

JUSTICE FOR WHOM: A TIME HAS COME TO FIND THE ANSWER

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ABSTRACT

The current criminal justice system is more inclined towards a retributive approach rather than restorative justice delivery mechanism. The victim who is the most important stakeholder in the Criminal justice system more often than not is a forgotten soul and is given a back seat in the current system and the steering wheel is completely in the hands of the State or prosecution, which is definitely for some viable reasons for instance State being the parens patriae. But the problem with such an approach is that without any effective participation the victim is expected to accept the judicial decision and believe that justice has been done. The system does not even bother to ask once that whether the entire process actually delivers justice to the victim or re affirms the power dynamics of the state. It is to be remembered that when a crime takes place it is the victim which is violated the most than the state. The impact of the occurrence of a crime is not just the violation of the law drafted and implemented by state and it's instrumentalities but rather much more than that. Restorative justice tries to interpret this multifold dimension and tries to answer the question that it is justice in actual sense for whom. And that is the objective of this research paper as well.

“More Law and less Justice”¹

INTRODUCTION

India's criminal justice system maybe said to be a combination of several models of justice, like preventive, deterrent and reformatory models. However, it is still focused on punishing the offender for his/her wrongdoing, and in that sense our system is largely retributive in nature i.e. justification of punishments on the premise that imbalance created by the criminal in the social order is to be addressed by action against the criminal.² As a transitive verb it means, to give in return, to retaliate against person and to repay.³ Justice is considered to have been done, by punishing the wrong doer in proportion of the offence he has committed. As the understanding of justice has been reduced to putting the wrongdoer behind bars, the question we need to ask here is, it is justice for whom? The Victim or the State? The state takes it upon itself to seek justice by declaring a crime to be against the state. Individual victims of crime are pushed to the sidelines of justice, with little or no input. The people who are affected by crime look for the harshest punishment for the perpetrators of law. This behavior is widely based on the notion that “there should be an eye for an eye”. Although there is no perfect measure which guarantees that this process would actually do justice. But the Victims believe or have been made to believe since ages that this will bring home justice to them. Albeit it has been witnessed on many occasions that despite this long standing notion and process the victims are not able to feel the justice and at the end the long driven strenuous process make them feel empty and shallow and rather than healing them it makes their situation worse. The retributive process which is followed further perpetuates the trauma of victims and the societal wounds of the victims rather than helping them to recover and restore back from such a trauma. Many at times it leads to “double victimization of the victim” This is because other important needs of victims are not addressed by punishing the offender. That is, punishing the offender cannot restore their losses, answer their questions, relieve their fears, or heal their

¹ Marcus Tullius Cicero : found on <https://www.brainyquote.com/topics/justice-quotes> (visited on 18th.July.2023)

² S.Maheshwari and Bhavya SriRam, “Victim-offender Mediation and Criminal Justice”, P Madhava Soma Sundaram; K Jai Shankar and S Ramdass, “Crime Victims and Justice: An Introduction to Restorative Principles”, Serials Publications, 2008.

³ *Supra* 3

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wounds. The only way such things may be achieved is if there is a shift from the preventive retributive model to a restorative model.

In this discussion, we will ponder upon few questions that would come to the mind of any ordinary person i.e. weather such shift is possible? Can it be applied in every circumstance, including to serious and grave offences? Can victims ever forgive to complete the process of restorative justice? We shall also discuss restorative justice in India and its relevance in the Criminal Justice system.

What is Restorative Justice (RJ)⁴?

Restorative justice is definitely a brave but not a novel step in the victimology branch of Criminal Law Jurisprudence. The reason for believing in the above mentioned statement is that the model of restorative justice can be witnessed in the historical roots of any civilization. It was based on this model only that justice delivery mechanism used to work in indigenous communities. Restorative Justice acknowledges that when a crime occurs or a legal right is violated not only the equation between the offender and the State is disturbed but rather it disturbs every stakeholders involved in the Criminal Justice system and the person who gets most affected is the victim. The Social contract theory being widely accepted as the benchmark for governing system and the State being the *parens patriae*⁵ this has developed as a part of the system that whenever a crime occurs it's a violation of the rights of State and State has the responsibility to fight for justice against the offender. But eventually the actual victim is losing it's voice in such a system. The victim is not even asked that what their idea of justice is. We forget or the system forgets that it is the victim against whom the crime is committed. Rather the victim is reduced to a forgotten soul.

Restorative justice and its practices maintain that crime hurts everyone then whether they are the victims, or offenders and community.⁶ Thus there is an obligation to make things right from every stake holder's perspective and not just from the perspective of the state. Thus every stake holder has a role to play in the Justice Delivery Mechanism .It has to be understood that the victim is not just a witness but plays a role in making the offender realize the accountability of the act done by him or her.

Restorative Justice Practice around the World

The practices of Restorative Justice started as an alternative to justice delivery mechanism where the criminals are prosecuted or sentenced with some punishment. One instance of that can be Australia, where Family Group counseling has been in vogue. Restorative justice programs have been introduced by Canada in many of its prisons and in 1996, "Church Council on Justice and Corrections" whose prime task was to collect the community based responses to crime, reached to a conclusion that many of such responses resembled restorative justice practices.⁷

Restoration, refers to "the process of 'righting wrongs' or healing wounds", in the context of restorative justice.⁸ Although there is no doubt that this will have different meaning to different victims. Although the foundational aspect remains the same i.e., getting back the control over lives, or having answers for some questions related to incident which nobody answers, or to express their anger over the wrongdoing and the impact the event has had on them. For offenders, restoration means "accepting responsibility for their actions by repairing the harm they

⁴ Restorative Justice – to be termed as RJ in the remaining papers.

⁵ <https://juriscentre.com/2021/05/10/doctrine-of-parens-patriae/> (Visited on 17th .July.2023)

⁶ Center for justice and reconciliation- *A programme for Prison Fellowship International*, available at <https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>. (Visited on 15th July 2023).

⁷ May Leung, *The Origins of Restorative Justice*, 1999

⁸ *Ibid*

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have caused" and "addressing the issues that contribute to their propensity to engage in harmful behaviour".⁹For community, the process of restoration includes "denouncing wrongful behaviour and reaffirming community standards".¹⁰

Once an understanding of the process of restorative justice is there, the next phase is to redress the damage caused to the best possible extent in the most holistic form possible. This raises the following important question: How do we make offenders of all varieties, realize the damage they caused and make them own up the responsibility for their acts? Through different schemes and models of victim-offender mediation, offenders of the moderate types and the non-hardened and non-habitual types have been sensitized to the damage they caused to victims and thus make them take a conscious decision to own up responsibility of their actions.¹¹

Victim, Offender & Community Meetings

- **Victim offender mediation.** In VOM, if the victim shows his or her interest to meet the accused then they are given an opportunity to do so in an organized and structured environment with the help of a trained mediator.

The reasons for adopting VOM can be found in deficiencies of the retributive model. To elaborate, the retributive models rests on high rates of conviction which only serves to burden the state with rising prison population and high cost of incarceration. Belief in punishment model has not resulted in any significant deterrence. On the other hand, VOM has led to reduce fear among victims and reduced criminal behavior.¹²

- **Family or Community Group Conferencing.** It is a process to bring together the victim, offender, and family, friends and the supporters of both in deciding how to address the aftermath of the crime.¹³

- **Peacemaking or Sentencing Circles.** The objective is to encourage the healing of all the people affected by crime. Where every stake holder has a voice and they share the responsibility especially the offender and the community when it comes to responsibility. This helps in understanding the actual underlying reason behind an offence and also instills confidence around the shared values of community.¹⁴

Circles are being used throughout North America and were adapted from native traditions.

Above, approaches or models, with its focus on Restorative Justice, are ways in which this paradigm shift may be incorporated into our present system.

An essential issue to be addressed in the implementation of above methods is whether it can be used for all crimes and if not which crimes can it be used for?

More violent crimes are also sometimes referred to VOM, although this is not commonplace. Taking an example of South Africa, South Africa became democratic in 1994. Before this transition to democracy took place, South Africa had witnessed innumerable acts of violence by the ruling minority of whites who followed the racial discriminatory policy of Apartheid. These violent acts included murder, abduction, rape and other forms of grievous offences. After the first ever free and fair elections, it was decided to deal with the painful past; however entire difference was the way the South African leadership decided to deal with it. They came out with Promotion and National Unity and Reconciliation Act, 1995. Under this former perpetrator of human rights violations made

⁹*Ibid*

¹⁰*Ibid*

¹¹*Supra* 2

¹² *Supra* 1

¹³*Supra* Note 13

¹⁴*Ibid*

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a complete and full disclosure of the atrocities committed by him and met some other criteria laid down in the Act, and then Amnesty shall be granted to him. One of the most remarkable and unbelievable features of the proceedings of the commission was that victims or their kins decided to forgive the perpetrators when they made full disclosure of the unspeakable crimes they had committed.¹⁵ However this, does not mean that perpetrators merely apologize and then simply walk-away, scot-free. Public humiliation and exposure were fixed as penalty for the perpetrator as all the applications were considered in public in the full glare of television light. It was so traumatic for some that marriages broke up. That was some price to pay. Some even wanted to attempt suicide to get out of trauma and guilt of having tortured and killed innocent black people. This on goes to prove that, even outside the formal state legal system, it is possible to deal with serious offences.¹⁶ A perennial question which is asked is: can victims ever forgive? Is it possible for them? Particularly in serious offences like rape and murder? We shall seek an answer to this question through real life stories. The July 1995 edition of the Reader's Digest carried an article by the title – Three Words that Heal. One of the people featured in that article was a woman named Robin who had managed to forgive the person who had raped her. The other case is of Babu Bhaya who was convicted in 1983 for murdering 3 people in 5 minutes in a gang fight in Ahmedabad, Gujrat. After attending a course of meditation, he felt guilty of his past actions and contacted family of victims to seek their forgiveness. They forgave him and accepted him as their foster brother. Today, he is taking care of that family as his own family.

If all the above-mentioned people who constituted just a miniscule percentage of the largely unreported cases of those who have forgiven could all forgive, surely, we too can do so. The process may be difficult and time consuming but it is always better and positive.

Restorative justice in India

Restorative justice is not almost non-existent in Indian criminal jurisprudence. However the Criminal justice system or Justice delivery mechanism in India is still untouched with the progress made in the field of Victimology to an extent. One of the important contributing factor seems to be that the procedural laws here do not give much space to these practices to breath. The victim as a stake holder has a passive role and victim's role is still of a witness.

A progressive step was taken in the Malimath Committee Report 2003¹⁷, which strongly advocates rights of the victim and involving them in all stages of trial. It has strongly suggested to provide restoration to victim through compensatio. However, whatever power is given to the victim is within the retributive system only and not outside. The Report has not expressed its views on issues such as restorative justice and VOM. One of the recommendation of committee is to go for mediation between the spouses even in the matters of cruelty. Hence it was suggested to facilitate mediation between the spouses, for which it suggested that the offence of cruelty under section 498A of IPC, 1860 be made compoundable and bailable. Some scholars believe that such suggestion made by committee will do more harm than good because what is to be thought is that if the mediation process in this case turns out to be successful then women will be sent back into violent situations after the process of mediation between husband and wife is over. It is in sheer disadvantage to women because of the patriarchal nature of the process. Further "Plea-bargaining", was adopted under Chapter XXI-A of Code of Criminal Procedure on the recommendation of the Malimath Committee (2003). However "Plea- bargaining came into effect in 2006. The

¹⁵ *Supra Note 12*

¹⁶ Archbishop Desmond Tutu points out in his book "No Future without Forgiveness", "that the central concern is the healing of breaches, the redressing of imbalance, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offence".

¹⁷ Committee on Reforms of Criminal Justice System, Government of India, Ministry of Affairs, Report Vol.1, March 2003, at 75.

idea is to be not so punitive in the context of cases which are not punishable with more than seven years of imprisonment. So the procedure that is being followed is negotiated settlements rather than trial. However, the Legal representatives as well as the judiciary both seems to be not so attracted or convinced by such settlements, as the results show that even after more than a decade of its introduction, it remains a dead letter and is not used much by any of the stake holders. Hence to incorporate restorative justice we need to have new laws and institutions otherwise our criminal justice system will not adapt to this. However a new beginning can be seen in the existing provision of the code of criminal procedure 1973¹⁸. For instance, the compounding of offences under section 320 of Code of Criminal Procedure, Victim Compensation under section 357 of Code of Criminal Procedure has been allowed in an effort to bring in restorative justice in the prevailing system.

With regard to victim compensation, section 357 of the CrPC provides for compensation and it does not matter whether the offence is punishable with fine or not or the fine is just imposed. Further Criminal Procedure Code was amended in 2006, keeping in mind the recommendations of committee on criminal justice system reforms, an insertion of new section 357A has been made, which talks about victim compensation scheme. Under this provision "357 A", Code of Criminal Procedure, 1973, the State is also liable to pay compensation to the victims of crime apart from the accused under section 357 Code of Criminal Procedure.

Unlike what happened Earlier under section 357, the compensation was awarded only in the eventuality of the conviction of the accused but now not only in the case of conviction but the victim is awarded compensation even in case of acquittal, discharge or when the accused is absconding or not found. This is a positive development that brings in ray of hope to deal with the practically tough situations of life which is faced by the crime victim and the respective family. Thus the scope of compensating the victim has been widened by the introduction of Section 357A. Taking this forward to set up as an example : 'The Government of Delhi in compliance of section 357A Code of Criminal Procedure has framed a Victim Compensation Scheme for Delhi called as 'Delhi Victim Compensation Scheme, 2011''. It has come into force on 02.02.2012. The authority which will decide upon the quantum or affirmation of the Compensation is State Legal Service Authority or District Legal Service authority.'¹⁹

However it has been witnessed that these Compensation provisions are used very rarely in different jurisdictions of the country.

CONCLUSION

This restorative justice focuses on the strength of both the victims and the offenders rather than emphasizing on their weaknesses. It tries not to exclude the offender from the society but rather it's an attempt to incorporate or bring in the offender back in the society with respect and dignity. It's a process of integrating the offender in the community as a functional citizen .As restorative justice is based on the philosophy that crime in any way is harmful to both the offender as well as the victim who, or whose rights are violated and the solace and real justice would come to victim only when the offender realizes the accountability of his act.

In this world of turmoil and crumbling value system Restorative justice is the need of the hour, It's the most important NEED .Though a crime less society is an utopian concept we can't stop crime from happening in society but we can adopt a model of justice which will bring in change from within. The idea is not to remove the evildoer but evil from the society.

¹⁸ Code of Criminal Procedure- to be named as CrPC.

¹⁹ Indian Law Watch, Law relating to Victim Compensation <https://indianlawwatch.com/practice/law-relating-to-the-right-of-a-victim-of-an-offence-to-file-an-appeal/#> (visited on 10th July, 2023.)

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Quoting Mahatma Gandhi – we can live peacefully and better by understanding what he tried to teach us from following message when he said “*hate the sin, love the sinner*”²⁰”

²⁰ <https://cicd-volunteerin africa.org/quotations/ghandi-quotations> (Visited on 18th.July.2023)