

MEDIATION OF CRIMINAL DISPUTES*To victimize or to restore?*- Kavya Tekriwal¹**ABSTRACT**

The concept of an eye for an eye is what comes to our mind when we think of abolishing crimes in a society. The protectors of the legal system, disgrace not just the accused but also the victim to the crime by eliminating their right to be a party to the proceedings. The concept of justice which should be focused on the victim, shifts to the society at large. This not only further victimizes the sufferer but also seizes the possibility of the accused to be reintegrated in the society. While the principles of penology and victimology focus on the restoration of both the victim and the accused, the complete opposite is promoted. Perhaps, the failure to abolish or even reduce criminal activity, a modern approach be adopted by promoting mediation of criminal proceedings. A method adopted and proven effective by other states, is probably the way to go about for India as well in their journey to a crime free society.

INTRODUCTION

Have we ever thought about the fact that a victim to a crime, merely acts as a primary witness in the case? It is considered that any crime committed, is against the whole society and not solely the victim. It is for this reason that the State is party to criminal proceedings besides the accused. Any other party except the State and the accused is considered a 'third party' to the proceedings. Any 'third party' does not have locus standi to participate in these proceedings as has been made abundantly clear in the case of *A.R. Antulary V/s. Ramdas Srinivas Nayak & Anr.*, wherein the court stated "*The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance.*"²

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²(1984) 2 SCC 500

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What can go wrong with this setting is the possibility of the public prosecutor siding with the accused for a personal interest or if the accused is an influential personality. In such a case, the victim stands in a rather disadvantaged position. In a case where the victim does not know their way about the legal system, there exists a great possibility of swindling with the rights and justice of the victim. After a lot of requests made by the victims to have their own counsel engaged, the courts under Section 301 and 302 of the Cr.P.C allowed for victims to engage either under the supervision of the public prosecutor or independently, only on the discretion of the court. The courts are of the view that a crime not only has an impact on the victim but also largely has an impact on the state. Hence, the a public prosecutor is engaged from the victims end. What the courts and the State fail to acknowledge is the fact that the most affected by a crime would always be a victim, who has experienced the crime first-hand and not the society at large. To be able to validly prosecute an offender, we as a society and the person of authority try to understand what the victim has been through. Secondly, the courts are of the view that the public prosecutors are representatives of the court and not the state and hence, there shall not be a possibility of unfair bias. However, the sole reason that they are authorized to prosecute by the State, brings about a sense of doubt in the minds of the victims for the kind of corruption that exists in our country. ³

But the bigger question to ask is whether in the current circumstances and conditions of our legal system, the intervention of victims as a ‘third party’ or even the main party so to say, providing them with justice? In my opinion, the methods adopted by our legal system pertaining to criminal cases is rather outdated. The courts try to adopt a rather deterrent and retributive approach to crimes in India in a world of rehabilitation. While the accused becomes the centre of attention, the victim is cast aside as a mere witness, with no say whatsoever in how they believe justice would be served. Shifting to an alternate approach of rehabilitation and restoration, would not only help the victim overcome the grief and trauma but also, rehabilitate the offender and make them fit to co-exist within the society.

PLEA BARGAINING

With the 154TH Report of the Law Commission, which propounded the idea of introducing Plea Bargaining in the criminal legal system, the concept was added to the Criminal

³ Naidu, N Ramesh. “EXTENT OF INTERFERENCE OF THIRD PARTIES INCLUDING DEFACTO COMPLAINANT IN CRIMINAL TRIAL.” *Https://Districts.ecourts.gov.in/Sites/Default/Files/WORKSHOP-21092019.Pdf*.

Procedure Code 1973. Plea bargaining as the name suggests is for the offender to plead guilty in order to be able to bargain their sentence. However this was restricted to only criminal matters inclined to a civil nature, as was also opined in the case of *Gian Singh v. State of Punjab*, “*the criminal cases which have an overwhelmingly and predominantly civil flavour, like those of commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case full and complete settlement and compromise with the victim*”⁴

The system has been overshadowed with justifications of its benefit to courts and public prosecutors. It is expected to reduce the backlog of cases by helping the courts to manage its workload and relieves public prosecutors of the burden of examining fragile witnesses such as women and children. Other justifications include the financial advantage to the accused and their voluntary reform. However, upon a closer observation, the incompetence of the traditional procedural laws can be identified as it clearly benefits the upper classes who have the means to influence the police, the prosecutors and the victims during the bargaining procedure. The system may also influence an innocent accused to accept unjust compromises and punishment to avoid the ordeal of an expensive and time drawn. Due to this, the system can even be construed to be violative of the fundamental right to personal liberty enshrined under *Article 21* of the Constitution. Even cases where there is a high probability of acquittal will suffer as they will become cases of conviction which may be unmerited and effectively deprives the accused of their belief in the justice system. Therefore, the system of plea bargaining is a cover up of the inadequacies of the justice system and its capacity to deal with the cases that are brought before it.⁵

VICTIM-OFFENDOR MEDIATION

⁴ 2012 10 SCC 303

⁵ Dungdung, Anubhuti. “Plea Bargaining: The Indian Experience.” *Home - Papers*, www.readcube.com/articles/10.2139%2Fssrn.2049826.

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Another alternate approach which would actually serve to be restorative is Vendor-Offender Mediation (VOM), followed widely in the United States of America. This allows the victim and offender to sit together and discuss the ramifications of the crime committed and be able to come up with an amicable solution to the same. The set-up for this session is made keeping in mind the safety of both the victim and the offender. The offender is held liable and made to understand the consequences of their actions. As a 'dialogue driven' approach, it is based on the foundation of holding accountability, reconciling the victim and the offender, and serving the ends of justice.⁶In order to be able to inflict empathy in the offenders mind, the 'dialogue' is based on showcasing the cognitive and psychological demands of the victim.

This type of mediation is rather different than all other types of mediation. The dynamics of both parties are such that they are not in conflict with each other and have amicably agreed to resolving their dispute through mediation, with admission of guilt and suffering. The approach is not to reach a settlement but to delve deep into the actions and its reactions, with the victim making demands to fulfil their injuries without concession. The nature of this type of mediation, is for the victim to get closure on the loss so suffered and for the offender to realise their mistake and serve a shorter punishment. This may not be suitable for all crimes committed but mostly used for first-time offenders. If the agreement reached at is obeyed by the offender, the case can also be dismissed on the request of the victim. However, if the offender does not comply with the agreement, then With the increasing awareness of this type of mediation, victims of sexual assault and murder have also requested for a victim-offender mediation and found it to be serving far more justice than the Courts can provide.

Introducing the concept of Victim-Offender Mediation in India, could be step towards bridging the gap between victims and the delivery of justice. Even though it has been proven to bring about a positive change for serious crimes, even starting small could prove to be sustainable for India. Not only would it aid to the recognition and needs of the victim and rehabilitation of the offender, but also help the prevailing backlog of cases in the court. Unlike Plea bargaining, it would be beneficial too everyone involved. This will bring about change in ways going beyond backlog of cases such as prison conditions, fear of filing legal cases due to publicity, and protecting the lives of juveniles. However, the system of beliefs followed amongst the citizens of India and also the corruption, this approach can face setback

⁶ Sriram, Bhavya. *Towards a Restorative Criminaljustice System: Victim Offender Mediation*. nslr.in/wp-content/uploads/2019/03/NSLR-Vol-1-No-2.pdf.

in terms of offenders being coerced into mediation and family of minor victims not agreeing to this form of dispute resolution. However, a part of it can be overcome, with the implementation of an exhaustive legislation and awareness of the same.

TRANSFORMATIVE MEDIATION

Another type of mediation that can be approached by the Indian Court is of transformative mediation. This type of mediation as has been described by *Bush and Folger* in their book *The Promise to Mediation*⁷, assesses the long-term issues by not just assessing their immediate issues but also issues which may arise in the future. The parties are themselves responsible for taking forward the mediation and coming to a mutual consensus with the role of the mediator being minimal. It focuses on the 'empowerment' and 'recognition' of the parties involved. While the concept of recognition purports taking cognizance of the other party's viewpoint of problems and solutions, empowerment focuses on a more individual orientation of problems and the solutions to the same.

Bush and Folger define Empowerment as, "*The restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems.*"⁸ The goal is to attain transparency of their 'goals', 'resources' 'options' and 'preferences.'⁹ Basically, they would need a clear comprehension of what they want out of the mediation and the reason, what resources they have and how it can be used, analyse the options available as per their benefits and lastly, what they prefer based on the reasonings and justifications of both parties. In a crux, this transparency is solely based on their individual wants. On the other hand, they define recognition as, "*the evocation in individuals of acknowledgment and empathy for the situation and problems of others.*"¹⁰ It basically purports the idea of understanding the perspective of the other party. This type of understanding may eventually lead to a resolution between the parties.

Bush and Folger were the first to "*define transformative mediation as a concept.*"¹¹ While theorists and analysts are of the view that this form of mediation is best for solving disputes between family and co-workers, Bush and Folger think it can be befitting to any kind of

⁷*The Promise of Mediation: The Transformative Approach to Conflict*. 2nd ed. Robert A. Baruch Bush and Joseph P. Folger. Jossey-Bass Publishers, San Francisco, 2004 <http://www.amazon.com/The-Promise-Mediation-Transformative-Approach/dp/0787974838/ref=dp_ob_title_bk>.

⁸*Id.* 6.

⁹Sprangler, Brad. "Transformative Mediation." *Beyond Intractability*, 7 July 2016, www.beyondintractability.org/essay/transformative_mediation.

¹⁰*Id.* 6

¹¹*Id.* 8

dispute. They are of the view that the 'directive' approach to solving disputes should be limited to the litigating courts and mediation should take a more personal approach. In my opinion, this would be a rather fitting approach to reach the end goal of restoration in criminal disputes.

OPINIONS

Restorative justice is rather new concept introduced in the study in the field of victimology. It encourages understanding a crime from the perspective of the offender. It aims not only at repairing the injuries of the victim but also introducing the offender to the injury so caused to take cognizance, realise accountability and empathise. It introduces the parties so involved in-person to be able to discuss the issues. While it may be difficult for a victim to be able to face the offender, restoration has become an important aspect for the betterment of society. Multiple other countries are following different ways of restoration and have succeeded to a great extent. Moreover, this is not a resolution system that mandatorily needs to be adopted by every victim and offender to resolve the dispute. However, the only question one needs to really ask and answer is that, does the normal prosecution of the offender where the victim is merely a victim, really serve them or the society justice? Does it really repair the injury caused to the victim?

In my opinion, it does not.

As discussed above in the paper, the victim is not even allowed to engage their own counsel let alone be a party to the dispute. How then are they being served justice? The courts are not even bothered to understand the trauma a victim went through or even take into account how they would like justice to be served. Moreover, in our country, the offender is declared guilty even before the facts and circumstances prove that they are. Moreover, it is not a new piece of information that prisons are full of undertrial prisoners. Yes, laws are framed keeping in mind justice is served to every individual of the society, but justice is not really being served with criminal cases being heard years after the incident took place. Moreover, justice is not being served to every individual if an accused is put behind bars for years only to find out that they were innocent, years later. Justice is not being served by putting the offender behind bars.

We must understand that our brains are complex parts of our body that gets affected by little things and incidents that take place in our day to day lives. Looking at official statistics, it can be proved that most criminals come from an educated background, with no means to secure

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employment. The widely used phrase, “An empty mind is a devil’s workshop” is what applies best to the people who come from the lower strata of the society. This of course does not justify their actions, but in my opinion, putting them behind bars does not in any way repair the injury caused. The court can keep putting offenders behind bars and new offenders can keep committing crimes. The crime rate won’t decrease till a drastic change is made in the way our legal system works. A person who can commit a crime once can do it twice more if locked up in a place with no place to breathe. The prison reports prove that the mental condition of prisoners drastically deteriorates because of the conditions they are kept in.

CONCLUSION

Mediating the disputes will not only help the victims in being a part of the proceeding that decides the outcome of the actions the offender would face, it also gives the offender to express himself without the fear of multiple people in a court room reacting. This process allows both the victim and the offender to understand their virtues rather than being shamed by the society. Not only does it serve justice in a speedy manner, but also in a manner that would actually account as justice for the victim. It allows the offender to realise the negative impacts of their actions but also helps the victim understand the cause of their actions. The end goal of any legal system should be to reduce the crime rate. To be able to do this, a more contemporary approach needs to be adopted rather than using the colonial deterrent approach. A change should be made with taking a small step towards restorative justice. Mediation should be recognised as a legal dispute resolution method which binds the parties involved and be enforceable in court. Mediation in criminal cases should be given a chance for the sake of betterment of society. At the end Mediation is to analyse the areas of conflict and checking the interests of parties and coming with options that would serve justice to parties. Maybe trying a positive approach to curb the crime rate would bring about a change much required. Not only for the victim and offender but also for the courts and prisons.