

Restorative Justice: The Need of The Hour (With Special Reference to Plea Bargaining)

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Abstract

Plea Bargaining has taken a momentum in Criminal Justice and Restorative Justice around the world. India took an initiative to amend the criminal laws to add the provisions related to Plea bargaining in the Criminal Procedure Code through Amendment Act of 2005 in 2006 on the recommendations of the Law Commission report of 1996.

Present Article provides the insight of Plea Bargaining and basics of restorative justice with special reference to Plea Bargaining. Article explains concept of Plea Bargaining and focuses on the need of India to better implement it based on following quote-

“How can justice be found in the face of genocide, a crime so vast and evil that it defies simple justice? Is there any justice beyond retribution and revenge? Must some kind of justice be done before healing can take place? Something different has to be invented, a different way of defining justice, a different way of dispensing it.” – Jane Ciabattari¹

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1. Introduction

“We have seen that in primitive societies this idea of “making up” for a wrong has wide currency. Let us once more look into the ways of earlier men, which may still hold some wisdom for us” – Margery Fry²

Lorenn Walker, a Hawaii based Restorative Justice lawyer mentions an incident in one of her articles about a woman named Jane whose home was burglarized by her 19 year old neighbor, whom Jane had known since she was 4 years old and had even babysat her.³ Jane had very good relations with the young woman’s parents and knew that she had drug problems and hence wanted her to get help. So, Jane and the young woman, along with their family members go for a restorative justice proceeding/ meeting. Not just Jane and

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¹Michelle Maiese, “Restorative Justice” (October 2003) retrieved from <http://www.beyondintractability.org/essay/restorative-justice>

² Elmar G. M. Weitekamp and Hans-Jürgen Kerner, *Restorative Justice: Theoretical Foundations* 329 (Routledge, 2012)

³ Lorenn Walker, *Restorative Justice: Definition and Purpose* 3 (Sage Publications 2013)

the young woman, but also every other participant described how the incident had affected them. For example, her mother felt responsible and guilty for the act of her daughter and her drug problem. So, it was decided that the young woman would pay the necessary costs of repair to Jane and would stay sober and clean. So, through restorative justice mechanism, a decision was made and at the same the relations between the parties were also saved, which made everyone feel good about it. So, it could be termed as an outcome, which is more inclined towards a community.

In today's criminal justice system, where the victims or the individuals are represented by the state, the main focus is on identifying and punishing the wrongdoer and not on how the harm done to the victim and the community can be repaired.⁴

A crime causes not only physical but emotional harm to the people and those "people" not only includes the person who is a direct victim, but also the accused and both of their families and loved ones, and restorative justice gives an opportunity to be accountable and at the same time to heal. It basically works upon what we have learnt from our parents. Today various schools, religious institutions and societies are implementing restorative justice approach to deal with the wrongdoers.⁵

It gives you an opportunity to share their perspectives, face and answer each other each and find solutions together. Although a person can never undo whatever has been already done, but at least an effort could be made to make him understand the severity of his action and prevent any recurrence or further harm. There is one basis point that needs to be highlighted here that restorative justice cannot be implemented in a similar manner on everyone. There can be different forms of restorative justice, depending on the victim and situations. For some people, apologies and acknowledgement may be matter a lot, whereas for other compensatory actions may speak more.⁶

The twenty first century has been marked with a number of media trials and a very quick reporting of crime that has attracted an immediate reaction of the public at various levels. Whenever we hear about any such incident, we demand a strict punishment for the offenders and an even stricter one for the next incident that we hear, as if this will bring relief. It seems that turning towards harsher punishments is the only way we know right now to prevent crime and to provide justice. But we need to slow down and see if this "get-tough" approach is really fulfilling the purpose of justice? How far our punitive oriented justice system is successful and what lessons is it teaching us?⁷ It's high time that this approach, that only a harsh punishment can prevent crime, should be cross checked

⁴ Ibid.

⁵ Howard Zehr "Restorative Justice? What's That?" in *Restorative Justice Today* 7 (Sage Publications, 2013).

⁶ Rita Takahashi "Restorative Justice almost 50 years later" in *Restorative Justice Today* 229 (Sage Publications, 2013).

⁷ Paul McCold "Restorative Justice: The Role of the Community" paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston (31 March 1995).

and challenged.⁸

"And because people learn from the processes in which they participate, as well as from the objectives of those processes, we should give greater attention to what the process teaches and how it is experienced."⁹

One such participatory process lies in the new movement is Restorative justice that involves all parties. As opposed to the other approaches of justice, it is a powerful way that addresses not only the physical injuries but also pays attention to the psychological, social and relational injuries caused by the crime as well.¹⁰

Restorative Justice is not mere another method for trying to deal with the old criminal justice system but it is a "practice that contains the seeds for solving a new problem—the inadequacy of the criminal justice system itself and outdated the philosophy of revenge."¹¹

So maybe there is a need for a new approach towards justice. restorative justice, as a young reform, holds a great potential in the twenty first century.¹² It provides us with an opportunity to build a far more reliable, transparent and effective justice system, which is not only punitive, but healing as well.¹³ The main focus of our criminal justice system needs a shift from making an offender suffer to making him acknowledge and repair the harm he has done. No doubt that preventing crime and ensuring public safety will still remain the pivot concern, but the methods of achieving such goals need to be changed.

Howard Zehr, who is considered as the pioneer of the modern restorative justice, provides three main reasons for the requirement of implementation of restorative justice.¹⁴ He comments that in the present justice system, victims are not only left out, but they are traumatized all over again by the proceedings. Also, the community and the society, which is also affected by the crime in one way or the other, are left out in this system. All of us need to take responsibility for this. And lastly, the present justice system fails to follow the principle of "Accountability". According to Zehr, "Accountability is to understand the harm you've caused and doing something to make it right but the present

⁸ Pepinsky, H. E., & Jesilow, P. (1985) "Myths That Cause Crime". Cabin John, MD: Seven Locks.

⁹ Harris, M. K. "Moving into the new millennium: Toward a Feminist Vision of Justice" In R. Quinney & H. Pepinsky (eds.), *Criminology as Peacemaking* 83-97 (Bloomington, Indiana University Press, 1991)

¹⁰ Restorative Justice Briefing Paper – 1 (Centre For Justice & Reconciliation at Prison Fellowship International, May 2005) retrieved from <http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>

¹¹ Marshall, T.F. (1992) Restorative Justice on Trial in Britain. In H. Messmer & H.-U. Otto (eds.), *Restorative Justice on Trial* (p. 26). Netherlands: Kluwer Academic Publishers.

¹² Mary Ellen Reimund "Is Restorative Justice On A Collision Course With The Constitution?" *Appalachian Journal of Law* (Spring, 2004).

¹³ Umbreit, M.S., Vos, B. and Coates, R.B. "Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls" April 21, 2005.

¹⁴ Randi B. Hagi, "Howard Zehr: Pioneer Of Restorative Justice"; 20-07-2015; retrieved from <http://emu.edu/now/crossroads/2015/07/20/howard-zehr-pioneer-of-restorative-justice/>

justice system is ineffectively using punishments under the disguise of accountability.”¹⁵

2. Ways of Implementing

There are various methods in which restorative justice can be implemented.

(i) Modified Path

The existing system of criminal law could be dismantled and a new system could be modified, based on the civil justice system, where parties are given significant importance, responsibilities are recognized and focus is on restoration, reimbursement and settlement rather than punishment.¹⁶

(ii) Parallel and Alternative Road

Another method is that, instead of modifying the existing criminal justice system, a new and parallel justice system could be established, where the parties will have the choice to take matter to Restorative justice system instead of the criminal justice system. This parallel system could serve as an alternative, left to the choice of the parties.¹⁷

(iii) Interlinked Track

This third model has been put to light by John Harley, where’s model of restorative justice system and criminal justice system are interlinked. Here, the initial proceedings of a case would be done by the formal criminal justice system only, but later, at an apt stage, they would be shifted towards the track of restorative justice system. Such a shift would depend upon various factors, such as the gravity of the crime, willingness of the victim to forgive, repentance and eagerness of the offender to repair the harm, etc.¹⁸ There are certain steps that can be taken to work towards restorative justice:

- (i) Setting up of awareness workshops about restorative justice
- (ii) Responsive to requests and inputs.
- (iii) Set up a mechanism to evaluate what has been done.
- (iv) Frame measures in consultations with those who have been a victim or have been affected.
- (v) Consultation with other governments who are already following the principles of restorative justice.

In recent times, in India there is a moment going on for adopting the restorative justice in our criminal justice system especially with regard to the Plea Bargaining. Plea Bargaining

¹⁵ Ibid.

¹⁶ Garry Johnstone, *The future of Restorative Justice* 134 (Routledge Publications, 2011).

¹⁷ Garry Johnstone; “The future of Restorative Justice”; pg. No 135; Routledge Publications; 2011

¹⁸ Id at 136.

is a concept, which took birth long back when the two extremes were considered, one aspect when the power is given to criminal Justice to court for compounding the offences. Once the power to compound the offence is exercised, the accused is treated as having been acquitted. The other extreme is that there is no provision or any possibility under the provision of the code for compensating the case but there is discretion of the court. Come what the circumstances prevail before the court, lesser sentence can't be awarded, even in a situation where the person might admit the guilt. Then the thought process begins for providing the middle path between the two extremes which lead to promulgation of plea bargaining. It involves active negotiation where an accused by confessing his guilt in a court may get the benefit of a lighter punishment than what is provided for the offence in question. It is considered one of the alternatives to deal with the huge arrears of criminal cases. In Black Law Dictionary, plea bargaining is a process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. To reduce the delay in disposing criminal cases, the 154th Report of the Law Commission first recommended the introduction of 'plea bargaining' as an alternative method to deal with huge arrears of criminal cases.¹⁹

3. Concept of Plea and Plea Bargaining

Plea is since qua to a criminal trial because it is the preliminary stage where the accused is informed of the charges against him and pleads to it, thereby formulating the issue to be decided by the court. A plea is not a mere formality. The purpose of the plea is to make a point for determination of guilt or innocence of the accused. There can be no trial or merits in a criminal trial until the accused has pleaded guilty or not. There the accused has an absolute right to an opportunity to plead and he has indefeasible right as to how he pleads to the charge framed against him. The general rule is that one who stands mute on charge when it is read over to him in a criminal prosecution does not permit the truth of the essential allegations, as charged, to stand; the allegations of facts in support of information must be proved, at least prima facie, by the state before a finding of guilty can be recorded by the court. Plea bargaining thus refers to pre-trial negotiations between the defense and the prosecution, in which the accused agrees to plead guilty in exchange for certain concessions guaranteed by the prosecutor²⁰.

“Plea Bargaining” is different from the plea of the accused in the strict sense of the term plea”. At times accused, which is charged with a serious offence, does not choose to contest the same on facts but at the same time he does not wish to concede to the gravity of the offence. In such cases defending council may advise accused to take plea of guilty to the offence charged or to a milder alternative in the hope getting a less severe sentence, and for this purpose seek to discuss the position with their judge and the prosecution's

¹⁹ 154th Law Commission Report, 1996 on Code of Criminal Procedure, 1973, vol I.

²⁰ *Santobello v. New York*, 404 U.S. 257, 261 (1971)

council. Plea – bargaining is a “bargain” of the accused with the prosecuting agency in the matter of punishment on the condition that he would waive his right to be defended or to defend himself or to contest at the trial. In exchange for a plea of guilty, the accused would receive leniency in sentencing.

In 1970, the constitutional validity of plea bargaining was upheld in *Brady v United States*,²¹ where it was stated that it was not unconstitutional to extend a benefit to an accused that in turn extends a benefit to the State. One year later, in *Santobello v New York*²² the United States Supreme Court formally accepted that plea bargaining was essential for the administration of justice and when properly managed, was to be encouraged. Law on pleading guilty is an area having clarity and certainty. But the sphere of plea bargaining is quite sticky to explain. With a view to address the problem of the huge backlog of criminal cases, a new system was adopted by India by an amendment in 2005²³ whereby the Plea Bargaining was recognized as a part of the Code of Criminal Procedure, 1973. A plea bargain is generally an agreement between the defense and the prosecutor where the defendant pleads guilty and in exchange, the prosecutor reduces the charge or recommends a sentence of reduced nature.²⁴ Looking at the plethora of cases pending in the Criminal Justice System, it was a constant pressure on the judicial organs to impart justice without any delay. Hence, as a bold step plea bargaining came into play²⁵.

4. Indian Law on Plea Bargaining

As noted earlier, in India, the system of plea bargaining is in its experimental stage. The system was introduced as a result of criminal law reforms introduced in the Criminal Law (Amendment) Act, 2005 (Act 2 of 2006). Section 4 of the Amendment Act introduced Chapter XXIA to the Code having Sections 265 A to 265 L. Though the Act was passed in 11th January, 2006, the provisions were notified and came into effect from 5th July, 2006.

4.1 Applicability

Section 265 A deals with applicability of the Chapter XXIA. Benefit of Plea bargaining can be extended in two circumstances. One is, if a report is forwarded by a Station House Officer of a Police Station after the completion of investigation to the Magistrate. The other is, if the Magistrate has taken cognizance of an offence on a complaint under Section 190 (a) followed by examination of a Complainant and witness under Section 200 or Section 202 and issuance of process under Section 204. Thus, it means, after the

²¹ 297 US 742-25 L.Ed. 2d 747

²² DD Basu, *Code of Criminal Procedure* 1973 (LexisNexis, 4th Edition, 2010).

²³ *Ibid.*

²⁴ Pinaki Ranjan, “Concept of Plea Bargaining in American Jurisprudence vis-à-vis its applicability under Indian Law”, 2005 (1) *Unreported Judgment (Journal)* 40 (SC).

²⁵ 154th Law Commission Report, 1996 on Code of Criminal Procedure, 1973, vol I

commencement of proceedings upon a private complaint under Section 190 (a) of the Code. However, if the Accused is involved in an offence, which is punishable by death, life imprisonment or imprisonment for more than seven years, benefit cannot be extended.

Apart from that for offences affect socio- economic conditions of the country, which are notified by the Central Government or offences against women or offences against a child below the age of 14 years, benefit of plea bargaining is not available. Under Section 265 L, the provisions of plea bargaining is not applicable to any Juvenile or Child as defined under Juvenile Justice (Care and Protection of Children) Act, 2000. The Savings provision under Section 265J has extended an independent existence to the Chapter, in case of inconsistency with other provisions of the Code.

4.2 Salient Features of Plea Bargaining

A new chapter (chapter XXI A) on plea bargaining has been inserted in the criminal procedure code 1973. A notification to bring into effect the new provision has been issued and it has come into effect from 5th July, 2006. Plea bargaining was introduced through the criminal law (Amendment) Act, 2005 which was passed by parliament in the winter session of 2005. The salient features are as follows: -

The plea bargaining is applicable only in respect of those offences for which punishment of imprisonment is up to a period of 7 years. It does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman and a child below the age of 14 year. The application of plea bargaining should be filled by the accused voluntarily. A person accused of an offence may file the application for plea bargaining in the court in which such offence is pending for trial.

The complainant and the accused are given time to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused compensation and other expenses incurred during the cases. Where a satisfactory disposition of the case has been worked out, the court shall dispose of the case by sentencing the accused to one fourth of the punishment provided or extendable, as the case may be such offence. The statement or facts stated by an accused in an application for plea bargaining shall not be used for any other purpose other than for plea bargaining. The judgment delivered by the court in the case of plea bargaining shall be final and no appeal shall lie in any court against such judgment.

Plea Bargaining does not solve the entire problem but reduces its severity of penalty. The introduction of plea bargaining is a shortcut aimed at quickly reducing the number of under-trial prisoners and increasing the number of convictions, with or without justice. It is undoubtedly a disputed concept since few have welcomed it while others have abandoned it. The consequences will be felt most obviously by the countless numbers of poor languishing in the country's prisons while awaiting trial. Taking into account the

advantages of plea-bargaining, the recommendations of the Law Commission Plea bargaining was clearly recognized as the need of the hour and by no stretch of imagination can the taint of legalizing a crime will attach to it. At this stage it can be safely held that 'Law is not a Panacea. It cannot solve all problems, but it can reduce the severity'. Plea bargaining in India endeavors to address the same, which despite its shortcomings can go a long way in speeding the caseload disposition and attributing efficiency and credibility to Indian Criminal Justice. Thus, we can say that the concept of Plea-bargaining acts as a distinctive tool for restorative justice or it is a way to alternate dispute redressal system.

5. Conclusion

In Spite of all the efforts that have been put into the present justice system, the dissatisfaction of the citizens with the legal system and its processes can be witnessed everywhere.²⁶ So even where providing such harsh punishments and putting the offender behind bars has not helped in reduction of crime over the centuries, maybe it's time to let go of the revengeful approach and to adopt a new one which aims at restoring the relations between the offender, victim and the community to ensure a lasting harmony and peace.²⁷ Speedy trial is the essence of criminal justice and there is no doubt that delays in trial itself constitutes a denial of justice. Initially, the concept of plea- bargaining was criticized by a group of society including legal experts and intellectuals by stating that it will demoralize the public confidence in the criminal justice system and also lead to lesser penalties to rich class, conviction of innocent people and therefore, it has become disputed concept now. Today, it is used by all great countries like USA, Europe, Canada and some authorities stated that the prevalent conditions in India are very different from US, even then to meet out the huge backlog of cases in India and ultimately it will have to be done with the consent of both the parties' i.e. accused and prosecution, then what undermines? Therefore, India cannot abstain itself for this law.

²⁶ Judge Sophia H. Hall ; Restorative Justice: Restoring The Peace ; 21-APR CBA Rec. 30 CBA Record; April, 2007

²⁷ Harry Mika, "The Practice and Prospect of Victim-Offender Programs", 46 *SMU L. Rev.* 2191, 2193 (1993).