

## Restorative Justice: A Perspective From Victims

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### Abstract

Restorative justice handles crimes through negotiations, respects the right of victims, and makes up for the deficiency of retributive justice that overlooks the right of victims, but is also prone to create problems such as victim-oriented thinking and unfairness. Thus, restorative justice needs to address these new problems through continuous development.

**Key words:** Restorative justice; Victim; Deficiency; Principal role

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### INTRODUCTION

According to Tony Marshall, an UK criminologist, “Restorative justice is a process whereby all parties with a stake in specific offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” (Daniel, 2001) By “collective resolution” among “parties with a stake in specific offense”, restorative justice “emphasizes healing harms brought by or caused by crimes to victims and society” (Daniel, 2005).

Restorative justice has many advantages in revolutionizing the judicial system, but it is a double-

edged sword. Those who use the sword must stay prudent in theoretical research and practice so as to leverage the advantage and avoid side effects in protecting the right of victims.

### 1. OVERVIEW OF RESTORATIVE JUSTICE

According to Tony Marshall, restorative justice is special in the following ways. Firstly, participation and negotiation are full. Besides victims and offenders, family members and community members can also participate in discussing the resolution. Secondly, punishment is negotiated. Victims are directly affected by the criminal behavior, and therefore are entitled to major just claim to take part in discussing the punishment ahead of the state. Thirdly, punishment is restorative. In the theory of restorative justice, crime is believed to have harmed the offender-victim and offender-community relationship. Thus, the ultimate goal for punishment is repairing and restoring such relationship.

Restorative justice was originated in the 1970s. Starting from the first offender-victim reconciliation program in Kitchener, Ontario, Canada in 1974, restorative justice spread to North America, Western Europe, Latin America and Asia. In 2000, the 10<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders held in Vienna passed a declaration that requires member states to expand the use of the restorative justice (Xu, 2007, p.53). The flourishing restorative justice, as the opposite of retributive justice, emerged from judicial practice and influences judicial practices and social life style. Thus, “restorative justice is not only a way to revolutionize criminal judicial system, but also a way to revolutionize the judicial system as a whole, family life, work style and political practice.” (Zehr & Tocws, 2004, p.5) There

are three major models of restorative justice<sup>1</sup>: Victim Offender Mediation, Conferencing and Circles (Xu, 2007, pp.54-56). In Victim Offender Mediation model, a mediator summoned the victim and the offender to talk about in an equal manner the harm on the victim caused by the crime, and then discuss restorative punishment. The process includes apology and compensation from the offender, and emotional expression and mental restoration of the victim. If the victim can reach an agreement about compensation with the offender, the state usually respects their will by decriminalization of the case and therefore finalizes the litigation. This model is the most widely used. Conferencing involves more participants. Besides the victim and the offender, relatives of the victim (family members and friends) and helpers to offender (family members and friends) are involved in the restorative discussion because of their connection with a party in the criminal relationship. Circles is similar to Conferencing, with the major breakthrough of involving any community member who is interested in the case, which serves as restoration of community harmony.

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## 2. ROLE OF VICTIMS IN RESTORATIVE JUSTICE

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### 2.1 Victim-Offender Oriented Restorative Justice Projects the Principal Role of Victims

The theory of retributive justice believes that the state has the right to prosecute and punish offenders. The state and offenders are antagonistic and at the core of justice, while victims are “exiled”. The state has the absolute power of prosecution and punishment in public prosecution cases, while victims are in name only and ignored (even criminal litigations with supplementary civil actions face difficult implementation and other problems).

Restorative justice believes that criminal behavior harms the right and interest of victims and offender-victim relationship, and then disturbs community harmony and harms the state. Hence, the primary task in resolving crimes is to handle the damaged right and interest of victims. Thus, restorative justice breaks the state-offender relationship at the core of state prosecution system, and takes offender-victim relationship as the core of criminal cases. Victims become a decisive component of crime resolution plans. Once victims are unsatisfied with the compensation and disagree to forgive offenders, the offenders will face the risk of criminal prosecution and

sentencing from the state. Victims are therefore no longer “outsiders” but a principal part of criminal prosecution.

### 2.2 Blurred Boundary Between Criminal Crime and Civil Tort Strengthened Just Claim of Victims

Tort (here referred to civil tort) is mainly about individual right and interest, while criminal behavior damages both individual and state interest. In early period of criminal law, the state took part in criminal proceedings to make up for the weakness of individuals in providing themselves with judicial relief, and therefore criminal and civil cases were separated. With evolution of the criminal justice system, state power easily squeezed individual victims out of the principal position in criminal prosecution; as a result, in conventional criminal justice, victims do not have the right to initiate criminal prosecution or make decisions.

Actually, criminal law and civil law are hard to separate. From the nature, most criminal behaviors first damaged right and interest of victims, then indirectly damaged community harmony and finally the society. Individual victims undertook the greatest impact of the consequences, and are therefore entitled to priority in prosecuting and punishing crimes. In judicial practices, victims (plaintiff) in private prosecution cases are given greatest right of claim, which is consistent with civil litigations; in public prosecution cases, victims still enjoy right of prosecution in criminal litigations with civil actions and claim for compensation for damages.

Restorative justice respects the fact that the boundary between criminal crimes and civil torts is blurred, and believes that criminal behaviors tort interpersonal relations (Sun, 2005, p.21). Victims as primary sufferers have the initiative of asking for compensation and reparation, i.e. just claim. The judicial department should provide opportunities for victims to have priority in making claims so as to obtain physical compensation and emotional comfort, and repair victim-offender relationship. If the two parties reach an agreement and the judicial department accepts the agreement, decriminalization can be given to the offender so as to finalize the criminal procedure. Once the victim is unwilling to accept compensation, apology or other non-criminal reparation, or the two parties fail to reach an agreement, if the case is qualified for public prosecution, then confrontational litigation procedure (Yu & Cui, 2007, p.116) is the last resort. Such mechanism follows the party disposition principle, strengthens the just claim of victims and blurs the strict boundary between criminal behaviors and civil torts.

### 2.3 Negotiations Deepen the Leading Role of Victims

Equal negotiations between victims and offenders are a feature of restorative justice. Negotiations are aimed at resolving the liabilities of offenders, but during the process, offenders and victims talk face to face freely, so communication and repair of relationship are important components.

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<sup>1</sup> Note. some scholars think there are four models of restorative justice worldwide. Besides the three mentioned above, another is Community Reparative Boards mainly used in Vermont and some areas of other states in the United States. For more information, see Bian, J. L., & Feng, L. Q. (2008). Building Chinese Model of Criminal Reconciliation – on the Basis of Criminal Forgiveness. *Tribune of Political Science and Law*, 6, 9-10. Since Community Reparative Boards is used only in a small scope, this paper only introduces the most popular three models.

The ultimate aim of restorative justice is one of healing. Through receiving appropriate reparation, the harm done to the victim can be redressed; by making good the damage caused, the offender can be reconciled with the victim and reintegrated back into his/her social and familial networks; and through such reconciliation and reintegration, community harmony can be restored.” (Wundersitz & Hetzel, 1996, pp.113-114)

In “healing”, only when the pain of is consoled and loss is compensated, can be victims forgive offenders, and the conflict and hatred between the two parties be resolved.

In negotiations, offenders will seriously listen to victims express emotions, make positive apologies and satisfy the compensation demand from victims. Thus, victims are in a leading position, enjoy initiatives, can fully express anger and compensation demand to repair emotional and physical loss. Through negotiations, offenders usually will pay for the settled compensation in full amount. After the case is resolved, victims seldom bring up suits towards the same case again. Negotiations in restorative justice not only deepens the principal role of victims in crime prosecution, but also help victims to get tangible interest in emotional comfort, damage compensation and relationship repair, which are an effective way to give full respect and reparation to victims.

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### **3. DEFICIENCIES OF RESTORATIVE JUSTICE AND ITS FUTURE DEVELOPMENT**

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#### **3.1 Deficiencies of Restorative Justice**

##### **3.1.1 Strengthened Trend of “Victim-Oriented”**

Restorative justice takes the reconciliation between victims and offenders as the prerequisite for the state to surrender prosecution towards offenders, or reference for the state to reduce sentencing, which improves the role of victims in participating and deciding punishment. However, decriminalization and sentencing are highly different, and the result depends on whether a mediation agreement can be reached. Thus, offenders are most concerned about getting forgiven by victims. Once the destiny of offenders is handed over to victims and the principle of “victim-oriented” is excessively emphasized, mediation in practice may go to extremes.

With options of either guilty or innocent, offenders will do anything for innocence. In negotiations, offenders, sincere or not, are completely in the dock and have to satisfy all demands such as apology and enough compensation from victims so as to avoid litigations. In cases where both victims and offenders have wrongdoing, such practice is clearly against the principle of fairness. Besides, with no options other than guilt and innocence that are poles apart, offenders will pursue innocence at all costs. It is therefore difficult to actually prevent crimes, because offenders pretend to “sincerely regret the

wrongdoing and apologize for it” only for the forgiveness of the victims, and propose huge compensation to “appeal to victims”. After decriminalization, offenders may well believe in their luck and continue crimes just because they have evaded criminal punishment.

##### **3.1.2 New Unfairness in Judicial Practice**

In practice, another question towards restorative justice is the suspicion of “buying away sentencing and guilt”. “Restorative justice usually supplements regular judicial justice. Once no agreement is reached or agreement is not carried out in restorative justice, in most cases, offenders face the direct consequence of cases being handed over to regular judicial system for prosecution and trial” (Liu, 2006, p.238). Whether any agreement is reached and carried out is decisive in whether offenders are labeled “guilty”. Poor offenders, even with sincere regret, may well be prosecuted, tried and sentenced by the state if they are unable to pay compensation and get forgiveness from victims; offenders who are able to pay compensation may well evade sentencing and even criminal records. When financial capability decides the consequence of crimes, unfairness in another form results, which are a new problem that needs to be addressed in restorative justice.

#### **3.2 The Future Development of Restorative Justice**

Restorative justice has many advantages in revolutionizing the judicial system, but it is a double-edged sword. Thus, restorative justice should develop step by step.

Firstly, restorative justice should not proceed to fast. Experience from rapid economic growth and environmental deterioration shows that new things in the global judicial system need to not only catch up with the development of judicial practice, but also pay attention to side effects in the long-term development. Expanding the scope of application of restorative justice and strengthening independence of restorative justice will not be too rash; a set of seriously justified preconditions will be put forward.

Secondly, restorative justice needs improved matching measures. Offenders in restorative justice now only have two extreme options: Litigation with guilt and sentencing or mediation that ignores wrongdoing of victims. Is there something in between that can comfort and compensate victims as well as determine liabilities of victims and offenders to guarantee equality for offenders? To prevent offenders from satisfying any compensation demand so as not to be guilty, gradient system for criminal liability undertaking should be established. For example, between sentencing under the state prosecution and decriminalization in restorative justice, multiple options of conditional publicity of previous criminal records, conditional abolition of previous criminal records, and exclusion from recidivism calculation can be added to provide five options in total, so that offenders will not be excessively weak in the hope of pursuing complete innocence.

Finally, state judiciary department must play some extent of initiative. "The state should not evade the conflict between victims and criminal offenders, but work with the society towards restoring peace." (Liu, 2006, p.242) State judiciary department should neither stay behind restorative justice nor work as a mediator only. In the triple relationship of offenders-victims-state, autonomous negotiations between victims and offenders need initiative and intervention from the state. State judiciary department, in mediating, should pursue maximum interest of all parties, respect the agreement reached by offenders and victims on an equal basis, and also follow the principle of reasonability to prevent the two parties from turning mediation into "bargaining". While improving the role of victims, certain extent of state power should be allowed to intervene. Otherwise, party disposition may well lead to the extreme of individualism. Only when just claim of victims and state punishment right is combined can the advantages of restorative justice be maximized in practice.

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## CONCLUSION

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Restorative justice, emphasizing loss compensation and emotional repair for victims, is flourishing around the world especially in countries with the party disposition principle. However, its inherent deficiencies are likely to

create new problems that need to be confronted so that restorative justice can become better and more adaptive.

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