

Restorative Justice: Is it Time to Stake out its Flat Turf on Criminal Justice?

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Abstract

This article is an attempt to re-conceptualize the restorative justice as a neoteric paradigm in resolving criminal cases. Although the basis of this paradigm has been structured on a robust and cogent theoretical basis, it has been at stake and wound up in a duel with the current conventional criminal justice, governing, up to now, criminal justice, and throwing back its echo of acceptance to the public.

As a final not and conclusion that this duel was no more than an elusive opposition by arguing that it went off the hook by its going hand-to-hand with the conventional retributive justice with respect to the two theories of retributivism and utilitarianism.

In practice, there has been a remarkable progress with adopting this model of justice, relatively. It is said “relatively, for the reason that it still poses good philosophical reasons that make the legal systems throughout the world somehow reluctant to start establishing its turf, in spite of its strong theoretical basis.

Keywords: Restorative Justice, Retributive Justice, Empowerment Theory, Criminal Justice, Just Desert, Victimology

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Introduction

It is conceded that the Social response to crime through the classic retributive justice system lacks perfection, and has, ever and anon, been under the Jurists' microscope. Not only do the jurists view this system with skepticism as its structure can best be described as offender-oriented, but also, the public does see it as unjust, posing misgivings about its effectiveness in fighting crimes. In this context, the vital question revolves around what the fair and efficient response to wrongful and criminal acts is. As a result of the legal system development in the comparative lawful systems and the flexibility this development needs, these systems have been commencing to recant sticking to the deeply-seated traditional legal system, allowing for restorative justice interventions that have become a phenomenon many countries have been competing with each other to adopt and integrate in their legal systems and their policy of punishment.

While the retributive justice has marginalized the victim during the court-based-process in favor of the offender, one of the most significant various developments in the field of criminal law since the 1960s and 1970s has been the revival of the victim. This revival yielded a new area of study, which was victimology, and an array of programs aimed at repairing the injuries caused by the offender and suffered by the victim. In fact, the revival of the victim is nowadays considered as a volte-face on the deeply-rooted conceptions of the criminal justice.

Due to the rising growth of the criminal justice interventions, the need is dire to re-conceptualize the current retributive criminal justice, and if the volte-face on its settled conceptions should be complete or not. Reconceptualization of the criminal justice necessarily requires a theoretical approach to answering the question: how and why do the retributive criminal justice and the restorative criminal justice interventions function as they do?

The implementation of the Empowerment Theory may produce a good explanation of why the restorative justice interventions outweigh its counterpart's traditional mechanisms. It is deemed, from our point of view, that there is more in this theory than meets the eye, which can create the public confidence in the criminal justice. But the debate is still heated over the efficiency of each other in promoting the ultimate goals of the criminal justice, and the questions still remain about whether the restorative justice is the inevitable alternative to the retributive justice, or it is to be placed with the other paradigm later or sooner, or it is complementary to the criminal

justice, or it is justice that is parallel to the retributive justice with independent institutions and mechanisms.

All of these questions may suggest that both of them be in a polar opposite, but they are not. Manifestly, the divergent aspects of each other are explicit and open, and effortlessly spring to the eye. Even if the divergence reflects a planned choice, this does in no case mean to place one of them on the scaffold, or to be substituted for the other.

This paper, by contemplating the outcomes the criminal justice seeks to gain, intends to assert that the restorative justice interventions may, in practice, efficiently operate if it is integrated into the realm of the current criminal justice, and as a piece of it, and may co-opt the retributive justice. Despite of its divergence to the retributive justice, the restorative justice model as a process-based approach can improve the social responses to the criminal acts by first abandoning the dominant idea that both of them are in flat contradiction to each other. This is to say because the convergence between both of them still lurks in the outcomes all of the different criminal justice paradigms have sought to. Simply, they differ in the process and come in close in the ultimate goals of criminal justice.

The road map of this paper starts in part one with the discussion of what the restorative justice is, and how it does work. In part two, the paper will focus on the Empowerment Theory so as to explain the theoretical foundation of the restorative justice, and why it deserves veneration. In part three, we will give an explanation of the plausible reasons of why the restorative is, in some of its aspects, divergent to the retributive justice. Afterward, and in the same part, the discussion will take another trend by rebutting the argument whereby the restorative justice is found pitted against retributivism and utilitarianism, which are considered the theoretical rationalization of the retributive justice. Lastly, the paper is to conclude that there has, in practice, been a difficulty due to some suspending questions or misgivings to perceive the restorative justice as a solo paradigm governing criminal proceedings.

1. The “Elusive” Concept of Restorative Justice:

It is no secret the lawmaker often deliberately eschews laying down a definition for some legal concepts, leaving this task to scholars and judiciary, as an eloquent and comprehensive definition has always proven elusive and unapproachable. The reason why we say so is because of the different lenses through which we see and comprehend things.

As regard to the field of restorative justice, there has been no consensus about its definition, or at least a well-accepted one⁽¹⁾. This due to the fact that there is more than an idea, philosophy, and an array of values and processes than a sole tangible and unvarying set of practices⁽²⁾, which portray an optimistic picture for this glittering development in the realm of criminal justice.

Leading restorativists have perceived it as a new paradigm, which was naturally born as a reaction to the deficiencies of the retributive criminal justice, in particular with respect to the victim's rights. Barnett, Eglash, Christie and Wright were among the first who viewed restitution as a venerable value, steering their discussion to talk about what they called as a "crisis", taking place in the criminal justice system, and about the alternative model that might be replaced with the retributive one.

While Barnett believed that the crisis could be resolved through adopting the concept of restitution⁽³⁾, Christie frankly talked about the conflict stolen by the state, and this led to depriving the society of an opportunity for norm-classification, and the most crucial discrepancy between the retributive justice and restorative justice lies in the contrasting values that motivate the two⁽⁴⁾. Eglash, in the same stream, articulated the values of restorative justice by extremely standing against the retribution upon which the traditional criminal justice was, and has still been built. According to his point of view, he focused, as grasped by us, on holding a comparison between three types of justice, namely, the retributive, distributive and restorative. He argued that while the first two types concentrate upon the criminal acts, ignoring the victim's involvement in the justice process, the third type focuses on the harmful repercussions of these acts, and requires that all parties engage in the criminal process⁽⁵⁾. Unlike the offender's passive participation and the victim's non-involvement, manifested in the first two types, the restorative justice, as a social value, gives the offender and the victim a chance to restore their ruptured relationship by keeping the offender up with a means to repair the

(1) Donald J. Schmid, (2002). *Restorative Justice: A New Paradigm for Criminal Justice Policy*, 34 VUWLR, P. 91-134, at 93.

(2) Carrie Menkel -Meadow, (2007). "Restorative Justice: What Is It and Does It Work?" 3 *Annu. Rev., Law Soc. Sci.*, 10.1-10.7, at 10.19.

(3) Barnett, R., (1977). "Restitution: A New Paradigm of Criminal Justice, Ethics" *International Journal of Social, Political and Legal Philosophy*, (87) 4, 279-301, at p. 245.

(4) Christie, N., (1977). "Conflicts as Property" *British Journal of Criminology*, (17) 1, 1-15, at p. 8.

(5) Eglash, A., (1977). "Beyond Restitution: Creative Restitution": in J. Hudson and B. Galaway (eds), *Restitution in Criminal Justice*, Lexington, MA:DC Heath and Company.

injury caused by the criminal act to the victim⁽⁶⁾. The victim should be helped by the offender or the society, and the offender is required, as Wright stated, to make amends to both⁽⁷⁾. He added that the fine line between the criminal act and other harmful actions is “artificial”⁽⁸⁾, and crimes are still actions, incriminated by law, that bring about the harm to others, and the conviction of the offender means that the sanction shall be imposed⁽⁹⁾. Wright proposes that that the restorative justice may constitute a new paradigm of justice where the response to criminal acts will not be by adding harms to the offender, but by doing “as much as possible to restore the situation”⁽¹⁰⁾.

The theoretical founders strongly believe that the restorative justice is a model to re-think of the punishment for wrongful acts⁽¹¹⁾, and to re-conceptualize the role of justice in repairing the social bonds by contending that the crime is a violation of people and interpersonal relationships⁽¹²⁾, and not a violation run by a systematic rules⁽¹³⁾. Howard Zehr, who has been considered a keenly prominent proponent of the restoration value, imparts a social tint to the crime by stating that the crime is a “wound in human relationships”⁽¹⁴⁾, and it triggers an obligation to repair and store the social bonds⁽¹⁵⁾ through prompting the victim and the offender to meet each other. While the focus, according to his philosophy, should be on the restoration of human ties, another well-known proponent, John Braithwaite, proposes the focus be on reintegrating the offender into their own community⁽¹⁶⁾.

Although the restorative Justice has a revered practice throughout the world,

(6) Mirsky, L., (2003). “Albert Eglash and Creative Restitution: A Precursor to Restorative Practices”. <http://www.realjustice.org/library/eglash.html>. visited on 10th of December 2016.

(7) Wright, M., (1977). “Nobody come: Criminal Justice and the Needs of Victims”, Howard Journal, (16)1, P.22.

(8) Wright, M., (1996). “Can Mediation be an Alternative to Criminal Justice”: in B. Galaway and J. Hudson (eds), Restorative Justice: An International Perspective, Monsey, NY: Criminal Justice Press. P. 132.

(9) Ibid, at 136.

(10) Ibid, at 112.

(11) Carrie Menkel-Meadow, Op.cit, at 10.2.

(12) Zehr, H., and Mika, H., (1998). “Fundamental Concept of Restorative Justice” Contemporary Justice Review. (1) 1, P. 47-55.

(13) Zehr, H., (1990). Changing Lenses: A New Focus for Crime and Justice, Scottsdale, Pennsylvania, Waterloo, Ontario, Herald Press. P. 181.

(14) Ibid.

(15) Ibid.

(16) Braithwaite, J. (1997), Crime, Shame and Reintegration, Cambridge University Press.

and has been approached by many countries and cultures⁽¹⁷⁾, the scholars have to date been unsuccessful to agree with a sole irrefutable and conclusive definition of it. The reason might be ascribable to their failure to produce an underlying theory explaining and justifying the restorative justice. As articulated earlier, it is evident that the practical and theoretical forefathers of restorative justice have endeavored to theorize and conceptualize this new paradigm of justice, but their discussion revolved around setting the restorative justice off against the retributive justice. Thus, the social movement seeking a turning point in the way the traditional criminal justice operates gave a fresh impetus, for them, to have revisited criminal justice systems. Outside the customary limitations of sentencing in the criminal courtroom setting, the social flavor is manifestly extant in the restorative justice to the extent that it might be perceived as a community-based- justice, motivated by august goals and values.

In this context, it is useful to draw attention to a frequently invoked definition produced by Marshall, who gives, as it were, “the prospective justice” run by the parties of an offence, or more broadly by the community a splendid triumph over “the retrospective justice”. In his definition, Marshall stated that the restorative justice is: “a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future”⁽¹⁸⁾.

This definition accentuates the process requirement that all parties embroiled in a dispute be given an opportunity to be heard about the repercussions of the crime, and what is necessary to be done to restore the victim, the offender and the community⁽¹⁹⁾. It is a painful fact that when a crime or even a serious wrongful act, not necessarily labeled as a criminal act, occurs, its aftermaths inevitably befalls the victim, the offender, interested people and a larger segment of the community in which it is committed. Consequently, these wrongful acts, whether labeled as criminal acts or not, will result in gashing the social bonds, and the restorative justice as a process then restores the dispute to its own stakeholders (the parties and the community)⁽²⁰⁾ to identify

(17) Read in this context Jon’a F. Meyer, (1998), “History Repeats Itself”, *J. Contemp. Crim. Just.* (1), 42-57,

(18) Tony F. Marshall, (1999), *Restorative Justice: An Overview* (HMSD, London), P. 5

(19) Chris Cunneen, (2007). “Understanding Restorative Justice through the Lens of Critical Criminology” in C. Cunneen and T. Anthony (eds), *The Critical Criminology Companion*, Hawkins Press. PP. 290-302, at. 290.

(20) Bazemore, G., (1998). “Restorative Justice and Earned Redemption: Community, Victims, and Offender Reintegration” (41) *American Behavioral Scientist*, Pp. 768-813, at 376.

the needs and responsibilities⁽²¹⁾ as they are regarded as being jointly and solely empowered to decide how to fine-draw the dispute's after-effects that ensue as a result, generally speaking, of serious bad conducts. At its most utopian, the restorative justice was contrived to be a socially-institutionalized- process that could, should right conditions are met, be seen as a means of avoiding severe criminal punishments and imprisonment⁽²²⁾ and concentrating, instead, on the humanity of the victim and the offender⁽²³⁾.

At the opposite riverbank, instead of introducing a definition of the restorative justice, some scholars have merely referred to a set of principles by which this paradigm is stamped⁽²⁴⁾. This tendency might be a sound approach due to the lack of a decisive definition, yet, it does not change the fact that to outline the key principles reflects a recognition of the restorative justice's momentum as a novel model, which gives a positive and affirmative role to the affected parties of an offence in controlling, inter alia, the process of decision-making, rather than state-centered-control of it.

Other definitions tend to focus on the core value and goal rather than the process, and the restorative justice, accordingly, is referred to as a system or practice that lays emphasis on the healing of the wounds suffered by the victim, the offender and the community that are revealed by the offender's bad conduct⁽²⁵⁾. Therefore, much consideration has, in both practice and theory, been given to heal those directly affected by bad acts on a basis of social reform⁽²⁶⁾.

From our point of view, to suggest a precise definition of the restorative justice might, in the ocean of this heated debate among scholars, be seen as a hard task, but it is not so. The proponents of this neoteric paradigm, as articulated above, have focused basically on either the ultimate goal of it as a hallowed value or the process through which it functions, but all are swimming in the same river. It is observed that those who focus on the value in building a

(21) Zehr, H., and Mika, H., Op. cit. Pp. 47-55.

(22) Zehr, H., Op. Cit, at 178.

(23) Martha Minnow, (1998), *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, (23) *New. Eng. L. Rev.* Pp. 967-969.

(24) See, for instance, Allison Morris, and Gabrielle Maxwell, (2001). "Restorative Justice Conferencing" in Gordon Bazemore and Mara Schiff (eds), *Restorative Community Justice*, (Anderson Publishing Co, Cincinnati) Pp. 174-175.

(25) See Donald J. Schmid, Op.cit. P. 93.

(26) Carrie Menkel -Meadow, Op.cit, at 21:27.

definition of it disregard the fact that the new paradigm is, per se, a process-based one, and the others who focus on the process disregard its sought-after goals and values.

A variety of differing practices have usually been included in pursuit of the restorative justice's core value and goal. To repair, restore, reconcile and integrate the victim and the wrongdoer to each other and to their relevant community connote the significance of the restorative justice. But, this significance is not deemed unique or merely excluded to this paradigm, and thus, it is not wise to build a definition taking it all for granted that the restorative justice as a buzzword stands on the opposite side of the retributive justice since those practices are still present in the latter as latent values, but not so visible as they are in the restorative justice. So, the question being posed in this context is: why are these practices obviously present in the restorative justice?

Simply, because the restorative justice interventions bring forward a new approach of administrating the criminal justice process, and leave behind the usual barriers of the punishment, which is the controlling trait of the conventional criminal justice. Moreover, because these interventions might take place in any part of the stages of the criminal justice process⁽²⁷⁾.

Ideally, the restorative justice interventions endeavor to bring together the victim and offender as well as their shared community to trigger a state of social reconciliation. To attain this long-sought state, sitting of the parties involved in a criminal dispute is the springboard to achieve it. In such sittings, the offender may confess the offence he perpetrated, and the harm he caused to the victim, and accordingly, the effects and repercussions of his wrongdoing could be acknowledged by him⁽²⁸⁾.

On the other side, the victim's narration of the harm he suffered might arouse the offender's consciousness and then make amends with a feeling of regret. In theory, the restorativists emphasize that this kind of acknowledgement of fault will inevitably lead to empathy as the wrongdoer's recounting of his motivation is a vehicle for the family members and the community to see, as one scholar stated, through his eyes⁽²⁹⁾. This explains why the restorative

(27) Jennifer Gerada Brown, (1994), *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, (43) *Emory L. J.* 1247, 1262.

(28) Patrick Glen Drake, (2006), *Victim-Offender Mediation in Texas: when "Eye for Eye" becomes "Eye to Eye"*, (47) *S. Tex. L. Rev.* 647.

(29) Kate Bloch, (2010), *Reconceptualizing Restorative Justice*, (7) *Hasting Race and Poverty Law Journal*, P. 205.

justice is reasoning because the creation of the empathy state may lead to restoration, which is the ultimate goal of it, and gives the stakeholders the chance to choose the appropriate means to repair the harm caused by the offence, not as a state-imposed punishment, but as an agreed upon contract among the concerned participants.

No one can deny that these values are noble, and simultaneously no one can dogmatize they are only confined to this new paradigm, and the retributive justice is bereft of the means to attain them. It is not enough to adopt the new paradigm to argue that the attainment of these values through the restorative interventions is a sitting duck.

However, to achieve this reasonable consecutiveness (acknowledgment, empathy and restoration), the archetypal patterns of the restorative justice process includes the mediation between the offender and the victim, group or family conferences⁽³⁰⁾, and the circles of the restorative justice⁽³¹⁾. It has been argued that the last two means might become wider by giving the families of the two parties involved in a certain dispute and the community an opportunity to establish criminal justice⁽³²⁾.

For the reason that the restorative justice is structured, as it seems, on an extreme deviation from the conventional criminal justice, we believe that this deviation lies solely in the process through which this model of justice

(30) In the USA, and precisely in 1996, a pioneer program used the family group conferences for juvenile wrongdoers in 12 communities in the 1st Judicial District of Minnesota. This program used the mediation type administrated by neutral facilitators, whose task was to assist victims, offenders and their concerned participants to caucus and engage in direct dialogue about the crime and its repercussions. See Fercello and Umbreit, "Client Evaluation of Family Groups Conferences in 12 sites in the 1st judicial District of Minnesota" (Centre for Restorative Justice and Peacemaking, Minnesota, 1981). However, in the USA, the main focus is nowadays on the cases of juveniles, and on the less serious crimes perpetrated by adults. See Jean E. Greenwood, and Mark S Umbriet, (1998), National Survey of Victim Offender Mediation Programs in the US, VOMA Connection, at 7. <http://www.voma.org/doc/connect> visited on 14th December 2017.

(31) Kate Bloch, Op. Cit, at 204. Circle sentencing is a type of the conferences of restorative justice, which has been resorted to in Canada since 1991 in the cases, in which the aboriginal offender involved, then extended to involve aboriginal and non-aboriginal offenders. It has been, as an informal process of justice, considered as an alternative to court sentencing process, and focused only on the serious crimes because they are lengthy and require devoted involvement from all participants. This process has not been excluded to juveniles, rather it extended to involve adults as well. Heino Lilles, (2000). "Circle Sentencing: Part of the Restorative Justice Continuum" in Allison Morris and Gabrielle Maxwell (Eds), *Restorative Justice for Juveniles: Conferencing, Mediation, Circles* (Hart, Oxford), Pp.2, 3.

(32) Kimmet Edgar & Tim Newell, (2006), *Restorative Justice in Prisons: A Guide to making it Happen*, Pp. 11-12.

works, thus, it is deemed that any definition of the restorative justice be seen as process-based.

2. The Empowerment theory as a Theoretical Foundation of Restorative Justice

The far-reaching transformation in the form of the restorative justice that has happened on, and then conceptualized, the criminal justice in European countries, USA and Canada in a specific category of crimes is remarkable. This transformation was actually concomitant, by scholars and theorists, with rational impulse to justify the brisk and eager strides towards this model of justice. Undoubtedly, the theoretical basis of the restorative justice has best been rationalized through the implementation of the Empowerment theory as without which or without any rationalization, this paradigm would be seen as if it cropped up, and then would suddenly disappear.

1.1. Gist of Empowerment Theory

Empowerment is defined as “the capability of some people and organizations to induce intended, foreseen and unforeseen effects on others”⁽³³⁾. It might also be defined by us as: a process of enabling the people and societal institutions by furnishing them with tools of change and leverage.

Wallestein perceives empowerment as a social process that aims at catalyzing the participation of individuals and community toward increasing the personal and social influence, the quality of community life and the social justice⁽³⁴⁾. It has become a vital construct to ameliorate the status quo of both community and individuals⁽³⁵⁾.

The Empowerment could, as Moscovitch and Drover stated in the gist of their book⁽³⁶⁾, be comprehensible through exploring the concept of both power and powerlessness. They clarified that the nature of the class-dominated- society implies that a small number of individuals do have either political or economic power, while the vast majority of people do have little or nothing. On the

(33) Cornell Empowerment Group, (1989), Empowerment and Family Support, (1) 2, Networking Bulletin, P. 7.

(34) Wallestein, N. (1992), Powerlessness, Empowerment and Health: Implications for Health Promotion Programs, 6 (3), American Journal of Health Promotion, Pp. 197-205.

(35) Douglas D Perlens, Marc A. Zimmerman, Empowerment, (1995), Theory, Research, and Application, American Journal of Community Psychology, P. 571.

(36) Moscovitch, A., Drover, G., (1981), Inequality: Essay on the Political Economy of Social Welfare, Toronto. University of Toronto Press.

individual level, the powerlessness can be perceived as the anticipation of the individual in a certain community that his/her own actions are in vain to influence the outcomes of his/her life events⁽³⁷⁾. Avidly, Lerner went one step further by making a difference between the real powerlessness and surplus powerlessness⁽³⁸⁾. Whilst the real powerlessness stems, according to his belief, from the repressive control used by some persons or institutions, the surplus powerlessness revolves around the ingrained thought that the change will not take place, and thus, this passiveness gives rise to absolute apathy and unwillingness to strive for gaining some leverage⁽³⁹⁾, in particular when the individuals with a fragile economic and political power are bereaved of the means for fetching more control and more resources in their lives⁽⁴⁰⁾.

In a bulk of research, empowerment has been linked up with the personal leverage, through which the individuals' opportunities to have control over their own lives, becomes an enhanced reality⁽⁴¹⁾. The people are aware of what they need better than anyone else, and then should be given the power to delineate, and work on, them. For this end, the people are in a dire need to get information about themselves and their environment in order for them to be eagerly prone to work with others and induce, as best described, a process of change⁽⁴²⁾.

The theories of Empowerment include both process and outcomes, and they vary in their outward patterns, but the discrepancy between empowering the process and empowering the outcomes is a pivotal issue to define the Empowerment Theory⁽⁴³⁾. For the individuals, to empower processes might mean participation in the community's institutions, while it means, for the community, the collective leadership and shared decision making. On the other side, the empowered outcomes are pointed to the operationalization of empowerment that leads to examining the ensuing effects of empowering processes. The "specific-situation perceived control" might, for individuals,

(37) Keiffer, C., (1984), Citizen Empowerment: A Development, *Prevention in Human Services*, 3 (16), Pp. 9-35.

(38) Lerner, M., (1986), *Surplus Powerlessness*, Oakland, (A) Institute for labor and Mental Health.

(39) Ibid.

(40) Albee, G, (1981), Politics, Power, Prevention, and social Change, in *Prevention through Political Action and Social Change*, J. Joffe, G. Albee, (eds), Hanover and London, University Press of New England.

(41) See Rappaport, J., (1987), Terms of Empowerment: Examples of Prevention Toward a Theory for Community Psychology, 15 (2) *American Journal of Community Psychology*, Pp. 21-48.

(42) Cornell Empowerment Group, Op. Cit, Pp. 8-10.

(43) Douglas D. Perkins, and Marc A. Zimmerman, Op. Cit, P. 570.

be, as Douglas and Zimmerman contend, the sound connotation of the empowered outcomes⁽⁴⁴⁾. In their outmost reaches, the empowered outcomes for community include the existence of both organizational partnership and accessible community resources.

1.2. Interpretation of the Empowerment Theory from a Legal Perspective

The legal empowerment is about strengthening the capacity of all persons to exercise their legal rights as either individuals or members in a community. It is a theory that is oriented to making certain the law is not restricted to courts⁽⁴⁵⁾, but it is comprehensible and approachable to all lay people. As a theory, the legal empowerment is common throughout the world under different appearances, including but not limited to, legal empowerment as such, access to fairness, poverty, empowering women, human rights, and legal equity.

The empowerment provides an individual with the necessary legal tools with which to better challenge the dilemmas that afflict him. In other words, to legally empower persons is to help them ferret out solid resolutions for daily legal problems even when the environment is stained with arbitrariness or unfairness as with this theory and in this situation, it can be said that justice is possible. It has been theorized that on account of the lack of power, the people might be incapable of seeking justice, and the fact that the incapability of seeking justice encompasses a wide segment of population, requires no proof. Thus, the change is, in this case and in ad hoc cases, is extremely required. The question raised in this context is what should be done to create such change. Often, non-judicial strategies would be more effective than allegation in resolving a dispute, in particular when the humane relations need to continue with the consent of the community or parties.

Paralegals play often a pivotal role for the programs of legal empowerment that combine a board of attorneys with a forefront of paralegals or non-attorneys who are much close to a community the wrongdoing or offence was committed in, and possess a wider range of tools than other attorneys do. This combination is supposed, in a legal context, to strike balance between

(44) Ibid

(45) Open Society, Justice Initiative, Legal Empowerment: An Integrated Approach to Justice and Development, (2012). Available on <https://www.opensocietyfoundations.org/sites/default/files/lep-working-paper-20120701.pdf>. Visited on 23\11\2017.

the rights and obligations of individuals⁽⁴⁶⁾, and both are to be energetically buttressed by their communities and self-organizations.

The legal empowerment is actually focused on the marginalized or lowered members of a community, and it is thought a set of means might, in a legal proceedings, be resorted to snowballing the voices of those members by increasing the involvement of local communities in the process of criminal justice.

We think the empowerment as a tool of change is built, in the criminal proceedings under the guise of the restorative justice, on three elements:

First: the acknowledgement of the problem and its implications does require a swerving, to some extent, from the conventionalism of the current criminal justice, and for getting this acknowledgement, it is important that the individuals and local community be realized that their role in triggering the legal influence is an inexorable matter, because they are more able to understand what they need than anyone else. To trigger the legal influence is not a passing vogue, yet it is a long-life pursuit, and this is what they should comprehend.

Second: involvement in the process of criminal justice, and not only leaning upon others in making judgements about their own lives. Significantly, it seems for us that the purport of this involvement exceeds the bounds of this outward purpose. The restorative justice interventions play a vital role in generating what is called “the hypothesis of the reversal of moral disengagement”. In his meticulous analysis of why restorative justice interventions do function as they do, Barton gives much regard to this hypothesis to vindicate the new paradigm⁽⁴⁷⁾. When an offence or wrongdoing is committed, both parties (offender and victim) are prone to curbing their consciousness by different means as an attempt to justify their behavior. The restorative justice interventions play, as he contends, a momentous role in moral re-engagement. In well-run restorative meetings and group circles or conferences, the victim and other affected persons recount to the offender the harm and distress caused by him, and this might prompt him to internalize the tools of moral re-engagement regarded as very important in the criminal justice as a means to both reintegrate the offender into the community and restore the victim.

At the first blush, it might thought that this hypothesis was merely invented

(46) Ibid.

(47) Charles Barton, (2000), *Theories of Restorative Justice*” Vol. (2.1) No. 1, Australian Journal of Professional and Applied Ethics, Pp. 41-53.

as a need for the mechanisms of the offender's, not the victim's, moral disengagement to be challenged. The truth is the well-run meetings between the victim and the offender are considered as a good technique for the victim to obviously see the genuine penitence and humanity of the offender, and this technique could subsequently lead to a change in the victims' view of the offender. This process has been seen as crucial for the victim to forgive, and probably reconcile, the offender.

Third: commitment to the outcomes brought about by the various tools of empowerment. Of course, not only is the desired commitment legal, but also what is hidden beyond this commitment will be meaningful and evocative of vivid moral ends.

Morality is a socially constructed actuality, and it an inescapable means for social cohabitation. Even though the outmost end of the restorative justice is to reach a satisfactory socio-legal settlement among the stakeholder embroiled in a dispute, this settlement would be inchoate if it were not concomitant with a moral transformative in the offender's behavior. As the restorative justice interventions are prospectiveness-oriented, the settlement must be associated with moral enculturation, ensuring that the bad behavior will not be repeated by the offender in the future. Otherwise, the offender will surely fail to revert to the moral ligament, and thus, fail to give weight to social and moral values, and become a source of threat and gloom, not only for himself, but also for the victim and their shared community⁽⁴⁸⁾.

Reverting to the moral ligament is dependent upon the proper means to be accepted by the offender for repairing the harm. On the other side, for the victim to be content with any settlement, he needs to see the offender come back to the moral ligament so that he feels peace and not susceptible to any imminent threat.

3. Phases of Divergence and Convergence of Restorative Justice with its Retributive Counterpart

In this section, the paper turns to striking a comparison between both paradigms (retributive and restorative). This comparison is not an end in

(48) For more details see Von Willigenburg, I., (1996), *Criminals and Moral Development: Towards a Cognitive Theory of Moral Change*, in Henry Tam (Ed), *Punishment, Excuses, and Moral Development*, Brookfield, Ashgate Publishing Company, Pp. 127-141.

itself as much as it is essential to emphasize that as a process-based approach, the restorative justice does cross swords with the retributive justice, but both are in agreement whenever the matter relates to both salient theories of retributivism and utilitarianism that infused life in the retributive paradigm. In reality, to prove that the restorative justice has virtues, does not absolutely connote that it outperforms the other. Rather, its purpose is to foment the heated discussion of the new paradigm to know how and why it has still gained tremendous plausibility.

3.1. The virtues of Restorative Justice vs. the Vices of Retributive Justice

The light-footed movement, by a considerable number of legal systems, towards the restorative justice interventions has been perceived as a great stride in attempt to reforming the concept and ends of the current criminal justice. The incessant critique and the bone of contention have, in this context, been focused on the fine-grained anatomy of the current traditional criminal justice. Most restorativists have concluded that the conventional responses to the crimes have a little chance to do better than they have so far done.

Undoubtedly, the new paradigm brings the victims forward as a key constituent in the criminal process. Indeed, the revered virtues of the restorative justice go beyond the victim to encompass the offender and their concerned communities. Generally speaking, the victims and their families do not have a legal status in the criminal proceedings, and have no bearing on the case, whatever it is, except through the court appearance to give testimony, and without this appearance, they are flatly absent from the legal process⁽⁴⁹⁾. Furthermore, the prosecutors do not consult the victims in their dealing with the cases of victims' serious concern. In most cases, they show little concern to the victims' view, remarkably in both determining the plea of bargain and making the final decision⁽⁵⁰⁾. Given the prosecution do the best to get the victims acquainted with the headway of their case, there is an evident disregard for the victims stemming from the "marginalization" idea that is homegrown in the criminal

(49) Zvi D. Gabbay, (2005), *Justifying Restorative Justice: A Theoretical Justification for the Use of Restoration Justice Practices*, (2) *Journal of Dispute Resolution*, P. 351.

(50) George P. Fletcher, (1995), *with Justice for Some Victims' Rights in Criminal Trials*, Addison-Wesley, Pp. 190-193.

law per se⁽⁵¹⁾, they still remain a foreign element in defining the crime and in the procedural laws, governing the criminal proceedings⁽⁵²⁾.

In fact, the theory of criminal law is inherently structured on proving the elements, constituting crime, and if these elements have been proved beyond reasonable doubt, the process will then be turned towards determining the appropriate punishment to be imposed on the offender. Therefore, the focus is firstly and lastly on the offender, and on guarding the state interests, and not those, which are relevant to the victim.

Arising from this theory, Barton argues that the conventional retributive justice system fails to acknowledge that the wrongful and criminal acts are considered as a violation of certain individuals, to be precise the victim of the crime, not the state, and thus it is the victim who is the primary and legitimate suitor against the offender in a criminal justice reaction⁽⁵³⁾. In a nutshell, the crime is, in the retributive justice, seen as a violation of the rules and as a harm to the state, while it is, in the restorative justice, seen as a violation of both the victim (whenever he is identifiable) and the society.

On the strength of this discrepancy between both paradigms, it is conspicuous that the state's status in the retributive justice is central as long as it is controlled and run by the state itself and legal professionals, while in the other model, justice is overseen by the state, but usually driven by the community. Since the 1970s, this bare fact has been of minute scrutiny, and regarded as a springboard towards forsaking the extreme adherence to the punishment imposed by the state as a sole and most legitimate expression of the ability to fulfill the appearance of justice.

We believe that to grapple with this fact, it is essential to dispel the fog spreading all over the restorative justice by arguing that according to the current criminal justice, the parties of a dispute do feel that they have no power over the responses and outcomes, which are decided and then imposed upon them by others. The decisions made by the professionals will give rise to less contentment of the parties, perhaps unjustly, than the same decisions would have if they were reached by them through a dynamic process bringing together the victim and the offender.

(51) George P. Fletcher, (1999), "the Place of Victims in the theory of Retribution", 3 *Buff. Crim. L. Rev.* P. 51.

(52) Zvi D. Gabbay, *Op. Cit.*, P. 35.

(53) Charles Barton, *Op. Cit.*, Pp. 41-53.

The reason why this fundamental dichotomy normally occurs, is because the professionals, no matter how much competent they are in their field, have no detailed knowledge to successfully address the needs of justice and welfare related to the main parties in a criminal dispute. The stakeholders themselves and their close communities of care have detailed knowledge for needs and circumstances, and thus they can keep up with the adequate and profitable responses to the criminal conduct, its roots, and its ensuing consequences⁽⁵⁴⁾.

The symbolic meanings, manifest in what the restorative justice interventions endeavor to, are of reverence whenever they boost the chances of repentance and forgiveness among the stakeholders as well as reintegration of the offender into the community in contrast with the retributive criminal justice which condones these meanings and gives heed only to blaming, stigmatizing, and punishing the offender.

The long-term protection of the public mandates a concentration on both parties as the restorative justice discards the discrepant outcomes by contriving the proper atmosphere to arrive at win-win outcomes in lieu of win-lose outcomes, characterizing the retributive criminal justice.

3.2. Compatibility of Restorative Justice with the Theoretical Basis of Retributive Justice

In all legal systems dominant in the world, and through history, the philosophers developed their theories to explain and justify the criminal penalty. In fact, both theories of retributivism and utilitarianism played an unprecedented role in the sentencing-policy in most legislations. In practice, these two theories have had a robust influence in justifying the punishment inflicted upon the offenders, who committed any of the crimes enumerated in the Penal Act. Because of the restorative justice as a process-based- approach is structured on bringing forward an alternative process to the role of punishment, the question posed here is: what is the nexus between these two theories and criminal justice. In what follows, we seek to hunt up what legalizes the use of restorative justice by proving that it goes hand-in-hand with the key elements for the theories of retributivism and utilitarianism that must continue to perform a role in the criminal justice system⁽⁵⁵⁾.

(54) Ibid.

(55) Morris B. Hoffman, (2007), *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*” (29) *Fordham URB. L. J.* Pp. 2063, 2081.

3.2.1. Compatibility of Restorative Justice with Retributivism

The basis of the retributivism theory is built on the hypothesis that the injury caused as a result of the act is turned to society, not the victim⁽⁵⁶⁾, and without focusing on the crime and the injury inflicting on society, Hegel, who was way ahead of curve with his research into criminal justice, promulgated that the punishment would then be no more than a personal retaliation⁽⁵⁷⁾. Therefore, the reaction of the public and the infliction of the punishment on the offender pursuant to the principle of the “just desert” are the gist of retributivism, and to concentrate on other goals other than this core will inexorably be irrational⁽⁵⁸⁾. In other words, justice cannot be grabbed without the offender, and the punishment to be inflicted upon him is imperative, and by inflicting the “just desert”, society expresses its abhorrence of the offender’s conduct. As long as the punishment is fit and equal to the crime, any other merits will be inferior to the main goal for the “just desert”⁽⁵⁹⁾. This reasoning outwardly seems in contrast to the restorative justice leaning on a specific harm caused to a specific victim.

However, our argument herein tries to find what makes the restorative justice compatible with retributivism. The first points of convergence between this new paradigm of justice and retributivism can evidently be found in their basic structure. The punishment, as Hegel states, is not imposed on the offender by society, but by the offender himself, who deliberately breached the law and faced up with the repercussions of this breach⁽⁶⁰⁾. Breaching the law and the morally culpable conduct of the offender oblige the state to punish him. Therefore, the criminal offence is, as Gabbay states, a call for action that requires punishing the offender by the state⁽⁶¹⁾, and accordingly, he added, the punitive structure is very compatible with the offender accountability principle on which the restorative justice is based as well⁽⁶²⁾.

From the perspective of restorative justice theorists, the criminal offence obligates the state to set an action in motion in order to face up to the crime

(56) George Wilhelm Friedrich Hegel, (1967), *Philosophy of Right*, (T.M. Knox Trans, Oxford Uni. Press) Pp.140-141.

(57) *Ibid*, at 140-141.

(58) Immanuel Kant, (1986), *the Metaphysical Elements of Justice*, (John Ladd Trans. Macmillan) P. 101.

(59) *Ibid*, at 102.

(60) George Wilhelm Friedrich Hegel, *Op. Cit*, at 70.

(61) Zvi D. Gabbay, *Op.Cit*, at 376.

(62) *Ibid*.

and repudiate its effects and this is exactly the case in the retributive justice. However, the fine line between the two paradigms is that the restorative justice goes beyond the crime itself and look back at the offender requiring his accountability.

No doubt both paradigms contemplate the past events to prescribe the moral obligations, and the nexus between the past criminal conduct and the prospective commitment imposed on both society and offender is a central pivot for the two paradigms. Hence, the idea of state obligation is incarnated in both paradigms, but the restorative justice is oriented to close and intimate communities and parties' family. In theory, it never rebut the state obligation, rather, it does actually cement the justification of the imposition of obligations upon the offender.

In this context, it seems, at the first blush, that there is a gap between restoration of justice and reparation of the harm, but a different reading for the concept of justice can bridge this artificial gap between them, and considering the suffering of the victim as a fundamental part of the retributivism theory could fortify it. Most significant is to grasp that the relation between the offender and the victim is rather special, giving the offender a form of preeminence that means his appearance because of his being a main party in the legal action, is more important than the victim owing to his spreading throughout the process of establishing justice, including but not limited to, interrogation, apprehension, arrest, trial, and then the punishment. This preeminence extends to encompass reparation of the victim⁽⁶³⁾, and thus, as long as the punishment to be inflicted upon the offender is the "just desert", any other elements such as the suffering and struggle for repairing the harm are elements determined by the theorists of retributivism⁽⁶⁴⁾.

Going deeply into the nexus between the two paradigms appears for us that there has been a common misunderstanding of the restorative justice's perception of the punishment, and therein lies the perplexity. Whilst the retributive justice endeavors to restore justice through the infliction of the punishment, it has wrongly thought that its counterpart rummages around looking for alternatives to the punishment to avoid thereof. The fact is that the restorative justice never reject the punishment in itself. Rather, it draws attention to a new perception of the punishment by creating newfangled forms of it.

(63) In the same stream, see George P. Fletcher, (1999), *Op. Cit.*, at 57-58.

(64) See Zvi D Gabbay, *Op. Cit.*, at 377-378.

The chronological development of the punishment's conception has been continuously recurrent due to the unremitting change of the punitive philosophy with which the conception of the punishment is accordingly changeable. The most noticeable definition of the punishment connects it with the intention of imposing pain whether through incarceration or fine, and the intentional infliction of pain seems as though it is an explicit condition for determining the punishment.

Adhering to this definition might be rather illusive as it makes its scope very narrow and exclusive to monotonic patterns of it. This saying entails that non-punitive measures, rehabilitation, and the mechanism of reintegration are excluded from the purport of the punishment because the intention of pain therein is absent. We think that sticking to this narrow definition is inconsonant, apart from the restorative justice, with the calls for reforming criminal justice, and stands even as an impediment to the adoption of what is called "alternative penalties system" most legal systems have, nowadays, shown an intense interest in making them an indispensable part of their punitive premise. In this inventive system, many penalties have been inserted into the legal provisions as alternatives to the conventional penalties, namely short prison sentences, infused into mind as if they are the sole penalties that must ever be dominant. Thus, who can say that community service, censure, reprimand, judicial supervision are not penalties. Of course, according to the narrow definition of the punishment, they are not so, even if they are somehow painful by reason of the lack of the intention to trigger pain. On the same order and for the same reason, the restorative justice interventions will surely lose their equilibrium.

Moving away from the narrow definition of the punishment, becoming somewhat archaic to shedding a penetrant gaze on the broad definition of it proves that restorative justice does never disown the punishment. Rather, it gives great momentum to its concept, and presents newfangled patterns that allow a legal system maneuvering and steering in different directions on occasion. According to the broad definition, the punishment is defined as an unpleasant burden imposed upon the offender, and this definition has three characteristics:

First: the intention to trigger pain has no longer been part of the punishment.

Second: the adjective "unpleasant" has less bitterness than the word "painful" does have.

Third: the classic or archetypal forms of punishment, such as incarceration and fines, have been superseded by an elastic term (unpleasant burden), allowing to encompass innovative ways of it.

Accordingly, the restorative paradigm puts the offender on the path that is not paved at all, brimful of challenges, some of which are tangible and others are symbolic, but all can best described as “unpleasant”.

The face-to-face meetings with a resentful victim, family, and close community might be regarded as a burden on him, and in order for him not to be a burden to his community, he should comply with the process of his reintegration into the community⁽⁶⁵⁾. The social reactions to his obnoxious behavior place the offender in an unpleasant position as though he is in a bitter duel. Furthermore, the experience through which he has gone is beset by challenges of how to learn the right things and eschew the other wrongs, it is not a journey of overwhelming happiness. Rather, it is a journey to a happy destination.

The effectiveness of such unpleasant burdens, including compensation of victim of crime by the offender, might not fructify as we wish, unless they are complementary to the classic sanctions, and this has been the case to this point. To consider such unpleasant burdens as part of the punitive system is a way to romanticize our criminal justice as a whole.

3.2.2. Compatibility of Restorative Justice with Utilitarianism

Unlike the retributive theory that clarifies the robust relation between the offender’s past conduct and the violated norm, the utilitarianism theory goes beyond the phase of the infliction of the punishment, whereby the punishment is rejected, unless the general goal all legal systems endeavor to, which is to boost the whole happiness of the community⁽⁶⁶⁾ has been achieved. Then, should this goal be ruled out, the punishment will be no more than an “evil” deed as vividly described in this respect by Bentham⁽⁶⁷⁾.

However, for the reason that the punishment is designated to be as a tool to face up to the offender’s moral past conduct, its focus is to be on the wrongdoing,

(65) In the same vein see Kathleen Daly, (2000). Revisiting the Relationship between Retributive and Restorative Justice, in Heather Strang & John Braithwaite, *Restorative Justice from Philosophy to Practice*, Pp. 39-40.

(66) Jeremy Bentham, (1982). *An Introduction to the Principles of Morals and Legislation*, (J. H. Burns and H. L. A. Hart (eds), P. 158.

(67) *Ibid*.

not wrongdoer. In return, the Utilitarianism theory was not dreamt up to restore morality as the law is, for utilitarianism theorists, not about morals, but about defending the public's liberty and keeping society integral. Furthermore, Gabbay differentiates between the conduct in itself that breached the law and the offender, who perpetrated the wrongdoing⁽⁶⁸⁾.

He added as long as the Utilitarianism is irrelevant to morality, but relevant to the offender violating the law, the punishment should be given as much latitude as it is crucial to attain the public welfare⁽⁶⁹⁾. It has, therefore, been conceded that since the retributivism perceives the offender as the one who violated the law, the utilitarian punishment "must" be "fit" the offender, not the offence.

For this end, the criminal legal system persistently try to broaden the circle of the punishments imposed upon offenders. Subsequently, it can be stated that the restorative justice and the Utilitarianism are compatible. It emphasizes the role of the wrongdoing as a basis for the offender's moral obligation towards both victim and society, but simultaneously, it does never disown the utilitarian aspects of the punishment. Rather, it tries to re-boost such aspects.

Likewise, the restorative justice never accepts the infliction of the punishment merely because the offender deserves it. Rather, it accepts the assumption that the past wrongful behavior creates prospective obligations, but it does not perceive such obligations as the only goals for them. The infliction of the punishment does not imply that the offender is a morally pariah. Therefore, the restorative interventions are considered as forward-looking aiming at reintegrating the offender into society as one of their key objectives.

Of the utilitarian objectives that can potentially be attained by the infliction of the punishment is the general deterrence (detering the other potential offender from committing the crime and allaying the severity of the crime that was committed⁽⁷⁰⁾). Another objective is termed "specific deterrence", which means deterring the offender from re-offending in future. Obviously, restorative justice seems as though it goes hand –in- hand with the utilitarianism theory, whereby punishing offenders is justified, if by doing so crime can be scaled down. Remarkable studies have empirically demonstrated that restorative

(68) Zvi D. Gabbay, *Op. Cit.*, at 382.

(69) *Ibid.*

(70) Jeremy Bentham, *Op. Cit.*, at 165.

interventions shrink the rates of recidivism⁽⁷¹⁾. In other words, the restorative processes have astonishingly seen as a desired means of responding to crime achieving the specific deterrence.

On the other hand, heavy doubts have spread over the efficacy of restorative justice to achieve the general deterrence, and whether it is a remedy of great efficacy in its confrontation with potential offenders, and whether it is, as a soft power, capable of attaining this noble goal instead of mere intimidation.

Indeed, indefatigable efforts, theorized about social reactions to crime, have been devoted to dispersing such doubts. The people respect the law when they feel that their intimate community condemns any violation of law, or when they believe that the others they respect perceive the law as being deserved of compliance.⁽⁷²⁾ Other social theories concentrate on the hypothesis, whereby people obey the law when they view themselves as moral human beings, and herein the internal morals, considerably revered by their community, and the external norms labeled “the same actions right or wrong”⁽⁷³⁾. Thus, when the violation of law and immorality are in parallel, they will refrain from committing crimes.

In this context, Melia recapped that debate on the relation of the restorative justice with Bentham’s general deterrence by inventing the “positive general deterrence” that was premised on social theories. According to this term, the general deterrence can best be sought by strengthening and buttressing the fundamental norms proscribing the criminal conduct instead of resorting to mere intimidation and threat of inflicting pain in case of non-compliance⁽⁷⁴⁾. And this is the case in the restorative theory.

(71) See for details Jeff Latimer, Craig Bowden, and Danielle Muise, (2005), the Effectiveness of Restorative Justice Practices: The Meta- Analysis, (85), the Prison Journal, at 127, 135. Stacy L. Young, Timothy G. Plax, and Patricia Kearney, (2006), How Does Meta-Analysis Represent our Knowledge of Instructional Communication? In Barbara Mac Gayle et al. (Eds), Classroom Communication and Instruction Processes: Advances through Meta-Analysis, at 379. A bulk of the research refers to a positive connection between the restorative justice and recidivism or decrease in recidivism, but very few studies indicate the opposite.

(72) Paul H. Robinson, and John M. Darley, (1997), the Utility of Desert, (91) New. U. L. Rev. 453, at 468-470.

(73) Ibid, 469.

(74) Manual C. Melia, (2004), Victim Behavior and Offender Liability: A European Perspective” (7) Buff. Crim. L. Rev. Pp. 513, 514.

4. Serious Misgivings Standing under the Blue Sky of the Restorative Justices

Notwithstanding the go-getting strides towards the reconceptualization of the current criminal justice as a court sentencing process, and then kneeling down in front of the restorative justice, perceived as a long-sought objective, its implementation as a substitute for the retributive justice has evermore been encircled by enigmatic misgivings and issues. In practice, on account of these misgivings, its path is not, as many believe, paved. Rather, it remains wilding and beset with real risks, in particular, when it is intended to be the sole paradigm that should flood the other, namely the retributive criminal justice.

Due to the nature of the restorative justice viewed as an informal form of justice, the settlement reached by the concerned participants, including victims, offenders, and their close community as well as their family, might be of skepticism. This is because the preference of the victim could be ardently preponderated through its processes. Although the restorative interventions anticipate the participants will hold negotiations about what the acceptable resolution is for the participants, the ensuing settlement, whether it is lenient or rigid, is usually contingent on the victim's consent⁽⁷⁵⁾. Therefore, the case-by-case negotiations will definitely give rise to inconsistent and arbitrary outcomes, particularly in the absence of guidelines or restrictions on the sphere of settlement.

Additionally, some researchers referred, in an important study, to another potential risk⁽⁷⁶⁾. They concluded that such alternative resolutions could aggravate the risk of prejudice against susceptible disputants. To demonstrate the seriousness of this risk, they invoked some studies on social sciences revolving around the effect of prejudice on the concept of justice. These studies had come to a conclusion that the formal justice is disposed to curb prejudice, while informality is disposed to increase it⁽⁷⁷⁾. Subsequently, the existing prejudice might actually threaten the preeminence of the restorative justice as any mere appearance of it will certainly overturn the concept of justice as a rubric, none of the dominant legal systems must go beyond. Suffice

(75) For more details see Richard Delgado, (2000), *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, (52) STAN. L. Rev, 751, Pp. 759-760.

(76) Richard Delgado, Chris Dunn, Pamela Broun, Helena Lee, and David Hubbert, (1985), *Fairness and Formality: Minimizing the Role of Prejudice in Alternative Dispute Resolution*, Wis. L. Rev. 1359.

(77) *Ibid.*

it to say that it a cogent argument that the restorative justice was developed to empower the poor and marginalized people in the whole society, and the appearance of prejudice undermines its stature in the eyes of the public, because its interventions might make the parties of a certain dispute vulnerable to social, or even racial discrimination.

The fact is, however, that although the restorative justice brings forward an impressive image in the context of ameliorating the current criminal justice, this image has still been blur. Of no less importance for re-boosting this ambitious paradigm is to address other relevant philosophical issues prior to deciding that it should deflect the other paradigm from being dominated over criminal justice. These issues revolve, first and foremost, around the concept of justice per se, and the issue herein is who decides the sought justice, and who has interest in restoration (victim, offender, their close community, in which the offence was committed, or society as one entity).

Another issue relates to the role of state in having control over punitive policy as to strike balance between the victim-offender restitution, and justice or societal order requires that the state to be on, not behind, the scene as being a legitimate guardian standing beside individuals' fundamental rights and freedoms.

In practice, it seems that restorative interventions might run smoothly without philosophical complications whenever the victim is identifiable, or ambitiously whenever the harm inflicted certain individuals. However, to give the restorative justice, as a sole paradigm, a free rein to be dominated over criminal justice, must not be taken as a given in dealing with all criminal cases. The pivotal question posed in this context is what the case is if the crime was committed against society itself, and this is conceivable whenever there is no specific victim in some crimes, known as victimless crimes⁽⁷⁸⁾, such as prostitution, outrageous actions perpetrated in public, and gambling. The offender owes, indeed, debts to society in such cases⁽⁷⁹⁾. Even in the crimes where the social fabric is affected such as hatred crimes, the question herein flares up about who has the power to forgive the offender. It is true that in such cases the victim is specific, but the circle of affected people is clearly so

(78) For more details see Richard Dagger, (1980), Restitution, Punishment, and Debts to Society, in Joe Hudson and Burt Galaway (Eds) Victims, Offenders and Alternative Sanctions (Lexington, Lexington Book) P. 5.

(79) Ibid, at 3-7.

widening, and the question remains standing: can the individual condone the repercussions of the crime on behalf of other affected people?

5. Conclusion

Since its incipiency, the restorative justice paradigm has seemed as though it moves apart, and awash in irreconcilable contradictions with its retributive justice counterpart.

This saying might be true if it is viewed from a conceptual perspective, and not true from another perspective. From perspective of its general concept, the restorative justice is a paradigm that brings forward a newfangled vision for administrating the criminal lawsuit, solely based on process. This, therefore, required re-conceptualization of restorative paradigm being as it much focuses on indispensable values alongside resolving the dispute on a basis of social reform.

In return, this study has concluded that the restorative justice system is compatible with retributive justice with respect to the two theories of retributivism and utilitarianism, upon which the latter is based, and on account of this conventionally rooted theoretical basis, the retributive justice has gained general acceptance and hence got the upper hand to other models. Thus, both theories cannot be invoked to devalue the essence of the restorative justice paradigm.

Another conclusion is that the restorative justice in its current guise is congruous with the needs of criminal justice. Yet, for the reason that there have been some philosophical issues and real risks, invincible as yet, the restorative justice model has still been tottering to be overwhelmingly incorporated into the realm of the current criminal justice systems, notwithstanding how much veneration it does have.

It is believed that the typical approach is not to rummage around looking for a model that overcomes the other models. In this context, our incipient perception is built on four elements:

- First, the restorative model should be seen as part of, not as a substitute for, the current criminal justice.
- Second, the judiciary should have a pivotal role, even remotely, in administrating restorative justice intervention.

- Third, the implementation of this model as a first step should be confined to non-serious or non-severe crimes wherever the victim is identifiable.
- Fourth, failure to reaching the sought outcomes makes the implementation of the retributive justice an inescapable matter.

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