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# RESTORATIVE JUSTICE PRACTICES: IMPLICATION AND APPLICATION IN INDIA

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## ABSTRACT

Cambridge dictionary describes restorative justice as a way of dealing with crime that emphasizes taking responsibility for the effect of your crime on others, and trying to do something that makes things better for the victims.<sup>1</sup> Within legal systems, restorative justice is a view, perspective and belief that prioritizes healing the damage that illegal action or behaviour has created, as opposed to only punishing the perpetrator. This examines the theoretical underpinnings and development of restorative justice as a concept and a practice. It explores restorative justice system as an alternative to traditional criminal justice system and the problems with the existing criminal system of India. In response to this, the study also examines India's diverse historical and contemporary restorative justice approaches.

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<sup>1</sup> CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/restorative-justice> (last visited April 27, 2024)

## INTRODUCTION

Justice is one of the four cardinal virtues, the others being prudence, fortitude and temperance, derived from Plato's Republic. Justice is both a legal notion as well as a philosophical idea. The philosophy of the Indian Constitution, that is the Preamble states that one of the objectives that the Constitution tries to achieve is political, social and economic justice for its citizens.

Restorative justice can be seen as a part of social justice. Restorative procedures aim to promote reparation, restoration, redemption, and healing through community involvement.<sup>2</sup> This justice system focuses on persons accused of misconduct and applies a distinct framework. Thus, restorative justice aims to restore the harm caused by criminal behaviour and returning the victim as close to his pre-victim state as possible.

A "restorative process" involves active participation by the victim, offender, and other affected individuals in resolving issues related to a crime, typically with the assistance of a facilitator<sup>3</sup>. An agreement that is achieved during a restorative process is referred to as a "restorative outcome."<sup>4</sup>

## DEVELOPMENT OF RESTORATIVE JUSTICE

The emergence of modern restorative justice occurred within a society that was undergoing constant change. They took place in the context of a larger set of cultural circumstances, such as a dynamic culture of crime control<sup>5</sup>.

According to Howard Zehr, one of the early proponents of restorative justice, misconduct was mostly seen in an interpersonal rather than a legal context until the nation state was established. Community justice in this age was typically restitutive and significantly less structured. A more organized and centralized legal justice system eventually took the place of the human, customary, and negotiated aspects of community justice. The state became responsible for

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<sup>2</sup> HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES (25<sup>th</sup> edn. 2015).

<sup>3</sup> DANIEL W. VAN NESS, AN OVERVIEW OF RESTORATIVE JUSTICE AROUND THE WORLD, 5<sup>th</sup> UNCCPCJ, 1, 4 (2005).

<sup>4</sup> *Id.*

<sup>5</sup> Colleen L. Pawlychka, *Redefining Justice: The Framing of Contemporary Restorative Justice in Film*, UNIVERSITY OF MANITOBA (Sep. 09, 2010, 01:48 PM) <https://mspace.lib.umanitoba.ca/items/50e71f84-e8f9-4100-959a-8ac1b57d1012>.

enforcing a system of laws and punishments, not communities<sup>6</sup>.

According to Van Ness, restorative justice is both a recent and traditional idea<sup>7</sup>. Although the practice of the concept was present in various ancient societies, the modern understanding of it dates back to the 1970s. For example, all members of society participated in the sabha and samiti assemblies throughout the Vedic era. In these assemblies, disagreements that arose amongst people were settled. In a comparable manner, historical examples of restorative practices include indigenous gatherings like circles from First Nations practices in North America and conferences from traditional Maori practices in New Zealand<sup>8</sup>.

According to Braithwaite, For the majority of human history, the predominant model of criminal justice has been restorative justice<sup>9</sup>. In most premodern communities, both restorative and retributive traditions existed simultaneously. The late twentieth century saw a popularisation of the concept of restitution. Multiple programs based on reconciliation emerged in Europe and North America by the mid-1990s, as reported by Umbreit<sup>10</sup>.

In North America, the first restorative justice initiative appeared in the 1970s. Under the direction of the Christian Mennonite Committee, the Victim-Offender Reconciliation Program (VORP) was founded in Canada in 1982. Over the subsequent years, as the program expanded and changed, it produced a fresh way of looking at crime that was eventually labelled "restorative justice." Parallel advancements were also occurring in Europe. In his 1977 paper "Conflicts as Property," Norwegian criminologist Nils Christie critiqued the existing criminal justice system.<sup>11</sup> In this work, he explores how the state has appropriated conflicts from both the victim and the offender. The state stands in the way of using restorative methods to bring about social harmony.<sup>12</sup>

In nations like New Zealand, Canada, South Africa, France, Australia, and others, restorative

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<sup>6</sup> HOWARD ZEHR, *supra* note 2.

<sup>7</sup> VAN NESS, *supra* note 3 at 2.

<sup>8</sup> VAN NESS, *supra* note 3 at 4.

<sup>9</sup> JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION*, 5 (Oxford University Press 2002).

<sup>10</sup> MARK S. UMBREIT, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1 *Western Criminology Review* (1998).

<sup>11</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html> (last visited Apr. 29, 2024).

<sup>12</sup> Vidar Halvorsen, *Nils Christie: "Conflicts as Property"* in *Foundational Texts in Modern Criminal Law*, 335, Oxford Academic (2014) <https://doi.org/10.1093/acprof:oso/9780199673612.003.0018>.

justice is widely accepted and practiced. Victim-offender mediation is offered in these nations, giving the victim and the offender a better meeting place and opportunity<sup>13</sup>.

### RESTORATIVE JUSTICE: AN ALTERNATIVE

When it comes to responding to crimes, traditional justice approaches often emphasize community safety, retaliation, denunciation, punishment, and deterrence. The conventional justice system is based on retributive justice. Retributive justice focuses more on punishment than on rehabilitation of the offender. The offenders are punished in the proportion or magnitude of their offence. The subject of retributive justice essentially concerns how wrongdoers who have knowingly performed morally repugnant acts that cause harm to others directly or indirectly should be held accountable for their transgressions<sup>14</sup>. On the other hand, the ultimate objective of restorative justice is to make amends for the pain caused by injustice and crime. This is best accomplished by the people involved meeting willingly and working together to find a solution.

Since retribution is carried out by a legal authority who is not directly involved in the specific violation, it is usually regarded as impartial and reasonable. Vengeance is frequently equated with retribution. It's thought of as "pay-back" or retaliation. But the distinction between retribution and revenge is that the latter is carried out by the victim or a close relative, while the former is sanctioned by the state<sup>15</sup>. Retribution stems from the fact that when someone does a wrong, they owe society something and must repay that debt by enduring an equivalent measure of suffering<sup>16</sup>.

Several criticisms of contemporary criminal systems have been listed by Van Ness and Strong<sup>17</sup>.

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<sup>13</sup> Ajay George, *Applicability of Restorative Justice in India: An Overview*, 2 Part 1 Indian J. Integrated Rsch. L., 1, 6 (2022) <https://ijirl.com/wp-content/uploads/2022/05/APPLICABILITY-OF-RESTORATIVE-JUSTICE-IN-INDIA-AN-OVERVIEW.pdf>.

<sup>14</sup> KEVIN M. CARLSMITH, JOHN M. DARLEY, *Psychological Aspects of Retributive Justice*, *Advances in Experimental Social Psychology*, 40, Acad. Press, 193, 194 (2008).

<sup>15</sup> Vicki A. Spencer, *Retributive Justice: The Restoration of Balance*, Springer Nature, 1, 3 (2021) [https://doi.org/10.1007/978-981-15-3877-3\\_20-1](https://doi.org/10.1007/978-981-15-3877-3_20-1)

<sup>16</sup> *Id.*

<sup>17</sup> Susan M. Olson, Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38(1) Law & Society Review, 139, 143 (2004), <https://www.jstor.org/stable/1555115>

- i. First, there is a lack of regard for the victims.
- ii. The criminal justice system's inability to lower crime and recidivism is the subject of the second criticism.
- iii. Third, the system falls short in equipping criminals with the skills needed to reintegrate into society<sup>18</sup>.

The restorative justice concept views crime as an injury to actual people and relationships that has to be repaired, in addition to a legal breach that needs to be denounced in public. In a traditional system, victims are only allowed to testify on behalf of the prosecution and are not recognized as the party who was initially harmed. The victim is identified as the state, and the offense is viewed as a social wrong. As a result, the criminal procedure has little to do with the real victim, and the crime charged is one of breaching the law rather than doing harm to the individual.

Consequently, offenders also require justice. They require due process and a fair trial. They also require the chance to atone for their crime and gain acceptance back into the society. Therefore, the effects of crime give rise to a complex array of needs related to justice for those affected, needs that the traditional judicial system finds it difficult to address<sup>19</sup>.

Justice Wadhwa has stated that *“criminal justice would look hollow if justice is not done to the victim of the crime. A victim of crime cannot be a forgotten man in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injuries. An honour which is lost or life which is snuffed out cannot be recompensed but then compensation will at least provide some solace.”*<sup>20</sup>

Restorative justice system appears to be appealing for both liberal and conservative politicians. The liberals support this as it is less punitive than the traditional system, whereas, the conservatives are attracted towards the system as it favours family and community intervention and reduce the need for the intervention by the formal legal system.<sup>21</sup> Proponents of restorative justice contend that crimes are less about breaking state rules and more about harms done to

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392.

<sup>21</sup> BRAITHWAITE, *supra* note at 10.

specific victims and the community<sup>22</sup>. It is believed that addressing this harm is more crucial than prosecuting the criminal. A limited government philosophy that minimizes the involvement of the state in people's lives is embodied by restorative justice<sup>23</sup>.

## RESTORATIVE JUSTICE PRACTICES IN INDIA

Restorative justice is not a completely novel concept; rather, it represents a resurgence of earlier, more straightforward, informal, localized, and successful methods of assisting offenders and their victims. The present condition of criminal justice in developed nations, which gives the government the exclusive right to impose penalties. According to restorative justice, it is society's responsibility to mediate, reconcile, and encourage peaceful resolution of disputes between offenders and victims. The post-independence constitutional framework and the Indian judiciary have worked together for the past 150 years to establish the official criminal justice system in India<sup>24</sup>.

The Vedas, Sutras, Epics, and Dhamashastras are a few of the ancient Indian literary works that help us understand a lot about the dispute resolution institutions that were used during that time. Hinduism specifically promoted the use of tribunals appointed by the parties themselves to resolve disputes. The parties agreed that the decisions made in these circumstances were final and definitive. Panchayats in villages were frequently locals who served as mediators in their own village between parties in conflict. The Panchayat sometimes had the appearance of a court since it could act on a single party's complaint rather than always requiring the consent of both sides<sup>25</sup>.

The ancient Indian judicial systems suffered from caste-based discrimination, which prescribed unequal punishments for equal crimes according to the status of the offender in the Varna system of Hindu social hierarchy. This discrimination was evident when judging from the standpoints of equality before law, the rule of law, and the prevailing sense of equality. The discriminatory policies did not sit well with the colonial rulers. Rather than addressing the

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<sup>22</sup> Susan M. Olson, Albert W. Dzur, *supra* note 11, at 143

<sup>23</sup> ANNIE E. CASEY FOUNDATION <https://www.aecf.org/blog/the-conservative-case-for-restorative-justice> (last visited Apr. 29, 2024).

<sup>24</sup> Shiva M. Jaamdar, *Restorative Justice in India: Old and New*, Springer, 41, 42, 43 (2017) [https://link.springer.com/chapter/10.1007/978-3-319-47659-9\\_3](https://link.springer.com/chapter/10.1007/978-3-319-47659-9_3).

<sup>25</sup> S. Latha & R. Thilagaraj, *Restorative Justice in India*, Springer, 309, 311 (2013) <https://link.springer.com/article/10.1007/s11417-013-9164-4>.

shortcomings of the previous system, the colonial authorities opted to disregard the advantages and completely eliminate the previous systems<sup>26</sup>.

## **PROBLEMS WITH THE EXISTING CRIMINAL JUSTICE SYSTEM**

The Indian Criminal Justice System, which is primarily a relic from colonial times, has extremely limited application of the restorative justice idea. There are several reasons outlined for this:

- (i) The vast majority of people do not comprehend secular laws and formal court proceedings in the English language. Excessive formality in the legal process combined with torturous witness appearances that last for days on end over months or even years can lead to disastrous outcomes and public distaste for the traditional legal system.
- (ii) In actual reality, the ideas of "rule of law" and "equality before the law," which were foreign to Indian tradition and Hindu psychology, are frequently broken. It is impossible to talk about equality in India without mentioning the intricate web of caste affiliations that exists in the country.
- (iii) Reformatory social laws were created in an effort to outlaw several old Hindu evil customs, including animal sacrifices, sati, polygamy, dowries, untouchability, female infanticide, child marriage, and a restriction on widow remarriage. These actions were in opposition to the traditional Hindu community, which saw these rules as outside influences on their way of life.
- (iv) The prolonged legal proceedings stifle any desire for swift justice or a spirit of retaliation. Excessive hold-ups, usually lasting years, undermine the sense of justice and drive victims and law enforcement officials to despair.
- (v) Poverty and the prospect of being granted justice are interlinked. India's poverty rate is so severe that the impoverished are unable to pay for justice.<sup>27</sup> The

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<sup>26</sup> Shiva M. Jaamdar, *supra* note 25, at 43, 44.

<sup>27</sup> Asian Human Rights Commission, <http://www.humanrights.asia/resources/journals-magazines/article2/vol-01-no-02-april-2002/contemporary-problems-in-administration-of-justice-in-india-answers-to-a-questionnaire-formulated-by-the-committee-on-reforms-of-the-criminal-justice-system/> (last visited Apr. 29, 2024).

professional handling of litigation in formal courts entails costly legal fees, which many impoverished individuals cannot pay. Aside from this, the criminal justice system's administration is antiquated, ineffective, and backward. Inadequate technical and human resources have an impact on all system components. Therefore, the general poverty in rural areas deters people from filing formal complaints<sup>28</sup>.

Furthermore, there is no distinct legislation that gives victims a voice in the criminal judicial system, and restoration, restitution, and compensation are still seldom. This is partly because India's procedural law does not allow for these more creative and interactive approaches. Regarding compensation, the process for most victims to obtain the mandated compensation is excessively arduous, and since the Indian Penal Code was written in 1860, the amount of the fine imposed on the offender—which serves as the primary source of compensation—has not been changed.<sup>29</sup>

## **APPLICATION OF RESTORATIVE JUSTICE PRACTICES IN INDIA**

### **I. PANCHAYAT SYSTEM**

India is predominantly a rural country. The majority of people in India reside in villages—roughly 70%. The residents of these villages are a close-knit group of individuals who have known one another since infancy and who judge one another based more on the norms of behaviour set by secular laws than on the behavioural regulations imposed by regional customs, traditions, and folkways. Local, informal, and customary means of resolving disputes—whether they be criminal or civil—are the norm in practically every one of these villages.<sup>30</sup>

India has Panchayati Raj Institutions at the local level, which are part of a decentralized governance structure. The decentralized structure of Indian government is compatible with the restorative justice ideals that promote community involvement. In India, the Panchayati Raj System is not just a phenomenon that emerged after independence. The village panchayat has actually been the main political entity in rural India for decades. Panchayats were typically

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<sup>28</sup> Shiva M. Jaamdar, *supra* note 25 at 44-45.

<sup>29</sup> S. Latha & R. Thilagaraj, *supra* note 26, at 312.

<sup>30</sup> Shiva M. Jaamdar, *supra* note 25 at 48, 49.



elected bodies with both executive and judicial authority in ancient India. Through the 73rd Constitutional Amendment Act, the Panchayati Raj system was adopted in 1992<sup>31</sup>.

The implementation of the Gram Nyayalayas Act of 2008<sup>32</sup> legalized the informal practices of Panchayats inside the communities. The creation of the Gram Nyayalayas at the local level is facilitated by the Gram Nyayalayas Act. The Act's two main goals were to guarantee that no person would be denied the chance to obtain justice because of social, economic, or other disadvantages, and to give residents access to justice right at their doorstep<sup>33</sup>.

## II. ALTERNATIVE DISPUTE RESOLUTIONS

Alternative Dispute Resolution is the set of procedures that a society uses to settle conflicts without the need for expensive adversarial court proceedings<sup>34</sup>. Examples of alternative dispute resolution frequently showcase such mechanisms as a fast, easy, and reasonably priced substitute for litigation. More and more cases in the criminal court system are being settled by restorative justice, a type of alternative conflict resolution<sup>35</sup>. Arbitration, mediation, and conciliation are common forms of dispute resolution.

Arbitration, carried out in accordance with the terms of the Arbitration and Conciliation Act, 1996<sup>36</sup>, is one of the most widely used forms of ADR in India<sup>37</sup>. Through the arbitration process, a disagreement is brought before an arbitral tribunal, which renders a ruling (an award) that is legally enforceable against the parties<sup>38</sup>. In most cases, arbitration is used when both parties consent to using it as a resolution mechanism for disagreements resulting from terms and conditions or agreements made in contracts. Only in the presence of a legally binding

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<sup>31</sup> C. Priya Lakshmi, *Present Scenario of Panchayati Raj in India*, 77, Proceedings of the Indian History Congress, 1016, 1016 (2016) <https://www.jstor.org/stable/26552737>

<sup>32</sup> Gram Nyayalaya Act, 2008, No. 4, Acts of Parliament, 2008 (India).

<sup>33</sup> S. Latha & R. Thilagaraj, *supra* note 26, at 313.

<sup>34</sup> *Training Manual on Alternative Dispute Resolution and Restorative Justice*, UNODC, 1, 16 (2007) [https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Training\\_manual\\_on\\_alternative\\_dispute\\_resolution\\_and\\_restorative\\_justice.pdf](https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Training_manual_on_alternative_dispute_resolution_and_restorative_justice.pdf).

<sup>35</sup> HARVARD LAW SCHOOL, <https://www.pon.harvard.edu/daily/dispute-resolution/alternative-dispute-resolution-examples-restorative-justice/#:~:text=Alternative%20dispute%20resolution%20examples%20often,dispute%20resolution%20called%20restorative%20justice.> (last visited Apr. 30, 2024)

<sup>36</sup> Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament (1996).

<sup>37</sup> DEPARTMENT OF LEGAL AFFAIRS, [https://legalaffairs.gov.in/sites/default/files/Arbitration\\_Mediation.pdf](https://legalaffairs.gov.in/sites/default/files/Arbitration_Mediation.pdf) (last visited Apr. 30, 2024).

<sup>38</sup> S. Latha & R. Thilagaraj, *supra* note 26, at 314.

signed Arbitration Agreement pursuant to Section 7<sup>39</sup> may the arbitration process start.

Another less formal form of alternative dispute resolution (ADR) is mediation, which helps the parties in dispute to negotiate a settlement. Since a settlement reached through mediation is voluntary and consensual, it helps people and businesses involved in conflict maintain their relationships, unlike arbitration<sup>40</sup>. A neutral third person (the conciliator or mediator) helps the parties to a dispute arrive at a mutually agreeable and satisfying settlement through the non-binding process of conciliation. There is no need for any previous agreements to exist in order to use this technique. Any side may ask the other to designate a conciliator<sup>41</sup>.

### III. LOK ADALATS

For many Indians who live in remote or rural regions, Lok Adalats are their sole avenue of access to the country's judicial system. Through Lok Adalats, parties can get over organizational, procedural, and financial obstacles that might otherwise keep them from approaching the courts<sup>42</sup>.

Less formal, alternate methods for settling disputes and disagreements have been a longstanding tradition throughout Indian history. The idea that disputes should be resolved between people without going to court dates back thousands of years. Lok Adalats have garnered praise from both members of the house and the judiciary throughout the years for being one of the most effective and swift ways to administer justice<sup>43</sup>.

Lok Adalat's goal is not to establish guilt or render a definitive judgment against the guilty, but rather to mediate between the harmed parties and help them find a common ground in order to arrive at an understanding. There are certain merits of Lok Adalat. It's a rather efficient system. The fact that traditional litigation in courts is typically limited to those with the financial means to pay for legal counsel and court costs over an extended period of time is a significant drawback. Lok Adalats operate with greater flexibility. They use a more individualized approach, handling every case uniquely based on its requirements. A Lok Adalat's goal when

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<sup>39</sup> Arbitration and Conciliation Act, 1996, § 7 No. 26, Acts of Parliament (1996).

<sup>40</sup> DEPARTMENT OF LEGAL AFFAIRS, *supra* note 42.

<sup>41</sup> S. Latha & R. Thilagaraj, *supra* note 26, at 315.

<sup>42</sup> Tameem Zainulbhai, *Justice for All: Improving the Lok Adalat System in India*, 35(1) Fordham International Law Journal, 247, 249 (2016).

<sup>43</sup> MANUPATRA, <https://articles.manupatra.com/article-details/Lok-Adalat-A-Catalyst-for-change-in-the-Indian-Judicial-Structure> (last visited Apr. 30, 2024).

a case is brought before it is to mediate the issue through conciliation in order to get the parties to agree on a compromise. If no agreement is reached, the matter is brought back before the court. Therefore, it guarantees that the path to justice is taken amicably since the Lok Adalat's sole responsibility is to ensure a compromise rather than to provide a decision in favour of or against any party<sup>44</sup>.

Professor Menon also opined that “*Lok Adalat has the potential for social reconstruction and legal mobilization for social change. It can influence the style of administration of justice and the role of the lawyer and judge in it. It can take law closer to the life of the people and reduce disparity between law in books and law in action.*”<sup>45</sup>

## CONCLUSION

The notion of restorative justice has garnered significant interest in contemporary legal discourse owing to its capacity to rectify the drawbacks of conventional punitive methods employed in addressing criminal behaviour. The foundational ideas of restorative justice are healing, responsibility, and community involvement. These practices cover a variety of procedures meant to promote communication, comprehension, and responsibility among interested parties.

Programs for restorative justice have been established all throughout the world, both as stand-alone projects and as supplements to established judicial systems. Studies have indicated that restorative justice initiatives can result in higher levels of victim satisfaction, decreased levels of trauma, and greater empathy among offenders, all of which can contribute to safer and more cohesive communities.

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<sup>44</sup> *Id.*

<sup>45</sup> N.R.Madhava Menon, *Lok Adalat: People Program for Speedy Justice*, 132 (2) INDIAN BAR REVIEW, 134 (1996).