1. INTRODUCTION

The element of crime is present in the nature since the birth of the cosmos, and therefore, it has been coexistent with that of humanity. It has also been co-extensive. Crime symbolizes a major form of conflict in the society. It deprives the victim from their fundamental human rights especially those pertaining to life, liberty and safety. An effort has always been made to discover the root cause of crime but the search, so far, has been in vain. Further, the more attempts to stop crime are made, the more quantitative and qualitative crime is emerging on every inhabited patch of the globe, and therefore, India is no exception to it.

The poor economic and political scenario of our economy added fuel to the fire. One third of the India’s population is living below the poverty line. The poor victims in India suffer because of two reasons. One is their ignorance and the second is lack of resources to approach the appropriate authorities.¹ The Criminal Justice system is cumbersome, expensive and cumulatively disastrous. The poor victim(s) of crime can never reach the temple of justice because of heavy cost of its access and the mystique of legal ethos. The hierarchy of courts with appeals after appeals puts legal justice beyond the reach of the poor.

The grand corruption pervades at the highest levels of a national government leading to a broad erosion of confidence in good governance, rule of law and economic stability. The criminalization of politics gains much importance now-a-days. The elected representatives do have a criminal past which results in the establishment of monarchic form of government.²

An economy which is characterized by the defective legal system; corruption; unfair use of the legislative Acts; poor economic or political perspectives gives impetus to the rule of jungle which is inherent with all the signs of bravery, indecency, immorality and no question of right and wrong. All these perspectives lead India in making highest crime zone in the world. The crimes against women and children have also reached an all time high. The worst more is our criminal justice system which is struggling hard to break its image of bias and lethargy and proved inefficient and ineffective. These factors in conjunction with such a precarious situation strongly recommends the dire need for the application of restorative justice system in India.

Restorative justice reflects a sort of crimino-victim justice system where equal justice to crime-doers and victims is ensured. In its most idealized form, there are four potent features of Restorative Justice i.e., repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared communities. Thus, restorative justice seeks to repair the harm done by a criminal act by bringing together those most affected by the crime. Meaningful conferencing may change the offenders thinking and allow him or her to take responsibility for the behavior and the effect that it has had on the victim. Restorative Justice is an alternative means of redressing imbalance that may arise from adversarial systems where both victim and offender may feel that their needs have not been adequately serviced.

The field of restorative justice is an effort to transform the way we think of punishment for wrongful acts. It revolves around the idea that a crime or serious bad act affects the victims, offenders, and interested bystanders (such as family members, employees, or citizens), and the larger community in which it is embedded. These bad acts or ruptures in human interaction create needs and responsibilities for the direct participants in the act, as well as for the larger society in which their act(s) occur.

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4 Ibid.
2. **VALUES OF RESTORATIVE JUSTICE**

The processes identified in restorative justice i.e., peace circles; family group conferencing; community conferencing; victim-offender mediation, etc. must be according to the principles and values of restorative justice. For example, a program that operates solely during the working day to accommodate the schedule of the paid facilitator is unlikely to be effective in engaging victims who work or have other responsibilities during the daytime.

A restorative process may be guided by values that are destructive rather than restorative, such as when the participants focus on excusing the wrongdoer, or at the other end of the spectrum, on humiliating that person. These problems may be confronted in a number of ways. One is to provide practice guidelines for practitioners. Another is to develop statements of best practices. A third is to create standards for use in accreditation processes. A final option is to focus on restorative values and to use those in designing and evaluating programs and in training and guiding practitioners.

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5 The principles and values of restorative justice adhere most on the promotion of repair, restoration; reconciliation and; reintegration. Also see Howard Zehr (2002), *The Little Book of Restorative Justice*, USA: Good Books, p-31.


7 The following is the “best practice” setting priorities for investments in restorative justice can be: (1) Restorative Justice seems to work best when it is focused on the kinds of offences that have a personal victim, who can – at least in principle – be invited to meet with the offender. The major criteria for “working” in this claim include helping victims and reducing reoffending; (2) Restorative Justice may be best able to reduce court and imprisonment costs, as well as crime and its medical and financial impact on victims, if it is used as a form of diversion from criminal justice – including prosecution, or on a post-conviction basis, as a diversion from unlikely incarceration.

8 *Supra* note 6 at 13.
Each of these approaches has advantages, and they are not mutually exclusive. Standards should reflect values; guidelines should be based on best practices. The first three are more specific to particular programs and justice systems, but values are less dependent on context. As a result, there has been growing interest in using them to measure and maintain the restorative character of particular interventions.

There may be almost as many lists of restorative values as there are definitions of restorative justice. Usually there is a great deal of overlap in the lists, but in some instances it appears that the authors are describing different things. John Braithwaite has suggested that there are three kinds of values. The first keeps the restorative process from becoming abusive or indifferent to the participants. The second is the deciding factor whether the outcome of the process has been successful. The third are what he calls emergent values, those that may or may not result from a successful process (such as forgiveness, remorse, reconciliation, and so forth).  

Another way of saying this might be to think in terms of normative values (the way the world ought to be) and operational values (the way restorative programs should function). Normative values could encompass Braithwaite's emergent values, but in addition would describe the sort of community and relationships to which restorative justice aspires. Operational values would include both process and outcome values.

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9 Ibid.
10 Ibid.
Howard Zehr suggests that there are four normative values.\(^\text{11}\)

- **ACTIVE RESPONSIBILITY** which means taking the initiative to help preserve and promote restorative values and to make amends for behavior that harms other people. From the Victim’s perspective, to attend fully to victims’ needs — material, financial, emotional and social. (Including those personally close to the victim who may be similarly affected).\(^\text{12}\) From the offender’s perspective, to enable offenders to assume active responsibility for their actions which resulted in lesser victimization of victims?\(^\text{13}\)

- **PEACEFUL SOCIAL LIFE** which means responding to crime in ways that build harmony, contentment, security, and community well-being. The purpose is to prevent recidivism by making efforts to reintegrate offenders into the community.\(^\text{14}\)

- **RESPECT** which means regarding and treating all parties to a crime as persons with dignity and worth. The purpose here is to make the processes identified with restorative justice -- non-stigmatizing, economically viable and socially practicable process.\(^\text{15}\)

- **SOLIDARITY** which means the experience of support and connectedness, even amid significant disagreement or dissimilarities.

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\(^\text{12}\) Ibid.


In addition, Howard Zehr and Van Ness proposed 10 operational values to guide how restorative processes are managed:

1. **Amends:** Those responsible for the harm resulting from the offense are also responsible for repairing it to the extent possible.

2. **Assistance:** Affected parties are helped as needed in becoming contributing members of their communities in the aftermath of the offense.

3. **Collaboration:** Affected parties are invited to find solutions through mutual, consensual decision-making in the aftermath of the offense.

4. **Empowerment:** Affected parties have a genuine opportunity to participate in and effectively influence the response to the offense.

5. **Encounter:** Affected parties are given the opportunity to meet the other parties in a safe environment to discuss the offense, harms, and the appropriate responses.

6. **Inclusion:** Affected parties are invited to directly shape and engage in restorative processes.

7. **Moral Education:** Community standards are reinforced as values and norms are considered in determining how to respond to particular offenses.

8. **Protection:** The parties' physical and emotional safety is primary.

9. **Reintegration:** The parties are given the means and opportunity to rejoin their communities as whole, contributing members.

10. **Resolution:** The issues surrounding the offense and its aftermath are addressed, and the people affected are supported, as completely as possible.

Of these 10, four seem to be of particular importance: *encounter, amends, reintegration, and inclusion*. If restorative justice were a building, we would expect to find them as key features or structural elements in its architecture.
3. **RESTORATIVE JUSTICE OR RESTORATIVE PRACTICES?**

As restorative practices have increasingly been applied in educational and business settings, some have suggested that the term "restorative justice" is inappropriate because it implies that they can only be used when the culpability of one party is clear and conceded. In other words, "justice" seems to narrow the use of restorative practices to situations that would ordinarily be handled by the justice system. This has practical consequences in advocacy: should proponents promote restorative practices and encourage their application in multiple contexts, one of which would be in dealing with crime? Or is it better to focus attention on wrongdoing and in particular, criminal wrongdoing?

This is being discussed as both a strategic and principled question. Those who support use of the term *restorative justice* agree that restorative processes are effective in other settings and that increased use of them anywhere creates a "restorative-friendly" context that might increase their use in criminal matters. So some organizations promoting restorative justice are asking whether they should expand their scope to all applications of restorative practices or maintain the focus on criminal and juvenile justice.16

That is the strategic issue. The question related to principles has to do with what is lost by using the term restorative practices rather than restorative justice. An obvious answer is that justice is lost when responding to crime or other rule violations. One of the needs of victims is to hear that this was not their fault (to the degree that is true). One can argue as well that offenders need to hear that they were wrong, and certainly society expects that there will be denunciation of certain kinds of behavior.17

It is clear that there is a huge overlap between restorative practices and restorative justice in terms of world view, values, principles and methods.18 But the similarities are not complete, and it is there that the discussion is likely to continue.

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16 Ibid.


4. RESTORATIVE JUSTICE AS OPPOSED TO WHAT?

In an early attempt to explain the uniqueness of the restorative vision, Howard Zehr offered a comparison between restorative justice and retributive justice. What he meant by the latter was criminal justice as we know it, a process focused on determining the guilt of an offender and then imposing a sentence. Gordon Bazemore added to this distinction by contrasting restorative justice with both retributive justice and the rehabilitation paradigm. These differences are useful for purposes of description, but they suffer certain limitations as well.

One is that they do not serve restorative justice well in public debate. Restorative justice includes principles of accountability and acknowledges that accountability may be painful. This is a common understanding of retribution or punishment. The narrow definition given retribution by restorative justice proponents ("pain imposed for its own sake") may be helpful for analytical precision, but misleading to a public that thinks less precisely.

Furthermore, the restorative-retributive dichotomy concedes too much. The retributive approach has traditionally justified imposing pain by arguing that crime creates an imbalance; the offender has benefited at the public's expense. The imbalance must be addressed by causing the offender to lose that benefit. But as legal philosopher Conrad Brunk argues, this is what restorative justice also tries to achieve.

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19 Supra note 7, at p-35.
So, there is much in the retributivist theory that is very close to Restorative Justice. Restorative Justice is also concerned primarily with making the wrong right or restoring the justice of the situation. It is concerned with demanding that offenders take responsibility for their actions by actively making things right with the victims. It is also concerned that punishment not treat offenders unjustly. But, as we shall see, Restorative Justice gives a much more concrete and practical account of how the injustice done to victims can be redressed, and of how justice can be done to the offender as well.21

Similarly, Kathleen Daly has suggested that the distinction between restorative, retributive, and rehabilitative justice can be misleading.

In my view, restorative justice is best characterized as a practice that flexibly incorporates "both ways"—that is, it contains elements of retributive and rehabilitative justice—but at the same time, it contains several new elements that give it a unique restorative stamp. Specifically, restorative justice practices do focus on the offence and the offender; they are concerned with censuring past behavior and with changing future behavior; they are concerned with sanctions or outcomes that are proportionate and that also "make things right" in individual cases.22

Antony Duff proposes that retribution must be restorative and that restoration must have elements of retribution.

I will argue that restorative theorists are right to insist that our responses to crime should seek 'restoration,' whilst retributive theorists are right to argue that we should seek to bring offenders to suffer the punishments they deserve; but that both sides are wrong to suppose that these aims are incompatible. Restoration is not only compatible with retribution: it requires retribution, in that the kind of restoration that crime makes necessary can (given certain deep features of our social lives) be brought about only through retributive punishment.23

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Interestingly, Zehr himself has moved away from drawing sharp distinctions between restorative justice and retributive justice, for reasons that are similar to those offered by Brunk and Daly. However, he cautions:

Retributive theory believes that pain will vindicate, but in practice that is often counterproductive for both victim and offender. Restorative justice theory, on the other hand, argues that what truly vindicates is acknowledgment of victims’ harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior. By addressing this need for vindication in a positive way, restorative justice has the potential to affirm both victim and offender and to help them transform their lives.”

To try to capture these nuances, we can use two related terms to describe these alternative perspectives on punishment. *Retribution* will mean deserved punishment for wrong behavior. The active party is the government, and the purpose of retribution is for the government to inflict harm on the offender proportionate to the wrong done. *Recompense*, on the other hand, will mean the deserved obligation to pay for wrongfully causing an injury. The active party is the offender, and the purpose of recompense is for the offender to repair as fully as possible the injury caused by the wrong.

A second problem with the restorative-versus-retributive dichotomy is that in this context "restorative justice" is presented as the better alternative. This is a questionable tactic strategically because it can inadvertently cause justice system people who might be supportive to focus instead on why the dichotomy is simplistic or unfair.

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24 *Supra* note 7 at p-45.
A third drawback of comparing restorative to retributive justice is that "retributive justice" is sometimes used in restorative justice literature to refer to the current criminal justice system. As a matter of fairness to retributivists, however, current criminal justice cannot accurately be called retributive because it is in fact a hybrid of several philosophies of justice (and sometimes, it appears no philosophy of justice at all).\textsuperscript{27} What term should we use to describe current practice, then? Some have proposed "traditional justice." Unfortunately, that is also used to refer to customary or indigenous practices. Another alternative is "criminal justice," which emphasizes the offender orientation of current criminal justice practice. However, this usage would encounter the same problem as retributive justice: the common understanding of criminal justice is a societal response to crime and not the narrow definition of a response that focuses on the criminal.

We can use the term "contemporary criminal justice"\textsuperscript{28} to describe the current justice system. It is possible that this term could be read narrowly to exclude the long history of offender orientation of the criminal justice system (i.e., contemporary as opposed to historical).

5. **DOES RESTORATIVE JUSTICE WORK?**

Frances Crook, director of the Howard League of Penal Reform, has said that restorative justice is the most over-researched and the most under-used criminal justice innovation. So, is it underutilized because of the research?\textsuperscript{29}


\textsuperscript{29} Frances Crook, testifying before the Home Affairs Committee of Parliament, (2009), The testimony can be found at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/ (accessed on May 05\textsuperscript{th}, 2012)
Apparently not. Lawrence Sherman and Heather Strang recently analyzed research conducted around the world that matched restorative justice with contemporary criminal justice. They found 36 studies whose direct comparisons were between two reasonably similar groups, one of which received a restorative justice intervention while the other did not. Among their conclusions were the following:30

- Crime victims who receive restorative justice do better, on average, than victims who do not, across a wide range of outcomes, including post-traumatic stress.31

- In large-sample test, it is found that restorative justice is helpful to prevent recidivism as compared to criminal justice.

- Restorative justice reduces repeat offending more consistently with violent crimes than with less serious crimes.

- Diversion from prosecution to restorative justice substantially increases the odds of an offender being brought to justice.

- Restorative justice does not conflict with the rule of law, nor does it depart from the basic paradigm of the common law of crime.

- Restorative justice can do as well as, or better than, short prison sentences, as measured by repeat offending.

- Restorative justice reduces stated victim desire for violent revenge against offenders.

30 Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence*, London: The Smith Institute, 2007, p-89. (In this book, the research report was prepared for a United Kingdom charitable trust. On the basis of their highly favorable evidence, Sherman and Strang recommended that restorative justice "could be rolled out across the country with a high probability of substantial benefits to victims and crime reductions for many kinds of offenders. Furthermore, restorative justice "as a diversion could provide the basis for far more general use of restorative justice, with possibly substantial crime reductions, less victim post-traumatic stress, and more offences brought to justice)."

6. **RESTORATIVE JUSTICE FROM INDIA’S PERSPECTIVES**

The Restorative Justice System and its practices are of great relevance in India. As one of the major benefits of such programs is its potential for flexibility i.e. it can be adapted according to the needs of particular communities. Otherwise also, it is about having the capacity to change even before the case for changes becomes obvious. But in the case of having to deal more effectively with crime, the case for change is staring us in the face. Therefore, we should explore a paradigm shift from a Retributive Justice System to a system in which there is a balance between Restorative and Retributive Justice. The numeric shadow of restorative justice can be found under various heads which can be explained with the help of the diagram given below.
I. PANCHAYATI RAJ SYSTEM IN INDIA

Justice and the rule of law for the millions residing in the rural areas of our country remains a painful illusion.\textsuperscript{32} The existing judicial system is neither accessible nor capable of delivering quick justice, apart from the forbidding cost involved, for the poor in the rural areas.\textsuperscript{33}

A forum for the resolution of disputes with people’s participation in the administration of justice is the constitutional goal enunciated in Article 39A. Whereas, Article 40 directs the state to take steps to organize Village Panchayats and endow them with such power and authority as to enable them to function as units of self-government.\textsuperscript{34} As also pointed out by Gandhi at a prayer meeting, “In the true democracy of India, the unit was the village. Even if one village wanted Panchayati Raj which was called republic in English, no one could stop it. True democracy could not be worked by 20 men sitting at the centre. It had to be worked from below by the people of every village.”\textsuperscript{35}

The Constitution (73rd Amendment) enjoined that there shall be a Gram Sabha in each village exercising such powers and performing such functions at the village level as the legislation of a state may provide by law. Further, Panchayats should be constituted in every state at the village, intermediate and district levels, thus bringing about uniformity in the Panchayati Raj structure. Unfortunately, in this amendment there was no mention of decentralization of justice and no state legislation in the wake of this amendment, took up this subject.\textsuperscript{36}


\textsuperscript{33} \textit{Ibid}.


\textsuperscript{35} \textit{Ibid}.

The Institute of Social Sciences took the initiative to study the subject of decentralization of administration of justice including judiciary and police. The primary step in respect of decentralization of judiciary was to organize an institution at the village level to function as a forum for resolving disputes and deal with petty cases of civil and criminal nature to provide justice at the doorstep, to the villagers.

The Indian heritage has much testimony to offer that its socio-cultural fabric contains intrinsic mechanism to bring the conflicting people together and settle their dispute in a highly informal manner. The Panchayati Raj System and other social groups for instance, in the countryside have been an effective source to dispense justice. The verdict delivered by these bodies is by and large acceptable to everybody. The interests of the victims are considered to be supreme. Many times the offenders are directed to compensate or restore the harm done to the victims. To encourage this practice, the Law Commission of India in its 114th report on “Gram Nyayalaya”, keeping in mind the first and foremost objective of reviewing the system of judicial administration to ensure that it is responsive to the reasonable demands of the times and in particular to secure:37

- Elimination of delays, speedy clearance of arrears and reduction in costs so as to secure quick and economical disposal of cases without affecting the cardinal principle that decision should be just and fair.
- Simplification of procedure and elimination of technicalities.38

Gram Nayalaya Act, 2008 and Nayaya Panchayat Bill, 2009 introduced by the Government of India to revitalize the centuries old concept of “panchayat” at participatory grass roots level dispute resolution through mediation, conciliation and compromise outside the formal judicial system.

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38 Ibid.
In India, Juvenile Justice System is broadly administered under the Juvenile Justice (Care & Protection of Children) Act, 2000. The Act aims to provide for proper care, protection and treatment of juveniles in conflict with law and child in need of care and protection by catering to their development needs and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children. The Act also aims to provide for their ultimate rehabilitation through various institutions established under this Act.\(^{39}\)


In Juvenile Justice (Care and Protection of Children) Act, 2000, we can find the glimpse of the Restorative Justice ideology behind its provisions. The law provides for separate treatment for children in need of care and protection and juveniles in conflict with the law. Juveniles in conflict with the law are kept in the observation home during the pendency of an inquiry under this Act, care and classification is made giving due consideration to age group, physical and mental status and degree of offence committed by the Juvenile for their further induction into the observation home.\(^{40}\)

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\(^{40}\) Section 8 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
Children in need of care and protection are sent directly to the children home for the reception of child in need of care and protection during the pendency of any inquiry and subsequently for their care, treatment, education, training, development and rehabilitation.\textsuperscript{41}

The law has made for the establishment of Special Home for the reception and rehabilitation of the juveniles in conflict with law.\textsuperscript{42} These Homes are more of custodial nature, especially with regard to the children in need of care and protection.

The distinction between the children home and the special home is illusory as the law treats both categories is by prescribing custodial care as one of the options.

The innovation the law makes with respect to children in need of care and protection is the conceptualization of restoration for the child as being the focal point, with restoration being conceptualized as restoration to parents, adopted parents or foster parents.\textsuperscript{43}

The juvenile home and special home are conceptualized as crèche which is a basically a sort of nursery for very young children. The law outlines four options for children living in juvenile homes and special homes which include adoption, foster care, sponsorship and after care and for this absolute care is needed into the procedures regulating adoption and foster care.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{41} Section 34 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
\item \textsuperscript{42} Section 9 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
\item \textsuperscript{43} Section 39 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
\item \textsuperscript{44} Supra note 39 at 117.
\end{itemize}
THE RESTORATIVE JUVENILE JUSTICE VISION

From a Practical Perspective; the concept of Restorative Justice requires the juvenile justice system to respond to crime by devoting attention to the following:

1. Enabling juvenile offenders to understand the harm caused by their behavior and to make amends to their victims and communities;
2. Building on juvenile offenders’ strengths and increasing their competencies;
3. Giving victims an opportunity to participate in the justice process;
4. Protecting the public through a process in which the individual victims, the community, and offenders are all active stakeholders.

In India, incorporating the Restorative Justice approach in the Juvenile Justice (Care & Protection of Children) Act, 2000 may help in delivering justice to children before and after the onset of delinquency in the following ways:

1. SUPPORT FROM THE COMMUNITY

   The community involved defining the harm experienced, and participating in the decision-making about steps for repair may result in increased victim recovery from the trauma of crime. Thus not only the victim gets a support from the community to deal with the harm and pain, the juvenile offender also gets an opportunity of acceptability from the community.

2. COMMUNITY PROTECTION

   The community involved in preventing and controlling juvenile crime, improving neighborhoods, and strengthening the bonds among community members may result in community protection.
3. REHABILITATION OF THE JUVENILE OFFENDERS

The juvenile offenders, while interacting with the victim and the community, get an understanding of the human impact of their behavior. They tend to accept responsibility for their action, start expressing remorse, and prepare themselves to take action to repair the damage through developing their own capacities. Thus the juvenile offenders may become fully integrated, respected members of the community, which may accelerate their rehabilitation in the community.

4. CONSTRUCTIVE RESOLUTIONS TO DELINQUENCY

Juvenile justice professionals, as community justice facilitators may organize and support processes in which individual crime victims, other community members, and juvenile offenders are involved in finding constructive resolutions to delinquency.

Broadly, it can be said that the Restorative Justice model can be included into the present Juvenile Justice System in India by providing needed services available for victims of crime and giving the victims opportunities for involvement and input. Also, community members, including individual crime victims and offenders could be widely involved in making, decisions and carrying out plans for resolving issues and restoring the community. The Non-Governmental Organizations and the Community Based Organizations can also play an effective role in this process. This would necessarily enhance the juvenile justice process in the best interest of the child.
Right from the dawn of history, women had been discriminated against and persecuted by men in myriad ways. Women had suffered such ignominies, indignities and harassment with fortitude and in a spirit of perseverance. This was more so in the case of Indian woman as they had by training, temperament and tradition; imbibed the quality of tolerance and adjustments; Women being physically weaker than men, Gender Justice demands women should be protected from atrocities committed by men.

The problems of women were neglected in the past. It is only very recently that they began to be aired in public. As a sequel, the legislatures and the judiciary started focusing their attention on the problem of women. In India, several significant steps were taken by the legislature to prevent offences like rape, dowry death, bride burning and domestic violence. Judiciary also started viewing these offences more seriously than ever before. Remarkable observations have been made by the public-spirited and socially sensitized judges of the Supreme Court and the High Courts in India highlighting the injustices against women. The role of judiciary in combating crime against women has been aptly stated thus:

A socially sensitized Judge, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.  

Judiciary in its role as the sentinel on the qui vive has great responsibility in ensuring gender justice in Criminal Law Administration. It is heartening to note that while interpreting gender neutral laws, the judiciary has done a yeoman service by breathing justice for women into such laws. In this section, judicial decisions are attempted to highlight how judiciary has come to the rescue of women and in protecting the rights of women in the proper perspective.

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The Protection of Women from Domestic Violence Act, 2005 is introduced to provide for more effective protection of the rights of women who are victims of domestic violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

The basic purpose this Act is the conceptualization of restoration for the aggrieved woman as being the first priority to secure housing and protection. The Act provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home. This right is secured by a residence order, which is passed by the Magistrate.

The Act empowers the Magistrate to pass protection orders in favor of the aggrieved women to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved woman, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved woman, her relatives or others who provide her assistance.

The Act provides for appointment of Protection Officers and registration of non-governmental organizations as service providers for providing assistance to the aggrieved woman with respect to her medical examination, obtaining legal aid, safe shelter, etc. The Magistrate may on an application being made by the aggrieved woman, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress.

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46 The term ‘women’ refers to sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation.
47 Articles 14, 15 and 21 of the Constitution of India provide remedy under the civil law which is intended to protect the woman from being victims of domestic violence.
48 The term ‘domestic violence’ is defined under Section 3 of The Protection of Women from Domestic Violence Act, 2005 which includes actual abuse or threat. Actual abuse may be physical, sexual, verbal, emotional or economic.
49 Section 19 of The Protection of Women from Domestic Violence Act, 2005.
50 Section 18 of The Protection of Women from Domestic Violence Act, 2005.
51 Section 8 of The Protection of Women from Domestic Violence Act, 2005.
52 Section 10 of The Protection of Women from Domestic Violence Act, 2005.
53 Section 22 of The Protection of Women from Domestic Violence Act, 2005.
RESTORATIVE PRACTICES TO VICTIMS OF RAPE IN INDIA

One of the heinous crimes against female folk is “Rape” where the victim has to suffer mentally, physically, psychologically, socially, culturally, and economically, for the rest of her life. A victim of rape is victimized repeatedly, initially in the hands of the police when a complaint is lodged or an investigation is ordered, secondly, when the trial of the case starts, and lastly, which may never be the least, is when the society behaves like a beast against the victims of rape. The net result is defamation and degradation of the victim of the rape in particular and the womanhood in general, which contingencies have to be faced by the victim throughout her meaningless life.

RELIEF AVAILABLE TO THE VICTIMS OF RAPE

THE RELIEF OF COMPENSATION The ministry of women and child development came up with a scheme to compensate the victims of rape by providing them financial assistance upto Rs.2 lakh but can it be enhanced upto Rs.3 lakh if the victim gets pregnant or is a minor, differently-abled, mentally challenged or infected with STD (including HIV/AIDS as a consequence of rape) or in any other case where the designated authority finds it necessary. Depending upon their needs, the victims will also be provided various support services such as educational and vocational training so as to help them overcome the trauma and lead an independent life. This Scheme, however, does not prevent an affected woman from seeking relief from the Courts under Section 357, as well as applying under Section 357A of the Criminal Procedure Code (Cr.PC).

INTERIM ASSISTANCE Rs. 20,000 will be given to the victim in the event a rape case is prima facie made out. The district board shall order the assistance as far as possible within 15 days and, in any case, not later than 3 weeks from the date of receipt of the application and Rs. 50,000 is the maximum amount the victim will receive as further aid after giving due consideration to the physical injury and emotional trauma faced by her.

FINAL ASSISTANCE Rs. 1.3 lakh will be given to the victim as final assistance within one month from the date on which the victim gives her evidence in the criminal trial or within one year from the date of receipt of the application in cases where the recording of evidence has been unduly delayed for reasons beyond her control.
RELIEF AVAILABLE TO THE VICTIMS OF RAPE

THE RELIEF OF CONDUCTING TRIAL IN CAMERA Section 327 of the Cr.P.C., provides the relief of conducting trial in camera while dealing with a rape case.\textsuperscript{54}

In \textit{S/o Maharashtra v. Chandraprakash Mewalchand Jain}, AIR 1990 SC 658, the Supreme Court expressed the view that "The court must not be obvious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffered a tremendous sense of shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often than not, treated a sinner, and shunned. It must therefore, be realized that a woman who is subjected to sex-violence would always be slow and hesitant about disclosing her plight. The court must, therefore, evaluate her evidence in the above background."

In \textit{Shri Bodhisattwa Gautam v. Miss Subhra Chakroborthy}, AIR 1996 SC 922, the Supreme Court held, inter alia, that a large number of women still fail to report rapes to the police because they fear embarrassing and insensitive treatment by the doctors, the law enforcement personnel or the cross-examining defiance attorneys. The fear has to be allayed from the minds of women so that if and when this crime is committed, the victim may promptly report the matter to the police and on a charge-sheet being submitted, the trial may proceed speedily without causing any embarrassment to the prosecutrix who may come in the witness box without fear psychosis.

VICTIM'S NAME SHOULD NOT BE PRINTED IN THE JUDGMENTS OF THE COURTS

In \textit{State of Punjab v. Ramdev Singh}, AIR 2004 SC 1290, the Apex Court opined that the name of the victim of rape should not be printed or published in the judgments. In this case, the Hon'ble Supreme Court further held that the courts are expected to deal with cases of sex crime against women with sensitivity. Such cases need to be dealt with sternly and severely.\textsuperscript{55}

\textsuperscript{54} Sub-Section (2) of Section 327 specifically contemplates that "Notwithstanding anything contained in sub-sec. (1) the inquiry into and trial of rape u/s 376 of the Indian Penal Code shall be conducted in camera …"

\textsuperscript{55} Sub-Section (3) of Section 327 of the Cr.P.C., reads as follows: "Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the prior permission of the court."
CONSTITUTIONAL SUPPORT TO THE VICTIMS OF RAPE

Rape is a crime against basic human rights and is also violative of the victim’s most cherished of the fundamental rights, normally, the right to life contained in Article 21. A rapist not only violates the victim’s privacy and her personal integrity but also causes serious physical and psychological damage. As observed by the judge of the Supreme Court, Justice Arjit Pasayat, “While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female.”

Article 21 of the Constitution of India provides that the right to ‘live’ is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. In a landmark case, Delhi Domestic Women’s Forum v. UOI, the Court reiterated some guidelines for trial of rape cases:

1. The victim of rape must be well acquainted with criminal justice.
2. Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state at the police station.
3. The police should be under a duty to inform the victim of her right to representation.
4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have any particular lawyer in mind.
5. In all rape trials anonymity (name not to be disclosed) of the victim must be maintained, as far as necessary.
6. It is necessary, having regard to the directive principles contained under Article 38 (1) of the Constitution, to set Criminal Injuries Compensation Board.
7. Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place.

58 In Chairman, Railway Board v. Chandrima Das AIR 2000 SC 988, The Supreme Court has held that where a foreign national, a Bangladeshi woman was gang raped, compensation can be granted under Public Law (Constitution) for violation of fundamental rights on the ground of Domestic Jurisdiction based on constitutional provisions and Human Rights Jurisprudence. Accordingly, she was awarded a compensation of Rs. 10 lakh.
IV. THE ALTERNATIVE DISPUTE RESOLUTION (ADR)

The ADR in India, unlike several foreign countries, is only applicable in civil disputes. We have the Arbitration & Conciliation Act, 1996 to deal with civil matters. The ADR refers to any ways and means of resolving conflicts and disputes outside the Courtroom. ADR includes arbitration, mediation, early neutral evaluation, and conciliation. As burgeoning arrears in the courts, rising costs of litigation, and time delays continue to plague litigants, many countries of the word have institutionalized ADR programs and that too in criminal matters. These programs operate on both voluntary and mandatory basis.

(i) PLEA BARGAINING APPLICABILITY IN INDIA  Keeping in mind that the pendency of criminal cases have gone through the roofs, the Law Commission of India in its 142nd report suggested reform, which included implementation of plea bargaining as one of the potent tool of ADRs in India. Further, in its 154th Report, the Law Commission reiterated the need for remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under trial prisoners. The 154th Report of the Law Commission points out that an order accepting the plea passed by the competent authority on such a plea shall be final and no appeal shall lie against the same. The 177th Report of the Law Commission, 2001 also sought to incorporate the concept of plea-bargaining which found a support in Malimath Committee Report, 2003.

To give effect to the recommendations, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament. Despite a very huge hue and cry against the amendment, the amendment was accepted and with the effect of same, Chapter XXIA was added in the Code of Criminal Procedure, 1973. The said chapter contains Sections 265 A to 265L, which deal with the concept of “plea bargaining.”

Some criminal ADR programs like Victim-Offender Mediation Programs have been successfully mediating to bring justice between crime victims and offenders for over twenty years. There are now over 300 such programs in the U.S. and Canada and about 500 in England, Germany, Scandinavia, Eastern Europe, Australia and New Zealand.

59 There are various criminal ADR programs that are running throughout the globe. Some of these are :- Victim-Offender Mediation Programs (VOM); Community Dispute Resolution Programs (CDRP); Victim-offender Panels (VOP); Victim Assistance Programs (VAP); Community Crime Prevention Programs (CCPP); Private Complaint Mediation Service (PCMS) and plea bargaining.

60 Some criminal ADR programs like Victim-Offender Mediation Programs have been successfully mediating to bring justice between crime victims and offenders for over twenty years. There are now over 300 such programs in the U.S. and Canada and about 500 in England, Germany, Scandinavia, Eastern Europe, Australia and New Zealand.
PLEA BARGAINING IN INDIA

‘Plea Bargaining’ can be defined as pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution. Notice is required to be given to the victim to participate in the meeting to work out a mutually satisfactory disposition of case, including payment of compensation to victim. This is a welcome step in direction of victim-oriented approach to criminal prosecution.

The defense counsel’s function in plea bargains is identical to that of a mediator, seeking to reconcile the positions of the defendant and the prosecution. Within this framework, the plea bargain should be seen as part of the broad conception of Alternative Dispute Resolution (ADR). The tactics of influence and use of an impression of force employed by the defense attorney in plea bargains are identical in every way to those used by mediators.

In the wake of Restorative Justice Theory a prototype shift has been made from an emphasis on retribution to one of restoration of good relations for those who admit their guilt. Plea Bargaining provides for pre-trail negotiations between the defense and the prosecution during which an accused might plead guilty in exchange for certain concessions by the prosecution. There cannot be plea bargaining for offences where punishment above 7 years is prescribed. There will be no plea bargaining in 3 exceptional cases namely, offences against women, children below the age of 14 years and socio-economic offences (like offences under Food Adulteration Act etc.). The basic purpose behind Plea Bargaining is to obtain important information from a defendant by the prosecutor and to avoid long and costly trial and to give a role to the victim in the negotiation, leading to settlement of criminal cases.⁶¹

⁶¹ In recent case of Vijay Moses Das v. CBI (Criminal Misc. Application 1037/2006), Uttrakhand High Court (Justice Praffula Pant) in March 2010 allowed the concept of plea-bargaining, wherein accused was charged under section 420, 468 and 471 of IPC. In the said case, Accused supplied inferior material to ONGC and that too at a wrong Port, which caused immense losses to ONGC, then investigation was done through CBI by lodging a criminal case against the accused. Notwithstanding the fact that ONGC (Victim) and CBI (Prosecution) had no objection to the Plea-bargaining Application, the trial court rejected the application on the ground that the Affidavit u/s (265-B) was not filed by the accused and also the compensation was not fixed. The Hon’ble High Court allowed the Misc. Application by directing the trial court to accept the plea-bargaining application.
Similarly, Lok Adalat is a special kind of people’s Court in which some particular kind of disputes are sought to be kept confusing court procedure and efforts are made to solve the disputes by direct talk between the litigants. The specialty of these courts is that in these courts the cooperation of social workers, workers and the students of law are also procured. They, after studying the case try to decrease the difference of opinion between the litigants.

**JURISDICTION OF LOK ADALAT** It is very difficult to contain and restrict the jurisdiction of the Lok Adalat, so they could be settled easily through these courts. As regards the cases which can be best suited for the following category of cases where the functioning of the Lok Adalats can be most effective, fruitful and desirable.

- Landlord-Tenant disputes relating to the enforcement of rent and vacating of the premises.
- Compoundable offences.
- Cases arising out of motor accidents.
- Matrimonial cases including cases relating to property given at the time of marriage, debts, securities, guardianship, custody of children and divorce.

The system of Lok Adalats is a success of democracy and is a most up-to-date and cheap method of providing justice at your doorstep. It is the justice visiting your place to shower blessing. The feeling of a Lok Adalat is a feeling of compromise and it is a philosophy which strikes the balance and urges the spirit of philosophy of ‘restorative practice’. So far as the cases which are not arising out of the dealings with the State are concerned, the results have been wonderful and in been held at Delhi, Gujrat, Jaipur, Jodhpur and Udaipur and in certain parts of U.P., they have proved their role and success. In one Lok Adalat, about 8000 cases were reported to be solved. People feel a sense of relief and calm. If they do not get decision in their favor they have no grievances as the system of Lok Adalats is free from prejudices, bias and revenge.
Protective custody is the name given to the custody in certain places like police stations, correctional institutions, hospitals and hostels among others. In all these institutions, the relationship is fiduciary and it is unfortunate that there is abuse of these relations. Subjecting the inmates to torture and custodial violence is one of the manifestations of such abuse.

The Universal Declaration of Human Rights which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulates in Article 5 that “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”

Though Article 9 para 5 of the Covenant on Civil and Political Rights ensures an enforceable right to compensation in case of unlawful arrest or detention, India’s ratification of the Covenant with reservations and the absence of any express right in the Indian Constitution to compensation for the violation of fundamental rights, have made the accountability of State in cases of unlawful arrest or detention or custodial violence difficult.

Initially the judiciary was also lukewarm in its response. When for the first time the question of state accountability for the infringement of fundamental rights under Art.21 was raised before the Supreme Court in Khatri v. State of Bihar62, and in Veena Sethi v. State of Bihar63, the judiciary was inimical to the payment of compensation for breach of fundamental rights, under Article 21. But continuous and unabated violation of human rights by the men in uniform has awakened the judiciary and brought into focus the need for a right to compensation against State.

62 A.I.R. 1981 S.C. 928
Rudul Sah v. State of Bihar is a path-breaking decision in this regard. Rudul Sah was found to have been illegally detained without any statutory justification for a period of fourteen years after his acquittal of criminal charges at a Sessions trial. The Court felt that this constituted a flagrant infringement of Sah’s fundamental rights under Art.21. As the state has deprived the man of fourteen invaluable years of life, the Court awarded compensation of Rs. 35,000/- to Rudul Sah. The genial seeds of compensatory jurisprudence have been laid and the citadel has been broken. The Court observed:

“Article 21 which guaranteed the right to life and liberty will be denuded of its significance if the powers of these courts were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with a mandate of Article 21 secured is to mulct its violators to pay monetary compensation.”

Similarly, in Sebastian M. Hongray v. Union of India, the Apex Court directed the Government to pay Rupees one lakh as exemplary costs towards interim protection to the wives of the two persons whom the Government failed to produce in spite of the writ of habeas Corpus being issued by the court. Treating it as willful disobedience to the writ and keeping in view the torture, agony and the mental oppression of the wives because of the breach of fundamental rights, the Court awarded the compensation.

Likewise in Bheem Singh v. Jammu & Kashmir, the Supreme Court directed the State to pay compensation to the appellant for the breach of fundamental right under Article 21 and Article 22(2) respectively. In this case Chinnappa Reddy, J., speaking on behalf of the Court observed:

64 A.I.R. 1983 S.C. 1086
65 Ibid.
66 A.I.R. 1984 S.C. 1026
67 A.I.R. 1986 S.C. 494

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“If personal liberty of a member of a Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals. Police officers who are the custodians of Law and Order should have the greatest respect for the personal liberty of citizens and should not flout the law by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not abduct.”\textsuperscript{68} The Court directed the State of Jammu & Kashmir to pay Bheem Singh a sum of Rs. 50,000.

In the Supreme Court Legal Aid Committee v. State of Bihar,\textsuperscript{69} the Court directed the state to pay a compensation of Rs. 20,000 to the person in custody when it was proved that the State acting through the Hawaldar was indifferent to providing medical treatment to the sick and injured person in its custody.

In Lakshmi v. Sub-Inspector,\textsuperscript{70} when a detainee was subject to tortuous treatment and third degree method of persecution, the Madras High Court awarded a compensation of Rs. 25,000 to the victim.

In Ram Konda Reddy v. State of Andhra Pradesh\textsuperscript{71} the Andhra Pradesh High Court gave a radical judgment by observing that the doctrine of sovereign immunity contained in Article 300 of the Constitution regarding tortuous liability cannot be said to be an exception to Article 21. In this case, in spite of the apprehensions of the danger to their safety in jail and in spite of the request for safety measures, a father and his son were not provided adequate safety as a result of which outsiders transgressed into the custodial arena and caused the death of the father and injured the son. The court awarded a compensation of Rs.1,44,000 and rejected the plea of the State that it would be a burden on the public exchequer. The Court remarked that the award of compensation is essential for good government and for ensuring rule of law.

\textsuperscript{68} Ibid.
\textsuperscript{69} (1990) 3 S.C.C. 482.
\textsuperscript{70} 1991 Cri. Law Journal 2269 (Madras)
\textsuperscript{71} A.I.R. 1989 A.P. 235.
The Supreme Court in *PUDR Vs. State of Bihar*\(^2\) ordered compensation of Rs.20,000 each to the dependents of the deceased and Rs.5,000 each to the injured persons in case of brutal police firing on poor peasants who were holding a peaceful meeting in Arwarp of Bihar.

The Apex Court in the case of *Saheli v. Commissioner of Police*,\(^3\) awarded compensation of Rs. 25,000/- to Kamlesh Kumari whose son was tortured to death by a police inspector in an attempt to get her vacated from a house of the land lord where she was residing as a tenant. Both in *PUDR* and *Saheli* the Court allowed the state to recover the quantum of compensation from the salaries of the delinquent police officers.

In *M.C.Mehta v. Union of India*,\(^4\) the Supreme Court emphasized that its jurisdiction under Article 32 is both preventive and remedial and that the remedial relief may include the power to award compensation in appropriate cases for breach of fundamental rights. An appropriate case is one where the infringement of the fundamental right must be gross, patent, incontrovertible, ex-facie glaring and its magnitude must be such as to shock the conscience of the Court.\(^5\)

In *Neelabati Behera v. State of Orissa*,\(^6\) the Supreme Court observing that public law remedies constitute important remedies and the anachronistic principles of acts of the sovereign do not apply in such violations awarded interim compensation to the mother of the victim. The Court observed;

\(^5\) Ibid.
“It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exception. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.”

Thus the Supreme Court has judiciously intervened wherever there has been an omission, a commission, or indifference on the part of the State in the protection of fundamental rights.

The high watermark in the custodial jurisprudence was reached when the Supreme Court issued the guidelines regarding all cases of arrest or detention in the case of D.K.Basu v. State of West Bengal, while issuing the guidelines the Court observed:

“Custodial death is perhaps one of the worst crimes in civilized society governed by the Rule of Law. The rights inherent in Articles 21 and 22 (1) of the Constitution require to be jealously and scrupulously protected. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breaker, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby anarchy. No civilized nation can permit that to happen.”

77 A.I.R. 1997 S.C. 610
The Court issued that the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:\textsuperscript{78}

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lockup, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the police station of the area of the concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of the right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

\textsuperscript{78} \textit{Ibid.}
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The “Inspection Memo” must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

9. Copies of all the documents including the memo of arrest, referred above, should be sent to the Magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout his interrogation.

11. A police central room should be provided at all Districts and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing arrest, within 12 hours of effecting the arrest and at the police central room it should be displayed on a conspicuous notice board.
In *D.K.Basu v. State of West Bengal*, the Court also took cognizance of the difficulties of the police. It observed:

“There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, students unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the; ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease.”

While turning new leaf of jurisprudence in accountability aspect for custodial violence, the Supreme Court cautioned that care must be taken to separate non-genuine claims. In *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*,\(^79\) and *Munshi Singh Gautam v. State of M.P.*,\(^80\) the Court observed:

\(^79\) (2003) 7 S.C. C. 749

\(^80\) (2005) 9 S.C.C. 631
“But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the Courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefiting masquerading as victims of custodial violence.”

In the case of *Sube Singh v. State of Haryana*\(^8^1\) the Supreme Court examining the issue holistically has suggested measures for improving the present situation. The Court observed:

“Unfortunately, police in the country have given room for an impression in the minds of public, that whenever there is a crime, investigation usually means rounding up all persons concerned (say all servants in the event of a theft in the employer's house, or all acquaintances of the deceased, in the event of a murder) and subjecting them to third-degree interrogation in the hope that someone will spill the beans. This impression may not be correct, but instances are not wanting where police have resorted to such a practice. Lack of training in scientific investigation methods, lack of modern equipment, lack of adequate personnel and lack of a mindset respecting human rights, are generally the reasons for such illegal action. One other main reason is that the public (and men in power) expect results from police in too short a span of time, forgetting that methodical and scientific investigation is a time-consuming and lengthy process. Police are branded as inefficient even when there is a short delay in catching the culprits in serious crimes. The expectation of quick results in high-profile or heinous crime builds enormous pressure on the police to somehow “catch” the “offender.”

\(^8^1\) (2006) 3 S.C.C. 178
The need to have quick results tempts them to resort to third-degree methods. They also tend to arrest "someone" in a hurry on the basis of incomplete investigation, just to ease the pressure. Time has come for an attitudinal change not only in the minds of the police, but also on the part of the public. Difficulties in criminal investigation and the time required for such investigation should be recognized, and police should be allowed to function methodically without interferences or unnecessary pressures. If police are to perform better, the public should support them, Government should strengthen and equip them, and men in power should not interfere or belittle them. The three wings of Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution. Be that as it may."

What the Supreme Court has been trying to emphasize is that the days of mutual recrimination and fault finding are over and that it is everyone's responsibility to work in the direction of restoring the confidence in the criminal justice system as such.

The Court further adds:

“Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurrences. Following steps, if taken, may prove to be effective preventive measures;

a) Police training should be reoriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.

b) The functioning of lower level police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and ensure adherence to lawful standard methods of investigation.
c) Compliance with the eleven requirements in D.K.Basu should be ensured in all cases of arrest and detention.

d) Simple and foolproof procedures should be introduced for prompt registration of first information reports relating to all crimes.

e) Computerization, video-recording and modern methods of record maintenance should be introduced to avoid manipulations, insertions, substitutions and antedating in regard to FIRs, inquest proceedings, post-mortem reports and statements of witnesses, etc. and to bring in transparency in action.

f) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavor should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence-building measures (CBMs), and at the same time, firmly deal with organized crime, terrorism, white-collared crime, deteriorating law and order situation, etc.”

This to date has been the saga of the journey of the High Courts and the Highest Court in India in the province of custodial jurisprudence.

If measures are initiated for ratifying the UN Convention on the Prohibition of Torture and Cruel and Degrading Treatment, for making legal provisions regarding the requirements to be followed in all cases of arrest and detention (as stated in the case of D.K.Basu) and also for making the right to victim compensation a fundamental right as suggested by the National Commission to Review the Working of the Constitution, the leitmotif of the 60th Anniversary of the Universal Declaration of Human Rights - JUSTICE AND DIGNITY FOR ALL will not be a distant abstraction.
Open prison system is the most recent development as far as the prison system in India is concerned. It manifests the reformative aspect of the Indian prison system. Open prison is a system where there are no armed guards no confining walls and locks. The prisoners are allowed to move freely and to maintain self-discipline and make a livelihood by means of labor. This creates an atmosphere which is congenial for reformation and rehabilitation-social, economic and moral and helps to prevent recidivism to a large extent. It develops trust and builds up self-respect among them and equips them with all the capabilities need for re-socialization once they are released.

There are nearly 27 open prisons of different sizes being run in different States in the Country. Some of them are:-

1949 :- Semi-open camp annexes attached to model prison, Lucknow, U.P.
1954 :- Maula Ali Colony, Hyderabad, A.P.
1955 :- Prison Farm Yeravada, Maharashtra.
1955 :- Open Air Camp, Durgapur, Rajasthan.
1956 :- Open Air Prison, Singanallur, Tamil Nadu.
1960 :- Open Air Jail, Bilaspur, H.P.
1962 :- Open Prison Nettukheltheri, Kerala.
1963 :- Sampurnand Bandi Shivir, Rajasthan.
1964 :- Open Air Colony, Jorhat, Assam.

The advantages of open prisons in India are both practical and philosophical. From a practical standpoint, they are less costly than traditional prisons and often profitable for the state. They could help reduce crowding since they are relatively easy to establish and require few staff. Philosophically, open prisons are more humane and reduce the time inmates spend in locked rooms. They are much more effective in keeping families together and help give offenders a sense of social responsibility which in turn helpful to reintegrate them into the community in the future. Thus open prison demonstrates that the presence of family has a moderating effect on the offender which shows that offending, punishing, restoring and compensating are all part of the social process.
In *Lingala Vijayakumar & Ors. v. Public Prosecutor, Andhra Pradesh*\(^{82}\) the court pointed out that ‘the court has responsibility to see that punishment serves social defense which is the validation of deprivation of citizen's liberty. Correctional treatment, with a rehabilitative orientation, is an imperative of modern penology which has abandoned justitician. The therapeutic basis of incarceratory life-style is not unknown to Gandhian India because the Father of the Nation regarded ‘a criminal as a morally aberrant patient’. A hospital setting and a humanitarian ethos must pervade our prisons whereby, by reformation and healing, the creative potential of the prisoner is unfolded. Prison practices must be such that you instill a sense of dignity and worth in the prisoner so that he awakens to a new consciousness and re-makes himself.

In *Umed Singh and another v. State of Haryana*\(^{83}\) the court pointed out that observations made by the Director General of Prisons, Haryana that convicts must realize that crime does not pay, seem to indicate the mindset that jail sentence is not punishment enough. If the convicts are made to work they must do so as a measure of correcting their conduct and behavior. Activities in the jail are supposed to be of therapeutic value to reduce boredom and restlessness. Modern theories of criminology like restorative and reparative theories have to be considered. The crime also has a direct impact on the victim and his family. If convicts are made to work as efficient carpenters, masons, farmers, factory workers or machinists, in well organized furniture making unit, farm, or a workshop in the jail and are paid a reasonable minimum wage, many advantages would flow. Some of them are that: - (i) the convicts shall acquire skills which would help them to rehabilitate themselves after release; (ii) the convicts shall earn some money which they could save for the maintenance of their families; and (iii) the convicts shall also be able to pay a reasonable amount as compensation to the victims.

This would be a measure of reform which is badly needed to restore the faith of the people in the correctional theories for criminology which are most relevant in the 21st Century. The State is becoming increasingly involved in protecting its citizens from rising crime. The State must think of a new and innovative wage structure to prevent the collateral damage which every crime inflicts on the family of the accused and on the victims.

\(^{82}\) A.I.R. 1978 A.P. 1485

\(^{83}\) A.I.R. 2009 P&H 1056
VII. RESTORATIVE PRACTICES TO CHILD ABUSE IN INDIA

Child Abuse and Neglect can be viewed as the intentional, non-accidental injury, maltreatment of children by parents, caretakers, employers or others including those individuals representing government/non-government bodies which may lead to temporary or permanent impairment of their physical, mental, psycho-social development, disability or death. The term 'Child Abuse' has different connotations in different cultural milieu and socio-economic situations. According to WHO\(^{84}\):

- **Physical Abuse:** It is the inflicting of physical injury upon a child. This may include burning, hitting, punching, shaking, kicking, beating or otherwise harming a child. The parent or caretaker may not have intended to hurt the child. It may, however, be the result of over-discipline or physical punishment that is inappropriate to the child's age.

- **Sexual Abuse:** It is inappropriate sexual behavior with a child. It includes fondling a child's genitals, making the child fondle the adult's genitals, intercourse, incest, rape, sodomy, exhibitionism and sexual exploitation. To be considered ‘child abuse’, these acts have to be committed by a person responsible for the care of a child (for example a baby-sitter, a parent, or a daycare provider), or related to the child. If a stranger commits these acts, it would be considered sexual assault and handled solely by the police and criminal courts.

- **Emotional Abuse:** It is also known as verbal abuse, mental abuse, and psychological maltreatment. It includes acts or the failures to act by parents or caretakers that have caused or could cause, serious behavioral, cognitive, emotional, or mental trauma. This can include parents/caretakers using extreme and/or bizarre forms of punishment, such as confinement in a closet or dark room or being tied to a chair for long periods of time or threatening or terrorizing a child. Less severe acts, but no less damaging, are belittling or rejecting treatment, using derogatory terms to describe the child, habitual tendency to blame the child or make him/her a scapegoat.

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Neglect: It is the failure to provide for the child's basic needs. Neglect can be physical, educational, or emotional. Physical neglect can include not providing adequate food or clothing, appropriate medical care, supervision, or proper weather protection (heat or cold). Educational neglect includes failure to provide appropriate schooling or special educational needs, allowing excessive truancies. Psychological neglect includes the lack of any emotional support and love, never attending to the child, substance abuse including allowing the child to participate in drug and alcohol use.

India is home to almost 19 percent of the world’s children. More than one third of the country’s population, around 440 million, is below 18 years. According to one assumption 40 percent of these children are in need of care and protection, which indicates the extent of the problem. In a country like India with its multicultural, multi-ethnic and multi-religious population, the problems of socially marginalized and economically backward groups are immense. Within such groups the most vulnerable section is always the children.

Independent India has taken large strides in addressing issues like child education, health and development. However, child protection has remained largely unaddressed. There is now a realization that if issues of child abuse and neglect like female foeticide and infanticide, girl child discrimination, child marriage, trafficking of children and so on are not addressed, it will affect the overall progress of the country.

Realizing this, the Government of India is focusing on child issues and created a new Ministry of Women and Child Development (MWCD) which has taken significant steps to address the issue of child protection by setting up a National Commission for the Protection of Child Rights, amending the Juvenile Justice (Care and protection of Children) Act 2000 and the Child Marriage Restraint Act 1929, launching the Integrated Child Protection Scheme (ICPS) and proposed amendments to the Immoral Trafficking Prevention Act (ITPA) and draft Offences against Children (Prevention) Bill.

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87 M. S. Bhattacharya, A Saga Of Agony And Shame — Child Labor And Child Abuse In India And The SAARC Countries, (2007), Delhi: Decent Books, p-51.
CONSTITUTIONAL SUPPORT TO VICTIM OF CHILD ABUSE IN INDIA

The Constitution of India recognizes the vulnerable position of children and their right to protection. Following the doctrine of protective discrimination, it guarantees in Article 15 special attention to children through necessary and special laws and policies that safeguard their rights. The right to equality, protection of life and personal liberty and the right against exploitation are enshrined in Articles 14, 15, 15(3), 21, 21(A), 23, 24, 39(e) 39(f) and reiterate India's commitment to the protection, safety, security and well-being of all people, including children.

**Article 14:** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India;

**Article 15:** The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them;

**Article 15 (3):** Nothing in this article shall prevent the State from making any special provision for women and children;

**Article 21:** Protection of life and personal liberty -- No person shall be deprived of his life or personal liberty except according to procedure established by law;

**Article 21A:** Free and compulsory education for all children of the age of 6 to 14 years;

**Article 23:** Prohibition of traffic in human beings and forced labour- (1) Traffic in human beings and beggars and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law;

**Article 24:** Prohibition of employment of children in factories, etc. -- No child below 14 years of age shall be employed to work in any factory or mine or any other hazardous employment;

**Article 39:** The state shall, in particular, direct its policy towards securing:-

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
Some of the important legislations are discussed below. Under each Act relevant sections have been enumerated:

**B-7.2A THE INDIAN PENAL CODE, 1860**
1) Foeticide (Sections 315 and 316)
2) Infanticide (Section 315)
3) Abetment of Suicide: Abetment to commit suicide of minor (S.305)
4) Exposure and Abandonment: Crime against children by parents or others to expose or to leave them with the intention of abandonment (S.317)
5) Kidnapping and Abduction:
   - Kidnapping for extortion (S.360)
   - Kidnapping from lawful guardianship (S.361)
   - Kidnapping for ransom (S.363 read with S.384),
   - Kidnapping for camel racing etc. (S.363)
   - Kidnapping for begging (S.363-A)
   - Kidnapping to compel for marriage (S.366)
   - Kidnapping for slavery etc. (S.367)
   - Kidnapping for stealing from under 10 yrs. of age only (S. 369)
6) Procurement of minor girls by inducement or by force to seduce or have illicit intercourse (Section 366-A)
7) Selling of girls for prostitution (Section 372)
8) Buying of girls for prostitution (Section 373)
9) Rape (Section 376)
10) Unnatural Sex (Section 377).

**B-7.3 THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994**

This is an Act for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders, chromosomal abnormalities or certain congenital malformations or sex linked disorders, and for the prevention of misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide and for matters connected therewith or incidental thereto.
THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

The Juvenile Justice (Care and Protection of Children) Act, 2000 is a comprehensive legislation that provides for proper care, protection and treatment of children in conflict with law and children in need of care and protection by catering to their development needs, and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under the Act. It conforms to the UN Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985, the UN Rules for the Protection of Juveniles Deprived of their Liberty and all other relevant national and international instruments.

It prescribes a uniform age of 18 years, below which both boys and girls are to be treated as children. A clear distinction has been made in this Act between the juvenile offender and the neglected child. It also aims to offer a juvenile or a child increased access to justice by establishing Juvenile Justice Boards and Child Welfare Committees. The Act has laid special emphasis on rehabilitation and social integration of the children and has provided for institutional and non-institutional measures for care and protection of children. The non-institutional alternatives include adoption, foster care, sponsorship, and after care. The following sections of the Act deal with child abuse:

S. 23: PUNISHMENT FOR CRUELTY TO JUVENILE OR CHILD The Act provides for punishment (imprisonment up to six months) if a person having the actual charge of, or control over, a juvenile or the child, assaults, abandons, exposes or willfully neglects him/her, causes or procures him/her to be assaulted, abandoned, exposed or neglected in any manner likely to cause such juvenile/child unnecessary mental or physical suffering.

S. 24: EMPLOYMENT OF JUVENILE OR CHILD FOR BEGGING The Act provides for punishment (imprisonment for a term which may extend to 3 years and fine) if a person employs or uses any juvenile/child for the purpose or causes any juvenile to beg.

S. 26: EXPLOITATION OF JUVENILE OR CHILD EMPLOYEE The Act provides for punishment (imprisonment for a term which may extend to 3 years and fine) if a person ostensibly procures a juvenile/child for the purpose of any hazardous employment, keeps him in bondage and withholds his earnings or uses such earning for his own purposes.
The idea of restorative justice is not alien to the Indian Criminal Justice System. Examples of restorative justice can be seen in various Indian legislations and in the Constitution as well. Some important hallmark provisions are mentioned herein:-

- **ARTICLE 141 OF THE INDIAN CONSTITUTION**
  The State shall, within the limits of its economic capacity and development, make suitable provision for securing the right towards, education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

- **SECTION 357 OF CRIMINAL PROCEDURE CODE, 1973**
  Sec. 357 states that when a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied to pay compensation to the victim or any other related function.

- **SECTION 358 OF CRIMINAL PROCEDURE CODE, 1973**
  Section 358 deals with Compensation to persons groundlessly arrested.

- **SECTION 359 OF THE CRIMINAL PROCEDURE CODE, 1973**
  Section 359 deals with Order to pay costs in non-cognizable cases.

- **SECTION 5 OF PROBATION OF OFFENDERS ACT, 1958**
  Section 5 gives the power to court to require released offenders to pay compensation and costs.
**Provisions for Compensation Under the Criminal Procedure Code**

Sec. 357 of the Criminal Procedure Code, 1973 deals with compensation for victims. This provision is in *pari materia* with Sec. 545 of the Criminal Procedure Code, 1860. While Sec. 357(1) and Sec. 357 (2) deal with cases where the court imposes a sentence, which includes a fine, sec. 357(3) extends to cases where fine does not form a part of the sentence.

Sec. 357 (1) (a) and (b) deal with the award of compensation in defraying the expenses of prosecution and in indemnifying any person who may have suffered any loss as a result of the offence, if that person could have recovered the same in a civil case, respectively. Sec. 357(1)(C) states that if a person is capable of claiming damages under the Fatal Accidents Act, 1855 from the accused for the death of the victim, that person can claim the same amount of damages as compensation under the criminal-case itself. One important phrase used in this sub-section is "caused the death". This would include cases of culpable homicide not amounting to murder also.

Sec. 357(l)(d) states that if a person is convicted for theft, criminal misappropriation, criminal breach of trust, cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property or property which he had reason to believe to be stolen, the Court may order such a person to compensate the *bona fide* purchaser for the loss suffered by him as a result of the property being returned to the rightful owner.

The next sub-section of Sec. 357, which is relevant is Sec. 357(3), which stipulates that where the sentence does not include a fine, the court may order the accused to compensate the victim for loss suffered by him.

Thus, there is a statutory provision related to compensation for victims. The question, though, is whether these provisions are adequate. Though there is a provision that deals with compensation for victims, it remains silent on what action should be taken if the offender fails to pay, on how a just and reasonable compensation should be determined etc.
However, there is insertion of section 357A in the Cr.P.C. Amendment, 2008 regarding Victim Compensation Scheme. i.e.,

(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."
Though in India no specific policy has been framed such as having Truth and Reconciliation Commission (TRC) or Family Group Conferencing (FGC) or anything of that sort, initiatives have been taken like the Victim Assistance Fund established in Tamil Nadu in 1995. The Supreme Court of India while deciding the case of *State of Gujarat V. Hon’ble High Court of Gujarat*\(^88\) held that apart from awarding sentence to the offender, court must also take care to the fact that victims of crime should not be left as 'forgettable man' in the whole process. So, court held that emphasis should also be made to make reparation of the losses to the victim. D. P. Wadhwa J., speaking for the bench held\(^89\)

"Reparation is taken to mean the making of amends by an offender to his victim or to victims of crime generally, and may take the form of compensation, the performance of some service or the return of stolen property (restitution), these being types of reparation which might be described as practical or material. The term can also be used to describe more intangible outcomes, as where an offender makes-an apology to a victim and provides some reassurance that the offence will not be repeated thus repairing the psychological harm suffered by the victim as a result of the crime."

**RECENT VERDICTS OF HIGHER COURTS IN FAVOR OF THE VICTIMS**

In the case of *State of Gujarat Vs. Raghavbhai Vashrambhai and Ors.*,\(^90\) the honorable Justice J.N. Bhatt of Gujarat High Court had opined :-

“In a realm of victimology the decision is one of the aspect towards fulfilling the design and desideratum and restorative justice to the victims of crime…..”

\(^88\) A.I.R. 1998 SC 3164.
\(^89\) *Ibid.*
\(^90\) *State of Gujarat Vs. Raghavbhai Vashrambhai and Ors.* (2003) 1 GLR 205.
In the case of *Bhagwan Kaur vs. State of Punjab*,\(^91\) the honorable Justice Viney Mittal of Punjab and Haryana High Court has observed: -

“Compromise in modern societies is the sine qua non of harmony and orderly behavior. It is the soul of justice and if the power of the court is used to enhance such a compromise, which in turn, enhance the social amity and reduces friction, then in truly is “finest hour of justice.”

In a recent judgment, in the case of *Anupam Sharma Vs. NCT of Delhi and Another*,\(^92\) the honorable Justice Pradeep Nandrajog of Delhi High Court had observed: -

“Restorative justice may be used as a synonym for mediation. The object and nature of restorative justice aims at restoring the interest of the victim. Involvement of the victim in the settlement process is welcome in the process of restorative justice. It is a process of voluntary negotiation and concentration, directly or indirectly between the offender and the victim.”

It is indeed, various Judges of High Courts in India realized the importance of Restorative Justice which is non-stigmatizing, economically viable and socially practicable process.

In the words of Albie Sachs, a former judge of the Constitutional Court of South Africa, “Restorative justice is a system of justice which restores harmony in society; it is a system where everybody lives together and it happens to fit comfortably with Gandhian philosophy.” Until recently, the criminal justice system was all about crime and punishment. The concept of restorative justice has changed that, causing the courts to now also address the causes and effects of crime.


\(^92\) *Anupam Sharma Vs. NCT of Delhi and Another.*, 146 (2008) DLT 497.
BARRIERS TO THE ADOPTION OF RESTORATIVE JUSTICE
IN THE PRESENT CRIMINAL JUSTICE SYSTEM IN INDIA

While highlighting the apathy of our criminal justice system Krishna Iyer, J. in case of Rattan Singh v. State of Punjab93 aptly remarked thus, it is the weakness of our criminal justice system that victims of crimes do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law.

Issues and problems: The existing Criminal Justice System could have become a viable mechanism of restorative justice but there are impediments in the way:-

➢ POLITICAL CORRUPTION The ultimate and enduring solution to the growing problems of crime and criminality in our society would hinge on the political will and initiative to evolve and implement an alternative model of socio-economic development aiming at the creation of a just and orderly society. The corruption is rampant among the Ministers (M.L.As and M.Ps) and other highest levels of a national Government, leading to a broad erosion of confidence in good governance, the rule of law and economic stability. As a result there is huge pendency of cases and higher rates of acquittal in the criminal justice system which indicates lots of barriers to afford innovation of any kind.

➢ INDUCED EXACERBATION It becomes the matter of interest to many that the conflict between the victim and offender should not subside. The lawyers from both side, for instance, is often said to have exacerbated the conflict.

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

➢ FAKE COMPROMISE The compromise, which takes place between the victim and the offender, by middlemen and others, is generally not in the interest of the victim. At times the victims are forcibly compelled to undergo the compromise. In fact, in some areas this has become a profitable business for many who by inducing fear to the parties try to settle the matter and charge heavy money from the interested party.

93 Rattan Singh v. State of Punjab (1979) 4 SCC 719
BENEFITS OF ADOPTING THE RESTORATIVE JUSTICE
IN THE PRESENT CRIMINAL JUSTICE SYSTEM IN INDIA

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

- **INITIATE CRIMINO-VICTIM JUSTICE SYSTEM** Restorative justice reflects a sort of crimino-victim justice system where equal justice to crime-doers and victims is ensured.

- **STRIVE TOWARDS REPAIRING, RESTORING, RECONCILING AND REINTEGRATING** Restorative justice seeks to repair the harm done by a criminal act by bringing together those most affected by the crime. Its basic purpose is to repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared communities.

- **PROMPT HEALING** Restorative Justice absorbs all the weaknesses of trial process based on adversarial system and ensures prompt relief to both victim and offender. It seeks to repair the harm done by a criminal act by bringing together those most affected by the crime.

- **FOCUS ON CAUSES AND EFFECTS OF CRIME** Until recently, the criminal justice system was all about crime and punishment. The concept of restorative justice has changed that causing the courts to now also address the causes and effects of crime.

- **NO CHANCE OF FAULTY AND SLIPSHOD INVESTIGATION** Restorative Justice provides equal opportunity to the victim to participate in the entire process which ensures no chance of Faulty and Slipshod Investigation. Police cannot adopt differential attitudes. There is no violation of equality and human dignity.
7. CONCLUSION

There are multiple conceptions of restorative justice. For some, its essence lies in encounters, the restorative processes in which parties may find healing. For others, it is a view of justice that insists that the harm caused by crime be repaired to the extent possible. For still others, it is a way of living that transforms relationships with others and with the social and physical environment. We hold to the reparative conception with the understanding that repair is best accomplished when the parties themselves participate cooperatively in determining how that should be done.

Restorative justice focuses on repairing the harm caused by crime and reducing the likelihood of future harm. It does this by encouraging offenders to take responsibility for their actions and for the harm they have caused, by providing redress for victims, and by promoting reintegration of both within the community. Communities and the government accomplish this through a cooperative effort.

Restorative justice is different from contemporary criminal justice practice in a number of ways. It views criminal acts more comprehensively: rather than limiting crime to lawbreaking, it recognizes that offenders harm victims, communities, and even themselves. It involves more parties: rather than including only the government and the offender in key roles, it invites victims and communities as well. It measures success differently: rather than measuring how much punishment has been inflicted, it measures how much harm has been repaired or prevented. Finally, rather than leaving the problem of crime to the government alone, it recognizes the importance of community involvement and initiative in responding to and reducing crime.
Restorative justice responds to specific crimes by emphasizing recovery of the victim through redress, vindication, and healing, as well as recompense by the offender through reparation, fair treatment, and habilitation. It seeks processes through which parties are able to discover the truth about what happened and the harms that resulted, to identify the injustices involved, and to agree on future actions to repair those harms. It considers whether specific crimes suggest the need for new or revised strategies to prevent crime.

Restorative justice seeks to prevent crime by building on the strengths of community and the government. The community can build peace through strong, inclusive, constructive, and just relationships. The government can bring order through fair, effective, and parsimonious use of force. Restorative justice emphasizes the need to repair past harms in order to prepare for the future. It seeks to reconcile offenders with those they have harmed, and it calls on communities to reintegrate victims and offenders.

Restorative processes and practices retain their restorative character as they reflect the values and principles of restorative justice. If these values and principles are lost or violated, then the result may not only be less restorative, it may be destructive. Four of these values are particularly important: encounter, amends, reintegration, and inclusion.