

Exploring Jurisprudential Foundations Of Victim-Offender Mediation And Its Incorporation Under Indian Criminal Justice System

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Abstract

Victims of offences feel progressively ousted and alienated by the justice delivery system. Victims abused by criminality are victimized additionally during the time spent getting justice. Outcome of justice process is also insufficient to cater justice to the victims. In no way it can be labelled as a system that does holistic justice to all stakeholders. The process of healing the victim from the imprints of offence is non-existent in our legal system. Justice system administering criminal justice are often referred to as curative systems but restoration of victim is neither an avenue of focus of the system nor it is in any way offered. A systematized and controlled dialogue between the victim and the offender that ensures that victim attains a sense of justice and offender realizes the guilt and takes the responsibility of the same. Traditionally, mediation is seldom used as a method of dispute resolution. In criminal law, the usage is almost negligible. In some traditions as a matter of custom and over past few decades in some countries, mediation between victim and offender has yielded good results. The idea of mediation is to develop an ecosystem where the victim is given an opportunity to articulate the impact of the crime upon him while at the same time allowing the offender to show repentance for act committed by him.

This research is an attempt to explore into the idea of having a mediation dialogue between the victim and offender. Such a conception is an attack on traditional idea of criminal justice system and many a time this approach has received massive criticism and an outright rejection. However, as we endorse the idea of effective restoration of victims as an element of progressive reformation of criminal justice system, the victim offender mediation dialogue is a subtle outcome of this larger cause. This work is an attempt to trace down the jurisprudential basis and origins of victim-offender mediation, showcase its relevance in contemporary times and how such an approach may be incorporated within the Indian Criminal Justice system. The researcher has visited the law relating to this approach of restoration in other jurisdictions and has suggested the best practices and procedures that can be incorporated in Indian legal system to that would give a victim centric approach the entire process.

Introduction

The discourse on victims' rights considers, four criminal justice models of deterrence, incapacitation, rehabilitation, and retribution. None of these discourses emphasize upon the importance of community that keeps victim trapped into a sense of helplessness and a feeling

of injustice.¹ No criminal justice system has ever thought of having a humane and considerate approach in solving the problems of criminality. Dialogues and discourses have historically been addressing the complex of disputes but their adoption in criminal justice system was outrightly rejected. It is however accepted, that a healthy and engaging dialogue has the potency to solve gravest of problems. The territorial disputes between States, military aggressions, disputes of crores of fraud, Inter-governmental disputes etc. have been effectively solved through dialogues and discourses. Crimes have been viewed largely through lens of punishment and correction of offender and a very less attention is attributed to victim needs. The said approaches suffer from humane consideration and is devoid of emotional and sentimental values that is a pre-requisite to correction of offender. Offender hardly realizes the gravity of the act committed by him, the dire consequences that have resulted from the acts, the state of suffering in which the victim is pushed and extended stigmatization that victim has to face.

Over the years it has been observed that an increasing number of crime victims have expressed their desire to be acquainted and meet face-to-face with those who victimized them.² They are inclined and interested to let the offenders know the aftermath of the crime on their lives and the lives of the family members and to put forth many lingering questions, have a dialogue on them and to be directly involved in holding offenders accountable for the harm they caused.³ Victim-offender mediation has emerged as a promising and progressive response to more traditional retributive response that have been aiming to serve victim needs by compensation, correctional facilities, and rehabilitative centres. Conceptually, victim-offender mediation is still quite nascent with a traceable history of only 25 years, it is essential to hold this exercise in manner highly conducive and sensitive to victim needs while considering the profiling and requirement of offenders. By declaring that the justice has been served to victim without victim feeling the sense of justice and by celebrating that the current reformative practices have reformed the offender without the offender actually getting reformed makes the process of criminal justice administration nugatory and a total snipe hunt. Since the idea of justice is highly subjective and the process of reformation requires an individual consideration, therefore what is required is that the person seeking justice: the victim; and the person causing harm and needing reformation: the accused, must be made to face each other in presence of State so that at a psychological level the justice could be eternalized and reformation could be induced. Victim-Offender Mediation can in this term be a game-changer.

The current research has few limitations. The researcher has not dwelled into the technicalities of victim-offender mediation procedures and practices and has not discussed any of the commonly practiced models of such mediation. The idea of research is to only give a theoretical strength and a strong jurisprudential justification to this otherwise sparsely acknowledged concept. Secondly, so far as Indian context is concerned the researcher has not suggested any innovative methodology or practice that could be adopted for victim-offender mediations; rather the avenues wherein within the existing legal framework how the mediations could be effectively implemented; has been the central approach of this work, that is to say how through least effort maximum advantage could be extracted without realigning or revamping the existing laws.

¹ Moran, K. L. (2017). Restorative Justice: A Look at Victim Offender Mediation Programs. 21st Century Social Justice, 4 (1). Retrieved from <https://fordham.bepress.com/swjournal/vol4/iss1/4>

² Abrams, L. S., Umbreit, M., & Gordon, A. (2006). Young offenders speak about meeting their victims: Implications for future programs. Contemporary Justice Review, 9(3), 243-256.

³ Victim Offender Mediation: A National Perspective, Justice for victim, Justice for all, OVC Archives. [Search | Office for Victims of Crime \(ojp.gov\)](https://www.ojp.gov/office-for-victims-of-crime)

Victim-Offender Mediation: A Jurisprudential Analysis

Criminal justice administration has an inherent characteristic of deterrence. State cannot afford criminality on cost of offender reformation. In no legal system deterrence has been totally eliminated, rather it is co-terminus with victim rehabilitation and offender reformation. The underlying reason for this attachment with traditional approach of punishment and deterrence is in relation to criminality of acts, their impact on society and quantum of damage it causes to all stakeholders of criminal justice administration. Certain offences are made as compoundable, certain can be settled through extra-judicial process, certain are open for plea-bargaining or probation and then there are certain class of offences that in the view of the State are serious, unpardonable, potential threat to law and order if not dealt heavy handedly. Based upon this view and legal classification of offences victim restoration has to be subjectively dealt and accordingly opening every kind of offence to victim-offender mediation is not only practically redundant but also contravene the criminal justice policy as set by State.

As a general rule, such a form of mediation is understood to apply in those cases primarily where State has legalized compounding. This would help in attaining customized justice to the parties involved. These are cases where a diversion from prosecution may be affected, assuming the mediation agreement would successfully complete. Once done, Court would eventually certify its legality to ensure no breach of justice policy has happened. The other types of cases referred for this practice are those where a formal admission of guilt has been offered by court and accepted by the court. In such scenarios, if the accused consents, then the process of mediation may be initiated. Lastly, in cases of release of offender on probation, the court may impose the process of mediation as a condition precedent for probation. The stakeholders of the process- Judges, probation officers, victim advocates, prosecutors, defense attorneys, and police must play an important role in ensuring that the process is initiated.

Victim-offender mediation has a potency to ensure a peaceful rehabilitation of the offender requiring him to right his wrongs through ADR philosophy. At the same time, it serves as a mechanism to ensure a psychological satisfaction to the victim in relation to his victimization. This mutuality and active engagement of accused and victim serves as an essential tool to humanizing the criminal justice process. The theoretical justification of the process thus settles by saying that it tends to humanize a process which is devoid of human touch. The process tends to look upon the humane elements of crime and victimization which the existing legal framework tends to ignore. Based upon this foundation, the accepted goals of victim offender mediation are summarized as under⁴:

1. Supporting the healing process of victims through dialogue by providing a conducive, regulated and safe setting for victims to interact with offender.
2. Ensuring that the offender learns and understands about the ill consequences of the crime and be willing to take direct responsibility for their conduct, action and behavior.
3. Extending a platform to victim and offender to discuss, deliberate and develop a mutually acceptable plan that accommodates their concerns and addresses the harm resulting from crime.

Scope Of Victim-Offender Mediation Under Indian Criminal Justice System

Indian Criminal Justice system long back practiced the approaches of Restorative Justice. The Nyaya Panchayats used to improvise upon community centric approaches to

⁴ Dr. Mark Umbreit, Restorative Justice Fact Sheet, Center for Restorative Justice and Mediation, School of Social Work, University of Minnesota

address the impacts of crime. The accused was made to repent for his act by indulging into services for the community and at the same time the victim was assisted by community and even by the culprit to be reintegrated to society. Such traditions lost their efficacy as the colonial justice system took over the process of justice administration. In recent years, owing to international development in area of restorative justice efforts have been made at the level of legislature to imbibe statutory norms for victim restoration. There has been a little development in the approach related to victim-offender mediation and so far as this approach is concerned, Indian justice system is still at a very nascent stage. This serves as a tremendous opportunity for India to develop a robust and evolved system of victim-offender mediation learning from the experiences of other jurisdictions. Certain avenues where Indian Justice System may incorporate victim-offender mediation are discussed under:

Compounding of offences under The Criminal Procedure Code, 1973 (CrPC)

The little development as referred above can be traced under existing provisions of The Criminal Procedure Code, 1973 (CrPC) Section 320 of the Code where legal framework for compounding of offences has been provided. For compounding, certain class and categories of offences have been specified wherein the Court is empowered to compound the offences. This is undoubtedly an effort to move towards restorative justice within the prevailing system.⁵ Although compounding requires permission of court and has a moral angle attached to it i.e. compounding solely for monetary consideration is discouraged however where the scope of settlement exists, Indian courts have pro-actively allowed compounding. The legal outcome of compounding is acquittal of accused after the settlement terms are complied with.⁶

When compounding is considered by courts as one of the probable ways to do justice, Victim-offender mediation may find its way. In matters where court has permitted compounding, the court may in addition also require the parties to undergo the mediation process. Mediation in such cases and at this stage may be of utmost benefit as the scope of any adversary against either party is ruled out as the matter is already settled judicially. The mediation at this stage shall afford a peaceful and conducive opportunity to both accused and victim to openly discuss about the crime, the accused may learn of the humane suffering undergone by victim and he may then be in a position to actually feel the actual wrongness of his act. Such a psychological eternalization of his guilty conduct would serve as a positive deterrence in future, as now the deterrence is not compelled externally by fear of law but from a real time realization about the inherent wrongness of the act that can cause suffering to other.

There are a couple of limitations to this approach. When victim-offender mediation succeeds a compounding proceeding, the limitation surfaces in terms of the number of offences that are compoundable. CrPC has classified only a limited number of offences that could be compounded, therefore when the process of compounding is itself limited to only certain offences, the process of mediation that succeeds it is inevitable restricted. Secondly, the jurisprudence of compounding in India is based upon the two inter-twined assertions namely-offences of less serious nature may be compounded and secondly the time of court must be invested in more complex disputes therefore the compounding helps to save the time of court by reducing burden of legal proceedings. Based upon this conceptual basis, it would be unlikely to undertake mediation- another formal legal exercise in those cases where the primary object

⁵ Under Section 320 of The Indian Penal Code (1860), the offences that may be compounded have been listed along with the persons by whom they may be so compounded. The section makes a distinction between offences for the composition of which, the permission of the Court is to be sought [Section 320(2)] and those for which such permission is not necessary [Section 320(1)].

⁶ S Muralidhar, "Rights of Victims in the Indian Criminal Justice System", National Human Rights Commission Journal, Vol. 1, 2004 at 88.

was to reduce burden on justice system. For the stakeholders involved in justice administration this would be like “out of the frying pan and into the fire.”

Victim Compensation Scheme

Section 357 A of the CrPC provides for compensation that may be awarded, irrespective of whether the offence is punishable with fine and whether the fine is actually imposed." This payment of compensation as a consequence of the court's order may be viewed as an attempt of financial restoration. The judicial approach towards awarding compensation to victims in India has been extrovertly cautious and inconsistent. The legislative drawback of the section is that the redressal of individuated grievances is totally excluded from this section and there is no mandate upon court to navigate through the principles of compensatory jurisprudence or through civil standards of compensation while deciding compensation under this provision. Any sum of money may be awarded but what sum victim feels adequate is nowhere mentioned to be considered. The question on adequacy of this provision have always been raised and debated but from standing nowhere to standing as per current regime of 357 A would still be a step towards a restorative paradigm.⁷

The aforesaid provision is an avenue where victim-offender mediation can play a pivotal role. In civil law, the compensation is generally pleaded by the party and the amount is decided by the party. Even when compensation to be paid is pre-decided as in contracts, the amount still is negotiated by parties together. In criminal cases likewise in certain categories of offences like against property or offences where compensation can remedy the wrong like hurt etc. compensation can be given to the victim as per the actual loss and demand of victim. Now, deciding an application under 357 A of CrPC is that stage of proceeding where victim-offender mediation may be pitched in. the victim and offender may be asked to undergo the process where through trained professionals the crime and its impact may be mitigated through dialogue. The victim could explain the accused about the ill consequences of crime and may put forth a demand for compensation that would be best suited to his need. This would give some level of participation to victim in the entire process of trial. The punishment part of offence is within the discretion of court but the compensation part of the offence may keep into mind the victim demand. Moreover, as Section 357 A explicitly provides that compensation may be payable regardless the outcome of trial in terms of conviction or acquittal, the question of compensation in lieu of punishment does not arise at all. Based upon statistical data of adopting mediation in deciding the quantum of compensation against crimes, many victims have reported that this engagement has helped them to level their voice and a greater sense of being heard and justice has accrued to them.

It is true that the above approach might not be applicable in all types and categories of offences. A careful selection of offences where such a method can be opted must be done so that while ensuring justice to victims we do not interfere with the established sanctity of criminal justice administration. Tracing the suitability of this approach a reference may be made to Malimath Committee Report.⁸ The Report recommended that “cruelty” as defined under Section 498A of The Indian Penal Code, 1860 ("IPC") be made compoundable and bailable in order to facilitate mediation between the wife and the husband. This means in matrimonial disputes involving criminal action the scope of mediation has been identified.⁹

⁷ Bhavya Sriram & Maheshwari S., Towards a Restorative Criminal Justice System: Victim Offender Mediation, 1 NALSAR Stud. L. REV. 16 (2005).

⁸ Report of the Committee on Reforms of Criminal Justice System, Vol. 1, Government of India, Ministry of Home Affairs, at 75 - 78 (2003).

⁹ Ibid n. 7

Confession and consequent Conviction

Conviction based upon confession by accused may be made by the Judge or Magistrate. For a trial before Court of Sessions, Section 229 of CrPC, 1973 and for trial before Magistrate Section 252 of CrPC, 1973 empower the Judicial Authority to convict the person when he confesses the offence before the court. Indian justice system has provided safeguards to this method of conviction. Any confession made to police officer is inadmissible as evidence and cannot be a ground of conviction. In order to convict, the confession must be made out of free will without any coercion before the court and the judge must explain to accused that such a confession would result in conviction. Additionally, if the judge is not satisfied with the confession so given, the same may be rejected and a trial shall commence requiring the prosecution to prove the charge against the accused. Now, in all cases where the confession has resulted into conviction, the scope of victim-offender mediation exists and efforts should be made to execute the same.

In all cases of confession, the accused has a psychological framework of repentance and it is perhaps this eternal realization of guilt that he admits the same before court. This mental state of accused is perhaps the desirable state that would yield favorable results in the mediation process. Where the accused accepts the guilt before court, it can be safely presumed he shall be open to accept the same before the victim. The accused shall take the responsibility of state of victim, his concern and the suffering. If such cases are dealt effectively, the offender may even be willing to offer support services to victim for successful rehabilitation.¹⁰ In such cases, if accurate reformatory efforts are taken for offender, he is likely to be reformed in true sense. Although cases where accused confesses the guilt are in itself minority within the entire gamete of criminal cases pending, but nevertheless as and when such cases surface; efforts must be made to initiate the victim-offender dialogue in such situations.

Conclusion And Suggestions

In conclusion, we could say that restorative justice aims to build a constructive approach of dispute resolution based upon the strengths of offender and the victim. The process of denouncing criminal behavior requires a strong will and a rigid cause that would enable the offender to open-heartedly accept the reformatory processes and since restorative justice emphasizes upon treating offenders with respect and making customized and personalized efforts to reintegrate him into the larger community, this would increase the probability of offender heading towards a lawful behavior. Similarly, for victim the process gives a sense of accomplishment and an enhanced sense of justice that definitely erases the bad imprints of crime and helps in quick restoration. The victim-offender mediation is therefore a very peaceful, systematized and effective method to ensure constructive resolution of dispute.

The Indian Legal System as of now requires a complete revamp to adopt the process of victim-offender mediation. Till the time, that is achieved some immediate steps may be taken to ensure incorporation of this model in our criminal justice system. Firstly, focus shall be given to train mediators in these types of mediation processes as this requires blended knowledge of law, criminology, victimology and sociology along with mediation expertise. Therefore, investment on human resource for this model is imperative. Secondly, an attempt must be made to identify the types and class of offences where such victim-offender mediation shall be started and efforts must be made to give continuity to such process. Thirdly, the offender and victims

¹⁰ Mark S Umbreit, "Creating a Safe, if not Sacred, Place for Dialogue";
<http://www.ojp.usdoj.gov/ovc/publications/infores/restorativejustice/96517_gdlines_victims_sens/guide9.html>

must be made aware about the efficacy of this process as the social standards of our country are going to offer reluctance on part of victim and offender to undertake this practice. Lastly, all stakeholders of criminal justice system shall be oriented about individuality of each case so that with an increased level of sensitivity they approach the offence and deal with both accused and victim.

References

- Dignan, J. *Repairing the Damage: An Evaluation of an Experimental Adult Reparation Scheme in Kettering, Northamptonshire*. Sheffield: Centre for Criminological Legal Research, Faculty of Law, University of Sheffield, 1990.
- Evje, A., and Cushman, R. *A Summary of the Evaluations of Six California Victim Offender Reconciliation Programs*. San Francisco: Judicial Council of California, Administrative Office of the Courts, 2000.
- Coates, R., and Gehm, J., "An Empirical Assessment." In M. Wright and B. Galaway (eds.), *Mediation and Criminal Justice*. Thousand Oaks, Calif.: Sage, 1989.
- Collins, J. P. *Final Evaluation Report on the Grande Prairie Community Reconciliation Project For Young Offenders*. Ottawa: Ministry of the Solicitor General of Canada, Consultation Centre (Prairies), 1984
- DR Singh, "Victimological Studies in India", Paper Submitted for the 11th International Symposium on Victimology, South Africa, (2003)
- John Braithwaite, (et al), *"Restorative Justice and Civil Society"*, Cambridge University Press, Cambridge, (2001).
- Kumaravelu Chockalingam, "Evaluation of the Implementation of the Victims Assistance Fund in Tamil Nadu",
- Mark S Umbreit, "Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment"