

Investigating the Restorative Justice's Potential Capacities and Challenges

Abstract

The present study aims at investigating the potential capacities and challenges of restorative justice. The study method is descriptive-analytical through the use of library resources. The investigations showed that not only processes with the required properties and scales are rarely witnessed in restorative justice but no effect has also been made by the prior criminology stream, i.e. supportive victim identification, thereon in the Islamic penal codes of law and Imamiyyeh jurisprudence. However, Iran's criminal justice system and its canonical infrastructures feature a lot of lofty restorative justice potential enabling the utilization of the restorative justice's thoughts and processes. But, the specialness and technicality of guiding the restorative justice's processes for accomplishing the goals have caused the required familiarity in the legislative aspect as well as the needed training and instrument in the executive aspect not to have been prepared. The study findings are indicative of the idea that there are jurisprudential and legal challenges and limitations in the supportive institutions, such as legal gaps, extreme insistence on the jurisprudential basics, and judges' insufficient attention to such institutions in the implementation stage, for the proper execution of the restorative justice.

Keywords: *Restorative justice's challenges, Supportive victim identification, Legislative aspect, Executive aspect.*

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Introduction

Restorative justice is a philosophical structure offering another type of mindset and thought about crime and criminal justice; it is a modern way of thinking about crime and the quality of responding thereto. Considering the criminal policy approach adopted by the Islamic Republic in the legislation of the new penal regulations as tangibly felt in 2013's penal codes of law, the position of restorative justice (paying attention to the victim), as well, is found almost elevated as compared to the same position in the prior laws.

There are regulations in substantive laws executed during the penal investigations and can provide proper conditions for running a restorative process, reaching a solution, and setting executive legal mandates during the implementation with the consideration of the victim's rights. The penal law is not the only proportional means for the correct pursuit and appropriate support of legitimate expediencies and norms. While all the instruments existing in the legal arsenal should be applied, the penal laws would be the last tool that should be taken into account. This tool should be used only when the private and administrative law regulations and their specific legal mandates do not have the required ability to accomplish the legislator's objectives. It is exactly due to the same reason that penal mandates are regarded as assisting instruments in contrast to the other legal mandates¹.

Considering the problems of traditional restorative justice, such as the insufficient paying of attention to the victims and society's rights and position and, in general, the criminal justice confiscation by the governments, the grounds were set

for the appearance of the restorative justice and the use of its executive methods in many of the world's countries. The restorative justice teachings gradually too positions in Iran's penal laws, because Iran's penal system features a high capacity due to the diversity of the tribes and the ancientness of the legal civilization, the existence of various kinds of pseudo-judicial culture and norms, and the enjoyment of Imamiyyeh jurisprudence's teachings. Being impressed by these vernacular resources and the comparative studies' accomplishments, the Iranian legislator has paved the way for the implementation of restorative justice in Iran in its recently approved regulations.

The present study deals with the restorative justice capacity of Iran's penal laws in light of 2013's Islamic penal codes of law and 2013's criminal trial procedures and Imamiyyeh jurisprudence, thereby examining the potential capacities and challenges of restorative justice in Iran.

Potential Capacities of Restorative Justice:

1. Investigating the Restorative Justice Theories with an Approach to Criminology and Psychology:

In the reparative processes, the conditions are in such a way that the criminals can criticize and evaluate their behaviors and, in case of finding them not following the ethical scales and norms and values and social customs, try repelling and correcting them and, contrarily, corroborating the positive deeds and behaviors and ethical virtues. Such a feeling as shame which is per se the product of this self-criticism and self-evaluation, emerges when a person does not consider his or her behaviors and deeds based on the ethical indices in this process

¹ Gholami, Hussein, (2012), "the principle of the minimalist penal law", seasonal journal of penal laws, 1(2): 45

of self-assessment and self-evaluation; better said, such persons feel anger upon the exhibition of bad deeds and try correcting them. "Such anger on oneself and the feeling of shame paves the way for an internal revolution and change and evolution."

Victimization or the suffering of a crime causes the victims' distrust of the social environment and efficiency of the institutions safeguarding the public security, reduction in the controls and curbing over the life realities, feeling of extreme dread and psychological insecurity, and reduction in the amount of the social-economic activities, possibility of insult and insolence to the victim hence reduction in their social stances; also, disorder and disintegration may be created in the relationships between the victim and the society following which a lot of extravagant expenses should be made for the restoration of the situations which can be done only in some of the cases. The toleration of inability and disability resulting from victimization, especially in crimes against physical integrity, and continuation of life with such experiences that result in the decline of life in the victims and their family members or their relatives is also another considerable matter². In many studies, much emphasis has been placed on the role and effect of victimization, especially during childhood and adulthood criminalization. Childhood and adulthood criminality should also be known as childhood victimization results, specifically adulthood criminalization costs. This way, besides policy-making for preventing criminality and recidivism, the prevention of victimization and, especially, repeat victimization prevention is another area of policy-making that should be taken into account. The notable point is that an important part of the repeat victimization reasons should be sought in the formal structures like the crime discovery and pursuit institutions, trial, and sentence enforcement. Moreover, the non-creation of the victims' supportive mechanisms and the mere formal-penal response to the criminals are, in many cases, ground-setters for repeat victimization.

Restorative justice, intermediary programs, and dispute resolution can be useful for reducing incarceration terms. Serious efforts to resolve the disputes between the criminal and the victim in some of the systems are among the factors contributing to the reduction of such a problem. Such efforts should be made before (or during) the trial. However, due to the scarcity of research in the area of the effects of loss compensation programs, restorative justice, or dispute resolution between the criminals and victims on the

punishments and populations of the prisons, it is difficult to evaluate the capabilities of restorative justice intermediation and loss compensation.

2. The Examples of Restorative Justice's Potential Capacities:

Iran's geographical-cultural position (a) and the Iranian society's legal anthropology situation (b) have made it a proper ground for restorative justice, considering the cultural, social, and tribal diversities therein.

The legal anthropology of Iranian tribes indicates that each uses its own pseudo-judicial culture and rituals to resolve intra- or extra-tribal disputes such as murder and battery. The ultimate goal of the native judicial rites is setting the ground for the compensation of the victim's losses, establishing peace between the victims, next-of-kin or blood avengers, and their families or tribes with the crime perpetrators, their families, and tribes via negotiation and intervening by the elders of the tribes. Pseudo-judicial procedures such as refuge, blood cease, peace, and resolution of blood for moderating and guiding the avenging feelings and interpersonal-interfamilial and intertribal violence seek to return calmness to the local community.

Predicting crime occurrence based on criminological studies means investigating crime perpetration or repetition possibility by the individuals that are suspected of crime perpetration. Predicting crime occurrence helps make better decisions in the criminal justice system. Therefore, by crime occurrence prediction, such penal decision-makings as probation, conditional freedom, acquiring good-behavior bond from the criminals, and corrective and preventive programs would be rendered better, useful, and matched with the criminological accomplishments. The recidivism rate is negatively associated with age increase; thus, age can be considered a prediction scale. This finding is consistent with what has been found by other researchers, including Hussein, Bunham, et al. and Beck and Shipley, in their studies. Many of the other researchers, as well, have emphasized that age is the best recidivism prediction factor³.

Restorative justice is a term entailing the idea that the crime perpetration creates an obligation for the criminal who should resultantly take measures in line with compensating the losses of the victim society and restoring the situation. In line with the same concept, another model or pattern is offered that is pertinent to the realm of the minors' crimes and criminal minors; this model combines restorative justice and the concept of balance⁴. It is termed "restorative and balanced

² Najafi Abrand Abadi, Ali Hussein, (2005), "legal journal of justice department", nos.52-53, p.13

³ Gholami, Hussein, (2002), "crime occurrence prediction", journal of theology and law, Razavi University (legal teachings), (2): 64&74

⁴ Freivalds, P. (1996), balanced sociology and restorative justice project (Brjp) office of juvenile justice and delinquency prevention, office of justice programs, U.S. department of justice. p. 1

justice.” It drew attention in 1992 in the US and was implemented in more than 35 states. According to the concept of balance, the minors’ criminal justice system should believe in identical values regarding the following realms, and it has to create a sort of balance between them. These realms are: 1) safeguarding security and health of the society; 2) making the criminal respond to the victims; 3) creating the conditions of development and perfection for the criminals’ abilities in the justice serving system in such a way that they can be provided with the possibility of performing legal activities after freedom⁵.

Restorative Justice in Prisons:

Restorative programs can be implemented in prisons and centers serving criminal justice⁶. Part of these programs includes creating conditions for the victims to meet criminals in the prisons. Such a meeting might set the ground for more awareness of the criminals about the results of their perpetrations and better healing of the victims. Furthermore, the victims and their survivors can converse with the criminals in prison. Even if it does not affect the quality of the enforcement of the sentences issued by the courts on the criminals, these meetings can soothe the victims or their survivors, and they can also be followed by more responsibility for the criminal.

On the other hand, with the imprisonment of the criminals, their relationships with their families are disordered in most cases, and the local community hosting the criminals may intensively feel insecure about their freedom. The criminal may even stop preferring the presence at the side of his or her family members and society in consideration of such conditions. Using restorative programs and creating a pattern of constructive conversation in conjunction with the mutual acceptance of some of the duties of the criminal, families, and the local community, it can be expected that the recidivism possibility would be reduced meanwhile repairing the relationship between the criminal, the families, and the local community. In addition to the above cases, reparatory programs for creating a peaceful space devoid of any tension inside the prisons can also be applied. In some countries, circles and groups within the prisons endeavor to implement dispute-resolution programs to reduce conflict and dispute inside the prisons while establishing better relationships with society outside the prisons. Such a strategy extremely reduces the costs of keeping prisoners. Instead of jail managers’ concentration on preserving their security, it sets the ground

for making intellectual and economic costs in line with the creation of successful returning of the inmates to society. Such a capacity-building ability would also increase the prisoners’ ability to live a life free of crime in a free society.

Jail managers should adopt preventive strategies regarding the prisoners parallel to their correction and rehabilitation. It occasionally happens that the prisoners are corrected during incarceration and become ready for attending the society, meaning that the prison programs would be effective for their correction and they are remaining in the prisons are no longer helpful to them and the society; in this case, if the jails’ managers find it expedient, they can free them under certain circumstances before the termination of incarceration period⁷.

Restorative Justice and the Police:

The police and the consultants are the first resorts of the victims following experiencing victimization. So, to prevent victimization, the second refuge would be the healing of the victim, and the police officers are to adhere to fairness upon facing them and pay attention to the creation of a calm space for the victim more than before. Amongst the institutions that can be effective in this regard is the police’s social assistance and advice unit. These units are among the institutions effective in multi-institutional prevention of crime. By taking advantage of specialized forces, useful interventions can be made relying on the principles of restorative justice and intermediation sessions parallel to reducing criminality in society. The goal of launching these units in the police structure is to enjoy the dejudification or the extra-judicial system dispute resolution strategies. In line with this, the victim and criminal’s arbitrary participation and intermediating managers in the restorative justice sessions are greatly important.

Whenever training the standards on the quality of implementing restorative justice is expanded to the police staff, the rate of the children-adolescents blending would be increased in society⁸. The philosophy or the quiddity of the restorative justice programs’ implementation, including intermediation, is reemerging the criminal into society. Thus, the formal investigations generally deprive the crime perpetrators of this opportunity to merge into society by labeling them.

Restorative Justice Challenges:

1. Criticisms of the Results of the Restorative and Rehabilitative Programs:

⁵ Freivalds, P. (1996), P.1
⁶ Towes, B. (2006), “the little book of restorative justice for people in prison”, GOOD BOOK, USA. pp. 5-11
⁷ Lotfi, Ali Akbar, (2016), “preventing recidivism in the light of the strategic principles governing the jail management”, MA dissertation, penal law and

criminology, Allameh Tabataba’ei University, Tehran, p.85

⁸ Dalvandi, Zahra, (2009), “the role of the police in the children- and adolescents-specific trials”, MA dissertation, Teacher Training University, p.75

Some believe that the criminals' legal rights are ignored in the implementation of restorative justice⁹. This objection can be responded to in two ways: firstly, the legal rights of the criminals are better secured through the offering of useful and effective advice; this has been carefully considered in restorative justice. Secondly, lawyers can also attend the restorative justice process in the same way that they can prove their presence in implementing traditional criminal justice. However, it has to be remarked that the lawyers' role in implementing traditional criminal justice differs from their role in the restorative justice process. In the traditional process of criminal justice, the lawyers speak on behalf of the defendants and, particularly, the criminals, and they take a position as the criminal and the preserver of their interests. However, in the process of restorative justice, the criminal should play an active role and, in the end, be responsible for his or her perpetrations. In other words, the feeling of responsibility should be created in the criminal so that society can feel good about the possibility of recidivism. This way, the lawyer's role in the reparatory process would be to support the criminal's essential rights, not endeavoring to reduce the responsibility and power of his or her providing of response in the face of the results of the actions done¹⁰.

Some critics object that restorative justice leads to the extreme taking care of the individuals' affairs hence interference in their private lives¹¹. To respond to this objection, it has to be noted that the role of the society and its interests is not unique in restorative justice and, unlike the traditional criminal justice that is solely engaged with the support of the society's resources, the restorative justice places the victim in the center hence the society and its representatives play secondary roles in directing the qualified justice-serving authorities and executives' attentions.

One of the other objections to implementing the reparatory processes is their costs. The objectors believe that the cost of consultation and time, especially about and on the less important crimes, is not smaller than the interests obtained. In response, it has to be stated seminally that there is no special barrier and limitation for exerting reparatory strategies about the severe and harsh crimes and criminals and, secondarily, that the costs of restorative justice's implementation cannot be compared with the costs of implementing traditional criminal justice include incarceration and that long-term

imprisonment's expenses made in such stages as pursuit, investigation, trial and sentence enforcement.

The proponents of restorative justice imagine that the social services and compensation of losses incurred by the victim alone suffice the correction of the damages stemming from the crime or believe that punishment would be unnecessary after these stages. However, this perspective has been criticized by some jurists; for example, Stephan P. Groy believes in criticizing this perspective that the supporters of restorative justice have mistakenly understood the nature of criminality.

2. Legal Constraints of Using Supportive Institutions:

The constitution creates limitations for accepting new legal and statutory provisions and human accomplishments. The red lines delineated in these laws, especially in the criminal and penal laws, are constantly exhibited distinctly on the path of the judicial bills' enactment, but, contrarily, the suspending principles of the constitution depict proper capacities that appropriately set the ground for the acceptance of the novel ideas and notions as mentioned in the first section.

Incarceration alternatives such as pecuniary punishment, daily punishment, public services, and home custody using electronic monitoring and suspension or conditional freedom have been successfully applied in the system of penal mandates during recent decades. Although conditional freedom has been rendered obsolete in some countries, it is still one of the important tools in most correction and training centers. However, the incarceration alternatives and conditional freedom are accompanied by imprisonment possibility in case of not paying for the pecuniary punishment, recidivism, or the violation of the conditions mentioned for the incarceration alternatives. In unfavorable economic statuses and expanded poverty, pecuniary punishment can be transformed into incarceration. The reports b the countries suffering severe poverty show that many criminals are sent to prisons due to the inability to pay for the cash penalties, even if very small ones¹².

Conclusion:

The present study aimed to investigate restorative justice's potential capacities and challenges. The investigations indicated that Islam's criminal policy might be conjectured as harsh, inflexible, strict, and not prone to any change and correction considering the mentality existing in the society about the Hadd punishments. Of course, this belief is not

⁹ Warner, K. (1994), the right of young people in family group conferences, in: Alder, c. and j. Wknderstiz (Esd), family group conferencing and juvenile justice, Australian institute of criminology, Canberra

¹⁰ Morris, A., G. Maxwell and P. Sherd (1997), Being a youth advocate: an analysis of their role and responsibilities, institute of criminology Victoria University of Wellington

¹¹ Ashworth, A. and A. Von Hirsch (1998), Desert and the three RS, in: von Hirsh A. and A. Ashworth (Esd), principled sentencing: Reading on theory and policy, Hart publishing, oxford

¹² www.pfi.org/Home/Center for Justice and Reconciliation/News/Partnership for Addressing Prison Overcrowding in South Africa

correct. Although the reparatory programs have no room in their special sense in most of the Hadd punishments, some of their machines can be indirectly implemented in such punishments, including the principle of hiding and concealing the crime, forgiving or not forgiving the crime, repentance axiom in Hadd punishments and the Islamic ruler's authorities in Hadd punishments. However, it has to be asserted that none of these perfectly exemplify restorative justice and cannot prove the existence of the manifestations of restorative justice in Hadd punishments; they can but pave the way for and using the restorative programs' justice. The abovementioned subjects can provide the required capacity for implementing restorative programs. The explanation is that one should try to resort to each of the techniques above, thereby preventing the entry of Hadd punishment-deserving files into the penal cycle and crime justification and sentence enforcement; it is by the elaboration of the issue's importance for the judges and institutionalization of crime-concealment and crime-hiding orientation amongst the members of the public prosecuting houses and judicial officers that the ruler's amnesty can be applied as a serious technique for using the restorative justice programs; then, the criminals' repentance can also be organized as a way for their correction along with embedding certain conditions in line with the use of the restorative justice programs and compensation of the victim's losses. In the meanwhile, if the perspective of a group of jurisprudents is accepted regarding the impermissibility of Hadd punishments in the era of His Highness Imam Mahdi (may Allah hasten his honorable reappearance)'s absence and use of Ta'azir punishments instead, a vast and intact, and well-prepared domain would be faced for the implementation of the restorative justice's procedures and programs. However, in this case, no topic can be posited within the format of the restorative justice's manifestations in the Hadd punishments' realm.

First of all, all of the crimes against spiritual figures in Iran feature many competencies for being included in the restorative justice programs due to several reasons; from insult to insolence and false accusation of adultery and sodomy and others can be forgiven. Because the case can be closed in case of the victim's satisfaction, the public prosecutor and the interrogator have the right to repair the trial process for dispute resolution and play the maximal role without using penal means. By considering such crimes as forgivable, the legislator has granted an important role in the pursuit and investigation stages to the victim. Thus, second of all, the interrogator and the court authorities can take the highest advantage of this privilege for rendering the investigation restorative and, additionally, refer the lawsuit for intermediation by an arbitrator in the match with article 82 of the law on the criminal trial procedures in regard of the crime degrees six to eight

(which includes insolence and insult); based on article 192 of the same law, they have been obliged to make efforts in line with the creation of peace and compromise and referring the case to intermediaries in regard of the forgivable crimes.

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Ethics statement

None

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