

## RESTORATIVE JUSTICE AND REFORMATION OF OFFENDERS

*Akanksha Marwah\**

“The end of penal laws is that they are not to be applied.”

-Fichte

### Abstract

“To err is human and to forgive is divine.” While divinity is difficult to be pictured in law, errors that humans commit are dealt with the force of law. It has been accepted for a fact that crimeless society is a myth and some form of it is always in existence in society. However, state does make an effort to control it as much as it can and deliver justice to the parties at loss. The approach of the state in dealing with the wrongdoers has walked miles and it has experimented with different justice system and punishment theories from retributive, to deterrent and now to reformation. The objective of this article is to combine the restorative justice system and read it into the objective of reformative and rehabilitation of the offenders. It shall first explain the concept of restorative justice and move towards its utility for rehabilitation of offenders.

- I. Introduction**
- II. Conceptual Understanding of Restorative Justice**
- III. Rehabilitation and Reformation of Offenders**
- IV. Rehabilitation of Offenders through Reformative Justice**
- V. Reformative Justice in India**
- VI. Conclusion**

### I. INTRODUCTION

ON MARCH 20, 2020, the world witnessed the hanging of Nirbhaya rape case convicts in India’s National Capital Territory of Delhi. Some were rejoicing, calling it justice, for the girl who was brutally raped by a gang of six ‘uncultured’ humans and for the mother who was religiously following the courts for more than seven years, seeking justice from it, in the form of death penalty only. For them, an example was set for the future. While on the other side, there were people who called this death sentence, act of an uncivilized nation and that the sentence which was awarded under the constant pressure from media and public and was not justice in its true sense.

---

\* Assistant Professor (Law), Delhi Metropolitan Education, Noida.

Opinions of people are going to vary on an issue like this, as to how offenders of law should be treated no matter what, but this raises a very crucial question upon which the entire future of our criminal justice system depends. A crimeless society is a myth.<sup>1</sup> And that stricter punishment reduces incidence of crimes has also been proved to be a myth. Had this been true, that innocent girl in Kathua<sup>2</sup> would not have gone through that excruciating pain after rape laws were made more stringent in 2013<sup>3</sup> after Nirbhaya rape case. Or those hundreds of girls would not have suffered after the Criminal Law (Amendment) Act, 2018 was passed.<sup>4</sup>

Believe it or not, punishments have failed to deter the potential criminals from violating the law. There can be multiple reasons for this and they have already been discussed by criminologists, legal experts, and jurists. Indian legal system is enriched with one of the best laws in the world. But when it comes to implementation, intentional or unintentional gaps in the system holds them back. This article intends to go beyond those loopholes in Indian criminal justice system and focuses on restorative justice for dealing with aftermath of crime and its gradual and full-fledged adoption of it. The author has tried to put forth principles of restorative justice and bring to forefront the benefits it has to offer to the criminal law policy, thus, emphasising on its needs, especially with respect to the existing flaws in the system. It also locates some of its forms as already present in the current system and suggests the way forward.

## II. CONCEPTUAL UNDERSTANDING OF RESTORATIVE JUSTICE

“Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>5</sup>

The Preamble to the Constitution of India secures to ‘We, the People’, social, economic, and political justice. Social justice, is vast enough to ensure equality in the society. One form is to

---

<sup>1</sup> NV Paranjape, *Criminology and Penology with Victimology* 3 (Central Law Publications, 16<sup>th</sup> edn., 2014).

<sup>2</sup> “India Outrage spreads over rape of eight-year-old girl”, *BBC News*, April 13, 2018, available at: <https://www.bbc.com/news/world-asia-india-43749235> (last visited on April 12, 2020).

<sup>3</sup> The Criminal Law (Amendment) Act, 2013 (Act No. 13 of 2013) introduced upon the recommendations of Report of the Committee on Amendments to Criminal Law, available at: <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (last visited on April 12, 2020).

<sup>4</sup> The Criminal Law (Amendment) Act, 2018 (Act No. 22 of 2018).

<sup>5</sup> Razaan Bailey and Thelma Ekiyor, “Retributive Justice v Restorative Justice, Prisons Transformation Project”, *Promoting Restorative Justice in South Africa’s Correctional Services*, Centre for Conflict Resolution (2005).

maintain harmonious relationships amongst the individuals and with the society. Crime happens when people harm each other and violate these relationships. People, who are expected to live with peace and tranquillity within the community, break those implicit promises and commit acts which harm this social justice secured by us to us through this constitution.

Restorative means to restore or to retribute and take the scenario back to its original situation. Justice refers to the principle of righteousness, just, strict performance of moral obligations, practical conformity to human or divine law, equity, uprightness, and fairness. The concept of restorative justice, thus, seeks to provide justice to the victim by restoring him to his previous conditions as much as it can be done by making amends.

Restorative justice finds its roots in 'Creative Restitution' developed by psychologist Dr Albert Eglash.<sup>6</sup> This system is characterized by presence of both humanity and accountability. In creative restitution, the offender is subjected to find the ways to make amends to the victims of his act and walk a 'second mile' with other offenders.<sup>7</sup> Not only does the offender is made accountable to the people he has hurt but is also made obligated to change the other offenders. It aims to restore the losses afflicted to the victims by taking care of their needs and also addresses the concerns of the offender who is given a chance to reform himself and integrate with the society again.

Restitution is not an altogether new form of punishment. It has existed since time immemorial. However, with the classification of acts and omissions committed against the generally accepted societal behavior into categories of crimes and wrongs, restitution was saved for civil wrongs and crimes were meted out with punishment.<sup>8</sup> Thus, while restitution is applied to civil wrongs, Dr. Albert Eglash through creative restitution promoted its application to the criminal cases as well.

Restorative justice takes all the parties involved in the offence, *viz.* victim, state, judiciary, and offender, into its loop. It understands their needs and opinions to resolve collectively and deal with the situation that has arisen due to act of the offender<sup>9</sup>. All the stakeholders get to sit

---

<sup>6</sup> Luara Mirsky, "Albert Eglash and Creative Restitution: A Precursor to Restorative Practices", *IIRP News*, (Dec. 3, 2003), *available at*: <https://www.iirp.edu/news/albert-eglash-and-creative-restitution-a-precursor-to-restorative-practices> (Last visited on April 12, 2020).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Supra* note 1 at 3.

<sup>9</sup> Karan Shubh, "Restorative Justice & Weaker Section: Role of Judiciary in the Perspective of Delinquency Prevention", Legal Services India, *available at*: <http://www.legalservicesindia.com/article/623/Restorative-Justice-&-Weaker-Sections.html> (Last visited on April 12, 2020).

together, discuss the consequences of the injustice perpetrated by the offender and decide the plan of action which benefits all.<sup>10</sup> It works on the principle of optimism which asserts that making offender and victim sit together and letting their emotions come out would be in the interest of both. This intends to restore the loss done to victim, mends the causes which led to the commission of crime by the offender, and secures the faith of the society that during this process the offender has been healed and is no more a threat to the society.

Most importantly, this theory holds that crime is not committed against the society, but people, relationships, and emotions. It is violation of one person by another as it was believed in the case of retributive justice, probably the only point of commonality between the retributive justice and restorative justice. However, restoration is future oriented since it focuses on the future for solving the problem created by the acts of the offender.

On the other hand, retributive justice, while looking at past, establishes the blame and only punishes offender for the acts committed by him. Thus, it makes it an obligation to make things correct. It tends to bring victim and offender together so that they can tell each other about the victimization, the way they have been hurt, reasons for committing crime and to find a road to be travelled that serves all. This makes it a problem-solving approach for both offender and victim and not the punitive one. It, thus, also recognizes the needs of the victim which anyway Indian Criminal Justice System has been held guilty, at many occasions, of ignoring. Justice Wadhwa has, on the same lines, iterated that, “*criminal justice would look hollow if justice is not done to the victim of the crime. A victim of crime cannot be a “forgotten man” in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injuries. An honor which is lost or life which is snuffed out cannot be recompensed but then compensation will at least provide some solace*”<sup>11</sup>. To compensate and retribute the victim becomes the foremost duty of every criminal justice system.

### III. REHABILITATION AND REFORMATION OF OFFENDER

The emergence of human rights jurisprudence evolved the way society and law should look at the offenders. Instead of subjecting them to pain and suffering as a consequence of their

---

<sup>10</sup> John Braithwaite, “The Fundamentals of Restorative justice”, in Anita Jowitt, Tess Newton (eds.), *A kind of Mending* 35 (ANU Press, 2010).

<sup>11</sup> *State of Gujarat v. Hon'ble High Court of Gujarat*, (1998) 7 SCC 392.

criminal act, the law treats them with utmost care so that they do not turn into hardcore criminals and become a part of society again. However, in certain cases where the act of the offender shocks public conscience, the offender is treated without an iota of mercy, thus, sentencing him to death penalty, calling it 'rarest of the rare' case.

The reformatory theory emphasizes on the reformation of offender through individualized treatment by way of diversion methods. Humanistic principles upon which the theory stands believe that even after committing crime, offender does not cease to be a human. It, thus, aims at strengthening the character of the offender by channelizing him to the right path. It holds that strict punishment without treating the criminal instincts within the offender is of no good to the offender as well as victim and society. The theory can be located in United Nations Standard Minimum Rules for the Treatment of Prisoners<sup>12</sup> where under Rule 58 it is provided as:

The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

It is believed that labelling them as offenders can further increase the level of bitterness in their mind and soul and cast them into irretrievable criminals.<sup>13</sup> It maintains that reformation serves as a medicine to the disease of crime.

Furthermore, it solidifies its reasoning by looking at the condition of the prisons in India. Justice Krishnaswamy Iyer, in *Rakesh Kaushik v. Superintendent Central Jail*<sup>14</sup>, questioned, "Is a prison term in Tihar Jail a post graduate course in crime?". In a place like prison, especially in a developing country, there are umpteen problems including bad sewerage, infestation, no doctors, no medicines, little water, and acute overcrowding. The presence of negative vibes in there makes reformation even more difficult.<sup>15</sup> Various alternatives to

---

<sup>12</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at: [https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf) (Last visited on April 12, 2020).

<sup>13</sup> Akanksha Marwah, "Shifting of Penological Trends towards Rehabilitation of Offender" 2(2) *HNLU JLSS* 13 (2017).

<sup>14</sup> (1980) Supp. SCC 183.

<sup>15</sup> *Supra* note 13.

punishment are, therefore, resorted to depending on the peculiarities of the criminal. They can be in form of peno-correctional institutions and non-institutionalized measures like parole, probation, community service, public censure, house arrest, curfew, suspension, apology to victim, and injunctions. It also suggests complete updation of prison system with the facilities supporting reformation like establishing open prisons, providing recreation, education, employment and the like.

United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)<sup>16</sup> provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards of persons subject to alternatives to imprisonment. These rules aim at greater involvement of community in the management of criminal justice and the treatment of offenders and promotion of sense of responsibility towards the society. It mandates the member states to develop non-custodial measures within their legal systems to provide other options, thus, reducing the use of imprisonment and observance of human rights, social justice, and rehabilitation needs of the offender. It provides for non-custodial measures at all the stages of the criminal justice administration, *i.e.*, pre-trial, trial, and sentencing stage, and post-sentencing stage.

#### IV. REHABILITATION OF OFFENDER THROUGH RESTORATIVE JUSTICE

Restorative justice is closely linked with the reformatory forms of punishment which are based on 'communitarian-diversionist model'<sup>17</sup> aiming at providing alternatives to custodial sentencing. Thus, devising a system which runs parallel to the penal system. Indian Criminal Justice system has been moving towards gulping the rehabilitative forms of punishment within its sentencing policy. Restorative justice system goes a step ahead to develop a full-fledged model to complete this process of reformation. Albert Eglash also makes restorative justice primarily about the 'justice and reformation of offenders'<sup>18</sup>. Howard Zehr, in his book calls

---

<sup>16</sup> Adopted by General Assembly resolution 45/110 of 14 December 1990, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TokyoRules.aspx>. (Last visited on April 12, 2020).

<sup>17</sup> *Supra* note 5.

<sup>18</sup> Gwen Robinson and Joanna Shapland, "Reducing Recidivism: A Task for Restorative Justice?" 48(3) *The British Journal of Criminology* 337-358 (2008).

reduction of recidivism a byproduct of restorative justice that is achieved after offenders are encouraged to take responsibility of their actions.<sup>19</sup>

The situation of jails in our country is not hidden anymore. It is well said that a civilization should be judged on the basis of its jails. Due to lack of resources and unavailability of experts, the rehabilitation programs are not implemented. Without the facilitates for their social reformation, from first time offenders they become hardened criminals. Once a person gets incarcerated, his chances of rehabilitation and reformation are decreased due to lack of facilities ensuring this in jails. This is the reason why even internationally alternatives to punishment are looked forward to and instead of institutional methods of correction, the focus is on non-institutional methods.<sup>20</sup> It is noteworthy that judiciary is also conducive to the need of more reformative techniques now.<sup>21</sup> But, it is time when it should be made a part of system and not just be left to the discretion of the court.

Furthermore, the real problem is realized after their release when they are not able to be a part of the society again. They lack self-respect. They do not have a means to earn livelihood. The stigma of imprisonment does not allow them to enter into the mainstream society. Here, the chances of recidivism are increased and the purpose of punishment loses its meaning. Lack of attention to the reformation and diversional techniques is the root cause of this. Neither are the offenders able to gain the zeal to be part of the society nor the society is able accept them due to lack of faith which the punishment as a mode of reprimand fails to achieve.

The system needs to understand that eventually person who has been punished for an offence has to go back to society. Instead of focusing on the past act of convict, what it should focus is on the future of the convict. This future-oriented approach is taken care of, by the restorative justice. There are two methods of responding to crime.<sup>22</sup> One is by way of keeping a hostile attitude towards the offender and punishing him. The other is to recognize the social and individual breakdown that might have been happening on the inside of the offender and focus on reconstructing the same by way of mending it and obtaining future results. The former one is nothing but the old wine of retribution in a new bottle. While the latter one is restorative and, in true sense, reformative.

---

<sup>19</sup> Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* 8 (Good Books, US, 2002).

<sup>20</sup> *Supra* note 16.

<sup>21</sup> *Supra* note 13.

<sup>22</sup> *Supra* note 9.

Albert Eglash described justice as ‘the first mile’ and restorative justice as ‘the second mile’. He said, “The first mile is punishment, or reparations or indemnity or atonement. But the offender has not yet squared or redeemed the situation, making it good. Only a second mile is restitution in its broad meaning of a complete restoration of good will and harmony.”<sup>23</sup> Restorative justice helps the offender empathize with the victim and his suffering and make amends. Thus, inculcating in him values for a constructive future.

Germany, which follows an inquisitorial system of justice, has come a long way in adopting restorative justice methods. Victim-Offender Mediation Programmes (VOMPs) was amongst the first few.<sup>24</sup> The programmes there are designed for ensuring that offender feels accountable for his acts and making it good whichever way possible. While many countries, including India, use it in civil cases, Germany uses it in criminal justice area quite frequently.<sup>25</sup> There it is called Täter-Opfer-Ausgleich (TOA) literal meaning of which is perpetrator-victim compensation. It aims at balancing of conflict between victim and offender through restitution and reconciliation as opposed to penal sentencing policy.<sup>26</sup> An Act in 2009 authorized negotiations in criminal cases and validity of it was upheld in 2013 by German Constitutional Court.<sup>27</sup>

Restorative justice expects genuine repentance and apologies from the offenders. It helps in personal transformation and redemption of the offender leading to development of self-respect. It seeks to achieve this object through “a process of shaming when the individual (usually a young person) is confronted by victims, family members (usually parents or grandparents), community elders, trained mediators, and often representatives of the criminal justice system (uniformed police officers in many cases).”<sup>28</sup> It also suggests the role that reformed offenders can play in reforming the new ones. Initially, in Germany, this mediation program was limited to juveniles but was later extended to adults also.<sup>29</sup>

## V. RESTORATIVE JUSTICE IN INDIA

---

<sup>23</sup> S. Maruna, “The role of wounded healing in restorative justice: an appreciation of Albert Eglash”. *Restorative Justice*, 2(1), 9-23 (2014), available at: <https://doi.org/10.5235/20504721.2.1.9> (Last visited on April 12, 2020).

<sup>24</sup> Mehak Bajpai, “Advancing of Restorative Justice in Criminal Law in India and Germany: A Comparative Study” 1(1) *Journal of Victimology and Victim Justice* 102-112 (2018).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Supra* note 23.

<sup>29</sup> The Victims’ Protection Act, 1986.



Restitution, as already mentioned above, is not a new thing. There have been Victim-offender mediation programs in US and Western European Countries<sup>30</sup>. Indian criminal justice system, which is adversarial in nature, also testifies existence of some instances of restorative justice system. It pre-supposes the accused to be innocent until proven guilty except for certain offences where the onus of proof is upon the accused. Otherwise, the prosecution is under the burden to prove the guilt of the accused under reasonable doubt. The whole assumption lies on the precept that supposition of guilt just upon the allegations of the victim can cause an irreparable damage to the accused who has yet not been proved guilty through the procedure established by law. Thus, it seeks to protect the accused from the agony of the society for committing that still has not been proved and the stigma that can cost him and his family dearly. This is, precisely, the premise of according so many protections to the accused. In words of Blackstone, “Better that ten guilty persons escape than that one innocent should suffer”.

This is the reason why provisions for bail have been made lenient in our law with exceptions in heinous offences. The principle followed is ‘bail, not jail’. Also, there is a provision that if accused due to poverty is unable to furnish the security for bail, he shall be released after stipulated time.<sup>31</sup> There is another provision which relates to the maximum period during which an undertrial prisoner can be detained.<sup>32</sup>

While awarding sentence, court is also endowed with the discretion to balance the sentence keeping in mind the circumstances in which offence was committed, condition of the victim, and background of the offender. First time offenders are often treated with leniency. Similarly, if the offence is committed due to some underlying cause or force, offender is meted out with less punishment or even alternative forms of punishment, for example, community service.

Even in the case like Gujarat Communal riots, the convicts were released on bail while appeal against their conviction was pending. They are given mandatory community service in Madhya Pradesh.<sup>33</sup> The Godhra massacre in 2002 was one of its kind, but, even then, chances of

---

<sup>30</sup> *Supra* note 9.

<sup>31</sup> Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s. 436.

<sup>32</sup> *Id.* s. 436A.

<sup>33</sup> “Godhra riot convicts arrive in Indore for community service”, *Times of India*, February 11, 2020, available at: <https://timesofindia.indiatimes.com/city/indore/godhra-riot-convicts-arrive-in-indore-for-community-service/articleshow/74073067.cms> (Last visited on April 11, 2020).

reformation were seen for supporting their social transformation and re-integration in the society.

Another infamous case is that of *Sanjeev Nanda*<sup>34</sup>, popularly known as 1999 Delhi hit-and-run case, wherein the accused ran over six people including three policemen, the sentence of convict was reduced to the time he served in the jail and was further given two years of community service.

A special case is in the area of laws relating to children in conflict with laws. One change worth mentioning is substitution of word 'juvenile' with 'children in conflict with laws' which was there in the previous Act<sup>35</sup> due to negative connotation attached to it. It was disregarded in the Juvenile Justice (Care and Protection) Act, 2015<sup>36</sup> and only kept in the name of the law.

Unlike the traditional forms of punishment in Indian Penal Code, 1860<sup>37</sup> (hereinafter referred to as IPC), the 2015 Act, provides for various alternative forms of punishment like advice or admonition by appropriate authority, counselling, community service, fine. Release on probation of good conduct and placed under care and supervision in a facility, special home for providing reformatory services.<sup>38</sup> The Board appointed under the 2015 Act can also pass additional orders attending school, vocational centre, therapeutic centre or prohibiting child from visiting any particular place.<sup>39</sup> These provisions are in conformation with the international instruments focussing on diversionist techniques ensuring re-integration of offenders in the society.

An attempt to include such alternative forms of punishments in IPC was also made in 1978 through introduction of a Bill in the Parliament which, unfortunately, could not see the light of the day.<sup>40</sup>

---

<sup>34</sup> *Sanjeev Nanda v. The State*, CrI. Appeal No. 807/2008.

<sup>35</sup> The Juvenile Justice (Care and Protection of Children) Act, 2000 (Act No. 56 of 2000).

<sup>36</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act No. 2 of 2016).

<sup>37</sup> The Indian Penal Code, 1860 (Act No. 45 of 1860).

<sup>38</sup> *Supra* note 36 at s. 18(1).

<sup>39</sup> *Id.* at s. 18(2).

<sup>40</sup> Law Commission of India, 156<sup>th</sup> Report on Indian Penal Code (August, 1997, Volume I) at para 2.07.

Besides these, the Code of Criminal Procedure, 1973 also provides for compounding of offences.<sup>41</sup> Compounding means settling of the matter out of the court or entering into a compromise. Section 320 of the Code of Criminal Procedure provides a list of those offences which can be compounded. This list has been further divided into two categories, one, those offences which can be compounded with the permission of the court and second, those which can be compounded without the permission of the court. The intent of this provision is to develop friendliness between the parties and reach an amicable solution.

In India, restorative approach, is also adopted through informal mechanism by gram-panchayats in villages and helps in promoting reconciliation and relationship building.<sup>42</sup> Besides, this, Alternative Disputes Resolution mechanisms like mediation, conciliation, arbitration, negotiation and Lok Adalat are also given more importance these days. They all aim at reaching a 'beneficial-for-all' solution through an informal set up ignoring the tedious court processes full of technicalities.

Restorative system of justice has been adopted in the Indian Criminal Justice by piecemeal method. In future, it can be suggested to be made more formalized and allowed green signal to enter into the system.

The leaning of judiciary also has been witnessed in favour of restorative justice in the last few years. In *State of Gujarat v. Raghavbhai Vashrambhai*<sup>43</sup>, the Punjab and Haryana High Court observed compromise to be a *sine qua non* in modern societies to maintain harmony and order. To promote compromise of the soul of justice which aims at enhancing social amity and reducing friction in the society. In another case, Delhi High Court observed that restorative justice is a reflection of mediation in criminal justice. In leads to involvement of victim in the justice delivery process which should be welcomed in criminal justice administration.<sup>44</sup> Involvement of victim can give the feeling of wrong being done to the victim otherwise the criminal proceedings only remain to be a process for the finding out if the law was violated by the accused or not, thus, diverting the focus from victim to the law.

---

<sup>41</sup> The Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s. 320.

<sup>42</sup> B Rajeshwari, "Restorative justice", 41(13) *Economic and Political Weekly* 1222-1292 (2006).

<sup>43</sup> (2003) 1 GLR 205.

<sup>44</sup> *Anupam Sharma v. NCT of Delhi*, 146 (2008) DLT 497.

It might not, however, seem prudent to apply this principle to heinous crimes so as to not give a message to the potential law breakers that law is going soft on them, considering the rising crime rate. But Howard Zehr, proponent of the theory, suggests to apply the principles of restorative justice to heinous crimes. He maintained that it is not primarily intended for ‘minor’ offences or first-time offenders.<sup>45</sup> It is easier to get support of the community for minor offences but the experience has shown that it has greatest impact on offenders in more severe cases.<sup>46</sup> A genuine apology from the side of accused can make him realize the wrong he has committed. Forgiveness becomes a challenge when someone has suffered a major harm, but nevertheless it can ignite the torch of humanity in the offender. Also, this apology and forgiveness has meaning only they are voluntary and are freely chosen by the two parties. This is possible only when the two parties are given space to listen patiently to each other and this opportunity is given to them in the restorative justice model.<sup>47</sup>

Although the proponent of this theory suggests that it should be applied to heinous crimes, as a first step, it can be applied to minor offences which have lesser punishments, let’s say, the ones which are non-cognizable, bailable and compoundable. These offences are considered not so serious kind of offences and in such cases the victims might not have struggled in facing the offenders. A ‘trial and error’ can be run by legislature to see what is the impact of victim-offender mediation programmes in such offences.

Furthermore, the technique of restorative justice can be used also in the matrimonial disputes. the intention of legislature and judiciary is always to protect the matrimonial ties. This is evident from the provisions of the Hindu Marriage Act, 1955<sup>48</sup> where the intention to give alternate remedy of restitution of conjugal rights or judicial separation before passign the decree of the divorce. In the offences relating to matrimony, like harassment related to dowry, an option can be given to the parties to meet each other other in the presence of a mediator and understand of the perspective of the other. Presently, it is only divorce and other civil matters relating to matrimonial issues that have been made amenable to mediation. Offence like those under section 498A in the IPC have been made non-compoundable. An attempts to reconcile the deviance can heal the relationships between the parties and reduce the chances of breaking

---

<sup>45</sup> *Supra* note 19 at 9.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Supra* note 10.

<sup>48</sup> The Hindu Marriage Act, 1955, (Act 25 of 1955) at s. 9, 10, 13A.

up of the matrimonial home. Since law also works as therapeutic agent, techniques of restorative justice become pertinent in the matters where more than punishment amends are expected to work. While one approach can be crime-specific, another can be offender-specific. The nature of offender and circumstances in which crime was committed by him can also help in determining whether restorative approach should be applied or not. For instance, this step can be taken in the cases of children in conflict with laws. The Juvenile Justice (Care and Protection) Act, 2015 categorises the offences as petty, serious and heinous offences<sup>49</sup>. The initiative can be taken in the cases of petty and serious offences to familiarize the children in guilty of these offences with the sufferings of the victims of their acts. They might not necessarily be their own victims but can also be those who are similarly placed. This can actually help these children in understanding the repercussions of their delinquency and their impacts on the lives of others, the need of making amends and eventually can lead to their reformation. Similarly, if the crime was committed by a first time offender, or in the heat of moment or in necessity, or the circumstances where defences are available<sup>50</sup> or where specific exceptions are available, instead of any punishment, even if minimal, restoration can be adopted.

## VI. CONCLUSION

*“Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts.”* Justice Krishna Iyer in his book ‘Death Sentence on Death Sentence’.

Deterrence theory which is resorted to in the current scenario can be either punitive or restorative. Punitive deterrence, *i.e.*, awarding of punishments for the conduct of the offender has become another form of retribution. The time has come to experiment with the restorative deterrence. The increase in the crime rate over the years depicts the inefficiency of the criminal justice system to control the incidence of crimes. Punitive approach to the criminal makes him run away from the criminal justice and adopt strategies to delay the justice.<sup>51</sup> This can,

---

<sup>49</sup> *Supra* note 36, at s. 2(33), 2(45) 2(54).

<sup>50</sup> *Supra* note 37, at Chapter IV.

<sup>51</sup> *Supra* note 5.

obviously, be testified by the games played by the Nirbhaya convicts to delay their execution.<sup>52</sup> And of course, this is just one case which was able to catch every eye in the country. There are many cases wherein the alleged offenders and their counsels try to use creative tactics to delay the proceedings and harass the victims, thus, adding to their agony.

The need of the hour is to determine how can co-existence of adversarial system and restorative justice model be achieved. Provisions like probation, parole, community service, public censure and other measures have always been introduced in the system, the need is to formulate programs for effective application of restoration principles. Restitution and restoration are time consuming processes. There needs to be a developed policy of how restoration can take place and in what kinds of offences can restoration take place. It has to be a slow and gradual process supervised diligently along with the changes in the punitive criminal justice system. Entire system cannot be replaced all of a sudden. It shall require inputs from people at all level, from legislature, judiciary, probation officers, counsellors, experts on reformation, facilitators, and community. Legislature to be willing to renounce retribution. Judiciary would have to be indifferent to public opinion. Community would have to develop the sensitivity towards the reformation of the offender and facilitate the same.

It is quintessential to remember that restorative justice cares about socially constructive consequences.<sup>53</sup> It thinks about not just the victims and offenders but entire society. It is participative and it is healing in its approach. It helps offender in making amends and building relationships. It was remarked by Mahatma Gandhi that 'hate the sin and not the sinner'. But sinner continues to be punished for the sin he committed. This became modern form of retribution. Now is the time to ponder on what Albert Eglash remarked, "I'm not arguing whether you have a right to revenge or not, but to me, even if you have a right to it, revenge is a human wrong."<sup>54</sup>

---

<sup>52</sup> *Ibid.*

<sup>53</sup> Albert Eglash, "Creative Restitution- A Broader Meaning for an Old Term" 48(6) *The Journal of Criminal Law, Criminology and Police Science* 619-622 (1958).

<sup>54</sup> Albert Eglash, *Armed Conflict as Fixation: Twenty-one Steps toward Peace*, Unpublished manuscript in Luara Mirsky, "Albert Eglash and Creative Restitution: A Precursor to Restorative Practices", December 3, 2003 available at: <https://www.iirp.edu/news/albert-eglash-and-creative-restitution-a-precursor-to-restorative-practices> (Last visited on April 13, 2020).