

Time to think about Restorative Justice

– Creating a balance on human rights of offenders and victims –

: ANIL XAVIER

Some of the recent events and judgments of some High Courts and the Supreme Court of India on the question of settlement in some heinous crimes and inflicting strict sentences in some others have created a furore among the legal fraternity and civil society.

The execution of Mumbai blasts convict Yakub Memon has sparked a debate over death penalty, some calling for a ban based on human rights ground and some in favour of retaining it as a deterrent against ghastly crimes.

Even though the United Nations General Assembly had adopted in 2007, 2008, 2010, 2012 and 2014, non-binding resolutions calling for a global moratorium on executions, with a view to eventual abolition of death penalty, the four most populous countries in the world, where over 60% of the world's population live, such as India, China, the United States and Indonesia continues to apply the death penalty.

Civil rights organizations have started to place increasing emphasis on the concept of human rights of offenders and an abolition of the death penalty.

When we complain about human rights of offenders and about putting their fate on the individualistic approach of the concerned judges, who award death penalty, we also hear objections when attempts are made by judges to settle matters between the offender and the victim in criminal cases. I am reminded about the 12th century Jewish legal scholar, Moses Maimonides, who said that executing an accused criminal on anything less than absolute certainty would lead to a slippery slope of decreasing burdens of proof, until we would be convicting merely “according to the judge’s caprice”. Maimonides’ concern was maintaining popular respect for law, and he saw errors of commission as much more threatening than errors of omission. How do we bring in consistency to these decisions without leaving it to the discretion of individual judges?

On 24th June 2015, an order came from the Madras High Court, where the Judge while hearing a bail appeal of a man convicted of raping a young girl, agreed to the bail request on condition that the man try “mediation” with the victim. The judge observed, “The case before us is a fit case for attempting compromise between the parties...he [the rapist] should be enabled to participate in the deliberations as a free man and vent his feelings, open his mind and moorings”. The logic behind this “reference to mediation” seems to be that an unwed mother and her child are “lepers” in Indian society and they are better off enjoying the “respectable” status of a married woman, even if the husband is her rapist. The Judge further added that in another similar case “mediation was proceeding towards a happy conclusion”. In other words, wedding bells were ringing. This order provoked widespread protests mainly on the ground that there cannot be a compromise or settlement as it would be against the honour of the victim which matters the most.

On 1st July 2015, a judgment came from the Supreme Court of India in an appeal relating to a rape case involving a minor in Madhya Pradesh, where the court held that mediation should not be encouraged in cases of rape or attempted rape. The court held, “Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most”. The Court ruled that courts should not fall for the subterfuge of a rapist to corner the traumatised victim into a compromise, or even worse, enter into wedlock with him.

Based on the judgment of the Supreme Court, the Judge of the Madras High Court recalled the order of mediation on 11th July 2015 and cancelled the interim bail granted to the convict.

On 21st July 2015, the Delhi High Court passed another judgment, while dealing with a Revision Petition against the order of discharge passed by a Sessions Judge in a case where the accused was charge-sheeted for an offence of rape and sexual assault under the Protection of Children from Sexual Offences Act 2012. The Judge of the High Court set the accused free of all the offences alleged, holding that the victim was married to the accused and voluntarily consented to the sexual intercourse.

The Madras and Delhi High Courts considered the option of mediation or compromise in a non-compoundable criminal offence like rape and the Supreme Court on the other hand clearly closed the option of mediation in such a case.

In the Madras case, while the mediation option was put forward by the accused/offender, the Judge did not seek the consent or even the opinion of the victim for such a process. The Judge decided that it was for her “benefit” that she participates in mediation. In fact when the press approached the girl, she expressed incredulity and dismay. It is reported that she said, “It is unfair of the judge to do this to me. How can he do this without seeking my opinion? The rapist only wants to get out of jail, which is why he agreed to mediation. Can the judge guarantee my safety if he is in this area, or my daughter’s safety? I am being forced to suffer again”.

In fact the Judge has said that the accused should be enabled to participate in the deliberations as a free man and vent his feelings, open his mind and moorings and therefore enlarged him on bail to participate in the mediation process. This is an important observation, but unfortunately used in the opposite proposition. This option of venting one’s feelings, opening one’s mind and moorings has to be afforded to the victim first and not to the offender.

There were severe criticisms on the orders of the Madras and Delhi High Courts stating that the human rights of the victims were not considered. There were also disapprovals when the Supreme Court held that any kind of liberal approach or a thought of mediation in a crime like this thoroughly and completely sans legal permissibility. The same uproar came when the death sentence was awarded to the accused in the Mumbai blasts, stating that it is a human right violation.

Can the question of human rights and fate of persons based on human rights be left so ambiguous and determined by the personal philosophy of the decision maker? Shouldn't the criminal justice system engrain human right concept within itself to make it more methodical and the outcome more foretelling?

We need to understand that a crime is not just the violation of the law, but also the violation of people and relationships. This violation creates an obligation rather than a guilt and justice, in its true sense. This could be resolved ideally only when there is involvement of all the stakeholders of a crime, i.e., the victims, the offenders and the community members, in an effort to put things right. The central focus is, not on the offenders getting what they deserve, but on attending to the needs of the victim and offender, for repairing the injury caused in the best possible manner.

In our criminal justice delivery system, do we consider the feelings, fate or opinion of the victim?

Justice is a nebulous concept. Aristotle divided justice into two main parts: distributive justice – the sharing of social benefits and burdens – and corrective justice – the rectification of injustice. Jeremy Bentham, the British philosopher and jurist also dichotomised justice, considering procedural justice – fairness in processes – and substantive justice – fairness in rights and obligations. Taking these approaches together, we need to have a legal system which allows parties to fairness in process and rectification of injustice. We need to consider related emotions of the parties like hurt feelings, trauma, dignity, social reputation etc.

Our traditional criminal justice system is a system of retributive justice – a system of institutionalized vengeance. The system is based on the belief that justice is accomplished by assigning blame and administering pain, where it is believed that “justice equals punishment”. But in the recent years, a relevant question is being asked – “justice for whom?” In many cases we find that the punishment often leaves the victim unsatisfied and also fails to address the other important needs of the victim, such as, consolation for their loss, easing their trauma or mending their wounds. Restorative justice programs are based on the belief that parties to a conflict ought to be actively involved in resolving it and mitigating its negative consequences. Restorative justice gives as much importance to the process as to the outcome.

Restorative justice is the new way of looking at criminal justice that focuses on repairing the harm done to people and relationships rather than punishing offenders. Restorative justice is about the idea that “because crime hurts, justice should heal”. These programs can also be used to reduce the burden on the criminal justice system, to divert cases out of the system and to provide the system with a range of constructive sanctions.

The efficacy of mediation in resolving civil, family and commercial disputes and its acceptability world-wide had encouraged our Parliament and Judiciary to embrace mediation for resolving pending court cases and courts all over India has supported mediation programs in civil cases and started referring matters to mediation for early resolution and also for bringing down court dockets and pendency. The overwhelming effect of this may have prompted some of our courts to refer criminal cases also to mediation.

We need to understand that mediation in civil, family and commercial disputes are basically issues where only the rights of the parties involved in the disputes are affected. The society is not concerned with the outcome of such disputes. Settlement of non-compoundable criminal cases, especially in heinous crimes and sexual offences, settlement is a controversial topic. Victim-offender mediation programs are among the earliest restorative justice initiatives. But this cannot be left to the discretion of individual judges' social philosophies and to the calibre of mediators who are trained to resolve just civil or family matters. There are a number of crucial steps that contribute to the effective implementation and sustainability of restorative justice initiatives. They include a formal legislation, scheduled leadership and organization. Victim-sensitive training should also be offered to mediators and criminal justice and other practitioners involved in restorative justice programs, to handle sensitive and complex cases.

A developed or culturally matured society should have this option for resolving criminal offences through restorative justice programs. Right now we find that when parties settle criminal matters outside court, the law compels them to tell lies or file false statements in court to wriggle out of criminal trials. We have seen in umpteen numbers of criminal cases where the victims or de-facto complainants turn hostile and speak against the prosecution case. They are left with no choice of telling the truth because that would upset the settlement and again wreck the relationship. The index of a developed community should necessarily have laws that would encourage people to speak truth without fear and uphold their dignity and integrity and not compelling them to speak falsehood to attain justice. Similarly in the absence of statutory requirements, it may be difficult for a restorative justice program to insert itself into the daily routine of the criminal justice system. Legislation may be useful in providing the impetus for a more frequent use of the restorative justice process. It can also be used to promote predictability and certainty in the use of the restorative process as well as to establish all of the necessary legal safeguards.

Even though the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters was adopted in 2002 by the United Nations Economic and Social Council, whereby encouraging Member States to adopt and standardize restorative justice measures in the context of their legal systems, we have not taken any

steps toward this concept. Report of Justice V.S. Malimath Committee on Reforms of Criminal Justice System submitted in 2003 also hoped that that victims must be protected and justice must be done to them and eventually the system will have to lean towards more restorative justice. The Committee stated that an important object of the Criminal Justice System is to ensure justice to the victims. The considered view of the Committee was that criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognized by law and restitution for loss of life, limb and property are provided for in the system. But nothing has been done so far.

I think we should use the on-going discussions about human rights of offenders, mediations in criminal cases like rape cases or other heinous crimes, as an opportunity to have a larger debate on reforms in the criminal justice system of the country, making a better system to address the needs of the victims.

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