



## RESTORATIVE JUSTICE AND THE LEGAL SYSTEM: AN INDIAN PERSPECTIVE

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**“The moral arc of the universe is long,  
but it bends toward justice.”**

**-Martin Luther King, Jr.<sup>1</sup>**

### ABSTRACT

*Restorative Justice refers to a form of justice where the major emphasis of legal proceedings is on repairing the damage imposed by a party on the victim of a civil wrong or a crime. The extent to which the judicial system can resolve human conflict and restore peace and order is its most desirable outcome. It is in this context that restorative justice is gaining ground. Restorative Justice processes aim to achieve meaningful accountability for the offender, Restoration of the victim, Reformation and rehabilitation of the offender and a possible forgiveness and reconciliation. Rather than viewing the justice process as an adversarial process, restorative justice gives victims and community members active roles in the legal process. Thus, victims remain central to the process. The principles of Restorative justice permeate much of Indian law and tradition. Community-centric models of dispute resolution have existed since ancient India. In contemporary times, meeting the needs of*

*those who have been harmed and rehabilitating offending persons has witnessed an increased importance in Indian law and procedure, especially in laws protecting women and children. These include the Constitution as well as Criminal Laws such as Indian Penal Code 1860, Code of Criminal Procedure 1973, Code of Civil Procedure 1908, and legislations pertaining to Gender-related violence, sexual offences and Juvenile delinquency. This paper analyses the concept of Restorative Justice, its salient features and applicability in the Indian Law.*

**KEYWORDS:** Restorative Justice, Indian Law, Criminal, Civil Wrong, Offender, Victim, Constitution, Indian Penal Code 1860, Code of Criminal Procedure 1973, Code of Civil Procedure 1908, Gender-Related Violence, Sexual Offences, Juvenile Delinquency.

### Introduction

According to Salmond, the law exists for the promotion of justice. He defines law as “*the body of principles recognized and applied by the state in the administration of justice*”.<sup>2</sup> Thus, the ultimate objective of every legal system is to secure justice. The term justice has been derived from the Latin word ‘*Jungere*’ which means to bind or tie together, thus in this way it can be stated that justice is the key element which ties the individuals in the society together, harmonizes a balance between them and enhances human relations.<sup>3</sup> Justice manifests itself in various forms *qua* Social Justice,

<sup>1</sup> Justice Quotes, Notable Quotes, (Oct.20, 2020, 10:45 PM), [http://www.notable-quotes.com/j/justice\\_quotes.html](http://www.notable-quotes.com/j/justice_quotes.html).

<sup>2</sup> S. Dorsett, The Persona of the Jurist in Salmond's Jurisprudence, Research Gate, (Oct.20, 2020, 10:50 PM),

<https://www.researchgate.net/publication/256059381-The-Persona-of-the-Jurist-in-Salmond's-Jurisprudence-On-the-Exposition-of-What-Law-is>.

<sup>3</sup> Twinkle, Concept of Justice, Legal Bites, (Oct.20, 2020, 10:55 PM), <https://www.legalbites.in/concept-of-justice/>



Distributive Justice, Economic Justice and Political Justice etc. However, from the perspective of a modern legal system justice is classified into two broad categories: Civil Justice and Criminal Justice. Civil Justice is concerned with Civil portion of the Legal System, which allows individuals to bring private actions to achieve a remedy against private wrongs committed to them. Civil Justice is enforced through the Institutions which represent the Civil Justice System. Criminal Justice on the other hand seeks to act against the offender, for committing a wrong against the society at large (crime). This action against offender, is generally through punishment, backed by various theories such as Retributive, Deterrent, Preventive, Reform and Expiatory theory. Criminal Justice is enforced through legal Institutions which represent the Criminal Justice System.<sup>4</sup>

### Restorative Justice

The Concept of Restorative Justice refers to a form of justice where the major emphasis of legal proceedings is to repair and restore the damage/loss imposed by a party on the victim of a legal wrong or a crime.<sup>5</sup> Tony Marshall, an eminent jurist states that “*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.*”<sup>6</sup> Traditionally Jurists, have studied the concept of

Restorative Justice in the context of the direct comparison of the same with traditional criminal justice system which is focused primarily on retribution against the criminal.<sup>7</sup> This is because fundamentally, Restorative justice closely involves the victim of a crime in the judicial process so that proper compensation is offered to him/her through imposition of an appropriate penalty on the offender. However, Restorative justice is a much wider concept. It is about repairing the harm done to relationships. It is about holding the parties to a dispute accountable through dialogue and reconciliation and mobilizing the community to resolve the conflict. Thus, the concept of Restorative Justice holds key significance not only in Criminal, but in Civil Justice System as well. The extent to which the justice system can resolve human conflict, restore peace and order is the outcome of Restorative Justice. It is in this context that restorative justice is gaining ground and recognition.

### History of Restorative Justice

Restorative justice has a long historical background. In the context of Criminal Law, the main emphasis of Restorative Justice has been on ensuring that the offender takes the responsibility of the offence so that the victim does not face excessive harassment and can be satisfied that the offender is guilty of his/her act.<sup>8</sup> This was accompanied by punishing the offender, depending on the gravity of the offence. The concept of

<sup>4</sup> Ibid.

<sup>5</sup> Dr. P. Ghosh, Restorative Justice: The New Paradigm in the Province of Justice in India, MANUPATRA, (Oct.21, 2020, 3:30 PM), <http://docs.manupatra.in/newslines/articles/Upload/0D00FA2E-4EA4-4DA8-87E3-4096B2684D68.pdf>.

<sup>6</sup> Balaji Naika, Restorative Justice: Fundamental Concepts and Practices, Journal on Contemporary

Issues of Law, (Oct.20, 2020, 1:00 PM), <https://jcl.lsyndicate.com/wp-content/uploads/2017/02/Balaji.pdf>.

<sup>7</sup> Ghosh, *supra* note 6.

<sup>8</sup> What is restorative justice in law, The Hindu, (Oct.21, 2020, 4:00 PM), <https://www.thehindu.com/opinion/op-ed/what-is-restorative-justice-in-law/article26357977.ece>



Restorative Justice was recognised in ancient India by the institutions of Sabha and Samiti, by applying the concept of Dharma which recognized the Expiatory theory of Punishment based upon Penance.<sup>9</sup> Some of the famous penal codes across the world, had the provisions of restorative justice including the Code of Hammurabi, the Sumerian Code, and the Roman Law of Twelve tables which contained provision for restitution of property in cases of theft.<sup>10</sup> In fact, in Modern Era, much of Gandhian philosophy and practices such as Ahimsa and Satyagraha<sup>11</sup> are based on principles of restorative justice including the practices of fairness and equality. In context of International Law and Human Rights Jurisprudence, the principle of Restorative Justice is exemplified in various International Covenants, Declarations and Treaties. For instance, the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century (2000) advocated the “development of restorative justice policies, procedures and programs that are respectful of the rights, needs and interests of victims, offenders, communities and all of the parties”<sup>12</sup> Article 3 of the UN Declaration of Human Rights states that everyone has right to life, liberty and security and implicitly provides that a person cannot be deprived of his human

rights if he hasn't committed any offence.<sup>13</sup> Further Article 5 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6(4) of the International Covenant on Civil and Political Rights states that any person sentenced to death shall have the right to seek pardon or commutation of the sentence. Article 10(2) of the said Covenant states that an accused shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as undertrials. Article 10(3) states that the penitentiary system shall comprise treatment of prisoners and the essential aim of the same shall be their reformation and rehabilitation.<sup>14</sup>

#### **Fundamental Principles and Aims of Restorative Justice Process**

The main principles that form the foundation of Restorative Justice Process in context of Criminal Justice system are as follows:<sup>15</sup>

- Crime harms victims, their families and the community and they are in need of restoration.
- Victims, offenders and the community are key stakeholders in securing justice.
- The legal process belongs to the community.

<sup>9</sup> The Expiatory Theory of Punishment., Indian Legal Solution, (Oct.21, 2020, 4:00 PM), <https://indianlegalsolution.com/the-expiatory-theory-of-punishment/>

<sup>10</sup> Balaji, *supra* note 7.

<sup>11</sup> V. Deswell, Restorative justice: Incorporating Gandhian ideals, The Times of India, (Oct.21, 2020, 4:00 PM),

<https://timesofindia.indiatimes.com/blogs/legally-speaking/restorative-justice-incorporating-gandhian-ideals-for-a-cathartic-approach-towards-punishment/>

<sup>12</sup> The Vienna Declaration on Crime and Justice, United Nations, (Oct.21, 2020, 4:30 PM), <https://www.un.org/ruleoflaw/files/4r3e.pdf>

<sup>13</sup> United Nations Declaration of Human Rights, Office of the High Commissioner, (Oct.21, 2020, 4:30 PM),

[https://www.ohchr.org/en/udhr/documents/udhr\\_translations/eng.pdf](https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf).

<sup>14</sup> International Covenant on Civil and Political Rights, United Nations Treaty Collection, (Oct.21, 2020, 4:30 PM),

<https://treaties.un.org/doc/publication/unts/volume20999/volume-999-i-14668-english.pdf>

<sup>15</sup> Balaji, *supra* note 7.



- The victim needs information, validation, vindication, restitution, testimony, safety and support and providing the same is the starting point for legal process.
- The legal process should maximize the opportunities for participation, dialogue and mutual understanding between victim and offender.
- Offender's obligations are to make things right as much as possible.<sup>16</sup>

Restorative Justice processes aim to achieve the following outcomes:<sup>17</sup>

- Meaningful accountability for the offender.
- Restoration of the victim.
- Reformation and rehabilitation of the offender.
- Forgiveness and reconciliation between the victim and offender.

Restorative Justice in the context of Civil Justice System has following aims and principles:<sup>18</sup>

- To maximize the opportunities for participation, dialogue and mutual consent between the parties involved in the dispute.
- To encourage compromise, mediation and settlement in disputes especially in Marital and Family issues.
- To promote arbitration, mediation and conciliation to settle Commercial disputes.
- Adoption of compensatory jurisprudence in cases of tortious liability.

<sup>16</sup> Handbook on Restorative Justice Programmes, UN Office on Drugs and Crime, (Oct.21, 2020, 1:30 PM), [https://www.unodc.org/documents/justice-and-prison-reform/2001146\\_Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/documents/justice-and-prison-reform/2001146_Handbook_on_Restorative_Justice_Programmes.pdf).

<sup>17</sup> Tony F. Marshall, Restorative Justice: An Overview, Antonio Casella, (Oct.21, 2020, 1:30 PM),

- To provide for restitution in cases of breach of contract, through which the parties to the contract are restored to their original position.

### Stakeholders in Restorative Justice

**Process:** Restorative justice process takes into account the various loopholes of traditional legal system and gives proper attention to all the vital elements for securing complete justice. The three important stakeholders in restorative justice are as follows:<sup>19</sup>

- Victim/Aggrieved Party:**<sup>20</sup> In the context of Criminal Law, Victim is the person which suffers the crime. It is the most affected party in a crime. But in spite of victim being an important and affected party and instead of taking its views into concern, the State replaces the victim with its authority in the traditional Legal process and Thus, the victim is made to suffer in the same. While, the traditional legal process serves a purpose by punishing the offender and deterring the other possible criminals, but in this process, no heed is paid to the mental, physical and emotional suffering of the victim and neither the offender is made to realize and take the responsibility of the act. On, the other hand in case of Restorative Justice Process, one of the most important steps is to make the offender admit the responsibility for the offence and acknowledge his/her wrong doing under Criminal Law. In cases of Civil Law, the aim of Restorative Justice is to

[http://www.antonioacasella.eu/restorative/Marshall\\_1999-b.pdf](http://www.antonioacasella.eu/restorative/Marshall_1999-b.pdf).

<sup>18</sup> Restorative Justice Process in Personal Injury and Civil Matters, Cutting Edge Law, (Oct.21, 2020, 5:10 PM),

<https://www.cuttingedgelaw.com/page/restorative-practices-personal-injury-and-other-civil-matters>

<sup>19</sup> Balaji, *supra* note 7.

<sup>20</sup> *Ibid*.



encourage participation and dialogue between parties to the dispute, and provide for resolution of disputes through Restitution, Arbitration, Conciliation and Compensatory Justice.

**b. Offender<sup>21</sup>:** Restorative justice efforts in context of Criminal Law are motivated by a desire to work with offenders in a more positive manner. This desire to work with offenders is motivated by the reasoning that people are not born criminals but are made to act in a criminal manner due to psychological or societal factors. In the context of Civil Law compromise, arbitration and mediation are used to arrive at a settlement between the parties.

**c. Community<sup>22</sup>:** The involvement of the community is yet another vital component of restorative justice in context of Criminal law. This is so because both the victim and the offender come from the society. The involvement of the community becomes all the more important to show a better direction to the offender. In Civil disputes, the role of Panchayats and local bodies assumes significance for this reason.

### Forms and Models of Restorative Justice

**Process:** The core principles on which the process of Restorative Justice is based are implemented in different forms and models. These center on repairing harm suffered by victim/aggrieved party, involving all persons impacted by the crime or civil wrong, empowering victims and facilitating dialogue between various stakeholders.<sup>23</sup>

**a. Victim-offender mediation/dialogue<sup>24</sup>**

It is one of the clearest expressions of restorative justice process and has received a great amount of attention throughout the World. Under the same face-to-face meetings, are conducted between the victim and the offender in the presence of a trained mediator to arrive at a mutually agreeable plan to repair any damages as a result of the crime/civil wrong.

**b. Conferencing<sup>25</sup>**

Conferencing includes the discussions in which victim and offender arrive at a redress agreement, which might include financial restitution, symbolic restitution specific to the victim's needs, community service, therapy for the offender, or other agreed upon undertakings to repair harm which the offender has caused to the victim.

**c. Circles<sup>26</sup>**

Restorative circles bring together stakeholders to speak and listen to each other. Participants sit in a circle and give each person equal voice in the discussion. In these Circles, people can address issues such as the impact of the crime/civil wrong has had on the victim as well as their families and the community and the restitution for the same.

### Applicability of Restorative Justice in Indian Law

While Adversarial and Punitive justice systems dominate the modern legal landscape in India, nonetheless there is evidence of Restorative justice principles in Indian law and legal tradition. For instance, the Community-Centric models of dispute resolution have existed since ancient times in India. Under the contemporary Indian law, principles such as meeting the needs of victims, victim compensation, rehabilitation

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> *Supra* note 17.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.



of offenders under in criminal cases and arbitration/mediation in civil disputes has been recognised by both Substantive and Procedural Laws.<sup>27</sup>

**Constitution of India:** The Constitution of India, is the supreme law of the Land. Article 21<sup>28</sup> of the Constitution provides for the Fundamental Right to Life and Personal Liberty, as no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 32<sup>29</sup>, which provides for the Right to Constitutional Remedies, ensures appropriate relief to the persons whose rights have been violated by the acts of the State or through its servants. Further, under Article 142<sup>30</sup>, the Supreme Court may pass such a decree/order as is necessary for doing complete justice in any cause or matter before it. Article 299<sup>31</sup> and 300<sup>32</sup> prescribe additional remedies for the State's Contractual and Tortious liability respectively. Further the Supreme Court of India has been described as the Sentinel on the *qui vive*<sup>33</sup> and protects the Fundamental Rights contained in Part III of the Constitution. The judiciary in several decisions involving interpretation of the Constitution has recognised Restorative Justice and Compensatory Jurisprudence.<sup>34</sup> Two of these include decisions in the following case laws:

- **Chairman Railway Board v. Chandrima Das**<sup>35</sup>: The Hon'ble Supreme Court held that Article 21 which provides for the Right to Life and Personal Liberty extends to Indian citizens as well as foreigners and hence provided compensation to a Bangladeshi national who was gang-raped by employees of the Railways.
- **Rudal Shah v. State of Bihar and Another**<sup>36</sup>: The Hon'ble Supreme Court ordered the State to pay a sum of Rs.30,000 to the petitioner who was unlawfully detained in a jail for 14 years after being acquitted in 1968 for violating the petitioner's Right to life and personal liberty under Article 21 of the Constitution.

**Panchayats and Customary law:** Panchayats are traditional village councils and are reflective of an enduring understanding that the community is a key stakeholder in justice and the judicial process.<sup>37</sup> After independence, legislations such as the Gram Nyayalayas Act, 2008 enabled the creation of Nyaya Panchayats/Nyayalayas which are community centric justice models with minimal application of formal legal procedures.<sup>38</sup> Further, Article 13(3)<sup>39</sup> of the Constitution of India recognizes custom as a source of law. Customary law plays a significant role in dispute resolution in these forums and this is representative of the fact

<sup>27</sup> Ghosh, *supra* note 6.

<sup>28</sup> INDIA Const. art. 21.

<sup>29</sup> INDIA Const. art. 32.

<sup>30</sup> INDIA Const. art. 142.

<sup>31</sup> INDIA Const. art. 299.

<sup>32</sup> INDIA Const. art. 300.

<sup>33</sup> Sentinel on the *qui vive*, Live Law, (Oct.23, 2020, 6:37 PM), <https://www.livelaw.in/top-stories/sentinel-on-the-qui-vive-phrase-judges-must-constantly-remind-themselves>.

<sup>34</sup> Balaji, *supra* note 7.

<sup>35</sup> Chairman Railway Board v. Chandrima Das, (2000) 2 SCC 465.

<sup>36</sup> Rudal Shah v. State of Bihar and Another, 1983 AIR 1086.

<sup>37</sup> Balaji, *supra* note 7.

<sup>38</sup> Gram Nyayalayas, Manifest IAS, (Oct.23, 2020, 6:40 PM), <https://www.manifestias.com/2020/08/11/gram-nyayalaya/>.

<sup>39</sup> INDIA Const. art. 13.



that justice should be community-centric, corrective, conciliatory and not merely punitive.

allows for the applicability of Restorative Justice process.

2. **Civil Law:** A number of Civil dispute resolution models exist in India which strive to maximize the opportunities for participation, mutual consent and dialogue between various stakeholders. These include:
  1. **Code of Civil Procedure, 1908<sup>40</sup>:** The Code (CPC) is the procedural law regarding the administration of civil proceedings in India.<sup>3</sup> It contains provisions regarding Restitution,<sup>4</sup> which is indicative of Restorative Justice. Restitution is an act of restoring a thing to its proper owner. Under CPC, it means restoring to the party a benefit which the other party has received under a decree subsequently declared to be wrong. Relevant provisions under CPC include:
    - **Section 144:** It statutorily recognizes the principle of restitution and regulates the power of a Court regarding this matter. The section states that the Court may order a restitution to be made through refund of costs, payment of interest, damages, compensation and mesne profits from one party to the other.
    - **Section 151:** It deals with inherent powers of the Court. The Section states that “Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court” Thus, a Court has inherent powers to order restitution<sup>7</sup> irrespective of Section 144. The Section, thus

**The Lok Adalats<sup>41</sup>:** These have been given statutory backing under the Legal Services Authorities Act, 1987<sup>42</sup> and aim at providing time-bound justice in civil cases. Such courts emphasize participation and dialogue between the parties to a dispute and seek compromise, mediation and settlement between them.

**The Family Courts<sup>43</sup>:** They were established under the Family Courts Act, 1984 and decide disputes pertaining to judicial separation, divorce, validity of marriage and restitution of conjugal rights etc. These courts encourage dialogue between the parties and aim to resolve disputes amicably without the presence of legal professionals or the rigid legal procedure.

**The Arbitration and Conciliation Act, 1996<sup>44</sup>:** The Act provides for resolution of disputes through arbitration, mediation and conciliation. It thus enables the affected parties to participate and resolve disputes with mutual consent. These processes are increasingly being relied upon for resolution of contract and partnership disputes. Further, Courts throughout India, have set up mediation centers to reduce pendency of cases and encourage speedy resolutions by helping parties reach their own solutions to disputes.

<sup>40</sup> Shubham Bhargava, Restitution and its Legal Interpretation, Legal Service India, (Oct.22, 2020, 2:45 PM), <http://www.legalservicesindia.com/article/2140/Restitution-W.r.t.-to-Civil-Procedure-Code-1908.html>.

<sup>41</sup> Balaji, *supra* note 7.

<sup>42</sup> The Legal Services Authorities Act 1987, NALSA, (Oct.23, 2020, 6:40 PM), <https://nalsa.gov.in/acts-rules/the-legal-services-authorities-act-1987>

<sup>43</sup> Balaji, *supra* note 7.

<sup>44</sup> Ibid.



8. **Law of Torts<sup>45</sup>:** Under the law of Torts, the Judiciary has adopted victim-centric approach along with compensatory jurisprudence in dispute resolution in a number of cases such as:

- ***Bhim Singh v. State of Jammu and Kashmir<sup>46</sup>*:** In this case the petitioner was restrained from participating in the proceedings of the State Legislative Assembly. The Supreme Court order payment of compensation for the violation of right of the petitioner as a legislator to participate in the legislative proceedings.
- ***State of Rajasthan v. Vidyawati<sup>47</sup>*:** The Supreme Court held the State vicariously liable for the act of its Servant whereby due to rash driving of the Driver of a car of the Collector, a pedestrian was killed. Further, the Court directed payment of compensation to the Victim's widow and infant daughter.
- ***N. Nagendra Rao v. State of Andhra Pradesh<sup>48</sup>*:** The Supreme Court held that the State was vicariously liable for the acts of its servants in this case as the goods of the petitioner were spoiled in the custody of the police. The court ordered the State to compensate the petitioner for the loss borne by the him.

9. **Indian Contract Act, 1872<sup>49</sup>:** Under the Law of Contract in India, there are specific provisions for restitution where the parties to a contract are restored to their original position in case of breach of such a contract. Section 65 of the Indian Contract Act, 1872, states that "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."

**Criminal Law:** The concept of Restorative Justice under the Criminal Law in India is manifested as follows:

1. **Indian Penal Code 1860<sup>50</sup>:** The IPC is primarily concerned with defining offences and providing for their quantum of punishment since it is a Substantive Law. Section 53 of the IPC enumerates the different punishments which the courts may award to a person convicted for a crime. These are death, imprisonment for life, rigorous or simple imprisonment, forfeiture of property and fine. The recent attitude of the judiciary has been to allot the fines imposed on the offender not to the State treasury, but to pay the same to the victim, so that it can be used for his/her benefit and treatment. This approach has been especially followed in offences against women and compensation has been paid to:

- **Victims of Acid Attack: Sections 326A of IPC** provides that the fine imposed by a Court as punishment for acid attack shall be just and reasonable to meet the medical expenses for the treatment of the victim and that any such fine imposed under Section 326A shall be paid to the victim. **Section 326B of IPC** lays down the punishment for attempted acid attacks.<sup>51</sup>

<sup>45</sup> Ibid.

<sup>46</sup> *Bhim Singh v. State of Jammu and Kashmir*, (1985) 4 SCC 677.

<sup>47</sup> *State of Rajasthan v. Vidyawati*, 1962 AIR 933.

<sup>48</sup> *N. Nagendra Rao v. State of Andhra Pradesh*, 1994 SCC (6) 205.

<sup>49</sup> Rishabh Soni, *Restitution in Indian Contract Act 1872*, Ipleaders, (Oct.22, 2020, 4:47 PM),

<https://blog.ipleaders.in/what-is-the-doctrine-of-restitution/ThedoctrineofRestitutioninIndianContractact&text=ProvisionsofSection65>

<sup>50</sup> Balaji, *supra* note 7.

<sup>51</sup> A. Jha, *A Restorative Justice Model for Rehabilitation of Acid Attack Survivors*, *Delhi Journal of Contemporary Law (VOL.II)*, (Oct.22, 2020, 5:21 PM),



- **Rape Victims** (Under Sections 375, 376, 376A, 376B, 376C and 376D of IPC).
  - 2. **Code of Criminal Procedure, 1973:**<sup>52</sup> The Code contains certain provisions which have the tenor of restorative justice. Consequently, the victim and the offenders are encouraged to arrive at an amicable solution. Relevant provisions include:
    - **Section 27:** It provides that any offence which is not punishable with death or imprisonment for life and which is committed by any person who, at the date when he appears or is brought before the court, is under the age of 16 years, may be tried by the court of a Chief Judicial Magistrate or by any court especially empowered under the Children Act 1960 or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.
    - **Sections 265A-L:** These Sections allow 'Plea Bargaining'. The outcome is that the time of the prosecution otherwise wasted in proving those charges is saved and both the victim and the offender don't need to face the lethargic process of the court. The other benefit is that the offender will be put to lenient punishment if he/she accepts his/her guilt, as in other cases he/she would have had to face the punishment after proving of the charges in a lengthy trial.
    - **Section 320:** Compounding of an offense is provided for by Section 320. It is applicable only to those offences which are mentioned under the section. The Code makes the section applicable to a wide range of offences (with punishment up to 7 years imprisonment) but excludes socio-economic offences and offences related to women and children.
    - **Section 357:** It provides for Court order to pay Compensation to the victim. It states that when a court imposes fine as the mode of prescribed punishment for a particular offence then the court may order the fine to be paid to the victim for defraying the expenses incurred in prosecution or as a compensation for the loss caused to the victim due to the offence. Such compensation is payable in both offences related to property and offences against the human body. Further, under **Section 357A** of CrPC, every State Government in coordination with the Central Government, shall prepare a scheme providing funds for compensation to the victim/dependents who have suffered loss/injury as a result of a crime and require rehabilitation.
    - **Section 360:** It empowers the court to order the release of an offender on probation after he/she exhibits good conduct or after admonition while directing him/her to keep peace and maintain good behavior.<sup>53</sup>
- Legislations and Schemes pertaining to Gender-related violence and Sexual Offences:** Legislations such as Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Protection of Women from Domestic Violence Act, 2005 and Protection of Children from Sexual Offences Act, 2012 recognize the importance of meeting the needs of the victim of domestic violence or sexual offences. They recognize that compensation, restitution, rehabilitation, repairing relationships, safety and support are the fundamental needs of victims.<sup>54</sup>

<http://lc2.du.ac.in/DJCL2/7AyushJhaSimonaSahiraWahead.pdf>

<sup>52</sup> Balaji, *supra* note 7.

<sup>53</sup> *Ibid.*

<sup>54</sup> Perspectives of Justice: Restorative Justice and Child Sexual Abuse in India, Centre for Criminology



Additionally, State Governments in India have established special funds to compensate victims for harm caused by criminal offences. Similarly, the Union Government has enacted several schemes such as Central Victim Compensation Fund. These schemes provide medical aid, police assistance, legal counselling and assistance, psychological counselling and temporary shelters to women affected by crime, although these initiatives haven't been implemented properly. Further, the legal system attempts to protect the identity of the victims and prevent secondary victimization. Various Legislations and corresponding rules under them protect victims during various stages of the legal process such as Investigation, Testimony, Evidence and through Police Protection.<sup>55</sup>

### Juvenile Delinquency Reform

**Legislations-** Relevant legislations include-

- a) **Probation of Offenders Act, 1958<sup>56</sup>:** The Act aims at securing the release of certain offenders on probation or after due admonitions. The scope of the Act was discussed in these cases:
  - **Rattan Lal v. State of Punjab<sup>57</sup>:** The Supreme Court observed that the Act is a milestone in the progress of modern liberal trend of reform in the field of penology.
  - **Musa Khan and others v. State of Maharashtra<sup>58</sup>:** The Supreme Court observed that the Act is a social legislation aimed at reforming the juvenile offenders and

to prevent them from becoming hardened criminals by providing them with an educative and reformatory treatment.

- b) **Children Act, 1960<sup>59</sup>:** It is aimed at providing care, protection, maintenance, welfare, training, education, rehabilitation and trial of neglected or delinquent children. It is only in force in the Union territories of India.
- c) **The Juvenile Justice (Care and Protection of Children) Act, 2015:** It incorporates various principles of restorative justice such as ensuring accountability of the offender, reform and rehabilitation for juveniles who violate the law. The Act makes a departure from traditional model of Criminal Justice and punishment as it recognizes the possible negative outcomes of association of juvenile delinquents with adult offenders. The Act aims at reformation of juveniles through various community based reformatory and rehabilitative measures, such as group counselling and community service.<sup>60</sup>

### Restorative Justice: A Critical Analysis

The Concept of Restorative Justice aims to bring all the stakeholders in civil or criminal dispute together on a common platform. It provides for an alternative framework which restores the victim and the offender to their former positions, rather than merely punishing the latter. Thus, it is an infinitely preferable alternative to the adversarial and retributive nature of the conventional justice

and Victimology National Law University Delhi, (Oct.22, 2020, 5:21 PM), <https://nludelhi.ac.in/download/publication/2017/PerspectivesofJustice.pdf>

<sup>55</sup> Ibid.

<sup>56</sup> Ayushi Singh, The Probation of Offenders Act- An Analysis, Legal Service India, (Oct.23, 2020, 6:00 PM), <http://www.legalserviceindia.com/legal/article-453-the-probation-of-offenders-act-an-analysis.html>.

<sup>57</sup> Rattan Lal v. State of Punjab, 1965 AIR 444.

<sup>58</sup> Musa Khan and others v. State of Maharashtra, AIR 1976 SC 2566.

<sup>59</sup> Children Act 1960, Ministry of Women and Child Development, (Oct.23, 2020, 6:00 PM), <https://wcd.nic.in/children-act-1960-60-1960>.

<sup>60</sup> Restorative Justice, Vikaspedia, (Oct.23, 2020, 6:00 PM), <https://vikaspedia.in/education/child-rights/living-conditions-in-institutions-for-children-in-conflict-with-law/restorative-justice>.



system.<sup>61</sup> However, Restorative justice can never be the sole remedy<sup>62</sup>, in the sense that it's not always successful in maintaining law and order in the society and because it fails at solving the complicated issues pertaining to criminal and civil disputes. Further, the human desire to preserve life and security by holding an offender accountable only through proper punishment renders restorative justice ineffective, at least in grave criminal cases. Also, the fact remains that Restorative Justice, as is presently practiced has been defective, and has indirectly provided legitimacy to the rigid judicial system and repressive crime control strategies. Still, one cannot completely ignore the fact that there is a need of undertaking structural judicial reforms to ensure that the justice system works in best in the interest of the victim, the offender and the society as a whole. Perhaps, the best and most practical solution is to combine both the traditional and restorative justice approaches to meet the challenge of social reform and ensure smooth operation of the legal system at the same time.<sup>63</sup>

**Relevant Case Laws:** A few Judicial Decisions in which Courts have expressed their opinions on Restorative Justice are as follows:

- a) *Anupam Sharma v. NCT of Delhi and Another*<sup>64</sup>: The Delhi High Court observed that, “Restorative justice may be used as a synonym for mediation. The object and nature of restorative justice aims at restoring

the interest of the victim. Involvement of the victim in the settlement process is welcome in the process of restorative justice. It is a process of voluntary negotiation and concertation, directly or indirectly between the offender and the victim.”

- b) *State of Uttar Pradesh v. Sanjay Kumar*<sup>65</sup>: The Hon’ble Supreme Court observed that by laying emphasis on individualized justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice abstains from uniformity of sentencing. But, undue sympathy to impose inadequate sentence would do more harm to the public system and undermine the public confidence in the efficacy of law and society could not long endure under serious threats.
- c) *Tirath Singh Yadav v. State*<sup>66</sup>: Delhi High Court held that Compensation is payable to a victim, even for a crime committed prior to the enactment of the Criminal Procedure Code (Amendment) Act 2005.
- d) *Serina Mondal v. State of West Bengal and Others*<sup>67</sup>: The Calcutta High Court while deciding the issue of granting compensation to a victim of human trafficking, held that denial of such compensation to the victim in pursuance to Section 357A of CrPC is a violation of Article 21 of the Constitution.
- e) *State of Gujarat v. Raghav Bhai Vashrambhai and Others*<sup>68</sup>: The Gujarat High Court opined that, “In a realm of victimology the decision is one of the aspects towards the fulfilling the design and

<sup>61</sup>Chris C, Restorative Justice: A Critical Analysis, Antonio Casella, (Oct.22, 2020, 1:30 PM), [http://www.antonioacasella.eu/restorative/Cunneen\\_2015.pdf](http://www.antonioacasella.eu/restorative/Cunneen_2015.pdf)

<sup>62</sup> Balaji, *supra* note 7.

<sup>63</sup> Ibid.

<sup>64</sup> Anupam Sharma v. NCT of Delhi and Another, 146 (2008) DLT 497.

<sup>65</sup> State of Uttar Pradesh v. Sanjay Kumar, (2012) 8 SCC 537.

<sup>66</sup> Tirath Singh Yadav v. State, CRL. A. 273/2004.

<sup>67</sup> Serina Mondal v. State of West Bengal and Others, WP 4517 (W) of 2018.

<sup>68</sup> State of Gujarat v. Raghav Bhai Vashrambhai and Others, (2003) 1 GLR 205.



desideratum and restorative justice to the victims of crime.”

- f) **Ram Phal v. State and Ors**<sup>69</sup>: The Delhi High Court stated that "at present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system."
- g) **Manohar Singh v. State of Rajasthan and Ors**<sup>70</sup>: The Hon'ble Supreme Court held that the "Whole purpose of Section 357 of CrPC 1973 is to accommodate the interests of the victims in the criminal justice system. Sometimes the situation becomes such that there is no purpose served by keeping a person behind bars. Instead, directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice."

### Conclusion

Restorative Justice has brought about a remarkable change in the process of dealing with crimes and civil disputes. It reflects a balanced judicial system which aims at delivering justice to both the offenders and victims. Restorative Justice is applicable in every stage and field of legal process. Presently, it is being extensively used in criminal matters. Restorative Justice Process is based upon the premise that punishment is not the sole remedy in a legal dispute, as the real roots of all crimes and civil wrongs lies elsewhere. It focuses on encouraging the offenders to understand the impact of their behavior and the consequences of their harms by holding them accountable to the victim or the aggrieved party. In doing so, it aims at reconciliation between the offender, the victim/aggrieved party and the community,

something, which has been long neglected by the traditional Criminal and Civil Justice Systems. Nonetheless, Restorative Justice process, in spite of its obvious merits cannot be used as a sole remedy as there are serious practical difficulties in implementing its unconventional procedure. Thus, the path forward lies in using the Restorative Justice process in conjunction with the traditional judicial and legal processes and not in completely abolishing the latter.

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<sup>69</sup> Ram Phal v. State and Ors, (CDJ 2015 DHC 768) (FB).

<sup>70</sup> Manohar Singh v. State of Rajasthan and Ors, A.I.R. 2015 SC 1124.