APPLICABILITY OF ADR IN CRIMINAL CASES

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ABSTRACT

Alternative Dispute Resolution (ADR) includes processes that are out of court proceedings. Due to the fact that the pendency of court cases and suits have gone through roofs, ADR has gained paramount significance in almost every civilized dispensation. The criminal jurisprudence is quite different from the ADR mechanism, as, in the case of a criminal dispute, penal provision is sought after to place a benchmark. In the case of ADR, some kind of settlement that may not result in a court proceeding is sought after. A recent trend that can be noticed in the sphere of ADR is its applicability to criminal matters. Mediation is the most sought after form of ADR, where the issue of criminal justice is concerned.

The use of ADR processes in the criminal justice system connotes the image of the restorative justice movement, which seeks to shift the emphasis from the ideas of violation of the state and punishment towards reparation and inculcating in the offender a sense of responsibility towards the victim and the community.

The rights and liabilities in a criminal case have to be determined by the criminal courts have to determine the rights and liability arising out of certain actions falling in the area of criminal offences, because such courts are specially equipped with tools to try criminal offences and inflict punishment. Therefore such disputes are not triable by the 'arbitral tribunals'. When the question arises as to the criminal nature of the dispute, the arbitral tribunal will look into whether the matter is one which the public policy would permit to be compromised.

The author seeks to study the Indian position on the applicability of ADR in criminal matters along with its comparative analysis.

Keywords: ADR, crime, offence, plea bargaining,

INTRODUCTION

During the span of a period falling between the 1970s and 1980s, a range of nontraditional dispute resolution processes evolved, which fell under "ADR"[1], intending to harmoniously resolve problems. Further, it was in 1976, at the Roscoe Pound Conference on "Perspectives on Justice in the Future," that brought together judges and lawyers to discuss potential procedural alternatives to adjudication[2]. The conference highlighted ADR's advantage over crowded courts and litigious citizens.

After the movement that evolved through the Conference, various ADR procedures gained attention as they facilitated courts to clear their dockets while engaging in less adversarial proceedings[3]. Unlike the suits and trial cases, Alternative Dispute Resolution (ADR) includes processes that are out of court proceedings. Due to the fact that the pendency of court cases and suits have gone through roofs, ADR has gained paramount significance in almost every civilized dispensation. ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration. Sometimes a fifth type, conciliation, is included as well, but for present purposes, it can be regarded as a form of mediation.

In arbitration, the parties rely on a third-party decision-maker to reach binding judgments. In case of negotiation, attorneys of the parties work together to settle disputes. The mechanism of mediation uses a neutral third-party to bring about a voluntary resolution, and settlement.

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A recent trend that can be noticed in the sphere of ADR is its applicability to criminal matters. Mediation is the most sought after form of ADR, where the issue of criminal justice is concerned.

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[1] Melissa Lewis & Les McCrimmon, *The Role of ADR Processes in the Criminal Justice System: A View from Australia*, available at http://www.doj.gov.za/alraesa/conferences/papers/ent_s3_mccrimmon.pdf. (last visited 4h Mar. 2021)

[2] Maggie T. Grace, *Criminal Alternative Dispute Resolution: estoring Justice, Respecting Responsibility, and Renewing Public Norm*, 34 VT. L. REV, available at www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1524762 (last visited 4th Mar. 2021).

[3] Id.

NEED FOR ADR IN CRIMINAL CASES- THE INDIAN SCENARIO

So that the rule of law and justice can be administered properly, certain basic steps are to be taken by the state. As far as the picture of pendency is concerned in the civil cases, that can be tackled by the alternatives available such as the ADR mechanisms. But there is some doubt upon the application of ADR in criminal justice. About the criminal justice, the term ADR encompasses several practices which are not considered part of traditional criminal justice such as victim/offender mediation; family group conferencing; victim offender-panels; victim assistance programs; community crime prevention programs; sentencing circles; ex-offender assistance; community service; plea bargaining; school programs. It may also take the shape of cautioning and specialist courts (such as Indigenous Courts and Drug Courts).

Restorative Justice- The use of ADR processes in the criminal justice system connotes the image of the restorative justice movement, which seeks to shift the emphasis from the ideas of violation of the state and punishment towards reparation and inculcating in the offender a sense of responsibility towards the victim and the community. Restorative justice is thus, 'victim-centred. The movement grew largely from victims groups who felt that victims were excluded and disempowered by formal criminal justice processes[4].

Arbitration in Criminal Cases- The rights and liabilities in a criminal case have to be determined by the criminal courts have to determine the rights and liability arising out of certain actions falling in the area of criminal offences, because such courts are specially equipped with tools to try criminal offences and inflict punishment. Therefore such disputes are not triable by the 'arbitral tribunals'. But if the question arises as to the criminal nature of the dispute, the arbitral tribunal will look into whether the matter is one which the public policy would permit to be compromised. If the public policy does not permit, the matter will not be compromised[5]. Further, it has been held in *S.N. Palanitkar v. State of Bihar*[6], that merely because there is an arbitration clause in the agreement that can not prevent criminal prosecution against the accused.

[4] Melissa Lewis and Les McCrimmon, *The Role of ADR Processes in the Criminal Justice System: A view from Australia*, www.justice.gov.za/alraesa/conferences/.../ent_s3_mccrimmon.pdf (last visited 5th Mar. 2021).
[5] O.P. Malhotra and Indu Malhotra, *the Law and Practice of Arbitration and Conciliation*, 1145-46, ((2006)
[6] AIR 2001 SC2960

But an arbitral tribunal can not acquit or punish a person for a criminal offence, as it can not assume the powers of a magistrate[7].

Alarming Pendency of Cases- In the Indian context, it will not be fallacious to say that due to the pendency of the cases the time has come to take recourse to ADR in criminal cases. Figure available for the year 2000 shows that the total number of cases pending before the Supreme Court for that year was 21600, as against 1.05 lakhs a decade ago[8]. A similar figure was available for the pendency in various high courts as well as various district courts. The prominent reason was that the vacancies in the courts were not filled to a great extent.

Right to Speedy Trial- It has been recognised that the right to a speedy trial, being part of Article 21 of the Constitution, is the fundamental right. But, due to inordinate delays, the citizens can not avail the right to a speedy trial, which in turn leads to the lengthy trial procedure. This is even though the Supreme Court has recognized the fundamental right to speedy justice in the landmark case of *Maneka Gandhi v. Union of India and anr*[9].

Fast Track system- The Apex Court has emphasized the quick dispensation of justice, which was reflected in *Brij Mohan Lal v Union of India*[10] where the court upheld the constitutional validity of the "Fast Track Courts Scheme". In that case, the Court observed that priority shall be given by the Fast Track Courts for disposal of those sessions cases which are pending for the longest period, and/or those involving under trials. Similar shall be the approach for civil cases i.e. old cases shall be given priority.

Compounding of Offences: Need to Reframe Section 320 Cr. P.C- Section 320 of the Criminal Procedure Code (Cr. P.C.) lays down the provision for compounding of offences. The provision contains the list of offences that can be compounded with the consent of the court and those offences that can be compounded with the court's permission. These offences, which can be compounded, with the consent of the court include *causing hurt, wrongful restraint, criminal*

[7] Id.
[8] Madabhushi Sridhar, *Alternative Dispute Resolution: Negotiation and Mediation,* 217 (2006).
[9] AIR 1978 SC 597
[10] (2002) 5 SCC 1

trespass, adultery, enticing defamation, criminal intimidation and *act caused by making a person believe that he will be an object of divine displeasure.* Thus, keeping in mind the alarming pendency of criminal cases and trauma of the trial, there is a need to widen the scope of compoundable offences[11].

PLEA BARGAINING

Plea bargaining may be defined as an agreement in a criminal case between the prosecution and the defence by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution or when the judge has informally made the accused aware that his sentence will be minimized if the accused pleads guilty[12]. In other words, it is an instrument of criminal procedure which reduces enforcement costs (for both parties) and allows the prosecutor to concentrate on more meritorious cases[13].

Applicability in India- Keeping in mind that the pendency of criminal cases has gone through the roofs, the Law Commission of India in its 142nd report suggested reform, which included implementation of plea bargaining in India[14]. Further, to reduce the delay in disposing of criminal cases, the 154th Report of the Law Commission recommended the introduction of 'plea bargaining' as an alternative method to deal with huge arrears of criminal cases, which found support in the Malimath Committee Report.

To give effect to the recommendations, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament. The bill attracted a large scale of hue and cry. The Supreme Court had also time and again castigated the concept of plea bargaining saying that negotiation in criminal cases is not permissible[15].

[11] Madabhushi Sridhar, *Alternative Dispute Resolution: Negotiation and Mediation*, 217 (2006).
[12] Sidhartha Mohapatra and Hailshree Saksena, *Plea Bargaining: A unique remedy*, INDLAW NEWS.COM, http://www.indlawnews.com/display.aspx?4762 (last visited 10th Mar. 2021).
[13] Id.
[14] LAW COMMISSION OF INDIA REPORTS (101 - 169), http://lawcommissionofindia.nic.in/101-169/index101-169.htm (last visited 11th Mar. 2021).
[15] State of Uttar Pradesh v. Chandrika 2000 Cr.L.J. 384(386)

Despite a very huge hue and cry against the amendment, the amendment was accepted and with the effect of the same, Chapter XXIA was added in the Code of Criminal Procedure, 1973. The said chapter contains Sections 265 A to 265L, which deal with plea bargaining.

Plea Bargaining in Other Countries- The concept of plea bargaining prevails in England, Canada, and most of the other nations of the British Commonwealth. Earlier Germany was referred to as "the land without plea bargaining". Subsequently, due to time-taking trials and increasing white-collar crimes in Germany, the system of plea bargaining was instituted by statute[16]. In the United States of America, plea bargaining has a vital role to play. White J, in a US case of *Brady v. United States*[17] observed the validity of plea bargaining and upheld its validity in the following words:

"For a defendant who sees the slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious - his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State, there are also advantages - the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment, and, with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof".

CRIMINAL ADR PROGRAMS

As far as the development of Criminal ADR procedures is concerned, it took birth from earlier "informal justice" programs[18]. Various criminal ADR programmes are running throughout the globe. Some of these are as follows:

[16] K.P. Pradeep, *Plea Bargaining- New Horizon in Criminal Jurisprudence*, available at http://kja.nic.in/article/PLEA%20BARGAINING.pdf (last visited 12th Mar. 2021).
[17] 397 U. S. 742 (1970), also available at JUSTIA: US SUPREME COURT CENTRE http://supreme.justia.com/us/397/742/case.html (last visited 12th Mar. 2021).
[18] Melissa Lewis & Les McCrimmon, *The Role of ADR Processes in the Criminal Justice System: A View from Australia*, available at http://www.doj.gov.za/alraesa/conferences/papers/ent_s3_mccrimmon.pdf. (last visited 5th Mar. 2021)

1. ***Victim-Offender Mediation Programs (VOM).*** Victim-Offender mediation programs provide an opportunity for crime victims and offenders to meet face-to-face. A discussion between the crime victims and offenders is encouraged and facilitated by a trained mediator, often a program volunteer. Also referred to as *victim-offender reconciliation programs (VORP)* or *victim reparation programs*, in most cases, its purpose is to promote direct communication between victim and offender. Victims who participate are provided with an opportunity to ask questions, address the emotional trauma caused by the crime and its aftermath, and seek reparations[19].

2. ***Community Dispute Resolution Programmes (CDRP).*** CDRP seek to dispose of minor conflicts that have not been disposed off and are clogging criminal dockets.

3. ***Victim-offender Panels (VOP).*** VOP developed as a result of the rise of the victims' rights movement in the last two decades and in particular to the campaign against drunk driving. They often used to provide the convicted drunk drivers with a chance to appreciate the human cost of drunk driving on victims and survivors. It also intends to decrease the likelihood of repeat offences[20].

4. ***Victim Assistance Programs[21].*** In the federal government of America, the Victim Assistance Programs appeared for the first time in the early 1970s as part of the Victims' Rights movement. Further, the victims' rights advocates argued for the establishment of victim compensation funds. Thus, the Victims of Crime Act of 1984[22] (VOCA) was enacted, which authorized the creation of programs that pay victims compensation for certain losses associated with a criminal act. VOCA established the Crime Victims Fund, which is supported by all fines that are collected from persons who have been convicted

[19] John R. Gehm "Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks", *Western Criminology Review* 1 (1). [Online]. Available: http://wcr.sonoma.edu/v1n1/gehm.html. (Last visited 5th Mar. 2021)
[20] RESTORATIVE JUSTICE ONLINE: *Victim-Offender Panels*, http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/processes/panels (last visited 5th Mar. 2021)
[21] OVC: *OVC Links to Victim Assistance & Compensation Programs*, http://www.ojp.usdoj.gov/ovc/help/links.htm (last visited 6th Mar. 2021).
[22] VICTIMS OF CRIME ACT OF (1984), http://law.jrank.org/pages/11121/Victims-Crime-Act-1984.html (last visited 6th Mar. 2021).

of offences against the United States, except for fines that are collected through certain environmental statutes and other fines that are specifically designated for certain accounts, such as the Postal Service Fund. The other way the fund provides compensation is to give the money directly to the governor of a state for the financial support of eligible crime-victim assistance programs.

5. ***Community Crime Prevention Programs***[23]**.** Community crime prevention programs were founded upon a simple idea that private citizens can and should play a critical role in preventing crime in their communities. Community crime prevention has included a plethora of activities, including media anti-drug campaigns, silent observer programs, and neighbourhood dispute resolution programs. No consensual definition of the community crime prevention program concept has emerged. But criminal justice scholars have restricted its application to activities that include residents of a particular locality who participate in efforts to stop crimes before they occur in that locality.

6. ***Private Complaint Mediation Service (PCMS)*.** PCMS provides mediation as an alternative to the formal judicial process of handling criminal misdemeanour disputes between private citizens. PCMS has been in operation since 1974 and is funded and administered by the Hamilton County Court system. PCMS gets its authority from Administrative Rule 9.02 of the Hamilton County Municipal Court[24].

Apart from the above programmes, there are also available the mechanism of sentencing circles, ex-offender assistance, community service, school programs, and specialist courts. These programmes point towards a gradual shift from deterrence to reparation, as a mode of criminal justice in some nations. In a nutshell, they show the application of restorative justice.

[23] Prevention: Community Programs - The History Of Community Crime Prevention, Chicago Areas Project, Political Mobilization, Evaluations Of Community Crime Prevention Programs, http://law.jrank.org/pages/1739/Prevention-Community-Programs.html#ixzz0kxrprMHD (last visited 6th Mar. 2021).

[24] MEDIATION OF CRIMINAL MISDEMEANOR DISPUTES, http://www.hamilton-co.org/MunicipalCourt/mediation/mediation_of_criminal.htm (last visited 15th Mar. 2021).

BENEFITS OF CRIMINAL ADR PROGRAMMES

Despite differences in these Criminal ADR Programmes, they focus on giving the victim a voice and dominant role in the process. Being forms of ADR, they remove legal conflicts from the courts intending to benefit all parties, reduce litigation costs and delays, and prevent subsequent legal disputes. The focus of ADR has always been the replacement of justice and rights with a process of compromise and agreement away from the courts.

APPRAISAL OF CRIMINAL ADR SYSTEMS

Some criminal ADR programmes like Victim-Offender Mediation Programs have been successfully mediating to bring justice between crime victims and offenders for over twenty years. There are now over 300 such programs in the U.S. and Canada and about 500 in England, Germany, Scandinavia, Eastern Europe, Australia and New Zealand[25].

Some statistics from a slice of the North American programs reveal that about two-thirds of the cases referred resulted in a face-to-face mediation meeting; over 95% of the cases mediated resulted in a written restitution agreement; over 90% of those restitution agreements are completed within one year. On the other hand, the actual rate of payment of court-ordered restitution (nationally) is typically only from 20-30%[26].

Privatizing public harm- With the growth of the ADR movement, Owen Fiss in his seminal article *Against Settlement* argued that ADR advocates naively painted settlement as a "perfect substitute for judgment" by trivializing the remedial role of lawsuits and privatizing disputes at the cost of public justice[27].

Mediation mostly being followed- Mediation has been adopted in various countries as a means to resolve criminal disputes. To be specific, mediation has been consistently applied in juvenile justice programmes.

[25] Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?* VORP, available at http://www.vorp.com/articles/crime.html (last visited 14th Mar. 2021).
[26] Id.
[27] Grace, Maggie T., *Criminal Alternative Dispute Resolution, Restoring Justice, Respecting Responsibility, and Renewing Public Norms*. Available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1017&context=student_pubs

As an example, Romania has been applying mediation to the field of Criminal Law. Articles 67-70 in **Law 192/2006** of Romania lay down provisions regarding mediation in criminal cases[28]. In countries like Canada, England, Finland, and even in the United States, the system of mediation is being used to resolve juvenile offences[29].

Though the mediation of severely violent crimes is not usual, in a chunk of victim-offender programs, victims and survivors of severely violent crimes, including murders and sexual assaults, are finding that confronting their offender in a safe and controlled setting, with the assistance of a mediator, returns their stolen sense of safety and control in their lives[30]. The emphasis is upon healing and closure. But in cases of severely violent crimes, victim-offender mediation can not replace punishment.

Not a flawless process- There have been several criticisms against the applicability of ADR in criminal disputes, which render ADR techniques unlikely to succeed. The victim-offender mediation is considered to be highly emotionally charged. Further mediation is argued to be successful where there is a moderate level of conflict. Further, the offender may feel to be under pressure to reach an agreement, rather than genuinely seeking to repair the harm done.
Other criticisms include that ADR is an appropriate remedy, where the parties have an ongoing relationship (which provides a significant motivation to achieve reconciliation). But this is not usually the case with victim-offender mediations.

[28] Zeno Daniel Sustac, Mediation in the Criminal Law, MEDIATE.COM, http://www.mediate.com/articles/sustacZ3.cfm, (last visited 15th Mar 2021).
[29] Peggy L. Chown, J.D. and John H. Parham, *Can We Talk? Mediation In Juvenile Criminal Cases*, http://www.lectlaw.com/files/cjs08.htm (last visited 15th Mar. 2021).
[30] Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?* VORP, available at http://www.vorp.com/articles/crime.html (last visited 14th Mar. 2021).