of restorative justice has been given an importance now a days moreover why it is to be considered as an effective form of reforming the criminals and fourthly the paper will involve the drawbacks and hurdles which are faced by restorative justice process specially in a country like India. The paper will discuss will give comparative analysis of the restorative justice system as followed in various countries. Specific focus will be on India scenario that is to say how effective the restorative system can be in India.

Keywords: restorative justice, criminal offences, definition, UN, policy considerations, offenders

1. Introduction

“When another person makes you suffer, it is because he suffers deeply within himself, and his suffering is spilling over. He does not need punishment; he needs help”

Thich Naht Hanh

Restorative justice is the program which runs parallel to the criminal justice system. The philosophy behind the concept is that lay emphasis on the need to mitigate the harm done to crime victims through the process of negotiation, mediation, conciliation and victim empowerment. This approach is related to problem solving rather than punishing the wrong doer.

The principle that governs that concept is about to focus on the harm done to the victim and to sooth the affected relationships. Restorative justice views crime as more than breaking the law – it also causes harm to people, relationships, and the community ^[1]. So a just response must address those harms as well as the wrongdoing. If the parties are willing, the best way to do this is to help them meet to discuss those harms and how to about bring resolution ^[2]. Other approaches are available if they are unable or unwilling to meet. Sometimes those meetings lead to transformational changes in their lives.

There are certain underlining principles which lay down the foundation of restorative justice. That crime causes harm and the justice must focus on repairing that harm. Secondly the victim should be made active participant to the resolution method. Thirdly it is the responsibility of the government to maintain law and order and along with it to maintain the peace and harmony in the society.

Restorative justice is an approach to justice that personalizes the crime by having the victims and the offenders mediate a restitution agreement to the satisfaction of each, as well as involving the community ^[3]. This contrasts to more punitive approaches where the main aim is retributive justice or to satisfy abstract legal principles.

2. International Perspective and UN efforts on restorative justice

The United Nations have worked extensively on the concept of restorative justice. Its various agencies have developed substantive work on restorative justice Restorative Justice Processes can be adapted to various cultural contexts and the needs of different communities ^[4]. The victim, the offender and the community regain some control over the process. The

process itself can often transform the relationship between the community and the justice system as a whole.

In 1995 the Council of Europe appointed an Expert Committee to evaluate and assess the use of mediation in criminal proceedings within Europe. It was between 1996 and 1999 that the Committee met to review reports from countries which discussed their experience in mediation of criminal matters. The report defines "mediation" and details 34 principles for Member States of the Council of Europe to consider when using mediation in criminal matters. The Committee of Ministers adopted the recommendation in September 1999.

Criminal justice reform is at the heart of the mandate of the United Nations. Successive UN Crime Congresses, the First UN Congress on the Prevention of Crime and the Treatment of Offenders being held in Geneva in 1955, have explored ways in which criminal justice systems can operate both more effectively and more humanely^[5].

Another important landmark in the area of restorative justice was that in April 1997, the Commission on Crime Prevention and Criminal Justice adopted a provisional agenda for that 2000 Crime Congress relating to "Offenders and victims: accountability and fairness in the justice process." It opened the door to discussion of restorative justice as well as issues related to the rights and roles of victims in criminal justice.

During the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century (2000) advocated the "development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all of the parties.

Thereafter in July 2000, United Nations Economic and Social Council (ECOSOC) adopted an resolution entitled 'Basic principles on the use of restorative justice programmes in criminal matters'^[6]. The Secretary-General sought comments from Member States and relevant intergovernmental and nongovernmental organizations, as well as institutes of the United Nations, with regard to Crime Prevention and Criminal Justice Programme network, restorative justice programmes in criminal matters, including the advisability of developing a new instrument for that purpose.

In July 2002, the United Nations Economic and Social Council adopted "Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters"^[7] as a guide to encourage member states to implement restorative justice in the operation of their domestic juvenile criminal justice systems. United Nations Economic and Social Council 37th plenary meeting, 24 July 2002.

The Crime Congresses, held in Vienna in 2000 and in Bangkok in 2005, have continued to strengthen the role of the United Nations in the area of criminal justice reform^[8]. The Vienna Declaration and its Plans of Action, in particular, highlighted the importance of the issue of criminal justice reform. The Commission on Crime Prevention and Criminal Justice has in successive sessions continued to underscore the importance of effective global responses in the area of criminal justice reform. The mandate to assist States in building fair and effective criminal justice systems are also contained in resolutions by the main policy-making organs of the United Nations: the General Assembly and the Economic and Social Council.

Thereafter 11th UN Congress on Crime Bangkok Declaration in 2005 was conducted to promote the interests of victims and the rehabilitation of offenders, we recognize the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution, thereby avoiding possible adverse effects of imprisonment, helping to decrease the caseload of criminal courts and promoting the incorporation of restorative justice approaches into criminal justice systems, as appropriate.

Drawing on the Basic principles on the use of restorative justice programmes in criminal matters and with an international focus on restorative processes, a handbook on restorative justice has been developed^[9]. It offers an overview of key considerations in the implementation of participatory responses to crime based on a restorative justice approach. It focuses on a range of participatory measures, inspired by restorative justice values, that are flexible in their adaptation to criminal justice systems and that complement them while taking into account varying legal, social and cultural circumstances. The handbook covers definitions of key concepts, a summary of the main types of intervention, legislation, rules and guidelines for practitioners, and programme operation, monitoring and evaluation^[10]. It is meant as a guide for policymakers, legislators and practitioners as well as international organizations and non-governmental organizations.

The UN Handbook on Restorative Justice Programmes mentions some features of Restorative justice programmes. It stated that a flexible and variable approach which can be adapted to the circumstances, legal tradition, principles and underlying philosophies of established national criminal justice systems; Further a response to crime which is particularly suitable for situations where juvenile offenders are involved and in which an important objective of the intervention is to teach the offenders some new values and skills; a response that recognizes the role of the community as a prime site of preventing and responding to crime and social disorder. The Handbook also delineates underlying assumptions of restorative justice programmes: That the response to crime should repair as much as possible the harm suffered by the victim; That offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and community; That offenders can and should accept responsibility for their action. That victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation. That the community has a responsibility to contribute to this process.

3. System in various jurisdictions

In April 2000, at the Commission on Crime Prevention and Criminal Justice meeting, the governments of Canada and Italy introduced a resolution proposing development of basic principles on the use of restorative justice. Thirty-eight other countries joined as cosponsors and the resolution was approved unanimously and referred to the Economic and Social Council. In many African countries, customary law may provide a basis for rebuilding the capacity of the justice system, where restoration of social responsibility, reconciliation between the offender and the victim and a sense of justice are the primary aims^[11]. In South Eastern Nigeria and many parts of West Africa, the "age grade" systems encourage reconciliation

within communities through peer group interventions. In Uganda, the local council courts have the power to grant remedies such as compensation, restitution, reconciliation or apology, as well as more coercive measures. In the Philippines, the Barangay justice system consists of a locally elected Barangay captain and a “peacekeeping committee” hearing cases involving conflicts between residents. There is a mediation session that is facilitated by the captain or another member of the committee. Agreements reached through this process are legally binding and are recognized by the courts. Victim-offender mediation programmes were among the earliest restorative justice initiatives ^[12].

In another part of the world the Czech Republic, the Probation and Mediation Service is involved in pretrial and court proceedings in an attempt to mediate effective and pro-social resolutions to crime-related conflicts. Mediation may only be carried out with the voluntary consent of the two parties. Mediators are skilled in effective negotiations. They help the disputing parties to settle their conflict and to find a mutually acceptable solution to the situation. A Community and family group conferencing model was adopted into national legislation and applied to the youth justice process in New Zealand in 1989. The majority of cases is handled by the police through restorative caution and by police-directed or court family group conferencing. It is based on the dispute resolution traditions of the Maori.

This model is now also widely used in modified form as a police initiated diversion approach in South Australia, South Africa, Ireland, Lesotho, as well as in U.S. cities in Minnesota, Pennsylvania and Montana ^[13]. Each conferencing process has a convenor or facilitator. It brings together the family and friends of both the victim and the offender and sometimes also other members of the community to participate in a professionally facilitated process to identify desirable outcomes for the parties, address the consequences of the crime and explore appropriate ways to prevent the offending behaviour from reoccurring. The mandate of family group conferencing is to confront the offender with the consequences of the crime, develop a reparative plan and in more serious cases in the New Zealand model, determine the need for more restrictive supervision or custody.

In Australia and the U.S., police officers generally serve as primary gatekeepers, while in South Africa it is the prosecutors. Community conferencing is also used sometimes as an alternative measure programme to which an offender can be diverted from the criminal justice system ^[14]. Such programmes tend to be managed by community groups or agencies with or without financial support from the government. The offender’s compliance with the terms of agreement may or may not function under the direct supervision of law enforcement or justice officials. Peacemaking committees operate in Zwelethemba (South Africa) ^[15].

The outcomes of peacemaking meetings are restorative in nature: apologies, restitution and compensation. Sentencing circles are conducted in many aboriginal communities in Canada. In circle sentencing, all participants: the judge, defence counsel, prosecutor, police officer, the victim and the offender and their respective families and community residents, sit facing one another in a circle. Circle sentencing is generally available to those offenders who plead guilty. The sentencing circle process is typically conducted within the criminal justice

process, includes justice professionals and supports the sentencing process ^[16]. The outcome of the circle is generally submitted to the judge, who may or may not have participated directly in the circle, and is not binding on the court. Circle sentencing is an example of how the principles of restorative justice can be applied within a holistic framework in which justice system personnel share power and authority with community members ^[17]. In contrast to the formal and often adversarial approach to justice, circle sentencing can help reacquaint individuals, families and communities with problem-solving skills, rebuild relationships, promote awareness and respect for values and the lives of others, address the needs and interests of all parties - including the victim, and focus action on causes, not just symptoms of problems.

4. The functioning of restorative justice which talks about the division of functions between State, victims, offenders and communities

The functioning between victims, their offenders, and members of the affected community are important ways to address the relational dimension of crime and justice. It is acknowledged that the accompanying three techniques are signs of restorative justice. Each requires that the offender admit responsibility for the offence. Each is limited to parties who volunteer to participate ^[18]. Like Victim offender mediation this is a process that provides an interested victim the opportunity to meet his offender in a safe and structured setting, engaging in a discussion of the crime with the assistance of a trained mediator.

The goals of victim offender mediation include: permitting victims to meet their offenders on a voluntary basis, encouraging the offender to learn about the crime's impact and to take responsibility for the resulting harm, and providing victim and offender the opportunity to develop a plan that addresses the harm ^[19]. There are more than 300 victim offender mediation programs in North America, and over 500 in Europe.

In Family or Community Group Conferencing the process brings together the victim, offender, and family, friends and key supporters of both in deciding how to address the aftermath of the crime ^[20]. The goals of conferencing include: giving the victim an opportunity to be directly involved in responding to the crime, increasing the offender's awareness of the impact of his or her behavior and providing an opportunity to take responsibility for it, engaging the offenders' support system for making amends and shaping the offender's future behavior, and allowing the offender and the victim to connect to key community support.

Peacemaking or Sentencing Circles is a process designed to develop consensus among community members, victims, victim supporters, offenders, offender supporters, judges, prosecutors, defense counsel, police and court workers on an appropriate sentencing plan that addresses the concerns of all interested parties ^[21]. The goals of circles include: promoting healing of all affected parties, giving the offender the opportunity to make amend, giving victims, offenders, family members and communities a voice and shared responsibility in finding constructive resolutions, addressing underlying causes of criminal behavior, and building a sense of community around shared community values.

In other words, it is a potentially restorative outcome that may result from either a restorative or a conventional process. Studies have shown that restitution increases victim satisfaction with the justice process. Some studies have shown that the use of restitution was associated with reductions in recidivism. Other studies have shown that when restitution is determined during mediation, it is more likely to actually be paid than when it results from court order alone. Community service is work performed by an offender for the benefit of the community [22]. It is justified in a restorative perspective as a method of addressing the harm experienced by communities when a crime occurs.

However, it can be used instead for retributive reasons or as a means of rehabilitating the offender. What distinguishes its use as a restorative response is the attention given to identifying the particular harm suffered by the community as a result of the offender's crime, and the effort to ensure that the offender's community service repairs that particular harm [23]. So, for example, offenders who put graffiti on buildings in a neighborhood can be given the community service of removing graffiti from buildings in that neighborhood. Community service programs in Africa build on customary processes for making amends, thus addressing community concerns and easing the offender's reintegration into the community.

5. Procedural Safeguards and Substantive limits in the pursuit of the apparently beneficent goals of restorative justice

Various procedural safeguards be taken while implementing the restorative system of justice. The participation of the victim and offender must be voluntary throughout the restorative justice process a restorative justice process cannot take place without the informed consent of the victim and the offender.

Another important step can be full participation of the victim and offender should be encouraged

the victim and offender are the primary participants in the restorative justice process Although there may be many other people who participate in the restorative justice process the interaction between the victim and offender is at the centre of the process

Thereafter effective participation requires that participants, particularly the victim and offender, are well-informed. Participants in restorative justice processes must be well prepared for the conference Pre-conference meetings should be held with participants, particularly the victim and offender. Participants will typically require information on the nature of the process, including; the procedures to be followed, who will be there and ground rules, realistic options for dealing with the offence, the benefits and risks to them of participating, limits to confidentiality, their role and rights in the process

Restorative justice processes must hold the offender accountable. The offender must acknowledge responsibility for the offence before a case can be referred to, or accepted for, a restorative justice process a case should not be referred to, or accepted for, a restorative justice process unless an offender has acknowledged responsibility for the offence.

Flexibility and responsiveness should be treated as inherent characteristics of restorative justice processes Restorative justice processes should be guided by restorative justice values Best practice requires that particular steps always be undertaken in a restorative justice process. The values required are physical and emotional safety of participants, respect and

dignity for all involved, safeguarding of offenders' and victims' rights, balance and fairness, voluntariness, transparency (of process and outcomes), empowerment of participants. Restorative justice processes must be appropriate and responsive to the culture of participants Facilitators should identify whether participants, particularly the victim and offender, would like particular cultural practices or needs to be accommodated within the restorative justice process.

Emotional and physical safety of participants is an over-riding concern. Restorative justice processes should be safe for participants at all times Participating in a restorative justice process has potential risks for the victim and offender that must be carefully managed. Personal information is always private to the individuals concerned and must not be disclosed without their consent.

Restorative justice providers (and facilitators) must guarantee the conveyance of a successful procedure. Robust internal management systems are required that include appropriate and transparent procedures and processes [24].

6. The need for adopting restorative justice in twenty first century

Basically Restorative justice offers a very different way of understanding and responding to crime. Instead of viewing the state as the primary victim in criminal acts and placing victims, offenders, and the community in passive roles, restorative justice recognizes crime as being directed against individual people [25]. It is grounded in the belief that those most affected by crime should have the opportunity to become actively involved in resolving the conflict.

The Repairing harm and restoring losses, allowing offenders to take direct responsibility for their actions, and assisting victims to move beyond vulnerability towards some degree of closure stand in sharp contrast to the values and practices of the conventional criminal justice system with its focus on past criminal behavior through ever-increasing levels of punishment; which must be change [26].

7. Why the concept of restorative justice is effective form of reforming the criminals

Restorative justice practitioners define "crime" as being primarily those crimes perpetrated by one individual on another, and therefore, the whole restorative justice process ignored the broader aspect of crime [27]. The larger crimes the ones that hurt more people much more severely stay as hidden under restorative justice as they do under the current retributive system [28]. The recent named scandals in India are the Coal Allocation Scam; 2G Spectrum Scam; Commonwealth Games Scam; Telgi Scam; Satyam Scam; IPL Scam, etc. This shows that the tentacles of corruption are spread far and wide in all horizons of life in India [29]. As a result, big power-abusers are not only free of the label "offender," but are also free to continue doing what they have been doing, including profiting from a system which gives rise to hundreds of thousands of small-time criminals [30].

8. Conclusion

Restorative justice is not simply a way of reforming the criminal justice system; it is a way of transforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics [31]. Its vision is of a holistic change in the way we do justice in the world.

Restorative justice practitioners often failed to raise awareness of the causes of crime, and therefore, offer no strategy for eliminating these causes^[32]. If we as a society would eliminate the obvious sources of criminal behavior deprivation and inequality, we would preempt the need for restorative justice in criminal justice cases^[33].

They are violent precisely because they are aware of the hypocrisy, dishonesty, and injustice that surrounds them and of which they have been victims^[34]. In short, if we acknowledge that the people we label as "criminals" spring from the oppressed, deprived stratum of society, then these so-called criminals are the original victims, though it is unpopular to view them as such^[35]. Most commonly, they also perpetuate the cycle of victimization within their own class

Government agencies track the number of rapes or property thefts that occur annually in each community of the Indian States. Yet there isn't a public agency that regularly collects statistics on white collar crimes such as huge scandals. The recent named scandals in India are the Coal Allocation Scam; 2G Spectrum Scam; Commonwealth Games Scam; Telgi Scam; Satyam Scam; IPL Scam, etc. This shows that the tentacles of corruption are spread far and wide in all horizons of life in India^[36]. Restorative justice practitioners mainly focus on those involved with illegal drug use, acts of one-on-one violence, and relatively minor theft and street crime. As a result, big power-abusers are not only free of the label "offender," but are also free to continue doing what they have been doing, including profiting from a system which gives rise to hundreds of thousands of small-time criminals.

Braithwaite has recognized various worldwide human rights values which have particular pertinence to remedial equity, for example, reclamation of human pride, property misfortune, and harmed human connections. As indicated by the restoratives overview of the writing in regards to human rights and helpful equity recommends that "equity" is another critical supporting worth^[37]. Issues of disparity surface in connection to issues, for example, social equity and power differentials.

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