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A COMPARATIVE STUDY ON SENTENCING POLICIES AND RECENT TRENDS OF RESTORATIVE JUSTICE SYSTEM IN INDIA WITH USA AND UK

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I. Introduction

Sentencing Policy refers to the mechanisms adopted by any criminal justice system to respond towards the commission of crime in the society. A sentencing policy encompasses wide range of processes and strategies relating to determination of the nature and type of penalty, procedure & rules governing release of offenders, and supervisory guidelines for governing post-imprisonment scenarios.[2726] The sentencing policy of any criminal justice system cumulatively reflects the comprehensive measures adopted by that system towards the criminals in terms of their punishment, reformation and prison management.

[2726] Andres F. Rengifo, *Sentencing Policy*, OXFORD BIBLIOGRAPHIES (Nov 01, 2017).

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In criminal jurisprudence, the term 'Sentencing' is not limited to infliction of 'punishment' towards an offender rather there exists a distinguishable line between these two. Sentencing refers to the rationale or the course of action to be taken against alleged criminal whereas punishment is one such course of action which meant actual imposition of penalty i.e., when the sentence is operationalized, it becomes punishment.[2727] Hence, the scope and objective of a sentencing policy is not merely restricted to the determination of appropriate punishment for the offender but also includes the determination of appropriate reformative techniques for treatment of offenders,[2728] and restorative justice techniques to ensure the interests of victims are properly safeguarded in the criminal justice administration.

For determining the proper sentence for any criminal, the role of judicial discretion holds a crucial place and thus, the contours of judicial discretion are guarded through the means of sentencing policy of a criminal justice system.[2729] Earlier, almost all the systems followed the '*indeterminate sentencing*' wherein the judicial authority had the power to order the imprisonment of the offender up to the maximum punishment limit mandated by the statute, however, now some of the systems have moved towards '*determinate sentencing*' wherein the statute itself prescribed the term of imprisonment for the offence committed and the scope of judicial discretion has been curbed.[2730]

As highlighted above the sentencing policy of different criminal justice system differs. While some systems adopt retributive theory in sentencing focusing on punishment of offenders, others pressed on rehabilitation of offenders. Previously, the sentencing policy of most of the jurisdictions, was largely based on the retributive and deterrence theory focusing on inflicting of harsh/brutal punishment on the criminal however, with the socio-economic changes and developments,[2731] this tendency is shifting highlighting the incorporation of proportionality principles and reformative theory for treatment of offenders.[2732] With the continuous evolution of different principles in criminal jurisprudence at present times, various reformative measures are enacted by legislatures dealing with treatment of offenders which is reflected from the sentencing policy of that jurisdiction. Further, the sentencing policy are also incorporating the measures relating to restorative justice such as victim compensation, community service, victim awareness work etc., showing transition from the normative means of inflicting punishment based on retributive theory.[2733]

This chapter deals with the major aspects related to the sentencing policy in detail and aims to explain the historical evolution of sentencing policy of different criminal justice systems along with rationale behind adoption of particular kind of sentencing measure by different criminal justice system by way of comparative analysis of sentencing policy adopted in different jurisdictions. Further, this chapter also delves into the issues surrounding the efficacy of sentencing policies along with explaining the shift in the sentencing approach to ensure restorative justice in the society by different jurisprudence and specifically discuss the restorative justice techniques or measures adopted in India in the sentencing policy.

[2727] Aastha Sahay, *Sentencing and Punishment Policy in India*, PRO BONO INDIA (Aug. 12, 2020), https://www.probono-india.in/blog-detail.php?id=152.

[2728] Hermann Mannheim, *Some Aspects of Judicial Sentencing Policy*, 67(6) THE YALE LAW JOURNAL 962, (May, 1958).

[2729] Charles W. Ostrom & Brian J. Ostrom, *Judges and Discrimination: Assessing the Theory and Practice of Criminal Sentencing* (Feb. 2004), https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf.

[2730] *What Are Sentencing Guidelines*, UNIVERSITY OF MINNESOTA (Mar. 21, 2018), https://sentencing.umn.edu/content/what-are-sentencing-guidelines.

[2731] T Chendhan, *The Sentencing Policy of India*, PRO BONO INDIA (Oct. 2, 2020), https://probono-india.in/blog-detail.php?id=183.

[2732] Andres F. Rengifo, *Sentencing Policy*, OXFORD BIBLIOGRAPHIES (Nov. 01, 2017).

[2733] Brenda de Oliveira Morsch, *Retribution vs. Restoration: Tendencies of the Criminal Justice System*, MASTER OF ARTS IN HUMANITIES | MASTER'S THESES, DOMINICAN UNIVERSITY OF CALIFORNIA (May 2019), https://doi.org/10.33015/dominican.edu/2019.HUM.04.

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II. Historical Perspective on sentencing policy- Theories on Sentencing

Traditionally, there was division of labour among sentencing institutions, namely, lawyers, prosecutors, judges, legislature, public, including academic experts, sociologists, scholars, etc. and administrative bodies, who were mutually dependent and operate as a system. Corollary to the same, the sentence scrutinized through varied standards and rules. From the angle of vivid substantive law, permutations and combinations of various theories of sentencing shifted the authority and significance of roles among various sentencing institutions.[2734] With time, these institutions argued for making gravity of offence and reformation of offenders as subsidiary aim in order to achieve justice and fairness.

Punishments in ancient India mainly included capital punishment, corporeal or physical punishment, social and financial punishment. In modern times, the sentencing trend shifted towards death penalty[2735] in rarest of rare cases, life imprisonment,[2736] rigorous and simple imprisonment, solitary confinement,[2737] forfeiture of property,[2738] and fine or monetary liability. The paradigm shift from indeterminate sentences to uniform sentencing with probation and associated sanctions and attaining pardon goals guaranteed even-handed and disabled justice.[2739]

To punish is to inflict pain or suffering via imposing penalty or sentence by authority of law for unlawful behaviour, non-observance of duty or offence committed by a person. Punishment maintains public order and goes hand in hand with law. Theory of punishment which is most suitable to the outcome, based on societal beliefs, is considered for practice. The correctional policies and criminal sentences are generally influenced by political and judicial branches.[2740] However, this has shifted to a distant position of conferring responsibility on legislature to carve sentencing laws based on restorative principle. Earlier, the idea of sentence being proportional to accused's culpability was prevalent. The same has been constantly debated and transformed while looking at other purposes and led to various theories of sentencing.

Retributive or Denunciatory Theory of sentencing is based on gravity of offence committed. This theory stipulates that the offender needs to be retributed or inflicted equivalent punishment proportional to the crime committed. '*Just desert*' is the term that defines the punishment deserved by the offender being proportionate to the offence. Like proportionality principle, it works on the idea that punishment should fit the offence. Such objective measures of offender's culpability are difficult to arrive at.

Deterrence Theory emphasises on deterring potential (general deterrence- setting example) or particular (specific deterrence) offender from committing the same offence again. Criminal justice stakeholders believed that fear of punishment will eliminate offensive and unreasonable behaviour. The same has been formalised by Bentham's three element theory which states that punishment must be expedite, certain and appropriately severe. It is similar to rational choice theory which elaborates cost-benefit analysis while deciding commission of offence. It majorly works with crimes of passion, i.e., those committed under influence of drug or alcohol intoxication. If benefits outweigh offence, the act prohibited will be done. One of the major demerits of this theory is high recidivism or reoffending rates.

Preventive Theory or Incapacitation where offender is subjected to long incarceration

[2734] Sohail Amjad & Nagina Riaz, *The Concept and Scope of Restorative Justice System: Explaining History and Development of the System for the Immediate Need of Society*, 5 IJL 100, 103 (2019).
[2735] Indian Penal Code, 1860, No. 45, Acts of Parliament (1860), § 121, § 132, § 194, § 302, § 303, § 305, § 307, § 364A, § 376A, § 376E, § 396 IPC.
[2736] Indian Penal Code, 1860, No. 45, Acts of Parliament (1860), § 57.
[2737] Indian Penal Code, 1860, No. 45, Acts of Parliament (1860), § 73, § 74.
[2738] Indian Penal Code, 1860, No. 45, Acts of Parliament (1860), § 121, § 126, § 125, § 127, § 169.
[2739] Richards K., *Rewriting and Reclaiming History: an analysis of the emergence of restorative justice in western criminal systems* (2009).
[2740] JOAN PETERSILIA & KEVIN R. REITZ, INTRODUCTION SENTENCING AND CORRECTIONS: OVERLAPPING AND INSEPARABLE SUBJECTS (1st ed. 2012).

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period to prevent further harm to society. It is a pragmatic mechanism devised to lock the offenders in secure environment and preventing relentless victimization of society. Apart from not being cost-effective (high financial, moral and social costs), the main critic is that it only reduces and not eliminates the possibility of crime as the confinement cannot be eternal.

Rehabilitative or Reformative Theory believes in the idea of transforming offender as responsible and law-abiding citizen of society. It individualises sentence and practices capable treatment in order to cure deviant behaviour and eliminate criminal tendencies. It avoids inconsistencies and abuses and strive to make them productive and acceptable members of society. It influences or responds with general improvement in their behaviour to achieve reformative goals. However, it led to relapses in crime and high recidivism rate due to poor, inadequate and underfunded execution.

Restorative Theory dwells on the impression of restoring back the societal position prior to the commission of offence, thereby, repairing the injuries caused by criminal behaviour to victim, society and even offender himself, rather than weighing offence committed on infliction of punishment.[2741] It has evolved as new idea in victimology and criminology.[2742] Excluding administration of key roles, it takes cooperative approach inclusive of all stakeholders[2743] and face to face meetings to address material, financial, physical, social, psychological, mental, moral and related harm.

Some of the major sentencing principles are inclusive of parsimony, proportionality, parity (similar sentences for similar offences), totality (in case of more than one sentence, overall punishment must be appropriate and just in accordance with the offence committed) and social justice.[2744] **Parsimony principle** operates on the ground that sentence must be minimally severe only to the extent of serving its intended purpose. It must be morally justifiable in achieving the valid and applicable purposes, thereby, restraining punishment and inflicting least possible pain to the offender. Whereas, **proportionality principle** holds that severity of sentences and overall punishment must be appropriate and proportionate to seriousness of offence and degree of moral responsibility of the offender. Mandatory minimum sentences and three-strikes laws go against this principle.[2745]

III. The concept Sentencing Policy in Common and Civil law systems

The civil and common law systems depict the two approaches to govern the legal systems of a sovereign State. These two systems of legal procedure have been developed on the basis of the difference of the ideological values on which the entire legal framework of a jurisdiction is set up. The common law system first emerged in England and later extended to the lands of British colonies now including US, India, Canada while the Civil law system is followed in Continental Europe including countries like Germany, France, Spain etc., and in African Countries.[2746]

Though some of the foundational schemes of law are similar between these two legal systems yet there exist certain crucial differences between these two systems. The common law system is mostly uncodified and designed through judicial decisions that acts as precedents while the civil law system is based on the codified set of principles which lays down both the substantive and procedural law governing different aspects of administration of justice and the judge's role is only restricted to

[2741] Elmar G. M. Weitekamp & Stephan Parmentier, *Restorative justice as healing justice: looking back to the future of the concept*, 4 RESTORATIVE JUSTICE 141, 144 (2016).

[2742] Theo Gavrielides, *Restorative justice—the perplexing concept: Conceptual fault-lines and power battles within the restorative justice movement*, 8 CRIMINOLOGY & CRIMINAL JUSTICE 165, 173 (2008).

[2743] **THEO GAVRIELIDES, COMPARATIVE RESTORATIVE JUSTICE (1st ed. 2021).**

[2744] Richard S Frace, *Sentencing Principles in Theory and Practice*, 22 CRIME AND JUSTICE 363 (1997).

[2745] D.J. Rothman, *Sentencing Reforms in Historical Perspective*, 29 CRIME & DELINQUENCY 631 (1983).

[2746] Judge Peter J. Messitte, *Common Law v. Civil Law Systems*, USIS ISSUES OF DEMOCRACY (Sept. 1999), https://web.ntpu.edu.tw/~markliu/common_v_civil.pdf.

the interpretation of the legislative codes.[2747] One of the crucial distinguishing factors between these two systems, is that the precedents laid down in any case by the courts does not hold the binding force over future case in civil law countries while precedents have a binding value on decisions of lower courts and tend to guide the future case laws in common law system.[2748]

Since the common law system follows *adversarial system*, the judges though acting in passive role in terms of investigating any matter yet judges exercise the authority to interpret existing rule and to apply precedents for establishing a new legal principle.[2749] Due to this feature, the nature and quantum of penalty to be administered to the accused majorly depend on the judicial discretion and precedents in common law jurisprudence. While in the civil law system, which follows *inquisitorial system,* judges exercise wide powers in terms of employing investigative tools but their decision making is limited within the contours of the codified statutes,[2750] and inflicting of punishment towards any offender is governed by the codified legal statutes not on judicial discretion.

The United Kingdom, which is one of the prime common law countries, allows the Court to exercise discretion in terms of analyzing different factors while determining the sentence of the alleged offender. The Courts in UK has power to analyze various factors such as nature and type of offence, circumstances surrounding the crime commission, criminal antecedents of accused etc., while determining the sentence of the accused,[2751] as these factors plays an important role to understand the status of accused and to determine appropriate penalty for the accused. However, this discretion casted upon UK Courts can not be exercised arbitrarily but is constrained through the means of sentencing guidelines laid down by Sentencing Council.[2752] Such Sentencing guideline takes into consideration different factors such as seriousness of crime, offenders' culpability, range of mitigating factors, criteria for considering past criminal antecedents of criminal and specify the range of sentence that can be imposed on the offender.[2753]

Another common law country, United States have also shown a transition from the concept of authorizing unguided judicial discretion to Courts while determining sentence of the accused to constraining the judicial discretion by implementing sentencing guidelines.[2754] Through the means of enacting sentencing guidelines, the State has ensured the protection of interest of offender against judicial inequality offered of some offenders. The US sentencing guidelines is based on the principle of mandatory sentences which stipulate that a mandatory fixed term of imprisonment, or fixed minimum sentence, or mandatory custody is to be awarded to accused on commission of specified offences.[2755]

In India, the criminal trials are governed by codified substantive and procedural law which prescribe the statutory minimum or maximum punishment which can be inflicted upon the offender but, there has no legislative mandate which restrict the judicial discretion exercised by the Courts within these prescribed statutory limits of punishment.[2756] This unguided judicial discretion has major implications on the criminal justice administration as it brings the

[2747] *The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION: BERKELEY EDUCATION 1, https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf.
[2748] Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 817 (2001).
[2749] Shruti Rajagopalan, *Adversarial versus Inquisitorial Systems: Error and Valuation*, JOURNAL OF BUSINESS VALUATION AND ECONOMIC LOSS ANALYSIS (2017).
[2750] *Id.*
[2751] *Sentencing Policy in UK and USA*, https://www.cusb.ac.in/images/cusb-files/2020/el/law/w2/Sentencing%20in%20UK%20and%20USA%20LL.M.pdf (last visited Nov. 10, 2021).
[2752] Coroners and Justice Act, 2009, § 120 (U.K.).
[2753] Coroners and Justice Act, 2009, § 121 (U.K.).
[2754] Charles W. Ostrom & Brian J. Ostrom, *Judges and Discrimination: Assessing the Theory and Practice of Criminal Sentencing* (Feb. 2004), https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf.
[2755] Julian V. Roberts, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, RESEARCH AND STATISTICS DIVISION | DEPARTMENT OF JUSTICE CANADA.
[2756] Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report 170 (Mar. 2003), http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf.

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probability of unfair treatment with a particular accused in a particular case and also allow judges' personal biases to crop in while deciding quantum of punishment.[2757] Despite the lack of comprehensive sentencing guidelines in frame, the Indian Supreme Court in various cases have laid down some of the principles to be adhered and analyzed while sentencing any accused which includes principle of proportionality, mitigating and aggravating factors, deterrent effect of the punishment and the possibility of rehabilitation of accused.[2758]

In civil law system, the extend of judicial discretion that can be exercised is not similar across all the countries and there lies a distinctive factor between each of the civil law countries with regards to the sentencing policy.[2759] While Netherlands criminal justice system authorize wide discretionary powers to judges with respect to sentencing and there exists no mandatory sentencing policy, judges may decide the duration of imprisonment and length of probation as laid down through Dutch sanctioning Policy,[2760] the French system restrict the exercise of discretion by the French Prosecutors in terms of dismissing or reducing the penalty after the case has been instituted.[2761]

IV. The Objectives and goals of Restorative justice system

In the primitive idea of criminal justice system, the definition of crime was limited to an abstract idea, in which it was considered as an individual act, which violates any law and is against the state. The offender's accountability was limited to accepting the punishment inflicted upon him by the state. But with the development of restorative justice model, the dimension of social responsibility was also added along with the individual responsibility in the definition of crime. [2762] The accountability of the offender was no more limited to accepting the punishment but it is also extended to admit the accountability of crime and to repair the harm caused to the victim.[2763] Some of the objectives behind introducing such a restorative system were -

1. To provide a sense of support to the victims and their family, by allowing and assisting them in communicating their needs and participating in the dispute settlement process.[2764] In any criminal justice system, there are certain needs of victims like knowledge of the process, empathy, involvement in the process, restoration etc. which they expect to be satisfied by the criminal justice system. But it has often been observed that most of the systems are not victim centric and they don't allow much intervention of the victim in the settlement process. The restorative justice model on the other hand idealises the process in which victims can communicate their needs and can participate in the decision-making process and most importantly can be treated fairly and respectfully. In furtherance of this objective, in 1976 the National Association of victim support scheme was launched in England with the objective of providing emotional support and guidance to the victims of crime.[2765]
2. To provide the offender a second chance, so that they can take the responsibility of their action.[2766] Instead of imposition of legal liability by others, the restorative justice system promotes the active admission of guilt by the offender and the acceptance of

[2757] Honey Malhotra, *Sentencing Policy in Indian Criminal Justice System: An Analysis with reference to Compoundable Offences*, SSRN (July 14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873358.
[2758] R Vishnu Prasad, *Issues Concerning Sentencing Policy in India*, 4 JCIL 44, 46 (2019).
[2759] Nora V. Demleitner, *Editor's Observations: Sentencing in Europe: How Others Deal with Issues That Trouble Us,* 7(6) FEDERAL SENTENCING REPORTER, 272, 274 (1995).
[2760] Peter J. P. Tak, *Sentencing in the Netherlands: Discretion and Disparity*, 7(6) FEDERAL SENTENCING REPORTER 300 (1995).
[2761] Richard S. Frase, *Sentencing Laws & Practices in France*, 7(6) FEDERAL SENTENCING REPORTER, 275, 280 (1995).
[2762] Chapter 4, *Restorative Justice/Community Justice*, OVC ARCHIVE, https://www.ncjrs.gov/ovc_archives/nvaa99/chap4.htm (last visited on Nov. 11, 2021).
[2763] J McLagan, *Report of the Ad Hoc Committee on Restorative Justice to the Minnesota Department of Corrections* (1992).
[2764] United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series, New York, 2006
[2765] Peter Dunn, *Victims support in the UK – Its history and current work*, 63 UNAFEI 93, 93.
[2766] Home Office Research Development and Statistics Restorative Justice: An Overview, Report (UK).

his responsibility for his conduct and its further repercussions. This model doesn't need stringent application of legal provisions, but only requires the transformation in the offender so that he can apologies and restore the situation of victim. In furtherance of same, in 2013 a special victim support programme was launched in the crown courts of England in which instead of promoting the prosecution, both the offender and victim brought together to repair the harm caused by the offence.[2767]

3. To develop such restorative schemes that will prevent further reoccurrence of crime and will promote the rehabilitation and restoration of victims and offenders in the society. In most of the criminal justice systems, an offender's past is the prime focus point, but in restorative justice system reliance is also place upon the offender's future behaviour. It advocates developing such restorative schemes, which will prevent re offending and will promote restoration and re integration of the offender back into the society. So that he can live his life peacefully and respectfully. We can observe the implementation of this objective in the form of initiatives like SRIJAN Programme[2768] or Open Prison system in Indian criminal justice system, in which the offenders are trained to live with self-discipline and to earn their livelihood through labour. These programmes are initiated to provide correctional treatment to the offenders so that rehabilitated and restored back into the society.[2769]
4. The restorative justice model also identifies the factors and causes which leads to the commission of crime and it further obligates the responsible authorities to take the identifies factors into consideration and ensure that the same crime should not be repeated in future.[2770]

But for achieving the abovementioned objectives, it is necessary to implement an effective restorative process first, and for these two critical ingredients are required to be there which are; that first of all there must be an identifiable victim, who is ready to willingly participate in the restorative process and secondly there should be an offender who voluntarily admits his guilt and is ready to participate in the process without causing any kind of threat or coercion to the victim.[2771] Both these ingredients are quint essential for any restorative process. In addition to this, equal importance has been given to the involvement of community[2772] to achieve a non Adversial form of justice system, in which the victim can address his needs fearlessly before the community and society. But a restorative process only considers as an effective one when it achieves certain goals. Some of the common process goals are – a) that the victim should be satisfied from the entire process b) the offender must understand his guilt and the harm cause by him to the victim and should make commitment to restore back the victim to the same situation c) such measures should adopted by the parties which focuses upon restoring the harm cause d) the offender should also address the reasons which resulted in the commission of crime by him and should stand up to his commitment of restoration e) Both the parties should try to mutually resolve their dispute by discussing the causes of the offence and try to reintegrate in the society.[2773]

V. International standing and recent developments on restorative justice system

There is no such any single restorative process, which is followed by all the countries worldwide. Each country had developed their own distinct

[2767] JANET BRIGHT, IMPROVING VICTIM TAKE UP OF RESTORATIVE JUSTICE (1st ed., 2017).
[2768] Srijan Program, Art of Living, https://www.artofliving.org/srijan-program (last visited Nov. 11, 2021).
[2769] Umed Singh and another v. State of Haryana, AIR 2012 P&H 1056.
[2770] United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series, New York, 2006.
[2771] *Id.*
[2772] HOWARD ZEHR AND ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002).
[2773] United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series, New York, 2006.

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processes for the purpose of promoting restorative justice with in their national criminal justice system. These recent developments are not completely modern, and they also took into consideration the indigenous criminal justice programmes.[2774] Some of the most prominent recent developments in the field of restorative justice system are –

1. **Victim-offender Mediation:**

Victim-offender mediation is one of the most used restorative processes around the world. This restorative process was first introduced in the year 1970 in Kitchener, Ontario. The parties involved in this process are victim, offenders and their mediators. In this process an opportunity is provided to the victims of the crime to meet with the offenders in a safe and regulated meeting in which the victims can put forth their loss and impact of offence upon them and can seek reparations and answers from the offender for his wrongful conduct.[2775]An equal opportunity is also provided to the offender to explain the reasons of his conduct and to apologise from the victim. This restorative process provides both the parties a chance to form a mutual acceptable plan and to settle the dispute between them. In this form of mediation, the parties can approach directly or the case can be referred by the judge, police, prosecutors or probation officers. According to the research, more than 75% of the victims come out satisfied from this process, and victims often feel less angry or fearful and experience a sense of emotional healing and happiness within them. The percentage of reparation agreements via this process also lies between 70-100 %.[2776] Currently, this process is being followed in the countries like USA, UK, Australia, New Zealand and many other countries worldwide.[2777]

2. **Community and family group conferencing:**

This process was first of all originated in New Zealand in 1980s.[2778] In this process a conference is organised which is attended by the victim, offender, family and friends of both of them and by community members also. This whole family and community group make the offender aware about the aftermaths of his offence and also tries to form a restorative and mutual settle plan for them.[2779] This whole process is completed in four stages. In the first stage, is often called the preliminary or preparation stage, in which an independent co-ordinator is appointed by the parties who co-ordinates with the extended family network and decided the venue, time and date of the conference and also prepares the parties for the conference. The second stage is called the information sharing stage, in which the appointed professionals share the information of with the family network and answer the queries which the family network has. The third stage is of private family time, in which the professionals, co-ordinators and all such other persons leave the family members alone to form any plan. And in the last stage, the family group shares their agreed plan with the professionals, and the professionals are asked whether they are agreeing on it or not.[2780] This process is successfully followed in the countries like Ireland, Australia, South Africa etc.

3. **Circle sentencing:**

Circle sentencing is a community driven process, which generally takes place with

[2774] *Id.*

[2775] John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, WEST. CRIMINAL REV. (1998).

[2776] HOME OFFICE RESEARCH DEVELOPMENT AND STATISTICS RESTORATIVE JUSTICE: AN OVERVIEW, REPORT (UK).

[2777] DR. MARK UMBREIT & DR. MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE (2010).

[2778] Bill Atkin, *New Zealand: Let the family decide – The New Approach to Family Problems*, 29 JFAML 387, 387 (1991).

[2779] Abyd Quinn Aziz, Developing an evaluation of family group conferencing across wales (June 2011) (thesis, Cardiff University).

[2780] Nick Frost & Fiona Abram, *Family group conferences: context, process and ways forward*, 19 CFSW 480, 181 (2014).

the mutual co-operations of community members and the criminal justice system. In this process, the tradition system is followed in which group is formed which involves victims and their supporters, offenders and their supporters, interested community members, police, judges, prosecutors and other stake holders of criminal justice system. In this group, all the interested parties put forth their concern and queries and then the circle after deliberate discussion decides the reparative plans for the well-being of interested parties and to prevent the further commission of any crime, and also the formation of follow up circles, which can keep a check on the progress of reparative plans. This process promotes the community values and empowers the community to resolve the disputes among themselves.[2781] But this process can work efficiently only for individual offenders or when the number of offenders is less. In the offences like riot, which involves a large number of offenders and also involves the community members, the use of this system would be inappropriate and it would be difficult to find the impartial community members to form the circle.[2782]

4. <u>Direct and Indirect mediation:</u>

In Restorative justice system, there are two types of mediations; direct and indirect. In direct mediation both the parties i.e., the victim and offender meet face to face and appoint a facilitator to carry out the mediation. In direct mediation, any interested party can attend the mediation such as the relatives of victim and offenders, community members etc, whereas in indirect mediation the victims don't meet face to face with the victim, instead they mutually appoint a facilitator who manages the whole mediation process and passes the message and proposals among them. In place of appointing the facilitator, the parties can also adopt any other form of communication through which they can mutually settle their disputes.[2783] In indirect mediation, because of the absence of face-to-face meetings, most of the emotional needs of victims are not satisfied. The indirect mode is less effective in reforming the offender and in developing a sense of understanding between the offender and the victim. Generally, the satisfaction rate of victims in direct mediation is much higher in comparison to their counterparts in indirect mediation.[2784]

In most of the countries direct mediation is the preferred process but Britain is an exception of this. In Britain the rate of indirect mediation is very high. The reason of this may be because the victims there are not comfortable in confronting with the offenders or may be because the indirect mediation is comparatively expeditious and simpler. Whereas in America, the rate of direct mediation is very high and the victim satisfaction rate is also higher in comparison to Britain.[2785]

Apart from the above stated restorative system there are certain legislations that are introduced by the different countries, such as, in UK the enforcement of the Crime and Courts Act, 2012 give chance to the judges and magistrate to differ from the specified sentencing to give way to the restorative justice system.[2786] The act also lists down provisions for raising the awareness among the victims and take a preventive measure to avoid the happening of crime. The provisions of the Act ensure that restorative justice system is followed in each step of the criminal procedure.

[2781] Balanced and Restorative an Informative Manual for California, Administrative office of the Courts, Cal. (2006).
[2782] Jens Korff, *Circle Sentencing*, Creative Spirits, https://www.creativespirits.info/aboriginalculture/law/circle-sentencing#circle-sentencing-criticism (last visited on Nov. 11, 2021).
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Another legislation that was passed by the UK Parliament was Offender Rehabilitation Act, 2014. The act provides for re-integration of the offender in the society with the reparative purpose by using restorative justice as a part of the sentencing policy.[2787] Under this act, activities are conducted through which the offenders are made aware of the damage caused by him to the victim as a method of restorative justice.[2788] Additionally, with the enactment of the Code for Practice for Conditional Cautions- Adults, the UK Legislation states that in order to achieve rehabilitative objectives, the prosecutors should also consider if there are opportunities that can provide restorative process which can have a positive impact on the society or the individual affected by the Act.[2789]

The legal system in UK and India is quite different than the system of United States. Major laws are dealt by the states and a few cases falls under the jurisdiction of the federal system. The system of victim-offender mediation has gained popularity in the States. This system has proved to be very effective for the victims to move on and let go the hatred against the offender by getting the answers to questions such as "why did this happen to me?", moreover, this activity makes the offender accountable and understand the gravity of the offence committed by him and the impact of the same on the victim.[2790] Additionally, the offenders of trivial matters are awarded community service which brings out the sense of accomplishment and helps them repair the harm caused by them to the society.[2791]

VI. Recent trends and innovative methods of restorative justice system in India

Western industrialised countries like United States, United Kingdom, New Zealand and Australia have experienced highest rates on incarceration in recent decade without facilitating restorative justice among prison population. Assuming transformation owing to restorative justice, changes in offensive behaviour at micro-level will significantly impact restorative outcomes, societal and prison conditions and structural effects on sentencing. The apex court in *Rakesh Kaushik v. Superintendent Central Jail,*[2792] highlighted certain issues related to lives on inmates in prisons including inadequate sanitation, poor drinking water, little or nil access to health care services, prison overcrowding[2793] and acute shortage of other basic facilities and humane treatment.[2794] This calls for looking out alternatives to sentencing based on specificities of offender on account of restorative justice in the form of non-institutionalised measures and peno-correctional systems in place such as probation, parole, community service, suspension, curfew, house arrest, public censure, injunctions and apology to victim.[2795]

Prisons are required to be modified in restorative manner facilitating non-custodial measures[2796] like open jails[2797] in every phase (pre-trial, trial, sentencing and post-sentencing), education,[2798] recreation and employment to inmates. Such alternatives to punishment would enhance involvement with responsibility and accountability among various stakeholders in criminal justice administration, thereby, improving ill-treatment towards offenders, protecting human rights with

[2787] Ian D. Marder, *Developing restorative justice in law, policy and practice: Learning from around the world*, PENAL REFORM INTERNATIONAL (Jan. 10, 2019), https://www.penalreform.org/blog/developing-restorative-justice-in-law-policy-and-practice/.

[2788] Jessica Mullen, *The offender rehabilitation act*, CLINKS BRIEFING (2015).

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[2791] Kay Pranis, *Restorative Justice in minnesota and the USA: Development and Current Practice*, 63 UNAFEI 111, 113.

[2792] Rakesh Kaushik v. Superintendent Central Jail, (1980) Supp. SCC 183.

[2793] Derek Neal & Armin Rick, T*he Prison Boom and Sentencing Policy*, 45 JLS 1, 41 (2016).

[2794] Akanksha Marwah, *Shifting of Penological Trends towards Rehabilitation of Offender*, 2 HNLU JLSS 13 (2017).

[2795] Subash C. Raina & Rakesh Kumar Handa, *A Justice that Heals: Restorative Justice from an Indian Perspective*, 1 SSACCJR 97, 105 (2017).

[2796] G.A. Res 45/110, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (Dec. 14 1990).

[2797] Anupma Kaushik & Neetu Sharma, *Human Rights of Prisoners: A Case Study of Sampurnanad Open Prison, Sanganer*, 3 Int. J. of Pol. Sci. (2017).

[2798] M. A. Ali & J. D. Ranadive, *Promoting literacy for prisoners' rehabilitation*, GHTC 420 (2015).

their engagement in justice process. A communitarian-diversionist prototype would be a mechanism to achieve restorative justice simultaneously with existing penal system.

Indian judiciary at various instances held epitome of restorative justice like mandatory community services, behavioural transformation and social reintegration in 1999 Sanjeev Nanda case, Gujarat communal riots case and 2002 Godhra massacre amongst others.[2799] Moreover, substituting 'juvenile' with 'children in conflict with law' through enactment of Juvenile Justice (Care and Protection) Act, 2015[2800] is also indicative of transformation to restorative justice in India. Focussing on diversionist techniques of social re-integration, it also has provisions of, inter alia, community services, special rehabilitative homes, reformative institutions, vocational and therapeutic centres, supervision and care facilities, probation for appropriate conduct, counselling, face-to-face meetings, advice or consultation with authorities and other stakeholders.

Furthermore, a 1978 bill relating to alternative forms of punishments[2801] apart from traditional ones mentioned in Indian Penal Code, 1860 (IPC)[2802] could not make through. However, Code of Criminal Procedure, 1973 (CrPC)[2803] mentions about various restorative mechanisms such as compounding of offence with or without court's permission in Section 320 advocating compromise or out of court settlement between victim and offender, thereby, reaching an amicable solution. Other such mechanism is the concept of plea bargaining which is enlisted in Chapter XXIA (Section 265A-265I) of the code.[2804] Restorative approach is also evident in other reconciliatory institutions such as victim compensation scheme, gram nyayalaya, gram panchayat including khap panchayats, Mahila Panchayats and Nari Adalat and other relationship building alternative disputes resolution (ADR) mechanisms like mediation, conciliation, arbitration, negotiation and Lok Adalat. These institutions provide beneficial and reasonable solutions in informal structures without subjecting to tedious and technical judicial processes.

The High Court of Punjab and Haryana in *State of Gujarat v. Raghavbhai Vashrambhai,*[2805] stressed compromise as sine qua non to maintain social amity and reduce friction in justice delivery process. Further, Delhi High Court in *Anupam Sharma v. NCT of Delhi,*[2806] promoted involvement of victim and mediation in criminal proceedings in order to shift the focus from law violated (crime-specific) to victim-offender positions (offender-specific).[2807] Furthermore, law relating to matrimonial disputes has glimpse of restorative justice among alternate practices before divorce decree, namely, restitution of conjugal rights, judicial separation, therapeutic techniques, mediation and conciliation. Such reconciliation attempts are also applicable in guardianship, custody, harassment and dowry cases under Section 498A IPC.

In order to strengthen these participatory restorative mechanisms, engage support systems, reintegrate and rehabilitate offender, promote amicable victim-offender relations,[2808] enhance offender's awareness about his behaviour and aftermath and take responsibility of harm caused, India, like other common law countries such as US and Europe, adopts practices of individualised sentences, voluntary victim-offender and community

[2799] S. Latha & R. Thilagaraj. *Restorative Justice in India*, 8 AJC 309 (2013).
[2800] The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament (2016).
[2801] LAW COMMISSION OF INDIA, 156TH REPORT ON INDIAN PENAL CODE (1997).
[2802] Indian Penal Code, 1860, No. 45, Acts of Parliament (1860).
[2803] T The Code of Criminal Procedure, 1973, No. 02, Acts of Parliament (1974).
[2804] Sarfaraz Ahmed Khan, Restorative Justice Under the Criminal Justice System in India: With Special Reference to Plea Bargaining and Compounding Measures (March 22, 2011) (M.PHIL. Dissertation, WBNUJS).
[2805] State of Gujarat v. Raghavbhai Vashrambhai, (2003) 1 GLR 205.
[2806] Anupam Sharma v. NCT of Delhi, 146 (2008) DLT 497.
[2807] Hervina Puspitosari & Bintara Sura Priambada, *Victim Impact Statement Model in Criminal Justice System in Restorative Justice Perspective*, 54 ICOL GAS 1(2018).
[2808] Sumanta Meher & Gaurav Shukla, *Restorative Justice to the Victims of Terrorism in the Criminal Justice System of India*, 12 INT. J. HUM. & SOC. SCIENCES (2018).

meetings,[2809] victim-offender mediation, family or community group conference, peace-making and sentencing circles, support circles, constructive resolutions with shared responsibilities, victim compensation, victim-offender meeting inside prison, constructive prison work, mainstream integration, intergovernmental communications, citizen participation, induction and sentence planning, post-sentencing mediation, restitution (compensating financial losses) and community service and other indigenous and customary practices.

VII. Conclusion

The scope of sentencing policy of any jurisdiction is quite extensive and encompasses not only the nature and quantum of punishment but also the post-imprisonment scenarios. The sentencing policy tends to limit the judicial discretion involved while analysing the factors to establish the guilt of the accused. Earlier the sentencing schemes of common and civil law systems was majorly based on the retributive and deterrent theory but with the dynamic changes in society, the measures to ensure restorative justice system are being incorporated within the sentencing policy.

With the advent of restorative justice model in the criminal system, the sentencing policy now factorize social aspect along with the individual harm caused to the victim, i.e., the punishment is given in accordance with the disruption caused to the conscience of the society. Earlier, the involvement of victim in the criminal process was negligible however, restorative system gave opportunity to the victims to participate in the process and to communicate their needs freely.

The restorative system of sentencing not only focuses on punishing the offender but also tries to bring victim back to the position before the offence was committed. Further, the system focuses on the future conduct of the offender and prevent him/her to repeat the crime and tries to rehabilitate and re-integrate the offender back in the society. For the successful implementation of the restorative justice system, two things must be necessarily fulfilled, firstly, a willing victim and secondly an offender who accepts his/her guilt, moreover, the system must achieve certain goals for the effective application.

Restorative sentencing policy points out the need of giving the victim and the offender the opportunity to communicate those results in mitigating and promotes re-integration by involving the victims and the society in the reconciliation process. The system also helps to hold the offender accountable for his wrongdoing to the victim and also gives him a way to transformation while completing the sentence awarded for misconduct. The restorative system brings out a sense of safety in the society as it helps out the victims of the crime to restore their emotional or physical imbalance caused by the offender.

There are various ways in which the restorative justice model can be executed. Different countries have adopted different methods to administer the same. One such method is the victim-offender mediation process which on one hand provides the platform to the victims to list down all the injuries suffered while on the other hand gives the opportunity to the offender to show a reasonable justification to his/her conduct.

It is well known that victim not only incudes the person who actually suffered the injuries but also his/her family member. Therefore, some countries conduct family group and community conferencing while others follow the process of circle sentencing. In the former the coordinator discusses the details of the crime with those who are affected by the crime and addresses their concerns while in the latter, a group is created consisting of the interested parties who raise their complaint before the circle who after discussion decides what's best for the interest of the community.

[2809] Muhammad Asadullah et. al., *Community and Restorative Justice Practices in India, Nepal, and Bangladesh: A Comparative Overview*, COMPARATIVE RESTORATIVE JUSTICE 223, (2021).

The restorative system is a positive model that provides a win-win situation for the offender and the victims unlike in Indian criminal legal system that follows the adversarial system and does not specify the restorative sentencing policy. However, there are certain instances that drops the hint of restorative justice system, for example, an offender is considered to be innocent until he is proven guilty. This principle is followed in almost every case unless the onus of proof is shifted upon the offender. Additionally, there are certain provisions that favors the offender, such as time bound detention in the police custody, background of the offender also helps in altering the sentence awarded. Another such example is releasing the offender because of his good conduct etc.

It is evident that the restorative justice model has been found to have an influence upon the criminal justice system across the globe. Although there is not particular law on the restorative sentencing policy however, Code of Criminal Procedure can act as an instrument for the successful application of the system. Therefore, it is time that India must learn to coincide adversarial system of justice with the restorative model to create a more understanding and justiciable system.

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