ABSTRACT

Restorative justice is not a new concept which has emerged during recent years. It was in existence in various ancient civilizations of the world such as Babylon and Sumerian civilizations. It was obliterated from the scene only when kingship began to raise its head and took away the function of law and order from the community. Earlier, the system of delivering justice and resolving any matter was in the hands of the community which involved both the offender and the victim. But after kingship, victim was replaced by the State and the parties to a crime reduced from victim, offender and community to State and offender alone. The paper is a brief study about the historical backdrop of the topic, its wider applications in Indian Judicial System and focuses on some of the international law and practices prevalent across the borders. It is mainly a doctrinaire study and has been written taking the help of the available text and resorting to self-interpretation as far as possible. Some of the terms such as mens rea and actus-reus have not been cited as it was a matter of general understanding among the legal scholars. The findings of the paper are that in context of developing countries like India and many under developed countries, the idea of complete implementation of restorative justice is not feasible owing to lack of resources as well as the lack of proper understanding of the community. So, the best possible solution at hand is to use restorative justice system in conjunction with the traditional system of justice delivery system where there will still be some place for prison and strict punishment depending upon the gravity of the offences.

1 Assistant Professor, University of Delhi
INTRODUCTION

The traditional pattern of criminal justice system involves the State and the offender since every crime is an offence against the State. But this system leaves behind other components which are either the causes or consequences of the crime. Every criminal activity involves three elements viz, the victim on whom the crime has been committed, the offender who has committed the crime and the community which gets effected by the consequences of the act. The State takes over the role of maintaining law and order in the society and hence handles the impact factor on the community at large by punishing the offender but in all these process, the victim is left alone. Every criminal act has two elements- Mens Rea and Actus Reus. There are several provisions in the penal code which classifies criminal acts into three categories where both mens rea and actus reus are mandatory for commission of a crime, acts where only actus reus is enough and acts where mens rea alone can attract penal charges. With respect to mens rea and actus neither Reus neither the court nor the State is concerned about the factors and circumstances which would have led to the commission of the offence. There are two possibilities in this regard. A victim may be an offender and an offender can be a victim too. For example, a person A commits an offence against person B. A gets the punishment but neither accepts his acts nor feels the guilt. This non-realization of guilt on the part of A leaves B unsatisfied. So, there are possibilities that B would do something to satisfy his grudge. He can probably become a potential criminal to settle his score afterwards. And this circle will continue despite of all the laws and regulations provided for curbing criminal activities. The traditional pattern seems to be insufficient for maintaining the long-term law and order issues. Hence, the role of restorative justice where the involvement of the victim, offender and the community is duly ensured becomes inevitable.

4 Howard Zeher, The little book of restorative justice. Available at: https://books.google.co.in (Accessed on 12 November 2016)
HISTORICAL BACKGROUND

Restorative justice has a long historical background\(^6\) which was there in most part of the world even in the countries which are considered to be the remotest and the most backward of all. First let us take the example of the western countries. Earlier in these countries the criminal act prima facie was not considered as an act against the State but was more victims centric.\(^7\) The elements of concern were the victim and his family along with the offender and his family. The offender and his family were asked to have a conversation with the victim’s family so that the matter can be resolved in an equitable manner and the cycle of continuation of crime can put to halt.\(^8\) This was done so that neither the victim nor any members of the victim family resort to other means to satisfy their grudge against the offender. Resorting to revenge is often practiced today also.\(^9\) So the relevance of restorative justice becomes pertinent. The main emphasis was on the taking of responsibility of the offence by the offender so that the victim does not face much harassment and the victim can have a sigh of satisfaction that the offender is guilty of his act.\(^10\) But that does not mean that the offenders could be allowed to go. This was accompanied by punishment depending on the gravity of the offence. Punishment can be in the form of fine, continuous reporting to the officer, or doing work for the crime victim etc.\(^11\) Some of the famous penal code which had the provisions of restorative justice includes the Code of Hammurabi\(^12\) which provided for restitution of property offences, Sumerian Code provide for restitution of violent offences, Roman law of 12 tables\(^13\) provided for aggravated restitution in case of theft.\(^14\) In all these

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\(^8\) Ibid


famous codes, restorative justice meant maintaining the status quo which has been disturbed by the criminal act. They would give back the property to the original owner by aggravating the amount of fine depending on the gravity of the crime. With respect to the offences against the human body, the provision under the Hammurabi code was an eye for an eye and a tooth for a tooth. This was done to make the offender face the same suffering which has been inflicted on the victim, thereby placing them on the same footing. But this was not justice because the offender’s loss cannot be the gain of the victim. Neither the justice is done to the victim nor to the offender. Even in the pre-colonial era, African societies had the provision for restitution where they focused more on the victim rather than inflicting the punishment on the offender so as to maintain the long-term order of the society. The remedy was more in the form of compensation than on corporeal punishment.

Restitution and restoration though has been used interchangeably but the two are different. Restoration is the process of bringing an object back to its original position while restitution is the process of making compensation for the losses. Though the literal meaning of both the words appear to be different, the intent of the two words in the world of criminology binds them together. Both the process intends to provide remedy to the victim either by restoring the loss done or through compensation. But things changed drastically after the institution of kingship started fixing its roots in the society by uprooting the earlier concept of justice carried on by the society. Rulers became the representative of the people and replaced the status of the victim. Now any harm done to any person was considered as an offence against the State. The State became concerned about maintaining law and order and hence started inflicting severe punishment on the offender to deter the other offenders. But in all this process, no concern was shown to the victim and to his/her physical or mental

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17 Difference between restitution and restoration Available at: http://wikidiff.com/restitution/restoration (Accessed on 22 November 2016)
20 *Ibid*
status, neither much attention was paid to reform the offender apart from the deterrence policy followed by the State. Restitution was replaced by the imposition of financial sanction and corporeal punishment. The fines which were imposed on the offender were to be deposited in the government treasury and the victim got nothing. The victim was completely ousted from the whole judicial and justice delivery system. The only parties to the criminal justice delivery system were now confined to the State and the offender and the victim was left to face the mental and economical harassment of the court proceeding and its status from being the prime party to the act was reduced to a witness to the crime. The other development which emerged in the process was that the criminal justice system became more future oriented rather than repairing the past harm. Repairing the past harm means that both the offender and the victim needs to be restored at their original position. Restoring the victim as well as the offender is the part of the restorative justice system where the victim is actively involved in the process so that she/he can know the reason for the crime committed on her/him. For a victim, it becomes very necessary to know the reason for the crime committed on him apart from the punishment which the offender gets. At times after knowing the reason of the crime which has been done out of some need or compulsion on the part of the offender, the victim himself changes his mind and recommends for rehabilitation of the offender so that he becomes a good person and does not get spoiled in the company of the hard-core criminals.

RESTORATIVE JUSTICE

22 Restitution and Reconciliation David B. Hershenov Available at: https://www.acsu.buffalo.edu/~dh25/articles/RestitutionandReconciliation.pdf (Accessed on 22 September 2016)
26 Howard Zeher, The little book of restorative justice revised and updated. Available at: https://books.google.co.in (Accessed on 26 October 2016)
27 Ibid
Tony Marshall defines restorative justice as the process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the offence and its implications for the future.\(^{29}\) The above mentioned definition takes into account all the parties to the offence into consideration to resolve the issue collectively as far as possible in a cordial manner but fails to take into account the background of the commission of the crime which again is a very important factor for restoration of the victim, offender and the community. The future consequences and the repetition of a crime can only be resolved if the history of the criminal and the factors leading for the commission of the crime is thoroughly studied. Even though all the stake holders in a criminal act are involved to resolve the matter, no permanent and far reaching effect could be reached out unless and until an attempt is made to restore every stakeholder to its original position. Martin Wright comes out with somewhat revised definition of restorative justice.\(^{30}\) He proposes that the new model of restorative justice should be one in which the response to crime should be not to add to the harm caused by imposing further harm on the offender but to do as much as possible to restore the situation. The community offers aid to the victim; the offender is held accountable and required to make reparation. Attention would be given not only to the outcome, but also evolving a process that respected the feelings and humanity of both the victim and offender. The definition proposed by Martin Wright takes into account all the important components of restorative justice. It takes into account the stakeholders of a crime along with the concern for both victim and the offender.

**COMPONENTS OF RESTORATIVE JUSTICE**

Under the traditional criminal justice system, the victims, offenders and community members felt that the justice delivered did not consider their particular grievances.\(^{31}\) Henceforth, restorative justice system takes into account all the loopholes of traditional system and gives proper attention on all the vital elements for complete justice. The three important components of restorative justice are dealt as below:


\(^{30}\) Ibid

\(^{31}\) Howard Zeher, *The little book of restorative justice.* Available at: https://books.google.co.in (Accessed on 22 October 2016)
Victim\textsuperscript{32}-The victim on whom the crime is committed is the most effected party to the crime. But despite of victim being an important and effected party and instead of taking their views into concern, the State replaces the victim with its authority. The victim is made to suffer a lot in the proceeding of the court.\textsuperscript{33} Instead of paying heed to the sufferings of the victim, the position of the victim is reduced to that of a witness where she can be used to prove the offence of the offender and the State can impose the requisite punishment.\textsuperscript{34} The State serves its purpose of punishing the offender and deter the other possible criminals.\textsuperscript{35} But in all these process, no heed is paid to the mental, physical and emotional sufferings of the victim neither the offender is made to realize and take the responsibility of the act. This has future repercussions in the form of killing of the victim and frightening the other witness so that no one can prove that the act is done by him. One of the most important steps under the restorative justice process is to make the offender admit to some level of responsibility for the offence and to acknowledge the wrong doing.\textsuperscript{36} This in turn leaves some room of relief for the victim when he/she realizes that the offender is actually admitting his deed and they are not unnecessarily harassed to prove the guilt of the accused. Involvement of the victim serves the following purposes. First is the answer to all the questions related to the commission of the crime such as why the offence has been committed and what changes did the act brought to the life of the offender apart from destroying the life of the victim.\textsuperscript{37} They need real information about the crime ranging from planning about the crime to its actual implementation.\textsuperscript{38} They do not want to rely on the mere speculations which the prosecution and the police have derived from circumstantial evidence and on the version of other

\textsuperscript{32} Section 2 (wa)of the Code of Criminal Procedure, 1973 defines “victim” as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir. Available at: https://indialawyers.wordpress.com/2009/06/23/changes-in-crpc-for-the-betterment-of-victims/ (Accessed on 29 September, 2016)


\textsuperscript{37} Howard Zeher, The little book of restorative justice. Available at: https://books.google.co.in (Accessed on 27 November 2016)

\textsuperscript{38} Ibid
witnesses.\textsuperscript{39} With relation to the victim, certain approaches have emerged which work in the direction of providing relief to the victim. Such approaches are as follows:

i. **Victimology**\textsuperscript{40}: Victimology is the study related to the causal relationship related to the victimization\textsuperscript{41}. Victimology includes the whole process ranging from events and causes that led to the occurrence of the crime, the experience of the victim at the time of the commission of the crime and after the commission and the response and behaviour of society with the victim. There are certain specific terminologies which are used under the umbrella of victimology to provide relief to the victim. These include among others concepts of compensation, restitution, victim recovery and victim offender mediation.\textsuperscript{42} There is a slight difference between compensation and restitution.\textsuperscript{43} Compensation is paid to the victim by the State and in restitution the amount to compensate for the loss is paid by the offender himself.

Victim recovery again pertains to the recovery of victim. A person has different mental conditions at different points of time. Similarly, a person on whom the crime is committed holds a different functionality and mental status before the commission of the crime but after the commission the functionality and the mental status gets affected.\textsuperscript{44} Victim recovery is about restoring the victim in his/her previous mental, physical and psychological status. Though it is very difficult to restore them completely to normalcy but their proper treatment, justice, admission of guilt by the offender, the support of the family and the community can help regain them their previous state of mind. There is one incident in which Justice Kelly of Supreme Court of South Australia in a case related to the offence of rape called up the victim and told her gently that whatever happened was not her fault so she should not feel that she has done anything wrong.\textsuperscript{45} These words laid a great impact on the victim and she went away

\textsuperscript{39} Ibid

\textsuperscript{40} Victimology, branch of criminology that scientifically studies the relationship between an injured party and an offender by examining the causes and the nature of the consequent suffering. Victimology WRITTEN BY: Andrew Karmen, Encyclopedia Britannica. Available at: https://www.britannica.com/science/victimology (Accessed on 16 November 2016)

\textsuperscript{41} Unwarranted singling out of an individual or group for subjection to crime, exploitation, tort, unfair treatment, or other wrong Available at: http://www.businessdictionary.com/definition/victimization.html (Accessed on 6 November 2016)

\textsuperscript{42} John P. J. Dussich, VICTIMOLOGY – PAST, PRESENT AND FUTURE. Available at: www.unafei.or.jp/english/pdf/RS_No70/No70_12VE_Dussich.pdf (Accessed on 15 November 2016)


\textsuperscript{44} IMPACT OF CRIME ON VICTIMS Eidell Wasserman and Carroll Ann Ellis Available at: http://www.cccvs.state.vt.us/sites/default/files/resources/VVAA%20Ch%206%20Impact%20of%20Crime.pdf (Accessed on 22 November 2016)

crying. After some time, the victim’s parent told the court that the words had a great psychological impact and she is recovering soon from the trauma of the crime.\textsuperscript{46} Justice Kelly afterwards in a conference stated that there is need for criminal law practitioners and justice providers to not only deliver justice but to act as healers as well.\textsuperscript{47} Victim-offender mediation is a process whereby either a mediator alone or accompanied by the families, community and other members related to crime are called on a platform to solve the conflict and victim and offender are given a platform to discuss over the grudges they have on each other so that they can overcome their internal and external conflict and find answers to their questions.\textsuperscript{48}

ii) Compensatory Jurisprudence\textsuperscript{49}: Compensatory jurisprudence is that part of the justice delivery system which focuses more on paying monetary compensation to the victim rather than to punish the offender alone. This system takes into consideration the damage faced by the victim rather than the damage to the law and order of the State alone.\textsuperscript{50} It tries to maintain equilibrium between the authority of the State and the sufferings of the victim. In India, the judiciary has tried to provide compensation to the victim in almost all the categories of law ranging from law of torts, contract, constitution, labor law to the penal code.

a. Offender\textsuperscript{51}: Restorative justice efforts have been motivated mainly by a desire to work with offenders in a more positive manner.\textsuperscript{52} It may primarily become a way to deal with offenders. A desire to work with offenders is again motivated by the reasoning that people are not born criminals but are made to act in a criminal manner either due to some psychological factors or compelling circumstances. This is in particular reference to criminal act such as rape\textsuperscript{53} and other women related offence\textsuperscript{54} where the offender also needs some help. In case

\begin{itemize}
  \item \textsuperscript{46} Ibid
  \item \textsuperscript{47} Ibid
  \item \textsuperscript{48} John P. J. Dussich, \textit{VICTIMOLOGY – PAST, PRESENT AND FUTURE}. Available at: www.unafei.or.jp/english/pdf/RS_No70/No70_12VE_Dussich.pdf (Accessed on 7 November 2016)
  \item \textsuperscript{49} Meaning of compensatory jurisprudence Available at: https://www.scribd.com/doc/315770397/compensatory-jurisprudence-notes (Accessed on 8 November 2016)
  \item \textsuperscript{50} Compensatory jurisprudence Available at: https://www.scribd.com/doc/315770397/compensatory-jurisprudence-notes (Accessed on 22 November 2016)
  \item \textsuperscript{51} Definition of offender- A person who commits an illegal act Available at: https://en.oxforddictionaries.com/definition/offender (Accessed on 19 November 2016)
  \item \textsuperscript{52} Howard Zeher, The little book of restorative justice. Available at: https://books.google.co.in
  \item \textsuperscript{53} Section 375 of Indian Penal Code defines rape as: A man is said to commit “rape” if he—(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions: (1) Against her will. (2) Without her
\end{itemize}
the act has been committed out of revenge then proper psychological treatment needs to be
given to the offender and if it has been committed due to some mental illness such as lust
then the offender needs a proper medical treatment. The attitude of having a belief on the part
of the offender that whatever they have done is to teach a lesson to the victim or to show their
superiority is very dangerous and cannot be cured by punishment alone. Even if the offender
has been punished, he holds the belief that he would have not been fallen into trap if the
victim has not taken the matter to the police or the court. There have been instances where
after coming out from the prison the offender has that revenge in mind to teach a lesson to the
victim and the vicious circle of commission of the crime continues. So, it becomes
inevitable that offender should also be taken into consideration for permanent elimination of
the conflict.

b. Community:  
The involvement of the community is yet another vital component of
restorative justice. This is so because both the victim and the offender come from a society.
The after effects of a criminal act are often aggravated by the naming and shaming by the
community. Often after the crime, a sense of fear prevails in the society which also needs to
be settled down. It also affects both the victim and the offender if either of them are
shamed. The naming of the offender discourages the victim and glorifies the act of the
offender which in turn compels the victim to take deadly steps against the life. Henceforth the
involvement of the community becomes all the more important to show right direction to
both the victim and the offender. With reference to India, this responsibility has been
overtaken by the panchayat and in the most perverted form by the khap panchayat.

54 Chapter III Offences against women: Sensitivity, Modesty and Sex. Available at:
55 Restorative Justice in Context, edited by Elmar G. M. Weitekamp, Hans-Jürgen Kerner Available at:
https://books.google.co.in/books?id=1135999309 (Accessed on 30 November 2016)
56 Community is defined as society at large. Available at: https://www.merriam-webster.com/dictionary/community
57 RESTORATIVE JUSTICE: THE ROLE OF THE COMMUNITY by Paul McCold, Ph.D. available at:
www.personal.kent.edu/.../RESTORATIVE%20JUSTICE%20THE%20ROLE%20OF. (Accessed on 19 December 2016)
Community: The community has been playing a very significant role since long. During ancient times, the institution of Sabha and Samiti played key role. While Sabha was the group of effluent persons such as noble and clergy. The samite consisted of the commoners and its main function was to convey the grievances of the people to the king. During British rule, the jury system was introduced in the Indian judiciary system. The people use to send a list of persons who in their opinion were best suited to perform the duties and then they in turn were appointed as jurors. But it was made sure that they are not biased and deliver a favorable judgment. If the court had the opinion that the verdict of the jury is biased then it can report to the high court of the same and then the case will be heard by the high court. In Indian context the famous case of K.M. Nanavati v. State of Maharashtra, the local newspaper owned by the Parsi community to which the accused belonged influenced the jury and henceforth led to the biased opinion of the jury in favor of the accused. This was the last nail in the coffin with regard to the abolition of jury system in India.

Panchayat: Justice in rural areas was delivered by a group of person usually five in number headed by a person known as Sarpanch to provide justice in village related affairs. But this also got contaminated owing to the influence of the effluent people in the community. The dominant class use to commit atrocities on the weak and poor people and got the decision in their favor. Due to all this the faith of the general public dissuaded from the justice delivered by the Panchs. The case of Phulan Devi is a glaring example of the failure of justice system delivered by the panchayat.

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59 Available at http://hssthistory.blogspot.in/2010/11/sabha-and-samiti-sabha-and-samiti-were.html (Accessed on 1 October 2016)
64 Definition of panchayat: a village council in India; a former group of five influential older men acknowledged by the community as its governing body; an elective council of about five members organized in the republic of India as an organ of village self-government. Available at: https://www.merriam-webster.com/dictionary/panchayat
65 Remembering the Bandit Queen: 10 things to know about Phoolan Devi Looking back into the life of the legendary Phoolan Devi By Mriganka Sen, New Delhi, Available at:
Khap panchayat: The recent trend of administering justice in the villages particularly in north India has been taken up by a new institution which is not constitutionally approved. It is known as the khap panchayat. Khap panchayat is the union of a few villages, mainly in north India though it exists in similar forms in the rest of the country. Lately they have emerged as quasi-judicial bodies that pronounce harsh punishments based on age-old customs and traditions, often bordering on regressive measures to modern problems. Though as part of the wide perspective of restorative justice, community involvement is there but the traditional and dictatorial attitude of the khap adds to the pain of the victim and does not serves the purpose for what justice is meant for. The atrocities by the khap can be seen from the example mentioned here. A Dalit girl in Haryana committed suicide after she was allegedly gang raped by four youths. Instead of condemning the incident, the khap said girls should be married off early so that rapes can be avoided. The khap has had nothing to say about how it would discipline the perpetrators in rapes.

WIDER PERSPECTIVE OF RESTORATIVE JUSTICE IN INDIA

a. Law of Torts Under the law of torts, the cases in which the judiciary adopted the victim centric approach along with compensatory jurisprudence are as follows: i) Bhim Singh v. State of Jammu and Kashmir: In this case the petitioner was restrained from participating in the proceedings of the State legislative assembly. Again, the court provided compensation for the violation of right of a legislator to participate in the legislative proceedings. ii) N. Nagendra Rao v. State of Andhra Pradesh: In this case, the court held that the State is vicarious liable for the acts of its servants when the goods of the petitioner was spoiled in the
custody of the police. The court ordered the State to compensate for the losses done to the petitioner.73

b. Contract Act74: Under the law of contract there are provisions for restitution where the parties to the contract are restored to their original position in context of breach of the contract. Section 65 of the Indian Contract Act, 1872, states that “When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it.”75

c. Indian Constitution76: There are certain case laws under the Constitution also which provides for a victim centric approach. Though restorative justice is about the combination of trio viz. victim, offender and the community. But since victim has been neglected for long, it is obvious that more efforts has been made to bring victim into focus of justice delivery system. The concept to victimology and compensatory jurisprudence has emerged to provide relief to the victim and not to establish the superiority of the State. In this regard the famous case of Chairman Railway Board v. Chandrima Das77, the apex court held that Article 21 which is the right to life and personal liberty extends national as well as foreigners and hence provided compensation to the rape victim who was a Bangladeshi national.78 One of the drawback which has persisted since long and has still not been cared for is the restoration in case of violation of fundamental rights. The State though takes note of the violation of fundamental rights which poses a threat to the life of the individuals but do not have the same attitude when it comes to providing relief to the victim whose other fundamental rights which are not so serious in nature are violated. The victim is again reduced to the position of a witness to prove the violation and assert the authority of the State as the protector of fundamental rights.79 Whatever penal or financial sanction are imposed are either to put the offender behind the bars or to benefit the State and the victim does not fall anywhere in this

74 The Indian Contract Act, R. K. Bangia, Allahabad Law Agency,
78 Ibid
whole process. Apart from this, there has been a huge range of cases decide by the Supreme Court which has provided appropriate relief to the persons whose rights has been violated by the acts of either the State directly or through the servants of the government. The famous cases of Rudal Shah v. State of Bihar\textsuperscript{80} and PUDR v. Police Commissioner\textsuperscript{81} (1989) have been decided to provide relief to the dependents of the victim by paying appropriate compensation along with punishing the offender.\textsuperscript{82}

d. **Criminal Law**\textsuperscript{83}: Under the penal code, the recent attitude of the judiciary has been to assign the fines imposed on the offender not in the treasury of the State but to give the same to the victim so that this can be used for the benefit of the victim and her treatment. This approach has been mainly towards women related offences such as victims of acid attack and rape. The code of criminal procedure comprises of certain provisions which have that tone of restorative justice. But then also the community has not much role to play rather the victim and the offenders are encouraged to arrive at an amicable solution. Such provisions are as follows:

e. **Plea Bargaining**\textsuperscript{84}: Chapter XXI of the code of criminal procedure provides for plea bargaining. It means that the offender in lieu of certain concessions from the prosecution pleads that he is guilty of the charges put against him. The outcome is that the time of the prosecution is saved in proving those charges and both the victim and the offender are saved from lethargic process of the court. The other benefit is that the offender will be put to lenient punishment if he had accepted his guilt or otherwise he had to face the same amount of punishment if proved after trial. This has certain exceptions also such as no plea bargaining is allowed if the sentence of imprisonment is more than 7 years, crime is committed against the women or a child below 14 years of age.\textsuperscript{85}

\begin{itemize}
  \item \textsuperscript{80} Rudul Sah vs State Of Bihar And Another on 1 August, 1983. Equivalent citations: 1983 AIR 1086, 1983 SCR (3) 508. Available at: https://indiankanoon.org/doc/810491/ (Accessed on 16 October 2016)
  \item \textsuperscript{81} Peoples’ Union For Democratic ... vs Police Commissioner, Delhi ... on 13 January, 1989
  \item \textsuperscript{82} History of compensatory jurisprudence Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/281819/9/09_chapter%202.pdf (Accessed on 22 October 2016)
  \item \textsuperscript{83} The word criminal law has been used here in context of the text comprising the Indian Penal Code and the Code of Criminal Procedure which consists of certain provisions for victim’s relief.
  \item \textsuperscript{85} Plea Bargaining in Indian Legal System Available at: http://www.legalservicesindia.com/article/article/plea-bargaining-in-indian-legal-system-1836-1.html (Accessed on 26 October 2016)
\end{itemize}
f. Compoundable Offences\textsuperscript{86}: Section 320 of the code of criminal procedure provides for compromise on the initiative of the victim and cannot be initiated on the part of the offender as per his convenience. This is a prerogative in the hands of the victim alone. There are two categories for offences being compounded, one is with the permission of the court and the other can be compounded by the victim alone and there is no need to take the permission of the court. Offences which are of more severe nature needs permission of the court for compounding whereas offences which are not that severe can be compounded by the victim.\textsuperscript{87}

g. Compensation\textsuperscript{88}: Section 357 of the code of criminal procedure\textsuperscript{89} provides for order to pay compensation by the court. It states that when a court imposes fine as the mode of prescribed punishment for a particular offence, then the court may order the fine to be paid to the victim for defraying the expenses incurred in prosecution or as a compensation for the loss caused to the victim due to the offence. The list of offences which caused loss to the victim covers both offences related to property and offences against the human body.\textsuperscript{90} The other case is that if there is no fine prescribed for the said offence, then also the court can order the accused to pay compensation to the victim to compensate for the loss the victim had due to the criminal act of the offender.\textsuperscript{91}

**RESTORATIVE JUSTICE: THE SOLE REMEDY?**

There are two possible solutions to bring all the stakeholders of a criminal act on a common platform. First, traditional criminal justice system to be replaced by the restorative justice and second, a system which has an element of both traditional and restorative systems. Restorative justice no doubt has an alternative framework for thinking about wrong doing but


\textsuperscript{87} Compoundable Offences Available at: http://www.lawyersclubindia.com/forum/Compoundable-Offence-18609.asp (Accessed on 22 November 2016)

\textsuperscript{88} Compensation means indemnification; payment of damages; making amends; that which is necessary to restore an injured party to his former position. An act which a court orders to be done, or money which a court orders to lie paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person dignified may receive equal value for his loss, or be made whole in respect of his Injury. Available at: http://thelawdictionary.org/compensation/ (Accessed on 30 December 2016)

\textsuperscript{89} Section 357 of the code of criminal procedure Available at:https://indiankanoon.org/doc/1705664/ (Accessed on 2 October 2016)


\textsuperscript{91} Ibid
this alone cannot be sufficient to maintain the law and order and solving the complicated issues pertaining to crime at the same time.\textsuperscript{92} So, for the time being what we need is the combination of both unless and until the society is developed to that stage to involve them in critical questions of crime. This is particularly with reference to the under developed and developing societies of the countries where there is still the tendency of blaming the victim. The mindset of the people cannot be changed overnight and for this we need a change in the societal as well as the educational system. Until then, it would be more appropriate to work according to what is best in the interest of the society and the victim as a whole.\textsuperscript{93} Hence, it is not an alternative to the prison system also and can be used in conjunction with prison sentence. Restorative justice also is not primarily about forgiveness or reconciliation. It provides a context where either or both might happen. Primarily, this is entirely upon the participants that they want to opt for which of the available options without any element of force or pressure.\textsuperscript{94} With reference to use of restorative system along with the traditional criminal justice system, we have following articles of international law in hand. Article 6(2) of International Covenant on Civil and Political Rights states that death penalty can be imposed for the most serious crimes only and in pursuant to a final judgment rendered by a competent court. Article 6(6) of the same covenant states that nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant, but at the same time Article 7 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**INTERNATIONAL LAW AND PRACTICES**

**England:** Several reformers raged series of movements and proposals to call for the introduction of reformative justice in the justice delivery system. Amongst them Henry Fielding, John Howard and Jeremy Bentham called for segregation of offenders from their criminogenic environments such as doctors would quarantine persons with a contagious disease. Like good doctors, they proposed a treatment for those offenders that would focus on correction of the mind.

\footnote{\textsuperscript{92} Howard Zeher, *The little book of restorative justice*. Available at: https://books.google.co.in (Accessed on 22 November 2016)}\footnote{\textsuperscript{93} Ibid}\footnote{\textsuperscript{94} Ibid}
United States of America: In USA like-minded reformers convinced policy makers to implement this rehabilitative model of sentencing. Reformers in Philadelphia, aghast at the cruelty of the contemporary punishment and jail conditions and stirred by the belief that criminals were the products of bad moral environments, succeeding in persuading local officials to turn the walnut street jail into what they called a penitentiary. In 1787, the preamble to the constitution of Philadelphia society for alleviating the miseries of public prison clearly stated their intention not only to save offenders from dehumanizing punishment but also to rehabilitate them. As a result of the movements and the literary works in favor of restorative justice, some of the governments have come up with suitable legislation to include restorative justice in their justice delivery mechanism. For example, USA and Canada have victim-offender reconciliation program, New Zealand has family or community group conferencing and India has the alternate dispute resolution mechanism to deal with the victim-offender approach to solve the problem.

Universal Declaration of Human Rights (UDHR): UDHR in article 3 states that everyone has right to life, liberty and security of person and it does not anywhere mention that offender can be deprived of his security in case he has committed any offence. The declaration in the preamble itself mentions that human right is available to all. Further Article 5 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6(4) of International Covenant on Civil and Political Rights Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. One of the step towards restorative justice finds its glimpse in Article 10(2) International Covenant on Civil and Political Rights which states that the accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvinced persons. Article 10(3) states that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Article 14 of the above covenant is with regard

95 Penitentiary- a place of penitence i.e. an action of feeling or showing sorrow and regret for having done wrong Available at: https://www.vocabulary.com/dictionary/penitentiary (Accessed on 8 November 2016)
to the community which states that the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century (2000) advocated the “development of restorative justice policies, procedures and programs that are respectful of the rights, needs and interests of victims, offenders, communities and all of the parties”.  

In August 2002, the UN Economic and Social Council adopted a resolution calling upon Member States implementing restorative justice programs to draw on a set of Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. In 2005, the declaration of the Eleventh UN Congress on the Prevention of Crime and the Treatment of Offenders (2005) urged Member States, for very practical reasons, to recognize the importance of further developing restorative justice policies, procedures and programs that include alternatives to prosecution.

In South Eastern Nigeria and many parts of West Africa, the “age grade” systems encourage reconciliation within communities through peer group interventions. In Uganda, the local council courts have the power to grant remedies such as compensation, restitution, reconciliation or apology, as well as more coercive measures. In the Philippines, the Barangay justice system consists of a locally elected Barangay captain and a “peacekeeping committee” hearing cases involving conflicts between residents. This model is now also widely used in modified form as a police initiated diversion approach in South Australia, South Africa, Ireland, Lesotho, as well as in U.S. cities in Minnesota, Pennsylvania and Montana. Each conferencing process has a convener or facilitator. It brings together the family and friends of both the victim and the offender and sometimes also other members of the community to participate in a professionally facilitated process to identify desirable

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101 Ibid

102 Ibid

103 Ibid
outcomes for the parties, address the consequences of the crime and explore appropriate ways to prevent the offending behavior from reoccurring.104

CONCLUSIONS

Restorative justice has brought about a new way of thinking in dealing with criminal acts and it has application not only in criminal law but restoration can be done in other fields of law as well. But with relation to bringing about a change in the psychic of a criminal, it is used extensively in criminal matters. It holds the faith that punishment is not the sole remedy and the real root of all criminal activities lies elsewhere. Encouraging offenders to understand the impact of their behavior and harms they have done and urging them to make right the wrong done has a long-lasting impact. Taking accountability of the act done by the wrong doer can heal the victim, offender and the community. It meets the need which has long been neglected by the traditional justice delivery system. Despite of having so many plus points, this system has not been used extensively by all the nations of the world owing to some of the practical difficulties such as lack of resources, undeveloped understanding of the community, different social structure rooted in the society etc. The remedy lies not in replacing the traditional pattern with the new one but using it in conjunction with the old one.

104 Ibid