

TOWARDS A RESTORATIVE CRIMINAL JUSTICE SYSTEM: VICTIM OFFENDER MEDIATION

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The criminal justice system that has been adopted in India is modelled largely on the lines of retributive justice.¹ Our current system indulges in an exercise of quantifying crime in terms of monetary and physical punishment. As a result, the focus primarily is on the offender, disregarding the need for victim participation. Victims of crime, therefore, feel increasingly frustrated and alienated² as the criminal justice system represents prosecution by the State.

Braithwaite, an eminent scholar on the issue puts it rather innovatively, “*the State, under the guise of caring for its citizens, steals their conflicts and hands them over to the courts.*”³ The crime is against the *State* and State interests drive the process of doing justice. Victims of crime are left on the sidelines of justice, with little or no input and thus feel twice victimized – first, by the offender and second, by the disregard of their interests by the criminal justice system.⁴

In this context, the need for a dilution of the existing offender driven approach to construct a system more sensitive to needs of victims, should be addressed. This may be achieved by adopting the restorative justice paradigm, which has emerged to combat the failings of the retributive system, by its recognition of crime as being directed first and foremost against an *individual* and not the State. Victim-offender mediation (VOM),

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¹ Mark Umbreit characterises retributive justice as focusing on punishment. The restorative paradigm on the other hand, emphasizes the importance of elevating the role of crime victims and community members. It also stresses upon accountability, holding offenders directly accountable to the people they violate, and restoring the emotional and material losses of victims. It is in this sense that the term “*retributive system*” has been used in this paper. Mark S Umbreit, “Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment”, <<http://wcr.sonoma.edu/r1n1/umbreit.html>>, last visited 21st October 2004.

² Report of the Committee on Reforms of Criminal Justice System, Vol. 1, Government of India, Ministry of Home Affairs, at 75 – 78 (2003).

³ John Braithwaite (et al), “Restorative Justice and Civil Society”, 114 (2001).

⁴ supra n. 1.

a process that allows victims of crime to meet face-to-face with the offender to talk about the impact of the crime and develop a restitution plan, is the oldest and most empirically grounded restorative justice intervention.⁵ This model therefore allows interested victims the opportunity to meet their offenders in a safe and structured setting.

The goal of VOM is to hold offenders directly accountable and to impress on them the full impact of what they have done, while providing important support and assistance to victims. The idea of bringing together a victim of a crime and the person who committed that crime is based on age-old values of justice, accountability, and restoration.⁶ VOM is primarily *dialogue-driven*, with emphasis upon victim empowerment, offender accountability, and restoration of losses. This dialogue addresses emotional and informational needs of victims that are central to both the empowerment of the victims and the development of victim empathy in the offenders.⁷

It is important to note here that VOM differs from other forms of mediation in four significant aspects. Firstly, in VOM, the involved parties are not *disputants*. This model covers cases where one party has committed a criminal offence and has admitted to doing so, whereas the other has clearly been victimized. Therefore, the issue of guilt or innocence is not in question. Secondly, there is no expectation that victims of crime compromise or request less than what they need to restore their losses. Thirdly, VOM, unlike other forms of mediation, is not *settlement driven* and emphasises on *dialogue*. Lastly, the mediator's role is distinct from that in a mediation process; the responsibility falls on the victim and offender to arrive at a solution acceptable to both, with the mediator playing a minimal role. The process and the solution are thus both crucial.

⁵ *ibid.*

⁶ The principles of restorative justice are consistent with those of many indigenous traditions, including Indian, Native American, Hawaiian, Canadian First Nation people, Aborigines in Australia, and the Maori in New Zealand. These principles are also consistent with values emphasized by nearly all of the world religions, *supra* n. 1.

⁷ Mark S Umbreit refers to this "*dialogue-driven*" mediation as Humanistic Mediation. It is a nondirective style of mediation in which the parties primarily speak to each other with minimal intervention by the mediator. The mediator maintains an attitude of unconditional positive regard and concern for all parties while remaining neutral, Mark S Umbreit, "Creating a Safe, if not Sacred, Place for Dialogue", <http://www.ojp.usdoj.gov/ovc/publications/infores/restorativejustice/96517_gdlines_victims_sens/guide9.html>, last visited 21st October 2004.

As a general rule, VOM is used prior to sentencing, where a successful outcome can subsequently be used to justify leniency in the same. Cases are also referred to VOM after a formal admission of guilt has been accepted by the court, or after conviction, with the mediation being a part of the sentence or the term of probation, if the victim is interested.⁸ VOM is thus commonly not an *alternative* to more conventional sentences, but a *supplement* that allows greater participation, and potential for reduced sentences.

VOM is clearly not appropriate in all cases, as it may not be possible or plausible to bring victims of all types of crimes in direct contact with the accused, particularly in violent crimes. Consequently, a majority of cases handled by VOM are property offences and minor assaults. For young offenders and first or second time offenders, mediation through VOM may provide diversion from prosecution. In these cases, charges may be dismissed if the offender mediates an agreement with the victim and complies with its terms.

Some violent cases, however, are referred to VOM, although this is not commonplace. In a growing number of victim-offender programs, victims and survivors of severely violent crimes, including murder and sexual assault, find that confronting their offender in a safe and controlled setting, with the assistance of a mediator, returns the stolen sense of safety and control in their lives.⁹ Illustrations of these are instances when parents of murdered children have participated in VOM and have expressed their sense of relief after meeting the offender and communicating their grief.¹⁰ A study conducted in the United States of America found that a mediated dialogue session in a severely violent case such as a sniper shooting, was very beneficial to the victims, offenders, and community members or family members.¹¹

⁸ Where a defendant maintains a plea of not guilty in contemplation of a genuine defense - self-defense, diminished capacity, etc. - there is no place for mediation until such issues are resolved. Where a defendant maintains a pro forma not guilty plea only to preserve the possibility for plea negotiations, a restorative justice process may be appropriate. See Marty J.D Price, "Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders", <<http://www.vorp.com/articles/justice.html>>, last visited 21st October 2004.

⁹ *ibid.*

¹⁰ *supra* n. 1.

¹¹ *ibid.*

As for the situation in India, restorative justice finds little place in our criminal jurisprudence. Much of the progress made in the sphere of victimology is yet to pervade the penal mechanism in India. The reason for this is perhaps that the procedural law here does not provide much scope for these practices. The victim is still largely restricted to the role of a witness. The criminal justice system, as a means of formal social control, is still steeped in the retributive model, and centres on the State. This is the “vertical dimension model” of the criminal justice system,¹² which persists to a great extent in India, based on an outdated colonial model. Relief from this retributive focus appears in the form of provisions for compounding of offences. It is also important to note that we may well be in the midst of a shift in judicial articulation, insofar as reformation and rehabilitation are finding emphasis in judgments in recent times.¹³

There is undoubtedly a need to have new laws and institutions for the incorporation of restorative justice. A beginning had been made under the existing provisions of The Criminal Procedure Code, 1973 (CrPC). For instance, the compounding of offences under Section 320 of the Code has been provided in an effort to incorporate restorative justice into the prevailing system.¹⁴ Under this provision, the victim may opt to compound the case, thus providing an opportunity for the victim to effect a compromise or to mediate with the accused. This ostensibly brings the victim to the forefront. Though, it is required that the Court be satisfied with the terms of the proposed compromise or mediation, there is no guarantee that this will in fact be effectuated. That is to say, the compounding of offences need not necessarily result in mediation at all, and the victim may be left bereft of a remedy. This is particularly due to the fact that the victim and the offender are often not placed on an equal footing, with coercion

¹² S Muralidhar, “Rights of Victims in the Indian Criminal Justice System”, National Human Rights Commission Journal, Vol. 1, 2004 at 88.

¹³ Reform should be the dominant object of punishment, and during incarceration, every effort should be made to recreate the good man out of the convicted prisoner. Reformation and rehabilitation of a prisoner are of great public importance. The reformatory approach is now very much intertwined with the rehabilitative aspect, *State of Gujarat v. Hon'ble High Court of Gujarat*, AIR 1998 SC 3164 at 3172.

¹⁴ Under Section 320 of The Indian Penal Code (1860), the offences that may be compounded have been listed along with the persons by whom they may be so compounded. The section makes a distinction between offences for the composition of which, the permission of the Court is to be sought [Section 320(2)] and those for which such permission is not necessary [Section 320(1)].

and corruption being rampant. This renders the entire exercise a mere means to dispose off cases in the name of restorative justice, the result of composition being acquittal.

In the opinion of the authors, there is only one basic difference between the compounding of offences and VOM. While compounding results in an acquittal, VOM, being a supplement to the sentence, does not absolve the offender of his liability to the State. In the event the compromise remains unfulfilled in a case of compounding, the victim would be left remediless. Thus, the entire objective of restorative justice is defeated. In VOM, on the other hand, the non-observance of the restitution agreement by the offender will not leave the crime unaddressed, as the offender will still be liable to the State, and punishment will be exacted.

With regard to victim compensation, Section 357 of the CrPC provides for compensation that may be awarded, irrespective of whether the offence is punishable with fine and whether the fine is actually imposed.¹⁵ This payment by the offender to the victim as a consequence of the court's order may be viewed as a form of restitution. However, the above stated provision is invoked sparingly and inconsistently by the courts,¹⁶ due to a variety of reasons such as lack of awareness and indifference on the part of the judiciary.¹⁷

¹⁵ Under Section 357(1) of the CrPC when the Court imposes a sentence of fine or, one of which a fine forms a part, the Court may order that the whole or any part of it may be paid as compensation to the victims in certain circumstances. In addition, sub-section (3) of Section 357 provides that the Court may order the payment of such compensation even in the imposition of a sentence of which fine does not form a part.

¹⁶ In 1960-61, out of 182 cases of violence tried in Pune, compensation was awarded to the aggrieved party only in 13 cases. A study conducted in 1980 found that no compensation was given to victims of dacoit gangs, but limited ex gratia assistance was provided in about 15 percent of the cases; D R Singh, "Victimological Studies in India", Paper Submitted for the 11th International Symposium on Victimology, South Africa, (2003) <http://www.victimology.co.za/new%20papers/singh_3.doc>, last visited 21st October 2004.

¹⁷ Kumaravelu Chockalingam, "Evaluation of the Implementation of the Victims Assistance Fund in Tamil Nadu", <http://www.aqpvc.ca/diffusion/abstracts/abc_a/chockalingam_nk.html>, last visited 21st October 2004. The Government of Tamil Nadu created a Victims Assistance Fund in 1995 under which for the first time in India, the State Government has allocated ten million rupees to provide relief to three categories of victims of violent crimes viz., dependents of murder victims, victims of rape and grievous injury.

Further, the implementation of this provision is dependent entirely on the order of the court to that effect.¹⁸

This provision merely seeks to appease the victim by providing monetary relief, while continuing to exclude the victim from playing any significant role. Therefore, the redressal of individuated grievances does not feature to the same extent as it does in VOM. However, in so far as some sort of restitution is provided to the victims, this provision pays attention, although in a pecuniary manner, to the victim, and is still a step towards a restorative paradigm.

As a progressive step, the Malimath Committee Report,¹⁹ has advocated the rights of the victim. It mentions the need to formulate a witness protection programme,²⁰ re-classify offences,²¹ and involve the victim in all stages of the trial.²² Another notable issue addressed by the Report is that of compensation to victims.²³ However, the Report does not empower the victim outside of the retributive system.

Although the Report remains silent on issues such as restorative justice and VOM, the Committee has recommended that the offence of cruelty under Section 498A of The Indian Penal Code, 1860 (“IPC”) be made compoundable and bailable in order to facilitate mediation between the wife and the husband.²⁴ However, the Committee’s insistence on reconciliation in this matter raises concern. A large percentage of women who approach the state or even non-governmental organizations for help are sent back into continuing violent situations following a process of “mediation” between husband and wife, in which the woman is at a severe disadvantage because of the

¹⁸ In *Hari Singh v. Sukhvir Singh*, (1998) 4 SCC 551 at 558, the Supreme Court had to exhort the criminal courts to use this provision since “*this power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system.*”

¹⁹ supra n. 2.

²⁰ ibid. at 284.

²¹ ibid. at 181, 289.

²² ibid. at 75-89.

²³ ibid. at 80-81.

²⁴ ibid. at 191, 290-291.

patriarchal nature of the process. The Committee's recommendation would not only condone but also encourage such solutions. Thus, in our opinion the one prescription for mediation made by the Report seems a completely imprudent choice.²⁵

Clearly, VOM is not a viable option for all offences. Prior to adopting VOM into the present system, a classification of offences to which it will be applicable, is imperative. As it has already been established that the only flaw in the current provision for compounding under the CrPC lies not in its substantive, but its procedural aspect, VOM may be applied to the same set of offences set out in Section 320 of the IPC, 1860. The authors are of the opinion that compounding of offences was an attempt towards the incorporation of restorative justice into the present system. Thus, the legislative application of mind with regard to classification of compoundable offences would suffice with regard to VOM as well. However, it is recommended that while referring cases to VOM, the Court should be allowed to exercise its discretion in determining whether the existence of power relations between the victim and the offender would adversely influence effective meditation.

In conclusion, restorative justice attempts to draw upon the strengths of both the offenders and the victims, rather than focusing upon their weaknesses. 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. Thus, it is the empowerment of affected stakeholders on both sides that is the crucial feature of restorative justice, the absence of which causes both conventional and retributive justice systems to fail.

²⁵The authors concur with Prof. Baxi's opinion in his critique of the Committee's reference to Section 498A as a "*heartless provision*" since it makes offences against married women non-bailable and non-compoundable. To quote Prof. Baxi, "*Curiously the Report assumes that for the Indian woman marriage is a sacred tie even in the context of matrimonial and domestic cruelty and violence, and the creation of the offence makes her fall from the frying pan into the fire. It goes so far as to aver that a less tolerant and impulsive woman may lodge an FIR even on a trivial act!*", Upendra Baxi, Introductory Critique in "The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights", 38 (2003). Also available at, <<http://www.interights.org/news/AI%20India%20Malimath%20Report.pdf>>, last visited 6th February 2005.

In light of the existing system and its inherent deficiencies with regard to victim participation, the situation calls for a merger of the “*vertical criminal justice system*” with a “*horizontal line of justice*”.²⁶ Although the terminology used by S Muralidhar has been borrowed, our suggestion is in contrast to his views in so far as he suggests the *replacement* of the vertical system by the horizontal system whereas we suggest VOM as a *supplement*, or at the most a combination, and not a replacement. where the penal mechanism is to be supplemented by a mediation system, empowering the victim within the retributive paradigm. The goal envisaged by the restorative paradigm may be achieved by inducting VOM into the existing model, thus furthering the interests of society without prejudicing the needs of the victim.

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²⁶supra n.12. Although the terminology used by S Muralidhar has been borrowed, our suggestion is in contrast to his views in so far as he suggests the *replacement* of the vertical system by the horizontal system whereas we suggest VOM as a *supplement*, or at the most a combination, and not a replacement.

8. Upendra Baxi, Introductory Critique in “The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights”, Amnesty International, India, (2003) at
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