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LEGAL AND ETHICAL CHALLENGES IN CRIMINAL MEDIATION; A STUDY OF VICTIM OFFENDER DIALOGUE

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Abstract

In the pursuit of justice, traditional criminal adjudication often emphasizes punishment over healing, leading to adversarial proceedings that may leave both victims and offenders dissatisfied. In contrast, the concept of restorative justice—particularly through criminal mediation—presents an alternative framework aimed at healing the harm caused by criminal conduct. This model, which includes Victim-Offender Dialogue (VOD), seeks not only to hold the offender accountable but also to provide a voice to the victim, allowing for acknowledgment, apology, restitution, and, in some cases, reconciliation. In recent years, criminal mediation has gained attention across the globe as an inclusive and humane means of resolving disputes, particularly for non-violent and minor offences. It emphasizes dialogue, understanding, and reintegration rather than retribution, aligning with evolving notions of justice in a civilized society.¹ Furthermore, in a rapidly developing economy, Alternative Dispute Resolution (ADR) procedures are gaining traction as effective alternatives to traditional litigation. ADR methods such as arbitration, conciliation, mediation, and negotiation offer a more expeditious resolution to disputes, easing the burden on the judicial system. For companies doing business in India and those interacting with Indian entities, these mechanisms are increasingly being preferred over conventional dispute resolution due to their efficiency and cost-effectiveness.² This evolving landscape of criminal mediation—both nationally and globally—raises critical questions. This leads to certain questions like; What are the core principles and models of criminal mediation? What are the existing legal provisions in India that support or limit criminal mediation? What ethical and legal dilemmas arise during the mediation process in criminal matters? How do international legal instruments and recommendations guide Victim-Offender Dialogue and restorative justice?

Keywords: criminal, mediation, restorative, cost-effective, reconciliation etc.

¹ Manu S R, Adoption of the Restorative Criminal Justice System in India, <https://www.ijfmr.com/papers/2023/5/14009.pdf>? Last Visited on 2nd April, 2025.

² Supra Note 1.

Introduction

In order to address the suffering produced by a crime, criminal mediation entails a mediator—a neutral third party—facilitating dialogue and discussion between a victim, an offender, and sometimes other impacted parties. It is an alternative to conventional court processes with the goal of fostering understanding and healing while lessening the adversarial aspect of the legal system. The approach between the offended party and the defendant is encouraged with the assistance of a specially trained professional known as a criminal mediator. As a result, the parties are encouraged to actively seek an agreement that permits reparation for the harm caused by the wrongdoing and aids in the restoration of social harmony.

Characteristics:

1. It is voluntary.
2. It is a non-formal, non-bureaucratic process.
3. It is quicker than a trial.
4. The parties must personally participate; however, they may be accompanied by a lawyer.
5. The mediator must uphold the obligations of independence, impartiality, diligence, and confidentiality throughout his work.
6. The information discussed in mediation sessions is private and cannot be used as evidence in court.³

In order to mediate a settlement between victims and offenders, restorative justice was first implemented in the 1970s. A meeting between the victim and the perpetrator or the community at large is set up in this criminal justice system. Instead of focusing on punishment and reckoning, this system emphasizes restoration, cure, and the rehabilitation of criminals.

Equal opportunities to be heard, resolve conflict, and address its effects are provided by restorative justice to both individuals and communities that are directly impacted. The goal of restorative justice is to move the emphasis from punitive actions to relationship restoration and the healing of all parties. While enabling victims to communicate the psychological and societal effects of the crime, it also pushes criminals to accept accountability for their deeds. This method promotes a sense of community and group healing while also supporting the victim's

³Criminal Mediation System, Justica, https://dgpj.justica.gov.pt/Portals/31/Ing1%C3%AAAs/FAQ_S_SMP.pdf?ver=TUEeL7V-CL6QARhCr_iCsQ%3D%3D, Last Visited on 4th April, 2025.

recovery and the offender's rehabilitation. Restorative justice promotes communication and understanding between people, which aids in reestablishing societal cohesiveness and trust⁴.

Victim-Offender Dialogue

Victim-Offender Dialogue (VOD) constitutes a restorative justice mechanism aimed at facilitating structured communication between a victim and the individual responsible for the commission of a criminal offence. It is distinct from traditional civil mediation in that the parties involved are not co-disputants seeking a negotiated resolution, but rather a victim seeking redress and an offender who has admitted culpability. The process is primarily rehabilitative in nature, intended to promote accountability, recognition of harm, and emotional closure. Initiation of VOD may occur at various procedural stages, including pre-trial, post-admission of guilt, or even during sentencing, and is typically facilitated by a neutral and trained mediator pursuant to a referral by judicial authorities or law enforcement agencies.

The models of VOD vary depending on the sensitivity of the case and the willingness of the parties involved. Direct mediation involves face-to-face interaction between the victim and the offender under the guidance of a mediator. Indirect mediation is undertaken through the mediator acting as an intermediary, where direct engagement is either impracticable or inadvisable due to emotional or safety concerns. Conferencing expands the scope of participation to include the affected community and relevant stakeholders such as family members, legal guardians, or social service providers, and is frequently employed in matters involving juvenile offenders. Each model is underpinned by the objective of restoring social harmony and reintegrating the offender into the community, while affording the victim a voice in the justice process. The successful execution of VOD requires the active involvement of several key stakeholders. The victim is provided the opportunity to articulate the impact of the offence, seek answers, and evaluate the offender's remorse or offer of restitution. The offender, conversely, is afforded the platform to acknowledge wrongdoing, accept responsibility, and make amends. The mediator, acting as a neutral third party, ensures procedural fairness, balances power dynamics, and maintains decorum throughout the process. The legal system plays a supervisory and enabling role, either through case referrals or through judicial recognition of mediated outcomes. VOD proceedings are characteristically confidential, thereby safeguarding the privacy of the parties and encouraging candid engagement. In

⁴ Restorative Justice, Times of India, <https://timesofindia.indiatimes.com/readersblog/hail-to-feminism/restorative-justice-in-relation-to-mediation-40493/>, Last Visited on 10th April, 2025

comparison to conventional criminal adjudication, VOD is a more expeditious, cost-effective, and emotionally reparative process that furthers the ends of both justice and reconciliation.⁵

Legal Framework Governing Criminal Mediation

In India

- Section 320 of the Criminal Procedure Code (CrPC) – Compounding of Offences: Under Section 320 of the CrPC, the Indian legal system allows for the compounding of offences, providing an opportunity for the victim and the offender to resolve certain criminal cases outside of the formal judicial process. This mechanism is available for specific offences, particularly minor crimes. In this context, victim consent is crucial for the settlement of the offence, facilitating an approach where both parties agree to resolve the matter. While the law excludes more serious crimes, it offers a pathway to restorative justice, where the victim can be compensated, and the offender may be encouraged to take responsibility for their actions. This provision aligns with the mediation process, emphasizing speedy resolution and providing an alternative to the often lengthy and emotionally draining litigation process. It also helps alleviate pressure on the judicial system while enabling both parties to find closure without a full trial. Thus, the law offers an avenue for both parties to participate in a process that focuses on repair and restitution, rather than mere punishment.⁶
- Juvenile Justice (Care and Protection of Children) Act, 2015 – Scope for Reconciliation Section 2(40): The Juvenile Justice (Care and Protection of Children) Act, 2015, addresses cases involving juvenile offenders, acknowledging that they require a distinct approach to justice. Section 2(40) of the Act defines a child in conflict with the law, creating an opportunity for diversion from the formal criminal process in specific cases. The law encourages mediation and reconciliation for juveniles who have committed less serious offences, emphasizing rehabilitation and restorative justice rather than punitive measures. This framework promotes the possibility of dialogue between the victim and the juvenile offender, aiming to allow both parties to heal. Through restorative justice principles, the Act encourages offenders to acknowledge the harm caused, seek forgiveness, and offer restitution, helping both the victim and the offender

⁵ Criminal Mediation, NUJS Journal, <https://journals.nujs.edu/index.php/jodr/article/view/352/279>, Last Visited on 11th April, 2025.

⁶ Victim Offender Mediation, IJLMH, <https://www.ijlmh.com/wp-content/uploads/Victim-Offender-Mediation.pdf>, Last Visited on 11th April, 2025.

move forward. The focus is on the child's reintegration into society as a responsible individual, with less emphasis on punishment.⁷

- Legal Services Authorities Act, 1987 – Lok Adalats and Mediation: The Legal Services Authorities Act, 1987 serves as a foundation for Lok Adalats (alternative dispute resolution bodies) and mediation across India. The law allows Lok Adalats to mediate and settle various criminal disputes, particularly minor cases, using mediation and conciliation. This system helps avoid prolonged legal battles, offering victims and offenders the chance to settle matters quickly and amicably. The Lok Adalat mechanism supports alternative dispute resolution (ADR), promoting restorative justice by ensuring that both the victim and the offender are given a chance to engage in a dialogue with the help of a neutral mediator. Through the Legal Services Authorities Act, the judiciary in India has made strides toward adopting mediation as a formal method of resolving criminal matters.⁸

Global Status

Globally, several jurisdictions have embraced restorative justice mechanisms with considerable success. New Zealand is widely regarded as a leader in this area, particularly in the realm of juvenile justice. The Children, Young Persons, and Their Families Act 1989 mandates family group conferences as a primary method of resolving youth offenses, reflecting a deep commitment to restorative values. Similarly, South Africa's Truth and Reconciliation Commission (TRC), established after apartheid, remains a landmark example of how restorative justice can be implemented on a national scale to achieve healing and transitional justice. Canada has also made significant strides by integrating restorative justice into both Indigenous and mainstream legal systems. The use of sentencing circles and community-based mediation programs reflects Canada's pluralistic and inclusive approach. In the United States, states like Vermont and Minnesota have experimented with restorative panels, particularly for juvenile and first-time offenders, emphasizing dialogue, restitution, and community involvement.⁹

⁷ Supra Note 6.

⁸ Supra Note 5.

⁹ Restorative Justice, IIRP EDU, <https://www.iirp.edu/news/circle-sentencing-part-of-the-restorative-justice-continuum?>, Last Visited on 12th April 2025.

Legal and Ethical Challenges in Criminal Mediation

Ethical Challenges

- Imbalance in negotiating strength: In criminal mediation, offenders often hold more power than victims, making negotiations one-sided. This can result in outcomes that fail to reflect the victim's actual needs.
- Possibility of pressure or manipulation: Victims might be subtly or directly pushed into settling the matter. Such influence threatens the voluntary and unbiased nature of mediation.
- Overlooking the victim's emotional state: If the process lacks empathy, it may ignore the trauma and emotional distress of the victim. This can lead to additional harm rather than offering closure.
- Challenges in keeping matters confidential: Sensitive cases, like those involving abuse, may demand disclosure for safety. This can conflict with the promise of privacy typically expected in mediation.¹⁰

Legal Challenges

- Reluctance of Legal Professionals: Judges may be reluctant to assign cases to mediation out of concern that it will weaken their power, and many attorneys may oppose its adoption because they see it as a possible danger to their revenue from drawn-out litigation.
- Absence of a Strong Legal Structure: Prior to the recent passage of the Mediation Act, 2021, mediation lacked thorough legal support, in contrast to arbitration, which has a well-established legal foundation. Its implementation was hampered by the absence of a defined legal framework, particularly with regard to the enforcement of mediated settlements.
- Lack of neutrality from the mediator: A mediator's partiality or guidance toward a particular outcome can distort the process. This makes the mediation less just and may favor one party unfairly.¹¹

¹⁰ Supra Note 9.

¹¹ Pros and Cons of Mediation, Willis Business Law, <https://willisbusinesslaw.com/blog/mediation/weighing-the-pros-and-cons-of-meditation-in-ontario/#:~:text=of%20public%20disclosure,-,Cons%20of%20Mediation,can%20affect%20the%20mediation%20process.,> Last Visited on 13th April 2025.

Comparative Jurisprudence

The goal of restorative justice is to keep the parties' peaceful relationships intact while resolving their disagreements. It gives the parties to a crime the chance to talk about the offense and its effects, make amends for any harm done, and reestablish cordial relations. The Constitution's Article 21 guarantees a fair, reasonable, and just process. For the benefit of all parties involved and society at large, the issues should be settled as soon as possible. The greatest farce of the law is the denial of justice by delay, but in India, this is more than just a joke—the delay actually destroys the entire system of justice. Alternative Dispute Resolution procedures are now more important for companies doing business with Indian companies as well as those operating in India.¹²

Retributive justice emphasizes punishment and deterrence, whereas restorative justice aims to foster healing and reconciliation. The goals, procedures, and roles that are given to victims and offenders in the two methods are essentially different. Restorative justice emphasizes repairing the harm caused by criminal behavior, involving the victim, offender, and community in a collaborative process. It aims to ensure that the offender takes responsibility, the victim finds closure, and the social bond is restored. Retributive justice, on the other hand, is rooted in the belief that punishment must be proportionate to the offense, serving both as a deterrent and a form of retribution sanctioned by the state.¹³

In restorative justice, the victim plays a crucial role, actively participating in the process and having a say in how things turn out. In contrast, the victim is usually simply a witness in a very formal and combative court case under retributive justice, where they frequently remain a secondary player. Similarly, while restorative justice allows the offender an opportunity to apologize, make restitution, and reintegrate into society, retributive justice focuses solely on the offender's guilt and the appropriate punishment, often resulting in incarceration or monetary penalties. Typically, restorative procedures are voluntary, unstructured, and proactive. They entail mutual agreement on results, facilitated communication between the parties, and frequently a feeling of emotional closure. Retributive justice, in contrast, is backward-looking and state-centric. It involves a rigid legal process that evaluates past conduct and imposes penalties based on statutory provisions. The justice ideal in restorative justice is

¹² Supra Note 11.

¹³ Community Justice, Vermont, <https://ago.vermont.gov/attorney-generals-office-divisions-and-unit/community-justice-unit/>, Last Visited on 13th April, 2025.

one of harmony and healing, while retributive justice prioritizes social order through state-imposed sanctions.¹⁴

Judicial Interpretations; Judiciary's Stance on Criminal Mediation

The Indian judiciary, particularly the Supreme Court, has played an instrumental role in promoting mediation and reconciliation in criminal cases. In the landmark case of *State of Madhya Pradesh v. Laxmi Narayan*¹⁵, the Court recognized the potential of mediation in specific criminal matters, advocating for alternative methods to resolve disputes when the parties are willing to settle amicably. The Court acknowledged that victim-offender dialogue could play a key role in achieving justice, particularly in minor offences.

The Supreme Court reaffirmed the value of early dispute settlement and promoted the use of conciliation and mediation in criminal cases in *Shatrughan Chauhan v. Union of India*¹⁶, another significant ruling.

In India, a number of High Courts have also encouraged mediation in criminal cases, including those involving minor infractions and family conflicts. These rulings demonstrate a growing recognition in India of restorative justice as a legitimate and beneficial mechanism for resolving criminal disputes.

Suggestions

Some key factors that may shape the future landscape of Criminal Mediation are the following:

1. **Greater Recognition and Integration:** The benefits of mediation in criminal cases are becoming increasingly apparent as restorative justice concepts are accepted and understood on a larger scale. With specific laws and regulations, legal systems and legislators may use mediation more frequently as an alternative or supplemental strategy within the criminal justice system.
2. **Specialized Training and Certification:** Specialized training and certification programs for mediators may be prioritized in order to guarantee the successful use of mediation in criminal cases. These courses would improve the caliber and professionalism of the

¹⁴ Supra Note 1.

¹⁵ (2019) 5 SCC 688

¹⁶(2014) 3 SCC 1

process by giving mediators the abilities, know-how, and ethical awareness unique to criminal cases.

3. **Culturally-Sensitive Approaches:** Given the various cultural backgrounds and requirements of those involved in criminal trials, there might be a stronger focus on mediation techniques that are sensitive to cultural differences. The efficacy and acceptability of mediation in various groups can be improved by tailored procedures that honor cultural norms, values, and customs.¹⁷
4. **Cooperation and Integration with Legal System:** There may be a rise in the cooperation between mediation experts and the legal system. Various phases of the criminal justice process, including sentencing conferences, post-conviction mediation, and pre-trial diversion programs, might incorporate mediation. This collaboration can enhance the overall effectiveness and efficiency of the criminal justice system.¹⁸

Conclusion

Criminal mediation, particularly through Victim-Offender Dialogue (VOD), provides a transformative approach to justice by focusing on healing and reconciliation rather than punishment. Unlike traditional adversarial systems, it enables direct communication between victims and offenders, giving victims a platform to voice their experiences while holding offenders accountable. This restorative justice model addresses the emotional and social harm caused by crime, offering a more compassionate solution for minor offenses. However, criminal mediation, while beneficial, presents several legal and ethical challenges.

From an ethical perspective, concerns arise regarding power imbalances between the victim and the offender, potential pressure on victims to reach a settlement, and the risk that emotional trauma may remain unresolved during the process. Legally, obstacles such as resistance from legal professionals, the absence of a comprehensive legal framework, and issues surrounding mediator impartiality can hinder the effectiveness of criminal mediation. These challenges can undermine the fairness of the process, potentially leading to unjust results and eroding trust in restorative justice.¹⁹

Despite these issues, both the Indian and international legal frameworks recognize mediation

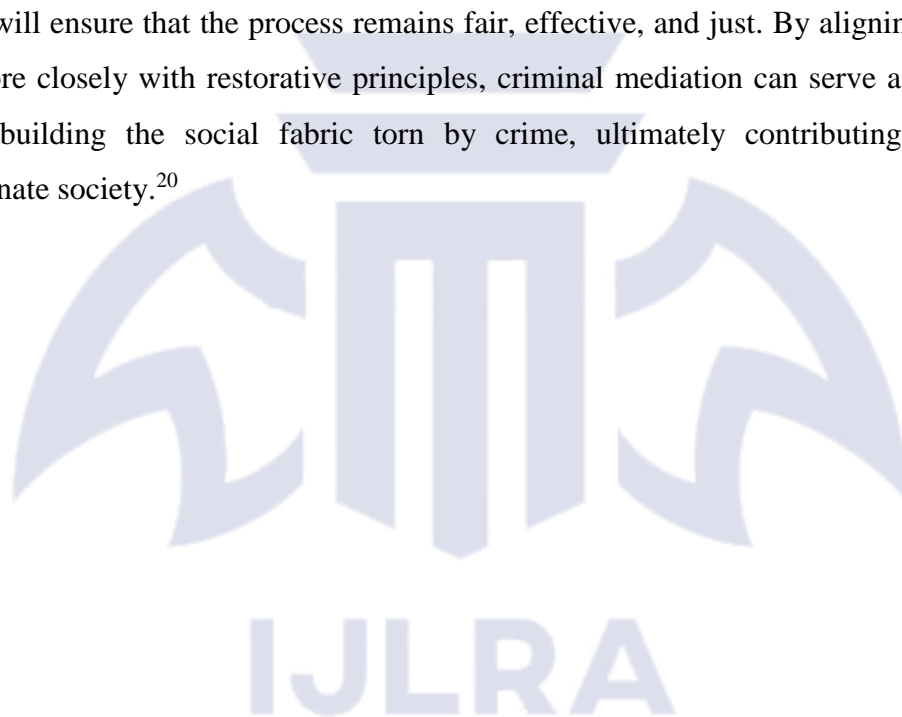
¹⁷ <https://www.mplegalfirm.in/2023/06/mediation-in-criminal-cases-and.html>

¹⁸ <https://www.mplegalfirm.in/2023/06/mediation-in-criminal-cases-and.html>

¹⁹ Supra Note 4.

as a viable alternative for resolving conflicts. In India, provisions like Section 320 of the Criminal Procedure Code, the Juvenile Justice Act, and the Legal Services Authorities Act facilitate mediation, particularly in minor offenses and cases involving juveniles. Similarly, successful restorative justice models in countries like New Zealand and Canada highlight the potential of this approach in promoting community healing and reconciliation.

As criminal mediation continues to evolve, it is crucial for policymakers to address the ethical and legal concerns by ensuring strong safeguards and a clear legal framework for enforcement. Moreover, continuous training for mediators and awareness campaigns for victims and offenders will ensure that the process remains fair, effective, and just. By aligning the justice system more closely with restorative principles, criminal mediation can serve as a powerful tool in rebuilding the social fabric torn by crime, ultimately contributing to a more compassionate society.²⁰



²⁰ Crime and Victimology, Sage Publications, <https://sk.sagepub.com/ency/edvol/victimologyandcrime/chpt/restorative-justice>, Last Visited on 14th April, 2025.