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Can the Potential of Restorative Justice Ever Be Fully Realised Within the Criminal Justice System?

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Abstract

This article will look at the context in which restorative justice emerged, analysing its main characteristics and examine how restorative justice differs from conventional models. While recognising its positive aspects, this article explores some of the criticisms that show how the potential of restorative justice cannot be fully realised within the criminal justice system. It is argued that the ideals of restorative justice do not seem suitable for all types of crimes, all societies and all cultures. In addition to that, restorative justice empowers individuals, weakening the State, presupposes voluntariness from people involved in the conflict, something that does not always occur, and has a barrier that is difficult to overcome, that is social expectations around criminal justice.

Keywords: Criminology, Restorative Justice, Criminal Justice, Alternative Models, Criminal Justice System

1. Introduction

The notion that the response to crime must be given through punishment as a result of a judicial process is common sense in the western world. Effectively living in a 'culture of control' (Garland, 2001), the response to crime has been increasingly surrounded by intolerance against the offender's person (Johnstone, 2011, p. 9). At the same time, conventional criminal justice models have also failed to provide assistance to victims and meet their wishes and needs (Hoyle, 2017). Restorative Justice (RJ) appears in a legal, political and social context as an alternative that proposes significant changes in the structures of the criminal justice system (Roach, 2000, pp. 250-254), more informal and promoting greater participation of the interested parties. Through restorative justice mechanisms, 'victims, offenders and communities of care come together and, with the aid of a facilitator, try to resolve how to deal with the offence, its consequences and its implications for the future' (Morris, 2002, p. 599).

A growing number of countries believe in restorative justice's potential as an innovative and efficient mechanism, incorporating it into their criminal justice system's (Van Ness and Strong, 2015, pp. 30-33; Rossner, 2017, pp. 967-968; Morris, 2002, p. 597). Restorative Justice attracts the attention and support of criminologists and politicians from across the spectrum and pleases both victim advocates and activists against mass incarceration.

Among other things, it promises to be less costly, reduce incarceration, provide more emphasis on the victim's needs and empower communities. In the words of Braithwaite (1999, p. 104), 'well-designed restorative justice processes will restore victims, offenders, and communities better than existing criminal justice practices'. Restorative justice, therefore, has very ambitious aims. As pointed out by Beven *et al.* (2005, p. 205), 'restorative justice appears to represent the ultimate win-win situation: satisfied victims, satisfied offenders, and a reduction in reoffending'.

This article will look at the context in which restorative justice emerged, analysing its main characteristics from a historical perspective by examining how restorative justice differs from conventional models and, while recognising its positive aspects, explore some of the criticisms that show how the potential of restorative justice cannot be fully realised within the criminal justice system.

2. Method

Regarding the methodology used, the collection of information for this work involved research in DiscoverEd (The University of Edinburgh platform), Web of Knowledge, Google Scholar, and Microsoft Academic resources. For the searches, the terms used were 'criminal justice', 'criminology' and 'restorative justice'. After procuring the results, the articles and books were briefly examined by reading their titles and abstracts in order to filter the articles obtained with the theme of this article.

As this is an article prepared from secondary data, resulting from other research carried out on the subject, the path taken here was to construct our own arguments, highlighting the most important points from the research carried out, seeking argumentative consolidation, coherence, seriousness, and originality in propositions. The use of existing data (secondary data analysis) as the research method was chosen because there is already a great number of empirical evidence on the subject and data analysis takes less time and resources, notably for the purpose of this article that is to highlight some of the criticisms that show how the potential of restorative justice cannot be fully realised within the criminal justice system.

3. Results

3.1 Restorative Justice supporters' criticisms of conventional models.

In the Western world, there was a system in which crimes were solved by the community itself. The re-establishment of peace between those involved was emphasised, observing the best way to repair the damage caused to the victim and the community. Gradually, there was a system based on the State's monopoly of conflict and rights. Public authorities, then, assume the exclusive right to punish and the representation of the victim and society in criminal litigation (Christie, 1977, pp. 1-3). In Christie's critique, criminal justice system's steals 'conflicts more rightly owned by victims, offenders, and local communities' (Wood and Suzuki, 2020, p. 904).

Conventional models consider crime to be a breaking of the law and the response to it must be through official mechanisms, administered by the State, led by public agents, and that the victims' interests are represented by a state body (Morris, 2002, p. 598). Thus, most of these models, especially in the Western world, are based on adversarial processes in which two parties find themselves on opposite sides – on the one hand, the accused, on the other, the State. At the end of the process, it is decided whether the accused is guilty or not guilty. If guilty, they will receive a punishment (Saulnier and Sivasubramaniam, 2015, pp. 511-512).

It is questioned whether in conventional models of criminal justice, the interests and needs of the victim are disregarded by a lack of adequate information and absence of effective participation in the process. Furthermore, such models would promote increased incarceration (Van Ness and Strong, 2015, pp. 13-14) and would fail to promote the healing of wounds caused by those involved in the crime – victims, community, offenders.

Another aspect criticised is that conventional justice systems minimise the feelings of those involved, weaken personal and social relationships, and that they have become extremely bureaucratic (Rossner, 2017, p. 968). The

community, also affected by the crime, lost involvement in the resolution of the conflict and began to omit the support that should be given to victims and the reintegration of perpetrators (Johnstone, 2011, p. 11).

All these criticisms, added to the dissatisfaction with the current criminal justice system, and the feeling of a need for change, influenced the emergence and development of restorative justice (Van Ness and Strong, 2015, pp. 15;39).

3.2 What is Restorative Justice and how is it different from conventional models.

Defining restorative justice is a challenging task, with variations in its interpretation. Some people try to define RJ by focusing on the restorative process – people coming together to interact about the crime – and others focus more on the outcomes of the process, such as reparation, forgiveness and the prevention of reoffending. Lastly, others define it by focusing on both the process and the potential end results (Daly, 2016, pp. 9-10; Hoyle, 2017, p. 415; Rossner, 2017, p. 970). The British Ministry of Justice's definition of restorative justice highlights both the process and possible outcomes (Ministry of Justice, 2014, p. 3).

Daly (2016, p. 21) provides a good definition that is worth to transcribe:

Restorative justice is a contemporary justice mechanism to address crime, disputes, and bounded community conflict. The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process – prearrest, diversion from court, presentence, and post-sentence – as well as for offending or conflicts not reported to the police. Specific practices will vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict.

It is essential for restorative justice 's understanding that the people involved, and not the State (Morris, 2002, p. 598), receive greater relevance and have greater participation. In addition, that the feelings of the people involved are prioritised, and these participants are invited to have dialogue about the events, their consequences and possible solutions (Rossner, 2017, p. 967; Van Ness and Strong, 2015, p. 64). The objective is to ensure ‘the opportunity for direct and active involvement of the victim, offender, and community in the procedures that follow a crime’ (Van Ness and Strong, 2015, p. 77).

The community has an enormous importance for restorative justice, directly participating in the decision-making process or taking responsibility for the members of the group. According to Braithwaite (1999, p. 105), ‘when communities start taking responsibility for the vulnerabilities of their young offenders and start talking about these vulnerabilities at and after conferences, of course they become more engaged with the deeper institutional sources of the problems’.

Restorative justice does not follow the formality typical of conventional processes and has more informal procedures, aimed at effectively solving the conflict between the parties and with the minimum intervention of a facilitator (Saulnier and Sivasubramaniam, 2015, p. 512).

Finally, RJ is concerned with what must be done to repair the harm caused by the crime – especially to the victim – and is focused on this reparation and not punishment (Saulnier and Sivasubramaniam, 2015, p. 512; Beven, 2005; p. 194, Braithwaite, 2014, p. 18). Another relevant point is the process of reintegration of victims and offenders after carrying out the restorative mechanisms. ‘Reintegration means re-entry into community life as whole, contributing, productive persons. This means acceptance of the person as a member of the community’ (Van Ness and Strong, 2015, p. 120).

Therefore, it can be said that restorative justice is based on principles such as voluntariness, cooperation, sense of responsibility, mutual respect and informality (Braithwaite, 1999; Johnstone, 2011; Van Ness and Strong, 2015; Daly, 2016).

In short, Zernova (2008, p. 35) sums up RJ's aspirations as follows:

to create a new ethical orientation; to develop an alternative to punishment and treatment; to craft a model of criminal justice which will place victims at its centre; to design a way of doing criminal justice which will aim to repair harm and restore peace and harmony in the aftermath of a criminal offence; to construct a justice paradigm that will be characterized by voluntariness; to develop a model of criminal justice which will be de-professionalized, community-based and empowering for crime stakeholders.

3.3 Critiques and limitations of Restorative Justice: some reasons why its potential cannot be fully realised.

Despite exciting promise, restorative justice is not unanimously supported among criminologists and criminal justice scholars. As seen, RJ's aspirations are quite daring and some studies, in fact, demonstrate the relative success of restorative practices 'such as heightened participant satisfaction and reductions in recidivism' (Saulnier and Sivasubramaniam, 2015, p. 532). However, despite scientific findings that evidence some success in using restorative justice mechanisms, several methodological problems are observed when comparing restorative justice and conventional models. Additionally, there was evidence of a difference, but of little relevance (Saulnier and Sivasubramaniam, 2015, pp. 517; 532). In short, there are still many doubts, questions and fears regarding the mass implementation of RJ mechanisms.

One of these criticisms concerns the reduction of recidivism. Restorative justice supporters claim that one of the advantages is that it reduces recidivism (Johnstone, 2011, p. 5; Saulnier and Sivasubramaniam, 2015, pp. 516-517). Despite being controversial and methodologically problematic, some studies show that defendants who go through restorative justice commit fewer crimes in the future compared to those under conventional forms (Johnstone, 2011, pp. 18-19). However, in general, the difference found is small and the success of the practice depends on the full attainment of restorative justice standards – constraining, maximising, emergent standards (Rossner, 2017, p. 980-981). In fact, even Braithwaite (2014, p. 20) seems to recognise some methodological limitations in proving that restorative justice reduces recidivism and that there are no major differences in this regard between RJ and conventional models.

Victim satisfaction is another regular argument in favor of restorative justice. The evaluation of participants – victims and perpetrators – in the RJ mechanisms is, in general, positive, which is one of the optimistic aspects best described in empirical research on the subject (Saulnier and Sivasubramaniam, 2015, p. 516). It is claimed that RJ mechanisms serve victims' interests better than conventional methods (Johnstone, 2011, p. 5). Furthermore, it is stated that RJ mechanisms would bring more psychological benefits to victims, including contact between offender and victim (Rossner, 2017, pp. 979-980). However, it is important to clarify that most restorative justice programs are still limited to less serious crimes and it is not clear whether there are, in fact, benefits to victims of violent crimes with the practices of restorative justice.

One of the criticisms made of restorative justice refers to the belief 'restorative justice lacks legitimacy' (Morris, 2002, p. 609), as coerciveness is something important in the criminal justice system. One of the pillars of RJ is consensus – the solution to the conflict takes place through consensus among those involved and the role of the State in this process is secondary. There is no obligation to a decision made by an impartial third party, as with the conventional model. Thus, restorative justice does not have a theoretical basis and adequate structure to deal with the State's punitive claim when there is resistance on the part of the offender. Willingness, awareness and acceptance of mechanisms are essential in restorative justice's practice (Van Ness and Strong, 2015, p. 77). There will always be a need for the State's coercive force to be used in cases of resistive punitive claims and, also, in cases in which the offender, even after agreeing, withdraws from the pact made. Therefore, restorative justice will never be able to be a single path because it presupposes dialogue and voluntariness without which a consensus and said restoration cannot be reached. It has to be an option, but not the only one, because there must be the path of imposing a penalty – especially when the accused or the victim does not accept dialogue.

One question that is asked about restorative justice is whether it is capable of satisfying the punitive purpose, considered an important aspect, of the criminal justice system (Rossner, 2017, p. 982). Regarding society's expectations of the criminal justice system, Johnstone (2011, p. 21) accurately observes that 'most members of the public, including many victims and potential victims of crime, have certain expectations of the criminal justice system.' Thus, for a considerable part of the community, including victims, a justice application model that proposes dialogue, interaction between victim and offender, and a solution that is consensually adopted through meetings between them, seems wrong or an inadequate response (Hamilton, 2021, p. 175) to different types of crime – especially in cases of serious violent crimes. This feeling of injustice, or that nothing happened to the criminal, reflects a culture rooted in society that the response to crime should be punishment. This culture is difficult to change – it takes time. So, effectively, when it comes to social expectations in relation to criminal justice and the response to crime, culturally, punishment is expected. The results of the application of restorative justice mechanisms are not seen as a punishment and the generalisation of restorative justice to all cases compromises the credibility and trust of a large part of the population in the criminal justice system.

One of restorative justice's objectives is the repair or compensation of harm caused as a form of punishment. In other words, the crime is responded to by looking for a way to compensate or repair the harm caused by that act. This idea is at odds with that of punishment that is concerned with inflicting proportional and adequate punishment on the person causing the harm. The idea of repair is interesting and particularly fair in some cases. The problem arises when reparation is not possible or even not accepted by the victim, who prefers that a punishment be applied. In less serious crimes, reparation seems more adequate and viable. What to do when it comes to murder or another serious crime, for example? Or a crime in which society – in addition to the victim – is severely hit? 'There are some wrongs which are so serious that compensation or reparation is insufficient to put them right' (Johnstone, 2011, p. 22). Therefore, the restorative justice mechanisms must be used insofar as they are adequate, and the conventional methods of imposing a sanction must always be available.

Furthermore, one of the functions of criminal justice is to promote the protection and safety of people. In conventional systems, one way to do this is to remove the individual who has committed a crime from society or to control them in some way, including with the removal of liberty. Thus, through the application of a penalty (punishment) to someone who committed a crime, it is intended to take that case as an example so that other people do not commit the same crime. For restorative justice, the family and the community play an important role in the recovery and prevention of new crimes. This can be done through support groups that monitor and intervene in case of need, as well as monitor any risk that that individual may present. These mechanisms would be more effective, according to restorative justice supporters (Braithwaite, 1989, 1998; Cayley, 1998 as cited in Johnstone, 2011, p. 24). However, as Johnstone (2011, p. 24) points out, mechanisms to protect society may work in some cases, but they are not effective for most situations. They are most effective in smaller, more integrated communities where this control can be exercised more easily and effectively. In fragmented or poorly integrated communities, it is much more complicated to exercise the control necessary to ensure the security of society. Provide dates defining the periods of recruitment and follow-up and the primary sources of the potential subjects, where appropriate. If these dates differ by group, provide the values for each group.

4. Final considerations

Although restorative practices are old, interest in the topic became stronger in the 1990s, due to various criticisms of conventional models, especially with regard to their low effectiveness, high cost and the needs of the victims of crime who tend to receive little importance. There is scientific evidence to show positive aspects of restorative justice practices compared to traditional models. However, some of these studies have methodological limitations and, even so, the results obtained are not easy to interpret.

It is noticeable that the success of restorative justice mechanisms is based on a supposed failure of conventional models. The ideas, while good, do not seem suitable for all types of crimes, all societies and all cultures. The very idea of reparation assumes that this component is desired by the community, but it cannot be said that this thought

is universal. For many people, the response to crime is and must be punishment. On the other hand, restorative justice empowers individuals affected by crime by posing the problem for them to decide on the conflict, weakening the State.

Voluntariness is fundamental to restorative justice mechanisms; remove this component and it is not possible to implement its practices, because the eventual results will not be true or authentic. Therefore, when voluntariness is absent – of the offender or victim – it will be necessary to use the conventional model of imposition of force.

The shift from punishment to restoration, proposed by restorative justice, is interesting. However, it encounters a sociological barrier that is difficult to overcome: social expectations around criminal justice. The idea of justice is still associated with punishment for a large portion of people who do not see “doing justice” in restorative justice mechanisms.

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