

RESTORATIVE JUSTICE PROCESSES IN CASES OF CHILD SEXUAL ABUSE: AN ANALYSIS

PREFATORY

With the various impacts on societal development due to the fast development brought about globalization has resulted to change not only on society but on every individual's lifestyle and mind set. No doubt society has succumbed to various types of evils that have clearly created a rift between members of the society. Long had been the existence of crimes from petty theft to heinous crimes of murder. Punishments were imposed in various forms based on societal practice.

The idea of the concept of justice has created much debate as to the balance of justice between the victim and offender. The concept of justice varies from cases to case. The Indian criminal justice administration has undergone many changes and over the time it has become complicated for the ordinary person to understand the law and bias in nature as it is costly thus benefit the elite more than the poor who often fall prey as victims.

The criminal justice administration is one of the most important organs of the constitutional democracy to protect peoples' rights as well as the interest of the state. The principal objectives of the criminal justice system and its administration are to enforce rule of law and order, convict the offenders committing crime and rehabilitating the violators of law in the society with the help of correction system of justice. For the attainment of these objectives, a network consisting of the police, bar, judiciary and correctional services constitute the criminal justice system. Since the criminal law provides the basic framework for the whole criminal justice administration, it is also considered as a component of the whole system.

The questions that has triggered the minds of many socio-legal thinkers is whether the existing punishments and the administration of criminal justice would bring forth a balance of justice between the rights of the victims with the rights of the criminal offenders and whether it shall bring positive changes to the criminal offender and society as a whole. Thus,

The concept of restorative justice had been in practice since the mid 1970s in many countries. Restorative justice is a very recent theory adopted by countries like Canada, Australia, USA and UK. Restorative justice is a process that focuses on rehabilitation of offenders through reconciliation with victims and community at large. It emphasizes the need

to repair the harm done to the crime victims through means of mediation, negotiation, victim empowerment and reparation.

CONCEPT OF RESTORATIVE JUSTICE

It is defined by Howard Zehr as, ‘a process to involve to the extent possible those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.’¹ It moves away from the concept of punitive sanctions, and focuses on rehabilitation of offenders through reconciliation with victims and the community at large. It emphasizes the need to repair the harm done to the victims of the crime through means of mediation, negotiation, victim empowerment and reparation.

UNICEF, in its document titled Justice in Matters involving Child Victims and Witnesses of Crime: model law and related commentary,² states in article 30,

“if restorative justice measures are considered, [name of competent body] shall inform the child, his or her parents or guardian and the children’s lawyer of the available restorative justice programmes and how to access such programmes, as well as the possibility of seeking restitution and compensation in court if the restorative justice programmers fails to achieve an agreement between the child victim and the offender.”

Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty First Century(2000)³ speaks about the development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interest of victims, offenders, communities and all of the parties. European Convention on the Compensation of Victims of Crime, 1993 contains minimum standards for compensation to crime victims⁴.

The fundamental principles of restorative justice are:

- i. Crime causes harm and justice should repair harm
- ii. The people should be able to participate in its resolution

¹ Howard Zehr, The Little book of Restorative Justice, Good Books, 2002, p. 37

² United Nations Office on Drugs and Crime, Vienna, Justice in Matters involving Child Victims and Witnesses of Crime: model law and related commentary, 2009

³ General Assembly, Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty- First Century , Fifty-fifth session Agenda item 105, 55/59, https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2000/General_Assembly/A-RES-55-59.pdf last accessed on 21/5/2016.

⁴ Council of Europe, European Convention on the Compensation of Victims of Violent Crimes, European Treaty Series - No. 116 available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680079751> last accessed on 23/05/2016.

- iii. Responsibility of government to maintain order and community to build peace (Van Ness, 1997)

There four corner post in restorative justice: (write correct heading)

- i. Inclusion of all parties
- ii. Encountering the other side
- iii. Making amends for the harms
- iv. Reintegration of parties into their communities.

Modes of restorative justice:

- i. Victim- offender mediation or victim offender conferences
- ii. Family group conferencing or family group discussion making
- iii. Circles
- iv. Restorative cautioning (Police)
- v. Restorative dialogues, classroom conferencing, formal conferences (Schools)

Understanding the concept of restorative justice, the question that arises is, whether this concept will cater in cases of child sexual abuse cases. Therefore, we shall draw attention to the Indian Criminal Justice System as to whether the implementation of the restorative justice would bring negative or positive impact on child sexual abuse, criminal offenders and society at large.

Restorative justice is a significant component of criminal justice system throughout the world. The restorative justice programmes are often localized and experimental; in a number of countries restorative measures constitute a significant aspect of various criminal justice systems. Restorative justice has been in practice since the 1970s and Canada was the first country to adopt restorative justice measures.⁵ The different types of restorative justice programs available throughout Canada, like Peacemaking Circles, Healing Circles, Sentencing Circles, Community-assisted hearings, or releasing circles, Community Conferencing and Community Justice Forums. Circle program has been used in Canada to

⁵ Howard Zehr, Ali Gohar, The Little Book of Restorative Justice available <http://www.unicef.org/tdad/littlebookrjpakaf.pdf> last accessed on 3/06/2016.

deal with reintegration of selected high risk sex offenders at the conclusion of their custodial sentence.⁶

New Zealand introduced restorative justice processes in 1989 with Family Group Conferencing. To address sexual offences and family violence matters, New Zealand in the year 2012 adopted restorative justice conferencing. Australia acknowledged restorative justice process through a legislation called 'Crime (Restorative Justice) Act, 2004. USA practiced restorative justice through a program of Offender Mediation.⁷

In Uganda, the local Council Courts have the power to grant remedies such as compensation, restitution, reconciliation or apology, as well as more coercive measures⁸.

In Thailand, restorative justice is based as per their culture, and it is referred as "harmony for social justice" a term that facilitates cultural acceptance.⁹ So,

This concept has not yet been entirely amalgamated into the Indian legal system, and the Criminal Procedure Code, till the enactment of POCSO Act 2012, was the only law which mandated restorative justice processes. The Cr.PC was amended in 2008 to include S. 357A, which provides for victim compensation. In POCSO, Act 2012 also provided for victim compensation u/s 33 (8), read with Rule 7(3) of POCSO Rules, 2012. This provision is discretionary in nature.¹⁰ There is a need to study the concept of restorative justice system and to analyze whether restorative justice system can fit into the Indian criminal justice system or supplement and create a balance of justice between the rights of the victims with the rights of the criminal offenders. And the Indian criminal justice system is based on the concept of every legal wrong there is a legal sanction. This is based on the adversarial system where the parties come before the Court/Judge to settle down the matter; resulting to either conviction or acquittal. Those who are proved guilty are thus the implementation of restorative justice system in India will mean compensatory form of settling criminal cases and this will dilute the very purpose of the criminal justice system. It will also have societal,

⁶ Daniel W. Van Ness, Karen Heetderks Strong, Restoring Justice: An Introduction to Restorative Justice, Fourth Edition. Anderson Publishing, Lexis Nexis. Pg 51

⁷ Tali Gal, Child Victims and Restorative Justice- A Need- Rights Model; Oxford University Press Inc. 2011, pg 127

⁸ Restorative Justice: An International Perspective available at <https://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminartwo/SiaLucio.pdf> last accessed on 25/5/2016

⁹ <http://www.justicereparatrice.org/www.restorativejustice.org/editions/2006/november2006/thailand>, last accessed on 1/06/2016

¹⁰ Section 33 (8) of Protection of children from sexual offences Act, 2012 and Rule 7(3) of Protection of children from sexual offences Rules 2012.

cultural and economic impact as from the societal and cultural view the mindset of the people cannot be changed with change in law. Societal stigma is attached to every individual (victim or offender). From economic point of view many will opt to settle matter through reparation thus, violating the rights of the victims as well affect the entire justice system and may encourage more criminal activities. Section 357A of the Cr.P.C. mandates the formulation of a compensation scheme in every state, in consultation with the Central Government. The restorative justice process, as understood in the western countries, hasn't entirely been adopted in India. The only aspect adopted within the Indian legal framework is that of victim compensation. For example under the Delhi Victims Compensation Scheme 2015, no upper or lower limit has been fixed in cases of compensation to be awarded to a minor. The amount of compensation is generally fixed by the courts at Rs. 2-3 lakhs. As per the Delhi Scheme, 80% of this money has to be put in a deposit, from which a withdrawal cannot be made before the attainment of majority. Further, even under POCSO, the decision to award compensation to victims is the sole discretion of the judge. In a poverty-ridden country, where children are often the target of sexual predators; a meager sum of Rs. 60,000 may not be enough to cover the costs of mental, physical, and psychological injuries till the attainment of majority so the restorative justice in India is faulty, and that only adopting the aspect of victim compensation dilutes the purpose of the concept. Main problem is to see how effective this process of restorative justice is for the victims and their families.

The question is whether restorative justice is beneficial to child victims as it is for adult? In what circumstances it is mostly beneficial, and are there cases in which restorative justice may actually harm children?

India is a country with a vast population of varied culture, language, religious belief and traditions. Every law enforced is based on the customs and traditions of the people. No law can survive or sustain if it contradicts the customs and practices of the people.

The criminal justice system in India too is based on the concept of societal welfare keeping in mind the mindset, customs and practices of the citizens at large. The advancement in all aspects of economic, social, political, technology and science has transformed the individual's behavior. The change has contributed much to the criminal acts that being committed by both adult and juvenile.

Here, emphasis shall be laid upon the crimes committed upon children with special reference to child sexual abuse. Children are most vulnerable to such acts as they physically,

emotionally and psychologically. As has been seen there are numerous crimes committed on a child specified under the IPC. The availability to seek such legal remedy of the child victim is a question as the criminal justice administration side tracks such cases and importance is given to other cases dealing with adults.

Adding to the scenario, what saddens is that majority of the sexual offences on a child are being committed by family members, relatives, friends and acquaintances. As such the following reasons can be identified as to why victims do not come forward to report such crime and seek legal aid and assistance:

- i. The personal nature of sex crime
- ii. Victims' anxiety about their identity becoming public
- iii. Victims' worry that they will not be believed if report the crime or be blamed for the offence
- iv. Victims' self-doubt or self-blame
- v. Victims' emotional ties to the offender, financial dependence on the offenders or concerns of what will happen to the offender
- vi. Fear about retaliation by the offender.

The current system of adjudicating and sentencing sex offenders exacerbates many of these problems. Therefore, socio-legal thinkers are of the opinion that a restorative approach could minimize the problems mentioned.

The criminal justice system in India does not appreciate a restorative justice system; it is more inclined towards a reformatory and retributive justice system. 'For every legal wrong there is a legal sanction' had been practiced and appreciated by the citizens and society, though the concept of restorative justice can be seen to be indirectly mentioned in cases of juveniles and under the Criminal Procedure Code with regards to compounding cases or compromise.

Based on the statistics of 2014 we can determine that crimes committed in the country have exorbitantly increased especially in offences like rape, sexual abuse, trafficking, sexual assault, kidnapping and abduction. The Delhi Gang rape case has created much discussion on the change in the criminal justice system by making the law more stringent and to punish juveniles who commit heinous crimes as adults. The recent amendment on the Juvenile Justice (Care and Protection) of Children Act has reduced the age of a child in conflict with law to 16 years with the objective to punish all those who commit crime above 16 years as

adults however; this also implies the restoration of the juvenile after completing 16 years of age.

The fear for such law and implementation of such justice is recidivism. There are many criminal cases pending in the Courts and everyday a new crime is committed and new offenders are added into the prison cells daily. This creates an environment within the prison where offenders can meet and mingle together thus, giving room for them to build up ideas and plans which often may be criminal in nature rather than reform of behavior. Thus, it is more likely that a criminal who has served in prison may relapse to criminal behavior.

Therefore, the idea of restorative justice system with regards to child sexual abuse will take away the victims' rights to seek justice. As it is already in existence where child sexual abuse are either left unreported or left unregistered and are pending in the court of law.

END NOTE

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