

# LEGALFOXES LAW TIMES

## CRIMINAL LAW CONVERGENCE WITH MEDIATION; “A SPECIAL REFERENCE TO INDIA”

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With increasing frequency, mediation is being utilized to resolve civil disputes in the country to a large extent. The mere future of mediation is fulfilling and promising and it has become a very accepted method in the society. But unfortunately, the society has failed to recognize the benefits and usage of mediation procedures in criminal justice system as well. If we look carefully, we can see that the neutralizing communication skills and powerful bargaining strategies of the negotiation process can strengthen the system's capacity to bring justice in the society. It is high time that the Indian legal system understands this and bring mediation in the field of criminal justice system as well.

The term “Restorative Justice” is a very important phrase in the process of mediation. It is a criminal justice which focuses on the rehabilitation of offenders through reconciliation with victims and community at a large. It is an approach to justice, in which the response to crime is to organize a meeting between the victim and the offender. The community is responsible for the well being of all its members, including both victim and offender. Restoration i.e. repairing the harm and rebuilding relationships in the community is the primary goal of restorative justice.

The legal system, especially the criminal justice system can definitely benefit from the use of mediation process. Imagine a system where the criminal defendant (the person who has committed the crime) and the victim of a particular crime are encouraged to sit down together, as a part of prosecution of the case and express how the experience has impacted them. In fact, we take a closer look, we will be able to see how many criminal cases are actually there which are ripe for the mediation process. Foreexample, there are cases where the neighbour files a complaint against his next-door neighbour who habitually trespasses, a noise complaint from the

neighbour or a mere landlord tenant dispute which gives rise to a breach of peace charge. All these examples are criminal in nature but they do not need to be resolved within the normal confines of the court litigation process. Just by merely 'punishing' the offenders, do not get to the core of the anti-social and inhuman behaviour that gave rise to the criminal charges in the first place. Here, the concept of offender-victim relationship becomes very important which can only be possible through the process of mediation.

### **Need for Alternative Dispute Resolution in criminal cases in India**

The rule of law and justice should be administered properly and certain basic steps should be taken by the state. We already know the huge number of cases which are pending on the courts and how these courts are actually burdened by these cases and how justice is getting delayed. This problem can be tackled by the ADR mechanisms. But there is some doubt upon the application of ADR in criminal justice system. In reference to criminal justice, the term ADR encompasses a number of practices which are not considered a part of the traditional criminal justice system, such as victim-offender mediation, family group conferencing, victim offender panels, victim assistance programs, plea bargaining, community crime invention programs etc.

In this case, the current society fails to understand the utility of these kind of programs and how these can actually help in the betterment of the society.

This paper mainly focuses on the benefits of mediation in the criminal justice system and some of the benefits of mediation would be discussed briefly:-

- Mediation is a non-binding procedure controlled by the parties.
- Mediation is confidential in nature.
- Mediation is an interest-based procedure.
- Mediation is a time saving procedure.
- Mediation saves the court fees of the parties.
- Mediation gives a faster outcome than the traditional court procedures.
- Mediation provides a great support to both the parties in dispute. Here, the mediator acts as a neutral facilitator and supports each of the party in the process.

Hence, we can see how efficient mediation can be to resolve disputes between people. Mediation gives much more control to the parties over the way their dispute or difference is dealt with and over the outcome. The scope for solutions is usually greater than the remedies available in the courts and tribunals, or even in prolonged negotiation. It is definitely known that criminal court mediation is a relatively unexplored concept, but it needs to be explored and researched thoroughly. Our society is changing at a great speed and it is not far away that mediation will be a part and parcel of the criminal legal system as well.

But there are certain obstacles as well, which makes mediation not a very easy and convenient process in the field of criminal justice. Some of the disadvantages of mediation are, there are no formal rules for the process; it is a much more informal process. If a skilled mediator is not employed, the lack of formal rules can often result in an impasse. Mediation also relies on the cooperation of both the parties. If the parties involved in mediation are not able to compromise, the process can end in failure. It is very common for mediation to end without the parties successfully reaching a settlement. Hence it is very essential to employ a proper and qualified mediator in the process of mediation who have the power to settle the disputes between both the parties and to make them reach a mutual solution.

We should know that, mediation has the power to develop the human relationships throughout the world, i.e. mediation actually has the power to change us as human beings. It gives us a much broader perspective towards people as a whole and their individual perspectives as well. But as we know, things cannot be changed in one day. It will take time for people to understand the actual benefits of mediation and to abide by them.

There is a very important question which arises when mediation is being discussed and that is the effectiveness of mediation in “non-compoundable” cases. Non compoundable cases are generally more serious in nature and they cannot be compounded; they can only be quashed. These kinds of offences are generally extremely grave and criminal in nature. All those offences which do not come under the list of Section 320 of the Criminal Procedure Code, are non-compoundable offences. These offences include rape, murder etc and other kinds of grievous offences. Now the question lies on the convenience of mediation in these kinds of offences.

In the current scenario, India should start practising mediation with the non-compoundable cases first to lower the burden of the courts in our country. Non-compoundable cases can be very easily and conveniently resolved using mediation, with the help of a qualified mediator.

Criminal mediation should be preached on a larger basis, so that people can actually consider it as an option to resolve disputes and come up with non-compoundable cases as well. The traditional practice of court room litigation in people's mind cannot be changed in one day. But gradually the society will understand the usefulness of mediation and come forward with their cases for a speedy and more convenient solution.

The main motive of mediation is to develop human relationships and to give more viable solutions to people. Mediation believes in restoration, reconciliation and compromise. It also means that we are the solutions of our own problems.

There are two important concepts which should be discussed in this paper which are very essential in criminal mediation and can be called as the pros of mediation in non-compoundable cases as well. They are "plea-bargaining" and "victim-offender mediation programs".

### **Plea Bargaining in Mediation**

Plea bargaining is an out of court process which allows the accused to plea for reduction of a charge or sentence for an offence that he has committed. It is a common practice among the accused and the prosecutor to expedite the disposal of a criminal case. It benefits the prosecutor to secure the punishment of the accused without proceeding to a full trial; which needs a certain procedure and a higher standard of proof to prove the accused guilty of an offence. Through plea bargaining the accused will not be subjected to severe charge or punishment, and the prosecutor and the accused cannot appeal the case to the higher court, if plea bargaining is successful.

Criminal mediation in case management process is an improvement in the plea bargaining system. The presence of a judge acting as a neutral third party to facilitate the plea bargaining process reduces the probability and the dangers of immoral plea bargaining. The use of mediation in criminal cases saves a lot of money, cut short the formal hearings, appeals and retrials.

## **Victim Offender Mediation Programs**

These kinds of programs involve a meeting between the victim and the offender facilitated by a trained mediator. With the assistance of the mediator, the victim and the offender begin to resolve the conflict and to construct their own approach to achieve justice in the face of their particular crime. Both are given the opportunity to express their feelings and perceptions of the offence. The meetings conclude with an attempt to reach agreement on steps the offender will take to repair the harm suffered by the victim and in other ways to “make things right.”

Hence, we can see the VOM system aims at a particular conversation between the offender and the victim which can help both the parties to have a peaceful conversation with each other and also it makes the offender aware of the harm he has caused to the victim. The victim gets the chance to put forward the actual impact of the crime on himself in front of the offender.

This paper will specifically highlight two cases from India which framed the guidelines for the criminal mediation processes.

### **“ Reference of criminal cases to mediation only if offence is ‘ Compoundable’ or HC won’t have inhibition to quash it later: Delhi HC”**

The Delhi High Court, in *YashpalChaudhurani&Ors. V. State*<sup>1</sup>, has held that the court while considering reference of the parties to a criminal case to mediation, must before even ascertaining as to whether elements of the settlement exist, first examine the permissibility in law for the criminal action to be brought to an end either because the offence involved is compoundable or because the High Court would have no inhibition to quash it, bearing in mind the broad principles that govern the exercise of jurisdiction under Section 428 of the CrPC.<sup>2</sup>

In another case on 17<sup>th</sup> October 2017, a division bench of Delhi High Court delivered the judgement in *DayawatiV. YogeshKumarGosain*<sup>3</sup>. It held that a criminal compoundable case of cheque bounce under Section 138 of Negotiation Instrument Act, 1881 can be referred and resolved through mediation.

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<sup>1</sup>Yashpal Chaudhurani & Ors. V. State

<sup>2</sup><https://www.livelaw.in/news-updates/reference-criminal-cases-mediation-offence-compoundable-concerned-hc-inhibition-to-quash-delhi-hc-144598>

<sup>3</sup>*DayawatiV. YogeshKumarGosain*

These two cases paved the way to compoundable criminal mediation in India. India is still hesitant about taking non-compoundable cases to mediation because of the serious gravity of certain cases. It is indeed convenient to take these kinds of cases to the traditional court room litigation but at least the non-compoundable cases which are not that much serious or grave in nature can be resolved through mediation if given a fair chance.

### **Conclusion**

Mediation can bring justice in the society in the long run. As we all know, communication is the key to resolve any dispute between two parties. Mediation is a process which enables a conversation between parties on a one to one basis where the parties get the fair chance to place their own opinions and perspectives on their own cases. There is much more freedom in mediation for the parties than litigation and this is a huge benefit for the parties of any dispute. There is a common concept which is developed among the people, that is, once a criminal mediation has started, it will never end, because the adjudication of criminal cases takes a very long time and hence it is a time-consuming process. Mediation has the potentiality to decrease significantly the costs and delays associated with traditional court proceedings. Mediation has a lot of scope in the present society if implemented properly which can ensure proper and speedy justice to the people of India.