Towards Restorative Justice

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Human conflicts are basic to human societies. Crime symbolizes a major form of conflict in the society. It deprives the victim from their fundamental human rights specially those pertain to life, liberty and safety. The mankind has always been instrumental in finding the most effective ways to resolve conflicts or crime in the society. The advent of the criminal justice system was the consequence of similar efforts. The experiences in most countries of the world tell us that the formal system of criminal justice, due to various reasons, has not been fully successful in achieving its objectives. Mounting arrears in the court, delay in disposal of cases and consistently rising rate of acquittals resulted in the loss of public confidence in the system. Besides, it was felt that the victims of crime who ought to be in the center are often marginalized in the criminal justice process. Whatever may be the outcome of the case in the court, the fact remains that the victim does not get any substantial gain to mitigate his/her victimization. Nothing helps the victim to restore and repair the damage caused to him/her by crime. Mere an aggressive response to crime problem does not benefit the victims. Neither putting the offender behind the bars serve any purpose nor by isolating him any progressive solution to the conflict between the victim and the offender can be effected. The idea of restorative justice is emerging as answer to these issues. This idea is gaining ground throughout the world as alternatives to the present justice processes (Bazemore & Umbreit, 1994; Klein,1996;Bazemore & Walgrave,1997).

The Concept:

While Albert Eglash is generally credited with coining the term "restorative justice" in his 1977 article "Beyond Restitution: Creative Restitution," the idea of justice to which he referred was not new. Restorative justice is not a "new wave" movement on the fringe of legal practice. Such conceptions of justice have been more or less prominent through most of history. As John Braithwaite observes "[r]estorative justice has been the dominant model of criminal justice throughout most of human history for all the worlds' people."
The notion of restorative justice, in some form or the other, appears to have been with human societies since long. Clearly, restorative justice theory owes much to recent movements aimed at addressing the failures of the existing justice system and developing new ways of "doing justice."

Van Ness and Strong (1997) identify five such movements:

1. The informal justice movement emphasized informal procedures with a view to increasing access to and participation in the legal process. They focused on delegalization in an effort to minimize the stigmatization and coercion resulting from existing practices.

2. Restitution as a response to crime was rediscovered in the 1960's. The movement focused on the needs of victims, maintaining that meeting the needs of victims would serve the interests of society more generally.

3. The victim's rights movement works to have the right of victims to participate in the legal process recognized.

4. Reconciliation/conferencing movement – It has two major strands in this movement:
   a. *victim/offender mediation* -- Originating from efforts of the Mennonite Central Committee, this process brings victim and offender together with a mediator to discuss crime in order to form a plan to address the situation.
   b. *Family group conferencing movement* in New Zealand -- arising out of the Maori traditions in New Zealand.

5. The social justice movement -- This label refers generally to a number of different groups working for a vision of justice as concerned inherently with social well being.

Restorative justice seeks to heal and put right the wrongs (Zehr, 1997). It is a form of criminal justice based on reparation, that is, actions which attempt to repair the damage caused by the crime, either materially (at least in part) or symbolically. Marshall (1995) defines restorative justice as: "...a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it. It is also, more widely, a way of dealing with crime generally in a rational problem solving way. Central to restorative justice is recognition of the community, rather than criminal justice agencies, as the prime site of crime control...”

Restorative justice emphasizes the importance of role of crime victims and community members through more active involvement in the justice process, holding offenders directly accountable to the people and communities they have violated, restoring the emotional and material losses of victims, and providing a range of opportunities for
dialogue, negotiation, and problem solving, whenever possible, which can lead to a greater sense of community safety, social harmony, and peace for all involved. (Umbreit, 1994). Restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the state, but as an injury or wrong done to another person or persons. It encourages the victim and the offender to be directly involved in resolving any conflict through dialogue and negotiation.

Any discussion on restorative justice remains incomplete without reference to Alternative Dispute Resolution (ADR). The ADR, as technique, helps the restorative justice to achieve its objectives. The ADR refers to any ways and means of resolving conflicts and disputes outside of the courtroom. ADR includes arbitration, mediation, early neutral evaluation, and conciliation. As burgeoning arrears in the courts, rising costs of litigation, and time delays continue to plague litigants, many countries of the word have institutionalized ADR programmes. These programmes operate both voluntary and mandatory basis. The two most common forms of ADR are arbitration and mediation.

Arbitration is a simplified version of a trial involving no discovery and simplified rules of evidence. Either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third to comprise a panel. Arbitration hearings usually last only a few hours and the opinions are not public record. Arbitration has long been used in labor, construction, and securities regulation, but is now gaining popularity in other business disputes.

Mediation is an even less formal alternative to litigation. Mediators are individuals trained in negotiations who bring opposing parties together and attempt to work out a settlement or agreement that both parties accept or reject. Mediation is used for a wide gamut of case-types. On average the success rates of mediation processes range from 80% to 85%. (Victoria, British Columbia, Law firm of Duhaime & Company, Canada.)

**Common Features of Restorative Justice:**

The basic elements in the philosophy of restorative justice contain the following:
Crime causes harm to victims, offenders and communities; crime is fundamentally a violation of people and interpersonal relationships.

Violations create obligations and liabilities. Offenders’ obligations are to make things right as much as possible.

Besides, the government, victims, offenders and communities should be actively involved in the criminal justice process; and

In promoting justice, the government should be responsible for preserving order, and the community should be responsible for establishing peace (Van Ness, 1997).

The cardinal principles in the idea of restorative justice are the following ones:

- A definition of crime as injury to victims and the community peace;
- A focus on putting right the wrong;
- A view that both the victim and the offender are active players in responding to and resolving the criminal conflict;
- Compensating victims for their losses through restitution by the offender;
- Empowering victims in their search for closure through direct involvement in the justice process;
- Assisting victims to regain a sense of control in the areas of their lives affected by the offence;
- An objective of holding offenders accountable for their actions;
- Impressing on offenders the real human impact of their behavior;
- Encouraging offenders to accept responsibility for their behavior in a way that will aid them to develop in a socially acceptable way;
- Seeking to address the personal and relationship injuries experienced by the victim, offender and the community as a consequence of the offending; and
- A commitment to include all affected parties in the response to crime.

The Economic and Social Council of the United Nations has already developed a blueprint of the Basic Principles of the Use of Restorative Justice Programmes in Criminal matters (2000). This instrument is likely to become a model guideline for launching the restorative justice system. This document says "Restorative process" means any process in which the victim, the offender
and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles”.

The Declaration provides operational guidelines and procedure to effect the restorative process. It provides:

Fundamental procedural safeguards should be applied to restorative justice programmes and in particular to restorative processes:

(a) The parties should have the right to legal advice before and after the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to parental assistance;

(b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;

(c) Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes.

The Document highlights some other important provisions in the Clauses- 13-23 of the Declaration. The salient ones are as under:

- Judicial discharges based on agreements arising out of restorative justice programmes should have the same status as judicial decisions or judgements and should preclude prosecution in respect of the same facts.
- Where no agreement can be made between the parties, the case should be referred back to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Lack of agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.
- Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Failure to implement the agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.
- Facilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. They should be able to demonstrate sound judgement and interpersonal skills necessary to conducting restorative processes.
- Facilitators should be responsible for providing a safe and appropriate environment for the restorative process. They should be sensitive to any vulnerability of the parties.
Facilitators should receive initial training before taking up facilitation duties and should also receive in-service training. The training should aim at providing skills in conflict resolution, taking into account the particular needs of victims and offenders, at providing basic knowledge of the criminal justice system and at providing a thorough knowledge of the operation of the restorative programme in which they will do their work.

There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding of restorative processes and outcomes, to increase the extent to which restorative programmes are used and to explore ways in which restorative approaches might be incorporated into criminal justice practices.

Member States should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as an alternative to the criminal justice process and provide positive outcomes for all parties.

Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular, rigorous evaluation and modification of such programmes in the light of the above definitions.

**Forms of Restorative Justice**

The restorative justice programmes do not show a uniform structure. Depending on the need and resources, varying shapes and contents are observed in the working of these models in the US, Canada, England, Australia and New Zealand etc. Some of the popular models of restorative justice are: Victim-offender Reconciliation Programs (US and Canada), Victim-offender Mediation programmes (England and Australia), Family/community Group conferencing and Reintegrative Shaming (New Zealand).

**International perspective:**

In many countries of the world like North America, Europe, Australia and New Zealand today, the concept of restorative justice is linked to diverse practices, including conferencing, sentencing circles, and victim-offender mediation schemes. These practices focus on repairing the harm caused by crime, by holding moderated meetings of crime victims, offenders, and others affected by crime. They can be used at different sites in the justice system: as a diversion from court, as a pre-sentencing option, and following the release of a person from prison. Restorative justice
practices are also applied in the handling of family welfare and child protection matters, and in workplace disputes.

A somewhat different model is in use in the New Zealand. That model was first introduced in New Zealand in 1989, incorporating Maori approaches to the handling of child protection and juvenile justice cases. The conferencing idea was subsequently borrowed and adapted by jurisdictions in Australia, the United States, Canada, the United Kingdom, Ireland, Singapore, and South Africa. Conferences can differ from victim-offender mediation schemes in that they bring more community people into the discussion, acknowledge a wider range of victimized people, and emphasize participation by the family members of offenders.

The operational procedure in the restorative programmes tend to vary. Essentially, these programmes require the victims, offenders and the community act together in repairing the damage of crime as per the procedure of law under the authority of the state. In yet other initiatives that are separate from the justice system, operate on different plane to those of court processes and may act as an alternative to the justice system in settling disputes about offences. Restorative justice initiatives that function as alternatives to influence the disposal of cases within the criminal justice system tend to be part of formal programmes, and involve the consent of authority figures such as judges, lawyers and probation managers. These integrated programmes have systems and processes linked with those of the criminal justice system. Their aims often include the general aims of the criminal justice system in addition to those specifically related to restorative justice. In a paper “Restorative Justice- A Discussion Paper”, Belgrave (1996) explained that there are three stages at which formal restorative justice programmes are generally applied. They are:

1. Pre Conviction: These programs operate where the defendant does not deny guilt or has indicated that they do not intend to defend the case. As a procedural safeguard it is usually expected that the prosecuting agency has formed an intention to prosecute the case. Outcomes may include a recommendation or report to a court, or else the case may be finalized by agreement between the victim, the offender and the prosecuting agency without proceeding to a court.

2. Pre Sentence: Once guilt has been admitted or proven, a court may refer the case for a victim-offender mediation.
3. Post Sentence: Certain victim-offender mediation programmes operate with the convicted offenders who have been put to community-based sentences or to imprisonment. They may operate between victims and offenders who have a direct relationship, or between groups of victims and offenders who are not connected by a specific offence. Mediation between an inmate and the community into which he or she will be released has also been used to assist integration.

**Institutions**

At the international level, there appears a systematic course that followed the development of restorative practices. And presently the idea has taken a matured shape. It is obviously due to extremely significant work done by some institutes and individuals. A brief account in this regard is imperative here. To start with the US, it is observed that most consistent and systematic work in this area flow from this country. Current applications of the idea began to develop and proliferate in the 1970s in North America, beginning with a victim-offender reconciliation program in Ontario, Canada in 1974. Hundreds of similar programs subsequently emerged in other North American sites and in Europe.

The highlight of the researches conducted in the US is the fact that the idea of restorative justice was actually practiced in a big way by formulating a number of models. The lead in this direction was taken by many organizations that were in most cases autonomous institutions and academic faculties of the Universities.

*The Center for Restorative Justice & Peacemaking* at the University of Minnesota School of Social Work on the University's St. Paul campus, for instance, has been established to provide technical assistance, training, and research for those in the state of Minnesota, nationally, and internationally in support of restorative justice practice and principles.

The Center believes that through restorative justice, victims, communities, and offenders can be placed in active roles to work together. The Center promotes dialogue and negotiation which are central to restorative justice, and problem solving for the future. Balance is sought between the legitimate needs of the victim, the community, and the offender that enhances community protection, competency development in the offender, and direct accountability of the offender to the victim and victimized community.
The Conflict Transformation Program at Institute for Justice & Peacebuilding (IJP) is another important initiative in this area. It provides direct services in the form of trainings, consultancies, peace-process design, conciliation, mediation, and action-oriented research. Its Summer Peacebuilding Institute provides specialized, intensive, training workshops that are specifically tailored for practitioners working in situations of protracted conflict.

The Conflict Transformation Program (CTP), comprised of a master of arts degree in conflict transformation, the Institute for Justice and Peacebuilding, and the Summer Peacebuilding Institute, was established within Eastern Mennonite University in 1993. CTP supports the personal and professional development of individuals as peacebuilders and strengthens the peacebuilding capacities of the institutions they serve.

CTP operates with the belief that today's conflicts call for long-term strategies that must (a) address root causes of the conflict, (b) develop strategic approaches to conflict transformation, and (c) promote the healing of relationships and restoration of the fabric of human community.

The National Organization for Victim Assistance (NOVA) has contributed excellent efforts in the area of victim assistance in the US. In fact, various policy changes in the area of victim justice are directly attributable to his formation. The endeavours made by the Community Justice Institute Florida Atlantic University College of Urban and Public Affairs and Victim Offender Reconciliation Program (VORP) Information and Resource Center are also noteworthy in sustaining the movement of restorative justice in the US. The Department of Corrections created in February 1994 as Restorative Justice Planner for exploring the ways so that the principles of restorative justice could be applied in corrections, courts, law enforcement, education, and communities. The programme launched by this center in the recent past as Minnisota Restorative Justice Initiative was a widely acclaimed one.

In the US the contributions in this field by Gordon Bazemore (1997 (a,b) 2001), Umbreit (1994 (a,b);1995 (a,b,c); 1997), Zehr (1985, 1995) are particularly remarkable. Galaway, Hudson, Von Ness, Classon etc are some other prominent scholars working in this area in the US. In the same line a range of initiatives taken in Canada to implement the restorative model of justice.

Going beyond the US, in the New Zealand a specific programme namely Reintegrative Shaming Experiments mainly developed by Heather Strang, Director, Centre for Restorative Justice
Indian Scene:

The Indian heritage has much testimony to offer that its socio-cultural fabric contains intrinsic mechanism to bring the conflicting people together and settle their dispute in a highly informal manner. Infact, the caste panchayats and other social groups in the countryside have been an effective source to dispense justice. The verdict delivered by these bodies was acceptable to everybody. The interests of the victims were supreme. Many times the offenders were directed to compensate or restore the harm done to the victims. The effect and impact of social expectations and social sanctions on the behaviour of the people have always been decisive. This has been able to resolve the mutual conflicts of the people.

With the winds of changes, the rural India underwent a process of considerable shift. The socio-political changes have almost replaced the traditional functioning in the rural communities. The informal mechanism of settling the disputes got weakened. Crime kept on increasing. The police and courts have made the inroads in these areas.

The current scene regarding the restorative justice in the country can be understood in the following heads:

Inadequate Legal basis: The restorative justice in the Indian criminal jurisprudence is almost non-existent. This is mainly due to the fact that the system of criminal justice in this country is hardly a victim-oriented one (Bajpai, 1997). The progress made in the spheres of victimology is yet to reach to the criminal justice practices in this country. There is no separate law in this country enabling the victim to have their say in the criminal justice process. The compensation, restitution and restoration are still not very common here. The main reason is perhaps that the procedural law in the country does not provide much scope for these practices. As regards compensation, some highly inadequate and restricting provisions are available in the Sections 357-58 of the Criminal Procedure Code, 1973. The procedure to get the prescribed compensation is too cumbersome to practically help the victim. The amount of fine imposed on the offender, the main source of compensation, has remained unrevised since 1860, the year when the Indian Penal Code was enacted.

Compoundable offences:
The victim and offenders can reach to settlement of the matter in accordance with the Section 320 of the Criminal Procedure Code, 1973. This procedural law allows the parties to undergo what is called “compounding of cases” in certain offences without the permission of court and in some cases with the approval of the court. The compounding the offences has connotations to what is now popularly being voiced as “restorative justice”. There are some offences which affect individuals and do not affect the society. This type of offences can be compounded without the permission of the court under the sub section (1) of 320 of the Criminal Procedure Code, 1973. The offences under this category are: hurting religious feeling of a person, hurt, confinement, mischief, criminal trespass, adultery, defamation etc. The offences under sub section of 2 of this law contains those offences which are of grave nature and likely to affect people at large. These can not be compounded without the permission of the court. The offences under this class include: grievous hurt, wrongful confinement, misappropriation of property, breach of trust involving heavy amount, fraud, counterfeiting, indecent behaviour towards women etc. The offences reached to successful compounding always result in acquittal. Unlike the system in the US, the procedure is merely a way to dispose off the case. It does not attach any condition of restoration/reparation of harm afflicted. In the name of restoration, recently higher courts in India have given verdicts in favour of the victims.

Table-1 Showing the state of Compounding of Cases out of total Cases (IPC) taken up for disposal by the courts (1997)
<table>
<thead>
<tr>
<th>Crime Heads</th>
<th>Total cases for trial</th>
<th>Compounded/withdrawn</th>
<th>Percentage to the total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Murder</td>
<td>154002</td>
<td>300</td>
<td>0.2</td>
</tr>
<tr>
<td>2. Attempted murder</td>
<td>125687</td>
<td>929</td>
<td>0.7</td>
</tr>
<tr>
<td>3. C. H. not amounting to murder</td>
<td>16423</td>
<td>99</td>
<td>0.6</td>
</tr>
<tr>
<td>4. Rape</td>
<td>55863</td>
<td>183</td>
<td>0.3</td>
</tr>
<tr>
<td>5. Kidnapping &amp; abduction</td>
<td>60372</td>
<td>591</td>
<td>1.0</td>
</tr>
<tr>
<td>6. Dacoity</td>
<td>35296</td>
<td>130</td>
<td>0.4</td>
</tr>
<tr>
<td>7. Preparation &amp; assembly for Dacoity</td>
<td>4807</td>
<td>13</td>
<td>0.3</td>
</tr>
<tr>
<td>8. Robbery</td>
<td>77141</td>
<td>293</td>
<td>0.4</td>
</tr>
<tr>
<td>9. Burglary</td>
<td>240428</td>
<td>2423</td>
<td>1.0</td>
</tr>
<tr>
<td>10. Theft</td>
<td>614770</td>
<td>8336</td>
<td>1.4</td>
</tr>
<tr>
<td>11. Riots</td>
<td>421091</td>
<td>13539</td>
<td>3.2</td>
</tr>
<tr>
<td>12. Criminal breach of trust</td>
<td>72011</td>
<td>700</td>
<td>1.0</td>
</tr>
<tr>
<td>13. Cheating</td>
<td>102779</td>
<td>1392</td>
<td>1.4</td>
</tr>
<tr>
<td>14. Counterfeiting</td>
<td>2345</td>
<td>8</td>
<td>0.3</td>
</tr>
<tr>
<td>15. Arson</td>
<td>3662</td>
<td>550</td>
<td>1.7</td>
</tr>
<tr>
<td>16. Hurt</td>
<td>781376</td>
<td>55028</td>
<td>7.0</td>
</tr>
<tr>
<td>17. Dower Deaths</td>
<td>19435</td>
<td>96</td>
<td>0.5</td>
</tr>
<tr>
<td>18. Molestation</td>
<td>100654</td>
<td>5217</td>
<td>5.2</td>
</tr>
<tr>
<td>19. Sexual Harassment</td>
<td>14130</td>
<td>527</td>
<td>3.7</td>
</tr>
<tr>
<td>20. Cruelty by husband or relatives</td>
<td>113181</td>
<td>3040</td>
<td>2.7</td>
</tr>
<tr>
<td>21. Other IPC crimes</td>
<td>2417551</td>
<td>9038</td>
<td>3.8</td>
</tr>
<tr>
<td>22. Total Cognizable (IPC) crimes</td>
<td>5461004</td>
<td>185432</td>
<td>3.4</td>
</tr>
</tbody>
</table>

Source: Crime in India, 1997
Assessment:

An effort in this section has been made to assess the actual practices of the compounding of the cases resorted as way to dispose off the cases by the criminal courts in India. The data presented in Table-1 show the category and percentage of cases settled through compounding of cases. The data presented in the table bring it out that out of more than five million cases taken up for trial by the courts in India in the year 1997, only 3.4 percent cases could be resolved through compounding. Out of twenty-one categories of offences, in almost half of the cases the percentage of compounding remained below one percent. In cases of hurt, molestation, sexual harassment and riots the percentage was higher than the total average percentage.

Issues and problems: The existing system of compounding of cases could have become a viable mechanism of restorative justice but there are impediments in the way:

I. It becomes the matter of interest to many that the conflict between the victim and offender should not subside. The lawyer, for instance, is often said to have exacerbated the conflict.

II. Because of not being able to foresee the implications of this process the victim and offender do not take much interest in this process.

III. There is no active official backing and support to this type of initiatives.

IV. The compromise, which is effected, by middlemen and others is generally not in the interest of the victim. At times the victims are forcibly compelled to undergo the compromise.

V. Infact, in some areas this has become a profitable business for many who by inducing fear to the parties try to settle the matter and charge heavy money from the interested party.

VI. Because of not getting properly institutionalized within the system of criminal justice, this practice has not been able to produce the desired results.

VII. The system of criminal justice is in a state of crisis because of pendency and higher rates of acquittal and is perhaps not in a position to afford innovation of any kind.
Looking Ahead :

The search for some effective and viable alternatives for the criminal justice process in India is no longer a matter of choice. Hundreds of reports from bodies like the Law Commission, National Police Commission and several studies by the organizations and individuals are testimony to the fact that the system of criminal justice in the country is virtually collapsed. The justice looses its basic purpose if only twenty percent people get justice and millions remain in the queue for decades together, if litigation is so costly and if the victim continue to sideline and accused manage to get all the procedural benefits. The scenario has been equally dismal in many countries of the world. But by applying the Alternative Dispute Resolution and similar techniques, many crippling problems of the justice process have been overcome. If implemented systematically, the restorative model of justice in India can offer highly imperative results.

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*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often a real loser--in fees, expenses and waste of time.*" Abraham Lincoln.

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REFERENCES


