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EXPLORING THE SCOPE AND CHALLENGES OF RESTORATIVE JUSTICE IN INDIA

AUTHORED BY - ARZOO KEDIA

Abstract

This article delves into the role of restorative justice (RJ) in the Indian criminal justice system, focusing on how it involves and satisfies victims. This approach to delivering justice views crime as not only the violation of law but of relationships, aiming to mend the damage, lower repeat offenses, and compensate victims. This article also explores various models of Restorative Justice practices worldwide, acknowledging their success, and then compares them with contemporary and traditional methods of India like the Panchayat system, Lok Adalat, and the Arbitration and Conciliation Act. It raises concern about the shortcomings of India's current system, especially the role of victims, the complexities of procedures, and the socio-cultural barriers that prevent effective support for victims. The article also examines the restorative aspects of the Juvenile Justice Act and how it is integrated in criminal law, including plea bargaining, victim compensation, and probation. The analysis discusses the feasibility and challenges of adopting Restorative Justice in India, especially for crimes like sexual assault and ensuring fair justice across different socio-economic backgrounds. The conclusion emphasizes that while RJ is a promising alternative to punishment, it needs careful implementation to avoid further traumatizing victims and to ensure their needs are met. The study ultimately calls for a balanced approach that blends traditional and restorative justice practices to better support victims and create a more compassionate and effective criminal justice system.

Introduction

Crime, when viewed with respect to law and order, represents a violation of the code. However, restorative justice offers a different perspective, seeing crime as a violation of relationships.¹ Instead of just punishing offenders through punitive measures, this approach focuses on repairing the damage done, reducing reoffending, and compensating the victim. It aims to meet the needs of all parties affected by the crime, including primary and secondary victims, the state, and the

¹ Debra Heath-Thorton, 'Restorative Justice' (Law, Conflict Resolution & Victim Empowerment, *Britannica*, 31 May 2016) < <https://www.britannica.com/topic/restorative-justice> > accessed 25 June 2024

community, while also emphasizing the rehabilitation of offenders to prevent recidivism and support their reintegration into society.

In India, the criminal justice system is often criticized for ignoring victims' needs. The recent Pune car crash, where a minor drove under the influence and received a seemingly lenient punishment of writing a 300-word essay, highlights concerns about the role of the victim in the justice process.² Restorative justice methods, such as dialogue between victims and offenders, conferencing, and forming restorative cycles, are suggested as alternatives to address these shortcomings. This article explores the position of victims in the current legal and social framework of India and aims to understand whether the practice of Restorative Justice will work as a suitable alternative to increase victim participation and satisfaction in the criminal justice system.

Restorative Justice: A Global Perspective

Restorative justice (hereinafter referred to as "RJ") is implemented worldwide in different formats, yet the primary goal remains unchanged: to engage victims and offenders in a conciliatory process where they can discuss the offence, its repercussions, and avenues for mutual progression. This solution-oriented approach contrasts with the punitive nature of traditional criminal justice systems, providing benefits to both parties. RJ, as a modern reform for mass incarceration and victim satisfaction, is being widely integrated into the criminal justice system around the globe. It has been historically practiced by various tribes, a few examples of which being collective responsibility among the Maori tribes of New Zealand³, traditional courts and community involvement among the Vhavenda tribes of Africa⁴, and Circle Sentencing for the Indigenous communities of Canada⁵, but there has been a widespread phenomenon where it is being formally recognised by governments as an alternative to retributive systems. Countries like Canada, Australia, and New Zealand have been successful in developing a model for RJ that serves its purpose of reducing recidivism rates and making the justice delivery process more victim-friendly. The Youth Criminal Justice Act⁶ and the Restorative Justice Program in Canada, along with the

² Prabhakar Jha, 'Pune Porsche accident: Rs 48k booze, 300-word essay, rich dad and a political slugfest' *Times of India* (India, 22 May 2024)

< <https://timesofindia.indiatimes.com/city/pune/the-pune-porsche-accident-booze-300-word-essay-rich-dad-and-a-political-slugfest/articleshow/110328618.cms> > accessed 25 June 2024

³ V. E. Jantzi, 'Restorative Justice in New Zealand: Current Practise, Future Possibilities' (2001)

⁴ Joshua Mawere & Ndwamato Walter Tshamano, 'The Role of African Indigenous Knowledge Systems in Achieving Restorative Justice among the Vhavenda of South Africa' in Sanjeet Kumar(ed), *Indigenous people-Traditional Practices and Modern Development* (Intech Press 2024)

⁵ Ivan Potas and others, 'Circle Sentencing in New South Wales: A Review and Evaluation' (2004) 8 AILR < <https://www.jstor.org/stable/26452472> > accessed 25 June 2024

⁶ Youth Criminal Justice Act 2003 (Canada)

Youth Court Act⁷ and the Restorative Justice Scheme in New Zealand, have attracted great response and decreased recidivism rates among youth offenders. One notable aspect is that in Canada, 46.1% of the cases which were referred to RJ did not require face to face meeting of victim of offender but participation without contact.⁸ India can also adopt this practice to avoid revictimization when practicing restorative process. Likewise, Australia's National Framework for Restorative Practices and the National Indigenous Restorative Justice Program have successfully fostered social cohesion between Indigenous communities and mainstream society.⁹

Restorative Justice in India: Current Framework and Practices

India has also started incorporating elements of restorative justice into its legal system, albeit in a less comprehensive way. The current systems such as the Panchayat system, Lok Adalat, and different forms of arbitration include some aspects of restorative principles. These methods strive to settle disputes amicably and include community involvement, aligning with the fundamental principles of restorative justice. This section delves into the functionality of these traditional and contemporary practices within India's legal framework and their potential for wider implementation.

- **Panchayat System and its History of Self-Righteousness**

Due to developments in social and economic realms, traditional Panchayats have lost effectiveness and relevance, yet they persist in rural and tribal regions of India, particularly among Scheduled Tribes (STs) and Backward Classes (BCs), dealing with social and caste matters. However, it has been observed that the decisions passed by such caste or khap panchayats are often disproportionate and backwards. Khap Panchayats have been declared unlawful by the Supreme Court for this reason. In 2010, the Supreme Court in *Mahendra Nath Yadav v. Sheela Devi* ruled that verdicts issued by village panchayats concerning the personal lives of couples hold no legal validity, regardless of local community acceptance of such decisions.¹⁰ However, even after the direction of the Supreme Court to discontinue these gatherings, a lot of caste and community panchayats are rampant in the country and passing decisions or *diktats* on the personal lives of

⁷ Oranga Tamariki Act 1989 (New Zealand)

⁸ Federal-Provincial-Territorial Working Group on Restorative Justice, 'Increasing the use of Restorative Justice in Criminal Matters in Canada- Base Report'

⁹ Jessica Pika, 'Honoring the Global Indigenous Roots of Restorative Justice: Potential Restorative Approaches for Child Welfare' (Center for the Study of Social Policy, 1 November 2019) <<https://cssp.org/2019/11/honoring-the-global-indigenous-roots-of-restorative-justice/>> accessed 25 June 2024.

¹⁰ *Mahendra Nath Yadav v. Sheela Devi AIR ONLINE 2010 SC 312 (India)*

members on self-righteous beliefs.¹¹ These panchayats are usually referred to for personal matters like land inheritance disputes or marital disputes, the members of communities find it more convenient to refer these matters to the authorised elders of their community instead of seeking legal recourse as their first resort. The decisions of these *baithaks* are considered to be binding on the members and the sanctioning for disobedience includes outcasting of members from their caste or communities.¹² While the court has passed the decision to put a halt to this system, much needs to be done to actually ensure the implementation of the court's will. One of the reasons why people tend to seek the help of these panchayats instead of taking legal recourse is because of the simplicity of this process, a lot of the population still holds the perspective that the judicial process is cumbersome. Additionally, court cases have a propensity to take a long duration to get disposed of and when matters are of a personal nature such as matrimonial or long disputes, people tend to be especially impatient. Lok Adalat¹³ is one such attempt to tackle this problem and deliver speedier justice.

- **Lok Adalat**

The Legal Services Authorities Act of 1987 gives "Lok Adalat," sometimes known as the "People's Court," its legal standing.¹⁴ Lok Adalats operates as a non-adversarial approach where various legal entities conduct simulated courts to handle specific jurisdictions. Cases are referred to Lok Adalats upon petition by one party, and settlements are prioritized. If no agreement is reached, the case returns to court;¹⁵ however, a settlement in Lok Adalat results in a legally binding decision based on mutual consent, akin to civil court judgments. These proceedings are judicial, akin to civil courts, and effective in settling various disputes, including financial, landlord-tenant, motor vehicle accidents, and matrimonial cases.

The "Lok Adalat" is seen as a democratic success, providing cost-effective local justice by professionals close to the conflict. It embodies justice and fairness through compromise, balancing restorative practices. However, it is essential to ensure that the rights and interests of all parties are not sacrificed for the sake of speedy justice,¹⁶ as it is rightly said

¹¹ Dr. Maninder Kaur, 'Khap Panchayats: Tentacles of Traditional Institutes' (Anthropology India Forum, 25 January 2022) < <https://www.anthropologyindiaforum.org/post/khap-panchayats-tentacles-of-traditional-institution>>accessed on 25 June 2024

¹² Rajika Chaudhary, 'Lousy Truth of Khap Panchayats' *Times of India* (India, 22 May 2022)

¹³ National Legal Services Authorities Act 1987 (India)

¹⁴ Idib

¹⁵ NLSA Act 1987, s 20(5)

¹⁶ Manju Gupta V National Insurance Company (1994) ACC 242 (India)

that “Justice delayed is a Justice denied but Justice hurried is Justice buried”. There have been instances where it was observed that people prefer the traditional court system and pressurise their lawyers to stick to the same, and sometimes even lawyers are not willing to give up the cases to Lok Adalat for resolution. This might be a reflection of how the country still might not be entirely ready for Restorative Practices, so for it to be implemented successfully, awareness for the same needs to be expanded so that the confidence of the public can be gained.

- **The Arbitration and Conciliation Act**

The Arbitration and Conciliation Act of 1996¹⁷ provides frameworks for resolving disputes via arbitration, mediation, and conciliation. This enables parties to engage in friendly resolution of disputes. These methods are gaining traction for handling disputes related to contracts and partnerships. Moreover, mediation centers set up by courts across India aim to expedite case resolutions by aiding parties in promptly reaching agreements independently.

- **Restorative Justice in Juvenile Law**

"The Juvenile Justice (Care and Protection) Act 2015"¹⁸ is based on the philosophy of Restorative Justice. The act provides alternative sanctions such as counseling, community service, fines, probation for good behavior, and placement in reformatory facilities. The Act empowers the Board to require a child's attendance at school, vocational training centers, or therapeutic facilities, or impose restrictions on accessing specific locations. These measures align with international standards promoting offender reintegration through diversion techniques.

The Act categorizes offenses as petty, serious, and heinous. For petty and serious offenses, children may learn about victims' "sufferings," aiding their understanding of consequences and the importance of making amends, fostering their reformation. For initial infractions, spontaneous actions, necessity, or legal defences, restorative measures can replace penalties, even minor ones.

The Act provides for the creation of Juvenile Justice Boards in every district to ensure that the principle of RJ is being followed, however, due to a lack of clarity in the functioning of these boards, the intention of the act is not being entirely fulfilled. There is also a want

¹⁷ The Arbitration and Conciliation Act 1996

¹⁸ The Juvenile Justice (Care and Protection) Act 2015

for proper infrastructure and training for these boards to function adequately.

Incorporation of Restorative Principles in Criminal Law

The procedural criminal law of India has some provisions that are based on the principles of restorative justice, the three new criminal law acts aim to shift towards a reformatory justice system by incorporating community service as an alternative to imprisonment. However, the criminal justice system largely maintains its existing punitive nature. Following are some provisions in the Criminal Law where the principle of RJ has been maintained:

Plea Bargaining

Plea bargaining is a process where a defendant agrees to confess to a lesser offense or accept a reduced penalty in exchange for concessions from the prosecutor or court. Section 290 of the Bhartiya Nyaya Suraksha Sanhita outlines the provisions for 'Plea Bargaining.'¹⁹ This process saves time for the prosecution, which would otherwise be spent on proving allegations, and helps both parties avoid lengthy legal proceedings. Additionally, the offender benefits from a reduced sentence upon admitting guilt, compared to the potentially harsher punishment that might result from a lengthy trial.

Victim Compensation

A court order requires compensation for the victim, specifying that when the court assigns a "fine" as the designated "punishment" for an offense, it may direct the fine to be paid to the victim to cover prosecution costs or as reparation for the victim's losses resulting from the offense. Compensation is applicable to both property crimes and crimes against individuals. Furthermore, according to Section 396 of the Bhartiya Nyaya Suraksha Sanhita, every "State Government," in collaboration with the "Central Government," must establish a "scheme providing funds for compensation to victims/dependents" who have experienced loss/injury from a crime and require rehabilitation.²⁰

Probation

Section 401 of the Bharatiya Nyaya Sanhita gives the court authority to release an offender on probation upon demonstrating good conduct or after receiving a warning and being directed to maintain good behavior.

¹⁹ Bhartiya Nyaya (Second) Sanhita 2023, s. 290 (India)

²⁰ Bhartiya Nyaya (Second) Sanhita 2023, s. 396 (India)

Current Position of Victims in the Criminal Justice System

The Indian Criminal Justice system is frequently criticized for marginalizing victims in criminal proceedings.²¹ Nonetheless, recent years have seen efforts to make the system more accommodating to victims, driven by International Covenants on Victim Rights, proactive judicial actions, and numerous law commission reports. The introduction of three new criminal laws aims to foster a more victim-centric approach by implementing provisions for zero FIR²² and enhancing the framework for disseminating information to victims²³, among other measures.

Despite these efforts, there are several institutional issues that still needs major reforms:

- **Victim's Right to Appeal:** The victim's right to appeal is restricted by specific conditions, preventing them from seeking redress in various situations, such as appealing on the grounds of inadequate sentencing.
- **Limitations on Victim's Counsel:** In *Rekha Murarka v. State of WB*,²⁴ the constraints on the victim's counsel prohibit the victim's advocate from conducting a parallel prosecution, indirectly affecting the victim's ability to appeal by emphasizing the secondary role of the victim's counsel.
- **Victim Compensation:** Although section 357A of CrPC ensures victim compensation even if the accused is not convicted, the process for obtaining compensation is complicated and rigid.
- **Practical Challenges:** Victims often face significant legal complexities and financial burdens when filing an appeal. Judicial delays further discourage them from pursuing their rights.
- **Insensitivity and Bias:** Victims frequently feel ignored and disregarded by law enforcement and judicial authorities, leading to re-traumatization and a lack of trust in the system, as highlighted in a joint report by the Women's Rights Initiative and the International Centre for Research on Women.
- **Lack of Information, Support, and Protection:** Inadequate support services and the absence of comprehensive victim protection measures, such as witness protection programs, leave victims vulnerable to intimidation and harm.

²¹ G.S. Bajpai, *Victim in the Criminal Justice Process: Perspective on Police and Judiciary*

²² *Bhartiya Nyaya Suraksha Sanhita 2023*, s. 173 (India)

²³ *Bhartiya Nyaya Suraksha Sanhita 2023*, s. 193 (India)

²⁴ *2020 (2) SCC 474 (India)*

It is evident through the brief breakdown above that victims in the country still face several hurdles, both legal and social, when it comes to obtaining justice. There are still no provisions in place to encourage offenders to take responsibility and help restore victims to their original state. In contrast, some jurisdictions provide broader rights to victims. For example, the European Union's Directive 2012/29/EU establishes minimum standards on the rights, support, and protection of victims, ensuring a more comprehensive right to appeal.

Will Restorative Justice truly serve “Justice”?

Despite significant progress in India regarding "victim justice," where the victim and their care are considered crucial to the overall process, much remains to be done to achieve effective participation and rehabilitation of the victim. In the current scenario, where victims are treated as secondary parties in proceedings, it is inaccurate to claim that restorative justice is an appropriate solution. Although restorative justice should be an option for those who opt to engage with the offender, surveys conducted with victims suggest that not every victim wishes to engage in mediation.²⁵ Authorities must ensure victims are "notified, consulted, and taken into account." Given the various divisions such as class, caste, religion, and gender in India, it would not be entirely incorrect to assume that victims might be deprived of this choice. Consequently, restorative justice has the potential to be skewed in favour of the privileged, becoming another tool for them to evade the law. The principle of RJ is incorporated in the Juvenile Justice (Care and Protection) Act, 2015, but the applicability of the process lacks clarity, therefore resulting in incidents like the Pune Porsche accident, where the offender was initially let off with a punishment to write a three-hundred-word essay, highlight the sentiment that “there’s one law for the rich and another for the poor.”²⁶

Moreover, the absence of formal victimization surveys in India has created a significant gap in understanding victims' expectations and frustrations with the justice delivery system. Surveys carried out in the United Kingdom, the United States, and New Zealand show that the majority of victims favour facing their offenders and seeking compensation or negotiating an agreement without a direct confrontation.²⁷ Hence, it is crucial to ascertain whether sexual assault survivors in India would opt for such an alternative or parallel procedure instead of the criminal trial, a

²⁵ Edna Erez & Pamela Tontodonato, 'Victim Participation in Sentencing and Satisfaction with Justice' (2006) 9 (3) Justice Quarterly

< <https://doi.org/10.1080/07418829200091451> > accessed 25 June 2024

²⁶ Colin Webster, 'Conclusion: 'There's One Law for the Rich and Another for the Poor'', *Rich Crime, Poor Crime: Inequality and the Rule of Law* (Emerald Publishing Limited, 2023)

²⁷ Mary P. Koss, 'Disposition and Treatment of Juvenile Sex Offenders from the Perspective of Restorative Justice' in Howard E. Barbaree & William L. Marshall (eds), *Juvenile Sex Offender* (2nd edn, 2006).

feminist legal strategy would prompt women to talk about their encounters with the official trial system and how it has either empowered or disadvantaged them. Meanwhile, it can be examined as an option following conviction for victims dissatisfied with formal criminal penalties and for juvenile offenders as part of their rehabilitation.

Restorative justice offers an alternative approach to addressing crimes, however, it is inadequate for maintaining law and order and addressing the complex issues related to crime.²⁸ Restorative justice cannot serve as a replacement for the existing criminal justice system. However, it could potentially act as a catalyst, either before or after legal proceedings, to ensure a certain level of satisfaction for victims. Therefore, for the foreseeable future, a combination of both approaches will likely be necessary unless society progresses significantly to involve victims more directly in crucial criminal justice matters. This is particularly relevant in underdeveloped and emerging communities, where victim-blaming remains prevalent. Changing people's mindsets takes time and requires societal and educational reforms. Until such changes occur, it is prudent to prioritize the best interests of both society and victims collectively. Consequently, restorative justice should not be viewed as a substitute for incarceration but can complement a prison sentence. Additionally, it is not solely about forgiveness or reconciliation but provides a platform where these elements, among others, can potentially take place.

It is also crucial when using restorative justice methods to handle cases with great care and sensitivity, given the vulnerable position of victims. It should be ensured that while practicing methods like mediation, the victim is empowered and gaining back control by having given the power to accept or reject an apology, and not being re-traumatized by the process or being pressured into acting against her will. This is extremely relevant in cases of sexual assault where a significant number of cases involve the perpetrators being someone known to the victim. Therefore, proper infrastructure needs to be developed first by the state so that the psychological closure of the victims can be achieved without any external pressure corrupting their decision. Recruitment of trained mediators and the creation of a controlled and unbiased environment are preliminary requirements for such practices to succeed.

²⁸ Howard Zehr, *The little book of restorative justice* (Good Books 2015)

Conclusion

For approaches like restorative justice to be effective, the criminal justice system must prioritize the victim's role in proceedings. This starts with eliminating biases and acknowledging the unique needs of victims. The recent criminal bill fell short in this regard as it overlooked the possibility of males being victims of sexual assault. In a society where prevailing views of masculinity often lead to the neglect of male victims, such oversight in the law is a significant setback.

In summary, policies centered around victims are crucial to ensure the delivery of justice, adequate support and care for victims, and a more empathetic criminal justice system. There is a pressing need to invest in victim support systems nationwide, including provisions for legal assistance, medical attention, and counseling services, to foster trust in the criminal justice process. The government should also intensify public awareness efforts and target specific groups requiring support and care. It is imperative to prioritize the voices of victims, empower them, and safeguard their rights. Only then can we truly ensure that the criminal justice system operates in the best interests of those it serves.

