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Restorative Justice Indicators, Criminal Justice and Human Rights

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***Abstract*— In the later half of the last century 'restorative justice' ideas and practices emerged as an alternative to the formal criminal justice system. By the late 1970 in countries in Europe, the United States, Australia and parts of Canada, both civil law and common law victim offender reconciliation programmes were already in place. In India, the idea of restorative justice gained acceptance rather slowly. A few explicit measures like 'Plea Bargaining' and 'Compounding' and many more implicit measures that appeal to justice rather than legalism, focus on the victims of wrongdoing rather than the wrong and accord primacy to restoration of disequilibrium by award of compensation rather than punishment. Restorative justice ideas also gained recognition as human rights by virtue of reconciliation of conflicts by several off beat and humane solutions. However, despite all these positive and pro restorative justice developments, the real breakthrough would require a conscious and express legislative decision to deploy restorative justice procedures in respect of certain categories of wrongdoings/offences. The decision to apply restorative justice procedures may be based on central legislation that may be operated by state agencies or jointly by state and civil society agencies. Obviously, the restorative justice procedures will be greatly facilitated by voluntary initiatives coming particularly from students and youth.**

***Keywords*— Justice, Criminal, Human Rights**

Primarily, the Criminal Justice System (CJS) is designed to provide an appropriate response to every kind of harm-doing perpetrated by a 'criminal' against a 'victim', but the public discourse on harm-doing is often dominated by harms of a serious nature, such as murder, rape, dacoity and robbery, that draw greater media, Governmental and societal attention. Such a slant in the dominant discourse tends to ignore the many other non-heinous forms of crimes and diverse possible ways of responding to them in day-to-day justice administration. Furthermore, even in respect to the serious crimes, the operations of the CJS leaves much to be desired, because the CJS often gets associated with long delays, skewed crime processing, in favour of the resourceful and privileged, and an irrational and erratic punishment system. All this has been responsible for generating a constant sense of disillusionment and disappointment against the CJS the world over. As a sequel, the institutional response has been two pronged, the first, aims to address the functional shortcomings of the agencies of the CJS and the second, looks for appropriate alternative to the CJS itself.

I. WHAT IS 'RESTORATIVE JUSTICE'?

In the latter half of the last country the idea of 'restorative justice' emerged as an alternative to the traditional CJS. The restorative justice idea is premised on a thinking that every wrongdoing or crime incident creates a state of disequilibrium in the social harmony that tends to disturb the balance of interest not only between the victim and the wrongdoer but society as a whole. The resultant imbalance needs to be restored to ensure order and peace in the society. The task of restoring balance is secured best by bringing the victim and the wrongdoer face to face to sort out matters between themselves, in a reconciliatory frame, without caring much for the requirements of legalism and the formal punishment. Commenting upon the growing acceptance of the idea of restorative justice in Europe and America in the 1970s David Miers observes:

As described by Miller and Blackler, the phrase 'restorative justice' is used to refer to an extraordinarily wide and diverse range of formal and informal interventions including:

1. Victim/offender conferences in criminal justice context
2. Disciplinary problem solving policy initiatives in disputes between citizens
3. Conflict resolution workshops in organizational context
4. Team building sessions in occupational settings
5. Marital advice and counselling services
6. Parental guidance and admonishment of their misbehaving children.
7. Apologizing for offensive or otherwise hurtful remarks in institutional and other settings .

As these uses illustrate, one can approach restorative justice from a variety of standpoints: First, it may be conceived from the victim - offender standpoint; second, it may be conceived from the standpoint of the problem on

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hand or the conflict to be resolved; third, it may be conceived from the standpoint of the conflict-resolving agency; fourth, it may be conceived from the standpoint of the process that may be deployed; and finally, it may be conceived from the standpoint of the outcome of the exercise itself.

II. EXPLICIT RESTORATIVE JUSTICE MEASURES

Traditional CJSs follow an adversarial nature of proceedings, apply formal processes and culminate in the verdict of guilt. All these leave very little room for the application of restorative justice. However, situations arise when the formal CJS gives way to the operation of restorative justice ideas on grounds of moral, ethical or social considerations. Such resort to restorative justice may be on a permanent basis or merely as a temporary measure. Furthermore, withholding the formal system may be the outcome of a duly considered legislative measure, or flow from a mere administrative order. The best example of a legislatively sanctioned resort to restorative justice can be found in the famous South African legal measure, namely, The Promotion of National Unity and Reconciliation Act 35 of 1995 (hereinafter the Reconciliation Act).

The Reconciliation Act in terms of Section 20(7) (a) provided blanket immunity for all the acts, omissions or offences with these words, "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organization or the state shall be liable, and no person shall be vicariously liable for any such act, omission or offence." Similarly Sections 20(8), 20(9) and 20(10) extended immunity even in cases in which a person is charged, convicted and awaiting passing of sentence or from any kind of civil liability or in respect of expunction proceedings.

III. IMPLICIT RESTORATIVE JUSTICE MEASURES

The formal CJS, apart from the explicit/express transformation, is constantly subjected to implicit transformations brought about by the regularly undertaken legislative and judicial changes, that may be described as those that fall short of qualifying as explicit transformations, but such transformation tacitly endorse one or the other restorative justice element. For example, the appeal to a different and higher ideal of justice, rather than sheer legalism, may not be good enough to alter the system, but it does succeed in transforming the system incidentally. Similarly, the wide range of legislative changes brought about to alter the status of victim may not as such transform the formal system, but it does pave the way for restorative justice in the long run. Furthermore, the implicit transformations may emanate more from judiciary rather than the legislature, because it is the judiciary that ultimately fine-tunes the justice component in dispute resolution. Though implicit transformation may assume diverse forms and characters, we shall presently focus on the three, namely:

(a) Appeal to 'Justice' rather than legalism
(b) Focus on the victim of the wrongdoing
(c) Primacy to restoration of disequilibrium by compensation rather than punitive sanctions.

Appeal to 'Justice' rather than Legalism

'Justice' in the formal CJS has more or less a technical connotation, which means justice as per formal law. Thus, more often mere compliance with the rule is treated as sufficient evidence of justice in terms of the law. However, such a narrow and technical view may elude the broader and ideal sense of justice that tends to vary from situation to situation. The broader and ideal sense of justice may mean: First, the ability of the legal resolution to stand to higher values; second, a sense of fairness that the legal resolution may evoke, and third, a personal sense of satisfaction derived by the parties, both the wronged and the wrongdoer that they have received their due. While the first and second relate to ideas of justice that depends upon external factors, the third idea of justice in premised on the personal or internal feelings of the parties. Commenting on the experience of the parties involved in mediation

experience, Tony Peters and Ivo Aertsen4 have observed: "Parties involved in mediation experience a different type of 'justice' and get the feeling that they themselves are creating justice instead of passively undergoing 'justice'." Commenting in the same vein the authors further observe, "For the victim it is of great importance to express emotions, rage and to comment on the effects which include fear, insecurity and shame. From the offenders side, it is first important to accept to listen to the victim to show that he is prepared to bear responsibility and to show willingness to collaborate in a reparative approach".5

(i) Need for a humane language

Ordinarily, the positive law is appreciated and expressed in the commonly used language, which may at times reflect a negative mind-set of the concerned official. In the present case, the Metropolitan Magistrate had in his judgment used the following language: "The accused was found begging by raising his front paws before passersby". Justice Ahmed, in the context of the language used by the Magistrate has observed:"To describe their hands as, "front paws," is nothing short of contempt for them. Beggars are not beasts with claws! They are human beings and they should be

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treated as such"7.

(ii) Need for a purposive understanding of the social legislations

Social legislations such as the Prevention of Begging Act need to be creatively understood by going into the reasons of begging, rather than merely satisfying the enquiry as to whether there was solicitation and receiving of alms in terms of Section 5(1) of the Act. Once the enquiry is shifted to reasons, the act of solicitation or receiving alms can fall in one of the four categories, namely: First, who is downright lazy or a person who is not interested to work. Second, that of an alcoholic or a drug addict in search for the next drink or dose. Third, that of a person at the mercy of exploitative ring leader of a beggary gang. Four, that of a person who is starving, or helpless. In this context Justice Ahmed observes: "Although apparently, the said Act does not distinguish between the four different kinds of 'beggars' mentioned above.

Focus on the Victim of Wrongdoing

The formal CJS is known to be largely accused-centric, in the sense that it is first over obsessed by the powers of the executive and the judiciary in controlling the accused; and second, by providing statutory and constitutional protections to the accused against possible excesses is the exercise of the regulatory powers. In comparison the scheme of the formal CJS, the victims of wrongdoing are more or less relegated to the margins. It is paradoxical that the CJS assumes powers to control the accused on behalf of the victim, but in the process the victim himself is virtually pushed out of the system, he neither has a say nor is assigned any role in the system. Restorative Justice aims to reverse this unhappy situation by trying to re-locate the victim in the scheme of justice.

the State or the District Legal Service Authority for award of compensation.'

Once the concept of 'victim' is established the next enquiry relates to the identification of range and nature of his needs and entitlements. The

U.N. Declaration had identified four major entitlements or needs of the

victim, namely:

(i) Access to justice and fair treatment: This includes access to the mechanisms of justice and prompt redress, right to be informed of the victim's rights, right to proper assistance throughout the legal process and right to protection of privacy and safety.

(ii) Restitution: This includes return of property or payment for the harm or loss suffered; where public official or other agents have violated criminal laws, the victim should receive restitution from the state.

(iii) Compensation: When compensation is not fully available from the offender or which result in bodily injury, for which national funds should be established.

(iv) Assistance: Victim should receive the necessary material, medical, psychological and social assistance through governmental, voluntary or community based means. Police, justice, health and social service personal should receive training in this regard.

In order to ensure better access to justice to the victim, it may be useful to keep in mind the following measures:

a) Legislate to entitle victims with information about release, bail or remand of the offenders and progress of their cases.

b) Enable victims to subunit a "victim personal statement" to the Courts and other Criminal justice agencies setting out the effect of the crime on their lives.

c) Establish a victim's Commissioner (Ombudsman).

d) Enable victims to report minor crimes on line and track the progress of their case on line.

Primacy to Restoration of Disequilibrium rather than Punitive Sanction

In the early 1990s, John Braithwaite wrote a path-breaking book concerning punishment, 'Crime, Shame and Reintegration'13. The main thesis of the book is that all modern forms of punishments are stigmatizing in nature, which leads the punished accused to be disintegrated from society. Therefore, if the nature of punishment undergoes a change, so that it leads the accused to be better integrated then the results are likely to be more desirable. According to Braithwaite, in communitarian societies punishment is replaced by 're-integrative shaming,' which takes a better care of the disequilibrium created by criminal conduct. The 're-integrative shaming' objective can be achieved equally by the wrongdoer either displaying expiation, or atoning or making good the loss or harm suffered by the victim. In the modern context making the wrongdoer pay compensation to the victim is considered the best way of atonement. The Indian judiciary is much more inclined to fall back on compensation rather than to insist on imprisonment as a form of punishment. In Ankush Shivaji Gaikwad Vs. State14 The Supreme Court, speaking through Justice. T.S. Thakur (Justice Gyansudha Mishra concurring), observed:

"The provisions dealing with compensation to the victims of crime confer a power coupled with a duty on the Courts to apply the mind to the question of awarding compensation in every criminal case. The Trial Judge must record his reasons for awarding/ refusing compensation. The grant of

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compensation to the victim of a crime is equally a part of first sentencing"15.

Quest for Higher Ideals of Justice

Justice as per formal law and justice as an ideal construct are two distinct notions that vary in terms of their content and import. As a higher ideal, justice may be, or even bound, to differ from justice in the routine sense. In the South African Constitutional Court ruling AZAPO Case, the Court considered reconciliation a higher ideal than litigation for the crimes committed in the past. In the context of the case the Court refers'shame of the past' as to the sordid tale of the large number of apartheid crimes committed under the earlier regime, which constituted crimes to be tried and punished by the criminal Courts. But it was realized that merely punishing for past crimes might only mean compliance with legal justice, at best, not justice in the essential sense. The raising of the strife ridden society to a higher level required taking the bold step of upholding the Reconciliation Act, that would lead society to the 'promise of future' under which the human rights of all could be better protected.

Thus, rising to the higher levels of justice means an appeal to the human rights of the parties, as well as of the community. After all, higher justice is as much an essential component of the human rights in the true sense.

Victim Centricism

The formal system of criminal justice is known for its partisan approach to victims of crime. But in the last decade several pro-victim trends are underway that have considerably transformed the system from the victim's standpoint. First, several victim-centric laws such as the POCSO Act 2012, the Criminal Law (Amendment) Act, 2013 have been enacted that have ushered an era of criminalizing and victimization for a specific category of offending. Second, victims have been conferred specific enabling procedural rights such as right to report crime, right to a counsel, right to appeal. Third, the compensatory claims of victims have received recognition through wholesome compensatory orders.

According the victims, a right bearing status has, to a considerable extent, offset the disadvantages faced by victims under the traditional system. Victim remain a weaker section within the criminal justice system, but the trend of shifting the focus towards them is decidedly a move in the direction of actualizing the human rights of victims of crime. Human rights that stand violated when the victim of crime is left without remedy or when the agencies either deny her remedy or ignore her claims to justice because of extraneous considerations.

Surrender and Pardon of Dacoits

Surrender by dacoits, extremists and other serious and non-serious criminals, and their subsequent commutation or pardon can be viewed as a restorative justice measure. The surrender by the dacoits of the Chambal

valley under the influence of Sarvodaya leaders in the 1960s and 1970s is an example of restorative justice ideas being put to the test for resolving some of the most intricate law and order problems that had been faced by the Indian society for a long time. The threat posed by the dacoit problem can be assessed from the dacoit related crime statistics.

Like the dacoit surrender the administration encourages and permits voluntary surrender by extremist groups and civil society dissenters. For students indulging in routine acts of vandalism and hooliganism the Governments often offer amnesty schemes in order to wean away youth and students from a possible life of criminality.

Thus, self realization, remorse and regret and in return compassion and munificence constitute the essence of the human right to surrender and pardons, which has immense possibilities in an egalitarian and multi-layered society like ours.

Consensual Justice

Usually parties to justice share a conflicting relationship. But in consensual justice the parties agree to come together to seek justice. The cases in point are Plea Bargaining and Compounding of offence proceedings. In Plea Bargaining the application by the accused/wrongdoer is not contested

by the victim, but he volunteers to be a part of the mutually satisfactory disposition and takes part in the deliberations. Similarly, in compounding of offence proceedings too, both the parties at the instance of the victim agree to the proposal of compounding the case. The success of plea-bargaining and compounding measures lies in both the parties feeling an equal involvement in the rendering of justice, rather than the external agency like the judge or the arbitrator. The element of consent byboth parties is the essence of justice in most of the indigenous systems of justice, which are based on total involvement of the justice seeker and the justice maker. Professor N.R. Madhava Menon has strongly espoused the cause of restorative justice, recently, in these words:

"India needs to experiment with more democratic models aimed at reconciliation and restoration of relationships. Restorative justice is a welcome idea particularly in matters of juvenile justice, property offences, communal conflicts, family disputes etc.. What is needed is a change of mindset, willingness to bring victim to centre stage of criminal proceedings and to acknowledge that restoring relationships

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and correcting the harm are important elements of criminal justice system".23

Compensation as a means of justice

The pre-occupation of the formal criminal justice system with punishment, leaves little scope for restoration of harm or compensatory justice ideas. However, of late with the better realization of victim needs, legislative and judicial attention has been drawn towards the restoration of harm or compensatory justice. The idea of restorative justice is premised on the need to redress the harm suffered by the victim, rather than look for the punishment to the wrongdoer, that hardly helps the victim to really reduce the trauma of harm suffered by her. Compensation to the victim or restoration of harm is the underlying philosophy of the recent legislative change that has for the first time introduced a right to compensation under Section 357A of the Cr. P.C. (inserted by the Act 5 of 2009). In addition to this legislative amendment, the Indian judiciary, particularly the Supreme Court, has taken lot of interest in making restorative or compensatory justice a reality in the day-to-day administration of compensation claims. Laxmi v. Union of India, and Parivartan Kendra v. Union of India are the two notable Apex Court rulings that are solely devoted to the issues as to how, why and what amount of compensation should be granted to victims of acid attacks. In both these public interest petitions the Courts neither discussed the issue of liability, nor of standing, but only focused on how much compensation was needed in such cases.

To restore the harm suffered by the victim is a laudable objective for the law to aspire, and a law that really cares for the human rights of the victim. Mere notional restoration provides no real satisfaction.

Rise of Restitutive laws at the cost of repressive laws

Long ago, Emile Durkheim had predicted that as society progresses, restitutive laws will replace the repressive laws. With the increasing resort to mediation and reconciliation to resolve civil and criminal disputes the prediction of Emile Durkheim appears to be coming true. Restitutive laws are characterized by private party initiation, civil processes of dispute resolution and imposition of non-punitive sanctions. However, in societies where restitutive systems have not adequately evolved or the political resolve to switch over to the restitutive laws is still weak, the restitutive transformation has not really caught on. In India too, the restitutive laws have been applied selectively, without adequate rationalizations. For instance, the black money disclosure scheme or the IDS, the emphasis is only a monetary sanction in the form of higher tax rate deductions, which could be described as a classic case of restitutive reform.

According recognition to restorative justice ideas as a human right, may at best, be an important measure for legitimizing the multiple ways of responding to wrongdoing in the society. It may constitute the basis for filing a petition by the victim for the violation of their human rights before the Human Rights Commission under Section 12 of the Protection .

IV. THE WAY FORWARD

In the earlier parts we have described how the restorative justice ideas have made inroads into the formal CJS, either explicitly or implicitly or have been projected as new human rights. All such inroads may constitute an important prelude to the transformation of the system towards restorative justice as an alternative system. But such measures alone are not good enough to bring about a formal restorative justice transformation. What is required is a clear and conscious decision to usher in a regime of restorative justice procedures in respect to certain categories of wrongdoings/offences. The restorative justice decision will be required in respect to two things: First, which offences would be subject to restorative justice; and second, what procedures would be followed in restorative justice proceedings. The categories of offences that would be subject to restorative justice need not be very restrictively defined. For instance, petty offences (punishable with less than 3 years imprisonment) and serious offences (punishable with less than 7 years imprisonment) could easily fall within the sweep of a restorative justice ambit, but even certain kinds of heinous offences (punishable with more than 7 years imprisonment) such as voluntarily causing grievous hurt to extort property/valuable security or counterfeiting Indian coin etc. (both punishable with 10 years imprisonment) may qualify to be suitable for restorative justice.

Equally important would be creating a stake on the part of NGOs/ CSOs and a large army of volunteers to the restorative justice cause. NGOs/ CSOs need to be encouraged and facilitated in respect to restorative justice programmes. Some District Legal Services Authorities have already taken useful initiatives in the direction of organizing Lok Adalats, the need is to activate NGOs to take up individual criminal conflicts for mediation. Students of Law, Social Work, Sociology and others can serve useful functions as mediation volunteers: The whole idea is to create an environment in which the more democratic, informal, re-integrative and expeditious system of rendering justice will get a chance.

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