

## VICTIM-OFFENDER MEDIATION IN INDIA'S CRIMINAL ADMINISTRATION: AN ANALYSIS OF EMERGING PRACTICES THROUGH RESTORATIVE PRINCIPLES

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### Abstract

*India has a long history of the resolution of disputes outside the formal judicial system. This was in use since it provided an opportunity to the victim to resolve the dispute in a manner, they deem fit and suitable. In the field of criminal law, such a mechanism has the elements of restorative justice which promotes out of Court settlement. It provides several benefits compared to the traditional adjudicatory process which include speedy disposal, lower costs, maintenance of a good relationship where possible and lesser compliances and formality. The present system, particularly in the field of criminal law is based on the retributive system of justice. This has resulted in the benefits of restorative justice being unavailable to the victims in criminal cases. The restorative system is based on the resolution of conflict and reparation of the harm. It allows the offenders to repent for their actions and make reparations to the ones affected. It aims to restore the well-being of the victims that has already been damaged by the crime. In the recent times, the shift to Alternative Dispute Resolution has also seen encouragement of Victim-Offender Mediation in criminal cases. It provides an opportunity to the victims of a crime to meet the offender, discuss the offence, express their concerns and negotiate an agreement on mutual terms. This is an effective alternative as the criminal justice system in India takes a significant amount of time before the final judgment is delivered. The accused have the right to file for appeals and revisions which takes up a considerable amount of time. This results in trauma for the victim and mental agony during the entire trial process. Moreover, the victim has to bear the brunt of the crime without adequate compensation for the harm suffered. This paper explores the development of victim-offender mediation in India based on the principles of restorative justice. It analyses the existing framework, judicial guidelines and provides suggestions to increase the ambit and effectiveness of victim-offender mediation in India.*

**Keywords:** *Crime, Mediation, Restorative Justice, Settlement, Compounding of Offences*

## I. INTRODUCTION

Restorative Justice has been defined as, “a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>1</sup> The Indian Constitution has the concepts of Justice and Fraternity as a part of its Preamble. The maintenance of the same is dependent upon the harmonious relationship between the individual and society. When an individual becomes the victim of a crime, this relationship is disturbed, and a conflict is created between the individual and society. In this scenario, restorative justice can be of great utility.

Restorative Justice aims to restore the victims and offenders to the original position they were in before the commission of the crime against the victim. The complete restoration of previous positions will not be possible in all cases. However, an effort is made for the restoration of previous conditions to the maximum possible extent. The concept is based upon “*Creative Restitution*” which has been developed by **Dr. Albert Eglash**, a Psychologist. The main characteristics of this system are “*humanity*” and “*accountability*”. Under this, the perpetrators of the crime apologize to the victims for their wrongdoings and compensate them for the harm suffered. Moreover, they also spend time with other perpetrators and encourage them to change.<sup>2</sup> It is aimed at alleviation of the pain of the victim and also allow for the rehabilitation of the offender.

Restorative Justice can be adopted in a variety of ways. The “*Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*” have been adopted by the “**United Nations Economic and Social Council.**” These principles aim to lay down the legal standards for restorative justice. This resulted in various methods pertaining to restorative justice which were adopted by the countries with ‘*Victim Offender Mediation*’ (VMO) being one of the most effective methods. The methods aim to hold the offender accountable for the offences committed by them and address the needs of the victim. It has further evolved to the extent where the perpetrators are given a chance to understand how their crimes have impacted the victims through role-plays and experimental experiences. This provides an

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<sup>1</sup> NV Paranjape, *Criminology and Penology with Victimology* 3 (Central Law Publications, 16th edn., 2014).

<sup>2</sup> Luara Mirsky, “Albert Eglash and Creative Restitution: A Precursor to Restorative Practices”, *IIRP News*, Dec. 3, 2003, available at <<https://www.iirp.edu/news/albert-eglash-and-creative-restitution-a-precursor-to-restorative-practices>> (last visited on April 12, 2020).

alternative to the retributive system of justice which primarily focuses upon punishment for the victim.

The process of restorative justice can be carried out using several means. Some of them have been discussed below.

### **Conferencing**

They are the discussions where an agreement is reached between the victim and offender on the redressal of the issue. This includes solutions that are tailored to the needs of the victim like “*financial restitution*”, “*community service*” and “*offender therapy*”. It aims at repairing the harm caused by the offender to the victim.

### **Formation of a Restorative Circle**

They are places where the stakeholders are brought together. They engage in discussions and listen to each other. Every person is given the opportunity to speak and express their viewpoint during the discussion. These discussions can include the impact of the crime on the victim, their families and the community. The strategies for restitution can also be figured out.

## **II. RESTORATIVE JUSTICE IN INDIA**

India has an “*adversarial criminal justice system.*” It follows a system where in most instance the guilt of the accused has to be established beyond reasonable doubt by the prosecution. There are only few cases where the ‘onus of proof’ to establish innocence is on the accused. The system is based on the premise that if the allegation of the victim turns out to be untrue, it can result in irreparable harm for the accused. It aims to shield the accused from societal stigma and suffering if he has been accused of a crime incorrectly. This system is based on the premise that “*it is better that ten guilty people escape than that one innocent person suffer*” as stated by Blackstone.

In judicial decisions, the adversarial system plays a pivotal role in determining guilt or innocence in criminal cases. Prosecutors present the evidence and arguments on behalf of the state, seeking to prove that the accused is guilty of the charges beyond a reasonable doubt. The defense, in turn, challenges the prosecution's evidence and presents arguments and evidence to counter the charges and establish the innocence of the accused.

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The judge presiding over the case acts as a neutral arbiter, ensuring that both sides have a fair opportunity to present their case. The judge considers the arguments, evidence, and legal principles relevant to the case before rendering a verdict. The decision is based on the strength of the evidence presented and the application of the law to the facts of the case.

While the adversarial system is the dominant method of resolving criminal cases in India, there has been a growing recognition of the limitations of this approach. The adversarial system is not necessarily sensitive to the plights of the victims. The restorative system of justice takes a problem-solving approach. It aims to be sensitive to the needs of the victims as well. In the case of *State of Gujarat v. Hon'ble High Court of Gujarat*,<sup>3</sup> Justice Wadhwa stated that, “*criminal justice would look hollow if justice is not done to the victim of the crime. A victim of crime cannot be a ‘forgotten man’ in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injuries. An honour which is lost or life which is snuffed out cannot be recompensed but then compensation will at least provide some solace.*” This emphasises that the role of the justice system does not have to be limited to providing punishment to the offender. Such an approach is not sensitive to the victim who has suffered the consequence of the crime. It should be able to provide compensation and restitution for the victim for the harm suffered.

In the case of *Anupam Sharma v. NCT of Delhi and Another*,<sup>4</sup> it was held by the Delhi High Court that the use of restorative justice can be made interchangeably with mediation. The aim of restorative justice is to restore the interest of the victim. It encourages the participation of the victim in the settlement process. It is a voluntary process where negotiation takes place between the victim and the offender.

Section 357 of the Criminal Procedure Code (CrPC) in India pertains to the "Order to pay compensation" to victims of crimes. The main objective of this section is to provide for the payment of compensation to victims who have suffered loss or injury as a result of a criminal offense. It aims to address the financial and rehabilitative needs of the victim and to ensure that they receive some form of restitution for the harm caused to them. The scope of Section 357 of the Criminal Procedure Code, 1973 was explained by the Supreme Court in the case of *Manohar Singh v. State of Rajasthan and Ors.*<sup>5</sup> It stated the objective is to make sure that the interests of the victims are taken into account. There are instances where the keeping the

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<sup>3</sup> (1998) 7 SCC 392.

<sup>4</sup> 2020 SCC OnLine Del 1646.

<sup>5</sup> (2009) 13 SCC 82.

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accused in prison does not make sense. In such scenarios, the accused can be directed to compensate the victim for the crime to ensure that justice is served. It serves as an important provision for compensating victims in the Indian criminal justice system, the introduction and promotion of victim-offender mediation programs can further enhance the scope of restorative justice practices in addressing the aftermath of criminal offences.

There are a significant number of criminal cases awaiting trial in India. The disposal of such cases takes a considerable amount of court due to the multiple factors involved and the overburdening of courts. The Indian Supreme Court has also lamented the delayed trial in such cases in the case of *Hussainara Khatoon v. State of Bihar*.<sup>6</sup> As a result, the concept of “plea-bargaining” was proposed which includes “*pre-trial negotiations between the accused and the prosecution.*” The accused agrees to plead guilty before the prosecution in lieu of certain concessions which are given as a *quid pro quo*. This approach is adopted by the Courts, particularly in cases of lesser gravity.<sup>7</sup> The utility of plea-bargaining was also echoed by a former Indian Chief Justice who said that, “*many minor offences against property are still classified as non bailable, whereas it is evident that classifying them as compoundable offences and relying on methods such as ‘plea-bargaining’ may be more effective and agreeable to address the injury caused by the same.*”

### **Existing Systems in India which can Aid in Implementing Restorative Justice**

The growing recognition of the limitations of the traditional adversarial system in resolving disputes in India. Restorative justice approaches, rooted in India's cultural heritage and history, offer promising avenues to complement the formal court processes and promote a more victim-centred and community-oriented system of justice. Among these alternative mechanisms, the Panchayat system and Lok Adalats hold particular significance, providing accessible and community-driven forums for dispute resolution.

#### *Panchayat System*

It is a method for the resolution of disputes which has existed in India since ancient times. It is used for the resolution of a wide variety of disputes. The word "Panch", means "arbitrator" and it is a traditional institution in India. The Panchayats have been accorded power by the Courts to make decisions in cases where serious bias or misconduct is not involved. The

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<sup>6</sup> AIR 1979 SC 1360.

<sup>7</sup> Law Commission of India, “Report on Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining, Report No. 142, 1991” (August, 1991).

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**Gram Nyayalayas Act, 2008** formalized the Panchayats' informal practices inside communities. This was done to ease “*access to justice*” and ensure that the right of a citizen to justice is not denied owing to any disadvantage.<sup>8</sup> The judge of this court is known as a Nyayadhikari. The court is known as “*Gram Nyayalya*”.

#### *Lok Adalat*

They were established under the National Legal Service Authority Act, 1987. The Indian State has a constitutional obligation to provide legal aid which was also prompted by the decisions of the Supreme Court. This resulted in the formation of a “**Committee for Implementing Legal Aid Schemes (CILAS)**”. “**Lok Adalat**” is also known as the “*People’s Court*”.<sup>9</sup> It is a non-adversarial system and mock courts are held on a periodic basis. They are presided by retired judges, social activists, or attorneys. They do not have jurisdiction over compoundable offences. It does not have any court fees or rigid procedural requirements. The parties are allowed direct communication with the presiding judge, which is not allowed in the ordinary courts.

#### *Juvenile Justice (Care and Protection) Act, 2015*

There are a number of alternative sanctions which have been established under this Act. These include alternative sanctions, including counselling, community service, and a fine. It includes provisions for release on probation in exchange for good behaviour at the facility or the special home for the provision of reformatory services. The Board appointed under the Act has the powers to issue additional orders for the kid to attend school, a vocational centre, or a therapeutic centre, or bar the child from accessing a specific site. The aim of these provisions is to allow for the reintegration of juvenile offenders into society.

#### *Plea-Bargaining Law in India*

A law related to plea bargaining in India was introduced under Chapter XXIA of the Criminal Procedure Code, 1973 by Criminal Law (Amendment) Act, 2005. It incorporated the concept of plea bargaining into the Criminal Justice system of India. The bill aims to reduce the time taken for the disposal of criminal cases in the Indian courts. It was observed that the trial for several cases does not commence for a period as long 3 to 5 years after the accused was

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<sup>8</sup> Gram Nyayalayas Act, 2008 (Act 4 of 2009).

<sup>9</sup> Legal Services Authorities Act, 1987 (Act 39 of 187).



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remitted to judicial custody. The bill saw plea bargaining as a method to deal with the large number of pending criminal cases. The main features of the amendment act were:

- It was applicable only to the offences where the punishment of imprisonment for the crime is up to 7 years under Section 265 A of the Criminal Procedure Code, 1973.
- The law was not applicable where the offence impacted the socio-economic condition of the country or was committed against a woman or a child below 14 years of age.
- The accused has the option of filing the application for plea bargaining on a voluntary basis. It can be filed when the case is pending for trial before the court.
- It allows the victim and the complainant to work out a mutually agreeable way to dispose the case. This can include victim compensation and other expenses incurred in the proceedings.
- Once the case has been satisfactorily resolved, the court shall dispose of the case as it seems fit in accordance with the law.
- The statements or facts used in plea bargaining cannot be used for any other purpose.
- Once the court has delivered a judgment after successful plea bargaining, such judgment is final, and no appeal lies against it.

The concept of plea bargaining as introduced in India is markedly different from the rest of the world. Unlike in the USA there is no provision for charge bargaining in the Indian system. This was despite the recommendation for the same in the 154<sup>th</sup> report of the Law Commission which formed the basis for introduction of plea bargaining into the system. The resolution through plea bargaining banks upon the reaching of a '*mutually satisfactory disposition*'. It is difficult to achieve with the present system since the stakeholders involved have different goals. The interest of the prosecutor is to secure justice by conviction. The defence lawyer wants to secure an acquittal or getting least possible punishment. The victim could want higher punishment with repatriation. The investigating officer will be aiming for a conviction. This shows that there will be a difficulty in reaching an agreement due to the plethora of diverse interests that are involved.

This is different from the process under victim-offender mediation where only the mediator, victim, accused and their counsels are present. The increased number of stakeholders in the Indian scenario was aimed at providing greater protection but it reduces the possibility of reaching a resolution. The low chances of resolution have resulted in very low success and most of the cases have to go through the grind of the long trial process prevalent in the

existing Criminal Justice System of India. In such cases, Victim-Offender Mediation offers an alternative which can be adopted for a greater degree of success in the efforts of providing an alternative to the traditional justice system.

### III. REFERENCE OF CRIMINAL CASES TO MEDIATION BY INDIAN COURTS

India does not have a specific legislative framework exclusively dedicated to victim-offender mediation. However, there are provisions in the Indian criminal law and other related laws that indirectly facilitate or support victim-offender mediation. Section 265A of the Criminal Procedure Code (CrPC) allows for the compounding of certain offenses. Compounding refers to the process where the victim and the offender reach an agreement, and the victim agrees not to prosecute the offender in exchange for some form of restitution or compensation. Though this section mainly pertains to compoundable offenses, it can, in some cases, be associated with the principles of restorative justice and victim-offender mediation. The concept of restorative justice, which underpins victim-offender mediation, has been recognized by the Indian judiciary in various judgments. The courts have, in certain cases, encouraged the use of restorative justice practices, including mediation, to facilitate reconciliation between the victim and the offender.

In the case of *Afcons Infrastructure v. Cherian Varkey Construction*<sup>10</sup>, it was held by the Supreme Court that criminal cases are not suitable for mediation. However, there are cases of family disputes having criminal elements which can be referred to as mediation. Moreover, the Indian law already has provisions for compounding of offences which raised questions over the applicability of mediation in the context of criminal cases.

Mediation is a facilitative process where the mediator does not have the authority to make binding decisions for the parties.<sup>11</sup> His role is limited to encouraging amicable resolution of the dispute. The 129<sup>th</sup> Law Commission Report recommended amicable resolution of disputes outside the courtroom. They were incorporated into Section 89 of the Code of Civil Procedure, 1908. It allows the court to refer a dispute to a resolution procedure that results in an “*amicable settlement.*”

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<sup>10</sup> (2010) 8 SCC 24.

<sup>11</sup> Law Commission of India, “Alternative Dispute Resolution: Mediation and Conciliation, 2003” (May 2003).



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This was discouraged in the Indian criminal system as a criminal offence was considered to be a wrong against the society and not a private individual. It did not provide for forgiveness or reconciliation. An attempt has been made to remedy this under Section 320 of the Criminal Procedure Code, 1973 which allows for compounding of not so grave offences. The 41st Law Commission Report recommended the compounding of any crime that “*is essentially of private nature and relatively not serious.*”<sup>12</sup> It is a step for preventing prosecution through amicable settlement between the parties involved. It allows a chance for the condonation of the behaviour of the offender if he shows repentance. It does not absolve the guilt of the offender but creates a situation where the victim is willing to forgive the offender after receiving a suitable solution.

This approach was taken in the case of *B.S. Joshi v. State of Haryana*<sup>13</sup> where a complaint against cruelty had been filed under Section 498-A of the Indian Penal Code, 1860. An amicable divorce was reached between the parties and the Supreme Court stated that in lieu of the amicable divorce, the High Court had the power to quash the FIR under Section 482 of the Criminal Procedure Code, 1973. This was a case where the mutual willingness of parties allowed the compounding of even a non-compoundable offence. In the case of *Ashok Sadarangani v. Union of India*,<sup>14</sup> the court opined that continuation of criminal proceedings when a compromise had been reached between the parties is “*an exercise in futility.*” The quashing of the FIR on mutual agreement is allowed and is a major step in the evolution of conciliation as a main factor in Indian Criminal Jurisprudence. This was also seen in the case of *Sreelal v. Murali Menon*,<sup>15</sup> where the Court prescribed mediation in order to determine the compensation amount for the compounding of the Criminal Offence.

A major question in criminal jurisprudence is what the rationale behind the imposition of criminal punishment on individuals by the state is. The justification for this theory is based in the retributive system is justice. Restorative justice means that the harm caused by the criminal is “*balanced by offering support to the victim and requiring the offender to make amends, with the help of the community if necessary*”. It does not balance the harm by inflicting harm on the criminal. Therefore, criminal justice should address the needs of the victim, the offender, and the community.

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<sup>12</sup> Law Commission of India, “The Arbitration Act, 1996 - Report No. 246, 2001” (August 2001).

<sup>13</sup> (2003) 4 SCC 675, 676.

<sup>14</sup> (2012) 11 SCC 321.

<sup>15</sup> (2014) 3 KLT 536, 539.

The retributive system does not offer a complete theory of justice.<sup>16</sup> It basically punishes the previous conduct of the wrongdoer and focusses on an individual in a specific case. There is no guidance for the rehabilitation of the victim. The rehabilitation is an important part of any legal system. Moreover, the victim is side-lined. As a result, the needs of the offender and victim are not sufficiently accounted by the retributive system of justice. It is the norm in the Indian Justice System and forms a barrier to the inclusion of alternative dispute resolution methods in the Indian system. The criminal law excludes victims from the system. There has been a shift from a retributive to a restorative system of justice over the past few years.<sup>17</sup> India also followed the restorative system of justice in the past and the Victim Offender mediation offers a great opportunity to adopt the restorative system of justice by addressing the shortcomings of the retributive system of justice.

#### IV. THE CONCEPT OF VICTIM-OFFENDER MEDIATION

Mediation is an increasingly popular alternative dispute resolution method used in various contexts, including family disputes, workplace conflicts, and community issues. The goal of mediation is to help the disputing parties reach a mutually acceptable agreement or resolution that addresses their concerns and interests. In a mediation session, the mediator creates a safe and structured environment for the parties to express their perspectives, needs, and concerns openly. The mediator does not impose a decision on the parties but rather assists them in exploring various options and finding common ground. The mediator plays a crucial role in guiding the process and ensuring that both parties have an opportunity to express their perspectives and needs.

The role of Victim-offender mediation programs is to provide a platform for conflict resolution to the victim as well as the offender. The process is facilitated by the mediator. His role is to assist the parties in addressing their informational and emotional needs. It is followed up by a discussion of the losses of the victim and work towards the development of a restitution plan which is mutually acceptable to both parties.

This is an alternative to the adversarial system where neither the victim nor the offender is treated as an active participant in the justice process. The retributive process is highly

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<sup>16</sup> Mehak Bajpai, "Advancing of Restorative Justice in Criminal Law in India and Germany", 1 *Journal of Victimology and Victim Justice* 103–112 (2018).

<sup>17</sup> Pranita Shrestha, "The Scope of Informal Justice Mechanisms in Criminal Justice System", 9 *Kathmandu Sch. L. Rev.* 137 (2013).

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depersonalized and focuses on penal action. It can lead to a feeling of double victimization since the victims are first victimized by the offender and then by an uncaring criminal justice system that does not have time for them. The human dimension of the criminal behaviour exhibited by the offender for the victims is not usually understood by the offender. The offenders often rationalize their actions. The victim-offender mediation process provides a chance for the offender to be accountable and facilitates the resolution of the conflict in a meaningful manner.<sup>18</sup>

It is different from civil mediation processes as the parties involved are not ‘disputants.’ In most cases, a crime has been committed by one of the parties and the other party has been the victim of the crime. This means that the question of the innocence of the perpetrator does not form a part of the discussion. It is not a process focused on reaching a compromise. It is not “settlement-driven” but primarily “dialogue-driven”. The main focus is the empowerment of the victim, accountability of the offender, and restoration of losses. The dialogue gives a chance for the assessment of the emotional and informational needs of victims. They are important since they can also lead to the development of victim empathy in the offenders which can discourage criminal behaviour in the future.

### Phases of Victim-Offender Mediation

The victim-offender mediation process comprises the following phases:

- *Intake Phase:* This phase commences with the court referral of the offender. The admission of guilt by the offender is a requirement for most programs. There are some cases where cases can be referred even prior to the admission of the guilt as a part of the deferred prosecution effort. A mediator is assigned the case.
- *Preparation Phase:* During this pivotal phase of Victim-Offender Mediation, the victim and the offender engage in separate meetings with the mediator, ensuring privacy and comfort for each individual. The mediator adopts an attentive and empathetic approach, actively listening to the accounts of both parties and affording them ample space to express their perspectives fully. By encouraging open communication, the mediator facilitates a safe environment that encourages candid dialogue, enabling each party to convey their emotions, needs, and concerns without reservation.

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<sup>18</sup> N M Rangappa, “Crime Victims and Offenders in Mediation: An Emerging Area of Criminology and Correctional Administration”, 3 *The International Journal of Indian Psychology* 88–93 (2016).

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Furthermore, during this phase, the mediator seeks explicit confirmation from both the victim and the offender about their willingness to participate in the mediation process. This voluntary aspect of mediation underscores the importance of self-determination, empowering the parties to choose whether they wish to engage in this alternative dispute resolution method. By fostering a sense of autonomy and agency, the mediation process ensures that the participants have ownership over the outcome and are more likely to find satisfaction with the resolution reached.

- *Mediation Phase:* Once the separate meeting of both parties is completed and the parties agree to participate in the mediation process, a joint meeting is scheduled by the mediator. The session begins with the mediator explaining the ground rules for the process and explaining how to communicate. The meeting then proceeds with facts of the crime and the feelings related to the crime. The victims are able to express their feelings before the offender and are given a chance to ask the questions which have been baffling them post the commission of the crime like “why me?” “How did you get into our house?” “Were you stalking us and planning to come back?”

It puts the offenders in an unexpected position where they have to face the victim of their crime. They are provided with an opportunity to show their humanity and express remorse for the actions that have been undertaken. Once the discussion about the facts and feelings is over, the meeting moves forward to the second part where the losses are discussed, and a mutually acceptable restitution agreement is attempted to be reached. The focus of such a plan is accountability and compensation. The settlement is not imposed by the mediator and the parties enter into it out of their free will.

- *Follow-up Phase:* This phase commences once the restitution agreement is approved by the referral agency. If the mediation is successful, the process results in the closure of the case. The tasks that are to be done in this phase include communication with the victim to ensure that the restitution agreement is fulfilled. If required, the agency contacts a probation officer to secure the offender’s compliance. The completion of this phase results in the final closure of the case.

### **Willingness of Victims to participate**

In the USA, the late 1970s saw a growing interest in Victim Offender Mediation programmes in the USA. A public poll conducted across the state of Minnesota saw that 82 percent of the citizens surveyed would consider participation in the Victim Offender Mediation process if

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they were victims of property crimes.<sup>19</sup> For the existing Victim Offender Mediation programmes in four states, interviews with 280 victims revealed that 91 percent felt their participation was totally voluntary. A survey conducted for the victims who did not participate in the mediation process saw that 70 percent would have preferred to face and confront the offender in given the choice.<sup>20</sup> This indicates that there are several people willing to participate in the process and confront the offender.

However, it is essential to recognize that not all victims may desire to face their offenders for every criminal offense they have experienced. The needs and preferences of victims can vary significantly, and they should be respected in their decision-making process. Keeping Victim-Offender Mediation completely voluntary is essential to ensure that victims have the freedom to choose the process that aligns with their emotional and psychological well-being.

Furthermore, the success of Victim-Offender Mediation in garnering victim participation relies on various factors, such as the availability of support services for victims, proper outreach and awareness efforts to inform them about the option of mediation, and ensuring a safe and supportive environment for the mediation process. It is crucial for authorities to proactively address concerns and barriers that may deter victims from participating in restorative justice initiatives.

The willingness of victims to participate in Victim-Offender Mediation is evident from the positive response seen in surveys and interviews. By offering victims the choice to engage in the process voluntarily, respecting their autonomy, and acknowledging the diversity of their needs, the criminal justice system can move towards a more victim-centered and transformative approach that prioritizes healing, accountability, and community restoration.

### **Willingness of Offenders to participate**

The willingness of offenders to participate in Victim-Offender Mediation is a crucial aspect of restorative justice programs. Some offenders may readily embrace the opportunity to engage in mediation, recognizing the potential for personal growth, accountability, and reconciliation. These individuals are more likely to take responsibility for their actions, expressing genuine remorse for the harm caused to the victim. By voluntarily participating in the mediation process, they seek to repair the damage and work towards restoring the

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<sup>19</sup> National Criminal Justice Reference Service, Office for Victims of Crime, U.S. Department of Justice "Guidelines for Victim-Sensitive Victim Offender Mediation: Restorative Justice through Dialogue." (September 1996).

<sup>20</sup> US Department of Justice, Office for Victims of Crime, "Guide 4: Victims' Rights and Services", (2014).

relationship with the victim. For these offenders, mediation serves as a platform to express their willingness to be held accountable and to make amends for their actions, fostering a sense of personal redemption and the potential for rehabilitation.

Conversely, some offenders may be hesitant or resistant to participate in Victim-Offender Mediation due to various reasons. Fear of potential legal consequences may discourage them from openly admitting guilt or engaging in a process that involves confronting the victim. They may worry that their participation in mediation could be perceived as an admission of guilt, leading to further punitive actions. Moreover, offenders who do not fully understand the benefits of mediation may perceive it as an additional burden, failing to see how the process can contribute positively to their own growth and resolution of the conflict.

The presence of legal counsel can also influence an offender's willingness to participate in mediation. If offenders believe that their legal rights and interests are adequately protected during the process, they may be more inclined to engage. Moreover, the perception of the victim's willingness to participate can significantly impact offenders' attitudes towards mediation. If offenders perceive that the victim is open to dialogue and reconciliation, they may be more willing to actively participate in the process.

To enhance offenders' willingness to participate in Victim-Offender Mediation, it is crucial to implement measures that address their concerns and foster a positive perception of the process. Educating offenders about the benefits of mediation, emphasizing personal growth and the opportunity for reconciliation, can help dispel misconceptions and encourage active participation. Providing support and preparation before the mediation process can address their uncertainties and ensure they understand the process and their rights.

### **Analysis of the Victim-Offender Mediation**

The adversarial form of criminal trial saw a negligible role for the victim. The aim behind this is to ensure that the trial does not turn into a vindictive duel. However, this may not be the most beneficial outcome for the victim since they feel left out in the trial proceedings. The introduction of "*restorative justice*" means that there are conscious efforts to correct this anomaly. The considerations of the victim are taking a more important place in both "*domestic and international criminal justice systems.*"

Amongst these, Victim-Offender Mediation is the clearest expression of Restorative Justice in the process of Criminal Justice. It is based on restoring the damage caused by the crime.



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The participants meet voluntarily and try to settle their issues without going into the trial. It allows the victims to confront the offender and expose the victims to the effects of the impact their actions have had on the victim. This is done with the aid of mediator advocacy. The victims have the ability to seek answers to the questions which have persistently bothered them when the crime had been committed.<sup>21</sup> The advantages and disadvantages of the process have been highlighted in order to analyse the feasibility of Victim-offender mediation.

#### *Advantages of Victim-Offender Mediation*

- The exposure of the perpetrators to the impact their action has on the victim can reduce the chances of recidivism.
- It provides a chance for the offender to reintegrate and rehabilitate into society without undergoing the rigors of a criminal trial.
- The defender is held liable and punished for their actions in consonance with the wishes of the victim.
- It is fair on both the offender and the victim as it provides them with an innocuous, unprejudiced & more comfortable setting to conciliate face-to-face.
- It improves the participation of victims in the justice process and allows them to be an active participant instead of an audience.
- The victims under the adversarial system often do not receive sufficient restitution for the harm that has been suffered by them. This provides them an opportunity to be repatriated for the damages suffered by them.

#### *Disadvantages of Victim-Offender Mediation*

- The process has not fully developed in India and there is a lack of awareness and trained professionals who can facilitate the process.
- The victims may be apprehensive of participation in the process for the fear that they may be forced to settle on unfavourable terms. There is a possibility that the offender has some clout which they can use to force the victim into a settlement which is favourable to them.
- The system is not suitable for all offences, particularly ones involving sexual abuse and sexual assault. In such cases, the victim may not want to face the offender as it can result in further trauma and injury for the victim. This limits the utility of the process.

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<sup>21</sup> Isha Dwivedi, "Victim-Offender Mediation in Juvenile Delinquency: Is It a Beneficial Effective Approach?", *IRALR*, May 24, 2021, available at <<https://www.iralr.in/post/victim-offender-mediation-in-juvenile-delinquency-is-it-a-beneficial-effective-approach>> (last visited on April 12, 2020).

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- The process has not been provided with much recognition in India as opposed to the system of plea bargaining and there are still some hurdles in its acceptability and implementation on a larger scale.
- There is a possibility of the subversion of justice by the offender through an empty apology. This can defeat the whole purpose of the process.
- Restorative justice has received criticism as it could replicate the power imbalances already existing between the victim and the offender. It does not address the issues of structural inequality and oppression which victims may experience especially where they have a prior relationship with their offenders.
- The rights of victims are subject to certain risks like question to participate threats to personal safety offender bias proceedings and a lack of information about what to expect from the proceedings. It may not provide the vindication that victims long for after suffering from a crime.

This indicates that while the feasibility of adopting Victim-Offender Mediation in India holds significant promise, but it also presents several challenges that need to be addressed for its successful implementation. The advantages of this approach, such as empowering victims, promoting offender accountability, and providing an alternative to the adversarial system, are compelling factors that support its adoption. However, a more in-depth analysis reveals certain considerations that need to be taken into account to ensure its efficacy and widespread acceptability.

1. **Voluntary Participation and Power Imbalances:** In a country as diverse as India, where power imbalances exist across various social, economic, and cultural strata, ensuring the voluntary participation of victims becomes essential. There is a risk that victims may feel pressured or coerced into reaching settlements that may not be in their best interest. Mediation must be conducted in a safe and supportive environment, where victims' rights are protected, and they have the agency to make informed decisions without fear or intimidation.
2. **Limitations in Serious Offences:** Victim-Offender Mediation may not be suitable for all types of offences, especially those involving sexual abuse and assault. In such cases, victims may not want to face their offenders due to the potential for re-traumatization and further harm. The scope of Victim-Offender Mediation must be carefully defined to

ensure its applicability to cases where it can genuinely foster healing and restitution, while recognizing the limits in more severe criminal acts.

3. **Recognition and Implementation:** While restorative justice practices like plea bargaining have gained some recognition in India's legal system, Victim-Offender Mediation still faces hurdles in its acceptability and broader implementation. Establishing clear guidelines, frameworks, and legal provisions to support Victim-Offender Mediation as an alternative approach to justice is crucial. Incorporating restorative principles into the existing criminal justice system requires a careful balancing of various interests and perspectives.
4. **Addressing Structural Inequalities:** A key concern with restorative justice approaches is the potential replication of power imbalances and structural inequalities already present in society. In cases where victims have prior relationships with their offenders or belong to marginalized groups, ensuring a fair and equitable process becomes more challenging. Addressing these structural inequalities is vital to avoid perpetuating further injustice.
5. **Safeguarding Victims' Rights:** Victims' participation in mediation must be protected, and their rights should not be compromised or undermined during the process. Adequate safeguards, support services, and access to legal counsel must be provided to ensure that victims are fully informed and empowered to make choices that align with their needs and interests.

### **Victim Rehabilitation**

The major objective of the model is to repair the consequences of the crime. The "traditional criminal justice system" which only believes in "retribution" as a method of "prevention" of crimes does not have this as the major focus. Before the "Code of Criminal Procedure (Amendment) Act 2008" was enacted, the compensation was mostly dependent on the fines which had been collected from the convicts. This was only done once the accused had exhausted all the "legal remedies" including "appeal to higher courts". This was available only in cases when a fine was imposed on the accused by the Courts. The compensation amount depended on the financial situation of the perpetrator which meant that if the perpetrator was not well off, the victim will not be adequately compensated for the harm suffered.

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A provision for “*Restitution*” was included in Section 545(1)(b) of the Code of Criminal Procedure, 1898. It allowed the court to direct the payment of compensation to a person for any loss or injury caused by the offence. The accused was entitled to “*substantial compensation.*” It was reintroduced by the “*Criminal Procedure Code Bill, 1970*” and Section 545 was reintroduced as Section 357.

The 2008 amendments to the code added Section 357-A which allows the Court to order the state to pay compensation to the victim if the compensation awarded under Section 357 is insufficient for rehabilitation or if the case ends in acquittal for the rehabilitation of the victim. In order to further clarify and provide for a better compensation scheme, sections 357B and 357C were introduced to allow the victims to be compensated in addition to fines.

## V. CONCLUSION: THE WAY FORWARD

The objective of the implementation of a restorative system of justice is to increase the engagement of the victim in the criminal justice process. It provides a mechanism of justice where the victims are also provided with the accountability of the perpetrator in the crime committed against them. The plea-bargaining system in India has not enjoyed great success due to the numerous variables which need to be satisfied in order for the process to be successful. The process of mediation has taken its root in civil cases and has been an effective mode of resolution for civil disputes. Its applicability in the criminal system is growing and victim-offender mediation is seen as an effective method of restorative justice.

It further gains ground when compared to retributivism, which both in theory and practice, fails to deliver complete justice. The Victim Offender Model allows the victim and the offender to craft their own solutions. The victims have the opportunity of formulating their own justice which is efficient and gives them a greater sense of closure. India does not have a direct law for the regulation of restorative justice process. However, the power granted to the Court under Section 320 of the Criminal Procedure Code, 1973 allows the parties to reach a settlement and submit it to the Court for the compounding of the offence. The limitation for such an action is the nature of offences to which such power is applied. However, it shows the feasibility for the applicability of Victim-Offender Mediation in India. The following *suggestions* can be implemented to further its development in India.

- The stakeholders in the Indian legal system, particularly the lawyers should be apprised of the utility and benefits of the Victim-Offender Mediation process. If they are convinced

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of the benefits of the same and its utility, they will perform the role of making the masses aware and educating them to its benefits.

- **Legislative Framework:** Develop a comprehensive legislative framework specifically addressing restorative justice and victim-offender mediation in the Indian criminal justice system. This framework should encompass procedural guidelines, training standards for mediators, and provisions for the integration of restorative justice principles in sentencing.
- The participation in the process is voluntary. Therefore, no one should be deprived the chance of participation in the process.
- **Public Awareness and Education:** Conduct public awareness campaigns to educate the general population about the benefits of restorative justice and victim-offender mediation. Disseminate information about the availability and process of mediation to encourage victim and offender participation.
- It should be ensured that grave offences are not referred to Victim-Offender Mediation. However, it can be used under highly secure circumstances for determining the restitution amount to be provided to the victim or sentencing.
- The other processes, such as Victim-Offender Mediation, plea bargaining, and compounding of offenses, should also be developed as they can be effective tools in providing restorative justice.
- **Training and Qualification of Mediators:** Ensure that the mediators involved in victim-offender mediation programs undergo comprehensive training and possess the necessary qualifications. Adequate training can help mediators understand the nuances of restorative justice, communication techniques, conflict resolution skills, cultural sensitivities, and legal aspects. This will enhance the effectiveness and credibility of the mediation process.
- **Increased Awareness and Outreach:** Conduct awareness campaigns and outreach programs to educate the public, legal professionals, and law enforcement agencies about the benefits and significance of victim-offender mediation. Promote the availability of mediation services as a viable option for dispute resolution in criminal cases and encourage stakeholders to actively participate in the process.
- **Victim Support Services:** Establish comprehensive victim support services that ensure victims have access to emotional, legal, and financial support throughout the mediation

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process. Providing support to victims can alleviate concerns about power imbalances and ensure their active participation in the mediation process.

- **Offender Accountability Measures:** Implement mechanisms to ensure that offenders are held accountable for their actions and comply with the agreed-upon restitution plans. This may include involving probation officers or follow-up sessions to monitor the progress and compliance of offenders with their obligations.
- **Mediation in Appropriate Cases:** Identify the types of criminal cases where victim-offender mediation is most suitable and effective. Focus on cases where there is a possibility of successful mediation and where the parties are willing to engage in the process voluntarily. Selecting appropriate cases can enhance the outcomes and credibility of victim-offender mediation programs.
- **Evaluation and Research:** Conduct regular evaluations and research to assess the effectiveness and impact of victim-offender mediation programs in India. Use data-driven insights to identify areas of improvement, measure success rates, and make evidence-based policy decisions.
- **Institutional Support:** Garner support from the judiciary and law enforcement agencies to promote the use of victim-offender mediation as an integral part of the criminal justice system. Institutional backing can increase the acceptance and legitimacy of restorative justice practices in India.
- **Safeguarding Confidentiality:** Strengthen confidentiality measures to protect the privacy of victims and offenders involved in the mediation process. Ensuring that the content of mediation sessions remains confidential can encourage openness and honesty during discussions.
- **Integrating Mediation in Sentencing:** Consider incorporating the outcomes of victim-offender mediation into the sentencing process. Acknowledge the efforts made by offenders to take responsibility and make amends for their actions through mediation when determining appropriate sentencing measures.



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## ABBREVIATIONS

- CILAS - Committee for Implementing Legal Aid Schemes
- Cr.PC - Code of Criminal Procedure
- Ors. - Others
- VMO - Victim offender Mediation