1. INTRODUCTION

Restorative justice, despite its broad support, has received a great deal of critical attention over the years. In typical restorative justice fashion, restorative scholars have often embraced criticism and self-criticism as part of a necessary dialogue about how to improve justice in our communities. The leading scholars\(^1\) in the field of restorative justice raised some issues that have implications for both practice and evaluations of practice and programs. These include questions about:-

- Whether restorative justice is as victim-oriented as it claims (or are victims being ‘used’)?
- Whether the needs of offenders are being adequately addressed?
- Are the ethnic and cultural dimensions of restorative justice being addressed?
- How well is restorative justice doing in societies dominated by a culture of punishment?

However, it is also the case that some of the criticisms of restorative justice are more damning than others and requires some deep rethinking rather than a mere tinkering with restorative justice concepts and procedures. There are, what have been here termed, both technical and substantive criticisms. The technical criticisms illustrate oversights and errors in restorative justice thinking that are correctable through minor adaptation and revision. In contrast, substantive criticisms attack the broader ethos of restorative justice, exposing contradictions and dangers at its very roots. To address these latter criticisms, restorative justice must engage in an intensive project of re-evaluation and re-invention.

\(^{1}\) The leading scholars in the field of restorative justice are:- Howard Zehr (recognized as father of restorative justice); Gordon Bazemore; Gerry Johnstone; George Pavlich; Heather Strang; Larry Tifft; Dennis Sullivan, Lode Walgrave; Keith Daly and; Susan Sharpe.
2. RESTORATIVE JUSTICE CRITICISM

Restorative justice is a set of ideals about justice that assumes a generous, empathetic, supportive, and rational human spirit. It assumes that victims can be generous to those who have harmed them, that offenders can be apologetic and contrite for their behavior, that their respective 'communities of care' can take an active role of support and assistance, and that a facilitator can guide rational discussion and encourage consensual decision-making between parties with antagonistic interests. Any one of these elements may be missing, and thus potentially weaken the entire restorative justice process. Furthermore, it may not be possible to have equity or proportionality across restorative justice outcomes, when outcomes are supposed to be fashioned from the particular sensibilities of those in restorative justice encounter. Similarly, restorative justice can be criticized on various grounds from Indian perspectives that can be understood with the help of the diagram given below.
3. CONCEPTUAL PERSPECTIVE

Restorative justice is not simply a way of reforming the criminal justice system; it is a way of transforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics. Its vision is of a holistic change in the way we do justice in the world.2

It is worthwhile discussing briefly an apparent tension within this restorative understanding of justice. This tension has been identified explicitly by Braithwaite and Strang, who seem to suggest that there are not one but two conceptions of restorative justice: "Restorative justice is conceived in the literature in two different ways. One is a ‘process’ conception, the other as a ‘values’ conception."3 Braithwaite and Strang’s position seems to be that the restorative justice movement is after two quite different things.4

1) A change in the process by which we deal with offending: in contrast to conventional criminal justice processes, which exclude and hence disempowering stakeholders affected by a crime, restorative justice processes include and empower all stakeholders; and,5

2) A shift in the values that undergird criminal justice interventions: instead of being guided by vindictiveness and the desire for vengeance, restorative justice is motivated by the desire for healing and reconciliation.6

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4 Ibid.

5 Ibid.

6 Ibid.
Most of the leading scholars have raised the question about the restorative justice movement, whether it was upon first hearing about the concept or after many years of practice. As simple as the question seems, the answer, or answers, are profound and varied. The definitions we use are based on a number of factors: our personal life experiences, our culture and worldviews, the audience to whom we are speaking, our experiences as practitioners or academics, Our understandings of victimization and offending, our experiences with particular application, to name a few.\(^7\)

The diversity of definitions and understandings contributes to richness in the restorative justice field, but it is also a source of confusion and even conflict. Relationships between practitioners, and even stakeholders, can be either strengthened or weakened based on their definitions. Practice, and our perceptions of one another’s practice, is equally influenced. The diversity sometimes contributes to divisions among practitioners and theorists into camps of like-minded individuals. Holding tightly to these definitional differences, the differing camps often find it difficult to bridge the divide and to engage in dialogue with others. Equally damaging, these divisions may minimize the important contributions the different perspectives bring to the overall field.\(^8\)

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Many theorists like Braithwaite strongly caution against establishing firm definitions of restorative justice or setting standards for its practice, for fear of closing off innovation or responsiveness to local needs.\textsuperscript{9} At the same time, many agree that we do need to define restorative justice clearly enough to distinguish it from retribution and rehabilitation, from other kinds of alternative justice processes, and from strikingly bad practice.\textsuperscript{10}

### 3b RESTORATIVE JUSTICE OR ‘PRIVATIZING CRIME’

The restorationist vision is founded in a core theoretical postulate, namely, the privatization of the criminal episode. Here restorative justice is properly radical. It ‘moves away from a state-center definition of crime and contemplates a transfer of power from the state.\textsuperscript{11} It re-conceptualizes the criminal episode as a private conflict between individuals that has disturbed the relations of community within the affected segment of the population. The essential task of restorative justice is to mend those relations, without the intrusion of the ultimately violent resources of the state which seems to be a difficult one in a populated country like India.

### 3c RESTORATIVE JUSTICE - A PUNITIVE ORIENTED CONCEPT

There is some debate over whether restorative justice processes could be used in fact finding, but virtually all the research findings are of dispute resolution mechanisms in pre-modern societies, which rely on particular sets of ‘meso-social structures’ that are tied to kinship, geography, and political power.\textsuperscript{12}


\textsuperscript{10} Supra note 7, p-93.


When we consider the typical forms of RJ practices, such as family group conferences (in New Zealand), family or community conferences (in Australia), police restorative cautioning schemes (in selected jurisdictions in England and North America), circles and sentencing circles (North America), or enhanced forms of victim-offender mediation (North America and some European countries), we see that all are concerned with what a justice practice should be after a person has admitted committing an offence. Restorative Justice does not address if a 'crime' occurred or not, or whether a suspect is 'guilty' of a crime or not. Rather, it focuses on 'what shall we do' after a person admits that s/he has committed an offence.

3d MODEST BUT PATCHY RESULTS IN THE RJ PROCESS OUTCOMES

Furthermore, it may not be possible to have equity or proportionality across restorative justice outcomes, when outcomes are supposed to be fashioned from the particular sensibilities of those in restorative justice encounter. Thus, we should expect 'modest and patchy results' to be the norm, not the exception.13

4. RESTORATIVE JUSTICE FROM VICTIM(S) PERSPECTIVE

There is a gap between the ideals or aspirations of restorative justice and actual practices. This gap should not surprise us because the ideals for restorative justice are set very high, and perhaps too high. Advocates have made astonishing claims for what restorative justice can achieve, and what it can do for victims and their family members and communities.14 Thus, a gap arises, in part, from inflated expectations for what restorative justice can achieve. There are deeper reasons for the gap from the Indian victim(s) perspectives which can be understood with the help of the diagram given below.

13 Id. at 110.
Using some form of restorative justice in cases of violent crime is a major issue. The public and victims generally support the restorative justice model but are very reluctant to accept it in cases of serious crimes. The proponents of this practice claimed that there is no principled reason to reject the applicability of restorative justice processes in cases of serious crime. The thinking that the more serious the crime, the more need there is for its thorough reparation. But there is a concern for 'security' which can overrule the priority for restorative responses. Furthermore, there is a concern for ‘threat to public safety/policy’ which can be the other potent reason to limit the restorative caliber of an intervention.


It must be recognized that many victims of serious crime want nothing to do with the practice. The more they perceive the crime as irreparable, the more significant they view the aftermath of the crime, the less receptive they are to the thought of being face to face with the perpetrator of the crime.\textsuperscript{17} That prospect can cause a great deal of stress. It can be hurtful and interpreted as a lack of understanding of what they went through.\textsuperscript{18} These people had lost someone close to them; they were sexually assaulted by a family member or attacked by their spouse. Leery, angry or suffering unduly, they declined any attempt at reconciliation or restoration of their relationship with their attacker or the person who took a loved one away from them. In most cases, the idea was a non-starter because the victims had nothing to say to the offender and felt that a meeting would serve no purpose.

Some crimes cause serious rifts, severing relationships within families and with people outside the family. Many victims will opt for a healing process and measures that will help distance them from the offender. In the interest of self protection, they will refuse to follow the legal process, media coverage of their case, in fact any form of participation in the social reintegration of the offender.\textsuperscript{19} The thought of being near or having any contact with the offender could instill a sense of violation or re-victimization.

Criminal victimization means a loss of power or affirmation of a lack of power, especially in situations where the offender is repeatedly violent or the relationship with the victim is characterized by domination, tyranny or manipulation.\textsuperscript{20} Is restorative justice able in those cases to meet the needs of persons who are in a weaker position because of their age, their relationship, their past or their life history?

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\textsuperscript{17} Supra note 23, p-123.
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\textsuperscript{18} Ibid.
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For whom, in what circumstances and when is it appropriate where persons who have been victimized over and over or whose lives have been filled with acts that have undermined their physical, mental or sexual integrity? If it is true that in a large proportion of interpersonal violent crimes, victims and offenders know each other, in what situations and at what price should those relationships be preserved?

These questions reflect victim support groups’ resistance to restorative justice. In cases of violence against women and children, this model of justice also elicits strong opposition because of the risk of keeping that type of crime behind closed doors, blaming the victims and increasing existing power imbalances. The merits of restorative justice will probably have to be proven in less “sensitive” areas before the model gains acceptance in cases involving women and children. Meanwhile, there is still much work to be done to understand reversal of roles and normalization of behavior in violent situations.

4b VICTIM(S) CAN EXPERIENCE “POWER IMBALANCE”

Restorative justice has been much criticized for its potential to replicate and perpetuate power imbalances already existing between victim and offender.\(^\text{21}\) Restorative interventions are said not to address issues of structural inequality and oppression which victims may experience, especially where they have a prior relationship with their offenders.\(^\text{22}\) Marshall and Merry have also claimed that there has been little research on how to achieve equal treatment.\(^\text{23}\)

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LaPrairie, in reviewing the operation of sentencing circles in Canada and conferences in Australasia, observed that ‘power and coercion may operate within informal structures to re-victimize the victim’.24

4c RISKS TO THE RIGHTS OF VICTIM(S)

The promises made by restorative justice to victims are unique and ambitious; they include repair, healing, and the opportunity to tell their stories and to ask their questions. Yet victims’ participation in restorative justice programs may include lot of risks. The risks to the rights of victims within such programs are varied; they include coercion to participate, threats to personal safety, offender-biased proceedings and a lack of information about what to expect from proceedings.25

Another risk to the rights of victims is that restorative justice processes may leave victims without a remedy if there is a failure of offenders to follow through on agreements, especially with regard to restitution. Given the value placed on restitution by victims, this kind of failure may result in overall distrust in the potential of these processes to respond to victims’ particular needs.26 There has been little discussion about the victim's right to bring civil proceedings being compromised by participation in a restorative justice process.27 Can we ask victims of crime to forfeit their right to use the civil process as a prerequisite to participate in a restorative justice process? If we don't do so, what about the risk to offenders who may be asked to pay compensation through a restorative justice process and later be sued through the civil process?


How do practitioners react to "bad" and "good" victims? Probably most often by dreading and discouraging the one and encouraging and welcoming the other. Certainly some victims have merciless and punitive attitudes which remain unaltered by anything an offender does or says. For these victims and offenders it is imperative to have ways in which to limit the severity of any restorative justice outcome, even one to which an offender agrees, to the level that would prevail in the courtroom. But for the vast majority of victims, their "badness" from the practitioners' viewpoint is primarily a function of the emotional harm they have suffered.28 "Good" victims may not have suffered nearly so seriously and, if their needs are not so great, may not reap the potential benefits of a restorative justice encounter. "Bad" victims usually are in greatest need of the kind of solace that a contrite offender can give them.29 They will also be the victims most likely to provide the emotional power necessary for a successful meeting.

Most victims (of rural areas) do not participate in any formal process to resolve the issues surrounding their victimization. There are many reasons for this. The victim may not report the crime to the police, the police may not find the offender, the offender may not be arrested, the prosecutor may not pursue the case, or the case may never make it to trial.30 To the extent that restorative justice models depend upon an arrest, an official complaint, or a criminal justice disposition to trigger the restorative justice process, only a small percentage of victims (of urban areas) will be able to take advantage of their benefits.31

Even those restorative justice programs that do not operate within the criminal justice system typically still require the active participation of an offender, and that offender is required to admit some culpability. Consequently, the number of these cases eligible for restorative justice interventions is also limited.

For those few victims and offenders with identified offers who acknowledge some responsibility for the harms they have caused, restorative justice may present a far more appealing option than traditional criminal justice system. Unfortunately, however, only a small percentage of crime victims and offenders have that option.

While restorative justice programs can promote healing, repairing, but the experienced by victims is often far more complicated than apologies, restitution and relationship-building. Some victims move on with their lives fairly easily, but many suffer continuing trauma without the services and support they need. Victims often suffer lowered academic performance, decreased work productivity, and severe loss of confidence. Mental illness, drug and alcohol abuse, and suicide are far more common among crime victims than the general public. Addressing these needs can require long-term sophisticated counseling, assistance with safety planning, or relocation.

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Any number of social services may be required to rebuild a life, emergency
day care for the parent who needs to get a job to handle new crime-related
expenses, substance abuse treatment for the traumatized victim who has turned to
drugs, an escort service for the victim now too afraid to leave home alone,
employment counseling or training for the victim who no longer can perform his
or her old job, or even something as simple as new locks or windows for his or
her home.\textsuperscript{35}

Many, if not most, of these needs cannot be met by individual offenders or
other stakeholders who participate in restorative justice process because there is
only so much they can do. And sometimes, the restoration victims seek has very
little to do with an ongoing relationship with an offender or a community. The
restoration of victims should not be limited to the resources that an offender and
a community of stakeholders bring to the table.\textsuperscript{36}

\textbf{4g \hspace{1em} DIFFICULT TO ACHIEVE A “SINCERE APOLOGY” FOR THE VICTIM(S)}

It is said that in the aftermath of crime, what victims want most is
'symbolic reparation, primarily an apology.'\textsuperscript{37} Perhaps for some offences and
some victims, this may be true; but there may be another philosophy that most
victims want more, than an apology. Fundamentally, victims want a sense of
vindication for the wrong done to them, and they want the offender to stop
harming and hurting them or other people. A sincere apology may be a useful
starting point, but we might expect most victims to want more. In research on
violent offences, for example, Cretney and Davis suggested that a ‘victim has
an interest in punishment,’ not just restitution or reparation, because
punishment ‘can reassure the victim that he or she has public recognition and
support.’\textsuperscript{38}

\textsuperscript{35} \textit{Ibid.}
Let us assume, for the sake of argument, that a sincere apology is what victims mainly desire. What are the elements of a sincere apology, and how often might we expect this to occur in a restorative justice process? Drawing from Tavuchis' work on the sociology of apology, distils the 'experiential dynamics' of an 'ideal-typical apology:'

In the fully-accomplished apology ... we have first a call for an apology from the person(s) who regard themselves as wronged, or from someone speaking on their behalf; then the apology itself; and finally an expression, of forgiveness from the wronged to the wrongdoer.

Bottoms then says that 'each of these moves' in the fully-accomplished (or ideal typical) apology ‘can be emotionally fraught’ such that ‘the whole apologetic discourse is (on both sides) ‘a delicate and precarious transaction”.

It is important to distinguish between two types of apologies: an 'ideal-typical apology,' where there is an expression of forgiveness from a victim to an offender, and a 'sincere apology,' where there is a mutual understanding between the parties that the offender is really sorry, but there is no assumption of forgiveness. We must make this distinction because we might expect a 'sincere apology' to occur in restorative justice process, but we should not expect a victim to forgive an offender.

There is surprisingly little research on the character of apologies in restorative justice processes. From the RISE project, we learn that conference victims rated the offender's apology as 'sincere' (41 per cent), and a further 36 per cent rated it 'somewhat sincere'. Hayes's summary of RISE observational and interview data on the apology process concludes that "the ideal of reconciliation and repair was achieved in less than half of all cases."
Hayes proposes an added reason for why sincere apologies are difficult to achieve. He suggests that there are ‘competing demands’ placed on youthful offenders in the conference process: they are asked both to explain what happened (or provide an ‘account’) and to apologize for what they did. Hayes surmises that ‘offenders’ speech acts ... may drift from apologetic discourse to mitigating accounts and back again.’ Victims may interpret what is said (and not said) as being insincere.43

4h OFFENDER ORIENTED NOT AN EXCEPTION TO RESTORATIVE JUSTICE

Even though restorative justice processes are often referred to as victim-centered, restorative justice programs are still very offender-oriented:44 the process is limited to those cases with an offender, who admits culpability and wants to participate, and the remedies are limited to what the offender and, secondarily, the community can provide.45

A more victim-oriented response to crime would ask, what do victims need to repair the harm caused by crime — in other words, to be "restored" as much as possible.46 If the process and the remedies were more victim-oriented, our justice response would begin whenever a crime occurs and would attend to the needs of all victims.47

43 Ibid.
Restorative justice processes currently can occur with or without the victim as long the victim's perspective is represented by someone. A more satisfying justice process would also take place with or without offenders and address the needs of all victims.

5. **RISKS TO THE RIGHTS OF OFFENDERS**

Historically, the rights of offenders are more elaborately defined than those of victims. Restorative justice poses risks to these offender rights in at least five categories: coercion, "net-widening," outcomes, double jeopardy, legal representation and child offenders.

Because most current restorative justice processes require the offender to acknowledge responsibility before referral to a restorative justice program, the rights to be presumed innocent until proven guilty and to remain silent are no longer applicable. Some argue that the offender is voluntarily relinquishing these rights in order to benefit from the restorative justice option, but the extent to which these decisions are made voluntarily is in doubt.

"Net widening" refers to the tendency of criminal justice systems to be ever more inclusive, thus expanding control over their citizens. It can take many forms. Cases where there is insufficient evidence to sustain a conviction may end up being "dumped" on the restorative justice pile, along with petty cases that the prosecution considers not worth taking to trial, such as school cases that could have been dealt with in school, and family issues that could have been dealt with in the family. The value of a straightforward decision not to prosecute should not be overlooked, provided that the victim's views are taken into consideration. Roach raises concerns about how concepts such as responsibility and shame may be used to widen the net of social control.

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51 *Supra* note 15, p-263.
The principle of proportionality in outcomes is a major factor in deciding on a particular sentence in a criminal trial. Warner asserts that in a criminal trial a sentence cannot be increased beyond a limit appropriate to the severity of the offence, on the grounds of possible future offending nor on the grounds of the need to treat the offender. However, these considerations may tend to influence outcomes of restorative justice processes.

Another concern relates to disparities in outcomes. Conference outcomes may be outside the range of penalties usually imposed by courts. Thus, there is a risk that not only will there be internal inconsistency in family group conference (FGC) outcomes, but in addition there will be disparity between FGC outcomes and court outcomes for similar offences. It might be argued that a victim-driven process will almost inevitably lead to more variation in outcome, but that the risks might be managed through standards ensuring restrictions on excessive penalties.

In most criminal justice systems, if a convicted person is of the view that his or her sentence is disproportionate, a remedy lies by way of appeal or review. One of the dangers of restorative justice processes is that there is often no procedural avenue open for review or appeal.

A fair trial includes the right not to be tried twice for the same offence. Known as double jeopardy, the risk may arise where a restorative justice process fails to reach an agreed outcome and the offender is then punished by the court for failure of the conference as well as for the offence, or where an offender complies with the agreement to a certain point, and then fails to complete. While Warner points out that these situations are not true double jeopardy, they do entail risk.

52 Supra note 16, p-245.
53 Ibid.
Whilst many restorative justice processes do allow parties to have legal representatives present, lawyers who have not been trained in mediation or restorative justice tend to hinder rather than help the process. Braithwaite points out that restorative justice is intended "to transcend adversarial legalism," and he therefore does not support a legal right of the accused to have a lawyer speak on his or her behalf at such proceedings.55

Due to their lack of experience, children are highly suggestible and are more likely to be coerced into making false admissions to avoid "more trouble," often guided by caring but misguided adults around them. Dumortier has recorded research that indicates that children also are often excluded from mediation due to their inability to pay material reparation.56

6. DANGERS OF COMMUNITY INVOLVEMENT

The concept of "community" occupies a central place in restorative approaches to conflict and crime. Some view the community as contained within a geographical space; restorative justice is here developed as an element of local "neighborhoods".57 For others, the community comprises individuals linked by common interests, values, goals and aspirations — extended families, sports clubs, community leagues — irrespective of geography.58 Included here is the idea that community could form around, and in response to, given incidents. From such perspectives, restorative justice emerges as group or community conference that "empowers" stakeholders harmed by a criminal event to negotiate restorative outcomes.

55 Supra note 14, p-573.
58 Ibid.
Some analysts expand the implications of these conferences beyond the specific events, emphasizing how restorative practices help to preserve vital democratic structures. The community is thus visualized as a collective comprising spontaneous interaction among free individuals. While distinct, it is nevertheless crucial to the democratic functions of formal state institutions. Accordingly, restorative justice is seen as a way to promote democracy by nurturing civil society's active participation in justice-related affairs.

Still others envisage the community as an amorphous idea, a symbolic or imagined representation that both reflects and creates group identities. As an imagined symbol, it projects an ideal for our everyday interactions with others.

Despite these differences, restorative justice advocates all view the community in positive terms. It signifies aspirations to collective harmony that is the ultimate goal of restorative justice. It also offers a way to distinguish restorative practices from the state's adversarial, abstract and coercive system of justice.

Restorative justice relies heavily on the notion of 'community'—it imposes more responsibility for the causes and the effects of crime on the community, as a means to affirm and strengthen the power of community and to reclaim the community's involvement. But like Restorative justice, the concept of ‘community’ has no abstract and definite meaning. What is 'community'? What is the nature of community involvement? Do cohesive/appropriate communities actually exist? These must be the cause of concern for the proponents of restorative justice.

59 Supra note 45, p-125.
All proponents of restorative justice must agree that a lack of technical, human and financial resources has the potential to undermine the efficacy of any community-based service. Under such circumstances, restorative justice initiatives—notwithstanding the positive intent behind them—run a very high risk of failure.

Even supporters of restorative measures insisted communities must have the necessary means to provide continual support both for the victim and the offender, prior to, during, and following any process. Debate centered on whether and how this could be accomplished.  

7. **CONSTRAINTS OF THE STATE CRIMINAL JUSTICE SYSTEM**

There is no denying the fundamental incompatibility between the state system of doing justice and the principles of restorative justice. The state operates through impersonal and rationalized procedures administered by disinterested professionals with specialized legal, administrative and penal expertise. The goal is to punish, manage or rehabilitate people who violate the law in order to maintain control over its jurisdiction. Restorative justice, by contrast, seeks to delegate decision-making and control to those individuals directly involved in the incident. The goal is to harness the power of relationships to heal that which has been harmed and to empower the community to engage in processes of repair, reconciliation and redemption in order to restore balance in the wake of harm.

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It is sensible to be skeptical about state involvement in restorative justice. One need only reflect on previous criminal justice reforms — the penitentiary, the reformatory, the juvenile court, probation, diversion programs and community corrections — to see a dismal pattern of good intentions gone awry. In each instance, the ideal vision of reformers was undermined by forces beyond their control and imagination.

Likely pitfalls for state-sponsored restorative justice include: lip service for victims; re-victimization of victims; the phenomenon of net-widening; erosion of due process for offenders; professionalization of the restorative process; and deeper penetration of the state into the community. Some of these dangers may so likely be inevitable that future historians may look back and see terms like "community justice" and "restorative justice" as ideological masks for the continued extension of state power and control.

Three related but distinct features of the state criminal justice system provide enormous pressure and can be thought of as "constraints" on the implementation of restorative justice: constraints of sovereignty, organization and professionalism.

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66 Ibid.


68 Ibid.

7a THE CONSTRAINT OF SOVEREIGNTY

Sovereignty concerns the political interests of the state regarding crime control, frequently understood as "law and order" and a key obligation of an effective government. With the rise of corrections, the state has also claimed responsibility for the "reform" of the "offender/client" through treatment, programming, education and other services. The state claims "ownership" of crime and justice through formal control of both the process and meaning of justice, and therefore, creates obstacles for restorative justice.70

7b THE CONSTRAINT OF ORGANIZATION

The crime control industry is a system of loosely coupled formal organizations which employ people to "work" at doing justice. These organizations are structured to align the material and symbolic self-interest the individual employee with the larger goals of the organization, control the worker's time and define their purpose. Whether lawyers, correctional officers, police, caseworkers or probation officers, this organization mediates the parameters of the paid employees' relationships their "clients," the offenders or victims which usually creates overlapping and chaos in the process of restorative justice.71

7c THE CONSTRAINT OF PROFESSIONALISM

Restorative processes run counter to many of the norms of professionalism that privilege mental and technical expertise over other kinds of knowledge and experience and valorize intellectual problem-solving and the efficacy of coercion over compassionate caring and the efficacy of love. This ideology pressures system personnel to discount and distrust their own knowledge and wisdom and forces a separation between personal values and professional responsibilities.72

70 Ibid.
71 Ibid.
72 Ibid.
The restorative paradigm recognizes the journey toward healing as a central part of justice and the participation of family, community and system as supporters and witnesses as important to that journey. Those who witness are empathetic observers to assist the victim and offender in their journeys. People who work in justice routinely witness the trauma of victims, the suffering of offenders subject to state-sponsored punishment and the human suffering brought on by poverty, discrimination, neglect, abuse, violence, shame, humiliation and loss. In a sense, the system has "professionalized" the witnessing of trauma.

Yet professional norms reject an emotional stance of compassion or empathy. Instead, these norms idealize a kind of emotional detachment, objectivity and technical expertise and resist empathetic engagement with offenders or victims. To do otherwise is "unprofessional." The roles available to the systems professional are limited to that of the "zealous advocate" for victims or offenders or "technical expert" who dispassionately and objectively applies rational problem-solving skills to effectively manage a problem or a population.

Professionals assigned the task of intentionally inflicting harm on other human beings have perhaps the greatest struggle. As advocates for either victims or offenders, justice personnel are trained to pursue the interests of their client at the expense of the person on the other side of the conflict. In the role of "warrior" the professional adopts tactics and engages in behaviors intentionally designed to diminish or harm the other person, usually by denying their full humanity and refusing to empathize with them as full human beings.
8. **IMPEDEMENTS FOR PROFESSIONALS AND PRACTITIONERS**

Different perspectives on the practice of restorative justice can certainly lead to conflict and confusion. A practitioner may doubt the integrity of another's work. Local practitioners' may not be able to agree on the best way to apply restorative justice within their community. One program may measure success by the number of meetings facilitated, while another evaluates its program on degrees of satisfaction experienced by victims or offenders, or even by changes in public policy.\(^73\) One program trains volunteers in facilitation skills, while another employs professionals to do community building. Programs may compete in promoting their models.\(^74\)

In many ways, different aspects of restorative justice point us back to the definition of restorative justice for it is difficult to know what to do or how to do it without knowing what guides us.\(^75\) Much of our dialogue is shaped by our visions for what restorative justice does and could mean for victims, offenders, communities and, perhaps, ourselves. In turn, exploration of our practice may offer insight into our definitions of and visions for restorative justice. It is through this movement back and forth between theory and practice that good or bad practice is shaped.\(^76\)

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\(^74\) Ibid.


\(^76\) Ibid.
9. **IGNORED THE SOCIO-ECONOMIC ROOTS OF CRIME**

Restorative justice practitioners often failed to raise awareness of the causes of crime, and therefore, offer no strategy for eliminating these causes. If we as a society would eliminate the obvious sources of criminal behavior — deprivation and inequality — we would preempt the need for restorative justice in criminal justice cases.

After more than 30 years of treating and studying criminals as a forensic psychiatrist, James Gilligan summed up his findings thus:

Violent criminals are not violent because they are dumb, out of touch with reality, or unable to recognize hypocrisy, dishonesty, and injustice when they see it. They are violent precisely because they are aware of the hypocrisy, dishonesty, and injustice that surrounds them and of which they have been victims.

In short, if we acknowledge that the people we label as "criminals" spring from the oppressed, deprived stratum of society, then these so-called criminals are the original victims, though it is unpopular to view them as such. Most commonly, they also perpetuate the cycle of victimization within their own class.

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78 Ibid.


80 Ibid.

81 Ibid.

82 Ibid.
Restorative justice practitioners define "crime" as being primarily those crimes perpetrated by one individual on another, and therefore, the whole restorative justice process ignored the broader aspect of crime. The larger crimes — the ones that hurt more people much more severely — stay as hidden under restorative justice as they do under the current retributive system.

Government agencies track the number of rapes or property thefts that occur annually in each community of the Indian States. Yet there isn't a public agency that regularly collects statistics on white collar crimes such as huge scandals. The recent named scandals in India are the Coal Allocation Scam; 2G Spectrum Scam; Commonwealth Games Scam; Telgi Scam; Satyam Scam; IPL Scam, etc. This shows that the tentacles of corruption are spread far and wide in all horizons of life in India.

Restorative justice practitioners mainly focus on those involved with illegal drug use, acts of one-on-one violence, and relatively minor theft and street crime. As a result, big power-abusers are not only free of the label "offender," but are also free to continue doing what they have been doing, including profiting from a system which gives rise to hundreds of thousands of small-time criminals.

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84 Ibid.


10. **IMPACT OF CULTURE, CLASS AND GENDER**

The key to progress toward adaptation of restorative justice framework is increased sensitivity to culture, class and gender issues that affect restorative justice programs and the administration of justice itself.

**10a IMPACT OF CULTURE**  Indian culture is multicultural, multi-religious, and multilingual, a reservoir of multiple traditions. In India, there is also a practical quotidian existence of tradition(s) and modernity. Often the cultural backgrounds of victim, offender, and program staff member are different, and these differences can lead to miscommunication, misunderstandings, or worse, re-victimization of the victim.\(^{87}\) Such a scenario demonstrates a brief exchange between people of different cultural backgrounds can leave each participant feeling misunderstood, dissatisfied, and doubtful of the mediation’s effort to “humanize” the justice system.\(^{88}\)

**10b IMPACT OF CLASS**  This refers to the affluent group; the upper class of the society which includes political leaders and the leading entrepreneurs. The post independence political leadership has risen from the grassroots level in the form of regional, caste, linguistic and other protest movements. They have transformed the nature of politics and administration, immoral politics, self-aggrandizement, disregard of the constitutional norms in the pursuit of power, political survival at any cost are their rules of the game. They interfere with the administration of justice and have bent bureaucracy and every enforcement agency to do their bidding. In such a situation, the success of restorative justice would be doubtful. Whether the poorest people would be able to secure benefits as offender/victim and How we would be able to keep the whole restorative process free from corruption?\(^{89}\)

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10c IMPACT OF “GENDERED HARMs” The law has traditionally been poor at recognizing the harms associated with humiliation and exploitation, but it can be argued that there is a special wrong involved in sexual offences: a violation that is different from the violation of physical autonomy.\(^90\)

For instance, ‘rape’ is an experience which shakes the foundations of the lives of the victims. For many its effect is a long term one, impairing their capacity for personal relationships, altering their behavior and values and generating fear. There is therefore an argument that the lack of responsiveness of the criminal justice process to the needs of victims of sexual offending stems from the very structure of criminal law’s approaches to the criminalization of behavior.\(^91\)

Likewise, many types of restorative process require the victim and offender to meet and reach an agreement, feminists have expressed concern that this is problematic for women who have been the victims of domestic violence or sexual offending – often discussed together and referred to as “gendered harms”. The primary reason for this concern stems from the view that these are crimes that result from the power imbalance between men (usually the offenders) and women (usually the victims).\(^92\) Critics are concerned, as they are with the use of mediation for sexual harassment, or domestic violence claims, that women will not receive a just result when the power dynamic that has lead to the harm is replicated in the restorative justice or conference process. There are also concerns that harm may result from the less public forum typical of restorative processes, feeling that the private nature of the processes may diminish public perceptions of the seriousness of the offending involved.\(^93\)

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\(^{91}\) Ibid.


\(^{93}\) Ibid.
11. NO ACTIVE ROLE OF THE GOVT. IN REBUILDING VICTIMS' LIVES

From a victim's perspective, one of the reasons the traditional criminal justice system is inadequate is that it does not have authority to call upon the full range of resources necessary to meet the many needs of victims. Many restorative justice practitioners, in a commendable effort to humanize the justice system and reinforce interpersonal relationships, have chosen to keep the state in the background, or not involve the government at all. Only the state, however, has the authority to marshal the full range of resources necessary to address victims' potentially long-term, complicated problems. The day care, the employment counseling, the substance abuse treatment, or the long-range housing needs of victims usually cannot be adequately addressed by offenders and communities alone.\(^{94}\) When a crime occurs, society as a whole should be asked to help victims rebuild their lives.\(^{95}\)

Furthermore, a governmental role in responding to all crime victims would convey an important message — one not heard in either the traditional criminal justice system or restorative justice programs. The government can speak on behalf of society at large when it acknowledges that what happened to a victim is wrong. This could be a powerful and enormously beneficial statement for victims because it would not only validate their experiences; it would elevate it to a public concern. While restorative justice can provide important opportunities for offenders and communities to acknowledge the harm caused to a victim, this interaction is qualitatively different from a statement by the government on behalf of society at large. The traditional criminal justice system does not fulfill this societal obligation to victims. Neither does the restorative justice.\(^{96}\)

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\(^{95}\) *Ibid.*

12. RESTORATIVE JUSTICE VALUES IN PRACTICE

Most restorative justice processes involve a meeting or "conference" between the victim, offender and other members of their immediate and wider community. For such a gathering to be truly restorative in character, the processes employed must evidence key restorative justice values. Many of the values-based processes listed below are, in fact, relevant to all levels of relationship in the restorative justice field — between individual facilitators, within and between Provider Groups, between Provider Groups and other community agencies and funding bodies, and between Provider Groups and the State.

A conference process may be considered "restorative" if it:

12a Is Guided by Competent and Impartial Facilitators: To ensure that the process is safe and effective it should be guided by neutral, impartial and trusted facilitators. The participants should understand and agree to the process which the facilitators propose, and the facilitators should strive to deliver on expectations created by them in the pre-conference process. Pre-conference preparation should be undertaken with all who will attend the conference.

A process is not restorative if the facilitators do not ensure that power imbalances are managed appropriately and that interactions between the parties are effectively facilitated, or if the facilitators impose opinions or solutions on participants or allow any other party to do so.

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12b Strives to be Inclusive and Collaborative: The process should be open to all parties with a personal stake in what has happened. Such participants should be free to express their feelings and opinions, and to work together to resolve problems. Justice professionals, such as police and legal counsel, may be present, but they are there to provide information rather than to determine outcomes.\(^\text{100}\)

The process is not restorative if key participants are required to remain silent or passive, or where their contribution is controlled by professionals who intrude their own agenda.

12c Entails Voluntary Participation: No one should be coerced to engage in or remain in the process, or be compelled to communicate against their will. Restorative processes and agreements should be voluntary. Reaching agreed outcomes is desirable but not obligatory; a well-managed process itself has value for the parties, even in the absence of agreements.\(^\text{101}\)

The process is not restorative if the participants are present under duress or are expected to speak or act or decide on outcomes in ways contrary to their desires.

12d Fosters an Environment of Confidentiality: Participants should be encouraged to hold in confidence what is disclosed at the conference and not to pass it on to parties who have no personal stake in the incident. While the commitment to confidentiality cannot be absolute, since there may sometimes be compelling legal or ethical or cultural considerations that override it, in every other situation what is shared at a conference should be confidential among those in attendance.\(^\text{102}\)

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The process is not restorative if information disclosed in confidence is relayed to people who were not present at the conference so as to inflict further shame or harm on the person who in good faith, disclosed it.

12e Recognizes Cultural Conventions: The process should be appropriate to the cultural identity and expectations of the participants. No one should be required to participate in a forum that violates their cultural or spiritual convictions.\(^{103}\)

The process is not restorative if it is culturally inaccessible or inappropriate to the key participants or if it significantly inhibits the ability of participants to speak freely and truthfully.

12f Focuses on Needs: The process should foster awareness of how people have been affected by the incident of offending. Discussion should aim to clarify the emotional, material and consequential harm that has been suffered and the needs that have arisen as a result.\(^{104}\)

The process is not restorative if it is preoccupied with allocating blame or shame rather than addressing the human consequences of the incident, especially for the victim, or if it focuses solely on monetary compensation without regard to the value of symbolic reparation, e.g., apology.

12g Exhibits Respect for All Parties: All participants should be accorded fundamental respect, even when their prior behavior is condemned as blameworthy. The process should uphold the intrinsic dignity of everyone present.\(^{105}\)

The process is not restorative if the participants engage in personal abuse or show contempt for a participant’s ethnic; cultural, gender or sexual identity, or if they refuse to listen respectfully when others are speaking for example, by constantly interrupting.


\(^{104}\) *Ibid*.

\(^{105}\) *Ibid*.
12h Validates the Victim's Experience: The victim’s feelings, physical hurts, losses and questions should be accepted without reproach or criticism. The wrong done to the victim should be acknowledged and the victim absolved of any unjustified blame for what happened.106

The process is not restorative if the victim’s experience is ignored or minimized or trivialized, or if victims are made to shoulder undue responsibility for what occurred, or are pressured to forgive.

12i Clarifies and Confirms the Offender's Obligations: The offender's obligations to the victim and to the wider community should be identified and affirmed.107 The process should invite, but not compel, the offender to accept these obligations and should facilitate identification of options for their discharge.108

The process is not restorative if the offender is not held accountable for what happened and for addressing the consequences of their wrongful actions or is forced to assume responsibility involuntarily.

12j Aims at Transformative Outcomes: The process should aim at outcomes that meet present needs and equip for the future, not simply at penalties that punish past wrongdoing.109 Outcomes should seek to promote the healing of the victim and the reintegration of the offender, so that the former condition of both may be transformed into something healthier.110

The process is not restorative if the outcomes are irrelevant to the victim or aimed solely at hurting the offender.

108 Ibid.
110 Ibid.
12k Observes the Limitations of Restorative Processes: Restorative justice is not a substitute for the criminal justice system; it is a complement to it. It cannot be expected to meet all the personal or collective needs of those engaged in it.\textsuperscript{111} Participants should be informed of how restorative processes fit into the wider justice system, what expectations are appropriate for the restorative justice process, and how restorative outcomes may or may not be taken into account by the court.\textsuperscript{112}

The process is not restorative if it is exploited by participants to achieve unfair personal advantage, or arrives at manifestly unfair or disproportionate outcomes, or ignores considerations of public safety, or attempts to subvert society’s interest in having criminal offending dealt with in an open, fair and just manner.

13. THREAT TO HUMAN RIGHTS ISSUES

Braithwaite has identified a number of international human rights values which have specific relevance to restorative justice, such as restoration of human dignity, property loss, and damaged human relationships.\textsuperscript{113}

According to the restoratives survey of the literature regarding human rights and restorative justice suggests that ‘equality’ is another important underpinning value. Problems of inequality surface in relation to issues such as social justice and power differentials.\textsuperscript{114}

\textsuperscript{111} Supra note 23, p-138.


A critique often leveled at restorative justice has been its inability to resolve questions relating to social justice.\textsuperscript{115} This is an important issue. Economic, social and racial inequalities are deepening globally. It is likely that the rights of those who are disempowered, excluded and vulnerable due to these inequalities will be at risk in restorative justice processes.\textsuperscript{116}

While it is not suggested that the criminal justice system is any better an arbiter of these social justice concerns, the broader ambitions of restorative justice dictate that these concerns be brought to the centre of the discourse relating to both theory and practice.\textsuperscript{117}

Related to social justice are concerns about the effects of power imbalances that frustrate the intentions of restorative justice interventions.\textsuperscript{118} These disparities, arising out differences such as race, culture, age and gender, pose a substantial threat to the protection and promotion of rights in restorative justice programs.\textsuperscript{119}

According to Sullivan, "community has not been a safe place for women and that culture, community and colonization can be used to compete with and ultimately prevail over gender based harm."\textsuperscript{120} Knopff warn of the specific kinds of power imbalances that can result from violent relationships and how these can affect mediation sessions.\textsuperscript{121}


\textsuperscript{121} Knopff, R. (1989), Human Rights and Social Technology: The New War On Discrimination, Canada: Carleton University Press, p-54.
Given the power imbalances discussed above, coercion and the degree of voluntariness are a concern.¹²² The assumption that coercion disappears once there is consent to participate in a restorative justice process is dangerous and denies the nuances relating to power that are present in all human interactions.¹²³

14. CONCLUSION

Restorative justice has not yet changed the basic course of the criminal justice system. It has proven to be a more effective alternative to prison or other forms of punishment, but it can produce mitigated results in terms of victim participation and reparation for injury. Victims’ problems are not resolved once and for all by the solutions made available to them. The objectives of reparation and healing put forward in these approaches must not confine us to a simplistic view of their needs and the complex processes associated with their recovery.

While its objectives may be laudable, restorative justice is nevertheless a disaggregated model. Combining relational justice, participative or consensual justice and transforming or reforming justice, restorative justice has become a catchall concept that has something for everyone. The wide range of practices, the orientation of policies and objectives primarily toward offenders, and the lack of consensus on theoretical principles and its impact fuel the current debate. Lode Walgrave, an ardent proponent of this approach, agrees that the “piecemeal proliferation”, the “mix of good intentions” and the “rampant growth of programs” threaten the value and potential of restoration.


We must be careful not to be hasty in embracing this option and take the time to clearly identify the parameters of the underlying philosophy and the associated practices, implement initiatives in this area gradually and adopt an array of strategies. It is also important to target best practices, gather data on bigger groups and the long-term effect of programs. The research should also make it possible to conduct more thorough analyses in order to get a better understanding of victims’ concerns or their position on issues like forgiveness and reconciliation with the offender. The allocation of resources is a key factor in the attainment of such objectives.

Restorative justice has great potential for the parties involved and for the community. However, it is not the magic solution to all evils. It remains an option for some crimes in some circumstances and under some conditions. It must not be considered a cheap form of justice or pretend justice. Nor must it trivialize the valid demands of victims.

The restorative justice model will gain legitimacy if victims’ needs are placed in the forefront and it succeeds in mobilizing all of the players in the justice system, victim support groups in particular. Support groups must be actively involved in the design, implementation and evaluation of restorative justice programs. Finally, discussion of the restorative justice approach must not be confined to a small circle of experts. The community will never embrace and participate in restorative justice unless it understands its purpose and its aims.