



RESTORATIVE JUSTICE AND CRIME AGAINST WOMEN

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People respond in accordance to how you relate to them. If you approach them on the basis of violence, that's how they will react. But if you say, we want peace, we want stability, we can then do a lot of things that will contribute towards the progress of our society.

President Nelson Mandela

INTRODUCTION

In today's time, the victim is not getting justice and the guilty are not getting the punishment of the crime. Overall criminal justice is also facing many problems like false allegations, arguments, lack of solid evidence, delay in trial, false witnesses, and increase in crime rate and decrease in justice rate, victim dissatisfaction and increase in overcrowding of prisons. In this criminal justice system, neither the victim nor the perpetrator benefits. This research aims to explore the application of the restorative justice system in dealing with sexual offences. Restorative justice is a method of resolving a dispute through the participation of two parties to achieve a better solution.¹ An alternative method or method of bringing about change in the criminal justice system becomes very important and restorative justice may be a better alternative way to provide it. The study shall mainly find whether the restorative justice system is beneficial for the victims of sexual violence or not. Sexual offences have now turned into a typical in India. Discipline is the general public's standard reaction to a wrongdoing. It nor is helpful to the casualty nor has any impediment impact. The criminal equity framework which is relied upon to convey a feeling of equity has fizzled in its present reaction to fulfil the greater part of the people in question. A crimeless society is a myth. And that stricter punishment reduces incidence of crimes has also been proved to be a myth. If it were true, After the Nirbhaya rape case in 2013, even after the rape laws were further tightened, the innocent girl of Kathua would not have gone through that unbearable pain. Or those hundreds of girls would not have suffered after the criminal law

¹G.S.Bajpai, "Incorporating the Idea of Restorative Justice in Indian Criminal Justice System: Pondering or Contemplating the Possibilities and Challenges",



(Amendment) act, 2018 was passed.² Believe it or not, punishments have failed to deter the potential criminals from violating the law. There can be multiple reasons for this and they have already been discussed by criminologists, legal experts and jurists. Indian legal system is enriched with one of the best laws in the world. But when it comes to implementation, intentional or unintentional gaps in the system holds them back.³ The Indian criminal justice system are focuses on restorative justice for dealing with aftermath of crime and its should be adopted too gradual and full-fledged.

WHAT IS RESTORATIVE JUSTICE?

The word restorative refers to the restoration or the making of restitution that is to make things just like it was before or in other words in can be defined as to bring back in the former position. However, the word Justice has been defined as the quality of the just decisions, the conformity with the principles of right decisions and strictly performing according to the moral obligations. Restorative justice is a new movement in the fields of victimology and criminology. Restorative justice is a sound approach to justice that focuses on the needs of the victims and perpetrators as well as the community involved. Restorative justice gives victims a chance to meet or communicate with their perpetrators to explain the true impact of the crime, thereby empowering victims by giving them a voice. Restorative justice often involves a meeting called a convention, where a victim meets their offender face-to-face. When either of the parties is not able to or does not wish to attend such meeting, other methods may be adopted to obtain restorative results of repair of the damages.

According to Braithwaite (2004), restorative justice is:

“...a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows those conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.”

Similarly, citing Greif, Liebmann wrote a way of looking at restorative justice is to think of it as a balance among a number of different tensions:

- a balance between the therapeutic and the retributive models of justice
- a balance between the rights of offenders and the needs of victims
- a balance between the need to rehabilitate offenders and the duty to protect the public.⁴

The concept of justice includes the victims, offenders and community or the society which has been affected due to the offence being committed and they search for a solution which shall repair, reconcile and reassure the position of the victim in its original position⁵. Restorative justice is said to be a process through which the victims and the offenders come together and face each other and informs about the occurrence of the crime or offence and the victimization which helps the judicial system in reaching to an agreement whereby the offender is penalized for commission of the offence. The restorative justice is also defined as a response with respect to the criminal behavior and seeks to make a restoration of the losses o injury suffered by the victims and shall facilitate peace as well as

² Akanksha Marwah, “RESTORATIVE JUSTICE AND REFORMATION OF OFFENDERS”<file:///C:/Users/Rajvi/Downloads/RESTORATIVE%20JUSTICE-%20ARTICLES.pdf>, ILI Law Review, Winter Issue, 2020.

³ *Ibid.*

⁴ M.Liebmann, Greif, “Restorative Justice: How it Works” (<http://www.amazon.co.uk/gp/reader/1843100746>), London Jessica Kingsley Publishers, at 33, 2007.

⁵ McCold, P., “Restorative justice practice: The state of the field 1999” (1999). Retrieved on March, 7, p.2002.



tranquility between the parties. Therefore, restorative justice is said to be method through which the judiciary views commission of crime as braking or violation of the laws which causes injury or damages to others which includes victims, relatives and the society at large⁶.

SEXUAL OFFENCE ON WOMEN

The Indian Penal Code, 1860 provides the provisions for the sexual offences to address the issues of sexual offences against person of any age. Sexual offences are currently covered under different sections of Indian Penal Code. Mainly those offences are provided under sections 292-294, 354, 375-376D, 377, 497 and 509 of the Act. Sexual offences have been considered as an universal phenomenon which occurs within the society. Violence against women, including sexual hostility, has still up in the air and steady friendly issue inside India. By and by, the criminal value structure is far from great. The consideration is more on how evidence was gathered than concerning what that verification strategy. The current criminal value structure is one arranged by lawyers, for lawful consultants and the result is that setbacks and liable gatherings are habitually spectators in the procedures. The structure in itself is missing similar to overseeing transgressors, losses and organizations in the outcome of bad behavior. This system is seen as retributive, zeroing in solely on fixing shortcoming and culpability⁷.

JURISPRUDENCE BEHIND OF RESTORATIVE JUSTICE

In ancient times, the study of communities and civilizations used restorative practices and mechanisms to resolve disputes. Each country and community used its different methods to resolve disputes involving women and children. Albert Eglash was the first to coin the term restorative justice for these historical events. The first Victim Offender Reconciliation Program (VORP) began in Ontario Canada in 1970, which was considered the first program of this nature for reconciliation and reconciliation among members of a community. The event was followed in the United States and New Zealand for years to come. An act was passed in New Zealand known as the children, young persons and their families act, which introduced the first formal use of family group conventions. Canada and the United States formally adopted the traditional method of circle conferencing in 1992. In 1995, it was the first time that a committee known in Africa as the truth and reconciliation committee was created to take responsibility for reconciliation and conflict resolution. A milestone was achieved in 2002 when the restorative justice system was endorsed by the United Nations.⁸

In Australia, a comprehensive committee for restorative justice for women victims of family violence has been set up. And one of the most ambitious restorative justice laws in Australia to implement restorative justice practices for crimes involving family violence, the crimes (Restorative Justice) act, 2004 is the violence act. It applies to less serious crimes committed by young and adult offenders with a promising future. Restoration project USA in a restorative justice program, a conferencing model

⁶Whitehead, J.R.. "Restorative Justice in the South Pacific: Responding to Sexual Violence in Fiji (Doctoral dissertation, Monash University)" (2018).

⁷ Kathleen Daly and Julie Stubbs, "Feminist theory, feminist and anti-racist politics, and restorative justice" In Handbook of restorative justice, 2013, pp. 171-192.

⁸Sohail Amjad, Nagina Riaz, "The concept and scope of restorative justice system: Explaining history and development of the system for the immediate need of society", International Journal of Law, Volume 5; Issue 5; September 2019; Page No. 100-104.



was used to address prosecutor-referenced felony and misdemeanour sexual assault cases. The program ran from 2003 to 2007 in collaboration with law enforcement, prosecutors, sexual assault advocates and public health professionals. And the facilitators of the program included victims, perpetrators, family members and friends. Victims and supporting individuals voiced how the crime affected them and the perpetrators stigmatized their behavior and character. A redress plan is discussed at the end of the conference, which covers the needs between the victim and the perpetrator, such as therapy, meetings with case managers, community service and payment of the victim's expenses or compensation. The Victorian Law Reform Commission (VLRC) has considered the use of restorative justice in the context of family violence and sex crimes. In its review of family violence, it concluded that a restorative justice would serve as a model in relation to family violence and attract the victim and the victim's family to forget all about it and move on.⁹ Restorative justice system is now an established and well-structured system around the world and in almost every country, state and community. Restorative justice systems as a term may be new to scholars of dispute resolution and other such programs.

APPLICATION TO VICTIMS OF RESTORATIVE JUSTICE

Restorative justice is an approach to addressing the risk of harm or harm by involving all people coming to a common understanding and agreement as to how the damage or wrongdoing can be repaired. Where people live in society, in organizations, in schools, in families and in the justice system. It can be enforced and justice can be achieved.¹⁰ Restoration processes can be implemented within damaged communities, between damaged communities and corporations, between the state and activists, but also between humans and other than humans. Some such crimes, such as sex crimes, hate crimes and domestic violence, may present special challenges to the restoration process. Restorative justice can still help victims of these crimes. It is important that these types of cases are handled by senior physicians who have relevant skills and experience.

RESTORATIVE JUSTICE FOR SEXUAL VIOLENCE CASES

Benefits of the Restorative justice system as with other cases in general, cases of sexual violence act similarly. The way there is participation in the system, hearing the experience and story of the victim and the loss suffered by the victim, and planning for compensation for the loss. Restorative justice provides an opportunity for victims to raise their voice not as a victim but as a survivor. Victims often talk about the need to retell their past as 'survivors' of sexual violence rather than 'rape victims'. The victim continues to curse herself for life being ruined. Restorative justice fights for change in the autobiography. Thereby often victims want to meet with the perpetrator of their loss to answer their questions 'Why did you do this?' 'Why did you choose me?' 'Will you do this to me again or to someone else?' 'How much do you regret the pain you have caused me?' Restorative justice an encounter with the victim and the perpetrator can support recovery and enable victims to move on with their lives.

Restorative justice interventions support the rehabilitation of sex offenders. They encourage genuine acceptance of accountability, honest expression of remorse, motivation to participate in therapeutic

⁹ Retrieved from, "<https://www.alrc.gov.au/publication/family-violence-improving-legal-frameworks-alrc-cps-1/1-introduction-to-the-inquiry-2/>," visited on 07februaray 2022.

¹⁰ The complete article is available on, "<https://www.euforumrj.org/en/restorative-justice-areas-application>" (access on 06 March, 2022 at 6:30 AM).



treatment, and a personal journey or transformation. Restorative justice can support freedom from crime and calls for individual change in society for victims, perpetrators and their families from cases of sexual violence.

INTERNATIONAL SCENARIOS

According to the Law Reform Commission of Canada, sexual offence refers to the sexual contact with a person that includes touching the sexual organs of an individuals or touching the body of an individual with the sexual organ of another without the consent of the person. To commit a sexual offence the consent of the individual is very important. It was spearheaded in Canada 25 years prior and has demonstrated advantageous in helping the people in question and wrongdoers discover a feeling of fulfillment, conclusion and recuperating in the consequence of crime. Victim-guilty party intercession is an interaction that brings intrigued casualty and the blamed individual along with a go between to examine the wrongdoing and to foster an arrangement that settle the occurrence. These sorts of gatherings make a road for the casualties to communicate their sentiments, feelings and damage brought about by the occurrence to the wrongdoer and gets responds to for their inquiries. It likewise gives the wrongdoers to make expressions of remorse and to foster reparative plans. Gatherings allow an opportunity to a broader extent of perspective, more compelling fixes, better coordination of organizations and extended consideration of the individual being referred to and other neighborhood. The facilitator assists the get-togethers with concurring with regards to responses like compensation for the individual being referred to, an appeasing opinion, and neighborhood.

In the year 2002, the Economic and Social Council of the United Nations has made an adoption of the resolution which contains as set of principles which governs the programs on restorative justice in case of criminal matters. These principles have been developed in order to provide guidance to the developers of policies, organizations within the community and the officials involved in criminal justice for the purpose of developing restorative justice practices in relation to criminal cases within the society. It has been apparent from different exploration concentrates on that the violations like sexual viciousness and different wrongdoings which are carried out against people that hurt the nobility, regard and confidence of the person inside the general public might conceivably hurt a colossal number of men just as ladies inside the general public. Besides, there are numerous survivors of sexual offense who don't move toward the equity framework because of the probability of being misled for getting equity under the criminal equity framework.

The country of New Zealand has used restorative justice with young offenders since the Children, Young Persons and Their Families Act 1989, which allows judges to routinely adjourn proceedings for compulsory justice. Several subsequent acts in 2002 legalized the use of restorative justice with adults. More recently, the Punishment Amendment Act 2014 required judges to adjourn proceedings so as to provide restorative justice to adult offenders and their victims. This means that restorative justice can be used with a wide range of serious crimes, including cases where the perpetrator is ultimately imprisoned. Media suggest that the 2014 law came into force. Before there was sufficient capacity to timely assess all new referrals, courts reported significant delays in the early days of this reform. Now, comprehensive restorative justice services are provided by community-based groups across New Zealand, which are funded and regulated by the Ministry of Justice. The government has also released best practice guidance, as well as annual research reports and other documents on its use, to bring judicial justice into jurisdiction.



HOW RESTORATIVE JUSTICE CAN BE IMPORTANT FOR SEXUAL VICTIMS?

Restorative justice gives victims a chance to meet or communicate with their perpetrators to explain the true impact of the crime. It empowers the victims by giving them a voice. It holds criminals accountable for what they have done and helps them to take responsibility and make amends. The Restorative Justice Program aims to encourage criminals to acknowledge and understand the harm they have caused. Encourages criminals to take responsibility for the damage done by them. Restorative justice can potentially be used for any type of crime. It is awarded to victims of low-level crime and the families of victims and victims who have committed the most serious offences. There are some crimes that present special challenges to the rehabilitation process, for example sex crimes, hate crimes and domestic violence. Some ideas focus on dealing with these crimes.¹¹

(1) Compensation: A dispute between the victim and the offender, how the damage caused to the victim by the crime may be compensated. Compensation to the victim for the damage caused by the offense and the compensation required by the victim for the settlement of such offences. Justice can be done by repairing the damage.¹² Premature loss can be settled between both the parties.

(2) Encounter: The best way to determine how the parties make decisions together. It refers to the broader subset of values that describe the nature of the interactions between the people involved. These include respect, compassion, dignity, honesty, openness and development of the victim and the victim's family. It requires fairness and equality.¹³ Multicultural issues are important in ensuring that processes are balanced for all involved in society.

(3) Change: Restorative justice can address the environmental hatred of victims of sex crimes. Wrong thinking can be changed so that she feels deprived to live in the society. This can lead to fundamental changes in people, relationships and communities. And indicates good change in the victim, the victim's family, the offender and the society.

It involves an appreciation of the physical, psychological, mental, emotional, spiritual and social context surrounding each individual as well as the environment. It is important to note that the spiritual component is important to many participants and that a restorative experience deeply connects to their belief system.¹⁴

NEED OF LEGISLATURE FOR WOMEN DIGNITY IN INDIA

Incidents of increasing crime against women in Indian society are being heard and seen through the media every day. From the Constitution of India to the Government and from time to time the Supreme Court, High Courts have given women their rights. Makes many laws and rules and is committed to protect the freedom, dignity and rights of every woman, which is the foundation and pillar of a civilized society. Women have also been given a lot of rights to make them economically and socially strong. As our society is becoming educated and progressive, the cases of sexual harassment of women are also increasing in the society. Unwanted physical touch, obscene remarks, obscene gestures, obscene talk, obscene SMS, showing pornographic movies, making unwanted calls,

¹¹ The complete article is available on, "<https://treehozz.com/why-is-restorative-justice-important>" (access on 10 March, 2022 at 18:30 PM)./

¹² *Ibid.*

¹³ The complete article is available on, "<https://www.csc-scc.gc.ca/restorative-justice/003005-0006-eng.shtml>" (access on 10 March, 2022 at 20:30 PM)./

¹⁴ The complete article is available on, "<https://treehozz.com/why-is-restorative-justice-important>" (access on 10 March, 2022 at 18:30 PM)./



threats to disrupt work, temptation to prioritize work, threats to influence, workplace intrusions and threats comes under sexual harassment. These are all crimes that hurt the freedom, dignity and rights of women. Due to which women are not able to reach their goals. Such sexual harassment offenses are committed mostly through their close relatives and friends. Society has made the condition of sexually harassed woman pathetic. Due to which she is not able to complain about the crime against her to anyone. Women are afraid of being stigmatized in crimes such as rape or sexual violence. She feels that society will stigmatize her if she complains about all this. Restorative justice should be adopted in such cases in India so that the victim gets justice soon and the dignity of the victim's family is maintained in the society. In fact, 70 percent of the complaints of the victim's family plead for justice to save their dignity in the society.

Despite all the laws and provisions, there has been no significant improvement in the condition of women in India. One of the main reasons for this is the lack of awareness about their rights. Due to which the middle class keeps trying to save the honor of its family.

If a woman has sex with another man of her own free will before or after marriage, the society treats her with contempt. If the marriage by the woman is inter-caste or in the same gotra against the wishes of the family. Or refusing a marriage arranged by the family, In such a situation, even today the dignity of the head of the family gets hurt in our society. In which one or more members of the same family, lineage or community kill their daughter or in many cases kill a person of another community to which their daughter belongs. Murders on the belief that the actions of the deceased member have brought disgrace to that family, lineage or community in the society. There has been a slight change in the nature of 'honour killing' in the present context. This type of murder is seen in India especially in Haryana, Punjab, Uttar Pradesh and Rajasthan etc. Manoj-Babli was the first case in the history of India where the court took action against the Khap Panchayat. Also, for the first time, the death penalty was given in the honor killing case. The court had ordered a compensation of one lakh rupees to Manoj's mother Chandrapati. Despite the order, action was also taken against the policemen who left Babli-Manoj alone. In March 2010, the Punjab and Haryana High Court commuted the death sentence of four accused, including Babli's brother Suresh, to life imprisonment.¹⁵ The films Khap, NH-10 and Guddu Rangeela were also made in bollywood on this matter. In 2010, the Supreme Court issued a notification to central government and state government regarding ban on honor killing. And if any adult male and female are marrying by consent, no family member or khap panchayat should not interfere in the matter.¹⁶

Rape is such a heinous crime in the world, and if a woman gets pregnant due to that crime, then the woman gets a lot of shock not only physically but also mentally. The victim and the victim's family start thinking on a mental level. The victim and the victim's family go into shock and are unable to face the narrow minded person living in the society. The people of the middle class want to live with their dignity in the society. Safety of the women of their house is their prestige. In *Ms. X (Minor) through her father vs State of Uttrakhand and others*.¹⁷ The Uttarakhand High Court has allowed the termination of the 28-week-old fetus of a rape victim. There is a right to terminate the pregnancy on the ground of rape. The rape victim has the right to choose to be taken with her. She also has the right not to conceive. Under these circumstances, if the petitioner is forced to continue with her pregnancy,

¹⁵Gurdev Singh & others v. state of Haryana, Criminal Appeal No.479-DB of 2010.

¹⁶Nisha Patidar, "Khap Panchyat Or Honour Killing: A Curse," South Asia Law Review Journal, Volume-4, February 2018, pp 6-13.

¹⁷Writ Petition No. 201 of 2022.



it would be a violation of her right to live with human dignity, guaranteed under Article 21 of the Constitution of India.¹⁸ According to report, in 90% of the cases, pregnancy happens with the consent of the woman and the man. And by pressurizing the woman to maintain her dignity in the society, the relatives convert the matter into rape. Due to which in many cases the convicts are acquitted or in the absence of any concrete evidence, an out-of-court settlement is reached. Out of such cases, the court has been unable to investigate which cases are false and in which cases the offender can be punished. Thereby in such cases the restorative justice system can act as a remedial form, which is very helpful in compensating for the loss caused to the victim and the victim's family. A pregnant woman who has been raped may soon get justice and get back to her new life. Women fear being stigmatized for crimes such as molestation, sexual violence and rape. She feels that society will stigmatize her if she complains about all this. And her shame will be broken in the society and she will not be able to see her face. To fight such crimes, the thinking and mindset of men in the society has to be changed. They have to support women to improve their social and economic status. So that women can get equal opportunities while progressing while making employment, education, economic progress.

CONCLUSION

“Each saint has a past and every sinner has a future, the man dressed in criminal attire must never forgive, but cast away the dangerous fall within him, his retarded human potential to his feverish, weary or the hopeless must be restored from within by completely healing and repairing the oppressive, though hidden, injustice of the social order, which is counterintuitively responsible for the criminal behavior of many innocent convicts.” Justice Krishna Iyer has written in his book 'Death Sentence on Death Sentence. The resistance principle that is resorted to in the present scenario can be punitive or restorative. Punitive detention, that is, to punish for the conduct of an offender.¹⁹

Constructive results can be seen in the society through restorative justice system. It not only thinks about the victims and the perpetrators but about the society as a whole. It gives a chance to the victim to make his point and helps the offender to rectify his mistake. It helps in building the relationship between the victim and the offender. Mahatma Gandhi's remark was '*Hate the sin not the sinner*'. The sinner continues to be punished for the sin he has committed. It became the modern form of vengeance. The restorative justice should be an emerging thought and is basic for the improvement of the human culture. Restorative justice should be a communication through which the social occasions having a particular interest in an antagonistic action gets together to decide the conflict and chooses the aftermath of the commission of the sexual harassment and its impact on the relationship of the get-togethers in future.

¹⁸ Retrieved from "<https://lawupdates.in/rape-victim-has-right-to-terminate-pregnancy-uttarakhand-hc/>" Visited on dated 15-02-2022.

¹⁹Supra Note. 2.