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## **JOURNEY FROM RETRIBUTION TO RESTORATION: CHANGING PARADIGM**

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### **ABSTRACT**

Retributive justice and restorative justice are the most important approaches of dealing with the problem of crime. Retribution is used as a justification for imposing punishment upon the offender. Harsh punishment and an increasing prison population have been considered the effects of retribution. However, there is another model which is also gaining ground and that is restorative justice. Restorative justice tries to put things right as much as possible. It tries to restore the situation that existed before the commission of the crime. The model of retribution rests on the idea of the imposition of punishment for a violation of the penal law that has been enacted by the state. The idea of retribution is based on the fact that crime is committed against the state, as the state is the representative of the community. Restorative justice differs in its approach of dealing with crime. Restorative justice focuses on the idea of analysing the harm that has happened, the needs of the victim and the community, and the obligations and responsibilities of the offender towards the victim and the community.

## **Introduction**

Human civilization has always been aware of the crime. The discussion of crime can be found even in the most ancient societies. Whenever a crime takes place, it is the responsibility of society to take care of that crime. There are different ways of dealing with crime. Retributive justice and restorative justice are the most important approaches of dealing with the problem of crime. Retribution is used as a justification for imposing punishment upon the offender. Harsh punishment and an increasing prison population have been considered the effects of retribution. However, there is another model which is also gaining ground and that is restorative justice. Restorative justice tries to put things right as much as possible.<sup>1</sup> It tries to restore the situation that existed before the commission of the crime. The model of retribution rests on the idea of the imposition of punishment for a violation of the penal law that has been enacted by the state.<sup>2</sup> The idea of retribution is based on the fact that crime is committed against the state, as the state is the representative of the community. Whenever there is any violation of any penal law, it is not an offence against the individual but an offence against the state. One of the most important reasons for the emergence of a state was to protect law and order and its own citizens from external aggression and internal law and order disturbances, which is why whenever a crime occurs, the state considers it its own responsibility to punish the offender so that social harm can be avoided and social peace can be maintained. Restorative justice differs in its approach of dealing with crime. Restorative justice focuses on the idea of analysing the harm that has happened, the needs of the victim and the community, and the obligations and responsibilities of the offender towards the victim and the community. Under the model of retribution, the whole focus is on punishing the offender by the state and the victim is not considered a very important part of the whole criminal justice system. But in restorative justice, the attempt is to bring all the stakeholders and parties to the crime together and lead to a kind of amicable solution where the grievances of the victim can be settled as best as possible.<sup>3</sup> Though it may seem that the approaches are different and the ways of dealing with crime are different under the models of retribution and restoration, ultimately they both have the same goal of ensuring justice and having a peaceful society where people can live their lives in a peaceful manner.

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<sup>1</sup> HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (Good Books 2002).

<sup>2</sup> JEFFRIE G. MURPHY, *FORGIVENESS AND MERCY* 28 (Cambridge Univ. Press 1998).

<sup>3</sup> TONY MARSHALL, *Restorative Justice in Britain*, in *RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION- INTERNATIONAL RESEARCH PERSPECTIVES* 15–28 (Kluwer Academic Publications 1992).

## Restorative Justice: An Overview

Restorative justice tries to put things as right as possible after the commission of a crime. Restorative justice recognises that whenever a crime takes place, certain damage occurs, and after recognising this fact, it tries to offset the impact of the crime as best as it can in the situation. There is an attempt to bring all the parties together and all the stakeholders of the crime, including the victim and offender, come together and discuss the aftermath of the offence and what can be the best way in which they can deal with the aftermath of the crime. Face-to-face discussion between victim and offender becomes very important under the model of restorative justice. The whole attempt is to do things as best as they can be done. The idea of restorative justice existed during ancient times among the tribes. There wasn't much concept of retribution because there was an attempt to avoid wars and conflicts. However, restorative justice lost its grounds after the Norman conquest of Britain during the 11<sup>th</sup> century. It's only in contemporary times that restorative justice started to gain ground, starting in the 1970s with Canada. Restorative justice is reconciliatory in nature and can be applied in a broad spectrum wherever one party is considered the victim, which is why the concept of restorative justice can even be applied in domestic disputes and international conflicts; however, contemporary restorative justice has been developed in the context of crime, which is why the concept of restorative justice is best suited in cases of crime commission.<sup>4</sup> Restorative justice can also be viewed as a social movement and a more holistic approach to crime, as it assists both the accused and the victim and attempts to restore both of these stakeholders' positions within society.<sup>5</sup> Crime is considered a precondition for applying the concepts of restorative justice because restorative justice seeks to restore the position that existed before the commission of the crime, and that is the reason that restorative justice concepts can be applied in cases where crime has already happened, and that is the reason that crime is considered a precondition for application of the concepts of restorative justice. Restorative justice is more concerned with the concepts of peace and mercy.<sup>6</sup> There is a religious and moral significance to restorative justice also.<sup>7</sup>

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<sup>4</sup> Brenda Blackwell & Clark Cunningham, Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice, 67 *LAW & CONTEMP. PROBS.* 59, 68–69 (2004).

<sup>5</sup> Mark Umbreit, Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls, 89 *MARQ. L. REV.* 251, 254 (2005).

<sup>6</sup> DANIEL PHILPOTT, *JUST AND UNJUST PEACE: AN ETHIC OF POLITICAL RECONCILIATION* 68 (Oxford Univ. Press 2012).

<sup>7</sup> LODE WALGRAVE, *RESTORATIVE JUSTICE, SELF-INTEREST AND RESPONSIBLE CITIZENSHIP*, 2 (Willan Publishing 2008).

## **Restorative Justice and Crime.**

Retributive justice is based on the idea of the infliction of punishment in the case of a breach of penal law. The state makes penal laws and whenever such penal laws are breached by the offender, the state punishes the accused. Under retributive justice, a crime is considered not an offence against the individual but rather an offence against the state because the state represents the community which has given the state the responsibility to protect itself from all sorts of crimes. One of the most important functions of the state has been considered to protect its citizens from external aggression as well as internal law and order problems that exist within a society. Restorative justice differs from the idea of retribution. Restorative justice's entire focus is on the idea of reparation and undoing the harms that have happened as best as it can be done. It tries to put things as well as possible. Restorative justice is victim-oriented because it considers the victim the primary impacted party and gives the secondary, more passive role to the state. Restorative justice tries to understand the perspective of the victim and gives voice to the victim.<sup>8</sup> It tries to understand all the material and emotional trauma that has occurred to the victim and what the demands and requirements of the victim are in such cases. The process of restoration includes dialogues and deliberations between the offender and the victim.<sup>9</sup> Face-to-face dialogues between offender and victim are considered one of the most prominent features of restorative justice. There is an attempt to make the accused aware of the impact his actions have on the victim, and they take full responsibility and try to offset the impact.<sup>10</sup> The victim is also supposed to openly express his grievances and the requirements that can be best suited for them. The traditional legal system did not totally ignore the concerns of the victim but put them in the secondary position. This position has been changed by the concept of restorative justice. The best possible outcome of the process of restorative justice is the benefit of both the accused and the offender. Under retributive justice, there are two parties: the offender and the state, but under restorative justice, there are three parties: the offender, the victim, and the community. The traditional legal system puts victims in the backseat, where as under the model of restorative justice, the state is given a much more passive role. Restorative justice sees crime as much more than the mere violation of penal laws. Society is an interconnected institution where people are interrelated, and restorative justice believes that

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<sup>8</sup> David Miers, *The Responsibilities of the Rights of Victims of Crime*, 55 MOD. L. REV. 482, 496 (1992).

<sup>9</sup> Paul McCold & Ted Wachtel, *In Pursuit of Paradigm: A Theory of Restorative Justice*, RESTORATIVE PRACTICES FORUM (Aug. 12, 2003), [www.restorativepractices.org](http://www.restorativepractices.org).

<sup>10</sup> Heather Strang & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice*, 15 UTAH. L. REV. 1, 15 (2003).

crime breaks the interrelation between people. So, the focus of restorative justice is not on punishing the offender but rather on the restoration and reparation of the damage that has happened. There is an attempt to reach an amicable solution so that the relationship between the members of the society can be restored.

**Retributive Justice: an overview.**

A crime is considered a wrong against the public which is punished in a criminal case prosecuted by the state. Under the retributive model, the state performs four important functions in the context of crime. The state establishes the penal law, enforces the penal laws that have been established, judges the guilt through the mechanism of the judiciary, and imposes punishment when the guilt has been established. The state punishes the offender so that society can be protected. The state punishes the offender so that the order and safety of society can be maintained. The punishment also aids in the offender's moral recovery, which he had lost while committing the crime. State makes penal laws and whenever such penal laws are breached by the offender, the state punishes the accused. Under retributive justice, a crime is considered not an offence against the individual but rather an offence against the state because the state represents the community which has given the state the responsibility to protect itself from all sorts of crimes. One of the most important functions of the state has been considered to protect its citizens from external aggression as well as internal law and order problems that exist within a society. The old understanding of retribution was based on the idea of vengeance, which was done through the imposition of suffering. The gradual progress was that punishment should be proportional to the crime. Under the new understanding of retribution, it is considered that the offender deserves punishment, and once guilt has been established, the accused has to be punished. There is an attempt to offset the social harm that has occurred. To expiate the moral culpability of the offender, it is important to punish the offender.<sup>11</sup> It also has a positive impact on society because it creates deterrence and demotivates the other members of the public from committing the crime. Reparation can offset the material part of the crime, but moral culpability can be expiated through the imposition of punishment. The idea of restorative justice existed among the tribes. Roman law also allowed private parties to settle disputes through mutual understanding. However, the idea of retributive justice

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<sup>11</sup> Michael Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PHILOSOPHY* 182 (Ferdinand Schoeman ed., 1987).

became prominent after the Norman conquest in the 11<sup>th</sup> century.<sup>12</sup> The principle of retribution believes in the protection of the moral order which leads to the common good of society. The principle of retributive justice is based on the idea of human autonomy. It is based on the choice that has been selected by the offender himself.<sup>13</sup> If the state has provided that committing x crime leads to punishment y, and the offender decides to commit x crime, then it is understood that he has voluntarily decided to suffer the consequences. The principle is that when an offence has been committed, punishing is of paramount importance because only punishing can lead to the reestablishment of justice.

### **Criticism of retributive Justice and Need for Restorative Justice**

There are certain major concerns related to retributive justice. The principle of retribution has not been very successful in creating a deterrent for offenders.<sup>14</sup> It is also considered unjust for the offender because it doesn't give them the ample opportunity to be reintegrated into society. It has been more or less proven ineffective in ensuring social safety.<sup>15</sup> It is also very burdensome because of the cost related to social resources.<sup>16</sup> Even after applying the retributive principles, the prison population has increased. The major impact of this is on the families of the offenders, and such families are totally devastated. Society is based on interdependence and interrelationships, and the principles of retribution do not help much in the reestablishment of broken relationships. It has not been very successful in creating the desired deterrence. The most important concern with retributive justice is that it ignores the victims. Victims have been considered the most overlooked part of the traditional legal justice system. The victims are voiceless and have a very passive role to play under the traditional legal justice system. The needs and requirements of the victims are ignored, and it causes further problems in the healing of the victims. The deterrence aimed at by the traditional legal system works in certain situations only with certain specific types of offences and offenders. The traditional criminal justice system doesn't provide much scope for reformation, and such reformation is rare. Rather, it leads to further stigmatisation and labelling, which doesn't allow the person to be reintegrated into society. One of the most important problems with retributive

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<sup>12</sup> Mark Umbrett, Betty Vos, Robert Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls* 89 MARQ. L. REV. 251, 255 (2005).

<sup>13</sup> IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 194 (W. Hastie trans., 1847).

<sup>14</sup> Theo Gavrielides, *Reconciling the Notions of Restorative Justice and Imprisonment*, 94 PRISON J. 479, 479–80 (2014).

<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid*

justice is that victims do not always have the desired concerns for them. Society is an interconnected institution, and the good of individuals leads to the good of society. Alienation is problematic for society, and a retributive model increases the problem of alienation. There is not much scope for dialogue between the victim and the offender, and it further widens the alienation. Restorative justice attempts to change this prevalent perspective; it gives voice to the victims, and the victims become primary. Restorative justice is more holistic in nature and focuses on all the stakeholders of the crime, trying to lead all the parties to an amicable solution. Restoration is based on the idea of healing and requires both material and emotional reparation. Restorative justice believes that the harm can be redressed. The victim can be healed and the offender can also be given the opportunity to undo the harm and be a responsible citizen.

### **Conclusion**

Retributive justice and restorative justice are the most important approaches of dealing with the problem of crime. Under retributive justice, a crime is considered not an offence against the individual but rather an offence against the state because the state represents the community which has given the state the responsibility to protect itself from all sorts of crimes. There is concept of punishment under the retributive model once the penal law has been breached by the offender. Restorative justice tries to put things as right as possible after the commission of a crime. Restorative justice recognises that whenever a crime takes place, certain damage occurs, and after recognising this fact, it tries to offset the impact of the crime as best as it can in the situation. There is an attempt to bring all the parties together and all the stakeholders of the crime, including the victim and offender, come together and discuss the aftermath of the offence and what can be the best way in which they can deal with the aftermath of the crime. There are certain major concerns related to retributive justice. The principle of retribution has not been very successful in creating a deterrent for offenders. It also ignores the concerns of victim and put them in a very passive role. Restorative justice attempts to change this prevalent perspective; it gives voice to the victims, and the victims become primary. Restorative justice is more holistic in nature and focuses on all the stakeholders of the crime, trying to lead all the parties to an amicable solution. Restoration is based on the idea of healing and requires both material and emotional reparation. Restorative justice believes that the harm can be redressed. The victim can be healed and the offender can also be given the opportunity to undo the harm and be a responsible citizen.