

Perils and Possibilities in Restorative Justice: Spaces for Sexual Crimes and Punishment

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Abstract

Restorative Justice is a controversial process that brings together a victim of a crime with wrongdoer and/or other stakeholders for a dialogue as a way of healing from conflicts and harms brought about by crime. Many scholars are optimistic about its benefits to victims, wrongdoer and societal relationships at large yet others are skeptical of its application to sensitive cases where punishment must be administered for justice. This research explores the theoretical framework and debates to determine whether restorative justice is deemed suitable for crimes that require punishment especially for sexual crimes. This paper makes an attempt to understand that restorative justice need not be at odds with punishment, but may be applicable to some sexual crimes while safeguarding their best interest. Further, restorative justice may be delivered pre-trial/post-sentencing and at the clear and unequivocal option of victim/wrongdoer to avoid intermingling and/or being co-opted by the traditional criminal justice process.

Keywords: Restorative Justice; Punishment; Punishment theory; Retribution; Sexual Crimes; Criminal Justice

Introduction to framework of restorative justice

Restorative justice can be described as a communitarian, needs-based approach to justice wherein crime is seen as harm to people and relationships that requires healing through a process of participation of stakeholders to restore the dignity of all concerned (Menkel-Meadow, 2007). Restorative justice programs are organisations that endeavour to implement restorative aspirations on the ground. Practices including but not limited to methods of conferencing and victim offender mediation; the management of victim input for punishment; facilitator's training and role, and judicial oversight, sentencing circles, conferences, etc.

Punishment refers to the infliction of pain and penalty impressed upon the wrongdoer in order to hold him/her accountable for the harm caused to the victim (Sean, 2013). Incarceration, reparations, re-integrative shaming and rehabilitation are all forms of punishment. Sexual Crimes are crimes characterised by thesexual violence, gendered abuse, gendered harassment or gendered exploitation that may result in in-dignifying, subordinating and/or humiliating another, ranging from unwelcome colourable remarks to rape (Greer, 2012).

At first blush, Restorative Justice seems to lack force, therefore its use in sexual crimes is immensely suspect or at the very least controversial. The term 'restorative' connotes a return to how things were. However, sexual crimes do not warrant conciliation in modern sensibility. The nature of gendered crimes is such that they are enabled by skewed power dynamics in favour of wrongdoer in the first place and therefore the victim needs greater empowerment than they had prior to crime for equitable outcomes (Blair, 2018). News-reports quote academics as saying that restorative justice, although promising, might be too soft on crime (Smith, 2017). Several ambiguities arise here that need clarification: what restorative justice is; whether it can be compatible with punishment; whether it can be applied to sexual crimes, and how offenders are punished in restorative justice approaches.

Sexual crimes lie at a very deep end of Restorative Justice (Cunneen & Hoyle, 2010). This means that in other types of crimes that seem less outrageous there are spaces where restorative justice may be

used less controversially. Sexual crimes however are perilous for an application of restorative justice. Many jurisdictions may choose to exclude sexual offences from restorative justice because of the gravity of these crimes and the sensitivity they require to be dealt with which restorative justice being less formal and less stringent is perceived as ill-equipped to give. Some jurisdictions have endeavoured to apply restorative justice to sexual crimes however, with necessary safeguards. An example of such a safeguard is judicial oversight of conference outcomes to remove gross disproportionality either which is too lenient or too harsh (Cunneen & Hoyle, 2010).

Concept of punishment

Retributive, restorative and rehabilitative principles guide the punishment philosophy of restorative justice programs, retributive censure being most prominent (Wenzel, Okimoto, et al. 2008). Crime is a public health hazard that societies construct. Societies then grapple with the ruptures to themselves from the crimes in their own particular ways. The way that a society defines, constructs and resolves crime and punishment varies, and is telling of that society's core values. The historical, cultural and legal structures of restorative justice vary by context, as do its methods. However, at its core restorative justice remains a needs-based community approach to dealing with crime wherever stakeholder including victim and wrongdoer is heard and healed. There are many variants of restorative justice. It might be as simple as victim-offender-mediation conference, a sentencing circle, or the practice of apology. At sentencing, the reading of victim impact statements is also seen by some as enabling meaningful and deliberative victim participation if guided by democratic principles and the spirit of responsible citizenship (Kennedy, 2019). Other forms include peace circles or sentencing circles and conferencing.

Criminology textbooks classify punishment in large, broad categories: deterrence, prevention, retribution, rehabilitation and expiation. These theories are ideal-types, some of which are more predominant in certain legal systems than others. The retributive theory of punishment is endorsed by the famous jurist, HLA Hart (Hart, 1968). Hart set forth the logic that in order to fix liability on an offender, retributive principles must be applied. The foundations of retributive theory are on what is right and just, in contrast to the utilitarian approach whereby the consequence is of greater significance (Bentham, 2016). Emanuel Kant on the other hand holds that guilt, deservingness and proportionality (just deserts) must guide our notion of punishment, not the consequences, for no innocent should ever be punished whether any good comes out of it or not (Kant, 1965). In a society that takes rights and needs of individuals and communities seriously, the retributive theory of punishment is a useful approach in institutionalising the need of the victim for fairness and ensuring this is tempered with regard to the offender's right to be treated humanely.

For centuries, philosophers have opined on the utility of punishment in a society and the way punishment maintains social cohesion (Durkheim, 1991). He argued that punishment was not about the wrongdoer as much as it was about society i.e. that its goal is not to deter or punish crime, but instead to maintain a collective consciousness. A more contemporary, post-modern philosopher, Foucault described the sense of revelry and voyeurism a community feels at the site of a public hanging. Foucault described punishment as a means of controlling individuals, surveillance thereby maintenance of social order (Foucault, 1977). It is clear that crime, punishment and justice cannot be isolated from communities and stakeholders.

Much like restorative justice, the adversarial criminal justice system too relies on retribution, rehabilitation and restoration as its guiding tenets. However, society is unable to realise the potential of punishment theory through the traditional justice system because it fixates primarily on the accused. It does not adequately address the needs of the victims, nor other stakeholders. This is not to say that we must romanticise catering to victims needs or community needs. Often, as is demonstrated by Foucault (Foucault, 1977) these community needs might be perverse, mob-like, and fuelled by retributive rage and thereby confounding the goals of justice. Nevertheless, addressing them in an appropriate way might lead us to balance stakeholders' needs, channel them positively, raise awareness, and educate stakeholders in the aftermath of a crime. Restorative justice

therefore might deliver a desirable outcome to sexual crimes if it takes punishment seriously. It may be a supplement, a complement or an alternative to the adversarial system. It must work in tandem with institutions and movements. After all, no justice can take place in a vacuum.

Criminal justice system in practise

In the Indian context - there is widespread disillusionment with the criminal justice system - as is evident in mainstream media, daily discourse and law reform reports. Massive delays; overburdened courts; hostility; state heavy-handedness; and corruption among other evils plague the justice system, chipping away at its credibility. Often, reforms are implemented as knee-jerk reactions to news that shakes people's consciousness (such as the 2013 Amendment in the aftermath of a horrific, stomach churning rape, mutilation and murder on a bus in New Delhi). Too often, all stakeholders feel that justice is a far cry. In recent times, the MeToo movement typifies a victim's need for catharsis and visibility which our current system denies. In some nations, victim impact statements are read at sentencing trials. These - though validating for the victim - can cause the accused's right to be fairly sentenced and can unfairly influence the judge's mind, basis how expressive the victim is. A fair system would balance the needs of all parties concerned. The restorative justice framework holds some promise for such an equitable balance. However, it is useful to step back and research before we drink the proverbial cool-aid.

Restorative justice programs do not replace the criminal justice system at present in most jurisdictions. They may however provide an attractive complement in certain cases and at certain times. They offer a vocabulary of healing that we do not see in the formal justice system, and they incentivise apology, which is held against a wrongdoer in the formal justice system. Restorative justice may come in the form of Victim Offender Conferences; Family Conferences; and Sentencing Circles. The victim and the offender are brought together (with their consent); a dialogue between stakeholders is initiated, an agreement for justice is put together. Often, an apology is rendered and victims are given the opportunity to tell their story. This system may sound like a fairy-tale for justice characterised by a highly optimistic view of human nature. In reality, it must be implemented with the utmost caution, as romanticising it without seeing its potential downside may lead to mob violence against the accused on the one hand and victim shaming/blaming on the other hand.

At its core, the restorative justice system is a set of principles that formulates crime as a violation of rights from which obligations arise. Programs can emerge out of these principles to address specific needs. With its emphasis on narratives, healings and putting right the wrongs, restorative justice systems borrow from traditional Maori practices, integrating these as optional programs into western criminal justice systems. Their greatest strength perhaps is in their flexibility, adaptability and utterly compassionate way of dealing with crime.

Possibilities of restorative justice

At the turn of the twentieth century, *The Vienna Declaration on Crime and Justice: Meeting the Challenges of the twenty-first century*, endorsed developing restorative justice policies, procedures, and programmes that would cater to the rights, needs and interests of victims, offenders, communities, and all other stakeholders. Two years later, the UNECOSOC passed a declaration that drew attention to the need for adhering to basic principles (designed by a set of experts) in restorative justice programmes. The need for designing alternatives to prosecution with specific mention of restorative policies, procedures and programs was reiterated in 2005 by the declaration of the *Eleventh United Nations Congress on the Prevention of Crime and Treatment of Offenders*.

Under India's *Code of Criminal Procedure, 1973* and the *Probation of Offenders Act, 1958* there are meagre provisions that require victim compensation, there is much to be desired in terms of justice to victims. This was most evident in the famous Union Carbide disaster of 1984 when measly sums were doled out to victims of an industrial genocide that left a large community murdered and mutilated. The Committee for Reforms of Criminal Justice System, lead by Justice V.S. Malimath, took recommended ways to gain credibility for the justice system amongst people by legislating pro-

victim provisions and processes to graver punishments. However, these reforms do not embody principles of restorative justice as they obliterate the rights of offenders and steer the adversarial system to a continental style inquisitorial one. Restorative justice systems, however, are said to strike a balance the needs of all stakeholders and work towards healing communities, not pandering to their pro-victim tendencies.

The restorative justice movement arose out of desire to explore cultural wealth from aboriginal practices to Mennonite Christian and Islamic beliefs for a better way to deal with crime. It redefined crime as a violation of people, and put the needs of individuals and communities affected by it at center-stage. Albert Eglash (1957) and Randy Barnett (1977) two of the earliest modern-day advocates of restorative justice, rejected the notion of punishment as unfit for restorative justice approach. Zehr (1990) is a third notable pioneering champion of restorative justice. These early proponents made two comparisons to impart the need for restorative justice: first, they contrasted retributive punishment with restorative punishment. Second, they compared restorative justice with the criminal justice system. Future scholars then proceeded to demolish these distinctions, though they would maintain that they may have been useful at the outset to set out the idea of restorative justice.

Kathleen Daly made a seminal breakthrough in restorative punishment theory by arguing that restorative justice was reconcilable with the retributive theory of punishment. In fact, she contended that it was a myth that the two were in conflict (Daly, 2002). She went so far as to call it a 'sales pitch... definite boundaries need to be marked between the good (restorative) and the bad (retributive) justice, to which one might add the ugly (rehabilitative) justice (Daly, 2002). She observed that retributive censure and rehabilitative concern were very much a part of the restorative justice approach, as they should be. In fact, retributive justice must precede restorative approaches to make things right.

The second comparison between restorative justice and criminal justice is demolished by Cunene and Hoyle (2010) who hold that restorative justice is not separate from the adversarial criminal justice system but instead they work in tandem. Further, restorative justice is very much a part of the movement towards greater penalty and crime control in western States. In fact, restorative justice is used for low risk offenders while those perceived to be high risk ones in terms of demographics are not seen as eligible for such programs. It may be useful to circle back and observe how restorative justice relates to punishment. Wright made an interesting but problematic distinction between punishment and restoration (Wright, 1991). He stated that punishment is an intended deprivation, therefore its examples include incarceration and fines. Other constructive measures which involve doing work – he argued – are not intended to deprive, and therefore do not qualify as punishment. Wright's argument placed a more than adequate premium on the intention with which a punishment is prescribed. However, restorative justice practices often include collaborative decision-making by all and each party may have a distinctive reason for arriving at the tasks that the wrongdoer must perform or the sentence they must undergo. Therefore, Wright's distinction between punishment and restoration -relying on punishment of the giver- is likely not a useful one in determining what punishment is as it seems to be incompatible with restorative justice.

Retributive and restorative justice

Walgrave was a proponent of the civilisation thesis wherein our responses to crime must be similar to that of civil wrongs. He found the infliction of pain on the wrongdoer in the restorative process to be an unintended consequence, and not an appropriate end to achieve restoration (Walgrave, 2008). Walgrave blurred the binary between civil and criminal offences, thereby creating huge complications in matters that call for moral censure; that are as repugnant and insidious to society as sexual crimes are. Davis and Duff described punishment more broadly than Wright, placing less emphasis on the intention with which it is doled out, and more on the effect (Davis, 1992) i.e. the discomfort and unpleasantness it brings (Duff, 1992). They did not specify what is and what is not punishment. Instead, they focussed on perceived impact of restorative justice on the punished. Such

a perspective on punishment runs into a problem by relying too greatly on the receiver's subjective experience. For many wrongdoers, the encounter with their victim itself is an uncomfortable experience akin to a punishment. However, from the victim's perspective it is hardly a form of punishment to the wrongdoer. In fact, victims themselves may feel re-traumatized and thereby punished from encounters with the wrongdoer. However, Duff believed that even the censure of a crime as a retribution, and that retribution is integral to restoration (Duff, 1996).

Some advocates of restorative justice believe that retributive punishment has no place in restorative justice. Sullivan and Tift (2001), and Braithwaite and Petit (1990) argued for approaches that are case specific and flexible rather than retributive. They subscribed to consequentialism as justification for punishment. This consequentialist position is insidious to the foundation of restorative justice, because restorative justice rests on the philosophical foundation of doing right the wrongs as an end in itself, as opposed to mob community justice which is based on a consequentialist model taking a position that the end can justify poor means if the consequence of such poor means is for a greater good (Clear, 2005). Braithwaite went on to develop a theory of re-integrative shaming. He argued that shaming can be stigmatizing and create a class of outcasts. Re-integrative shaming instead is more useful, he theorized, as it follows censure for the wrong act with gestures of acceptance by the community, smiles for example. Van Ness (1993) disagreed with Braithwaite's lack of regard for retribution in restorative justice. They discussed the importance of grounding restorative justice in retributive theory with the cornerstones of just deserts and proportionality. Van Ness concluded that the challenges to restorative justice, i.e. the challenge to abolish criminal law, the challenge to rank multiple goals, the challenge to determine harm rationally, and the challenge to structure community-government cooperation (Van Ness, 1993) can be achieved by grounding restorative justice in retribution.

In the aftermath of the intellectual debate about the place for retributive theory in restorative justice, champions (Zehr & Gohar, 2003) of restorative justice revised their position stating that retributive and restorative justice are in fact compatible and not polar opposites as they had earlier stated. In the same year, Wesley Cragg wrote a wonderfully articulated book which described punishment as a necessary evil, not an end in itself, but as one means in a conflict resolution process and a measure for restoring the equation between the victim and the perpetrator. Another champion of restorative justice, London, drew on empirical evidence collected from an experiment at Rutgers university where it was found that crime victims and communities affected by crime needed to see that the wrongdoer was punished so that their trust in institutions could be restored (London, 2010). He made the compelling argument that punishment would push restorative justice out of the margins to the mainstream (London, 2010).

Restorative and gendered crime

The matter seemed to be settled. A consensus had emerged among restorative justice scholars and theorists that retribution was to be an important part of restorative justice. But there remains a gap between theory and practice (Daly, 2003) especially as restorative justice approaches are applied to precarious situations like sexual crime. Feminist perspectives on restorative justice, and its application to sexual crime need deeper examination to determine the role of punishment in restorative justice for sexual crimes. Kathleen Daly and Julia Stubbs (2006) discussed schools of feminism and their response to restorative justice. They pointed towards the skepticism about restorative justice by feminists. The authors held that feminists are ambivalent on the subject of restorative justice. Many are concerned about its use for domestic violence and other gendered crimes where both sides were never on an equal footing to begin with, that being not an equitable position to restore. However, in the western context, women in racial minority communities tend to see restorative justice as a healthy alternative to the mainstream criminal justice system. This is because they perceive the mainstream criminal justice system to be wrought with racism is more deeply entrenched with sexism. While feminist engagement here is discussed broadly, the authors did not delve into restorative approaches to punishment in gendered crimes. They expressed an

ambivalence about the use of restorative justice in gendered crimes. Not all feminists doubted the potential of restorative justice for gendered crimes.

Another feminist scholar, Katherine van Wormer highlighted some advantages of restorative justice systems in gendered crimes. She argues that restorative justice gives a voice to the marginalised who would otherwise not be visible in the criminal justice system. Restorative Justice opens up criminal justice to victims, communities, social workers, thereby allowing for a more holistic approach. Again, however, the author does not engage with the role of punishment. In theory and in practice, it is unclear how restorative justice programs arrive at punishment for sexual crimes, and if at all they do. Barbara Hudson, in another optimistic perspective, believed that restorative justice may well accomplish the tasks of criminal justice, specifically, retribution, rehabilitation/reintegration, individual and public protection even better than the current criminal justice allows for (Wormer, 2009).

Despite some optimism about restorative justice for gendered crimes from certain feminists, there is much warranted skepticism and dubiousness about its use for gendered crime. Even by its foremost advocates, restorative justice is seen as ill-suited for cases of domestic abuse and battery (Zehr & Gohar, 2003). Daly and Curtis-Fawley documented the responses from victim advocates of sexual crimes, some of who think restorative justice may hold some promise, but many of who are certain that restorative justice is most inappropriate for dealing with sexual crimes (Fawley & Daly, 2005). The concerns of those who oppose restorative justice are genuine: there is a risk of the informality of the restorative justice process to re-victimise victims, expose them to repeated violence, re-privatise crime and burden them with the encounter (Fawley & Daly, 2005). There is greater need to understand standards, safeguards such as those around punishment here, as Hudson pointed out (Hudson, 2003).

Among many others victim advocates (Fawley & Daly, 2005) Julia Stubbs (2012) showed great skepticism about applying restorative justice to gendered crime. She pointed to its inherent risks of re-victimisation for the victim and found it to be a softer on censure, less effective mechanism for offenders that may trivialise sexual crime. Because sexual crimes are not universally condemned in equal measure (often with the victims being blamed) a restorative justice approach might resurface patriarchal prejudices and therefore be counter-productive. Stubbs's concerns carry much weight if restorative justice is understood by its literal meaning (a misnomer, because proverbially one cannot go home again). However, a more sophisticated development of restorative justice, with safeguards, standards and safety mechanisms including training and education of all participants as well as clarifying the role of punishment in the process (as this project endeavours to do) would go a long way in addressing these concerns. In according agency to the victim, allowing them to tell their story and confront their pain, allowing the community to access first-hand the victim's account, restorative justice may even pave the path for a more empathetic society. Furthermore, restorative justice practices may be applied post-sentencing to prevent many of its risks to victim and offender by ensuring they can operate without prejudice.

Restorative justice can be viewed on a narrow level as a program or a practice. More broadly however, restorative justice is a movement that emerged in the aftermath of other movements such as the victims movement, the women's rights movement, the prisoner's rights movement, the civil rights movement, and a consequent rise of informal justice on the whole (Daly & Immarigeon, 1998). In recent years, the Metoo movement has taken many urban societies around the world by storm. The pervasiveness of sexual violence in all contexts including workplaces and educational settings is emerging through social media and the center-staging of crime victims. What remains to be documented is the way in which the restorative justice movement at the grassroots level (level of programs) engages with the metoo movement. At the outset, restorative justice does seem to address some of the needs of the victims by allowing them to tell their story. However, metoo survivors have already done so through social media. Is this a form of re-integrative shaming or stigmatising shaming? Have any of these cases been brought to restorative justice programs? How have they been

handled in that how might have punishment been appropriately determined in them? These are questions further research would have to address.

Much has been said about the victim's experience of restorative justice in sexual crimes. However, on the question of punishment for the crimes in the restorative justice programs the scholarship and our imagination lacks. Specifically on the point of punishment, McGillivray and Comaskey reported that indigenous women in Canada who suffered partner violence wanted more stringent punishment for the wrongdoers (McGillivray & Comaskey, 1999). They aired caution for the use of community based justice systems that may be subject to political manipulation by the wrongdoer and may amplify societal prejudices to the detriment of victims. Evidently, not all feminist indigenous scholars were on board with the application of restorative justice to gendered crimes. Nancarrow however, took the debate further by comparing indigenous and non-indigenous women's views on restorative justice for gendered crimes, and concluded that non-indigenous women seemed more opposed to the idea of restorative justice possibly because they perceived restorative justice more as a mediation (Nancarrow, 2006). Where appropriate punishment to the wrongdoer can be seen as part of a victim's needs, and victim input is taken seriously for the same in a restorative justice approach, but not so disproportionately as to violate the rights of the wrongdoer. A practical concern as regards victim's subjectivity plagues the consistency and proportionality of punishment. Ashworth described this concern by stating: "it would be unfair if sentences on offenders varied according to whether a particular victim is forgiving or vengeful (Ashworth, 2002)." Further research must establish how restorative justice programs grapple with sexual crime victims subjectivity and input, while ensuring punishment that is proportional, deserved and consistent to the responsible persons, if they do so at all. The larger question is how programs arrive at punishment for sexual crimes. Further research is needed for locating best practices for program developers, and practitioners of restorative justice.

Conclusion

A fair and safe model of restorative justice for gendered crimes would require censure of the crime that is punishing of wrongdoer to be located as part of the bundle of victim's needs and assuring the victim that restorative justice does not necessarily preclude punishment. Victims needs must not be assumed, rather, a victim's needs must be determined through meaningful engagement between a trained professional and the victim. The victim must feel motivated to take up restorative justice programs or decide not to take them up.

To summarise, this research concludes with a four-fold finding: first, that it may be desirable to apply restorative justice to sexual crimes with caution and at safe stages, given that the criminal justice system is perceived as unfair to minorities. Though restorative justice interventions must be designed and implemented carefully so as to be perceived more favourably by feminists. Second, that a failure to adequately punish sexual crimes is a failure of justice; and such failure would render women and future populations vulnerable to such crimes at greater proportion by perpetuating institutional violence against them. Third, restorative justice in sexual crimes will remain on perilous ground if it does not take punishment seriously. Finally, disproportionate or inhumane punishment of offenders does little to further justice in sexual crimes and risks slippage into a palliative expression of retributive rage.

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