

RESTORATIVE JUSTICE

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ABSTRACT

Restorative Justice is sometimes seen as an alternative to the established legal system. It is often considered the best method to eradicate crime and help the victim recover damages and etc. at the same time. But there are several issues than can be related to the implementation of the Restorative Justice. In this research paper we shall start by comparing existing legal system with restorative justice. We shall be pointing out the problems in the existing legal system which gave way for the rise of the idea of restorative justice. Then we shall be seeing how the idea of restorative justice works and what is its core essential and in the end we shall be pointing out the problems and areas where the concept of restorative fails.

Keywords: - Restorative Justice, Victim, Offenders, existing legal system

INTRODUCTION

One of the causes of the crime can be traced to the criminal justice system prevailing in the society. In many place, the criminal justice system is the biggest cause of the increasing criminal system activities. For example, in England and Wales, three out of every four new criminal convictions are reconvictions. This shows how much impact a criminal justice system has upon criminals. There could be several reasons by which criminal justice system contributes to the reconvictions of offenders. Some of the causes can be

1. Inadequate Rehabilitation Program: - If an offender, after completing his term, does not get adequate rehabilitation he goes back to committing crime as it is the only medium left out to him to sustain his livelihood.
2. Existing prison system: - in existing prison system, all the offenders are kept with each other. This helps them in creating a bound or “gang” between among themselves. The

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offenders after completing their prison terms remain in contact with their “gang” formed in jail and start organized crimes.

3. Ineffective counselling: - counselling of criminals is an important as it helps to insure that a convict does not commit the same or another crime. But presently. But presently in India there is no counselling of these criminals.

Hence the concept of Restorative Justice is very important. It is a very useful method to stop the offenders from committing crimes again which is the main reason for the failure of traditional criminal justice system. The restorative justice is way better than the traditional criminal justice system in many ways.² It considerably reduces the number of repeat offenders. It also takes into the account the mindset and feeling of the victims. It also helps to reduce the desire of victims for a violent revenge against the offender. This in turn helps the restorative justice to gain an upper hand on traditional justice system.

WHAT IS RESTORATIVE JUSTICE?

The concept of restorative justice is a very old concept and it has been used in many of the indigenous traditions and practices. This concept can be found in any of the Celtic practices and Brehon law³. But the use of the term restorative justice is relatively new. The use of term restorative justice emerged in the 1970s and it was mainly used to refer to the mediation between victim and offender that emerged in America and later it emerged as one of the widely accepted way of describing programs which had the idea of reconciliation between victims and offenders⁴. The term restorative justice was “likely “introduced by Albert Eglash in 1958. He distinguished between different approaches of justice. For Eglash, there are mainly three types of justice as follows⁵

² “Restorative Justice, Procedural Justice and Care” Critical Restorative Justice. (Last visited Apr 18, 2018).

³ Heather S, “Repair or Revenge: Victims and Restorative Justice” (2003) 10 International Review of Victimology 178

⁴ “Interim Report March 2008” [2008] National commission on Restorative justice, <<http://www.justice.ie/en/JELR/RestorativeJusticeLR.pdf/Files/RestorativeJusticeLR.pdf> > accessed April 5, 2018

⁵ GAVRIELIDES THEO, *PSYCHOLOGY OF RESTORATIVE JUSTICE: Managing the Power Within* (GARLAND SCIENCE 2017)

- (1) Retributive Justice
- (2) Distributive Justice
- (3) Restorative Justice

The three theories differ in many ways. The retributive justice is based on the retributive theory of punishment. This theory believes in the phrase, “*An Eye for an Eye*”⁶, which means that the victim has full right to take revenge from his offender and can cause as much damage as the offender has caused him. The Distributive Justice involves the treatment of the offender. And Restorative Justice, aims on restoring victim back to pre-crime scenario. There may be compensation for the loss or injury etc. in restorative justice.

The main aim of restorative justice is to think what is best for the victims of the crime, offenders of the crimes and the criminal justice system. For the advocates of restorative justice, the main focus is on victim. What happens in traditional criminal justice system like in India, when a crime is committed and FIR is registered by the victim then it is the duty of the state to bring the accused to justice. The role of victim ends after filling of the FIR. Now it is the duty of the state to do justice. The victim and his/her desire, the community and its needs are not taken into consideration.

The advocates of restorative justice assume that the offenders and the victim are not of different kinds of people rather they belong to the same kind. Making people belong to the same kind help the Restorative Justice thinkers help to resolve the desire of revenge against the offender. They also believe that offenders are themselves been victims of some form of crimes and that too from an early age. This idea helps to create some sort of bond between victims and offenders, which in turn helps to reduce the idea of revenge. One of the principles of Restorative Justice is to seek cooperation between victim and offenders and to repair the past damages and prevent future crimes. The restorative justice is the only theory which thinks about the “emotional intelligence: approach of justice”⁷.

⁶ Ahuja R, *Sociological Criminology* (New Age International Ltd 1996)

⁷ Sherman, 2003). Sherman, L “Reason for Emotion: Reinventing Justice with Theories, Innovations and Research”, American Society of Criminology 2002 presidential address, in *Criminology* vol 41 (2003), pp1-38

ASSUMPTIONS OF RESTORATIVE JUSTICE

The idea of Restorative Justice needs three participants for it to work correctly. The three participants are the victim (if not, then this family), the offender and the community or the society. These three participants are at the core of the restorative system. They are the pillar at which system of restorative justice stands. They help each other in coming to plausible solution to the problem at hand. Restorative Justice depends, like many theories, mainly on hypothesis. These hypotheses and the 3 pillars when work in compatibility with each other can work wonders in the criminal legal system. These hypotheses can be summed mainly into two parts. These two parts are about its procedure and effectiveness. The procedure part is based on hypothesis that the victim believes that restorative justice is a humane and more respectful than the traditional criminal justice system. And the effectiveness part is based on the hypothesis that the restorative justice is more effective than the traditional justice system and it helps the offender to come clean and return back to the society as a good and rational human being. This helps in reducing or eliminating the number of second conviction. These hypotheses when work effectively produces result which helps in producing results which were drawbacks of traditional criminal justice system, like reduction and elimination of feeling of revenge from the mind of victim, compensating for the loss of victim and repairing of the damage caused by the crime.

RESTORATIVE JUSTICE AND RULE OF LAW

The restorative justice in some way or other undermines the three basic principle of Rule of Law. The Rule of Law, have the state or the established legal system at the center and all the punishment and etc. is decided by the state only. Whereas for the restorative justice, victim is at the center and the victim with the help of the community decides what punishment should be given to the offender. Those who are believers of Rule of Law say that this practice of restorative justice abuses the rights of the individual and often this right gets abused by the victim and the community. The principles of Restorative Justice are not in line with equality before the law or equal application of law or with the supremacy of law. For the restorative justice, the quantum of punishment is not equal or previously fixed by any law rather it is fixed and decided on case to case basis by different victims. This also creates a bigger problem of precedence, which is the

backbone of the common law legal systems. Victim or the family of the victim decides the punishment with the help of the community. Hence this changes the level of each crime depending upon the mindset or the mental agony suffered by the victim.

The restorative justice is somewhat may be beneficial to the offender. The offender has an opportunity to help himself as well as the victim. But this has to be done in good faith and the offender has to feel sorry for him and there should be a feeling of guilt inside the offender. It is more like repentance for the offender.

PUNISHMENT AND RESTORATIVE JUSTICE

The idea of punishment which in line with the idea of restorative justice is Reformatory theory of punishment. The doctrine of tougher punishment by the theories like deterrence and retributive have failed to provide any relief to the victim⁸. The reformatory theory of punishment helps in eliminating the source of the crime in the individual not the individual itself. This is also one of the remarkable aspects of the reformatory theory of punishment which in turn helps in implementing the restorative justice. From the perspective of the offender, the restorative justice is good because it gives the offender a chance to improve his behavior and return to the society as a useful part of the society. The restorative justice makes the offender come face to face with his act. This in turn helps to increase the guilt inside of the offender which in turn helps the offender to ask for redemption for his act.

The reformatory theory of punishment also helps in reducing the number of repeat convicting which is the major problem that can be resolved with the help of restorative justice.

WHEN RESTORATIVE JUSTICE FAILS?

The restorative justice is not a full prove system. It also like many theories has some drawbacks. The restorative justice may backfire and fail sometimes. There can be many causes for the restorative justice to fail. One of the primary reasons for the restorative justice to fail is the failure of the hypothesis on which it stands. Restorative justice may also fail in those cases where in the any of the three, victim, offender or the community fails to participate in the deliverance of the restorative justice. The idea of restorative justice fails if the hypothesis of this theory fails.

⁸ ibid

Restorative justice is highly dependent to the victim and his/her humane behavior. The idea of restorative justice fails if any of this two fails. The restorative justice will fail if the victim asks for harsh punishment for example torture till death or any similar kind of punishment. For the restorative justice to work it is necessary that the victim has a humane feeling left⁹.

The restorative justice will also fail if the any of the three pillars fail to participate or are not willing to participate in the restorative justice system. Restorative justice will be a complete failure if all the parts of the restorative justice do not do their parts willingly.

The restorative justice may also fail from the side of the offender. If the offender does have a feeling of remorse or regret, then the whole idea of restorative justice will fail. It may also happen that the offender may fake the feeling of remorse and use it to escape any kind of punishment that may be awarded. What is in the minds of the offender can be read and to make the restorative justice work properly it is important to make sure that the offender has a real feeling of remorse inside of him¹⁰.

WHAT CAN BE DONE TO PREVENT RESTORATIVE JUSTICE FROM FAILING?

Since there are several ways that by which the restorative justice may fail, there are several solutions also which could help in resolving this issues. The foremost is the option of appeal to a higher authority like a court by the offender. This will in turn help the offender not to get any punishment which the offender does not deserve. This will resolve the issue of arbitrary exercise of power by the victim. The system of restorative justice can be fully functional only if the victim has some humane feeling left. If the victim does not have any humane feeling left and wants a vengeance, then this can't be done. To resolve the issue of vengeance, there could be a

⁹ Mark S. Umbreit, Robert B. Coates, Betty Vos, Victim-offender mediation: Three decades of practice and research at p. 280

¹⁰ Mark S. Umbreit, Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue, Centre for Restorative Justice & Peacemaking, U.S. Department of Justice, April 2000

counseling system is installed. This will help the victim to give punishment to the victim without being vengeful.

For the offender also, a system of counselling can be beneficial to understand that he/she is a habitual criminal or not. If the offender is a habitual criminal, then this system of restorative justice is no use¹¹.

Also the courts can also be very helpful in the system of restorative justice. The courts can decide, on looking on the condition of both the victim and the offender can order for use of restorative justice on case to case basis.

Although, restorative justice is quite a good concept but it can be used only in addition to the established legal system. Restorative Justice cannot fully replace a complete legal system¹².

CONCLUSION

The idea of restorative justice is a very bright idea in the criminal justice and delivery system. But there are several problems which have to be addressed before it can be fully relied upon. The self-reliance of the system is an another question which has to be looked upon. Indeed, the restorative justice system will be helpful in criminal delivery system but the few initial problems have to be resolved.

¹¹ Ritika, "RESTORATIVE JUSTICE UNDER THE CRIMINAL JUSTICE SYSTEM WITH SPECIAL REFERENCE TO PLEA BARGAINING" [2017] THE WORLD JOURNAL ON JURISTIC POLIT Y <<http://jurip.org/wp-content/uploads/2017/03/Ritika.pdf>> accessed April 15, 2018

¹² Thilagaraj R and Liu J, *Restorative Justice in India Traditional Practice and Contemporary Applications* (Springer International Publishing 2017)