

Restorative Justice: Better Protection Model for National Security.

M.K. Geethani Jeewanthi, Lecturer (Probationary), Department of Legal Studies, Open University Nawala

Crime and criminal justice system.

Society is a mixture of different kinds of people and organizations. The behaviours of people can vary from person to person and while some behaviours are accepted by society, some behaviours of human being which are committed against society are identified as unacceptable. Crime is also one such unacceptable behaviour and defining "crime" is not easy since it is a mixture of so many factors such as social, physical, legal and psychological.¹ Through out the history criminologists have tried to identify the causations for crime from different angles and classists such as Cesare Beccaria have explained the crime under the free will theory and pain and pleasure theory. Positivist's identified crime as a part of human nature based on biological, sociological and economic aspects. Sociologists rejected the idea of born criminals and they tend to point out the sociological aspects which are causes for criminal activities. However, in the current context it is impossible to identify a one reason for crime; rather a mixture of reasons can be found.

Whatever the reason for crime, it can create a huge impact in different contexts. Crime is a threat to social organizations. It is a threat to people's property as it can create adverse psychological problems for people. Crime stands as a burden to economy of a country. Crime can easily make a situation where people are vulnerable. Moreover, crime can be a threat to security, liberty and freedom of people and ultimately this can move to become a threat to national security. In this scenario, the criminal justice system of a country has a vital role to play in increasing the security of a country. Criminal justice system is a collection of many agencies that are independent, but closely related to each other and what one agency or institution has consequences for another agency in the process. All agencies have different and sometimes competitive, compatible objectives. One of the main objectives of a criminal justice system is the reduction of crime rate, make people fearful to commit crimes, and to maintain public safety and good order. Moreover, there are other objectives such as delivering justice through effective and efficient investigation, prosecution, trial and sentencing², restoring the balance between victim and the offender, review of the legality of our preventive and suppressive measures and correction by socially approved means of the behaviours of those who violate criminal law.³

1 Elliott, MA 1952. *Crime in Modern Society*. Harper & Brothers, Newyork, p.p 11-16

2 Ashworth, A 2000, *Sentencing and Criminal Justice*, 3rd ed, Butterworths, London p.60

3 Pursley, RD 1987, *Introduction to Criminal Justice*, 4th ed, Collier Macmillan, London, p.p.5-6

Three models of criminal justice.

In 1979, Albert Eglash has suggested that there are three types of criminal justice: (01) Retributive Justice based on punishment (02) Distributive Justice based on therapeutic treatment of offenders and (03) Restorative Justice based on restitution.⁴ Distributive justice can be considered as an expansion of retributive justice and both these models consider crime as a mere law breaking committed against impersonal society. Those who commit crimes consider as “outsiders” should be viewed with hostility and the inflicting a reciprocal harm upon the punishment considered as the appropriate response to crime. Finally both these methods encourage the participation of professionals to the process carried out in an impersonal manner by a large scale institution.⁵

Restorative Justice.

Howard Zehr who is considered as the “grandfather” of restorative justice⁶ describes restorative justice as ‘crime is a violation of people and relationships’. It creates an obligation to make things right. Justice involves the victim, the offender and community in a search for solutions which promotes repair, reconciliation and reassurance.⁷ In the case of *R. v. Proulx* Chief justice of Canada held that,

*[Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victims and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done to victims and to the community.]*⁸

Some scholars have used different terms for this concept; Ruth Morris describes this model as “transformative justice” emphasizing that crime is not simply a violation of people and relationship, it also offers an opportunity for a transformation of those people and relationships that can deal with the causes of crime, and in that way, increase safety in the community.⁹ Jonathan Burnside and Nichola Baker have used the term “relational justice” highlighting the importance of thinking of crime’s

4 Eglash, A 1977, *Beyond Restitution: Creative Restitution*, in J Hudson & B Galaway (eds), *Restitution in criminal justice*, Lexington, Toronto p.p.91-92.

Also available in <http://www.lorennwalker.com/uploads/articles/Eglash1977.pdf> [viewed on 03-July-2012]

5 Hucklesby, A & Wahidin, A (eds) 2009, *Criminal Justice*, Oxford University press, p.185

6 Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 26

7 Zehr, H 1990, *Changing Lenses: A New focus for crime and justice*, Herald Press, Scottsdale, p.181, cited in

Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 24

8 ([2000] 1 S.C.R. 61)

9 Morris, R 1994, *A Practical Path to Transformative Justice*, CAN: Rittenhouse, Toronto. Cited in Ness, DV &

Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 25

relational dimensions.¹⁰ Marlene Young uses the term “restorative community justice” to stress both the importance of community involvement and the value and potency of community action in crime prevention.¹¹

Restorative processes.

The idea of restorative justice can be practically used in several forms such as Victim offender reconciliation programs, conferencing/ Family group conferencing, Victim offender panels and Circles.

Victim Offender Reconciliation Programs (VORP)

This is an avenue for using reparation and reconciliation in which victims and offenders are given the opportunity to meet together with the assistance of a trained mediator to begin to resolve the conflict and to construct their own approach to achieve justice.¹² Mediator’s role of this process is to encourage victim to explain the offender how the unacceptable behaviour of offender has affected his/her life. Victims are allowed to talk freely about the incident and they can effectively engage in the development of restitution plans and offender also gets a chance to give explanation of his misbehaviour. It will give the offender a great insight into the harm caused, as well as an opportunity to repair the damage. Three stages can be identified in this VORP procedure as helping to identify injustice by talking to each other, creating pathways to remedial correction by understanding the real harm of the action and leading to future actions such as restitution schedules, follow-up meetings and monitoring procedures.¹³

Family Group Conferencing (FGC) / Conferencing.

This is similar to VORP in many aspects. The only difference which can be identified is that not only the victims and offenders, but also the family members or supporters of victim and family members can participate in this process. As the same, in the FGC both victim and offender’s parties have a chance to speak on their behalf and later a co-ordinator helps to find ways and means to repair the injustice caused by the offence. The victim’s party have an opportunity to state their expectations an offenders party can respond to it. Negotiations continuous until all participants agree to a plan, which is then recorded.¹⁴ There is a greater emphasis in FGC on construction of an action plan which will help the offender (quite often a young offender), not only to repair the damage caused by the crime, but also to change their way of life so that they have less chance of re-offending.¹⁵

10 Burnside, J & Baker, N (eds) 1994, *Relational Justice: Repairing the Breach*, waterside press, Winchester. Cited in Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 25

11 Young, MA 1985, *Restorative Community Justice : A Call to Action*, National Organization for Victim Assistance, Washinton. Cited in Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 25

12 Wright, M & Galaway, B (eds) 1989, *Mediation and Criminal Justice: Victims, Offenders, and Community*, Saga Publication, Newbury Park. Cited in Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 69

13 Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 71

14 Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 73

15 Hucklesby, A & Wahidin, A (eds) 2009, *Criminal Justice*, Oxford University press, p.192

Victim- Offender Panels. (VOP)

This is compound by a group of victims and a group of offenders who are usually linked by a common kind of crime, although the particular crimes of which they were the perpetrators are not common.¹⁶ Objective of this process is to help victims and to provide an opportunity for offenders to realize the harm caused by their activities. Daniel Van Nees and Karen Heetderks Strong have mentioned the importance and effectiveness of VOP's in relation to the offences of house burglaries and drunk driving. They were of the view that these programs demonstrated a better understanding of the offence and showed a dramatic change in the attitude of offenders and victims, and also helped in healing the problems.¹⁷

Circles.

Circles are facilitated community meetings attended by offenders, victims, their friends and families, interested members of the community, and representatives of the justice system. The facilitator is a community member whose role is primarily to keep the process orderly and periodically to summarize the benefit of the circle.¹⁸ Participants speak one at a time, and may address a wide range of issues regarding the crime, including community conditions or other concerns. The focus is on finding an approach that leads to a constructive outcome, in which the needs of the victim and community are understood and addressed along with the needs and obligations of the offender.¹⁹ This is also considering as sentencing or peacemaking circles.²⁰ Although this process comes under restorative justice this is not a better way of dealing with individual criminal case, but it is good as a way to resolve conflicts and tackle underlying social problems.²¹

Features of the Restorative justice model.

01. Restorative justice permits greater participation and satisfaction for victim than the existing legal system.

This can be considered as the perceived advantage of restorative justice. It gives them a role sometimes with actual decision power and a right to be heard and to respond to the offender's statement in a direct manner which is not restricted by court processes or the adversarial conception of the

16 Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 74

17 Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p.p.75-76

18 Restorative Circles. Prison Fellowship international beyond crime and punishment.(online) Available at <<http://www.pfi.org/cjr/downloads/focus-on-justice/focus-onjustice/circles/?searchterm=sentencing%20or%20peacemaking%20circles>> [viewed 03-July 2012]

19 Restorative Circles. Prison Fellowship international beyond crime and punishment.(online) Available at <<http://www.pfi.org/cjr/downloads/focus-on-justice/focus-onjustice/circles/?searchterm=sentencing%20or%20peacemaking%20circles>> [viewed 03-July 2012]

20 Layley, D 1998, *The Expanding Prison: The crisis in Crime & Punishment and the search for alternatives*, pilgrim press, Leveland

21 Hucklesby, A & Wahidin, A (eds) 2009, *Criminal Justice*, Oxford University press, p.193

state and the defendant as opposing parties.²² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) defines a “victim” as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power. The meaning includes both direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. In the restorative justice, it can be seen that victim’s are less victimising than in court procedure²³ and they can participate in the procedure in a respectful and non adversarial manner.²⁴ The restorative justice can help to reduce the victim’s post traumatic stress symptoms and create a less threatening environment for victims and more individualized approach of the victims.

In contrast to these features, a victims’ participation is not recognized in both retributive and distributive models. This can be specially seen in the Sri Lankan contexts where there is no protection for victims, although the state counsels represent the victim’s party in court that victims are not in a position to talk to their representative freely. So, without having a proper recognition for victim’s voice how can he be satisfied with ultimate results? Moreover, most of the victim’s in Sri Lanka have been victimised several times by several agencies of criminal justice system. This movement can lead to destroy the trust/ faith in law which people have in their minds. The restorative justice model is good in this context as it provides an opportunity for victims to obtain information, express the impact, to be empowered and to get restitution.²⁵

02. Restorative justice permits greater participation for offenders than the existing system.

In this model, offenders also get a chance to participate more actively than an adversarial criminal trial where he or she sits in dock and listens to the case about their alleged behaviour. Sitting in trials, it is clear that many defendants do not fully participate in their own case.²⁶ However, the

22 Koss,MP,Bachar,KJ & Hopkins,CQ 2003, *Restorative Justice for sexual violence: Repairing Victims, Building community and holding offenders accountable*, Annals of the Newyork Academy of Science, Available at < <http://www.ncbi.nlm.nih.gov/pubmed/12839913>> [viewed 05-July-2012]

23 Strang,H & Sherman,LW 2003, ' Repairing the harm: Victims and Restorative Justice', Utah Law Review, vol.15,p.p 15-42, also available in <[http://regnet.anu.edu.au/sites/default/files/publications/Strang_Repairing % 20the%20harm.pdf](http://regnet.anu.edu.au/sites/default/files/publications/Strang_Repairing%20the%20harm.pdf)> [viewed on 10-July-2012]

24 Victorian Association for Restorative Justice, Restorative practices advantages and benefits,(online), Available at <<http://www.varj.asn.au/advantages-benefits>> [viewed on 10-July-2012]

25 Victoria Restorative Justice Society, 2010, Benefits of Restorative Justice,(online), available in < <http://tjvictoria.wordpress.com/about/how-our-clients-benefit/>> [viewed on 10-July-2012]

26 McDonald, E & Tinskey,Y n.d, Real rape to real justice: prose cutting rape in New Zealand, available in <http://www.lawcom.govt.nz/sites/default/files/restorative_justice_frtrj_pp_414-423.pdf> [viewed on 10- July-2012]

restorative models provide an opportunity to take accountability for his/her action and to undergo personal transformation.²⁷ Specially this restorative model can be effectively used to change the young offenders where it provides a pragmatic and respectful manner for the offenders behaviours. Furthermore, it encourages the family to support their young persons in facilitating an opportunity for restoration to the family and re- integration within the community.²⁸

03. Restorative justice considers the reparation of harm as the appropriate response to crime.

Traditional criminal justice model assumes the infliction of reciprocal harm to the offender as an appropriate response to crime. However, the restorative justice considers making offender liable to repair the harm caused as the appropriate response to crime. In other words, restorative justice measures success differently; rather than measuring how much punishment has been inflicted. It measures how much harm has to repair or prevented.²⁹ The tradition view starts it responses from the offender's perspective, while the new model suggests starting from the victim's perspective for achievement of justice and for the fulfilment of goals of the criminal justice system. This innovative way of thinking can be justified under morally and politically as an effective method.³⁰ Howard Zehr has suggested the importance of making offenders accountable by allowing him to think about the "real human costs of what he has done" and to take active responsibility for his action.³¹ Both parties get the chance of participation in the development of restitution/ reparation plan. This can make a satisfactory end for both parties. The communication procedure for this end can also be seen as more flexible than a court room where key parties have been marginalized from the beginning to the end. Both primary and secondary victim's positions and also any other harm that has occurred from the criminal behaviour can be discussed under this reparation plan.

04. Restorative justice allows better re- integration for parties.

The traditional justice model views the offender as an enemy to the society and harsh punishments inflicted to see him suffer for the act which he had done. However, we cannot forget the truth that at some point that they have to be -admitted into society. Offenders face personal, societal and spiritual obstacles in re-integration after being sanctioned.³² The way in which the criminal justice system treats offenders mostly affect their later behaviours. If we treat them as enemies they will be reacting as our enemies. If we could provide proper solutions after identifying their deep seated problems through reconciliation, there is a reasonable prediction to see them as good human beings once they are re-admitted to the society. On the other hand, offenders are also capable human beings and if we try to strengthen bonds between offenders and law abiding members of the community we improve our chances of influencing them to behave better and to make a positive contribution towards the

27 Victoria Restorative Justice Society, 2010, *Benefits of Restorative Justice*,(online), available in <<http://rjvictoria.wordpress.com/about/how-our-clients-benefit/>> [viewed on 10-July-2012]

28 Victorian Association for Restorative Justice, *Restorative practices advantages and benefits*,(online), Available at <<http://www.varj.asn.au/advantages-benefits>> [viewed on 10-July-2012]

29 Prison fellowship international centre for justice and reconciliation, *Restorative Justice online lesson 02 Benefits of Restorative justice* (online), available in <<http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/benefits/>> [viewed on 10-July-2012]

30 Hucklesby, A & Wahidin, A (eds) 2009, *Criminal Justice*, Oxford University press, p.189

31 Hucklesby, A & Wahidin, A (eds) 2009, *Criminal Justice*, Oxford University press, p.189

32 Ness, DV & Strong, KH 1997, *Restoring Justice*, Anderson publishing co, Cincinnati, p 114

well-being of the community.³³ Victims also get both physical and psychological damages due to criminal behaviour and the traditional criminal justice model makes it worse for the victim's position by dragging out cases years by years even without hearing a single word from the victims. However, the restorative justice model helps victims to identify the environment and the offender in the very first instance and victims stress level can be reduced to a certain extent after telling his/her concerns to the offender and to the other stake holders.

05. Restorative justice allows participation even for the community.

The main aim of restorative justice is the healing and not the harm made to parties. The healing is applicable to all the stake holders including the community in a large scale. The reductions of criminal behaviour always increase the security of individual, as well as the security of the country. Unlike the traditional model, the restorative justice model encourages the active participation of the community as a secondary victim to the crime. This process gives an opportunity to society to be empowered and to strengthen community responsibility.³⁴ Moreover, this model can create harmony in the community than in an adversarial method where parties make enemies for the entire life time. The restorative justice model promotes the communities trust towards the criminal justice system.³⁵

Challenges to the Restorative Justice.

Despite the important features of restorative justice model, few challenges can be identified which diminish the value of the model. First, there can be a potential risk for victims in both physical and emotional aspects even in restorative justice model and also all the victims successfully go through this procedure. This is happening not because of the failure of the system, but because of the inherent features of human being. People are different from person to person and some may not have benefited from peaceful procedures such as restorative justice. The other challenge is this new model that can be used to "play" the system, allowing manipulation of the process by offenders in minimising their guilt or placing blame on the victim, particularly where there is a link back through to the formal process and potential reduction in sentencing.³⁶ Moreover, there is criticism of restorative justice that it can be a threat to some expected values in a legal system such as consistency, equality, proportionality in the due process. In this process, two similar cases may go down in very different paths, even though the criminal activity and gravity is similar. Even the disparities of reparation are also criticized under this ground. Finally, there is a challenge of implementing a fully restorative justice model within a country and implementing this restorative process for each and every criminal activity.

33 Hucklesby, A & Wahidin, A (eds) 2009, *Criminal Justice*, Oxford University press, p.188

34 Victoria Restorative Justice Society, 2010, *Benefits of Restorative Justice*, (online), available in < <http://tjvictoria.wordpress.com/about/how-our-clients-benefit/> > [viewed on 10-July-2012]

35 Victorian Association for Restorative Justice, *Restorative practices advantages and benefits*, (online), Available at < <http://www.varj.asn.au/advantages-benefits> > [viewed on 10-July-2012]

36 McDonald, E & Tinskey, Y n.d, *Real rape to real justice: prose cutting rape in New Zealand*, available in < http://www.lawcom.govt.nz/sites/default/files/restorative_justice_frtrj_pp_414-423.pdf > [viewed on 10-July-2012]

Conclusion.

Numerous effective features and also challenges could be identified in the restorative justice. This model is not functioning in an adversarial environment and it always recommended for solving problems through reconciliation. The challenges also should counter justified ground after carefully understanding the objectives of criminal justice system of a country. Reduction of crime rate and the re-integration of offenders as better persons can be considered as key goals of a criminal justice system. The increasing crime rate can be a threat to both national and individual security. It is very much unpredictable in achieving this goal by just inflicting harsh punishments within an adversarial system. Even in the Sri Lankan context, crime rates of recidivism and re-conviction are increasing annually. Specially there are many prisoners and remand prisoners held in custody in Sri Lanka who are suspected to have links with terrorists activities and most of them are teenagers. So this restorative model can be used as an effective method of re-integration these teenagers to the society.

As mentioned earlier, the all people are not equal and equal treatments may not provide equal results. Although there are many impressive features of restorative justice, sometimes it will not provide benefits in equal effectiveness. So it is always good to have a restorative model while keeping some punitive approaches too. Otherwise, restorative justice itself can be a threat to national security because of the manipulation of some parties. Some form of minimal transparent coercive power also need in the system where parties have neglected or omitted to participate in the restorative process. Moreover, there is possible inconsistency of application of restorative justice for all the offences such as white collar crimes, victimless crimes, serious crimes and crimes committed by habitual criminals. However, all the agencies should be educated about the impressive features of restorative justice and these agencies should be empowered to implement restorative process in any stage of the process. Sometimes police can implement VOPR or FGC before sending the case to court or the court can implement any process in the middle of the trial or before inflicting sentence. However what is important is recovering the people and relationship which was violated or irrupted by the criminal behaviour. Punishing harm can be justified at one level; however we should try our best to solve our problems through peaceful manners before making harm to others. The restorative justice model provides a sound background to this scenario where reconciliation and forgiveness are recommended as key features to recover people and their relationships. It is always good to remember the famous quotation of Mahatma Gandhi:

“The weak can never forgive. Forgiveness is the attribute of the strong.”