CHAPTER-VI
FROM RESTITUTION TO RESTORATIVE JUSTICE

Have we not neglected overmuch the customs of our earlier ancestors in the matter of restitution? We have seen that in primitive societies this idea of ‘making up’ for a wrong has wide currency. Let us once more look in to the ways of earlier men, which may still hold some wisdom for us.  

From Retribution to Restitution

Retribution is a socially popular theory of punishment and it is closer to social reaction to crime. Retribution seeks to right the balance by lowering the offender to the level to which the victim has been reduced. It tries to defeat the wrongdoer, annulling his or her claim to superiority and confirming the victim’s sense of worth. Restitution, on the other hand, seeks to raise the victim to his or her previous level.

The word “restitution” connotes restoring or compensating the victim for his loss. The original conception of restitution as a criminal remedy was that of forcing the criminal to yield up the fruits of his crime. It has been observed that this form of criminal restitution is sanctioned not only by history but also by its close relationship to the retributive and deterrent purposes of criminal punishment. Restitution is the term applied when the offender makes amends to his victim in a criminal offence by paying a sum of money or by service. Its benefits are twofold – the offender is made more responsible for the crime and the victim receives attention and benefit directly from the offender. It gives an opportunity to both the victim and the offender to feel that a wrong is being righted. When restitution involves service to the community, the whole society receives reparation from the offender. Since it is one of the alternatives in sentencing policy, it is a flexible means limited by the judge’s imagination, the offender’s willingness to participate, and the readiness of the victims to accommodate.

himself to the arrangement. Restitution is said to be punitive and rehabilitative. It is also said to serve the purposes of deterrence and criminal therapeutics.

Restitution is a positive measure and particularly appropriate for use in respect of juvenile offenders. It traces its origin to the Middle Ages and is more penal than compensation paid by the State since it does not merely offset the victim’s losses but makes the offender pay for them. The rationale for the restitution programme is that the offender is made to recognize his responsibility to the victim, it maintains the dignity of the offender unlike imprisonment, it saves the society and the offender from the deleterious effect of incarceration, and above all, it contributes to a sense of justice.

Long prison sentences stifle all hope of reform. The prison permeates the inmate, and when he is finally released he is almost helpless to make an adequate adjustment to free society. As Marshall B. Clinard and Daniel J. Abbott opined⁴, fines and imprisonment are penalties collected by an impersonal State and thus do little to restore the damage or loss caused to the victim or the victim’s family. Compensation or restitution to victim has particular merit as a substitute for both fine and imprisonment. For over a century, opinion has been developing in favour of restitution to the victim or the victim’s family by order of the criminal court.

An emerging trend in the sentencing process of India is the evolution of the concept of victim restitution. The Law Commission of India in its 42nd report vehemently felt the necessity of giving prominence to the aspect of compensation to the victim of the offence out of the fine imposed on the offender. Therefore, the provision relating to victim restitution, Section 357 of the Criminal Procedure Code, was thoroughly amended to give wider scope and application. Section 357 of the Criminal Procedure Code is discussed in detail in Chapter IV of the Research Work.

Beyond Restitution; Restoring Victims

The proponents of restitution place too much emphasis on financial restitution and reparation of material damage. Such emphasis is due to an inadequate understanding of the way in which crime harms people and of what the offender can

⁴ Crime in Developing Countries: A Comparative Perspective (1973), P.269:
do to help to restore the victim to the material, psychological and relational state they were in before the crime was committed.

But according to proponents of restorative justice, the main reason crime is wrong and requires some response is not because it is an offence against society, but because it is ‘a violation of a person by another person’. It is not denied that ‘the effects of crime ripple out touching many others’ and that society also has a legitimate interest in how the crime is dealt with, but it is asserted that these ‘public dimensions’ should not be the starting point for consideration of what to do about a crime. Rather our starting point should be the fact that one person has been harmed by the wrongful actions of another.

Advocates of restorative justice, also insist that what is problematic about crime is not that it is a willful attack on some abstract right which people possess. Rather it is concrete damage which crime causes to the victim that is the problem. This damage is partly material, i.e., property is lost or destroyed or physical injuries are incurred but mostly, it seems, the damage is psychological and relational; being a victim of crime is a deeply traumatic occurrence because it damages the victim’s sense of autonomy, order and relatedness what proponents of restorative justice, emphasis is the need to repair this psychological and relational damage. This, they contend, should be our overriding priority when deciding what to do about a crime.5 So what is hurtful about crime is the damage it does to our beliefs in the orderliness of the world and our sense of personal dominion.6 Such damage outweighs the physical injuries and property loss which crime causes, although the importance of such material damage should not be under-emphasised. This being so, applying the principle that the offender should be forced or persuaded into repairing the damage caused by his or her behaviour means they should be required to do something to help restore the victim’s sense of order and personal power, as well as attempt to make good the material damage caused.

By compensating victims for their losses, through money or services, the offender can in fact go some way towards repairing the psychological and relational

damage caused. Once again, for the proponents of restorative justice, such restitution is valuable mainly for what it symbolizes – the fact that the offender has wronged the victim and so owes them a debt rather than for its material value. It is accepted that in a great many cases offenders will not be able to repair or make adequate compensation for all the material harm they caused. However, by putting themselves out to repair what they can, they can help heal the psychological and relational damage which they cause.

But restitution, despite its symbolic value, is not on its own sufficient to heal the wounds of crime. Offenders can and must do more. In particular, proponents of restorative justice emphasised the importance to victims of offenders showing remorse and shame and offering genuine apologies for their crime. Offenders must also be prepared to meet face to face with their victims, in a safe atmosphere, to explain their act and to answer the victim’s questions about why they were victimised and other matters. A mediation meeting with offenders can also play a role in reducing the victim’s fear and sense of powerlessness, since it allows them to see the offenders as an ordinary vulnerable person rather than the threatening, all-powerful figure which, in line with public stereotypes, they often imagine criminals to be.

Face-to-face meeting can also be a forum where victim can ‘vent feelings of bitterness and hurt directly to the one who caused them’. While advocates of restorative justice insist that victim-offender meeting or restorative conferences should not become forums for the simple vilification of offenders, they do see one of their chief advantages over formal legal procedure as being their ability to act as mediums for emotional expression. Meetings between victims and offenders, focusing on restitution and reparation, can also help victim to recover a sense of personal power, by discussing and negotiating with the offenders and others about what would be a suitable form and amount of restitution, victims can take part in the justice process and gain control over the outcomes to their conflicts. Such meeting can also result in reconciliation between offenders and victims, which allows the victim to achieve closure- to reach a point where the offenders meetings and restorative conferences frequently result in victim forgiving those who have harmed them, which, quite apart form its benefits to offenders, help victims to recover from their traumatic experience.
In sum, face to face meeting between victims and offenders, in an atmosphere in which both feel safe, in which the focus is on getting the offender to express remorse and shame, offer meaningful restitution, and answer the victim’s questions, can go some way towards meeting the victim’s needs and hence towards helping the victim to recover from the traumatic experience of being victimized. Such meetings are far more beneficial to victims than are formal criminal trials, in which victims and offenders are kept apart and positioned as adversaries. And in which the focus is solely on determining the moral guilt of offenders and determining how much suffering they should be forced to undergo in order to pay their debt to society.  

Retributive and Restorative Justice

The dominant understanding of crime and justice all over the world is shaped by a retributive framework. This framework focuses on the establishment of guilt and understands crime as a matter of lawbreaking and an offense against the State. When a law is broken, this creates a debt that must be repaid to society. Offenders must receive their “just desserts” and endure their punishment. All most all the developed Criminal Justice Systems of the world have established elaborate legal mechanisms to administer “just” doses of pain to those who have willfully broken the law.

Restorative justice, on the other hand, understands crime as an offense against real people and relationships rather than the State. Making things right requires healing victim’s wounds, restoring offenders to law-abiding lives, and repairing the harm done to interpersonal relationship and the community. Moreover, restorative justice recognizes that victims, offenders, family members, and affected communities are all key stakeholders in the restorative process and should play an active role in deciding how to repair the damage caused by the offense. Restorative justice thus represents a progressive way of thinking about crime and justice. The alternatives to punishment that it suggests can help to empower and heal victims, offenders, and communities.

7 Johnstone, Gerry Restorative Justice-Ideas,values,debates Lawman(India) Private Limited,New Delhi 1985 p.76-78
### Comparison of Retributive and Restorative Justice Models

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<thead>
<tr>
<th>Retributive justice</th>
<th>Restorative justice</th>
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<td>Crime is a matter of lawbreaking and an offense against the State.</td>
<td>Crime is an offense against individuals, relationships, and communities.</td>
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<tr>
<td>Those who commit crimes freely and willfully break the law.</td>
<td>Those who commit crimes act within a specific context. In many cases offenders themselves have suffered harm.</td>
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<td>The process focuses on the establishment of guilt and is oriented toward the past.</td>
<td>The process focuses on offenders taking responsibility and is oriented toward the future.</td>
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<td>To make things right, offenders must receive their “just desserts” and undergo pain.</td>
<td>To make things right, the harm caused to individuals and communities must be repaired.</td>
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<td>Responding to crime centers on punishment. Victims' needs are peripheral.</td>
<td>Responding to crime centers on healing victims' needs are central.</td>
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<td>Legal personnel process cases. Victims and offenders do not play an active role in the justice process.</td>
<td>Victims and offenders play an active role in determining outcomes.</td>
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Restorative Justice: Conceptual Contours

There is the alternative approach which is aimed at moving away from the punishment of the offender towards restoring the harm done to the victim and the community and often extends to rehabilitation and reintegration of the offender. At present time a debate is developing on restorative Justice, which seeks to move away from conventionality, into new areas of mediation and involvement of victim and offenders. “Victim-offender Mediation” is one device employed by restorative justice. It involves a structured meeting between victim and offender, which hopes to convey to the offender that there is human consequence to the crime, while restoring a sense of control and resolution to the victim. Therefore this approach offers new ways of making offenders face up to their crimes and it is potentially a very hopeful development.

Recently interest towards restoration, rehabilitation, restitution of crime victims has been increased. There is a link between this new interest in customary and traditional legal systems in the former colonized countries and the development of new approaches to justice which the west, called “restorative justice” or “transformative” or “transactional” justice.

Archbishop Desmond Tutu speaking about South African Truth and Reconciliation Commission, expressed the idea behind this concept: --said,” But you see , the other thing is that, I think , lurking behind your question, is the concept of justice. Now you say, everybody has got to be punished. Your concept of what constitutes justice is retributive justice. Now that’s not the only kind of justice. We believe that there is restorative justice because you see, the application is heard in an open hearing not behind the closed doors..... And that public appearance constitutes a public humiliation which is..... If you are looking for punitiveness.......a punishment. But we didn’t think that was where we wanted to end. We were looking for healing

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8 Marcus, Michael “We can do better at fighting crime” at http://ourworld. CompuServe. come visited on 5th Feb. 2009 at 1:00PM
9 Archbishop Desmond Tutu is Noble Peace Prize Winner of 1984, He is Human Rights Activist and hero of South African anti-aparthied struggle.Recently he has been awarded Gandhi Peace Prize of 2005 on 31 January,2007 by The President.A.P.J Abdul Kalam towards adding India’s voice to the global recognition of Gandhiism.
…… It’s probably an African concept of our understanding of penology. What is the purpose? The purpose is ultimately the restoration of a harmony.  

In practice this new approach to justice puts emphasis on the relationship between the victim of crime and the perpetrator and looks for a solution that gives some satisfaction to the victims through compensation, an apology some act of restitution, and tries to influence the wrong that has been done.

**Restorative Justice**

Restorative Justice provides an entirely different way of thinking about crime and victimizations. Under previous criminal justice paradigms the state was viewed-as the primary victim of criminal acts, and victims and offenders played passive roles. Restorative justice recognizes crime as first and foremost being directed against individual people. It assumes that those most affected by crime should have the opportunity to become actively involved in resolving the conflict. The emphasis is on restoration of losses, allowing offenders to take direct responsibility for their actions, and assisting victims in moving beyond their sense of vulnerability and achieving some closure. These goals stand in sharp contrast to those of traditional paradigms, which focused on past criminal behaviour through ever-increasing level of punishment. Restorative justice attempts to draw upon the strength of both, offender and victim, rather than focusing upon their deficits. While denouncing criminal behaviour, Restorative Justice emphasizes the need to treat offenders with respect and to reintegrate them into the larger community in ways that can lead to lawful behaviour.

It represents a truly different paradigm based upon the following values:-

1. Restorative justice is far more concerned about restoration of the victim and victimized community than with ever more costly punishment of the offender.

2. Restorative Justice elevates the importance of the victim in the criminal justice process, through increased involvement, input and services

3. Restorative Justice requires that offenders be held directly accountable to the person and/or community that they victimized.

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4. Restorative Justice encourages the entire community to be involved in holding the offender accountable and promoting a healing response to the needs of victims and offenders.

5. Restorative Justice places greater emphasis on the offender accepting responsibility for his or her behaviour, and making amends whenever possible than on the severity of punishment.

6. Restorative Justice recognizes a community responsibility for social conditions that contribute to offender behavior.  

   The term restorative justice denotes a form of justice that advocates restitution rather than retribution being concerned neither with blame and punishment nor with forgiving and forgetting but with remembering, truth telling, repenting, forgiving and healing. The goal of restorative justice is to change wrong doers and in so far as possible to make wrongs right.

   Restorative justice can be understood as the only commendable after-fact attempt to make the best of a bad situation but the term is meant to encompass more than the reconciliation of victim and offender after an offence has taken place. It includes a preventive component.

   Today such kind of society is needed in which justice should come from just actions. Fair treatment should come before harm is done, care before things or people go wrong. Preventive justice would be like preventive maintenance on a car. It would involve the exercise of due care to catch and correct weaknesses before they result in breakdown of social fabric.

   Restorative justice emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through co-operative processes that include all stakeholders. In the concept of restorative justice three principles are inherent namely:-

1. Justice requires that some work should be done to restore those who have been injured.

2. The most directly involved and affected by crime should have the opportunity to participate fully in the Criminal Justice System.

Government’s role is to preserve a just public order and the community is to build and maintain a just place.

In nutshell restorative justice is a response to crime that focuses on restoring the losses suffered by victims holding offenders accountable for the harm they have caused, and building peace with in communities.

Restorative justice then:

- Is a different way of thinking about crime and our response to crime.
- Focuses on the harm caused by crime, repairing the harm done to victims and reducing future harm by preventing crime.
- Requires offenders to take responsibility for their actions and for the harm they have caused.
- Seeks redress for victims, recompense by offenders and reintegration of both with in community.
- Is achieved through a co-operative effort by communities and the government.

“Restorative justice is a process whereby all the parties with a stake in a particular offence together to resolve collectively how to deal with aftermath of the offence and its implications in future.”

John Dussich

“Restorative Justice” is a systematic formal legal response to crime victimization that emphasizes healing the injuries that resulted from the crime and affected the victims, offenders and communities. This process is a departure from the traditional retributive form of dealing with criminals and victims which traditionally have generally perpetuated the conflict which resulted in the original crime.

Howard Zehr

Viewed through a restorative justice lens,” crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim,
the offender and the community in a search for solutions which promote repair, reconciliation and reassurance."\textsuperscript{14}

\textbf{Kevin I. Minor and J.T. Morison}

"Restorative Justice may be defined as a response to criminal behavior that seeks to restore the losses suffered by crime victims and to facilitate peace and tranquility among opposing parties."\textsuperscript{15}

\textbf{Russ Immarigeon}

Restorative Justice is a process that brings victims and offenders together to face each other, to inform each other about their crimes and victimization to learn about each others backgrounds and to collectively reach agreement on a 'penalty' or 'sanction'.\textsuperscript{16}

\textbf{John Haley}

"In short Restorative Justice is a process through which remorseful offenders accept responsibility for their misconduct to those injured and to the community that in response allows the reintegration of the offender into the community. The emphasis is on restoration: restoration of the offender in terms of his or her self respect, restoration to the relationship between offender and victims, as well as restoration of both offender and victims with in the community.\textsuperscript{17}

The above definitions indicate that restorative justice provides a very different framework for understanding and responding to crime. Crime is understood as harm to individuals and communities, rather than simply a violation of abstract laws against the State. Those most directly affected by crime are victim's community members. The offenders have to be encouraged to play an active role in justice process

rather than the current focus on offender punishment as the restoration of the emotional and material losses resulting from crime is far more important hence restorative justice is a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies. Restorative Justice requires:

a) Making room for personal involvement of those mainly concerned particularly the offender and the victim and their families and communities.

b) Seeing crime, its problems and implications in the social context.

c) Preventive problem solving orientation.

d) Flexibility and creativity in practice.

Restorative Justice may be seen as criminal justice embedded in its social context, with the stress on its relationship to the other components rather than a closed system in isolation. There is a close relationship between offender, victim and community, as the concept of restorative justice could not be studied in isolation. The justice agencies should be directed towards not only inflicting punishment to the offender – the wrongdoer but also towards the restoration of the victim of the crime.

Thus primary goals of Restorative Justice could be summed up as:

1. To attend fully victim’s needs – material, financial, emotional and social (including those personally close to the victim who may be similarly affected).

2. To prevent re-offending by reintegrating the offenders into community.

3. To enable offenders to assume active responsibility for their actions.

4. To recreate a working community that supports the rehabilitation of offenders and victims and is active in preventing crime.

5. To provide means of avoiding delay of legal justice and the associated costs and consequences.

Restorative Justice is centrally concerned with restoration of all the stakeholders. It is not only solely backward-looking approach but also it is equally, if not more, concerned with the construction of a better society in the present and the future.
Historical Background

Restorative Justice is rooted in older traditions of Community Justice, in Christian ideals, drawn from the Sermon on the Mount and in earlier biblical concepts. Rooted in right relationships, not vengeance, restorative justice refocuses our gaze and reshapes the assumptions that underlie our systems for dealing with conflict. The theoretical framework of contemporary justice has developed in U.S.A. as an alternative to its traditional, vengeance-oriented criminal justice system.

The first use of the term restorative justice is generally ascribed to Barnett. He used this term for the first time while referring to certain principles arising out of early experiments in America using mediation between victim and offenders but the first writer to create a really integrated and comprehensive model of restorative justice was Howard Zehr. He referred this term firstly in a small pamphlet called “retributive justice”, in 1985 and subsequently in his book “Changing lenses” in 1990. He represented restorative justice as an “alternative justice paradigm” Opposed in all principles underlying legal or retributive justice. His work placed particular stress on benefits to victims and enabling offenders to assume active responsibility for putting right the harm they had caused (both as a matter of natural justice and as having a more profound impact on the offender than simply receiving punishment from the court). The interaction between victim and offender, involving personal reconciliation, atonement and potentially forgiveness was presented as entirely compatible with religious notions (especially but not only Christian) and given justification in those terms.

The limitations of Zehr’s early work were the attachment of restorative justice ideas to a single practical innovation, mediation (and a particular manifestation of such practice as represented by victim-offender reconciliation programmes) and its individualistic emphasis largely neglecting public interests in crime in favour of the more or less private concerns of victim and the offender. Mark Umberit in 1985 in America and Martin Wright in 1991 and John Harding in 1992 in Britain were influenced from Zehr. These authors treated restorative justice as virtually synonymous with victim-offender mediation and continued the emphasis on private negotiation as a sufficient response to crime.
Martin Wright presented restorative justice as a shift from criminal to civil law. This argument is traditionally backed by Nils Christie in 1977 who treated crimes as conflicts between the parties that had been “stolen out“ of their hands by the state and should be returned to the parties. Wright was also much concerned about the problem of reconciling restorative justice procedures (i.e. in his case, victim-offender mediation) with the traditional justice system. This issue was made particularly clear by emerging research such as that in Britain published by Home office and in America and Europe, papers from an International conference in Italy.

Criticism over individualized nature of restorative justice thinking also began to emerge in particular from Harry Mika in 1992 in U.S.A. and Tony Marshall in 1994 in U.K. as early as in 1987. However Shonholtz in U.S.A. was advocating community-based justice.

The social dimensions of restorative justice were given a boost by ideas associated with the group forum approaches of indigenous culture in North America and Pacific nations. (e.g. America and formal cultural practices of apology and forgiveness in Japan). While there is a large literature on community justice summarized by Marshall in 1985 which was important in early days largely in support of neighborhood justice centers in U.S.A and elsewhere more recently these ideas became associated almost by accident with a quite separate thread of criminological thought initiated by John Braithwaite in 1989 in Australia. His work had developed the idea of re-integrative shaming, theory of social control that argued that potential offenders were positively influenced by re-integrative shaming of the state in the form of criminal punishment. He favored locating social control in the community as far as possible.

As currently it stands, restorative justice lacks a definitive theoretical statement, although works continue to be written that take thinking forward, such as Cragg in 1992 and Bianchi in 1994.

Dignam and Cavadino in 1996 made an attempt to integrate different models of restorative justice action. The most comprehensive statement and the one that recognizes the community role in restorative justice is contained in a number of brief papers by Kay Prains in 1997. Which attempt to present restorative justice in context of holistic changes in the structure of community, society and political organization.
justice, many academic theories and approaches have been incorporated in or associated with it at different stages.

Whether or not restorative justice, is capable of becoming more than just a model of practice and becoming a complete theory of justice, remains to be seen. The academic development of such a theory is still in the early days of development, particularly in terms of formulations of a philosophy or ‘ethics’ of restorative justice in which number of commentators are currently engaged such as Rob Mackay at Dundee and Victimology Research group at Belgium.

To practical developments this matters very little and it may be advantageous that it remains an open model able to accept innovations as they occur rather than a closed system of thought that might restrict options. It is its ability to absorb many different concerns that gives it appeal and it is its grounding in successful practice that gives it persuasive justification. In this lies its strength and weakness.

Advocates of restorative justice suggest that, once the facts of a crime have been established, our priority should not be to punish the offender but:-

(i) to meet the victim’s needs, and

(ii) to ensure that the offender is fully aware of the damage they have caused to people and of their liability to repair that damage.

Achieving such goals requires something other than a formal criminal trial and judicial punishment. Indeed, the standard process of trial and punishment usually hinders the achievement of such aims. Instead, a face-to-face meeting between the victim and offender, in a safe setting is required. Ideally, members of the families and communities of the victim and offender will also take part in the process. Professionals will be involved in the process not as chief decision-makers but as facilitators. Their role is to ensure that the parties feel safe and to guide them towards constructive dialogue and a mutually agreeable resolution.

At such meetings offenders are urged to account for their behaviour; victims are encouraged to describe the impact which the crime has had upon them, materially and psychologically; and all parties are encouraged to decide upon a mutually agreeable form and amount of reparation – usually including an apology. Frequently, assurances are sought from the offender that the behaviour will not be repeated. Also, members of the offender’s family and community may resolve to monitor the offender and support them in their efforts to refrain from further law-breaking and anti-social
behaviour. There is an emphasis on persuading offenders, without threats, voluntarily to repair the harm they have caused. There is also an interest in reconciling offenders with their victims and with the community.

**Benefits of Restorative Justice**

- Restorative Justice meets the needs of victims of crime much better than judicial punishment.
- Offenders will benefit because Restorative justice offers them the chance to regain—or in many cases gain for the first time—the respect of the community rather than its permanent scorn.
- Communities will also benefit in a number of ways: offenders will be rendered less dangerous; the large fiscal costs of judicial punishment can be diverted to more constructive and crime-preventing projects; and Restorative justice will help foster arts of citizenship and a sense of community which can be useful in other situations.

**The Rebirth of an Ancient Practice**

According to its proponents, restorative justice was the normal way of handling ‘crime’ in the earlier times. In the Western world, it was suppressed from the twelfth century on, as the tasks of controlling crime and dispensing criminal justice became monopolized by an emerging central power in society, i.e. the State. In the hands of the State, doing criminal justice came to mean apprehending and punishing the perpetrators of crime. Older ideas of persuading offenders to make up for a wrong, through restitution to victims, became increasingly marginalised. By the nineteenth century, the story goes, Western power were imposing their model of State punishment on colonised people throughout the world, suppressing their native restorative justice traditions. By the twentieth century, the worldwide shift from Communal Restorative Justice to State Punitive Justice as the routine response to those wrongs officially classified as crime was almost complete. Restorative Justice survived as the routine response to ‘crime’ only in the dwindling, distant ‘simple societies’ and to some extent in oriental societies such as Japan. In the 1960s, however, a slight reversal of this long historical process began. Colonised people in North America, Australia, New Zealand and elsewhere started struggles to revive their native justice traditions. Some Western legal theorists have responded to this
phenomenon by suggesting that indigenous peoples should be permitted to have their own justice systems, based on native values and customs. For proponents of restorative justice, such a response – radical as it may seem to some – is far too conservative. For them the point is not to tolerate native justice traditions but to embrace them. They argue that we should follow the example of the New Zealand Maori and Native Americans and recreate our own older conceptions of conflict resolution.  

**Contemporary Restorative Justice: Historical Background**

Hundreds of experiments with Restorative justice are now taking place throughout the developed world, especially - but by no means exclusively - in relation to young offenders. Most of these experiments were started by criminal justice professionals, voluntary workers, and allied reformers working, within the Criminal Justice System using powers and structures already available. For example, the origin of the Contemorary Restorative Justice campaign, are conventionally traced to Canadian experiments with victim - offender mediations in Elmira, Ontario in 1974. Legend has it that probation officer Mark Yantzi (a member of the radical Christian sect, the Mennonites), frustrated with the usual process for dealing with offenders, had a 'pie-in-the-sky idea'. He asked the judge, in a case where two young men had pleaded guilty to vandalizing 22 properties, to order the offenders to meet their victims, in the company of Yantzi and fellow Mennonite, Dave Worth. To their surprise, the judge agreed, ordering the offenders to go with Yantzi and Worth and 'meet your victims and bring me back a report on the damage they have suffered. From this spontaneous, idealistic experiment, Restorative Justice – in the form of Victim Offender Reconciliation Programmes (VORPs) – was born (or rather reborn since, as we shall see, an important claim about Restorative Justice is that it is an ancient way of dealing with crime).

In VORPS, Restorative Justice takes the form of a face-to-face encounter between the victim and the offender, facilitated by a trained mediator, who is

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18 Johnstone Gerry, Restorative Justice- Ideas, values, debates, Lawman (India) Private Limited New Delhi p. 213
preferably a community volunteer. The mediator’s role is not to impose his or her interpretation or solution upon the ‘parties to the conflict’ but to encourage them to tell their stories, express their feelings, ask questions of each other, talk about the impact and implications of the crime, and eventually come to an agreement about what the offender will do to make restitution. While welcoming this as an important break with the conventional criminal justice process, some of those currently promoting restorative justice regard VORPs as unsatisfactory because they are ‘too individualized and private’. According to the view, if Restorative justice is really to take place, the community must also be involved. From this perspective the more important experiments are those with sentencing circles and family group conferences. He is willing to concede that ‘retributive justice’ may be so deeply embedded in our institutions and minds that it may be unrealistic to expect fundamental change. Yet he insists that development of the concept of restorative justice, through academic work and practical experiment, is a necessity.  

**Quest for Restorative Justice**

Traditionally victims of crime have been given virtually no legal standing in the process of doing justice in courts, even though the justice system exists because individual citizens have been hurt by criminal behaviour. Victims of crime feel increasingly frustrated and alienated by the current system of justice. The crime is against “the State” and state interests drive the process of doing justice. Individual crime victims are left on the sidelines with little, if any, input. Crime victims frequently feel twice victimized, first, by the offender and second by the Criminal Justice System that their tax dollars are paying for. For many crime victims their encounter with the justice system leads to increasing frustration and anger as they are largely ignored, often not even provided with information about the process, court date changes, and the final disposition of the case. Rarely do criminal justice professionals take the time to listen to the fears and concerns of the crime victims, seek their input, or invite their participation in holding an offender accountable. Second harsh punishments have failed to change criminal behaviour. If severe punishment and incarceration were effective, e.g. America would be the safest societies in the world. The United States is the only developed nation to routinely advocate and carry out capital punishment. Thirdly, the skyrocketing cost of

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incarceration specifically, is driving a growing number of legislatures and policy makers to reconsider the wisdom of the current retributive system of justice, which relies so heavily upon incarceration, while largely ignoring the needs of crime victims.23

Fourthly restorative justice satisfies victims of crime better than conventional criminal justice and punishment. It is usually conceded that victims derive some satisfaction from seeing punitive justice done to those who have wronged them. Proponents of restorative justice argue, however, that this satisfaction often turns quickly into anxiety and guilt. Moreover they argue that punitive justice fails to meet the more important needs of victims, such as their needs for restitution, healing of emotional trauma and empowerment. It is claimed that restorative justice meets these needs.24

One of the main complaints which proponents of restorative justice make about conventional punitive justice is that, it ignores the needs of victims of crime. In fact, they agree, the criminal justice system, through its apparent blindness to the fact that crime is at its core a violation of a particular person as well as a wrong against society, often adds to the injury suffered by victims. As a result, it is claimed, victims rarely experience justice when their case is dealt with by traditional punitive methods.

**Techniques of Restorative Justice**

To practice restorative justice certain innovative techniques are needed. The following are techniques of restorative justice:

1. Victim Offender Mediation
2. Family Group Conferencing
3. Community Participation
4. Community Service Programmes
5. Restitution which includes compensation, victim compensation programmes, victim assistance programmes

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24 Restorative Justice – Ideas, values, debates by Gerry Johnstone, Lawman (India) Private Limited New Delhi p. 23

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1. **Victim-Offender Mediation**

In victim-offender mediation meetings are organized to give offenders chance to take active steps to make voluntary reparation to their victims.

Such reparation extends much further than financial compensation. It includes an apology and an explanation of how the crime can be therapeutic for victims and usually has a visible impact upon the offenders, who have to face up to the reality of what they have done. Offenders can restore their own reputations, to some extent through reparation and can be better prepared for reintegration into mainstream of society by having resolved their guilt in this way. Reparation may take form of:--

(a) Financial payments
(b) Working for victims
(c) Working for a community cause selected by victim
(d) Specific undertakings (e.g. to attend counseling course)
(e) A mixture of these

Social benefits of victim-offender mediation are:-

1. Victim’s needs are more comprehensively served.
2. Victim and offender are able to see each other as persons rather than stereotypes (a learning experience for both) and
3. Offenders are more affected by the experience than by formal prosecution and punishment while being given a positive motivation to reform.

2. **Family Group Conferencing**

It is essentially an extension of victim offender mediation. It includes more parties—offender’s family, victim’s family or supporters and community contracts of offender who may be able to offer support or help (a teacher, employer, neighbor, youth worker, church, contract etc.) Family group conferencing allows offender’s family to share the blame and directly witness the harm caused and most importantly an exploration not only of how the offender can atone but also how to keep out of trouble in future and hence it includes community participation.
3. Community Participation

Support for victims most often occurs through the victim’s own personal acquaintances or relatives and this is the most natural source of assistance and usually the most valued. The voluntary organizations for victim’s support try to fill up the gap by offering practical help, support and consolation to victim on a local basis. This community concern for victim helps to overcome the social distrust and sense of alienation that afflict many victims of crime. It helps to restore the victim materially psychologically and socially. Community support also helps the offenders to find job, counseling, restraining drug or alcohol, literacy and education, accommodation for homeless, support for isolated and for the provision of activities to release energies or encourage social integration. This is an expression of community’s feelings of responsibility for re-incorporating their deviant members and supporting those that have been damaged by their experiences.

4. Restitution Includes Compensation

Restitution in criminal victim relationship means reparation of victim’s loss or better restoration of his position and his rights that were damaged or destroyed by and during the criminal attack. It can be understood as:- restitution.

It includes both victim assistance programmes and victim compensation programmes. Under Victim Assistance Programmes the victims are provided with a number of services like counseling, referral to various agencies and information intended to help victims in coping with the emotional, social and practical consequences of crime.25

Under Victim Compensation Programmes the State compensates eligible victims for un-reimbursed medical bills and for income lost as a result of the injuries incurred.26

As the law on compensation stands today, two major components of restorative justice are compensation and restitution.

Compensation

The idea of compensation to victims of any wrong is connected with the legal system in two ways, first the legal system has to regulate the relationship between the

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26 ibid.
offender and the victim. Secondly it has to regulate the relationship between the victim and the administration of justice.

**Meaning of Compensation**

The term compensation means amends for the loss sustained. In the sense of an act, the word compensation means money which a court orders to be paid by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damnedified may receive equal value for his loss, or be made whole in respect of his injury, it means the giving back of an equivalent in either money, which is but the measure of value, or actual value otherwise conferred.

It is counter-balancing of the victim’s sufferings and loss that result from victimization. It is the responsibility of the society, which is civil in nature responsibility, and has a non-criminal purpose and end. The rationale for compensation has following perspectives:—

1. As an additional type of social insurance.
2. As a welfare measure-another facet of the government/public assistance of the underprivileged.

In contemporary era the concept of compensation has been developed through the works of Margrey Fry in 1957. She after consulting with oxford professor Max Grunhut published her article on ‘Justice for victims’ in the ‘The Observer’. This paper was so clear a presentation of the merits of compensation to the victims of crime that soon other meaningful and powerful voices joined the pleas for “better help” for the injured.  

In 1958 Stephan Schafer was commissioned to do research on this issue for English home office. Schafer’s research results were published in book form in early 1960. The result showed that a movement was afoot to revaluate the criminal-victim relationship and that the increasing recognition of the broadened concept of responsibility in such a relationship would have to include the thesis that we cannot deal with crime and criminals without dealing with victims.

The concept of compensation and damages occupy an important place in the programme of justice to victims. Though these terms are sometimes used

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27 Devasia V. V. , and Leelamma, Criminology ,Victimology and Corrections, (Ashish Publishing House),1992 p.236
28 Schafer, Compensation And Restitution 2nd edi...p.x-xi
29 ibid
interchangeably, the words compensation and damages have subtle distinction in their application while ‘damages’ connote the measure of loss caused to the victims in monetary terms, the word ‘compensation’ indicates the form and occasion to pay damages.

The fundamental principle on which the award of damages is based is just compensation, for the injury sustained by the complainant. Where injury is such, that it does not admit of definite pecuniary measurement it is more appropriate to speak of reparation than of compensation, in some cases damages may be awarded, not only as a satisfaction to the injured person, but as a punishment to the wrongdoer.

The underlying theory of damages is that damages constitute the compensation paid in satisfaction for injury sustained. The sum of money, given for reparation of the loss or damage suffered, should as nearly as possible, be sum which will put the injured party in the same position as he would have been if he had not sustained the loss or damage for which he is getting damages.

**Compensation and Restitution**

Compensation and Restitution are alternative methods of repayment of losses. However, such definitions of restitution and compensation arise from the source of the obligations towards the victim and seen from the victim’s point of view. The term ‘victim compensation’ as such would encompass both restitutive as well as compensatory models of repayment. The distinction between compensation and restitution must be kept in mind; both are intended to provide victims with some reparation for damages done. It should be noted that the terms restitution and compensation are often used interchangeably although in fact they represent different points of view.

Compensation in criminal victim relationship concerns the counter balancing of the victim’s loss that results from the criminal attack. Restitution in criminal victim relationship concerns reparation of his position and rights that were damaged or destroyed by and during the criminal attack.

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30 Sammaiah Mundarathi ...Law on Compensation to Victims of Crime and Abuse of Power, (Deep And Deep Publications), 2002 p. 3
Compensation is an indication of responsibility of society rather financial obligation of governmental agencies to reimburse the suffering citizens or third parties like insurance companies. Restitution is an indication of responsibility of the offender he bears to his victims.

Compensation is claim for compensating action by society. Hence it is civil in nature and represents a non-criminal goal in a criminal case, while restitution is penal in character, major element of punishment besides protection of law and order and reformation and rehabilitation of criminal, thus represents a correctional goal in a case.

Thus restitution and compensation assume a rehabilitative character to the extent of personalizing the sentence and facilitating the criminal’s rehabilitation by keeping him in contact with victim thus increasing his awareness of responsibility and remorse.31

Eligibility for Compensation

Ideally victims of all crimes should be entitled to get compensation, however this can be accomplished only in a phased manner over a period of years depending on the resources of the State.

A victim should be eligible for compensation whether the offender is convicted or not or whether the offender is not responsible for the offence because of infancy, insanity etc. Compensation can be withheld or reduced if the victim himself has a criminal record or he is injured because of his own conduct (excepting when it occurred whilst helping a police officer or apprehending an offender), or he failed in his duty to inform the police without delay, or refused to co-operate in the investigation and prosecution of the crime. The compensation may also deny or reduced if the victim suppressed information or failed to co-operate in the legitimate processing of claims. In other words the victims conduct before, during and after the event constitute material evidence for the authority to decide whether to entertain the application at all or to sanction it with a reduced amount.

Compensation to Victims of Crime

Justice requires that a person who has suffered (including dependants) must be compensated. Basically the accused is responsible for the reparation of any harm

caused to the victim. However, it might be that the accused, being too poor, is unable to make any payment or otherwise unable to compensate the victim. In such a situation the State which has failed to protect the life, liberty and property of its citizens should compensate for loss and suffering.

**Restorative Justice : Position in Western Countries**

Apart from efforts of UN some States like England and other Western countries have developed their own system of compensation for the victims of crime.

**U.S.A.:** In U.S.A. 33 States have adopted victim right constitutional amendments. It can be said that next amendment to U.S.A. Constitution may guarantee certain rights to victims of violent crimes such as:-

a) Timely notice of any release, escape and public proceeding involving crime.

b) Not to be excluded from such proceedings.

c) To be heard at release, plea, sentencing communication and pardon proceedings.

d) And not be subjected to undue delay or to decisions that disregard their safety or their just claims to restitution.

This amendment includes restitution to be paid by the offender to the victim, victims to be present, heard and receiving restitution to be treated with respect. In 1983 President’s task force on victims of crime recommended the adoption of an amendment to U.S. Constitution entitled ‘Crime Victims Rights Amendment’. It seeks to provide certain permanent and fundamental rights for crime victims. It asserts that protection of these rights will not “abridge the right of those accused or convicted of victimizing them.”

A recent summit in U.S.A. on policing and victims, it concluded that victims require a continuous and timely support and service to heal from trauma they suffer. These components encompass the needs of victims, their families and communities, they identified.-

a) **Support:** Services and assistance to enable participation in justice processes recovery from trauma and repair of harm caused by crime.

b) **Continuity:** Consistency in approaches and methods across agencies, continuity of support through all stages of justice process and trauma recovery.
c) **Information:** Verbal and written about justice system processes and victim services that is clear, concise and user friendly.

d) **Access:** Ability to participate in the justice system process and obtain information and services, regardless of individual or family circumstances.

e) **Voice:** Empowerment to speak about processing of individual cases, opportunities to influence agency and system-wide policies and practices.

e) **Safety:** Protection from perpetrators and re-victimization, crime prevention through collaborative problem solving, a restored sense of individual and community safety.

**Compensation Programme in USA**

Under the Victim Compensation Programme, the State compensates eligible victims for non-reimbursed medical bills and for income lost as a result of the injuries incurred. In 1966 California became the first State to enact a victim compensation law. In New York the crime compensation board pays a maximum of 20,000 dollars to eligible victims of crime for the lost income with no limit for medical expenses. The eligibility criterion is that only victims of violent crimes are entitled for compensation, the victim is to report the crime to the police within forty eight hours of occurrence, the victim should not have provoked the crime, and the victim should not have been living or be a relative of the offender.

Under Victim Assistance Programme, the victims are provided with a number of services like counseling, referral to various agencies and information intended to help victims in coping with the emotional, social and practical consequences of crime. In some cases the victim assistance programmes tries to obtain restitution, as a condition of probation.

The rape crises centre provides information, referral service, temporary shelter, emotional support and counseling to rape victims. Sometimes the aid is extended beyond the trial period till the victim adjusted herself in society.

In U.S.A, 45 States have framed schemes providing for State compensation to the victims of crime. The Office for Victims of Crime (United States Department of

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Justice) provides a unique and inspiring example of a national responsibility centre, particularly as its funding comes from fines rather than general revenue. It was launched in 1986 as a part of federal legislation called Victims of Crime Act, 1984. Its main role is to multiply the number of services and laws that provide support, compensation and rights to victims of crime.

In U.S.A, State compensation is now paid to any person victimized by the offences covered by the relevant statutes and not just to state residents. The remedies are through private insurance, public assistance programmes and restitution. Most statutes insist on victim’s co-operation with the police to make him eligible for compensation. The crime must be reported to the police with in a prescribed period after its occurrence. Apart from the persons who are injured or killed as a result of crime, those who suffer injuries while preventing a crime being committed or apprehending a criminal or helping a victim of enforcement officer are also eligible for compensation.

International Institute of Restorative Justice Practices

The International Institute of Restorative Justice Practices has also been established in U.S.A. It has been approved as a graduate school by Pennsylvania, Department of Education. By this action Pennsylvania Department of Education has officially recognized Restorative Justice as a new discipline. This is world’s first graduate school wholly dedicated to Restorative Justice Practices. It holds conferences annually regarding restorative justice.

Compensation Programme in England

The British experience with State compensation for persons injured in violent crimes is important because it has existed for nearly forty years, using criteria similar to the civil courts. In 1964 the government established a non-departmental public body-Criminal Injuries Compensation Board (CICB) to award compensation from the government to the victims of crime. The basis of quantum of compensation is the same as that of damages in civil injuries and the money payable is for pain and suffering, loss of earning capacity and out-of-pocket expenses. The program was introduced to provide an acknowledgment of society’s sympathy for blameless victims of violence who co-operated with police and courts. The awards are made to

people who have been victims of violent crime or those injured to catch offenders or
prevent crime.

In 1996 supra scheme was re-organized into Criminal Injuries Compensation
Authority (CICA).

Whereas the Criminal Justice Act, 1972 introduced the idea of payment of
compensation by the offender. It also gave power to the court to make an ancillary
order for compensation in addition to the main penalty where ‘injury’, ‘loss’ or
‘damage’ had resulted. The Criminal Justice Act, 1982 made it possible for the first
time to make compensation as the sole penalty for the offence. It further provided that
where fine and compensation orders were given together compensation is to take
priority over fine. The Criminal Justice Act, 1988 required the court to consider the
aspect of compensation in every case of death, injury loss or damage.

When the court does not pass such an order, it has to furnish reasons for not
doing so. The Act also extended the range of injuries eligible for compensation. A
novel feature introduced in the Act was that if the victim felt dissatisfied with the
reasons of the court he may go for judicial review.

The Criminal Justice Act, 1991 contains a number of provisions which directly
or indirectly encourages a greater role for compensation. Thus English law provides
for restitution through a system of compensation orders that can be imposed by the
criminal courts. If an offender is convicted the court must make compensation order
unless it can justify not doing so. The compensation order is a penal sentence of the
court rather than a civil claim by the victim. The police are supposed to provide
information to the court on the losses to the victim. The court then decides the
compensation amount taking into account the ability of the offender to pay. The court
is responsible for collecting the compensation. The payment of order takes prudence
over fines and other costs that the offender may have to pay. If offender fails to make
the payments, then the court can order other sanctions including imprisonment.

There is also a provision for additional compensation, when applicants have also
suffered financial loss, through loss of earnings or earning capacity, cost of medical or
other care or because they were dependant on someone who was murdered. The
England Home Office has released two charters for victims. It is currently working on
a revised charter and bill of rights that could be underpinned by legislation. The
proposed new charter focuses on specific ways to:
• Treat victims with dignity and respect
• Provide protection
• Provide help and support
• Provide accurate and timely information
• Provide compensation or reparation
• Give victims the opportunity to say how they have been affected by the crime
• Provide a transparent system of justice.

It identifies responsibilities for the criminal justice agencies including what is expected of the police, prosecution service, victim support, witness service, courts, probation service, criminal injuries compensation authorities, prison service, parole board, criminal cases review commission and the home office. The expectations often include performance guidelines.

Another major step in crime prevention strategy is the adoption of Crime and Disorder Act, 1998. The act establishes a youth justice board to manage the efforts to prevent and rehabilitate young offenders but also requires every local government and police service to establish a local crime prevention plan.

**Compensation Programme in other European Countries**

Since the establishment of the first general European Crime Victim Compensation Scheme in U.K., similar schemes have been adopted by almost half of the European Countries. Switzerland also passed a Constitutional Amendment calling for such a scheme. With regard to the modality of implementation, through the general outlines of these schemes are similar. They differ greatly in matters of detail. The types of crimes covered for compensation range from deliberate acts of serious crimes to any criminal act those results in injury. Some other countries like France and Finland even cover some property offences. There are also considerable differences in the loss or harm and the obligation to cooperate with the authorities and the attitude taken towards the conduct of the victim. Here, France deserves a special mention because of its system of *partie-civile*. This enables the victim to have standing in the criminal court so that judges will decide what payments the offender will make to the victim for the damages that were incurred in the criminal act. There are often as many lawyers for victims in a court room as there are lawyers for defendants. There are out of court settlements also, community social mediators are very popular.
Many governments have already pioneered inspiring examples of national responsibility centers and services for victims. In some cases these have been financed creatively. For police, guidelines as well as several innovative projects exist but much more is left to be done. State compensation can provide funds to support victims with in reasonable time. The next decade may bring examples of constitutional amendments for victims that will have remedies so that there are real rights for victims.

As long as criminal justice system ignores victims, restorative justice will remain an ideal that is realized only in minority of minor cases-more often than not in favour of offender who is the only one who ultimately faces a formal court decision which the state can enforce.

However, legislators may make the changes that are necessary in criminal procedure to guarantee the rights of victims as required for instance in the International Criminal Court and European Council Framework decision as discussed before. Only then restorative justice may become a central part of the process where the interests of victims, offenders and society are equally protected. At the same time focus could be shifted to informal resolution of issues between the offenders and victims. It can be concluded that some momentum is growing internationally to invest significantly in measures that will reduce victimization of victims.

The Restorative justice movement is having an increasing impact upon criminal justice system policymakers and practitioners throughout the world. As a relatively young reform effort, the Restorative justice movement and the practice of victim-offender mediation, as its oldest empirically grounded intervention, hold great promise for the people. By drawing upon many traditional values of the past, and from many different cultures, people have the opportunity to build a far more accountable, understandable and healing system of justice that can lead to a greater sense of community through active victim and citizen involvement in restorative initiatives.