

RESTORATIVE JUSTICE AND MEDIATION

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ABSTRACT-

Our society still follows the traditional method of retributive Justice where "Justice means inflicting punishment over the offender." But this justice is served to whom? Crime affects a person in many ways including mental trauma, physical injury, hurts dignity, social reputation, etc. Punishing the offender doesn't cure the mental trauma or social reputation of the victim. Restorative Justice via mediation encourages the settlement through mutual agreement of all affected parties to the crime. Mediation is a process through which the parties to a dispute with the help of a third person known as mediator enters into a settlement by mutual agreement unlike in legal proceeding where a Judge passes judgement by application of the law and on merits of the case. Restorative Justice via mediation is gaining popularity in recent times as it not only provides justice to the victim and other related parties but also helps in reducing the burden of court. Unlike the traditional form of justice, mediation puts an end to conflict at once because the settlement from mediation is through mutual agreement against which no appeal or revision lies. It is one of the best processes for providing justice to the affected person with the ancillary object of reducing the burden of Judiciary.

RESTORATIVE JUSTICE AND MEDIATION

Justice is the concept of fairness, equality, ethical conduct, distinguishing between what's wrong and what's right keeping in mind the principle of Natural Justice, truth, honesty, fidelity, impartiality, fair and unfair facts. According to Merriam Webster's Dictionary Justice is "the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments"² Administration of Justice is the application of legal rules, regulations, principles to serve the purpose of Justice. Administration of justice includes the legislative bodies for the formation of laws, executive bodies for its implementation and judicial bodies for imposing punishments and penalties on those who violate the laws.

Our society still follows the traditional method of retributive Justice where "Justice means inflicting punishment over the offender." The retributive form of Justice is based on the principle

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² Definition of Justice, <https://www.merriam-webster.com/dictionary/justice>.

of “lex talionis” which means the law of retaliation. In general terms, the retributive theory is based on the concept of “an eye for an eye.” In this form of justice, crime is seen to be committed against the society at large. The retributive form of justice can be traced back from the well known Babylonian code of Hammurabi (C. 1750 BCE).³ Retributive theory based on the doctrine of Roman law, nulla poens sine leges and nulla peona sine crimen which means no punishment outside the law, and no punishment except for crime.⁴

Herbert Hart defined retributivism as ‘the application of the pains of punishment to an offender who is morally guilty’⁵ Retributive Justice supports the infliction of Punishment. It is based on the revenge as one must pay for the sin he has committed.⁶ It is based upon rights, desert and Justice.⁷ But this Justice is served to whom? Punishment is given to the offender considering the fact the offence is committed against the society at large and not the only the victim. Crime affects a person in many ways including mental trauma, physical injury, hurts dignity, social reputation, etc. Punishing the offender doesn't cure the mental trauma or social reputation of the victim. Hence, by giving punishment as per the retributive theory does the purpose of serving justice is fulfilled. Whereas restorative form of justice provides for a mechanism whereby the parties involved in the offence i.e. the offender, victim and the society are given a chance to identify their need after the crime.

Restorative Justice-

With the emergence of different religious propounders, the restorative form of Justice started gaining popularity. This form of Justice offers something to everyone, gives an opportunity of being heard and say in resolving conflict. It tends to heal the victim. To the victim, it provides the opportunity to regain what has been lost because of the offence. The theory supports punishment in the form of social service, it may include reconstruction of the burnt property, restoring of stolen property, healing injuries, paying for the medical bills, doing community services etc.⁸ The restorative justice encourages the people to abide by law not because of fear but because of the moral and ethical principles.

The objective of Restorative Justice⁹-

- To fulfil all the needs of the victim including physical, psychological, financial and social.

³ Meyer F. Jon'a, “Retributive Justice”, <https://www.britannica.com/topic/retributive-justice>

⁴ Vivek Rai, “critical analysis of theories of Punishment,” https://www.academia.edu/9453358/critical_analysis_on_theories_of_punishment

⁵ R.A.Duff and Stuart P.Green, ‘Introduction: The Special Part and Its Problems’ in *Defining Crimes: Essays on the Special Part of the Criminal Law* (OxfordL Oxford University Press, 2005): 1-20

⁶ John Cottingham, ‘Varieties of Retribution’, *Philosophical Quarterly* 29 [1979], pp. 238-46.

⁷ Amit Bindal, “Rethinking Theoretical Foundation of Retributive Theory of Punishment”, 51 *JILI* (2009). p.310

⁸ Russell Katherine, “Restorative Justice as Punishment” <https://www.katherinekeepswriting.com/thought-log/restorative-justice-as-punishment>

⁹ Restorative Justice https://shodhganga.inflibnet.ac.in/bitstream/10603/32064/5/05_chapter%203.pdf

- To give an opportunity of being heard to both the parties. (Audi Alteram Partem).
- To enable the offender to uphold the responsibility of the damages caused to the victim.
- To give an opportunity to offender to reintegrate into the community.
- To provide a means of justice with time saving and cost-effective manner.
- To create a community to prevent young offenders from entering the criminal justice system.

Mediation

The growing dissatisfaction from the current judicial scenario the heap of pending cases, longer running trials, is approaching towards the need of alternate dispute resolution mechanism. Alternate Dispute Resolution mechanism helps in speedy disposal of the dispute by means other than litigation. Section 320 of the Criminal Procedure Code, 1973 promotes the compounding of Offences and section 89 sets forth the provision for out of court settlement.

Mediation is a type of alternate dispute resolution mechanism whereby the parties to the dispute appoints an independent and neutral third party to resolve the dispute. Merriam Webster's Dictionary defines mediation as "intervention between conflicting parties to promote reconciliation, settlement, or compromise."¹⁰

In mediation, the parties to the dispute appoint an independent, neutral person who helps in reconciliation between the parties and helps in reaching a settlement on the terms decided by the parties to dispute. According to the Oxford English Dictionary, a dispute is "an argument or a disagreement."

The frustration and dissatisfaction of victim from the current judicial system, lack of victim recognition, have been an essential element for the enforcement of restorative justice and mediation. This is not only for those who have suffered or who have been convicted but also for the prevention of the young individual from entering the world of crime and punishment.¹¹

The primary objective of mediation¹²-

- To enable the parties to reach a mutually acceptable term of settlement.
- To provide for a cost-effective and speedy disposal mechanism.
- To avoid legal complexity.
- The role of the mediator is not to adjudicate the dispute. The mediator is an independent neutral person.

¹⁰ Definition of mediation, <https://www.merriam-webster.com/dictionary/mediation>.

¹¹ Lockyer Charles, "Restorative Justice and Mediation" ,<http://firstadrkit.org/adr/restorative-justice-and-mediation/>

¹² Advantages of mediation over traditional law suit, <https://adr.findlaw.com/mediation/the-advantages-of-meditation-cases-over-traditional-lawsuits.html>

- to provide for a mechanism other than litigation to preserve the relationship between parties.
- To provide for better compliance with the term of settlement.

Restorative mediation

The restorative mediation can be delivered only on the happening of following essentials-¹³

- There must be an identifiable dispute between the parties.
- The parties to the dispute must be able to talk about the damages caused.
- The parties shall be able to decide how to make things right.
- The parties must be able to rebuild the trust and prevention of future dispute.

Restorative mediation promotes a restorative outcome i.e. the mediator tries to acknowledge the wrong done and promotes a settlement on the mutual agreement based on making things right for both the sides and to prevent the future dispute.¹⁴ It promotes victim recognition, tries to acknowledge all the needs of the victim including financial, physical, social, psychological needs etc. In the process of restorative justice parties to the dispute are given the opportunity of being heard, resolving the dispute by making the offender realise the responsibility of damages caused by his act.

For example, under litigation, if a man commits the offence of rape he will be punished with a minimum imprisonment of 10 years. But what about the victim, is Justice really served? What about the victim's mental trauma, her medical bills, social reputation and other unmeasurable damages caused. In a similar case under restorative mediation the offender and the victim are given a chance of being heard, to determine whether trust can be rebuilt to avoid future crime by the same offender, they are provided with an opportunity to enter into such settlement which will fulfil all the needs of the victim and serve the purpose of Justice too. Restorative mediation does not create a fear of law. But it helps in setting up a preventive environment. It has been seen that the repetitive offenders aren't afraid of being caught or being punished but the restorative mediation creates a sense of responsibility on the offender to understand the actual damages caused to the victim and provides them with a platform to fulfil the needs of the victim.

The Supreme Court of India observed as follows in Delhi Domestic Working Women's Forum v. Union of India¹⁵

"The defects in the present system are first, complainants are handled roughly and are not giving such attention as is warranted. The police, more often than not, humiliate the victims. The victims have invariably found rape trials an experience. The experience of giving evidence in Court has been negative and destructive. The victims often say, they considered the ordeal to be

¹³ Douglas Noll, "Restorative Mediation" <https://www.mediate.com/articles/noll6.cfm>

¹⁴ Ibid.

¹⁵ 1995 SCC (1) 14

even worse than the rape itself. Undoubtedly the Court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself.”

Restorative mediation is concerned with the restorative outcome. The restorative outcome is an agreement reached by mutual consent as a result of the restorative process. The agreement may contain the term of restitution, community services, other services aiming at the fulfilment of physical, psychological, social, financial and other needs to recover the maximum damages suffered by the victim.¹⁶

Restorative mediation is done with the main purpose of restoration. Restoration of victim's dignity, restoration of damages caused restoration of the offender as a law-abiding citizen in the society not only the back-ward damages but also helps in establishment of society with law-abiding citizens for prevention of future disputes.¹⁷

Restorative justice and mediation in criminal matters-

Criminal Jurisprudence is different from restorative mediation as in criminal jurisprudence the provisions set forth in statute and ordinance are the benchmark for the delivery of Justice whereas in restorative mediation settlement on terms of parties are promoted. There have been recent changes noticed in the criminal jurisprudence, the judicial system is trying to integrate the concept of retributive mediation together with retributive Justice in heinous offences. In recent conference of National Initiative to reduce pendency and delay in Judicial System- “he Chair Hon’ble Shri Justice Kurian Joseph, Judge, Supreme Court of India, flagged the issue of pendency through statistics and informed that there were 2.75 crore cases pending in various courts and 3.5 lakh cases pending in the tribunals which need immediate attention. With this background, he asserted the need for effective use of ADR mechanism.”¹⁸

Need for mediation in criminal cases-

The increasing number of pending cases, long-running trials, irregular hearings, lack of judges, lack of resources, the concept of protecting the interest of offenders are making mediation a better choice for the resolution of disputes. Mediation has been accepted as one of the most effective ways of solving the civil dispute but now is the time for enforcing mediation in criminal matters too. The matters of petty crime and Juvenile Justice can be easily dealt with under restorative mediation. In the cases of minor crime such as trespassing, window breaking, creating illegal street art, stealing food etc. restorative mediation can be more fruitful rather than litigation. It will help in giving a better shape to the young generation not by threatening them

¹⁶ Supra 8 at 3.

¹⁷ Ibid.

¹⁸ Conference Proceedings of National Initiative to Reduce Pendency and Delay in Judicial System, <http://nagaonjudiciary.gov.in/statement/ProceedingSC.pdf>

with fear of law but by creating a platform for them to realise their social, ethical and legal responsibilities.

Victim-offender mediation: Model of retributive justice through mediation

Victim-offender mediation also known as victim-offender reconciliation programme or victim repartition programme provides for a platform to victim and offender to directly communicate and resolve the dispute. Victims are recognised and given an opportunity of being heard for presenting damages caused to them, to ask the question and address their emotional trauma, financial loss caused due to the offence and its aftermath.¹⁹ The purpose of the programme is to promote direct conversation between the victim and the offender.²⁰ The model is relationship-driven focusing on healing and attaining closure.²¹ It promotes the settlement for repair, reconciliation, reassurance and restoration. It offers an opportunity to create a balance between right and wrong. It promotes the idea of forgiveness.

The very first victim-offender reconciliation programme was held at Kitchener, Ontario in the early 1970s (Peachey, 1989 at 14-16) as an experiment when a youth probation officer requested that the offender shall be given a chance to meet the victim. After the meeting, the judge ordered the offenders to pay restitution to the victim as a ground for probation. The programme started as a probation based/post-conviction alternative inspired by the probation officer.²² It was started in the United State in Elkhart, Indiana in 1978.²³

Victim-offender mediation provides with the agreement on mutual terms which may help in healing the trauma with the administration of Justice whereas the criminal Jurisprudence helps only in the administration of Justice. It can be of superior value in petty cases where the need to realise the obligation and moral and ethical values are much more important than the imposition of punishment. Fear alone cannot help in the development of criminal psychology, the rehabilitation of criminals in society as law-abiding citizens needs reform which can be brought by understanding the psychology behind crime, its prevention. Mere sanction of law can sometimes result in failure of serving the Justice.

Justice is not only the administration of law but is based on the principle of fairness, quality, distinguishing between right and wrong. Mere enforcement of law without any changes in the

¹⁹ Mr. Anup Kumar, "Applicability of ADR in criminal Cases," [www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=5ff4acc7-53ef-4d12-a0a8-1b41ab12beba&txtsearch=Subject:%20Arbitration%20\(last](http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=5ff4acc7-53ef-4d12-a0a8-1b41ab12beba&txtsearch=Subject:%20Arbitration%20(last)

²⁰ Koman, R. N. (2016). Balancing the Force in Criminal Mediation. *Beijing Law Review*, 7, 171-180. <http://dx.doi.org/10.4236/blr.2016.73018>

²¹ Maureen E. Laflin, Remarks on Case Management Criminal Mediation, *Idaho Law Review* 571(2003-2004) at p. 580.

²² Victim offender mediation, restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/victim-offender-mediation/#sthash.jeopqogq.dpbs

²³ Victim offender mediation association, <http://www.voma.org/abt vom.shtml>

psychology of criminal cannot be termed as Justice. For providing Justice to the victim the loss suffered due to offence and its aftermath shall be met by the offender “to share the pain of victimization and to answer the question as to why and how.”²⁴

Victim-offender mediation brings both the offender and the victim to

Although it is not prevalent in India, it is not a new concept to the criminal Justice system. The 142nd and 154th Law commission report Malimath Committee Report brought the concept of victim-offender mediation as “Plea Bargaining.”²⁵

Plea bargaining was introduced through the Criminal Law (Amendment) Act, 2005. Merriam Webster’s Dictionary defines plea bargaining as “the negotiation of an agreement between a prosecutor and a defendant whereby the defendant is permitted to plead guilty to a reduced charge.”²⁶ It is a pre-trial step whereby the defendant is given a chance to plead guilty for the offence resulting in some concession in the punishment.²⁷ The concept of plea bargaining is based on the principle of “Nolo Contendere” which means “I do not wish to contest.”

In a landmark judgment *Bordenkircher V. Hayes*²⁸, the US Supreme Court held that the constitutional rationale for plea bargaining is that no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer. The Apex Court, however, upheld the life imprisonment of the accused because he rejected the ‘Plea Guilty’ offer of 5 years imprisonment. The Supreme Court in the same case, however in a different context observed that it is always for the interest of the party under duress to choose the lesser of the two evils.

The division bench of the Gujarat High Court observed in *State of Gujarat V. Natwar Harchanji Thakor*²⁹ that, the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable.

Application of Plea Bargaining³⁰ -

The provisions of Plea Bargaining are not applicable in the set forth cases-

²⁴ Supra 18.

²⁵ Victim Offender Mediation: an Indian Perspective, The legal speak, <https://thelegalspeakblog.home.blog/2019/03/20/victim-offender-mediation-an-indian-perspective/>

²⁶ Definition Plea bargaining, <https://www.merriam-webster.com/dictionary/plea%20bargaining>

²⁷ Ms. C Nithya “A Unique Remedy To Reduce Backlog In Indian Courts,” www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=4a5ad044-6b7e-4d1b-93cb-d0f1bf117bcf&txtsearch=Subject:%20Criminal

²⁸ 434 U.S. 357 (1978)

²⁹ (2005) Cr. L.J. 2957

³⁰ Soura Subha Ghosh, Plea Bargaining- an analysis of concept, Legal Services India, http://www.legalserviceindia.com/articles/plea_bar.htm

- Offences with imprisonment of more than 7 years.
- Offences against women and child below 14 years of age.
- Repetitive offenders on subsequent convictions.
- Offences which affect the socio-economic condition of the nation.

The object of Plea bargaining³¹-

- Decrease the number of trial prisoners.
- Decreases the pendency of cases.
- Provides for a platform to an offender for realising responsibility and obligation arising out of the offence.
- To promote speedy disposal of cases.
- To promote victim identification and fulfil the needs of the victim.

Benefit from victim-offender mediation-

To victim-

- Quick Justice.
- Cost-effective procedure
- Fulfils all the needs of the victim.
- End of uncertainty.
- Preserve the relationship between parties.
- Rebuild trust.
- Helps in attaining Closure.

To Offender-

- Creates a sense of responsibility and obligation.
- Provides for a lesser punishment.
- Helps in rehabilitation in society as a law-abiding citizen.
- No appeal lies from the settlement agreement.
- Less time and money consuming.

The success of the victim-offender mediation depends upon the neutrality of the mediator and understanding of the defendant. It is the common principle to accept the lesser evil, the agreement entered on a mutual settlement between parties provides the defendant with lesser evil and more benefit to the victim. The mediator shall possess all the essential qualification for understanding the roots of dispute and to promote such negotiation, conciliation and settlement between prosecution and defendant as to achieve the objective of mediation and to provide closure. The mediator shall refuse to mediate when he sees there is no ground for settlement as

³¹ Manmeet, "plea bargaining in Indian legal system," legal services India, <http://www.legalservicesindia.com/article/1836/Plea-Bargaining-in-Indian-Legal-System.html>

either the defendant is unwilling to plead guilty or the offence in itself is unidentifiable. Additionally, the mediation proceeding shall be confidential and cannot be used in litigation against the parties.

Conclusion-

Restorative mediation has a centralised aim to heal the victim, offer damages and to rehabilitate the offender as a law-abiding citizen in society. It is both backwards-looking and futuristic as it not only deals with the actual damages caused but also helps in rebuilding the trust and preventing future offences. It creates a sense of responsibility and obligation in the offender whereas the criminal jurisprudence creates a sense of fear from the sanction of law. Restorative mediation can be more superior and can result in a better outcome in course of petty crimes such as theft, assault, trespass and also in Juvenile Justice. Restorative mediation helps in developing society at large, helps in victim recognition, serves the purpose of Justice. The restorative outcome includes the terms for healing the physical loss, mental trauma, societal reputation etc. It may include punishment, community services, payment of damages or any other manner for recovery of damages and rehabilitation of the offender. Restorative mediation can become an effective way of speedy and effective disposal of criminal matters in the nearest future.