

# ENSURING JUSTICE TO VICTIMS THROUGH RESTORATIVE JUSTICE STRATEGIES: SOME UNDERPINNINGS

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*"Justice requires that we work to restore those who have been injured"*

## Abstract

Even the best of judicial decisions through the criminal justice system based on retributive philosophy may not give solace and a sense of complete justice to the victim of crime owing to his near exclusion in the criminal justice dispensation process.

Without any effective participation in the entire trial process, the victim is expected to believe that the judgment delivered by the Court of law has done justice. The traumatizing impact of crime leaves the victim shattered. Shock, anger, grief, loss, uncertainty, fear, worry, low self-esteem etc. are experienced by the victim on daily basis, in the retributive criminal justice system which further deteriorates the mental health and psychological well-being of the victims of crime.

Restorative Justice Strategies on the other hand through effective victim participation give a sense of inclusion to the victim in the administration of criminal justice. Most importantly their participation can help them overcome their emotions of helplessness, powerlessness thereby assuaging their lowered self-esteem which is crucial for their therapeutic healing and psychological well-being. This ensures the smooth reintegration of both the crime accused and crime victims into their society and foster them as a resilient and constructive individual in the community.

**Keywords:** *Restorative Justice, Emotions, Criminology, Victim Participation*

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## VII. Conclusion

### I. Introduction

THE PURPOSE of justice delivery mechanism is generally considered in the sense of social, political or economic justice<sup>2</sup> wherein the psychological wellbeing of the victim is never an initial consideration unless there is a vivid manifestation of its disequilibrium. And we continue to live under a mistaken impression that justice to the victim of crime has been delivered. However, the reality is even when the physical wounds have healed the psychological wounds of the victims of crime persist. They suffer intense fear, shock, and trauma, followed by varied emotions like anger, anxiety, depression, social isolation, and helplessness. Survivors of prolonged, repeated victimization, may develop severe mental health problems. To add more to their adversity, criminal justice system plays a contributory role. Thus, it is pertinent that delivering justice is not only to be understood as punishing the perpetrator but rather restoring back the victim in every possible way and the most important way is to ensure the psychological health and well being of the victim(s) of crime and by providing them with psychological justice. But ironically “the mental health impacts of crime are an underappreciated cost of crime in society.”<sup>3</sup>

It is the contribution of Bentham<sup>4</sup> and Beccaria<sup>5</sup> as pioneers of Classical School of criminology that identifies every human being as a *free willed* individual driven by hedonistic instincts of pleasure versus pain.<sup>6</sup> Hence every crime necessarily has to be met with a punishment that is deterrent as well as proportional to the severity of crime.

Why do we punish? Since ages the humankind is baffled by this question as we do not have any empirically tested singular reason justifying the punishment. Despite the three main ideologies viz retributive, deterrent, reformation underlying punishment, we cannot universally justify the reason for punishment in all instances. Analysing the purpose of punishment in the traditional criminal justice system,<sup>7</sup>

2 See R W M Dias, *Jurisprudence* 65 (Lexis Nexis Publication, New Delhi, 5th edn, 2013).

3 Mental Health and Crime Perspectives in Crime: How does local crime affect mental health?, *available at*: <https://pinkerton.com/our-insights/blog/mental-health-and-crime> (last visited on May 9, 2023).

4 Jeremy Bentham (1748-1832), A Utilitarian and reformer of Classical school of criminology.

5 Cesare Beccaria (1738-1794), Father of Classical criminology.

6 The Classical School of Criminology, *available at*: <https://www.lawteacher.net/free-law-essays/criminology/the-classical-school-of-criminological.php> (last visited on July 15, 2023).

7 Hereinafter “CJS”.

one can easily understand that punishment is used as a tool in shaming the wrongdoer publicly with the hope that the very threat of being shamed would work as a deterrent. The fear of humiliation or embarrassment restrains people from indulging in wrongful conduct. But ironically this concept of deterrence does not repair the harm caused to the victim in any which way and least of all repairing the psychological harm.

Restorative justice on the other hand focuses on the reparation of harm done by the wrongdoer and restoring the balance of relations in any given society. According to John Braithwaite,<sup>8</sup> the chief proponent of modern restorative justice approach “restorative justice is all about restoring offenders, restoring victims and restoring societies” in contradistinction to traditional criminal justice administration with a focus on punishing the criminal by way of retribution coupled with deterrence.

### **Brief Historical Background**

Restorative justice has been an integral part of all indigenous human civilisations. Be that traditional Hindu society in 600-2000 B.C, ‘ancient Buddhist Taoist and Confucian traditions’ or the ‘public assemblies of the Germanic people’, they all bear testimony to the interpersonal methods of conflict resolution. It has been witnessed that Restorative Justice made its way even in cases of homicide in certain ancient civilisations like Arabs, Greeks and Romans.

The period from 11<sup>th</sup> to 19<sup>th</sup> century the emergence of political state and rising of Monarchy resulted in the king appropriating the power of dispute resolution to himself, prosecuting, and punishing the offender in place of negotiated settlement on behalf of the victim and society too. Slowly and gradually the interpersonal conflict resolution transformed into a third-party conflict resolution by the State.

Disillusioned with the conventional CJS on account of huge pendency of cases, long and persecuting delayed trials coupled with total exclusion of the victim from the entire criminal justice administration has witnessed a revival of interest in restorative justice practices across the globe which also can be effective in maintaining the psychological health of the victims of crime through its strategies. Studies have shown that restorative justice strategies have physical and psychological health benefits.<sup>9</sup>

## **II. Restorative Justice: Meaning and Scope**

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8 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989).

9 Restorative justice’s impact on participant health, *available at*: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rstrtv-nhlth/index-en.aspx> (last visited on July 9, 2023).

Restorative justice is an age-old value reflecting justice, accountability, and restoration. The believers in restorative justice suggest that restorative justice practices are much more beneficial than traditional punitive approaches in addressing the claims of victims of crimes who otherwise invariably are a non-entity and forgotten lot in criminal justice delivery system. Restorative justice strategies like mediation, victim support and advocacy, restitution, compensation, victim offender conferencing, victim empathy, community policing etc. give opportunities to the offender to make amends, apologize, gain acceptance by willing to repair harm and get reintegrated in the society unlike the punitive approach of fine, reprimand, penalize, incarcerate, detain, suspend, expel which results in labeling the wrongdoer(s) and



thereby excluding them from reconciliation.

*Figure 1: Restorative Justice Stakeholders and Practices*<sup>10</sup>

Reintegration involves separating the wrongful act from the actor and disapproving the deed while intrinsically recognizing the worth of human being. This is precisely what Mahatma Gandhi's famous adage "hate the sin, not the sinner" also exhorts!

The UN Handbook on Restorative Justice Programs specifies underlying

<sup>10</sup> McCold and Wachtel's restorative justice typology, available at: [https://www.researchgate.net/figure/McCold-and-Wachtels-restorative-justice-typology-Source-McCold-and-Wachtel-2003-3\\_fig1\\_257681396](https://www.researchgate.net/figure/McCold-and-Wachtels-restorative-justice-typology-Source-McCold-and-Wachtel-2003-3_fig1_257681396) (last visited on June 8, 2023).

assumptions<sup>11</sup> of restorative justice tools:

- (i) A victim suffers some harm after a crime, the response to the crime should be such which repairs that harm;
- (ii) The one who has committed the crime should be made to understand that his/her conduct is unacceptable and his behavior has caused harm not only to the victim but also the community;
- (iii) The perpetrator should accept the responsibility for committing the crime;
- (iv) The victim's opinion needs to be taken into consideration to decide the ways in which the offender can repair the harm caused to victim; and
- (v) This process involves the contribution from the community as well.

There are primarily three conceptions<sup>12</sup> about restorative justice:

- a. *Encounter conception*: It is based on the concept where the stakeholders of a crime meet and discuss about it. Where they try to find out the way forward to repair the harm caused. People associated with this approach often suggest that Restorative practices can be brought forth and used even when we are not dealing with a crime situation. For instance: conflict with neighbours' or any domestic day to day conflict.
- b. *Reparative conception*: In this concept the idea is to focus on repairing the harm caused by crime. The groups associated with this concept consider this to be the best thing to do as repairing the harm caused is the most important thing to maintain a spirit of collective collegiality within the community.
- c. *Transformative conception*: This particular concept focusses on underlying cause of crime. It is also individualistic in its approach as it looks for individual injustice. The idea is to find out the root cause so that every stake holder can identify/accept responsibility. It is wider in its approach than the above mentioned concepts. It highlights on the significance of internal spiritual transformation along with external societal transformation.

Thus, by understanding and utilizing the above-mentioned concepts and principles, restorative justice seeks the four 'Rs' viz Repair, Restore, Reconcile, and Reintegrate<sup>13</sup>

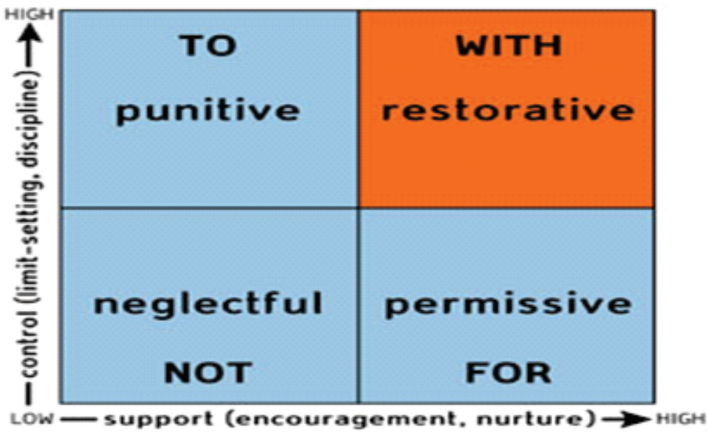
11 United Nations Office of Drugs and Crime; Handbook on Restorative Justice Programs, available at: <https://digitallibrary.un.org/record/617572?ln=en> (last visited on July 19, 2023).

12 Lucio Sia, "Restorative Justice: International Perspective" *Cambridge: Faculty of Education, Seminar 4* (2010), available at: <https://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminartwo/SiaLucio.pdf> (last visited on July 10, 2023).

13 Stuart Henry and Scott A. Lukas (ed.), *Recent Developments in Criminological Theory Toward Disciplinary Diversity and Theoretical Integration* (Routledge, 2009).

### III. Punishment for Ensuring Social Discipline

Restorative Justice can be further understood by using the “Social Discipline Window that reflects the interplay of control and support model developed by Terry O’Connell.<sup>14</sup> The purpose of punishment is to socially discipline people in accordance with the standardised aspirations of the group. The compliance to norms can be brought about through various methods. A punitive –permissive continuum to discipline people can be more comprehensively understood by analysing the interplay of two significant variables, i.e., control and support. The following



*Figure 2:* The Social Discipline Window<sup>15</sup>

- a. *Punitive-* As the above diagram shows is that disciplining method where the support which is provided is less but the control mechanisms are highest. So their leadership is authoritarian as primarily their objective is to do things TO people.
- b. *Permissive-* A disciplining method where providing support is higher in comparison to control or there is least control. This leadership style is generally paternalistic in nature. These are the people who do things FOR people.
- c. *Neglectful-* A disciplining or leadership style where there is no response to wrong doing. There is neither control nor support. There is a big NOT

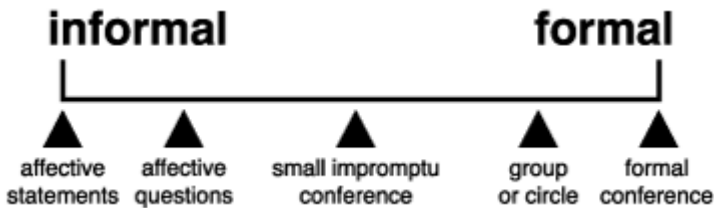
14 *Id.* at 153-154.

15 Source of Image, available at: <https://dev.iirp.edu/media/SocDiscWindowRio.jpg> (last visited on March 11, 2023).

doing anything to the people here. These kinds of leaders are very much irresponsible in their approach.

- d. *Restorative*- This is a leadership or disciplining style which we are looking at and is being emphasized. This a style where we find high control along with high support. This leadership style is positive in characteristics and authoritative in nature. Here the things are done WITH people so that people are engaged and empowered by having their say and effective participation.

Of late the value of restorative practices is being realised in various other fields of human activity e.g., education, parenting, counseling, organizational leadership involving management and motivation of human beings and the need of social disciplining for ensuring cohesive co-existence. There can be a vast range of restorative justice practices from being most informal to being formal, structured, and more impactful.



*Figure 3:* Restorative Justice Continuum<sup>16</sup>

Some of these are:<sup>17</sup>

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 counseling services
6. Parental guidance and admonishment of their misbehaving children.
7. Apologizing for offensive or otherwise hurtful remarks in institutional and other settings.

16 Source of Image, available at: <https://www.iirp.edu/images/rp-continuum-375w.png> (last visited on May 11, 2023).

17 B.B. Pande, "Restorative Justice Indicators, Criminal Justice and Human Rights" 15 *Journal of the National Human Rights Commission* 203 (2016).

#### IV. Restorative Approaches to Cross Cultures: International Scenario

Restorative approach to criminal justice administration is in practice across the globe. Many cultures have informally embedded some aspects of restorative justice in their dispute resolution mechanisms. For instance, informal participation in sentencing procedures has been a way of Australian and Canadian indigenous peoples' ways of life for decades.<sup>18</sup> This practice is largely informal and community based. Some of the countries adopted and modified the approach to suit their unique justice dispensation systems. Over the years strategies like 'victim offender mediation,' 'community family group conferencing,' 'peacemaking committees,' 'sentencing circles' have already been recognized as time tested processes furthering restoration perspectives. A brief outline about some of the restorative justice strategies being adopted by various countries is given below:

- a. *New Zealand*: There is what is a "Community and Family Group Conferencing" model adopted into national legislation and applied to the youth justice process in New Zealand started from 1989. The majority of cases are handled by the police through restorative caution, by police-directed, court family group conferencing<sup>19</sup> or police diversion schemes. Which is an alternate means of dealing with some offender and offences in court.<sup>20</sup> It is based on the dispute resolution traditions of the Maori community being first of its kind in resolving dispute through restorative mechanism. Because of its effectiveness, this model is now widely used in modified forms<sup>21</sup> in South Australia, South Africa, Ireland, Lesotho, as well as in U.S. cities in Minnesota, Pennsylvania and Montana.
- b. *United States*: Further, the US modified form of family group conferencing is the victim-offender mediation. It applies to other States within the US. There are considerable restorative justice activities in the US, being one of the earliest initiators of victim-offender mediation. Even though most victim-offender mediation is concerned with minor offences, there is increasing interest in very serious and violent cases, such as drunk driving, serious

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18 Lucio Sia, *supra* note 12.

19 Umbreit Bazemore, *et al.*, "The Impact of Victim-Offender Mediation: A Cross-National Perspective" 17(3) *Conflict Resolution Quarterly* (2000).

20 Adult diversion scheme - Police Manual chapter, *available at*: <https://www.police.govt.nz/about-us/publication/adult-diversion-scheme-police-manual-chapter> (last visited on July 23, 2023).

21 David B. Wilson, Iain Brennan, and Ajima Olagherehttps, "Police-initiated diversion for youth to prevent future delinquent behavior: a systematic review" 14(1) *Campbell Systematic Reviews* (2018).



injury and death’ rape, manslaughter, and murder. Mark Umbreit in Minnesota, David Doerfler in Texas and David Gustafson in Canada have pioneered this type of work, now known as Victim Offender Dialogue (VOD).<sup>22</sup>

- c. *Australia:* Australia follows Conferencing model. The conferencing idea was borrowed from New Zealand but applied with modifications. It was introduced into the Australian juvenile and criminal justice systems in the early 1990s. A year later in 1991 the police were the first to try out conferencing in the town of Wagga, New South Wales. The ‘Wagga Model’ helped all the stakeholders in a crime to resolve feelings and needs after a crime incident. Having turned out a success, police in other states observed and replicated same in their respective states.
- d. *Canada:* The first recorded victim-offender mediation and reparation service in recent times in the western hemisphere took place in Ontario Canada in 1974.<sup>23</sup> There were two accused who committed vandalism and in the first of its kind they met their victims for getting into a restitution agreement. In the year of 1970 there were voices from different stake holders in the CJS like-prisoners, lawyers and academicians. They wanted to protect the right of the accused, to reduce incarceration and also to bring in reforms within the institution.<sup>24</sup> Around this time, Canada developed the well-known ‘Mennonite initiative’. Since that date, restorative justice programmes have grown steadily, including small and large schemes.<sup>25</sup> Participants in this restorative approach are assisted to understand why they behave the way they do and are provided problem-solving skills that strengthen the mas they learn to independently fix their mistakes, repair relationships, and return to balance. It is a well-known fact that when there is self-discipline it improves the personality and emotional state of mind and also make the relationship stronger. Further it helps to nurture an increased sense of achievement.<sup>26</sup>
- e. *United Kingdom:* In England and Wales, there is the Youth Offenders Panels which is a widely-used method. Their restorative feature is the “referral

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22 Umbreit Bazemore, *supra* note 19.

23 The Effects of Restorative Justice Programming: A Review of the Empirical, *available at*: [https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00\\_16/p2.html](https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p2.html) (last visited on July 20, 2023).

24 *Ibid.*

25 Umbreit Bazemore, *supra* note 19.

26 Lucio Sia, *supra* note 12.

order”. How does it work? First time and young offender between the ages of 10-17<sup>27</sup> are referred to youth offender panels.<sup>28</sup> This is an organized panel. In this panel the victim is asked to come forward and present his or her say and meet the offender and highlight upon how they feel about the committed crime. Also, to present views on what could be done to repair the harm caused to them. However whether the opinion of the victims will be taken into consideration or not is finally decided by the Court.<sup>29</sup>

- f. *Czech Republic*: Czech Republic has a well-developed Victim-Offender Mediation programmes. One of the first instances of Restorative practices can be found here in this country and in its ancient civilization.<sup>30</sup>
- g. *Nigeria*: In Nigeria the offending party is usually persuaded to tender apologies, return whatever was forcefully taken away or repair any damaged property. The result is that there is relative peace among the people and their leaders. Incidents of invasion and hostilities are brought to the barest minimum.<sup>31</sup>
- h. *Uganda*: In the East-African state of Uganda, the local council courts are vested with powers to grant remedies such as compensation, restitution, reconciliation, or apology, as well as more coercive measures. A highly respected organ is in place to ensure amicable compliance with the remedies granted by the courts.<sup>32</sup>
- i. *Philippines*: The practice in the Philippines is equally interesting. There what is called the Barangay justice system consists of a locally elected Barangay captain and a “peacekeeping committee” hearing cases involving conflicts between residents. There is a mediation session that is facilitated by the captain or another member of the committee. Agreements reached through this process are legally binding and are recognized by other and higher conventional courts.<sup>33</sup>

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27 They were appearing before court for the first time.

28 Unless their offence is so serious as to require custody.

29 Lucio Sia, *supra* note 12.

30 *Ibid.*

31 Cynado Ezeogidi, “Resuscitating the Age Grade Associations and Women Guilds in Igbo Land for Effective Conflict Management Mechanism and Resolution” *SSRN Electronic Journal* (May, 2020).

32 Uganda, *available at*: <https://ulii.org/ug/legislation/act/2015/2006-22> (last visited on July 11, 2023).

33 About Philippines, *available at*: <http://www.lawjournals.org/download/115/3-2-31-301.pdf> (last visited on June 10, 2023).

## V. Indian Experience with Restorative Practices

Indian history and culture are full of illustrations reflecting compassion, pity, forgiveness etc in dispute resolution mechanisms. Our indigenous system was primarily based on *restorative approach* until the Britishers established their empire and took the control of criminal justice in their hands based on adversarial approach to protect their colonial interests. The surrender and rehabilitation of dacoits from Chambal Valley by Vinoba Bhave and Jai Prakash Narain is illustrative of restorative practice in Indian scenario. Even today the aboriginal tribes and tribals in remote and interior areas resolve their conflicts through conciliation.

Twentieth century India has witnessed huge changes of far reaching implications with reference to criminal justice administration. Article 21 of the Constitution dealing with 'right to life' has become the fountain of human rights jurisprudence through judicial activism of the Supreme Court of India. Through a catena of decisions dealing with abuse of power resulting in victimization of individuals the apex court has established 'right to compensation' for violation of Fundamental human rights.<sup>34</sup> From *Rudul Shab, M. H. Hoskot, Nilabati Behera, Chandrima Das to Bodhisattva Gautam, Dr. Jacob George, Laxmi, Ankuash Gaekwad, Parivartan Kendra* the court has recognized right to compensation not only in cases of abuse of power in the form of incarceration without trial, custodial violence, custodial death but also of victims of crime.

There are express legislative provisions that reflect restorative justice orientation. The Criminal Procedure Code, 1973, is a comprehensive code laying down elaborate procedures for criminal justice dispensation. A well-crafted Criminal Code supplemented with various procedural minutiae like compounding of offences, plea-bargaining, compensation, appeals, probation, Juvenile Justice (care and protection) Act, 2015, Legal Services Authority Act 1987 etc.

## VI. Restorative Justice: Rhetoric Versus Reality

### No Consensus on Definition

The problem related to definition is the "vexed problem," as Daly notes.<sup>35</sup> Although this concept has attracted the attention of criminal justice practitioners and criminologists for decades but it has not been easy to define the same owing to its usage as the omnibus term to describe various innovations in criminal justice. Diverse

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34 J.L. Kaul and Anju Vali Tikoo "Revisiting Award of Compensation for the violation of Fundamental Rights: The Indian Judicial Experience" *Journal of the Constitutional and Parliamentary Studies* (2009).

35 William R. Wood and Masahiro Suzuki, "Four Challenges in the Future of Restorative Justice" 11(1) *Victims & Offenders* (2016).

practices including victim–offender mediation, family group conferences, restorative conferences, restorative cautions, sentencing circles, and community reparation boards have made it difficult to reach a consensus about its definition.<sup>36</sup> This has resulted in “significant confusion, obfuscation, and contestation.”<sup>37</sup> For some scholars it is a concept loaded with set of values, philosophy and for others, it’s a specific practice or procedure. So, a simple solution can be as highlighted by Johnstone that rather than viewing it as a technique for controlling crime, it should be seen as a practice incorporating values and philosophy. The way forward is to build a concrete idea related to value and ethics which is common to all organizational settings with a scope of modification according to the institutional requirements for their effective functioning and vindicating justice. Although one-size-fit model will not be suited for all problems. But the ever-expanding hybridization of the concept must be checked; else it would be reduced to a meaningless word.<sup>38</sup> The definition given by Daly<sup>39</sup> has been considered to be one of the best definitions which include empirical perspective in Restorative justice and consider Restorative justice as both practice and value.<sup>40</sup>

### Collaboration among Participants and Professionals

A unique element of restorative justice practices is that they empower lay people—victims, offenders, families, friends, and community members— to actively participate in some kind of deliberative forum.<sup>41</sup> This encounter can go either way. It may increase the pain and conflict of the victim and terrorize the victim further and it

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36 David B. Wilson, *et.al.*, “Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis” National Criminal Justice Reference Service, *available at*: <https://www.ncjrs.gov/pdffiles1/ojdp/grants/250872.pdf> (last visited on April 14, 2023).

37 Doolin 2007; Mc Cold 1998; Johnstone and Van Ness 2007, *available at*: [https://www.researchgate.net/publication/316885806\\_Restorative\\_justice\\_in\\_the\\_21st\\_century\\_making\\_emotions\\_mainstream](https://www.researchgate.net/publication/316885806_Restorative_justice_in_the_21st_century_making_emotions_mainstream) (last visited on July 10, 2023).

38 *Supra* note 35.

39 Meredith Rossner, “Restorative justice in the 21st century: making emotions mainstream”, *available at*: [https://www.researchgate.net/publication/316885806\\_Restorative\\_justice\\_in\\_the\\_21st\\_century\\_making\\_emotions\\_mainstream](https://www.researchgate.net/publication/316885806_Restorative_justice_in_the_21st_century_making_emotions_mainstream) (last visited on July 10, 2023).

40 “Restorative justice is a contemporary justice mechanism to address crime, disputes, and bounded community conflict. The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process, pre-arrest, diversion from court, pre-sentence, and post-sentence, as well as for offending or conflicts not reported to the police. Specific practices will vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict (Daly 2016: 14).”

41 David B. Wilson, *supra* note 36.

42 David B. Wilson, *supra* note 36.

can also lead to accused feeling more confident about his deeds as he gets to encounter the victim as it doesn't happen this directly in widely practiced criminal justice delivery system. However, it can also recede the pain of victim and let the offender realize his mistakes and start a dialogue in between. Whatever is the case, it does involve facilitator and professionals to great extent to make this encounter successful. "Restorative justice processes can include roles for facilitators, service providers, social workers, probation officers, and police. Professionals also participate 'outside the circle' with a complex web of criminal justice staff supporting the integration of restorative justice into the courts or other institutions. Professionals serve a vital role in meeting the needs of lay participants, but that effective collaboration requires a clear delineation of roles and tasks as well as an explicit set of shared goals (Dzur 2008; Rossner and Bruce, 2016)".<sup>42</sup> Lack of effective collaboration and specification of roles and functions and ambiguity in shared goals lead to causing more harm to the lay participants rather than repairing the harm more particularly in the context of victim and it can further traumatize the victim. So, an effective cooperation and collaboration should be the very first rule of ensuring Restorative justice delivery system.

### **Narratives and Management of Emotions**

Restorative justice delivery system involves in its practice use of narratives so that the lay participants can start the communication and have at their disposal both sides of the story. So, one is "narrative of harm", stated by the victim and another is "narrative of accountability" stated by the offender. These narratives, which are facilitated by professionals, give rise to range of emotions starting from anger, fear, pain, shock, disgust, anxiety, shame, guilt, remorse to hope etc.<sup>43</sup> Managing these flooding of emotions is not an easy task and require expertise and involvement of experts like psychologists and councilors and the unconditional support of family members. Are we aware about these requirements? If at all the next question is how they can be made available readily and effectively. For this we require an effective strategic planning and intensive financial investment. We already (In India) lack requisite number of psychologists and councilors for medical attention. Their availability in the above-mentioned process in terms of shared goals seems unthought-of by Government.

### **Shaming a Misnomer or Negative Approach in the Optimism of Restorative Justice Mechanism**

Restorative justice works on the basis of several theories like Shame theories, procedural justice theories and interaction ritual theory. While putting out narratives

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43 Meredith Rossner, *supra* note 39.

as mentioned earlier a lot of emotions are encountered with, shame is one of the central most emotion through which the offender realizes his guilty conduct. However, feeling shame depends upon perceiving that others disapprove of you or your behavior. Does shame change or deter behavior? For people who care about how others view them, shame can deter behavior that incurred such sanction. A form of punishment, shame is an aversive emotion that most people will try to avoid.<sup>44</sup> When shame is internalized and becomes pervasive and enduring, a person can be at risk for developing unhealthy conditions such as depression or social anxiety disorder the fear of being scrutinized and the avoidance of social events that evoke such fear. Depression and social anxiety disorder are among the most prevalent psychological disorders and are associated with higher risk of developing additional psychological problems. This can lead to failure of reintegrative philosophy related to shaming. Inadequate, inferior, useless, regret these are the feelings of shame. It is a painful and toxic emotion. An emotion which lies at the root of low self-esteem. Many scholars and psychologists believe that shame is the origin of dysfunction in families and all reckless behavior are reactions to it.<sup>45</sup> By adopting this approach we are in a way putting the problem back to its origin point without resolving the real issues. Which makes reintegrative shaming theory less plausible.

### **Restorative Justice and Social and Political Fabric**

From Global experiences and after understanding the genesis of restorative justice its quite clear that Restorative Justice works well and can be effectively implemented in a vibrant democracy a tolerant society. Its success depends on the viability of a good governance and democratic set up. It has been always witnessed that lack of political will, non-availability of an effective legislation and non-conducive current socio-cultural dynamics has always shelved the best possible ideologies and practices related to it. The lack of conducive socio- cultural fabric as well as bend of legislature, executive and judiciary towards a retributive approach has failed in creating a favourable environment for restorative justice delivery mechanism. In the land of Ghandhi ji who firmly believed into the ideology of an eye for an eye will make the whole world blind. The concept of restorative justice is not able to gain a fertile ground to grow and has been reduced into a piecemeal approach. Recent past has shown on many instances how intolerant and insensitive we have

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44 Why Shaming Doesn't Work, *available at:* <https://www.psychologytoday.com/us/blog/longing-nostalgia/201705/why-shaming-doesnt-work> (last visited on June 13, 2023).

45 The Negative Impacts of Shame and How to Overcome Them, *available at:* <http://www.drkellyhb.com/part-ii-the-negative-impacts-of-shame-and-how-to-overcome-them/> (last visited on June 13, 2023).

grown as a society. Definitely this is not the right time for such an ideology to flourish.

### Other Challenges

There are other challenges which require an in-depth discussion. Challenges like whether Restorative justice is an alternative of Retributive or punitive justice system, whether it should be an alternative or supplementary to prosecution, its utility in case of prisoners serving longer sentences, its use in case of sexual violence and family violence, its use in case of offences against women and child abuse etc. However, the limitations related to the paper do not allow to discuss further.

### VII. Conclusion

It's time that law and criminal justice system should not only be seen as an instrumentality for punishment but rather as a social force for healing the victim and repairing the harm when delivering justice and following the due process.<sup>46</sup> It was only in 2015 when 195 member states of UN committed to achieve the 17 sustainable development Goals 2030 to change the world for better. These Global Goals are to be achieved through integrated measures. One of the Goals of SDG 2030 is Goal No. 3 which aims at ensuring healthy lives and promoting well-being for all at all ages. This health and well-being for all includes both physical and mental health of each and every person which includes the victims of crime. The historical past in the field of criminology suggests that mental health has been a neglected subject matter since ages, and whatever development has been there is not proportional to what is required. In India the Mental Health Care Act, 2017<sup>47</sup> was enforced in the year 2018 to provide for mental healthcare and services for persons with mental illness 'who have substantial disorder and whose functioning is grossly impaired' and to protect, promote and fulfill the rights of such mentally ill persons during delivery of mental healthcare services and for matters connected therewith or incidental thereto.<sup>48</sup> The Indian Parliament went to the extent of replacing the word "mental illness" by "severe stress", in 2016 after a lot of deliberations which was included in the MHCA 2017 while decriminalizing the attempt to die by suicide and eventually reducing the stress of the victim.

But the harsh reality is that neither MHCA, 2017 nor any other Statue deals particularly with the concern of the mental health of the victim of crime or their psychological

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46 David B. Wexler, "Therapeutic Jurisprudence: An Overview", *available at*: <https://www.researchgate.net/publication/228244466> (last visited on June 15, 2023).

47 Hereinafter "**MHCA, 2017**".

48 Laxmi Naresh Vadlamani and Mahesh Gowda, "Practical implications of Mental Healthcare Act 2017: Suicide and suicide attempt" 61(4) *Indian Journal of Psychiatry* (2019).

well-being when they have encountered a particular crime. Studies world over has shown how different kind of crimes impact the physical and mental health or the psychological well-being of the victims<sup>49</sup> and their condition is worsened by the procedural technicalities and lack of healing touch.

The system works in a manner which perpetuates the pain of victim and deepens the mental ill health. Mostly the justice is delayed, and then the victim is expected to accept this justice, delivered by a system without the victim's effective participation, which again raises a question that its justice for whom? Restorative Justice Delivery mechanism can be an answer to this question as its build on the foundation of an effective victim participation and ensures that the voices of the victims are to be heard. Restorative justice delivery mechanism can be the first step towards ensuring the mental health and well-being in the Criminal Justice System, of the Criminal Justice System and for Criminal Justice System. Victim participation makes victim feel they are an important part in the case; they are not like any other witness. It also fulfils the adage that justice is not only to be done rather seen to be done so the participation of victim makes them feel that the trial is fairer and that their procedural justice needs and interests are being protected or at least listened to. As they will have an input before a decision is made. Most importantly their participation can help them overcome their feelings of helplessness, powerlessness which can assuage their lowered self-esteem which is so important for their therapeutic healing. This will lead to their mental health and well-being and foster them as a resilient and restorative individual in the society which will provide them "*psychological justice*". This is the first step towards a resilient, restorative, and healthy society and world. To ensure that the mental health policies, and other statutes need to recognize the issue of psychological well-being of the victims of crime and specifically start working in that direction in the Criminal Justice system.

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49 Louise M. Howard, et.al., "Intimate partner violence and mental health: lessons from the COVID19 pandemic" 21(2) *World Psychiatry* (2022).