MEDIATION IN CRIMINAL JUSTICE SYSTEM: A PAINFUL REMEDY?

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# ABSTRACT

Mediation is a non-judicial procedure, agreed upon by the parties, in which a neutral third party, the “mediator”, facilitates communication and dispute resolution by the parties and helps them reach their own decision to settle the dispute. The adaptation to the process of Mediation dates back to the Pre-British times, when Panchayats were formed in every village to assist in resolving the matters in dispute arisen between the people of the village. There were no records kept of the cases that were resolved by the panchas, yet such process was regularly adopted and accepted by the Indian disputants. The concept of Mediation carries a striking resemblance to the procedure adapted by Panchayats, Panchs and Mahajan in pre-British and post British eras.

There has been a steady advancement in the growth of Mediation in India. Also, the development of mediation in India holds enormous promise. In particular, the neutralizing communication skills and powerful bargaining strategies of facilitated negotiation can strengthen the system’s capacity to bring justice to the society. Despite the demonstrable value of these techniques, however, several large obstacles block the path to mediation in India. Exposure to these facilitated negotiation processes, though spreading rapidly, remains limited. Judges and lawyers harbor understandable apprehensions about the relationship between mediation and the formal judicial process and deep skepticism over the application of mediation to a wide variety of Indian legal disputes.

The process of Mediation remains of a limited scope regarding the Criminal system as well, there has been numerous criticisms and challenges that has been faced by the Indian courts in referring a criminal matter for mediation. Though changing the Criminal Justice system from a Retributive to a Restorative remains an ever so challenging task, but it is also a way to make the criminals a better human being also, it helps in alleviating a victim’s wounds. Mediation, as a method of alternate criminal dispute resolution, personalizes crime wherein the wrongdoer is taught the human consequences of their acts, made to take responsibility for those acts and the victims are given the opportunity to speak their minds and their feelings to the people who are stakeholders to the crime, thereby, contributing to the victims healing. The research paper aims at defining Mediation with regard to Criminal Justice System, it highlights the growth of Mediation in India and also underlines challenges faced by the Criminal Justice system in implementing Mediation. The paper describes different views of the Courts regarding the scope and obstacles with respect to effectiveness of Mediation in Criminal Justice system.

# INTRODUCTION

John Locke, unlike Thomas Hobbes believed that man is sensible and trustworthy by nature, he is peaceful and have mutual obligation towards each other. Lock also believes that the state of nature is peaceful as compared to Hobbes’ theory of state of nature. Further, he adds on that individuals nevertheless agree to form a commonwealth (and thereby to leave the state of nature) in order to institute an impartial power capable of arbitrating their disputes and redressing injuries. The idea of Alternate Dispute Resolution lies on the same principle, it believes that man has the capability of compromising and making peace with each other, though he still requires an unbiased arbitrator that acts as a catalyst to initiate such compromise and dispute resolution.

Today, Man lives in a society with other men, where maintaining peace and harmony is the ideal situation, but it is likely of human beings to involve themselves into disputes and quarrels which might turn into a serious and dreadful dissension. The traditional judicial system being overburdened by the number of cases, have evolved the Alternative Dispute Resolution which tried and being applied to almost all areas of law. However, there still remains few grey areas where the journey of ADR system is still long.

India is country which faces the ills and defects of Red Tapism within the criminal justice system which is to say that the adversarial system which we follow, often inevitably leaves either party dissatisfied as the question of justice arises and remains. Mediation was introduced in India by dint of **Sub - section (1)** of **Section 30** of Arbitration and Conciliation Act, 1996. Mediation is one such alternative to the general litigation whereby a cordial agreement between the parties in dispute is arrived at. Mediation under **Section 89** of Civil Procedure Code can be referred to by courts in case of compoundable offences. It is non-binding in nature. Over the past decade, the attorneys and jurists have had cold feet about the enforceability of mediation as an alternative path to the otherwise complex litigation proceeding due to the conservatism pervading the judicial ethos. But gradually there has been an increase in preference and acceptance for mediation for dispute resolution.

As mediation has become more acceptable, the dialogue that has failed to recognize the benefits of using mediation techniques is equally valid when applied to the criminal justice system. “Restorative Justice” which is a catch phrase encompassing effort to de-emphasize the punitive aspects of the administration of the criminal justice system, includes, among other things, processes which encourage offender and victim interaction[[1]](#footnote-1) also referred to as victim-offender reconciliationprograms (VORP).

Essentially, the underlying purpose is to promote direct communication between victim and offender which gives way to transparency and efficiency. Victims are allowed the opportunity to question, address the emotional trauma caused by the crime and its aftermath, and come to a just agreement. With the overburdened pendency of cases at courts, mediation is coming off as a more desirable alternative. Criminal matters seek justice, which in turn seeks punishment for the crime and relief for the aggrieved. Since mediation’s sole objective is to strike a balance in agreement, many criminal matters dealing with serious crimes cease to come under its purview. Thus, only compoundable criminal cases can seek the aid of a mediator.

With that being said, it can be remarked that the scope of mediation is limited to the nature and severity of each case/dispute, yet elements like confidentiality (from public), cost-efficiency, flexibility and restoration of agreeable relationship between parties gets the best of the people’s preference when it comes to deciding which path to take in order to resolve disputes and come to an agreement.

# HISTORY

With the decline of the Indus Valley civilization the Aryan entered the Indian boundaries.The Aryan’s clan expanded their areas and began with riverine and inland trading which later flourished and quickly expanded. Increasing population and surplus production provided the basis for the emergence of independent states with fluid territorial boundaries over which disputes frequently arose.[[2]](#footnote-2)

In earlier times, disputes were peacefully decided by intervention of Kulas (family or clan assemblies), Srenis (guilds of men following the same occupation), Parishads (assemblies of learned men who knew law) before the king came to adjudicate on disputes.[[3]](#footnote-3) Many villages formed another political unit called a Visya, headed by a Visyapati. The Visyas in turn collected under a Jana, which was ruled by a Rajana or king. However, the precise relationship between the grama, the visya and the Jana has not been clearly defined anywhere.[[4]](#footnote-4)

From early times, the decisions of Panchayats were accepted as binding. The decision of a Kula was revised by the Sreni (assemblies of tradesmen and artisans) which, in turn, could be revised by the Puga (board of persons who belonged to different sects and tribes). Which further could be appealed toPradvivaca, the last stage was the prince or the sovereign.

During Mauryans the king was decided the important and grave matters. Courts were formed by citizens and also there were courts by the tradesmen and village, this was at local level. Also, special courts were presided over by the pradesika, mahamatras and rajukas.

During the Mughal Dynasty the judges chiefly followed the Quranic injunctions, the Fatawas or previous interpretations of the Holy Law. The principles of equity were also followed sometimes.

During the British era the justice administration went over a drastic change, on which the current Indian judicial system also works. Alternate Dispute Resolution in the present form picked up pace in the country, with the coming of the East India Company. The Bengal Regulations of 1772, 1780 and 1781 were the reason for the Modern Arbitration system and they also encouraged arbitration.[[5]](#footnote-5)The first Arbitration Act (Indian Arbitration Act, 1899) which only was limited to the Presidency – towns of Calcutta, Bombay and Madras. The Arbitration Act of 1940 was enacted replacing the Indian Arbitration Act of 1899 and section 89 and clauses (a) to (f) of section 104(1) and the Second Schedule of the Code of Civil procedure 1908.[[6]](#footnote-6)

Post-Independence era saw the establishment of Panchayats which even prevail today for resolving disputes. The Panchayat has, in the recent past, also been involved in caste disputes.[[7]](#footnote-7) In 1982 settlement of disputes out of courts started through LokAdalatswhich by the enactment of the Legal Services Authorities Act, 1987, got a statutory status. To keep pace with the globalization of commerce the old Arbitration Act of 1940 is replaced by the new Arbitration and Conciliation Act, 1996. Order XXXIIA of the Code of Civil Procedure, 1908 by amendment in 1976 provides for settlement between the families. Sections 23 (2) and 23 (3) of the Hindu Marriage Act, 1955 as also under Section 34 (3) of the Special Marriage Act, 1954 are also formed for putting effort for reconciliation. The Family Courts Act, 1984 makes it the duty of the court to make initiations for settlement of family disputes. Introduction of section 89 and Order X Rule 1A, 1B and 1C by way of the 1999 Amendment in the Code of Civil Procedure, 1908 is a sweeping and rigorous advancement for Alternative Disputes Resolution”.

# CHALLENGES OF MEDIATION IN CRIMINAL JUSTICE SYSTEM

*“There is no better test of the excellence of a government than the efficiency of its judicial system.”*

*~Lord Bryce.*

There are only a handful of method for resolving disputes, one of which is the adversarial system of our judicial system. Whenever, a dispute arises between two parties they approach the courts established by the law of the country. These disputes in the court of law are resolved by following procedures which are complex as well as time and energy consuming, they are expensive and take years to be resolved.

With the realization of the drawbacks of our judicial system, new methods of resolving are being introduced gradually but effectively, however such effectiveness of these Alternate Dispute Methods cannot be applied everywhere, there are a plethora of areas and cases where disputes are not easy themselves to resolved through a discussion with a mediator or any other method of resolution.

The criminal cases are one which need much more than just a discussion. The criminal jurisprudence is quite different from the ADR mechanism, as in the case of a criminal dispute, penal provision is sought after to place a benchmark. In the case of ADR, some kind of settlement that may not result into court proceeding is sought after. For instance, no justice can be done to a rape victim with an accused-victim meeting, it may become just an easy way out for the offender who has so effortlessly destroyed the very conscience of the victim.

In a recent case (24th July, 2015), Madras referred a case for Mediation, when the victim was a rape victim, in contradiction to this, Honorable Supreme Court refused to refer rape cases for mediation.[[8]](#footnote-8) Such judgment of whether a rape case can be referred for Mediation can only be answered by giving answers to a few questions. According to criminal jurisprudence, in a rape case, prosecution represents the case and not the victim and also that rape being a non-compoundable case cannot be referred for mediation. In another case in 2005, a Muslim woman was raped by her father-in-law; the Panchayat treated it as a case of adultery and ordered the woman to get married to her father-in-law and treat her husband as her son.[[9]](#footnote-9)

The judges are becoming the ambassadors of mediation but have forgotten to become the mandate of it, the result of Mediation is “win-win” situation, where both the parties are satisfied, as rightly said by Ludwig Erhard-*“A compromise is the art of dividing a cake in such a way that everyone believes he has the biggest piece.”* The reference of a rape case in mediation will not give a ripened fruit which both the parties can consume easily but rather a perished fruit from which only one party can have a bite of it and run away leaving the other party with nothing in hand, vulnerable and helpless.

Another challenge that is faced in Mediation is the ‘limitation of the mediator’, a mediator has to grasp all the technicalities, complexities and details of the particular case in limited time, such a clamping down of the time may lead to the failure of mediation and especially in criminal cases where there are matters of murder, rape, culpable homicide, etc. In such cases it is really difficult for a mediator to know the emotions of a family whose family member has been murdered, or the questions like whether it was rape or not, or whether it was murder or culpable homicide. Such type of questions in such constrained time considering the emotions involved of the family members of the murdered or the members of the dowry death victim whose body has either been burnt fully to death or who has been cruelly sung to deathbed or the soul of the rape victim which has been destroyed so brutally becomes more complex to be answered than ever. Mediation in such cases may not always lead to ‘win-win’ situation, but only ‘one win’ situation, which ultimately disregards the ultimate goal of the mediation.

According to Psychology, when a family member is murdered, the following are the traumas from which the other family members generally suffer from-[[10]](#footnote-10)

* Disbelief on the happening of the event of murder with loved one
* The fear of personal safety and safety of the other surviving family members
* The helplessness of not have been able to do anything about the death and the murderer
* Nightmares and images haunting the family members
* Immense and intense rage and the anger of taking revenge from the perpetrator.
* Agitation towards strangers and extreme fright of the fact that the perpetrator might attack again.
* Distress and dismay about meeting people and going to the places which reminds of the deceased.
* Physical symptoms, like head or stomach aches, difficulty sleeping, eating or focusing
* Traumatized, isolated, or denounced, or condemned by law enforcement bodies, media, and friends and family.

If such consequences are taken into account along with the possibility of bringing mediation into the matters of murder and death, then it will become almost impossible to convince the party of the deceased to compromise and talk through with the perpetrator. The rage and anger that the family will be filled with might come out at one or the other instance when the offender comes in front of them. Confronting in front of each other might create a possibility of danger to the offender, a family might initially agree to meet the offender, but such meeting can also be with a purpose of knowing the offender personally, so that revenge can be taken after such mediation has taken place, mediation will usually fail because one party does not trust the other; mediation will never fulfill the loss of a loved one to a family, no solution and amount of money can put family member’s mind at rest. Such situations make mediation a bounded Alternative Dispute Resolution. Only cases like ‘Motor Vehicle accidents’ can be conducted through mediation, it saves the victim and the offender from the long procedure for getting compensation for the accident, which will ultimately be done by mediation as well, but in a shorter time period where both the parties will leave the forum of discussion happily and satisfactorily.

Another challenge that exists in criminal matters is the mediation in a domestic violence case. Though Domestic Violence is a non-compoundable under Section 498A, still it has been frequently referred for mediation by the courts in cases of Mohommad Mushtaq v. State[[11]](#footnote-11) and Gurudath v. State of Karnataka[[12]](#footnote-12), but it remains a question that whether it is right to refer cases of Domestic violence for mediation. The critics of Mediation confers that Mediation in such cases will not punish offender and he will get away with such situation easily and smoothly, it is with no doubt very prime to save the matrimonial tie of the couple but the question arises ‘is mediation an assurance that domestic violence will not happen when they start living together again?’ It has been since time immemorial that women has been facing violence and discrimination and it is also said that the one who does not raise the voice against the wrong is also wrong on its part.

Women by nature have been a very tolerable being, who does not say anything till something does not crosses the times and bounds, isn’t the question of Domestic Violence being raise when it has become ‘way too much’ to be able to be handled. How can such mediations be a complete and satisfactory solution to the traumas they have faced as women, wives and daughter-in law in their families? How can it be assured that without separation the women will not ever face again any suppression? Yes, though it does take a huge amount of time to solve the cases, but what is a case solved when it is not ultimately leading to justice for the victim.

# DISPUTE RESOLUTION ANALYSIS IN OTHER COUNTRIES

In the United States, the Uniform Mediation Act is limited to creating uniform standards across states on procedural aspects such as confidentiality, enforceability, immunity of mediators, etc.[[13]](#footnote-13) On the other hand, the Singapore Mediation Bill only governs aspects of private mediations, excluding court-connected mediations from its scope.[[14]](#footnote-14) In the Australian view of ADR system there has been attempts to fit the Criminal Justice processes to the language of ADR, however such terminology remains inadequate and obscure. The argument is whether the criminal offence can be a ‘dispute’ which can be resolved by a ‘resolution’. The current language has a limited scope and its possibilities have to be increased to ‘fit’ criminal cases into ADR system.[[15]](#footnote-15) Also, in the country of Bangladesh, it has been more than a decade since the ADR system has been incorporated in the judicial system, but Bangladesh has not been able to institutionalize the ADR tools effectively and vigorously. It has failed to meet the high expectations of avoiding procedural complexity and inexpensive remedies. [[16]](#footnote-16)

## ADVANTAGES OF MEDIATION OVER LITIGATION

As is evident from the selective choice of the litigants, the parties, courts, mediation has been a go-to method of dispute resolution. Its features and characteristics promote a quicker yet efficient way of eliminating any bad blood between the warring parties. Litigation on one hand doesn’t come without its judicial drudgery and delayed judgment. Mediation on the other hand promotes a wider scope of communication between the parties in dispute and bolsters their severed terms with each other. Advocates of mediation say that it addresses each of the issues of diverting cases from court, building bridges between communities and transforming society into a more tolerant, understanding people.[[17]](#footnote-17)

One of the main reasons why parties who place far too much importance on their privacy choose this method is because mediation proceedings are absolutely private and the information of either parties regarding evidence, examination, cross examination, negotiations etc. is kept confidential. It is important to note that the primary reason why most people who have been a victim of an offence/crime don’t approach courts directly is because they lack the confidence and they fear the public eye. An adjudicating dispute resolution by means of litigation invariably leads to bitterness, hostility and animosity between the parties to the dispute as the losing party will continue to nurture a grievance against a successful party. The gloating by the aggrieved party also aggravates the situation. [[18]](#footnote-18)

Key Advantages of Mediation Proceedings:

* Power of Volition – Mediation proceedings have that flexibility aspect intact. The parties to the dispute practice their right to back out of a mediation proceeding even if it is underway. The objective would be defeated if it was not so. The objective being the cordial agreement. If a party is not satisfied with the direction of the proceeding or the potential outcome then it is given the freedom to opt out immediately without touching upon the reasons and detailed explanations for doing so.
* Flexibility – The day to day activities of the party members are almost never encroached upon unless absolutely urgent. The lack of a formal schedule keeps the parties at a convenient spot which helps in reducing the mental and physical agony should someone be susceptible to former or the latter. The proceeding can be modified according to both the parties. As long as the party isn’t being too sluggish or negligent, the flexible nature of the mediation proceeding is upheld.
* Comprehensive technique for dispute resolution - Mediation always takes into account the long-term and underlying interests of the parties at each stage of the dispute resolution process; in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.[[19]](#footnote-19)
* Impartial Mediator - Mediation is process which is free of the oppression of biasness.  The mediator does not discriminate and is immune to influence or power play as his solemn duty is to secure the best interest of both the parties. It is the duty of the mediator to gauge thorough the possibility of any oppression of inequality growing between the parties due to old rivalry. Therefore parties can have that reassurance that they won’t be discriminated against. A partial mediator is no mediator.
* Finality in decision – There is no question or scope of revision, any further litigation arising out of an appeal or any alteration to the facts leading up to an amicable decision, suitably in favor of both parties. This ensures the element of finality in the process of mediation as the goal is to avoid mischief and secure the best interest of both the parties.
* The parties have control over the mediation in terms of :

1) Scope(i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and

2) Outcome(i.e., the right to decide whether to settle or not and the terms of the settlement.)[[20]](#footnote-20)

## PROCEDURE UNDER MEDIATION

Mediation encourages the parties to participate in dispute resolution actively and directly whereby they explain the facts, lay down options or ways to resolve the dispute and make a final decision by coming to a settlement and also it is to be noted that mediation process in India follows all the general rules of evidence and, examination and cross-examination of witnesses. [[21]](#footnote-21)

We have to understand the types of Mediation before delving into the actual procedure that goes into the proceeding. Mediation is of the following two types:

* Private
* Statutory Mediation
* Court Ordered :

1.) Court annexed

2.) Court referred

Private Mediation: Private mediation can be resorted to on monetary and private basis. Private mediation allows the parties to select a mediator of their own choice after coming to an agreement and compromise. Private mediation can also be held on pure contractual basis.

Statutory Mediation: **Rule 5. (f) (iii)** of Civil Procedure – Mediation Rules provides for a mandatory/statutory mediation. Family disputes and some labor disputes are under the scope of mandatory mediation and they have to be dealt under this rule.

Court Ordered Mediation: During a judicial process and before the judgment, parties are given various different Alternative Dispute Resolution options to select from court is required to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation under Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908. [[22]](#footnote-22) This appropriate stage for making the reference in civil cases is after the completion of pleadings and before framing the issues, while in cases pertaining to family law, the appropriate time for making the reference would be immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent.[[23]](#footnote-23)

INITIATION OF MEDIATION PROCESS

The presence of the counsel and the parties is to be ensured by the mediator before the commencement of the mediation proceeding. Initial procedure includes the opening statements made by the mediator and the counsel for both the parties.

JOINT SESSION AND SEPARATE SESSION

In essence, the joint session is held when both the parties have the opportunity to hear the other party and their perspective while in the separate session the mediator is expected to understand one party’s view at a deeper level and as holistically as possible.

ARRIVAL AT AN AGREEMENT

After hearing the facts and circumstances of each side, the mediator is able to reach his own conclusion keeping in mind the best possible way to ensure a cordial agreement between the parties at the end of the mediation proceeding. The possibility of any biasness is ruled out by dint of the soul behind mediation. The parties are made to give their assent in determining the final outcome of the mediation and while they are still at it, any party, if dissatisfied can opt out from the proceeding and choose another mediator of their choice.

# APPLICABILITY OF MEDIATION IN INDIA’S CRIMINAL JUSTICE SYSTEM

*“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser— in fees and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”-Abraham Lincoln.*

A vibrant judicial system is the basis of a flourishing democratic tradition.[[24]](#footnote-24) It has been observed in recent times that due to the vast arrears of pending cases and overburdening of courts, ADR or Alternative Dispute Resolution has been evolved as an effective cure for this unmanageable docket of litigation, freeing the wings of India’s judicial system. However, ADR has been advocated by many as an end in itself, possessing not one but many objectives aimed towards the strengthening of the country’s justice system.

The reasons for the birth of various forms of Alternate Dispute Resolution in India are manifold, the primary reason being the duress that the courts are under due to the huge backlog of cases pending. It is because of this that a Resolution was brought into effect on 4th Decehmber,1993 by the Chief Ministers and the Chief Justices of States at a conference held in New Delhi under the chairmanship of the then Prime Minister presided over by the Chief Justice of India which stated -

*“The Chief Ministers and Chief Justices were of the opinion that Courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They emphasized the desirability of disputants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial".*

As far as civil cases and their pendency is concerned, various ADR mechanisms have been established such as negotiation, mediation, collaborative law, arbitration and conciliation. However, when the question of ADR in the criminal justice system arises, there has been some doubt about its applicability. In the Criminal justice system, ADR includes forms and methods which do not fit in the conventional category such as victim/offender mediation, family group conferencing, victim-assistance programs, community crime prevention programs, ex-offender assistance, plea bargaining etc.

As mentioned earlier the pendency of criminal cases has skyrocketed. As per recent data, a total of 57,179 cases were pending in the Supreme Court of India as of June 30th, 2011.[[25]](#footnote-25) As a corrective step, the Law Commission of India in its 142nd report suggested reform which included the implementation of plea bargaining in India[[26]](#footnote-26). Further, ‘plea bargaining’ was recommended by the Law Commission in its 154th report as the alternative method to deal with huge arrears of criminal cases to reduce the delay in disposing criminal cases, which was also supported by the Malimath Committee Report.[[27]](#footnote-27)

Giving meaning to these recommendations, Criminal Law Amendment Bill, 2003 was introduced in the Parliament. This amendment, despite heavy opposition, was accepted and passed. Chapter XXIA was added to the Code of Criminal Procedure which contains section 265A to section 265L dealing with plea bargaining.

There are various criminal ADR programs that have been adopted by various nation-states such as- Victim-Offender Mediation Programs (VOM), Community Dispute Resolution Programs (CDRP), Community Crime Prevention Programs, Victim assistance programs etc.

According to a consultation and research carried out with the aim to evaluate the effectiveness of ADR systems in India by the Indian Law Institute[[28]](#footnote-28), recommendations have been made for the ADR system in India such as, Building infrastructure and creation of a pool of professionals skilled in mediation and dispute redressal, establishing a separate bar of mediators and arbitrators, Promotion of a pro- dispute resolution culture in India and not always pro-litigation etc.

# CONCLUSION: LOOKING AHEAD

The scope mediation will only see a rise in the future of the judiciary in India as more people will be drawn to its appealing character and ease. India needs to get rid of red tapism sooner or later and Mediation proceedings in criminal cases is one step ahead towards a more efficient judiciary.

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