

Restorative Justice: An Idea Whose Time Has Come?

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INTRODUCTION

‘In a relatively short time, the trickle has become a river’ (Zehr 2005).

‘Nevertheless, I do not imagine that such a change is likely to occur’ (Johnstone 2002).

These were the two extremes between which the pendulum of my thoughts swung as I began to write this paper. Is restorative justice, an idea whose time has come? Or do we still await the tipping point to arrive? This paper explores the relevance of restorative justice by engaging with primarily three texts—*Changing Lenses* (Howard Zehr), *Returning to the Teachings: Exploring Aboriginal Justice* (Rupert Ross), and *The Expanding Prison* (David Cayley)—on the subject. While the texts are primarily an exploration of the concept of restorative justice in the west. They also raise questions which are of universal concern. I subscribe to the standpoint of universal values, with a qualification. It must be arrived at, by becoming conscious of the myriad hues that characterize human life, by respecting and learning from differences; universalism is not synonymous with homogenization. The idea of universal values has to be a result of a conversation, a dialogue. It is with this perspective that I approach the readings. The *first* section is the introduction. The *second* section explores the argument that restorative justice is a way of life via a discussion of the significance of language in the aboriginal communities. The *third* section is in an interview format where I share my conversation with a lawyer working in the Supreme Court of India on a comparison between restorative and penal approaches to justice. In the concluding section four, I discuss how to realize restorative justice.

There is a proliferation of literature on restorative justice in academic and policy worlds. The concept has been applied to a spectrum of micro and macro levels—victim offender conferencing (Amstutz & Zehr 1998), schools (Evans & Vaandering 2022), family group conferencing (Frost, Abram & Burgess 2014), church,¹ circle processes (Pranis 2005), and national truth and reconciliation commissions (Gutman & Thompson 2000; Llewellyn & Howse 1999). Claims to the concept have been made by many a departure (or attempts at departure) from the dominant criminal justice institutions and approaches to resolve conflict. The South African Truth and Reconciliation Commission, United Nations Office on Drugs and Crime (UN 2016, 2020), and the International Criminal Court (Garbett 2017, Gregoire 2024)² are all examples of such claimants.

The recent currency of the concept belies its roots in indigenous community practices (Kashyap 2005). The need for restorative justice in recent times, in the west, arose as a response to the

¹ <https://www.crcna.org/SocialJustice/restorative-justice>

² <https://www.euforumrj.org/en/icc-continued-space-restorative-justice-exploration>

negative effects of the increasing individuation in an alienated society plagued by dysfunctional relationships in society. Restorative justice is also an effort to re-humanize this increasingly atomized society. It is an attempt to bring back the sense of responsibility and sensitivity of individuals towards those around them. Optimism and hope are thus characteristics of a restorative justice approach as it scouts for routes to change notions and practices of (in)justice; of taking forward the claimed intention of the criminal justice system i.e., of transforming³ the offender so as to prevent recidivism. The promise of restorative justice most often requires *labouring* over a long *process*, it can rarely be realized over an event or via a certain number of sessions. While the material dimension of that labour would include a community's investment of its resources such as time and a dedicated restorative justice advocate's fee, restorative justice also demands a mindful introspection that is simultaneously also an outward gaze. The latter is necessary as restorative justice emphasizes relationships, is contextual and its core values include respect and empathy. Restorative justice is informed by a long-term vision and it jettisons quick fix solutions that are more often than not of cosmetic value only. It is, by default, an inspection of structural causation.

THE LANGUAGE OF RESTORATIVE JUSTICE

This section at first glance may appear to be an interruption, but I believe that it serves as a crucial segue between the preceding and following sections. Prominent advocates regard restorative justice as a justice paradigm that will work smoothly if is accompanied by its practice as a *way of life*.⁴ Endorsing such a view is Rupert Ross in his book *Returning to the Teachings: Exploring Aboriginal Justice* in which he draws attention to the aboriginal way of life and how its values, beliefs, and practices ensure a wholistic perspective that has a long term positive and enduring just impact on the victim, offender, and the community. In all this language too plays a crucial role, that is, the words which inform a community's conversation reflect its ethos.

In the revelations of the many wisdoms of aboriginal justice Rupert Ross exposes the flaws of the retributive criminal justice system. One of the most fascinating chapters in the book is the examination of the usage of language. The aboriginal treasure pun-like double meanings. Double meanings, Ross explains reinforce the conviction that everything is still in the process of transformation. Seemingly neutral words can be inherently violent.⁵ Such words can be a barrier to communication. Lack of communication leads to stereotyping, which is exactly what restorative justice seeks to shatter. The aboriginal language makes a minimal use of nouns. This perhaps explains the reason, that it is a non-judgmental and non-argumentative language. In my view this makes it a natural language of restorative justice.

³ There is a brief discussion in Zehr about a point of view which recommends that the nomenclature of restorative justice be replaced by that of transformative justice.

⁴ 'Restorative justice philosophy is neither a solid perspective nor a global theory, Restorative justice philosophy how and what to think, how and what to say, how to act. With a glance at the past, we live the present, looking to the future. In other words, "fixing the past, into the focus of the present and to some extent with the future' (Robert Mackay in Gavrielides and Artinopoulou 2013: 337).

⁵ I recall here, how the colonial master everywhere takes away the identity of the colonized by replacing the name of the colony with a new one. Therefore, the obsession in postcolonial society of renaming the country in the indigenous language. I also remember as a child being taught to speak *good* (positive) words. My grandmother would tell me that there is a great deal of power in the spoken word.

In the non-aboriginal context, being mindful about the choice of words can be a step towards reaching the goals of restorative justice. But we can't free ride all the way on the vehicle of a peaceful language. It works for the aborigines because it is part of a world that is not a throwaway society; it has a sensibility that respects nature; it does not believe in hierarchies; it believes in sharing knowledge. It does not define ownership as appropriation of property to the exclusion of others. In this world there is no room for patents and copyrights. This language of dynamic peace is part of a package deal.

He argues that appearance must be distinguished from reality. He nuances the meaning of the *changing of lenses* metaphor i.e., there are multiple ways of seeing *and* other ways of knowing. To make a case for restorative justice it is crucial to recognize that crime and justice are not natural but social constructions. This is important if the support constituency for restorative justice is to be widened. Common sense perceptions about retributive justice must be deconstructed so that restorative justice is not dismissed as a utopian ideal. The disclosure that retributive justice is just another paradigm is a helpful tool in starting a public debate on restorative justice.

THE FLAWS IN THE EXISTING CRIMINAL JUSTICE SYSTEM

There is a widespread acknowledgement that the current criminal justice system has failed or is near collapse. The system's emphasis on punishment has led to what David Cayley (1998) refers to as the phenomenon of the 'expanding prison.' In the popular perception of the criminal justice system punishment is deserved for commission of an offence, and prisons are in a sense the site where punishment is operationalized. But this normative connotation of punishment is of recent origin, there have been societies in history where punishment wasn't the only form of accountability of the offender: 'The idea of proportionate punishment was an Enlightenment invention which made punishment more rational and palatable...Prisons became popular as a way to apply proportionate punishment. Prison sentences can be measured in lengths of time and graded to fit the crime' (Zehr 2005: 2). In most countries, particularly of the Global South, the courts are overworked. The inordinate delay in the 'dispensation of justice' lengthens the period of the victim's public trauma. An accused from a socially and politically powerful background is often known to intimidate the victim. Long delays in court hearings facilitate bribery or intimidation of witnesses.

The criminal justice system punishes the offender and sends him to prison to be reformed where he is expected to reflect and repent for his offence; the prison experience is expected to deter the offender from committing crimes in the future. Yet recidivism has not ceased. The prison system is regarded as an indispensable accompaniment of justice. However, we may note that crime and punishment are not autonomous phenomena. David Cayley's (1998) writings demystify crime (and thereby the prisons). The structural logic of a certain society and political economy veer responses of the individual and community into a particular direction.⁶ Crime control has become a self-justifying growth industry and the prison is an important subsidiary of this mega enterprise. In the US, the circle of stakeholders in the *prison-industrial* complex is enlarged beyond the state, the offender and the victim to include local inn-owners, companies that provide technology to build high-tech prisons, transport agencies, and restaurants in the prison towns. The logic of commerce views the prison-industrial complex as

⁶ The argument is very close to the justice paradigm perspective put forward by Zehr.

profit making institution and seeks its perpetuation. The same interests would also propagate a legal perspective that justifies the prison system as indispensable. Cayley (1998) further argues that the failure of the welfare state to deal effectively with the problems of distribution of wealth and unemployment has had social consequences, some of which are conveniently categorized as crimes. It is, therefore, not a co-incidence that this is also the time of growing ascendancy of neoconservative politics which emphasizes individual responsibility and dilutes the idea of community. This only sharpens the alienation in society. It is by showing in relief the *uncivil* nature of society that he makes a case for an alternative view of criminal justice.

A DIALOGUE BETWEEN RESTORATIVE JUSTICE AND THE PENAL JUSTICE APPROACHES

The above problems of the criminal justice approach identified by Cayley are characteristic of not just the US system but of almost all modern states that have adopted similar institutional models. In such a context the popular response is usually one that emphasizes the need for the state to be tough on crime and enforce stricter laws. Restorative justice adopts a different approach to deal with this problem, before discussing details of the same, I bring out the contrast between the two approaches by putting them into a conversation with each other. In order to do so I interviewed a senior lawyer at the Supreme Court of India on this issue. This is how the subsequent conversation went:

Rina: One can contrast criminal justice with restorative justice. The former is a system that you work with as a lawyer. It views crime as a violation of the law and state. Violations create guilt. Justice requires the state to determine blame and impose punishment on the offender. In this process the victim's needs are not addressed. Also note that this system does nothing to stop the problem of recidivism. Restorative justice in contrast sees crime as a violation of people and relationships. Violations create obligations. Justice involves victims, offenders, and community members in an effort to put things right.

Lawyer: I agree and admire the goals that are sought to be met through restorative justice. But the 'nobility' of the purpose should not eclipse the flaws in your argument. I do not agree with the term contrast that you have used to describe the two systems because the criminal justice system at least in theory seeks to bring order and create a harmonious society. It believes that the criminal can be reformed by serving a prison sentence. Also, I have a problem with the nomenclature, criminal justice system, as a contrast to restorative justice because both are concerned with the identifying the criminal. Use the phrase penal justice system instead. Most importantly, it needs to be recognized that the penal justice system is indispensable in determining who has committed the crime. Restorative justice can be employed at a later stage while sentencing.

Rina: You are overlooking a major problem in your recommendation. The ethos of the criminal justice system which you call the penal justice system will not make it impossible for restorative justice to be used at a later stage. The adversarial nature of penal justice would have forced both the parties to dig in their heels and take hardened positions. And notice that you have focused on the identification of the offender. What about the needs of the victim?

Lawyer: The victim's needs cannot be belittled and I do agree that penal justice does not give this issue sufficient attention. I would go a step further and point out that in certain cases the

definition of the victim should be stretched to include the offender's family, especially if the offender is the sole breadwinner of the family.

Rina: Then you might as well include the victim's family also.

Lawyer: Yes. I also think that a case for restorative justice should not sidetrack us from the need and possibility of reforming the existing system, particularly, the jails. You are aware of the fact that Kiran Bedi managed to do this to some degree in Delhi's Tihar Jail.⁷

Rina: But don't you realize the danger of reforms being co-opted by the state.

Lawyer: Why do you demonize the state? It is a representative institution.

Rina: No, in fact that is my dilemma. Even though I am skeptical about the state's role in such a process, the state cannot be jettisoned in a hurry because in countries like India the community itself is far from being democratic. My fear is that restorative justice could be hijacked by vested interests in a non-democratic society.

Lawyer: I resent the argument, 'countries like India...' This is stereotyping. Even in the west all communities are not necessarily imbued with the democratic ideal; they could be as oppressive and hierarchical as those in third world countries.

Rina: Agreed. Let me raise another issue. In my opinion restorative justice is best suited to provide a context to break free from the binary penal justice framework. Between the opposite poles of guilty and not guilty, there can be other useful degrees of assessing responsibility. Most importantly restorative justice is a contextual approach. It enables us to see that there are differences (in terms of trauma, needs) among victims of the *same* crime. Similarly, there may be a need to measure the culpability of the offenders differently for a crime of the *same* nature.

Lawyer: I think enlightened judges seek to do so, but yes, they are limited by the penal justice framework.

Rina: Another advantage of restorative justice is that it makes possible truth seeking. The verbal calisthenics of lawyers (in the penal justice system) are aimed at either erasing or spicing up the truth.

Lawyer: Well, I don't do so, but it can't be denied that many in my fraternity would be guilty of this charge. Yes, you do have point there.

There are not very many surprises in the lawyer's reactions. As expected, those engaged in the modern penal justice system will doubt about the pragmatism in the idea of restorative justice. I do think that for those initiated and socialized into believing that penal justice is the only, or worse still, a 'natural' not a *constructed* system, restorative justice will seem a building castles in the air exercise. One fear, that I suspect, most people have, is that without penal justice, public order would be threatened.

⁷ Kiran Bedi, the first woman Indian Police Service officer, introduced several reforms in Delhi's Tihar Jail. She won the prestigious Magsaysay Award in recognition of this work.

RESTORATIVE JUSTICE AS A SOLUTION

Operationalization of restorative justice is not without challenges. Gerry Johnstone (2002) has dealt extensively with the issues that pose a confront the theory and practice of restorative justice. Refining and working out the theory of restorative justice is an important task particularly in those areas where its 'vision is vague or positively contested.' His list of questions raises further profound questions and dilemmas (Johnstone 2002: 162). This engagement is an ongoing process. For example, Howard Zehr, over a period of time, has revised his own opinion about the difference between retributive and restorative justice as being polar opposites; he acknowledges that out that there may be retributive elements in the restorative approach, for example, a victim may insist on the penal route, in addition to restorative measures such as acknowledgement of the crime by the offender, financial compensation and free counselling to the victim. Since the victim's needs are paramount in restorative justice, she should not be socially or emotionally pressurized to forgive. The South African Truth and Reconciliation Commission for all its merits is a flawed example of restorative justice as some victims were overwhelmed and succumbed to Desmond Tutu's exhortation to be good Christians and forgive.

The question that I wish to focus on is that in the absence of structural changes how can restorative justice be made a reality? To elaborate further, the challenge is to nurture the sapling of restorative justice in a hostile environment of consumerism, of a society characterized by alienation and dysfunctional relationships, of the gigantic phenomenon called the state. Can a greenhouse be provided? Addressing the problem will require certain measures.

Restorative justice must be made a political issue i.e., it has to be brought into the arena of public politics. This is one way to de-legitimize the tough on crime approach. Misconceptions about restorative justice need to be removed and the public informed that it is not about being soft on crime. That restorative justice

- Focuses on harms and consequent needs. (Of victims, offenders and communities)
- Addresses obligations resulting from those harms. (Offenders, but also communities, and society's)
- Uses inclusive, collaborative processes.
- Involves those with a stake in the situation. (victims, offenders, community members, society) (Zehr 2005: 270).

Gerry Johnstone raises a significant issue while quoting Zehr, "As reforming visions are made operational, they tend to be diverted (or subverted) from their original intents. Sometimes they end up serving purposes quite opposed to their original intent" (Johnstone 2002: 169). Though there is a danger of co-option of ideas of restorative justice, the efforts to reform the system should not be stopped. Piecemeal incorporation of restorative justice programs, ideas and techniques into the formal criminal justice complex is an opportunity to get a foothold in the system. This will gradually make it possible to change the terms of the dominant discourse on justice.

Simultaneously it is crucial for the advocates and practitioners of restorative justice to ally with other progressive forces in society, for example those working to reform and democratize

schools, universities, hospitals, and media. The context of democracy makes possible dialogue and critique; it is the arena which has to be reclaimed from the state by civil society; it provides a forum where reflexivity and 'experiments with truth'⁸ can take place. Zehr's three recommended values—respect, humility and wonder—cannot be adhered to in any context but that of democracy. Without these rims of values, the wheel of justice cannot work. The institution and idea of democracy, in my opinion, is a key context of restorative justice. After all, in the 1960s, it was the democracy of France, which allowed its students to criticize it. One of the popular slogans of that student movement was, 'Be practical, attempt the impossible.' It was an exhortation to change the lenses.

While writing this paper, I thought about my grandmother. She would have agreed with the concept of restorative justice and probably given me tips to refine the concept. She was the person whose upbringing did not separate the head from the heart. She believed in the power of love to heal those in pain. In her worldview it was obligatory on the community to take care of the victim. In her faith, people who strayed and later repented had a right to be back in the fold. It will be easier to find a support constituency for restorative justice in *traditional*⁹ mindsets than in those awed and seduced by the phenomenon of the modern state. The need of the hour is not to wallow in cynicism but to work towards democratizing the state *and* civil society. Restorative justice will be *both* a tool and a consequence of such democratic practices. After all best practice emerges from praxis.

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⁸ Gandhi's autobiography is titled *The Story of My Experiments with Truth*.

⁹ I make a distinction between the best practices in a tradition and those that are oppressive (for e.g., caste in India).

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