CRIMINAL LAW CONVERGENCE WITH MEDIATION

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# ABSTRACT

When parties need to resolve disputes, they may often turn not only before courts but also to alternative methods of dispute resolution as arbitration, mediation or any other methods like these. This paper seeks to examine the extent of Alternative Dispute Resolution over not only over the Civil Matters but also over the Criminal Offences. The eclecticism of the alternative dispute resolution movement is wonderful, uniting as it does the professional aspirations of both marriage counselors and rented judges, and the economic hopes of both consumer advocates and corporate cost control officers.

Its breadth is reflected in the evanescent quality of its name: alternatives it seeks, but to what? It is not explicit what the dissatisfaction might be. My method which I used is both quantitative and qualitative and the aim is to provide both the empirical knowledge about how Criminal offences can be dealt with Mediation and why one should go with this alternative when he can approach the court of law under the Code of Criminal Procedure, 1973. This paper also deals with why Criminal Law should be merged with Mediation showing that the neutral third parties (mediators) can meet with the parties with the goal of diffusing the situation and creating a better relationship between them even in the future.

In most instances, just “punishing” the offenders does not get to the core of the anti-social behavior that gave rise to the criminal charges in the first place. Concluding that as mediation has become more acceptable, the dialogue has failed to recognize the benefits of using mediation techniques is equally valid when applied to the criminal justice system hence Criminal Law should be consolidated with Mediation and other alternative methods to provide with more rational form of justice to all.

**Key words:** Alternative Dispute Resolution (ADR); Mediation; Criminal Law; Code of Criminal Procedure (Cr.P.C.); Criminal Offences.

# INTRODUCTION

Criminal Law convergence with Mediation might seem bizarre but there are many “criminal” cases that are perfect mediation. Example being of such instances, a neighbor filing criminal complaint against his next-door neighbor who criminally trespasses his or her house, or a landlord-tenant disputes that escalate to a breach of the peace charge; or mischievous teenagers damaging properties of other with intent thinking it would make them cool in front of others teenagers. All of these examples are criminal acts in nature but is it necessary for them to be resolved within the normal confines of the criminal justice system. Would it not be much better if a neutral third party can meet with the parties (both the victim and the offender) with the goal of diffusing the situation and also creating a better relationship between them even in the future? Simply put, in most instances, just simply “punishing” the offenders doesn’t get to the core of the anti-social behavior that gave rise to the criminal charges in the first place.

Mediation brings the disputing parties together, helps them clarify the issues, and also attempts to bring about an agreement that is acceptable to both sides. When a satisfactory solution is reached, the parties sign an agreement as to the terms, the plaintiff withdraws the complaint, and the settlement, in the form of a stipulated agreement, is filed with an appropriate authority. As described by the National Center for Correctional Mediation, "mediation offers an opportunity to develop a solution which the parties themselves feel is workable and, if it is successful, insures that a decision will not be imposed on the parties by a court or other agency" (1979).

## RESOLVING CRIMINAL OFFENCE THROUGH MEDIATION

The Delhi High Court, in the case of Yashpal Chaudhrani & Ors. v. State[[1]](#footnote-1), 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 482 Cr.P.C.

Framing guidelines for such cases, a single bench of Justice RK Gauba held that the mediator (before commencing mediation) must undertake preliminary scrutiny of the facts of the criminal case and satisfy himself as to the possibility of assisting the parties to such a settlement as would be acceptable to the court, bearing in mind the law governing the compounding of the offences or exercise of power of the high court under Section 482 of the Cr.P.C.

The court said that for the achievement of the same purpose, an "institutional mechanism" has to be created in the mediation centers so that there is consistency and uniformity in approach. It said that the "system of vetting", at the conclusion of the mediation process, needs to be institutionalized so that before a settlement vis-a-vis a criminal case is formally executed by the parties, satisfaction is reached that the criminal charge involved is one which is either "compoundable" or one respecting which there would be "no inhibition felt by the High court in exercise of its inherent power under Section 482 Cr.P.C, bearing in mind the relevant jurisprudence." It noted that it hopes and expects that these will serve as guidelines which criminal courts and mediation centres shall follow in future. The court said the same guidelines would mutatis mutandis apply to the other Alternate Dispute Resolution (ADR) methods.

Restorative Justice encompasses the efforts to de-emphasize the punitive aspects of the administration of the criminal justice system, which encourages offender and victim interaction. The Community Court model invites greater involvement between the party impacted and the criminal defendant during the process of prosecuting the case. The misdemeanor criminal docket can definitely benefit from the use of the mediation process. Imagine a system where the criminal defendant and the victim of his crime are encouraged to sit down together as part of the prosecution of the case and express how the experience has impacted them.

Society expects criminals to be held "responsible" for their crimes, garnering proportionate sentences that correspond directly to the depravity of a particular offense. Through retributivist ideology, the social order is preserved, as potential criminals are deterred from engaging in future unlawful conduct. However, as retributivism confronts increasing challenges from countervailing theories, the foundations of our modem criminal jurisprudence are being called into question. Specifically, the doctrine of rehabilitation continues to emerge as an attractive alternative for adjudicating "crimes of addiction" such as nonviolent drug abuse and alcohol-related offenses. In these settings, where treatment is imperative, it seems implausible to refer these offenders to a criminal justice system that emphasizes penological instead of rehabilitative objectives. Consequently, the adjudication of crimes of addiction in the criminal courts represents a misguided approach because it fails to effectively treat the addictions that ignite criminal acts, leaving offenders in a position to repeat offenses once incarceration terminates.

This is the point at which our criminal court system, with its emphasis on retributivist jurisprudence, is particularly vulnerable, and where alternative dispute resolution (ADR) mechanisms, such as court-sponsored mediation, emerge as a tenable alternative. The most efficacious method to deal with crimes of addiction is to refer offenders to institutions that can successfully serve a rehabilitative, not retributive, function. Because of their informal and congenial paradigm, specific ADR mechanisms, such as drug courts and court-sponsored mediation, can successfully implement the former approach, and thus more appropriately and effectively adjudicate crimes of addiction. These mechanisms are better suited to deal with these offenses because their informal structure allows them to address the insidious addiction that lies at the core of these criminal acts. In this way, mediation can serve as an effective means for resurrecting rehabilitative ends that address an individual's addiction, thereby leading offenders onto a path of recovery. In doing so, mediation can converge with the criminal law in vindicating both society's and the victim's interest in eradicating the problem of addiction.

## ROLE OF THE MEDIATORS IN CRIMINAL JUSTICE

Mediators are afforded a significant degree of latitude to assume different roles in facilitating discourse among the parties involved. As Levi explains, mediators "may take on numerous roles facilitating communications between parties and in seeking solutions."[[2]](#footnote-2) The role of the mediator can has been characterized in many ways, from that of a "process facilitator," a "resource expander," a "trainer,” a "problem explorer," and most importantly, a "leader." Levi highlights these differing roles, explaining that "a mediator may act as a guardian of discipline ... as a confidential advisor... or as a consultant charged with generating creative, mutually beneficial solutions."[[3]](#footnote-3) Furthermore, some mediators meet individually with each side of a dispute. Clearly, these descriptions highlight the notion that mediation affords flexibility to adjudicators that does not inhere to judges in the traditional trial process. The flexibility afforded to mediators is beneficial because it affords the mediator the opportunity to become an active participator, not a passive bystander. Individuals who commit compoundable crimes, such as drug or alcohol abusers, cannot have their illness eradicated in prison because prison abandons treatment alternatives. However, if we divert these individuals into an informal mediation paradigm, the mediator will have the opportunity to engage the individual's problem, to engage in creative solutions that will address the cause, not merely the effects, of the problem. As Stipanowich explains, "solutions are limited only by the imagination and willingness of... the mediator."[[4]](#footnote-4) Unlike the criminal court, the mediator will not be forced to apportion punishment to an individual knowing that such a response would be wholly ineffective in treating the problem. Instead, by having the opportunity to search for creative resolutions, the adjudicator will be able to entertain remedies that work, such as rehabilitation or treatment programs. In this way, our system would be adopting responses that provide an optimal chance for alleviating the addiction and thereby reforming the offender. In the traditional court paradigm the judge would have no such flexibility, and thus would not have the opportunity to explore in depth the problem that led an offender to violate the law. Therefore one can say that informality of mediation makes such an approach possible.

In addition, flexibility and discretion, the hallmarks of mediation's informality, will be enhanced because mediation relaxes adherence to both substantive and legal principles. Simply stated, the fact that a mediator is free to entertain novel solutions will have reduced efficacy if the mediator would nonetheless be constrained by substantive and procedural rules of law. Instead, because of the de-emphasis on legal mores, the mediator will not be bound by the stringent constraints of legality, leaving him free to come up with creative solutions without constantly feeling that he may be in contravention of the law. This approach avoids the "Catch-22" dilemma of the traditional courts, where a judge is often faced with "all or nothing" decisions that, based on precedent, necessitate a particular outcome. This can lead to decisions that, while legally correct, are not truly in the best interest of the offender or society. Conversely, under the informality rubric, the mediator will be free to engage in creative solutions, such as diversion to treatment programs, while the criminal court would be constrained to fewer options. As Delgado explains, "modem rules of procedure reduce... options... in ADR the inquiry is wide ranging."[[5]](#footnote-5) Adherence to legal precedence will not be the only source to which the mediator can refer in making such a decision. Principles of community values, mutual understanding, compromise, and increased discretion will allow the mediator more latitude in making an informed and personalized judgment. Viewing the process as one that strives for rehabilitation and restoration of the offender back into the community, the best interest of the parties and society, not legal strictures, will control the day.

# HOW MEDIATION IS BETTER THAN CRIMINAL JUSTICE SYSTEM

Most of us would agree that incarceration is a plausible judicial response, because it serves to remove the individual from society, thereby eliminating the threat of violence that he may pose to the community. We would probably concur that for many violent offenders, incarceration is necessary to achieve the goal and protect the community. In these circumstances, punishment via incarceration seems to be a valid penological objective.

However, imagine an individual who is repeatedly arrested for driving while intoxicated (DWI), or an individual arrested for non-violent drug possession, or public intoxication while exiting a bar or restaurant. In all of the above mentioned situations, there is no "victim," at least not in the same sense as in violent offenses. Yet, these offenders are processed through the same criminal system that deals with murderers and rapists. The response, incarceration, is the same for crimes of addiction as it is for violent criminal offenders. But is punishment really an effective remedy in these situations?

In mediation, the mechanism established in many non correctional settings, that is, both parties must first agree to submit the complaint to the process and then both must agree to the terms of the solution, if any. It is a consensual and voluntary process in which a neutral third party assists the contestants in reconciling their differences. It may be especially effective where the essence of the complaint is not a conflict of abstract principles but, rather, an administrative problem requiring an administrative solution.

The utilization of court-sponsored mediation can represent a novel, yet effective, means by which we adjudicate not all but some of the crimes successfully. But before we examine in-depth the plausibility of utilizing mediation, it is important to introduce the specific parameters of this alternative program. Pursuant to this alternative mediation program, an individual who is arrested and charged with an offense would first be required to plead guilty to his victimless offense and volunteer for court sponsored mediation. This would be the individual's only contact with the criminal court. The reason for such a requirement is based on the fact that any attempts at rehabilitation would be thwarted unless the offender, at the outset, acknowledged the wrongdoing in his action and the inherent necessity for treatment. Also, at the pleading stage, the offender would be entitled to the full panoply of procedural safeguards, in order to ensure an informed decision on his part. Once the offender has pleaded guilty, he would be diverted from the criminal courts into a mediation program that, after careful and thorough examination of the offender, would place this individual into a treatment program that aims to treat the addiction, not merely punish the offense. There is one caveat to such a program: the ability of the individual to avoid prison or further detainment shall be contingent upon his successful completion of the program. To assist in completion, there will also need to be continued supervision and monitoring after the completion of a specified program. The rationale behind such an approach is that if the individual fails or shows little initiative to cure his illness, then the threat to society remains, in which case incarceration or further rehabilitative efforts may be necessary.

The success of such a program will depend heavily on the characteristics and structure of mediation itself. Because of its informal paradigm, mediation can be an effective alternative forum for adjudicating crimes of addiction. If successfully and carefully used, mediation can exist as the mechanism that vindicates the societal interest in seeing this behavior eradicated. Mediation will adopt a response that has proven successful in reforming perpetrators of crimes of addiction: rehabilitation and treatment. In doing so, mediation can act as a conduit for the resurrection of rehabilitation and the restoration of the community. Unlike the criminal courts, the characteristics that comprise mediation are most conducive to achievement of this objective.

## NEED FOR MEDIATION IN CRIMINAL LAW

Mediation eliminates many formalities that are cornerstones of the traditional judicial process. For example, the rules of evidence and discovery usually do not apply. In some cases, the right to counsel is not required, and adherence to substantive legal principles is relaxed. In essence, mediation's structure consists of a series of de-formalized, de-centralized procedures that are aimed at substantive resolution of problems rather than loyalty to procedural niceties. It is these very procedures that allow mediation to sometimes adopt rehabilitative solutions like foe example the drug courts show a genuine chance to reform offenders with addictions.

Most importantly, this paper also highlights the role that ADR can play in the criminal context, as a necessary means for a successful ends. Without congruity of means and ends there is simply no possibility, no matter how noble the theory, to experience true practical success. This was exemplified by the courts' failure in adopting rehabilitation. Conversely, ADR, by combining elements of informality with creativity, serves an important role as a necessary means in solving a problem that has been plagued by failures and repeated tragedies. Mediation is a forum where rehabilitation can operate successfully. The desire to utilize rehabilitation in an ADR forum represents an endeavor that places practicality ahead of misguided morality, where true success is defined in terms of results, not merely by what is "popular." From this perspective, ADR plays a crucial role in vindicating the societal interest because it serves to vindicate the victim's interest.

While this inevitably involves a schism or categorization of certain crimes into different forums, it is an endeavor well worth taking. With this approach comes a realization that judicial responses must vary as the nuances of criminal behavior vary. A system of uniform responses to criminal activity ignores the fact that different crimes may, in some circumstances, call for vastly different responses. If we adopt such an approach, we will be effective in vindicating the societal interest in preserving the public welfare. To do this, our system of justice, at least in some circumstances, must be forward looking. This is where Mediation fills an important void that the criminal courts have been unable to sustain in adjudicating some of the compoundable crimes. Quite simply, certain offenders require treatment, not punishment. As a conduit for the rehabilitative approach through mediation, ADR (mediation) can serve a useful function in reforming certain offenders and restoring the sense of faith in our judicial system.

Even if the mediator employs a rehabilitative solution, the offender's ability to avoid incarceration is nonetheless contingent upon the successful completion or graduation from the program. Incarceration, upon the failure of an individual to successfully complete a treatment program, remains an alternative for the, prosecutor and the mediator. As a result, even if the prosecutor opposes rehabilitation, he may be less inclined to object, knowing that incarceration or other remedies remain as alternatives should initial or subsequent rehabilitative efforts fail. In a way, the prosecutor gets the best of both worlds he can agree to a novel solution that has already proven successful in many states via the drug courts, and if unsuccessful, there is still the option of incarceration if further rehabilitation options are rejected. Because of these mechanisms, there is a strong likelihood that prosecutors will have a diminished interest in taking advantage of procedural laxity. With the decrease in interest, there will be minimal desire for oppression.

## CRITICISM OF MEDIATION IN CRIMINAL LAW

The adoption of the Retributivist Model of punishment equates to an implicit rejection of utilizing ADR mechanisms, such as mediation, to resolve criminal disputes. As in mediation, an alternative forum where parties work collectively to search for creative solutions that respond to party’s needs, not stringent legal directives[[6]](#footnote-6). In mediation, for example, parties are not predisposed to a specific solution because specific resolutions are not predetermined[[7]](#footnote-7). This inherently recognizes the premise that different solutions may be necessitated in different situations. However, this approach has been rejected by our criminal system in favor of a strict "uniformity" that singularly appropriates punishment, regardless of the type of case, crime or individual involved. Because of the stringent legal imperative, flexibility in unearthing inventive solutions is nominal, creativity becomes obsolete, and imagination is ignored. Thus, ADR, namely mediation, has no role to play because punishment represents a predetermined solution that varies in degree but never in kind. The criminal system never seeks to respond individually to the offender, because it impersonally appropriates punishment as the moral choice for redress, even if a better solution would be plausible.

Unfortunately, the retributivist-centered approach now adopted by the criminal courts has not enjoyed universal success e.g. crimes of addiction.

# CONCLUSION

Mediation fosters a climate of candid communication and creates a sense of egalitarianism with the offender. In the criminal courts, the offender is normally a passive bystander, ignorant of the legal dynamics of a case, and dependent on his lawyer to represent his voice. But all this changes in a mediation forum, where the voice of the offender takes center stage, and where the offender becomes an integral participator in actively searching for a mutually beneficial resolution.

The individual may discuss family circumstances, personal relationships, or previous events that shed light on his dependence on illegal substances. In mediation, the offender has the chance to speak of personal issues that were important to him, and would never have been heard in a criminal setting. While this may be "irrelevant" in trials, it is relevant here, as the offender is free to offer suggestions about the most optimal path toward rehabilitation. In essence, the offender does not just represent a problem that needs to be solved, but the offender becomes a problem solver, active in communicating his input. By being involved and informed, the individual will become empowered, believing not only that he can have a voice, but that his voice matters, that his voice is not subordinate to others, and that his is, in essence, part of the search for the solution.[[8]](#footnote-8)

Mediation not only affords the mediator an increased flexibility in the decision-making process, but it also provides the opportunity for open and candid colloquy among all parties, including the offender. The same is not true in traditional adjudication, where procedural niceties and stringent formality exist as a barrier to effective discourse regarding an individual's addiction. Judith Resnik, Professor of Law at New York University, explains, "the formality of adjudication is perceived as undermining open communication."[[9]](#footnote-9) Mediation takes a different approach, where informality encourages open candor among the parties. As Stipanowich explains," instead of providing guideposts for settlement by approximating or predicting an adjudicated outcome... mediation allows parties to candidly express, in a private setting, the concerns that brought them to the table ... ," Thus, unlike the criminal courts, mediation can "take into account expressions that might be considered 'irrelevant' to adjudication .... The practical effect is that mediation's informality exists to give the offender a voice in the proceeding, which seems appropriate considering that the very purpose of the forum is to generate an effective solution that will lead the individual onto the path of recovery.

The varied roles that mediators can play, coupled with the relaxation of legal principles, create a structure where rehabilitation has a true possibility of becoming a reality. While the criminal courts seek to punish the offenders of the crime, the deference afforded mediators will permit an increased exploration of issues and alternatives. In this situation, mediation can flourish and become a predominant method for adjudicating some of the crimes. The flexibility afforded to participants must not be one-sided, affording only the mediator flexibility. Instead, the only method by which mediation and rehabilitation can be successful for the offender is if participants are involved and openly communicating about potential solutions. Indeed, mediation is structured to promote this atmosphere. Drug courts are paradigmatic examples of alternative dispute resolution mechanisms that reject the traditional punishment paradigm in adjudicating drug offenders.[[10]](#footnote-10)

So in conclusion, one can say that the jury is still out, but it is highly suggestive that having offenders and victims communicate will lead to a more tranquil society and fewer repeat offenders.

1. CRL.M.C. 5765/2018. [↑](#footnote-ref-1)
2. Deborah L. Levi, The Role of Apology in Mediation, 1997. [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)
4. Thomas J. Stipanowich, The Quiet Revolution Comes to Kentucky, (1993). [↑](#footnote-ref-4)
5. Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985. [↑](#footnote-ref-5)
6. FORREST S. MOSTEN, THE COMPLETE GUIDE TO MEDIATION (1997). [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Katherine L. Joseph, Note, Victim-Offender Mediation: What Social and Political Factors Will Affect Its Development? page 212-13 (1996). [↑](#footnote-ref-8)
9. Judith Resnik, Many Doors, Closing Doors? Alternative Dispute Resolution and Adjudication, page 249 (1995). [↑](#footnote-ref-9)
10. Carrie Johnson, Feds Fund New Drug Court, Page 6 of LEGAL TIMES, July 20, 1998. [↑](#footnote-ref-10)