

Development of restorative justice criminology essay



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Restorative justice can be found throughout the bible. Although, it has been previously said that biblical accounts support the existence of retributive justice, it is not true that restorative justice had no place in the early days. The principle of ‘ an eye for an eye’ appears primarily in the first few books of the bible, collectively called the Torah. However, the emphasis of the sacred scripture is primarily forgiveness, restitution and restoration, which are primordial considerations of restorative justice.[1]

One such account, supporting the existence of restorative justice, is the story of the tax collector Zaccheus. He was a tax collector, and as such he was abhorred by the people. He had wanted to see Jesus, but he couldn't because he was too short, so he climbed up a tree, and while there was seen and was asked to come down from the tree. He invited Jesus in his house, and when the people saw this, they were astonished and angered as they believed Jesus was going inside a “ sinner's” home. To this, Jesus replied:

“ Today salvation has come to this house, because this man too is a son of Abraham; for the Son of man has come to seek out and save what was lost.”[2]

Restorative justice as a principle of imposing penalty has played a secondary role to retribution and deterrence. It wasn't until the fifties did revival of interest in restorative justice occurred.

The 1950's: Creative Restitution

Dr. Albert Eglash, while working with adults and youths in the criminal justice system, developed creative restitution, upon finding that the current system

lacked humanity and effectiveness. Under this new concept, “ an offender, under appropriate supervision, is helped to find some way to make amends to those he has hurt by his offense, and to ‘ walk a second mile’ by helping other offenders.”[3]

Some principles of restorative justice is imminent in creative restitution such as: reinstating the relations between the wrongdoer and the offended party, offender’s admission of guilt and renunciation of retribution. He says that the attributes of creative restitution are:

- “ 1. It is any constructive act.
2. It is creative and unlimited
3. It is guided, self-determined behavior.
4. It can have a group basis.”[4]

Because the basic principles of restorative justice is found in creative restitution, Some of the basic tenets of restorative justice can be found in the principles of creative restitution, Eglash’s work is considered by many as one of the bases of the restorative justice movement.

The 1970’s: The Kitchener Experiment

In Kitchener, Ontario, Canada, two young men while intoxicated, robbed and vandalised a total of twenty one houses. They were caught and was handed over to a probation officer, who in turn brought them to court and arranged for them to visit the homes which they robbed and vandalised and apologize

personally to each and every home owner.[5]Thus, the birth of the Victim-Offender Reconciliation Program (VORP).

The Canadian experiment was the beginnings of modern use of restorative justice. Victim-Offender Mediation Programs (VOMP), also known as Victim-Offender Reconciliation Programs (VORP), brings offenders and offended parties, opposite each other with a trained mediator, wherein both parties have the opportunity to “ speak their minds and their feelings to the one who most ought to hear them,” contributing to the healing process.[6]The offender themselves come into an agreement with the offended party on what will be done to restore the loss.[7]

The 1980's

In the United States, during the eighties, then President Reagan created a task force to investigate the treatment of victims of the criminal justice system. The task force report was filled with criticism of the victim's rights programs, singling out the inadequacy of victim's compensation programs. Because of this event, the government passed a law providing restitution for crime victims and allowing the use of “ victim impact statements” at federal sentencing hearings, the Victim and Witness Protection Act of 1982.

According to the Canadian Resource Center for Victims of crimes, victim impact statements are:

“ A victim impact statement is a written account of the personal harm suffered by a victim of crime. The statement may include a description of the physical, financial and emotional effects of the crime. The victim impact statement is intended to give crime victims a voice in the criminal justice

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process. It allows them to participate in the sentencing of an offender by explaining to the court, and the offender, how the crime has affected them.”[8]

A victim impact statement is not a mandatory requirement, however, once made; the Court shall mandatorily take the statement into consideration in making the decision.[9]

2000’s

The year 2000 was a remarkable year for Restorative Justice, the Catholic Church endorsed restorative justice practices. They commended that restorative justice focuses on the victim and community first, unlike the dominant model, which asserts the hurt and loss of the victims, and maintain that offenders come to terms with their actions. Because the offenders and the offending party are face to face, it offers the victim a better sense of peace and accountability, the Church said.[10]

Another triumph was the adoption of the resolution encouraging countries to use a document providing guidelines for the implementation of restorative justice, by the United Nations Economic and Social Council.[11]This came into existence because of the joint efforts of Canada and Italy proposing to the United Nations Commission on Crime Prevention and Criminal Justice to cultivate an international guideline to assist countries in espousing restorative justice.[12]

Little by little, restorative justice principles have been developing in nearly most of the countries, such as Canada, Australia, Japan, Netherlands, Most European Countries, several South American countries and Russia.

The Theory of Restorative Justice at present

Many authors have attempted to define restorative justice, to have one standard meaning. However, there has been no standard definition as of yet. Howard Zehr defines restorative justice as “ restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”[13]When the attempt to get a consensus for a working definition of restorative justice could not be attained, the working party on Restorative and Justice, decided to adopt Tony Marshall definition. He defines it as:

“ Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”[14]

Marshall’s definition focuses on the process and interpersonal relation between the offender and the offended party.

Restorative Justice is focused on the offender, offended party and community members. The core values are: the offender must apologize or shamed and reintegrated, the offended party, harm and chance for forgiveness and lastly, community and relationships.[15]

Under this principle, it is pertinent for the offender to tacitly acknowledge that he committed an offense, showing that he accepts responsibility for the outcome of his wrong action and recognizing the injury undergone by the offended party.[16]Such apology, may be done orally or in written form. After this, it must be figured out how he can get back on track, which will be dealt with by the individualized treatment of the offender. Next step is for the offended party to assess the harm done and create an action plan on how to mend the injury.[17]The offended party must likewise accept the apology of the offender. The focus on the community pertains to the forging new relationships and repair broken relations.[18]

Restorative Justice's emphasis lie on repairing the injury caused by the crime, which is understood as a violation of relationships and therefore disrupts peace in the community.[19]It is collaborative and inclusive, and crime is not merely an offense against the state. It is inclusive because it allows the participation of offended party, offender and the community, the three parties who have the most interest in the reparation of the offense. It is collaborative because it is through the efforts of the interested parties which the solution is based from.

Respect for human dignity is the main basis of the restorative principles. The Canadians, one of countries which adhere to restorative justice, speaking through its Ministry of Justice said:

“ Priority is given to addressing the human needs of participants and empowering them to communicate their thoughts and feelings in an open and honest way. The goal is to build understanding, to encourage

accountability and to provide an opportunity for healing. A restorative justice process encourages the offended to take responsibility for their harmful behaviour in a meaningful way, to gain insight into the causes and effects of that behaviour on others, to change that behaviour and to be accepted back into the community. The process gives the victim a forum to ask questions, receive answers, gain understanding, explain the impact of the crime on them and contribute to the outcome of the process. The process may result in the victim receiving an apology, restitution, services or some other form of reparation. It creates a safe environment in which the victim can seek closure. Restorative justice processes have the potential to provide the community with an opportunity to articulate its values and expectations, to understand the underlying causes of crime and to determine what can be done to repair the damage caused. In doing so, it could contribute to community wellbeing and potentially reduce future crimes.”[20]

Purpose

Under the principle of restorative justice, crime is a violation of relationships between persons. In order to achieve justice the offended party, offender and community members must participate in putting things right.[21]

Focal Point

Unlike in retribution, wherein the main point in the imposition of penalty is giving the offender what he deserves restorative justice deal with the correction or the rehabilitation of the offender so that his future conducts will be law abiding. Rehabilitation supporters believe that sanctions must be used as a chance to make a positive change on the offender.[22]

Rehabilitation literally means to restore in good condition. The objective of restorative justice is to help the offenders so that they can re-enter society as useful citizens, or at the very least, no longer dangerous. It also aims to decrease the crimes, albeit in a very different manner. What restorative justice seeks to achieve is not only to correct the offender, but also to change the “ need or desire to commit crimes.”[23]

Pitfalls

Restorative Justice as a penal philosophy is not without criticisms and limitations. A study conducted in Africa on 2001, made the following observations:

“ First, The principle of the model inevitably rests on the cooperation of the parties concerned. If the offender, for instance, refuses to accept responsibility for the crime and to fulfil his or her obligations to the victim and the community, there can be no talk of restorative justice.

Second, A certain level of competence and the availability of infrastructure, such as a trained mediator, are prerequisites for community participation in restorative justice programmes. However, the skills and resources are not always available.

Third, In modern society, community bonds are not always so strong and aspects like the privacy of the individual and autonomy are strongly emphasised. A significant shift to community participation and involvement in restorative justice programmes will necessarily put a high premium on community education and the development of community sources.

Fourth, Any existing social injustices in and between communities could have a negative influence on the implementation of restorative justice. Social division can prejudice the cooperation of parties in the criminal justice process.

Fifth, Some people are of the opinion that restorative justice is a “ soft” option for the offender.

Sixth, A perception that restorative justice only applies in the case of juveniles and minor offences is quite common.”[24]

Another issue concerning Restorative justice is sentence inequality. Since, it is originally designed to address specific needs of the individual offender, the sentence meted differs on the determination of one’s progress through rehabilitation.[25]The idea of restorative justice is to develop an individualized treatment plan an impose an indeterminate sentence, the length of which will be determined on the offender’s progress.

Arising from these individualized treatment and indeterminate sentence, is human fallibility. Since human nature cannot be predicted with absolute precision, some were released before they were actually ready.[26]

One other problem that restorative justice faces is that given its long-term nature, offenders must “ experience incarceration in order to receive the necessary treatment for rehabilitation.”[27]

Retributive Justice principles in the Philippines’ current legal framework

Revised Penal Code

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Although majority of the Revised Penal Code's provisions are considered to follow the classical approach, which follows the postulate that retribution is the main justification of punishment, the positivist theory is also used in some of the provisions. Such principle is apparent in the provisions of impossible crime and mitigating circumstances.

Impossible Crimes

The Code penalizes impossible crimes, to wit:

“ Article 4. Criminal liability. – Criminal liability shall be incurred:

1. By any person committing a felony (delito) although the wrongful act done be different from that which he intended.
2. By any person performing an act which would be an offense against persons or property, were it not for the inherent impossibility of its accomplishment or on account of the employment of inadequate or ineffectual means.”[28](emphasis ours)

The term impossible crime is actually a misnomer because no crime was actually committed, due the inherent impossibility of its accomplishment or inadequacy and inefficiency of the methodology used. However, it is subject to a penal sanction because its commission is indicative of the criminal propensity of actor, as per the positivist theory is concerned. Also, he law punishes it because objectively the offender did not commit a crime, but subjectively he did.[29]it was inherently impossible to accomplish or due to inadequate or ineffectual means.

Circumstances affecting criminal liability: Mitigating Circumstances

Mitigating Circumstances are those which, if present in the commission of the crime, do not entirely free the actor from criminal liability, but serve only to reduce the penalty.[30]The following are the mitigating circumstances under the Code:

“ Article 13. Mitigating circumstances. – The following are mitigating circumstances:

1. Those mentioned in the preceding chapter, when all the requisites necessary to justify the act or to exempt from criminal liability in the respective cases are not attendant.
2. That the offender is under eighteen years of age or over seventy years. In the case of the minor, he shall be proceeded against in accordance with the provisions of article 80.
3. That the offender had no intention to commit so grave a wrong as that committed.
4. That sufficient provocation or threat on the part of the offended party immediately preceded the act.
5. That the act was committed in the immediate vindication of a grave offense to the one committing the felony (delito) his spouse, ascendants, descendants, legitimate, natural or adopted brothers or sisters or relatives by affinity within the same degrees.

6. That of having acted upon an impulse so powerful as naturally to have produced passion or obfuscation.
7. That the offender had voluntarily surrendered himself to a person in authority or his agents, or that he had voluntarily confessed his guilt before the court prior to the presentation of the evidence for the prosecution.
8. That the offender is deaf and dumb, blind or otherwise suffering some physical defect which thus restricts his means of action, defense, or communication with his fellow beings.
9. Such illness of the offender as would diminish the exercise of the will-power of the offender without however depriving him of consciousness of his acts.
10. And, finally, any other circumstance of a similar nature and analogous to those above mentioned.”[31]

Diminution of freedom, intelligence or the lesser perversity of the actor, is the basis for the mitigation.[32]It is in line with the principles and goals of restorative justice because it keeps track of the individual’s frame of mind at the time of the commission of the offense.

Mitigating Circumstances are classified into two groups: Ordinary and Privileged. Ordinary Mitigating circumstances are those enumerated in Article 13, save for minority, which is now considered privileged mitigating circumstance as a result of the legislation Republic Act no. 9344 or the Juvenile Justice and Welfare Act, which lowered the age of criminal responsibility. An ordinary mitigating circumstance has the effect of reducing

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the penalty a period lower. Privileged mitigating circumstances are those which are enumerated by law as such, and has the effect of reducing the penalty a degree or two lower. The existence of two ordinary circumstances has the effect of a privileged, lowering the penalty by a degree or two. A privileged mitigating circumstance cannot be offset by any circumstance, whereas the ordinary one may be affected.

Act No. 4103 or the Indeterminate Sentence Law

The Indeterminate Sentence Law was one of the more important innovations introduced by the Americans in our Criminal law. Under this system, offenders were to be sentenced with a an indefinite period and released upon showing of “ satisfactory progress towards reformation.”[33]A minimum and maximum range of penalty was determined, and after service of the minimum term and upon determination of the Board of Indeterminate Sentence of the fitness and readiness of the prisoner, reasonable probability that he will not violate the law when released, and compatibility of his release with society’s welfare, the prisoner will be released on parole and is therefore allowed to serve the rest of his indeterminate sentence outside of the incarceration facility.[34]The following shall not be entitled to the benefits of the Indeterminate Sentence Law:

“ Sec. 2. This Act shall not apply to persons convicted of offenses punished with death penalty or life-imprisonment; to those convicted of treason, conspiracy or proposal to commit treason; to those convicted of misprision of treason, rebellion, sedition or espionage; to those convicted of piracy; to those who are habitual delinquents; to those who have escaped from

confinement or evaded sentence; to those who having been granted conditional pardon by the Chief Executive shall have violated the terms thereof; to those whose maximum term of imprisonment does not exceed one year, not to those already sentenced by final judgment at the time of approval of this Act, except as provided in Section 5 hereof.”[35]

Indeterminate Sentencing have been criticised because of the differential treatment of persons similarly situated as well as the alleged difficulty in rehabilitation of the offender.[36]

Presidential Decree No. 968 or the Probation Law

“ Probation is a disposition under which a defendant, after conviction and rendition of sentence, is released subject to conditions imposed by the court and to the supervision of a probation officer.”[37] Probation has for its purpose: Rehabilitation and reformation of the Offender, and crime deterrence. An application for probation may be filed after conviction, even before the offender commences serving his sentence. If the application for probation is granted, the sentence will be suspended and he will be released under the following conditions:

“ Conditions of Probation. Every probation order issued by the court shall contain conditions requiring that the probationer shall:

(a) present himself to the probation officer designated to undertake his supervision at such place as may be specified in the order within seventy-two hours from receipt of said order;

(b) report to the probation officer at least once a month at such time and place as specified by said officer.

The court may also require the probationer to:

- (a) cooperate with a program of supervision;
- (b) meet his family responsibilities;
- (c) devote himself to a specific employment and not to change said employment without the prior written approval of the probation officer;
- (d) undergo medical, psychological or psychiatric examination and treatment and enter and remain in a specified institution, when required for that purpose;
- (e) pursue a prescribed secular study or vocational training;
- (f) attend or reside in a facility established for instruction, recreation or residence of persons on probation;
- (g) refrain from visiting houses of ill-repute;
- (h) abstain from drinking intoxicating beverages to excess;
- (i) permit to probation officer or an authorized social worker to visit his home and place or work;
- (j) reside at premises approved by it and not to change his residence without its prior written approval; or

(k) satisfy any other condition related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.”[38]

If the probationer violates any of the conditions of the release, the Court may issue a warrant for his arrest, and if found guilty, the Court may revoke the probation and subsequently order for his recommitment to serve the remainder of his sentence.[39]The benefits of the probation law shall not extend to those: sentenced to serve a maximum term of imprisonment of more than six years; convicted of any offense against the security of the State; who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos; who have been once on probation under the provisions of this Decree; and who are already serving sentence at the time the substantive provisions of this Decree became applicable.[40]

Republic Act No. 9344 or the Juvenile Justice and Welfare Act of 2006

In compliance with the United Nations Convention on the Rights of the Child, to which the Philippines is a signatory, the Congress of the Philippines enacted in 2006, the Juvenile Justice and Welfare Act. The Juvenile Justice and Welfare Act was a product of ten years of lobbying. An important provision on the law was the tacit recognition of Restorative Justice as a principle to be adhered to.[41]Under the statute, Restorative justice “ refers to a principle which requires a process of resolving conflicts with the maximum involvement of the victim, the offender and the community. It seeks to obtain reparation for the victim; reconciliation of the offender, the

offended and the community; and reassurance to the offender that he/she can be reintegrated into society. It also enhances public safety by activating the offender, the victim and the community in prevention strategies.”[42]

In one study, it had been said that the Juvenile Justice and Welfare Act was the most promising piece of legislation in the Philippines concerning Restorative Justice.[43]