

Re-Imagining Justice: From Punitive to Transformative

Pranav Jeevan P

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Before we start talking about different forms of Criminal Justice systems that are existing and that can be created, we need to sneak a peek into the current carceral Criminal Justice system in India. Our current criminal justice system is that of Punitive Justice, where we seek to impose a punishment (deprivation or restriction) on the offender which is mostly incarceration. At the end of 2019, we had 478600 prisoners with an occupancy rate of 118.5% (Executive Summary, 2019). Seven in 10 of them are under still under trial, two-thirds of whom are from marginalized castes. Also, more than one in five (21.5%) undertrials were Muslim. Data shows that 27.7% are illiterate and over 70% haven't received 10th standard education. Also, trials are taking longer and the number of people awaiting completion of trial in prisons for long periods is increasing. The high proportion of undertrial population defeats the purpose of prisons, which are supposedly meant to correct convicted offenders of law (Paliath, 2020).

Long periods of incarceration can deplete the prisoners and their families financially and emotionally, and eliminate their chances of employment and societal reintegration, leaving the underprivileged groups susceptible to more profiling and harassment by police and subsequent arrests. Deeply entrenched caste prejudices and over-policing of certain communities are important social factors behind the significant presence of marginalized caste groups in jails. Counter-cases are often filed against marginalized castes and minorities who might file a case of atrocity. The investigation and trial in these counter cases will be speedy, while the cases filed by Dalits and Adivasis against dominant caste communities will be slow. Once persons from marginalized social groups are registered in the criminal justice system, they tend to be targeted and profiled for offences repeatedly by the police. This is the case with de-notified tribes like Pardhis in Madhya Pradesh or Kuruvas in Tamil Nadu who were considered criminal tribes by the colonial administration under the Criminal Tribes Act, 1871 [repealed in 1952], where the legacy of profiling and stigmatization continues. Such communities, including children, are vulnerable to illegal detentions, false confessional statements and arrests as they have no means to seek bail. The bail system rests on furnishing of assets as sureties which most of those from marginalized communities do not have. Therefore, poverty, high cost of litigation, poor quality of free legal aid and caste bias ultimately fill our prisons mostly with underprivileged and marginalized (Paliath, 2020).

These statistics show that institutions like prison and police are structures designed to reinforce the social inequities already present in society and protect the power hierarchies. This is obvious when we see how the state uses these institutions to criminalize voices of dissent using colonial era laws like sedition, arrest and harass human rights activists by charging UAPA and NSA, create conspiracy theories and tag them as “anti-nationals” and “urban-naxals”. The violence unleashed by the state on its people and by dominant castes on the oppressed are never considered as violence. It is mostly when people who protest the oppressive social structures and pro-capitalist laws of the government like the new farm laws, EIA, NEP and CAA, who will be swiftly arrested and thrown to jails. People of power who spew hate and attack the minorities are never held accountable and in turn offered complete immunity from arrests. Many people say that this system is broken and corrupted and we should reform this system by funding more police, more surveillance and more jails. But the fact is that the system is functioning exactly as it was designed to operate – protect the existing hierarchies by relentlessly targeting the people it wants. It is imperative that we stop hoping to better this system and think of other ways in which we can think about of violence, crime, harm, justice and punishment.

Restorative justice seeks to compensate the victim, repair the harm, and facilitate the offender's remorse. It is an ideology much broader than the current criminal punishment system. It is about values around how we treat each other and acknowledges that we are human beings who can hurt and cause each other harm. When a violence or harm is committed, the punitive justice system just asks who committed it and what rules were broken, how to punish them, and it empowers the state to punish offenders. In Restorative justice, we enquire, talk, share and discuss about what happened. And then it focuses on the victim's needs. It asks them what they need as a result of this because harms engender needs that must be met. Then it looks at ways to repair this harm and who needs to be at the table for that to happen. It invites community in. It invites other people who were also harmed because it recognizes that the ripples of harm are beyond the two individuals that were involved, it also includes the broader community and the society at large (Rice & Smith, 2019).

People often confuse Restorative justice and transformative Justice, but they are not the same. Restorative justice focuses on the individual, the intervention is on individuals, not the system. Transformative justice tries to transform the conditions that make this possible. Merely restoring people to the situation prior to when harm occurred doesn't stop the problem from recurring. Most of the crimes and violence doesn't come just from individual motives, but has clear social and cultural factors behind it. The crimes on women, oppressed castes and minorities happen due to structural conditions and institutions that encourages this culture of violence. It is patriarchy, caste oppression, xenophobia, transphobia and capitalism which creates these social hierarchies which provides seeds for violence. We have to transform those conditions and in order to do that we have to organize, shift the structures and the systems and that goes beyond the interpersonal relationships that need to be mended (Rice & Smith, 2019).

People are always skeptical when they hear terms like "defund the police" and "abolish prison" which became popular with the recent Black Lives Matter protests. They immediately ask how would we protect ourselves from rapists and murders if we don't have prisons or police. But people fail to ask whether these institutions are actually protecting us now. If prisons and police are meant to convict criminals and protect people from violence, where is the data that shows that they are doing this job. For example, according to (Crime in India Report, 2019) one rape was reported every 16 minutes in India and only one in 4 cases results in convictions. The perpetrators were known to victims in 94% of the cases. Most rapes go unreported because the rape victims fear retaliation and humiliation. A UN study of 57 countries estimates just 11% of rape and sexual assault cases worldwide are ever reported (Factsheet – Global, Progress of the World's Women 2011–12, 2013). So that means roughly, less than 3 % of all rapes end in conviction. Also, if the perpetrator is from the dominant communities, conviction rate is even lower. We have seen the reluctance of police to arrest dominant caste perpetrators again and again during cases like Hathras. The current punitive system is not doing anything to stop crimes and violence. It is neither trying to identify the systemic and institutional hierarchies which creates this violence nor it is trying to help the victims heal after the ordeal. Therefore, the vast majority of people who are harmed in multiple ways, whether it's a theft or a physical assault or rape, never report to the system. They choose nothing over going to the current system. We don't think about the millions of people who don't avail the criminal justice system in the country. If every single person who were harmed went to the system, it would crash. There would be no way to account for them because it's not just filing the FIR from police, you need the investigation to be over, appear in trails or appeal to higher courts, etc. which is a long and expensive affair. Therefore, the

number of people who convicted are miniscule compared to those people who still exist out in the world who've harmed others. Restorative and Transformative Justice work overwhelmingly with people who either can't access the system, don't want to access the system, have accessed the system before and had horrible experiences in it. We can't have conversations about criminal justice without asking what is currently available to people and whether they are availing themselves of those options. For certain populations who are already at the margins, they feel already alienated and criminalized by the system so much that they came up with these other tools to try and actually address the harms that have occurred. The birth of Transformative Justice started with Trans people and black women rethinking ways to create models within their communities to address intimate partner violence, both domestic violence and sexual violence since the current punitive justice system wasn't solving their issues and quite often were getting criminalized the victims (Rice & Smith, 2019).

In the minds of people, justice centers around prison and punishment. This is instilled in us from our childhood by how children are beaten and punished for wrong behaviors. People don't like complexity and want simple solutions to things that are not simple. We live in a society where the punishment mindset has seeped into our hearts, our minds, our spirits where we can't even begin to imagine a world where people aren't being coerced into doing things. Transformative Justice say that prison is actually an outcome of a broader system of violence and harm that has its roots in casteism, patriarchy, and colonization. Restorative and transformative Justice are not alternatives to punitive justice or prisons, it is a philosophy and ideology on its own. Punitive justice creates binaries that categories person as good and bad. Transformative justice shatters these binaries and understands the nature of people and the complexities involved. People doesn't have to be a perfect victim to deserve that somebody pay attention to their harm and people are not monsters for having done a bad thing. This understanding is essential in trying to address harms that have happened in particular instances. The carceral state conspires to obfuscate structural and systemic violence and turns all violence into individual failing. Transformative justice understands the need to illuminate the structural and systemic violence and shows that violence is beyond the individual and is embedded on the social realities. The structural and state violence that exists is a mirror of the interpersonal violence that exists. It understands the complexities of people. For example, the domestic violence between partners is a manifestation of larger systems of patriarchy and misogyny and masculinity and doesn't just confine to man and a woman. Transformative justice rejects the idea that a singular solution to violence from intimate partner or protection of a vulnerable group is to put the perpetrators in prison. Without systemic changes and destruction of social hierarchies, this violence won't stop no matter how many jails we fill.

People who experience harm mostly want answers for questions like 'Why are you doing this?' 'Why did you do this to me?' If they're engaged, they want recognition and an admission of the harm. People also want some form of repair. Sometimes they want some restitution of their agency, which they feel has been taken away from them. And sometimes people say 'I want to make sure this doesn't happen to another person.' The current system fails to provide these answers and needs. Restorative Justice has different accountability processes in which survivor can be a part of if they want to. There can be processes with just the person who caused harm and no survivor. There can be processes with just a survivor and not the person who caused harm if they won't take accountability. Processes can be designed according to the needs of the people who are involved. It's very much tailored to what the situation is, what the harm is, what the

people need and want. In Punitive Justice, solution to every problem in incarceration. It's like taking a hammer and everything then is a nail. Restorative Justice constantly works in figuring out what is going to hopefully help people.

People who advocate Transformative justice understand that it is completely and utterly fair for the victim of violence to want their perpetrator dead. People might want to have vengeance and it is fair for individuals to want it. But it should not dictate the public policy of how we resolve these crimes. The victims should also not have to forgive their attackers. Restorative and Transformative Justice are not about forgiveness. Transformative Justice says that it is easy to punish people by inflicting pain and suffering, but it doesn't change the underlying conditions that existed in the first place that enabled the harm. We know that punishment often does not work in transforming the root cause of violence. Transformative Justice instead works with consequences rather than punishment. Consequences are always things that you have to think about within the context of the harm that occurs. Difference between consequences and punishment is that it doesn't deprive the person of their basic needs for living like food, water, shelter and liberty. Consequences focusses on identifying the position of power that person holds and removing them from that so that they can't repeat the horrible action they committed. It reminds people that they can no longer have the privilege of power if they abuse it. These consequences should also be proportional to the harm that they caused. Restorative justice asks the victims their wants and needs, but tries to ensure that they get their needs met. Restorative Justice understands that if the victims wants revenge or violence, it can't help them satisfy those wants, but it can help the victim in recognition of harm and moving forward with the healing process. It understands that wants of people change when the needs are fulfilled and they feel and think about the whole situation differently.

Prison abolition is not just about changing one thing in our criminal justice system, like closing jails. It is a project that is focused on not just the dismantling of the current punishing systems. It is a framework where we think about different ways to stop people from landing in prison in the first place. Our current criminal punishment system is surrounded by many other systems that creates situations of oppression and hierarchies that needs existence of prisons for its survival. So abolishing prison is eradicating all forms of coercion like capitalism, patriarchy, caste system etc. It's a systemic and structural view of how the world operates and what we need to do in order to be able to actually change those conditions. Working to make sure people have a higher wage, ensuring that people have access to free quality education and access to free healthcare is doing abolitionist organizing.

Abolitionists themselves are quite unclear of how the world will look when we change all these structural factors that lead to incarceration. So, when questioned about what to do with serial killers or habitual sexual offenders, they might be quite unclear as it all depends on the kind of relationships that are going to be in that new world. They know that we will need to come up with solutions at that point for people who cause harm on a regular basis. Abolitionists understands that there will be people who will be causing horrible harms to others repeatedly, but they also realise that punitive justice is not the best way of addressing it. Abolitionists are not asking for a sudden shutting down of all prisons and release of all prisoners in one day. They want to target the root causes of these harms and address it, solve them rather than throw people in prison without addressing it. They realise that imprisonment is not the solution to stop further harm from occurring. Prisons are used to hide the problems in the society, and to control marginalized populations.

We are seeing everyday how police is used by ruling party to quell dissent, arrest activists, attack protestors and enable violence on minorities. We have seen how human right activists and whistle-blowers have been hunted and put behind bars in fabricated cases such as Bhima Koregoan. We have witnessed police brutality against the under-privileged during Delhi Pogrom and worker migrations during COVID-19 Lockdown. It's time we start rethinking the possibilities in how we deal with crime and how we think about justice. Getting rid of prisons would require an array of alternative solutions whose utility depends on the person, the wrongdoing, and the circumstances. Those alternatives could include rigorous therapy, targeted treatment, housing, restorative and transformative justice, education and employment. It is not about letting all of the people out of prison right now, in this moment, and destroying the prisons. It is about creating a set of social and systemic structures that diminish the power of the prison by investing in communities so that it breaks the hierarchies which put people on trajectory to prisons. It is about continuously diminishing the need for this institution that we know which continues to cause harm. For those who think this sounds absurd and impractical, it's worth keeping in mind that our current system is also impractical and absurd. People come out of our current criminal justice system worse, not better. And this is a feature of the system, not a bug. We can't end violence, harm and destruction through a system designed to subject millions of people to violence, harm and destruction. It really doesn't make much sense to advocate for maintaining a system that has basically proven itself worthless. This is a system that causes actual harm to millions of people every single day. In other words, this is not a system built to make anyone better or to really rehabilitate them or to address the harm that they've done or focus on repair and healing. We should focus on not just addressing the situation at hand but really healing them inside, their trauma, their hurt and ensuring that they can have consequences for their actions but not in ways that destroy them.

"The most difficult and urgent challenge today is that of creatively exploring new terrains of justice where the prison no longer serves as our major anchor."

— *Angela Davis*

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This article draws its content extensively from an interview of Mariame Kaba, who is the director of Project NIA, the co-founder of Survived + Punished and a researcher in residence at Barnard Center for Research on Women.

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