

## A CRIMINAL DEFENSE LAWYER'S PERSPECTIVES ON RESTORATIVE JUSTICE

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**Abstract.** The article analyzes a criminal defense lawyer's perspectives on the restorative justice system. It focusses on the important features of the restorative justice and concerned with the merits and drawbacks of the retributive justice. The findings explore the differences between restorative justice system and the institution of reconciliation of the criminal law in the Republic of Uzbekistan. It is concluded with the role of a criminal defense lawyer in the restorative justice programs.

**Keywords:** restorative justice, institution of reconciliation, harms and needs, victim, offender, retributive justice.

In recent years we have mainly concentrated on rights, privileges and freedom of all our actions, thus forgetting the psychological necessity of courage, nobility

and responsibility. Restorative justice is an approach to building community and responding to harm. It is an approach, where justice «is sought via actions taken to satisfy the victim and to create an atmosphere of compromise between the victim/victim's family and the offender /offender's family». The philosophy behind restorative justice is to encounter the stakeholders, victim and offender together for the conversation, analyze what actually happened, through the prism of their personal interpretation first, and then seek the compromise solution to address the harm and needs of both of them. This is distinctive to the traditional retributive justice where interpretation of the crime is based on the state's legislation - find what law was broken and what's the penalty for it according to criminal code. Let's analyze the difference between the philosophies of these justice systems.

On one side, we have a retributive justice system, where justice equals Newton's third law (justice = suffer proportional to the level of crime).

On the other hand, we have a restorative justice system, where, let's say committed crime now is a broken car or object along the road and offender and victim are put around it for observation. Crime here is projected on to another dimension where the final victim is set to be a being, society itself or otherwise, the surrounding world and justice here is aimed to be achieved by the realization of offender about the overall imbalance his actions have caused and justice towards victim is targeted at helping him to rise above the cause, and help him to discover

that for the greater good of being, Newton's third law has to be abandoned and instead, look at the perspective from the point of theory of relativity.

### **Recognizing harms and needs of victims, harm doers and community**

Unlike a traditional criminal justice system, where crime represents an action against the law and state, restorative justice considers any crime as morally wrong conduct against individuals and the surrounding community. The main distinction between these systems is in their approach to engaging stakeholders. In traditional retributive practice, the victim and offender do not engage before the court. When the court hearing starts, the state initiates the process, where it considers the factors relevant to whether the offender broke the law or not and depending on this, find the offender guilty and convict him with imposing the punishment, and restore the victim by mandating the offender to pay the compensation for the harm he caused., thus dismissing the possible explanations from the offender behind the committed crime.

However, restorative justice does provide a platform where the victims and offenders get an opportunity to meet each other and show how the crime affected their life on an individual level. For the offenders, it helps them to realize responsibility for harm they have caused and analyze premises that lead them to the wrong path. For victims, this engagement practice provides an opportunity to show how they were affected according to their interpretation. Their voice is the source to find the causes of the wrongdoing, discovering which will prevent the acts of

wrongdoings in future. This is the major distinction of restorative justice, which says that it is the fact that parties find their voice being heard of, which addresses the solutions to the crime and prevents it from repeating, not just the fact whether the offender broke the law and his consequent imprisoning.

Restorative justice proposes two ways of engagement for possible achievement of the mutual agreement between the parties about the resolutions, related to harms and needs of both the victim and the offender: direct communication and indirect communication. Direct communication means that individuals will sit down in the same room and talk face-to-face about what happened. «Indirect communication can be a number of options such as exchanging letters, exchanging questions and information via facilitators of the process»<sup>1</sup>. To repeat the statement, the harms and needs of offenders are to be equally discussed in process, as repairment of offenders has an essential value to prevent future precedents. «This may require us to address the root causes of crime. The goal of restorative justice is to provide an experience of healing for all concerned»<sup>2</sup>.

Ensuring an engagement to the process of victims and offenders and acknowledging the obligation of wrongdoers to victims and the community.

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<sup>1</sup> Elizabeth Tiarks (2019) Restorative Justice, Consistency and Proportionality: Examining the Trade-off. Criminal Justice Ethics. Volume 38, Issue 2, p. 117

<sup>2</sup> Howard Zehr. The little book of restorative justice. 2002 by Good Books, Intercourse, PA. – p. 23

The distinction between two justice systems is in their approaches. Retributive approach is set to find the source of wrongdoing, while alternatively, a restorative approach intends to find the cause of wrongdoing. And to achieve this purpose, restorative justice emphasizes the importance of honest, mutual engagement of parties through open conversation. Nevertheless, engagement is completely optional and voluntary and it can only happen if both parties (offender and victim) agreed to take part. Any party can stop the process at any time if they are not comfortable with it. «Restorative justice emphasizes that they are the heart of the process and not just part of the process»<sup>3</sup>. It should be noted that in victim-offender meetings the presence of a professional mediator with sufficient pedagogical knowledge is mandatory. The presence of a mediator allows them to look at the current situation both from the side of the perpetrator and the victim, reach a compromise and achieve peace without the heat of passion. In such meetings, the involvement of parents, relatives of the offender and victims is encouraged. These individuals may be involved in the analysis of the circumstances that led to the commission of the crime. In addition, these participants may offer solutions to change the situation and behavior of their close ones.

Conflict is the object of the matter of crime. Both retributive and restorative justice has their own systematic methods to resolve it. In retributive justice, it is more common when the elements of conflict are selected and interpreted by the

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<sup>3</sup> Thomas Noakes-Duncan (2019), Communities of Restoration: Ecclesial Ethics and Restorative Justice. The Journal of Theological Studies, Volume 70, Issue 2, p. 955

opposing lawyers of parties, with the intention to favor their client, but main players of the cause, victim and offender, as a consequence are pushed to narrow their property - conflict to be interpreted in terms of what retributive legislation says, which often means the victim trying to push the offender to experience the most possible suffer and the offender trying to avoid this punishment.

Restorative justice can be initiated at a certain stage of the criminal justice process, but only if the victims and offenders give their consent to that, therefore, there are important considerations for the defendant that a defense lawyer can advise on. In other words, a criminal defense lawyer might be a voice of reason and initiate putting the both sides of a crime in a «restorative» meeting for the mutual good of both individuals, but mainly - provide them a chance to take the leadership in settling the conflict rather than going time-consuming, expensive court process. And when the conflict is settled between those two, the court and the lawyer's role switches to determine a compensation, which by the way, could be settled between victim and offender in advance during those engagement sessions and the lawyer can offer this mutually agreed compensation plan to the judge. If we come to think of it, lawyers are in less need for battling with each other to prove who is the source of wrongdoing in restorative justice processes, but rather could inform their clients of all of the options and plausible repercussions, because victim and offender are already engaged with each other to find the cause of wrongdoing in engagement sessions. Moreover, as already stated in the beginning of this paragraph, criminal defense

lawyers are the vital part of the restorative process as supporters, as the voice of reason for victim and offender.

Restorative justice includes community as one of the players that is going to engage in the process. However, it is doubtful that people who don't have any connection to the case may bring the significant benefit. Nevertheless, if people from similar cases are brought, who have experience, knowledge and got through the similar restorative justice practices, their help will definitely be essential, as their case is a precedent to the original one.

Retributive justice does not require people to act or think. It certainly does not require them to change. When a state locks people up, it excuses them from their responsibility to answer for what they have done. In contrast to that, restorative justice is a process to hold them accountable. But first and foremost, it offers a chance to discuss moral development to offenders who may have had little of it in their life. It may be their sexual morality, financial morality, physical morality, etc. depending on the type of crime they committed. Because it is the restoration of the offender's conscience, moral values that will prevent the crime from materializing into reality. Nevertheless, it still requires the offender to take responsibility to repair things as much as possible and to never commit that harm again. It is not about feeling sorry; it's more about doing sorry (getting a job, paying a retribution, apologizing, doing community services).

There is one interesting cross-point line of restorative justice with the religion Islam. The whole point of restorative justice for the offender is to make a "tawbah" (a remorse) from the soul, where the punishment for him comes from his own conscience, inner pain from committed sin. Meanwhile, for the victim, restorative justice offers him an option of forgiving or the right to have the offender punished.

In Islam, the victims have the right to have offender get punished, but the Muslims are taught, in accordance with reliable Islamic knowledge, about the consequences of the bad deeds the offender experiences in the aftermath, so from this perspective a victim also knows that this world is temporary and by a realization that the offender have actually hurt, damaged not him, but himself, he/she even comes to point of having a sadness towards the offender. Both victim and offender believers (of Islamic faith) have one ultimate goal in common - to reach the blessing of the Almighty in this world and after. Restorative justice, due to the absence of religious factors, projects the similar idea but to the concept of forgiving the offender for the "greater good of objective reality, being" or otherwise "being".

### **Analogy of the restorative justice in Uzbekistan**

In criminal law of the Republic of Uzbekistan there is an institution which is called «release from criminal liability in relation to reconciliation». This institution was enshrined in Criminal Code of Republic of Uzbekistan in 2001 and is actively used by perpetrators whenever they misconduct.

In accordance with Criminal Code of Republic of Uzbekistan, a person may be released from criminal liability on the basis of reconciliation with the victim if, in the absence of a conviction for a felony or very grave crime, he committed one of the crimes under Part 1 of Article 66(1) of the Criminal Code of the Republic of Uzbekistan, admitted his guilt, reconciled with the victim and made amends for the harm caused.

Article 66(1) of the Criminal Code of the Republic of Uzbekistan comprises these following crimes: Paragraph 1 of Article 105 (intentional infliction of medium bodily injury), Article 106 (infliction of intentional serious or medium bodily injury in the heat of passion), Article 107 (infliction of intentional serious bodily injury by exceeding of limits of necessary defense), Article 108 (infliction of serious or medium bodily injury by abuse when apprehending person committed socially dangerous act), Article 109 (intentional infliction of trivial bodily injury), Paragraph 1 of Article 110 (tormenting), Article 111 (infliction of unintentional serious or medium bodily injury), Paragraphs 1 and 2 of Article 116 (professional negligence), Paragraph 1 of Article 117 (neglect of helpless), Article 122 (failure to take care of persons aged under eighteen or disabled), Article 123 (failure to take care of parents); Article 136 (coercing or impeding woman to get married), Paragraphs 1 and 2 of Article 139 (denigration), Paragraphs 1 and 2 of Article 140 (insult), Article 149 (infringement of copyright or inventorship rights), Paragraph 1 of Article 167 (Larceny by Embezzlement), Paragraph 1 of Article 168 (fraud), Paragraph 1 of

Article 169 (theft), Paragraph 1 of Article 170 (causing pecuniary damage by deception or abuse of confidence), Article 172 (malpractice of property protection), Paragraph 1 of Article 173 (intentional destruction or damage of property), Article 192 (disparagement of competitor), Paragraph 1 of Article 260 (violation of regulations on safety of movement or operation of railway, sea, river, or air transport), Paragraph 1 of Article 266 (violation of safety regulations on movement or operation of means of transportation), Paragraph 1 of Article 268 (violation of regulations on ensuring safe operation of transport), Paragraph 1 of Article 298 (violation of rules of driving or operation of vehicles).

Guided by this norm, we can deduce that the offenders can have the chance of reconciliation with victims, only if their misconduct falls under the specific crimes described in Article 66(1) of the Criminal Code.

It is hard not to notice that the crimes abovementioned in Article 66 are mainly the less serious offences not posing great public danger. It should be noted that reconciliation is not just an act of forgiveness on the part of the victim, but his official renunciation of his initial demands and claims against the guilty, which manifests itself in a request by victim to stop the criminal investigation on behalf of an offender which was initiated by his/her crime report.

As we mentioned above, reconciliation is accepted only in the presence of three circumstances:

- Admission of guilt, commonly known as a guilty plea;
- Compensation for the harm and damages. Making amends for harm consists in compensation for property damage, costs associated with restoring health in cases of encroachment upon life and health, as well as in compensation for moral damage;
- Absence of a conviction of an offender for serious or very serious crime. Absence of a criminal record for committing a serious crime or a very serious crime means that the person has not previously been convicted of a such given crimes, or, if convicted, the conviction for such acts has been extinguished or removed in the manner prescribed by law.

It must be taken into account that reconciliation between the victim and offender is an act of freewill of the parties, expressed without coercion. It manifests itself in forgiveness and leniency showed by a victim towards an offender, as well as unwillingness for the guilty person to be prosecuted for their wrongdoing. In turn, the guilty person is required to admit his guilt and make amends for the harm caused.

If an offender is willing to redeem his sins, he needs to approach a victim to admit his guilt and prove that he is ready to repent, thus offsetting his misguided actions. The choice of whether to show mercy or compromise and take a satisfying revenge by letting him face the prosecution in the ways prescribed in law is totally up to the victim and no one else. Any coercion towards it by the perpetrator is

unacceptable. In case a victim is ready to forgive and reconcile with an offender, he might express his willingness to an investigator or a prosecutor in charge of the criminal investigation or directly to a judge itself.

The obligation of these authorities constitutes in making sure a victim is aware of the consequences of reconciliation with the offender – after reconciliation, victims will never be able to make a complaint or a claim against the offender in regard to this crime. This means that the decision of reconciliation is ultimate.

However structured the institution of reconciliation might be, it still cannot replace the restorative justice programs for several reasons. First of all, there is a limited category of crimes based on which victims and offenders could reconcile, while restorative meetings can be initiated in relation to any crime whatsoever. Second of all, restorative meetings are transparent with professional mediator, police officers or prosecutors taking part and regulating it. We cannot claim the same towards reconciliation process, which is held totally out of sight of the court.

### **Overview**

There is a stereotype of the wily criminal defense lawyer – the one who would use verbal tricks, unscrupulous means, technical loopholes to make sure that undeserving, guilty criminals are let back onto our streets.

In a democratic society everybody has a right to a fair trial, that there is a presumption of innocence, that it is for the judge to decide the guilt or otherwise of

a person. And if criminal defense lawyers can't protect those rights for everybody, then we can't guarantee them for everyone.

Most people would not bear sitting in front of a murderer, to look into the eyes of evil. They might be right in some part. However, we believe that what our jails are actually full of are traumatized people, desperate people, people with addictions – these are the kinds of backstories, that make us understand why they started abusing substances in the first place. They are full people who face mental health challenges or have cognitive impairments and don't have supports around them to deal with those experiences. With this said, we are not trying to say that perpetrators are saint or blameless. We are claiming they are not monsters, like we are used picture them in our society. In our opinion, they are, in fact, deeply human.

What about the victims? Let's imagine a courtroom. There is a defendant with his lawyer and on the other side there is a judge, prosecutor, whom people think they represent the interests' of victim. Reality, though, is far more complex. The way we see it, every country tries to protect fundamental personal rights and ensures safety of its citizens. Consequently, every misconduct constitutes in breaking of the mechanism that the government ensures the safety of its citizens with. As previously mentioned in one of the paragraphs, in the criminal justice system a state is regarded as a victim of crime. It seems to us, that a State is a victim because a crime harmed its reputation in the eyes of its citizens for it failed to provide its people with safety,

therefore the state punishes the criminal. This is not the case when it comes to the restorative justice.

Majority of victims tend to think that a wrong-doer does not only commit a certain crime by his/her actions, but also robs them of their sense of security and safety. Some victims also claim that having experienced a crime, they more likely lost faith in humankind, they feel like they have been robbed some of their innocence. Some people fully appreciate their feelings and their sense of anxiety. However, others might wonder: «When did **the harm-doers** lose their faith in humanity, where did they lose their innocence?» Was it the first time when they saw his dad flog his/her mother? Was it the first time their parents turn their back on them when they craved their attention? People need to realize that it is critical in a society that a criminal's story be heard, that his background be believed, that it be taken into account. And giving a voice to that story is the aim of a criminal defense lawyer.

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