

## THEORITICAL DIMENSIONS OF RESTORATIVE JUSTICE IN INDIAN CRIMINAL JUSTICE SYSTEM

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### ABSTRACT

*This article is an attempt to study the processes and phenomenon in which restorative justice is capable of offering a concrete solution like criminal violations, community ruptures and disputes, human rights violations etc. It also discusses the key idea of restorative justice and its applicability in Indian context. This approach has often been criticized, and many have attempted to highlight its limitations totally sidelining its success and achievements. Restorative Justice is not a new phenomenon rather has age-old existence but the modern legal system being result oriented at all levels has totally sidelined its utility in doing complete justice. In this paper, I have made an attempt to explore the foundational concepts of restorative justice, its various forms and nomenclatures.*

*Indian Criminal Justice system though lacks the infrastructure but is laden with infinite potential to imbibe the idea of restorative justice. Some traces of restorative principles for the victims of crime may be found in certain legislations and statutes but a holistic and complete framework is yet to take its roots. There are certain practice like- reintegrative shaming of offender, acknowledgment and responsibility, restitution of stakeholders, truth and reconciliation, sentencing etc that have been associated with restorative justice. It is now my attempt to define and explain the actual attributes of these practices. The practices and procedures of Restorative justice offers a transformative outlook to criminal justice focusing centrally on the process of healing, offering reconciliation for offenders, re-integrating victims and the communities. Author's efforts would be directed to develop a theoretical narrative for restorative justice in India, throw some light on its practices and procedures and comment upon the suitability of the concept in Indian criminal justice system.*

### INTRODUCTION

*"When another person makes you suffer, it is because he suffers deeply within himself, and his suffering is spilling over. He does not need punishment; he needs help"*

Thich Naht Hanh

The programs related to Restorative justice must be viewed as intrinsic to the entire process of criminal administration of justice. The conceptual foundations of the restorative justice programs rest upon the efforts to mitigate impact of crime on victims by undertaking various practices and procedures. Our traditional criminal justice system has been centered on the premise of awarding sentence to the accused and make him suffer for his deeds. The idea of justice in this process is highly retributive and it has become a standard practice of administering justice in criminal trials. This approach perhaps sidelines the concerns of victim and he is compelled to accept this conception of justice. Various jurist and political philosophers have time and again emphasized and re-emphasized upon the fact that justice is and has to be subjective but the criminal justice system has objectified the idea of justice by reducing it to mere awarding of punishment. Any discussion upon justice delivery beyond that seems to be an idea which is viewed as an approach obliterating the well-established justice system. However, the course of justice cannot be restricted by State's reluctance to evolve a better system or inability of stakeholders' to give heed to new idea of justice. This quest must continue so that roots of the problem may at some point of time be addressed. Restorative justice is now a counter-movement that interrogates the age old integrity of criminal justice system and perhaps argues that something more has to be offered by the system in order to ensure justice to victims. Underlying philosophy is to channelize efforts to undo the

harm done to victim and make active efforts to heal these affected relationships. As Restorative justice views crime from a different lens i.e. beyond breaking the law – harm to all i.e people, relationships, and also to community.<sup>1</sup>

Having said this, one of the more evolved and progressive response must be to identify crimes that cause most damage to victims and make efforts to address them. A most convenient way to address is to encourage parties to meet, create a conducive atmosphere for this meeting, and help them discuss the harms caused and bringing about resolution.<sup>2</sup> Restorative justice is the restoration and reintegration of victim back to his life as he was before the crime was committed. Therefore, the process of restorative justice does not ends with the completion of criminal trial. The approach demands taking up the victim along with the process at all stages. As has been stated earlier, restorative justice is not totally new to the system rather has an time-tested existence. It has been a part of our traditional methods of justice delivery and has been embedded in social practices. The modern times just demands a revisiting to those noble methods and to re-align the practices in a manner that they could be justified and accepted upon the parameters of modern legal system.

### **RESTORATIVE JUSTICE: PRINCIPLES AND DEFINITION**

**At the outset if one has to define the concept it would mean “to restore” or to put somebody back to his original position. The traditional system of criminal justice administration keeps accused at the center of the entire process. This has resulted in sidelining of the rights of the victim and many concerns of the victim are left unaddressed. Victims are sought to make peace with the sight of accused receiving punishment for his deeds. The reformatory theory has added to the process of liberalizing sentencing parameters for accused. The idea of reforming the offenders is undoubtedly a parameter of progressive outlook but rehabilitation of prisoners need not be by being indifferent and shutting our eyes towards the suffering of victims.<sup>3</sup> Victims being an essential stakeholder of criminal justice system and sufferers of crime must be entitled to additional protection and care. The restorative justice provides this space where we can extend the legal benefits and privileges to victims. The term however has various connotations. It is a collective term for variety of theories that deal with the aspect of restoration of victims, offenders and community. The terms encompasses various nomenclature within itself that includes positive justice, community justice, re-integrative justice, relational justice and transformative justice.<sup>4</sup> The Concept Defined**

In order to lay down a conceptual and theoretical framework many jurists and scholars have tried to define the idea and meaning of Restorative Justice. Few important definitions are reproduced below for understanding-

**Tony Marshall** – “Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.”

**Howard Zehr**- “As seen from restorative justice lens, "crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”

**Russ Immarigeon** – “Restorative justice is a process that brings victims and offenders together to face each other, to inform each other about their crimes and victimization, to learn about each others' backgrounds, and to collectively reach agreement on a 'penalty' or 'sanction.’”

**D. Kevin I. Minor and J. T. Morrison** – “Restorative justice may be defined as a response to criminal behavior that seeks to restore the losses suffered by crime victims and to facilitate peace and tranquility among opposing parties.”

The definitions are manifold and the above stated are merely an attempt to theorize the otherwise colossal concept. The process of restorative justice involves an active participation of all the stakeholders of criminal justice system- Victim, State, Judicial System and the Accused. Therefore, Restorative Justice’ is an all-inclusive mechanism within legal framework to accelerate the disposal of the legal issues aiming towards establishing social peace, order as well as least grievances in processual justice.<sup>5</sup> The proponents of restorative justice argue that realization of one’s mistake helps to eradicate crime and consequently if that is

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<sup>1</sup> <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson--what-is-restorative-justice/> (last accessed, 12 Feb, 2021)

done then sinful could be done away by peace.<sup>6</sup> Right relationships & not right rules are the central emphasis of restorative justice.<sup>7</sup> Therapeutic theory, Corrective and preventive theory of punishment are the sources from which restorative justice derives its basis.

### Principle of Restorative Justice

Various principles of Restorative Justice are discussed here:

1. **Fulfilling victim needs-** As discussed above the traditional system being victim oriented the victim needs are often left unaddressed. The pain and sufferings of victim must be addressed by the legal system. In our system victim has very little right in the process of prosecution and trial therefore his capacity is merely like an spectator. It is consequentially required that the legal system must now understand the psychological and physical aspects of crime and must try to mitigate the injuries and imprints of crime rather in addition to punishing the offender. The subjective sufferings of crime must be subjectively addressed.
2. **Restoring original relations between parties and communities:** The criminal delinquency and criminal behavior must be addressed from the root itself. Since crimes affect the victims, offenders and communities, it is imperative that the ill effects of the crime must be removed from the society. The relations must be restored in manner they were before the crime.
3. **Preventing further delinquency:** As discussed earlier, restorative justice is a blend of many reformatory theories. A true restoration is only possible when the offender is reintegrated back in the society so as to be free from any criminal tendencies. He must understand the consequences of his act, must take the responsibility of it and consequently must realize that such conduct only adds to suffering. Restorative process must ensure that offender is turned into a responsible person and his delinquent tendencies are curbed.  
**Creating a rehabilitative and reformatory community:** After having an experience of almost all kinds of measures to maintain order in the society with fewer results now the focus must shift to restorative justice mechanism. A community where the deviance is addressed by mutual cooperation of all in a manner that such deviance is never repeated is an ideal community for harmonious existence.
4. **Substitute to procedural harassment of traditional court system:** Indian court system is definitely one of the less remarkable and praiseworthy in terms of being litigant-friendly. Victims and offenders often have to face the rigidity of the system causing unnecessary duress to them. Indian courts have to ensure the procedural standards set by legislature and have limited authority to dispense away with the procedural requirements. The cumbersome procedures of Indian criminal justice system have often made jurists to say that "*in India a victim suffers twice- firstly when he becomes the subject of offence and secondly when he seeks justice through the legal system.*" Restorative justice programs being participative in nature have the potency to do justice without entangling the victim and offenders in the vicious loop of court procedures.

### RESTORATIVE JUSTICE: A GLOBAL PHENOMENON

The restorative justice movement is taking a steady root gradually across the globe. The United Nations and its various agencies have effortlessly worked on this concept. Resultantly, restorative justice and its associated processes must be accommodated in alignment with cultural contexts and community requirements.<sup>8</sup> A systematic application of the theory has given positive results and have increased victim satisfaction from criminal justice system. One of the initial developments was in 1995 when an Expert Committee was appointed by the Council of Europe with the objective of examining the utility of mediation practices and procedures in criminal proceedings. Within a span of 1996-99 the Committee discussed upon the findings of the members state and their experiences while mandating mediation for certain matters of criminal nature. The final report released by the Expert Committee highlights 34 principles which Member States can incorporate in their legal system while adopting the mediation practice in criminal matters. The recommendations of the Committee were endorsed and adopted in September 1999.

Way back in 1950's out of various sessions of UN Congress on Crime, in first session of Congress on the Prevention of Crime and the Treatment of Offenders it has highlighted ways in which

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<sup>2</sup> Ibid

<sup>3</sup> Victims of crime, Their Rights and Human Rights, Chandrasen Pratap Singh, Deep and Deep Publications Pvt Ltd, 2010.

<sup>4</sup> Smt. Neelabati Behra v. State of Orissa (AIR 1993 SC 1960)

<sup>5</sup> Dr. Puranjoy Ghosh, Restorative Justice: The new paradigm in the Province of Justice in India, Bharti Law Review, October-December 2014, 88

criminal justice administration be made both- more effective and more humane.<sup>9</sup> In April 1997 door to discussion on restorative justice were opened by the Commission on Crime Prevention and Criminal Justice. The commission unanimously agreed to ponder upon an interim agenda for Crime Congress held in 2000 relating to "Offenders and victims: accountability and fairness in the justice process."<sup>10</sup>

In 2000 at the tenth session of UN Congress on the Prevention of Crime and Treatment of Offenders, the Congress adopted the much awaited "development of restorative justice policies, procedures and programs that have elaborately identified the rights, needs victim's and offenders interest and of communities by giving them the respect that was due to them from a long time. United Nations ECOSOC resolution entitled 'Basic principles on the use of restorative justice programs in criminal matters' was adopted again in July 2000 to re-emphasize upon the need of the concept.<sup>11</sup> Again in July 2002, the United Nations ECOSOC adopted "Basic Principles on the Use of Restorative Justice Programs in Criminal Matters in order to promote and urge the states to enforce the aforesaid program in their juvenile criminal justice systems.<sup>12</sup> Thereafter at 11th UN Congress on Crime with the agenda to promote victim interest along with ensuring rehabilitation of offenders, a progressive advancement in restorative justice policies was decided. It was urged to include alternatives to prosecution, so as to minimize adverse effects of imprisonment, reducing criminal pendency were centrally discussed. To come with a uniform standards of implementation, UN handbook on restorative justice was developed.<sup>13</sup> It recommended for adoption of a flexible and variable approach that would be in tune with the legal tradition and underlying philosophies of justice system of various states.

<sup>6</sup> Incorporating the Idea of Restorative Justice in Indian Criminal Justice System: Pondering or Contemplating the Possibilities and Challenges, Shivani Shekhar,

<sup>7</sup> Barbara Hudson, Restorative Justice: The Challenge of Sexual and Racial Violence, Journal of Law and Society Vol. 25, No. 2 (Jun., 1998), pp. 237-256 (20 pages)

<sup>8</sup> Handbook on restorative Justice Programmes, Criminal Justice Handbook series, United Nations, New York. 2006,6

### RESTORATIVE JUSTICE: TRACES UNDER INDIAN LEGAL SYSTEM

Indian legal system is not completely aloof from the principles, associated practices and procedures of restorative justice. Benefits to victims and their constructive restoration has always been a focal point of deliberation and to certain extents courts have ensured restoration of victims. In civil cases the benefit of restoration is generally recognized by law and consequently courts have administered them time and often. In criminal cases however, it still has to take firm footing. In this part, I shall be highlighting in general various practices that could help in restoration of affected parties.

**a. Compensatory Jurisprudence:** Under the law of torts, courts have extended benefits to victims by incorporating compensatory jurisprudence. In *Bhim Singh v. State of Jammu and Kashmir*<sup>14</sup> compensation was provided by the court for the infringement of right of a legislator, when he was prevented from participating the legislative proceedings. In *N. Nagendra Rao v. State of Andhra Pradesh*<sup>15</sup> court imposed vicarious liability on State for the acts committed by its officers when the goods belonging to petitioner were spoiled in the custody of police thereby making a financial restoration.

**b. Contract Act:** Under the Act, restitution has been provided as one of the remedies; where parties are restored to the original position whenever either of the parties to the contract breaches it. Section 65 of Indian Contract Act, 1872 states, -“*When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it.*”<sup>16</sup>

**c. Victim Compensation Scheme under CrPC:** Law Commission in its 154th Report on CrPC has discussed at length on aspect of Victimology and a continuous growth on victim’s rights and requirements in criminal trials.<sup>17</sup> The judicial trend under the penal code, has now shifted to assigning the fines imposed upon offender to the victim so that some imprints of the crime may be erased by utilizing money into constructive things. Section 357 of the code has detailed provisions in regard to compensating victims of offences. It is agreed that money cannot offer restoration in all cases and in all sense but nevertheless somewhere it is useful in reintegration of the victims. The framework as to release of compensation and its quantum must be revisited to provide best benefit to victims.

**Plea Bargaining:** Under Chapter XXI of the CrPC detailed and elaborative provisions for plea bargaining are mentioned. It is one of the progressive developments that has taken place in criminal justice system. It means that the offender may plead guilty to certain charges for receiving certain benefits from the prosecution. As a benefit, the time of the prosecution is saved and the victim and offender are prevented from the plight of unnecessary harassment of court process.

**d. Compoundable Offences:** Section 320 of CrPC provides for a mechanism to execute compromise at the instance of the victim. Only victim is empowered to do this. Out of the two categories about the offences that could be compounded, first is with court’s permission and the second by victim alone. Severe acts needs court permission for compounding whereas the leftover can be voluntary compounded by victim.<sup>18</sup>

**e. Juvenile Justice Act:** The act prescribes a reformatory approach in dealing with delinquency in juvenile. Keeping in mind the psychology of minors, the nature of care and protection they require, the Act provides for various rehabilitative measures, encourages child by ensuring his engagement into counseling and duly reporting to perform their social services.<sup>19</sup> This helps the child in understanding the vices attached with his conduct and readjust into the society by becoming a better person.

### CONCLUSION

Restorative justice aims not merely upon reforming the criminal justice system; rather it lay emphasis on revolutionizing the entire legal system, our lives, conduct practices etc.<sup>20</sup> It is undoubtedly a more evolved and progressive method of handling cases by addressing victim’s need.<sup>21</sup> This system provides an amicable way of addressing the situation by addressing victim’s need and subjecting offender to reformatory and re-integrative measures. Like mediation and conciliation between the parties it is like an alternative measure that must be opted frequently. Community overall is the beneficiary of this approach as the offender understands its actions, is able to realize his guilt and deeds and he makes effort to reform his acts and redress victim injuries. Various provisions in Cr. P.C. and other ADR Acts have some imprint of restorative justice. Benefits of the system are tremendous and manifold. The process provides speedy justice, is cost effective and it enhances access to justice by including the weaker sections into its ambit.

As stated, though the benefits are manifold but this system is still not used exhaustively by many nations. It is agreed that keeping in mind the existing structure of legal system it is practically difficult to implement several of its practices and procedures. Some of the limitation that existing system offers is perhaps the lack of resources, paucity of legal infrastructure, underdeveloped understanding of community accompanied with different social structure and a

perpetual lack of understanding at all levels in relation to causes of crime and its remedies. India too is not aloof from such limitations in the system. The remedy lies in systematic conjunction of existing legal system with the modernistic requirement of incorporating the principles of restorative justice. Once we start implementing the programs for few categories of selected offences we would have a much better insight on re-aligning the system as per the requirements of restoration of victim of crimes and offenders.

<sup>9</sup> An introduction to comparative legal models of criminal justice, Cliff Roberson and Dilip K. Das, CRC Press. 2008S, 266.

<sup>10</sup> Lipika Sharma, Restorative Justice: A comparative analysis, International Journal of Law, Vol 3 Issue 3, 39-44

<sup>11</sup> United Nations publication ISBN-13: 978-92-1-133754-9 Sales No. E.06.V.15 V.06-56290—November 2006—1,200

<sup>12</sup> [https://www.unodc.org/unodc/en/commissions/CCPCJ/session/11\\_Session\\_2002/CCPCJ\\_11.html](https://www.unodc.org/unodc/en/commissions/CCPCJ/session/11_Session_2002/CCPCJ_11.html)

<sup>13</sup> <http://srsg.violenceagainstchildren.org/sites/default/files/documents/UN%20Resolutions/ECOSOC%20resolution%202002-12.pdf>

<sup>14</sup> Bhim Singh v. State of Jammu and Kashmir Available at: <https://indiankanoon.org/doc/1227505/> (Accessed on 22 Feb 2021)

<sup>15</sup> N.Nagendra Rao & Co vs State Of A.P on 6 September, 1994. Equivalent citations: 1994 AIR 2663, 1994 SCC

(6) 205. Available at: <https://indiankanoon.org/doc/1929784/> (Accessed on 9 September 2016)

<sup>16</sup> Section 65 of Indian Contract Act Retrieved from: <https://indiankanoon.org/doc/340124/> (Accessed on 16 September November 2016)

<sup>17</sup> <http://www.legalserviceindia.com/legal/article-332-victim-compensation-scheme-an-aspect-of-modern-criminology.html> (last accessed on 21st Feb, 2021)

<sup>18</sup> Offences Available at: <http://www.lawyersclubindia.com/forum/Compoundable-Offence18609.asp> (Accessed on 22 November 2016)

<sup>19</sup> Balaji Naika, BG, Restorative Justice: Fundamental Concepts and Practice, Journal of Contemporary issues in Law, Vol 3 Issue 1

<sup>20</sup> Shapland J, Atkinson A, Howes M et al., Situating Restorative Justice within Criminal Justice Theoretical Criminology. 2006; 10(4):505-532.

<sup>21</sup> Shreya Pandey and Sukanya Bharti, Restorative Justice System, International Journal of Juridical Studies and Research, Vol 2, Issue 1, June 2020