

## Restorative Justice: A Critical Review

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### Abstract

The criminal justice system continues to fall below standard and fails to meet people's expectations especially victims of crime. There are issues like miscarriage of justice, adjournments, giving offenders a slap on the wrist especially if they are politicians or white collar criminals, those who are wealthy can get a very good lawyer to wriggle them out of the criminal justice system. This makes a joke of the whole process, the prisons are perceived to be only for the poor while the rich who make the law "are most times above the law" and don't get to do time in the prisons. With all this pitfalls in the criminal justice system, it has given rise to restorative justice, a process that gives crime victims a voice and a say. This essay will critically look at restorative justice, what it has to offer, its shortcomings and future prospects.

**Keywords:** *Restorative Justice; Criminal Justice*

### Development of restorative justice

The works of Colson and Van Ness [1], Mackey [2], Van Ness and Strong [3], Wright [4] and Zehr [5] gave rise to restorative justice. Their works started with victim-offender mediation, family group conferences, sentencing circles and victim impact panels amongst others. These schools of thoughts were trying to look for alternative to imprisonment; this gave birth to community mediation gathering between victim and offender. When the community saw that these processes was working, they now included family members of both victim and offender, their friends as well as specialists and the well-to-do in the community to be a part of the mediation meetings.

Many schools of thought assumed that those who committed crimes were those whom the society had neglected, the communities that didn't have access to resources, those who have been victim of racism and also women who have been neglected because of their gender. The major goal of these scholars was to abolish prisons or minimize the use of incarceration. Fay Honey Knopp (1976) and Hull and Knopp (1978) looked forward to a society that cared for both the offender and the victim. As time went on, the communities began to have boards of justice that will serve as a means of conflict resolution within communities and this will give people access to justice within the community. After justice is served, another process begins whereby crime victims and offenders meet mostly in the presence of a neutral third-party which in many cases is either a professional or specialist but is always a member of the community that won't be sentimental. According to Zehr [5], the objective of the meeting is to restore the broken relationship between both parties (victim and offender). Some victims and scholars preferred mediation rather than reconciliation in fashioning out programs for victim-offender meetings so this gave rise to victim offender mediation programs in communities which is mostly managed effectively by professionals. Victim offender mediation is quite similar to victim-offender reconciliation programs but in the victim offender mediation program, other people affected by an offense maybe due to shock or witnessing such crime could be brought to meetings, particularly when more serious crimes were being addressed like armed robbery among others. The feminist activists in the communities also started voicing out their thoughts clamoring for victim advocacy especially for women and children in the society who had been physically and sexually abused. These feminists

wanted restitution for the crimes committed against women and children especially the girl-child, they wanted the police and court not to be biased against women, they wanted these victims to have their voice heard in the court and also wanted the community to be safe for them. Many scholars in the 70's and 80's agreed with these feminists and also believe victims of sexual crime don't really have a say in the criminal justice process and they wanted the trend halted.

Restorative justice continued to progress, some school of thoughts like Maxwell and Morris [6]; Umbreit and Zehr [7] discussed about family Group Conferences. Family group conferences simply gather more people in the community into discussions about the crime, recognize a wider range of abused people, and highlight involvement by the family members of delinquents. Ross [8] coined the term sentencing circles. He used sentencing circles to debate about how to resolve disputes in communities, how to restore peace and tranquility, how to repair the relationship of offender and victim and also how to heal the community that may have been wounded by the offense. Stuart [9] also buttress this point by agreeing that Sentencing circles are a consensus process that must involve crime victims and their families, lawbreakers and their families, inhabitants of the community that will serve as member of the jury that will address the needs of all parties.

Other communal practices emerged in the 1980s and 1990s and they all make up restorative justice today. These other communal practices include Reparation Boards which constitutes community members who punish juvenile delinquents; these punishments could be community service and sometimes victim-offender mediation and also payment of fines depending on the severity of the crime and the type of offense committed. Victims are not allowed to participate in these meetings.

All these helped in forming and shaping the modern day restorative justice which will be discussed below.

### Contemporary theories of restorative justice

This essay will take a critical look at the different school of thoughts that has shaped the modern restorative justice.

There is the school of thought of Informal Justice and the proponent of this theory is Abel [10] who talked about informal and formal justice. He asserts that because of the modalities of the legal system and the way it can be manipulated; there is a high impossibility of getting justice through the criminal justice system so there must also be a formal justice system as well as the informal one in the society.

Another school of thought emerged In the 70s and 1980s; Mathieson [11]; Bianchi and Van Swaaningen [12] propounded the abolitionism theory by calling for the abolition of prisons. They proposed alternatives to imprisonment and restorative justice initiatives like digression from court and pre-sentencing conferences and opined that it can be used as substitutes to imprisonment.

John Braithwaite (1989) coined the term re-integrative shaming to discuss that criminals shouldn't be stigmatized but should be re-integrated back into the society. His school of thought focused social disapproval that inculcates feelings of shame. The idea behind this is that even though the criminal will be re-integrated back into the society, the shaming process will not allow the criminal slip back into crime again, the shame will appeal on the emotions of the criminal. He believes that it's a form of social control that will regulate social order.

Another school of thought that has gained ground is Peacemaking Criminology. The proponent is Quinney [13]. Quinney [13], a feminist argues that poverty leads to crime; therefore peacemaking criminology is geared towards how to alleviate poverty in the society through skill acquisition and empowerment schemes. She also debates from a spiritual and feminist angle which is based on different traditional belief system that crime violates the victim, the same way the criminal justice system violates the victim, therefore in order to put an end to crime and poverty in the society, justice outside the criminal justice system can only come out of peacemaking and peace is the spiritual component of humans.

According to Johnstone (2003): "New processes have been developed and used in social responses to incidents of criminal behavior, processes such as victim-offender mediation, conferencing and circles. What is most distinctive about this process is rather than remaining passive while professionals discuss their problem and decide about what to do about it, victims, offenders and others affected by some crime or misconduct meet face to face in a safe and supportive environment and play an active role in discussion and in decision making".

For instance, with the assistance of a facilitator they speak openly but respectfully about what happened they also express their feelings and have a say in what is to be done about the matter. O'Connell, *et al.* [14] explains that "Such meetings are intended to be democratic experiences in which the people most affected by a problem decide how it should be dealt with".

Christie [15] also corroborates this by agreeing that "Rather than being the chief decision makers, professionals and state officials remain more in the background, making it possible for the stakeholders themselves to make the decisions".

Robison [16] discusses that this is what restorative justice is all about and the best way to define the term. This implies that restorative justice could also be associated with mediation, conference and encounter. The encounter conception's idea is when the victims, offenders and other stakeholders in a criminal case meet in an informal setting or a professional setting. This will enable people who are affected by the discussion and decision to be meaningfully involved in the discussion and the decision making process.

John Braithwaite (2003: 1) argues that: "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. Its vision is of a holistic change in the way we do justice in the world".

Many proponents of restorative justice regard it as a sentencing alternative. The process of restorative justice is in sequence; the offender is required to take part in a meeting with the victim or the victim's representative and other people affected by the crime. Offenders are required to listen respectfully while those harmed by the behavior describe how they have been affected by it. Offenders are also expected to answer any question their victim may have by engaging in constructive dialogue. Offenders are also expected to apologize and undertake a reparative task. Therefore, restorative sentences are different from other sentences because offenders don't have to go through pain or punishment to pay for their crime. They make amends for their crime through positive acts that benefit their victims. Through the process of conference, the offenders will make amends and such amends will be determined by the victims, offenders and other participants in the conference. The goal is to have all the parties agree upon what should be done about the matter. Whatever they agree upon must not be punitive but reparative.

Restorative justice may not be a viable solution as argued by Braithwaite and Strang [17]; they suggest that there are not one but two conceptions of restorative justice. One is process conception and the other value conception. They argue that restorative justice speaks from both sides of the mouth by arguing that in the process conception; it deals with offending; in contrast to criminal justice processes, which excludes and disempowers stakeholders affected by a crime meanwhile restorative justice processes include and empower all stakeholders. In the value process; they argue that there is a shift in the values that undergirds criminal justice interventions. Instead of being guided by vindictiveness and the desire for vengeance, restorative justice is motivated by the desire for healing and reconciliation. That is the significant tension Braithwaite and Strang identified in the heart of restorative justice which may not make it a viable solution. The source of the tension is because many people including victims and the society are likely to favor punishment over restorative dispositions even when presented with the option of restoration. Daly [18] further discusses that even though proponents of restorative justice will hope that healing will be achieved rather than the punitive measures, majority of the people will be disposed to punishments being meted out on the offenders.

### Restorative justice and the environment of crime

Bazemore [19], Walgrave [20], Zehr [5] differentiates between retributive, rehabilitative, and restorative justice processes as it affects the society. The processes entail punishment, treatment and reparation. In the present day society, restorative justice is favored amongst scholars because it's seen as progressive while the retributive model is seen as self-serving and crude. In the case of retribution [21] opines that the criminal must be punished in full proportion to their crime to justify their actions and this will invariably prevent

criminal activities and to change the behavior of the individual. In retribution, one of the goals is also to compensate harm, the goal of the punishment is to treat and rehabilitate the criminal to become useful and better person in the society. The goal sometimes is also to deter and incapacitate the offender so that the offender won't find crime attractive again. But the main objective of retribution is to prevent and reduce future crimes.

Furthermore, restorative justice processes do not occur in the public domain unlike retribution and rehabilitative processes, they are mostly shrouded in privacy without legal authorities and if at all they are present, they are few. Restorative justice scholars haven't defined the type of discussions and actions that should take place in public or private domains. Restorative justice is very useful in the environment of crime because it is open, it makes the voice of the victims to be heard and the friends and families of the delinquent can also express themselves and take back the offender into their fold. There are a whole lot of variances in what can be said and achieved in a courtroom in contrast to restorative justice settings. A major obstacle posed by restorative justice process is whether it is to be implemented to comply with the punishment- or welfare-oriented justice frameworks.

### Restorative justice and the criminal justice system

Zehr [5] contrasts between the criminal justice system and restorative justice system by taking a look at the prominent questions they ask. Zehr [5] opines that "Restorative justice asks questions like; who has been offended? What do they need? Whose responsibilities are these? What are the causes? Who has a stake in the situation? What is the most suitable procedure to involve stakeholders in an effort to address causes and put things right?".

Zehr [5] continues by saying "The criminal justice system asks only three vital questions which are; what laws have been broken? Who broke the law? What punishment does the law stipulate for the offender?".

The first main intervention point for restorative justice approaches within the regular criminal justice process begins with arrest by the law enforcement agents most likely the police. The statement of the criminal is taken and charged to court based on the offence committed. The next phase begins with the criminal taken to the court of law; there he becomes a defendant and allowed access to an attorney to defend him while the state gets a prosecutor to nail the offender in order for the offender to be punished. When the offender is pronounced guilty in the court of law, he becomes a convict and is appropriately sentenced. In the restorative justice system, there is no way to determine if the offender is guilty as charged because the restorative justice setting is not within the purview of the criminal justice system and in most cases there is little or no presence of law enforcement agents in their gathering. Furthermore, restorative justice processes are geared towards making the delinquent own up to the crime and harm committed as a prerequisite for accepting a recommendation. The third main intervention point for restorative justice approaches within the regular criminal justice system occurs in conjunction with the process of sentencing. For many years the sentencing power of the court has in various countries been amended to embrace a variety of potentially retribute and reparative measures such as compensation orders known as fines or community service orders. Where the criminal justice is lagging behind is that it doesn't involve key players such as the victim, the criminal and other interested parties in the decision making process itself whereby restorative justice takes all this into full consideration in order to fully repair the harm and restore the broken relationship and make the offender see and know the impact of what he has done and those that has been affected either directly or indirectly. The fourth and final principal intervention point for restorative justice approaches within the regular criminal justice system occurs after the sentence has been passed and the offender convicted. The offender is thereby engaged in treatment procedure often handled by skilled professionals, this procedure is geared towards reformation and rehabilitation of the offender, in the course of the treatment, the offender may take up unpaid jobs, learning of skills, empowerment programs that will make him a useful person to the society and deter him from crime.

According to Van Ness and Strong [3]; based on victims concerns, communitarianism and critical criminology in restorative justice has developed a socially more constructive philosophy in order to reorient response to crime being towards being more satisfying for the

victim, more peace assuring for the community and more re-integrative for the offender. In the criminal justice system crime is seen as a transgression of an abstract legal disposition unlike in restorative justice where crime is seen as a social harm caused by the offence. Restorative justice operates mainly through communities and their processes are informal and could include emotions and feelings, the outcome is not to inflict pain but to restore solution caused by the crime while the criminal justice system that is based on state and federal laws and justice is dispensed based on legality.

Tonry (1995); Sherman [22], both discuss that the criminal justice system sees punishment as a means to an end, and the objective of punishment is quite broad because it's to achieve a variety of goals. A long tradition of criminological research has led to the conclusion that punishment is not socially effective. Restorative justice looks towards repairing harm and repairing relationships rather than punitive measures which is seen as an obstruction to justice. The criminal justice system when determining an appropriate punishment to match the crime committed doesn't care or respect the feelings of the victim and because of the criminal justice's punitive measures, there is no way the offender will be able to communicate with the victim more so repair the harm done. In some cases, there have been disorderliness in the court whereby the victim may want to get his "pound of flesh back" by attacking the offender, the offender too may feel dis-satisfied with the judgment and behave unruly in the court to register his grievance and dis-satisfaction. The penalty given to the offender by the court of law hinders the offender from compensating the victim. Disapproval and unruly behavior expressed through the sentence either by the victim or the offender may communicate a clear message to the public, but it fails to communicate adequately to other key actors: the victim and the offender. For good and effective communication to take place, it should be under a less-tensed and peaceful atmosphere which the criminal justice system does not offer the victim and the offender.

Wright [4] further explains that "Good communication can't be achieved in a court within the criminal justice system where confrontation prevails over communication and where it is the judge who will at the end decide upon the hard treatment".

The criminal justice system doesn't allow the offender to know the impact of the crime he or she has committed, it doesn't also let the offender know if other parties has been affected indirectly by the crime, the offender's focus will be how to explore all legal tactics and loopholes in order to get away with a "slap on the wrist" (lenient punishment) or probably be discharged and acquitted, which makes the circle of crime to continue. There is no opportunity to improve the offender's behavior, even when the offender is behind bars, he or she may feel bitter and aggressive towards the society and probably come out hardened after he or she has completed his or her time behind bars.

Furthermore, it is good to rebuke and chastise the offender for his or her criminal behavior but in most cases, treating the offender harshly is not the only way out. In our day to day living, condemnation of an act or behavior is expressed routinely without punishing the offender. From a moral angle, people who wield some sort of power aren't effective in influencing moral thinking and behavior than those who don't have the power to punish. There is saying that "power corrupts and absolute power corrupts absolutely", this saying is very true especially in the criminal justice system whereby the judge or jury has the absolute power to wield as they wish.

After a crime has been committed, a restorative justice setting will make more sense for effective communication and moral condemnation for atonement than disciplinary actions and prohibitions. The truth is, most offenders would like to debate about the crime if they are accorded respect and compassion. When the atmosphere is conducive and filled with empathy and mutual respect, the offender and victim can now deliberate, victim-offender mediation will now take place coupled with family group conferences which will help to position the harm and suffering centrally. This prevents victimization as the focal concern, and provides huge communicative potential. Punitive measures which is the basic tool that the criminal justice system wields is inflicts more pain on the offenders and sometimes also the victim, and this in turn portends serious socio-ethical problems. In conclusion, the objective of restorative justice is to restore and repair but the use of pain will be an obstacle to achieve its central goal.

**Towards a restorative criminal justice system**

Several scholars like Braithwaite [23], Van Ness [3], Dignan (2003), Walgrave [20] have outlined the ideal legal framework for restorative justice. They have all taken it as their priority, the need for voluntary deliberative processes, which are assumed to resolve the (increasing) majority of cases. They then provide several variations of coercive interventions by courts, while still maintaining opportunities for partial reparation. Finally, security concerns may make the incapacitation of the offender inevitable. These levels roughly represent different degrees of restorativeness.

When contrasting between restorative justice and the criminal justice system, it doesn't mean this essay is rejecting coercion and legalism to achieve its goal. This essay believes the criminal justice system is indispensable but must be geared towards doing justice through restorative processes thereby discarding punitive measures. Futuristically, the criminal justice system should progress towards being a fully-fledged restorative criminal justice system. According to Harrington [24], he discussed that restorative justice will remain and operate "shadow justice" in years to come before it's wholly accepted by all and sundry.

**Conclusion**

In conclusion, more empirical research can still be done to make restorative justice "sellable" to the politicians and the society as a whole.

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