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## Upholding 'Human Rights' by Mediation and Restorative Justice

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### Abstract

Mediation, a type of 'Alternate Dispute Resolution' (ADR) technique is evolving as a potent and prefer mode of dispute resolution. The growing clamour for compounding, the practice of plea bargaining in context of petty matters and disputes pertaining to personal laws have become potent candidate for resolution in a negotiated environment, whereby none of the parties and stakeholders in the dispute process is at loss, rather it is a 'Win-Win Scenario'. In India, the dispute resolution via ADR is still at a nascent stage; whereby, mediation is considered as an apt and a potent tool to address the challenges of contemporary criminal justice system. In view of catena of cases surfacing before the Hon'ble Court of Laws in India, it is evident that facilitating settlement via negotiation and for all practical purpose of avoiding the hassles of 'adversarial justice system' which demands lot of time, cost and resources holds lot of promise while addressing the long pendency of cases in litigations surmounting in Courts for justice delivery. The advantages of Mediation are multi-fold including that of maintaining of confidentiality, exchange of views and exploring options for settlement of disputes in a congenial environment, viable options of pre-litigation settlements, cost-effective solutions. 'Restorative justice' practices are encouraged more and more, enables better pro-social oriented training, better accountability, community crime prevention programmes, awareness in prisoner assistance programmes, Victim-Offender panels and circles, assistance programmes which are 'psychological' and 'sociological' game changers in addressing the issues pertaining to injustice caused to the victim by the offender. Human Rights is a quintessential component in the endeavour of any justice delivery system and 'Restorative justice' promotes the idea of

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‘restitution’ and ‘reconciliation’ by enabling a reformative approach which is built in the edifice of Human Rights principles and tenets.

**Keywords:** *Alternate Dispute Resolution; Mediation; Plea Bargaining; Compoundable Offences; Human Rights.*

## **Introduction**

The increasing utilization of Mediation as a form of ‘Alternate Dispute Resolution’ in civil cases is accentuating with the passage of time. Mediation is a ‘unique’ method of settlement of disputes where the parties voluntarily enter into mediation for discussing and deliberating threadbare various issues pertaining to their disputes and to arrive at a solution through exchanges of information, views and weighing the options for early settlement in an environment which is not affected by any form of biases or premonitions or prior interest of the parties concerned. It is quintessential to note that the ‘Mediator’ acts as a catalyst and a facilitator in the entire exercise where the Mediator tries to be a ‘neutral spectator’ allowing the parties to come to a mutually acceptable solution for the resolution of the disputes. There is an angle of human rights in the entire process of mediation. Mediation facilitates the dispute resolution where the parties are at equal pedestals before commencing the exercise and while weighing the viable and potential options or competing options for resolution by an effective decision making with an efficacious dispute resolution mechanism. The instant paper is an attempt to look at the points of intersection of criminal justice system where ‘Restorative Justice’ is fit case in line with the human rights principles which is at the core of any justice delivery system and particularly for alternate dispute resolution via Mediation.

## **Restorative Justice: A Buzz word**

‘Restorative Justice’ has been the buzz word which tries to address the inherent issues to ‘criminal justice’ with emphasis on ‘restoring the victim’ and community rather than any punitive or deterrence-oriented system of punishing the offender. Human Rights is a broader concept which encompasses a wide and a plethora of ‘bundle of rights’ which a human being is entitled to for their very existence. Fundamental rights as enunciated in the Constitution of India<sup>2</sup> spells out the quintessential aspects of right to life and human life with dignity and personal liberty as the basic building block for the very essence of humankind. Human person is the centre stage of any human rights irrespective of the caste, creed, religion, gender, race or

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<sup>2</sup> Constitution of India, 1950

colour and nationality. Legal scholars and philosophers have considered human rights as the most basic, innate, inherent, fundamental, implicit, natural and birth right for an individual. Restorative justice is an evolving concept which look at methods, techniques and mechanism for reforming the offender and bringing in a sense of corrective mechanism socially, psychologically, culturally, scientifically and a 'reformatory approach' so that the offender does not repeat the offence and is brought to the mainstream of life. It also warrants a look at restoring the victim to a state where the options are explored, attempted and effectual steps are undertaken so that the victim is brought back to same or similar condition before the commissioning of the offence. Varied restorative justice processes or techniques include victim offender mediation, victim offender panels, circles, victim assistance programmes, compensation to victims, ex-offender assistance, awareness programmes for constant interaction via conferencing, psychological workshops, representative approach in boards and utilization of community driven exercises, among others. It is pertinent to note that Probation of Offenders Act, 1958 is a benevolent legislature; in this context, in *Commandant, 20<sup>th</sup> Battalion, ITB Police v Sanjay Binjola*<sup>3</sup>, it was held by Hon'ble Supreme Court of India that, "The probation of Offenders Act has been enacted in view of the increasing emphasis on the reformatory and rehabilitation of the offenders as useful and self-reliant members of society without subjecting them to deleterious effects of jail life. The Act empowers the Court to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life or for the description mentioned in Section 3 and 4 of the said Act..."

### **Mediation: An Efficacious Quintessential Tool**

Mediation is alternate to adversarial adjudication mechanism of addressing and resolution of litigation, which though being conventional but has its roots in the Vedic times; history is replete with examples in Indian culture and human civilization, how a solution arrived within family members are more self-satisfying, process is self-governed and leads to better implementation. The inherent advantages of confidentiality, willingness of the parties to enter into a mediation process to resolve disputes has been held from time immemorial to be an effective and potent tool for identifying the key interest areas and delving into them for parties concerned while arriving at a decision. The mediator's suggestion is non-binding in character and enables conversation among parties to dispute where the suggestion of the mediator is

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<sup>3</sup> *Commandant, 20<sup>th</sup> Battalion, ITB Police v Sanjay Binjola* (2001) 5 SCC 317

merely recommendatory in nature. It is vital to note that during mediation, because of the vast experience and the training dovetailed to facilitate solutions, the mediator's suggestions are influential and given a credence by the parties. This effectually results in upholding the basic rights of the parties concerned including the human rights of listening and providing an equal opportunity to express oneself which is very innate and inextricably linked in the entire exercise and parleys during mediation.

Another vital aspect when it comes to Alternate Dispute Resolution like Mediation is that the parties can even quit the process of negotiation any time after starting the discussion in a mediation setup. The need of the 21<sup>st</sup> century, as has been reiterated in multiple forum internationally including at the 'Global Pound Conference'<sup>4</sup> to have both conventional adversarial criminal justice system and alternate non-adversarial system of resolving disputes via ADR.

The sense of satisfaction is evident in mediated based outcomes as the settlement happens addressing the pertinent real needs of the parties concerned. These cases are less prone to reopen as a result compliance from such negotiated settlement via mediation is very high. Negotiation involved in mediation are threadbare analysis of varied options, in-depth discussion on subject matter, which are jointly and decided by the parties and the stakeholders themselves, parties involved in the understanding of the disputes have a better understanding of the issues involved and the available possibilities for settlement of the disputes.

Another perspective is adherence and compliance to international norms and upholding of the human rights pertaining to mediation, India's proactive role and recognition in Singapore Mediation Convention<sup>5</sup> which ensures enforceability of the cross-border and international mediated settlements. India is increasing integrating both domestic and international cross-border mediation in its dispute resolution mechanism with almost all Hon'ble High Courts of the country having a Court Annexed Mediation Centre. It enables access to multitude of litigants who want to avail the mediation service which are cost-effective and resource-optimised. Slowly and steady mediation is taking shape in India and garnering traction for utilisation of mediation *inter alia* in commercial disputes, tax dispute and trade conflict cases, property cases. It is *fait accompli* that Mediation in matrimonial cases have already been

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<sup>4</sup> A global conference addressing Alternate Dispute Resolution via talks and deliberations on the subject matter and named after Nathan Roscoe Pound, former Dean and Prof of Harvard Law School

<sup>5</sup> India including US and China are at the forefront of upholding mediation and become leading countries to recognize the Singapore Convention in 7th August, 2019

successful in addressing the conflicting issues in the family cases. The quest for ‘appropriate and effective’ time saving dispute resolution technique is emerging as a preferred method of dispute resolution in the present times.

### **Human Rights and its roots**

The development of the discourse of ‘Human Rights’ dates back to Hammurabi Code, which established fair wages and required to prove charges at trial. Plato<sup>6</sup> advocated recognition to standard of ethical conduct universally. Greek and Roman Philosophers considered the idea of ‘natural justice’, later St. Thomas Aquinas strongly believed that the ‘natural justice’ was a derivative of ‘Divine Laws’. History has been testimony to the fact that ‘Magna Carta’<sup>7</sup> was with the sole purpose of protecting from arbitrary exercise of power by King; thereby laying the foundation of ‘Jury trial’ which protected from arbitrary arrests and imprisonments. Magna Carta was broadened to include all English men in the Bill of Rights<sup>8</sup> and subsequently for all citizens.

### **Human Rights and Mediation**

Mediation as one of the several alternatives to litigation could be resorted by the parties and thereby it is a viable alternative to Court litigation and enables the parties to decide disputes by mutual consensus building process. Hon’ble Justice Cyriac Joseph once asserted, *“One of the parameters to fathom the success of justice delivery system in the society is to ascertain how quickly and efficiently the dispute between the parties are settled...”*. In *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, Patna*<sup>9</sup>, the Hon’ble Apex Court, the Supreme Court of India reiterated the importance of speedy trial as it involved in the instant case trails of offenders who were in jail for a period longer than the maximum sentence that could be imposed for conviction, Hon’ble Justice Bhagabati observed that, *“Although, the right to speedy trial is not specifically mentioned as fundamental right, it is implicit in the broad sweep as contained in Article 21 of the Constitution of India...”* The objective of Mediation as effective tool ensuring justice on the broader parameters of human rights can be summed up in the words of Abraham Lincoln, *“Discourage litigation. Persuade your neighbours to compromise where you can. Point out to them how the nominal winner is often the real loser -*

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<sup>6</sup> Greek Philosopher

<sup>7</sup> ‘Magna Carta’ enshrined which provided for protection to rights of the Lords by King John of England in 1215; was christened as ‘Magna Carta Libertatum’ as “Great Charter of Freedom”.

<sup>8</sup> Bill of Rights, 1689

<sup>9</sup> *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, Patna* (1980) 1 SCC 81

*in fees, expenses and waste of time...*” It is vital to note that Mediation has to be dovetailed to the line of ‘human rights’ substantiating the four pillars, ‘Neutrality’, ‘Party Autonomy’, ‘Confidentiality’ and ‘Finality’ as the quintessential edifice on which mediation stands.

### **‘Compounding’ of offences**

Compounding of offences enables the parties to settle a case amicably over a time with the consent of the Hon’ble Court; however, the ‘Plea Bargaining’ is settled by the Hon’ble Court in a single sitting where the role of the Court is relatively large, whereby the Hon’ble Judge provides the decision of acceptance or rejection of the plea bargain. It is pertinent to note that a compromise of a compoundable case deprives the Magistrate of his jurisdiction to try a case. Section 320(1) of CrPC<sup>10</sup> lists those offences which are compoundable while Section 320(2) of the aforesaid Act<sup>11</sup> enlist those offences which are ‘compoundable offences’ with Court’s permission. In *State of Uttar Pradesh v Chandrika*<sup>12</sup>, the Hon’ble Supreme Court of India mentioned about compounding of certain offences under Section 320 as one of “negotiated settlement in criminal cases”. Compounding of offences has the effect of acquittal, in contrast to ‘plea bargaining’ where there is admission of guilt at the very beginning for competing decision of punitive and ‘rehabilitation’ rationales for punishment. As held in *Aslam Meah case*<sup>13</sup>, it was held that, “*Exploring whether a case merit compounding of offence at any time before sentence is pronounced even whilst the Magistrate is writing the judgment...*”; however in *Chottey Singh v State*<sup>14</sup>, it was held that, “*application for compounding an offence filed after the disposal of an appeal is not maintainable as at that stage no proceeding is pending...*”

### **Conclusion**

Needless to say, mediation is evolving as an effective method in dispute resolution in the present-day scenario of ever-increasing number of pending cases and demands evolving a mechanism by which finality to the cases are attained by ending protracted litigation within a reasonable time-frame. The need of the hour is to sensitise the citizenry with awareness and information dissemination programmes so that human rights tenets and principle of speedy and cost-effective justice is rendered in an environment which encourages confidence building via Mediation among the disputed parties. This in turn help in upholding the values of ‘Human

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<sup>10</sup> Code of Criminal Procedure, 1973

<sup>11</sup> Code of Criminal Procedure, 1973

<sup>12</sup> *State of Uttar Pradesh v Chandrika* AIR 2000 SC 164

<sup>13</sup> *Aslam Meah* (1917) 45 Cal 816

<sup>14</sup> *Chottey Singh v State*, 1980 CrLJ 583 (All.)

Rights' inbuilt in the edifice of justice delivery system. Driven by the emergent need of the present times across the world, there is imperative urge felt of late of increasing online mediation recently by all stakeholders including Institutions and judicial setup. The advantages of mediation leverage the inherent positives of meeting the ends of justice with an eye on human rights and other basic fundamental rights which are innate to any justice delivery system. The non-conventional and alternate dispute resolution is an answer to resolve issues with positive bend of mind and leads to a 'win-win' situation for all the stakeholders in the value chain of growth and progress. The move towards alternate dispute resolution is attempt to uphold human rights basic principles where the 'Victim Offender Mediation' is a method to iron out the differences ensuring balance of interests of parties in congenial environment and via elaborate discussion where the parties take the ownership of the final decision and results in better compliance eventually.