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EXPLORING THE EFFECTIVENESS **OF MEDIATION IN RESOLVING** **CRIMINAL MATRIMONIAL CASES:** **A COMPREHENSIVE ANALYSIS**

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Abstract

In India, the pervasiveness of domestic violence, especially against women, is a cause for worry for society at large and the judicial system, which is responsible for delivering justice in these situations. This raises the issue of whether domestic abuse cases, which are frequently criminal in nature, should be settled through mediation. According to an examination of the problem, the main concern is striking a balance between the interests of many parties involved in the incidence of domestic violence, including the abuser, the victim, children, the courts, and society at large. The purpose of this study is to offer suggestions for how to include mediation in domestic

To preserve the benefits of mediation while minimizing its problems, this paper will explore ways to use mediation in domestic violence instances. The focus of the essay will be on a remedy for adult domestic violence cases as well as the risks of mediation in child domestic violence situations. The controlled use of mediation in domestic violence situations must be promoted in a way that maintains the fear of punishment and is advantageous to all parties concerned, as has been the case in several Indian court rulings.

Keywords- Cruelty, Domestic Violence, Mediation, Non-compoundable offence, Divorce

Introduction

Domestic violence is any violent, forceful, abusive, coercive, or threatening action by a family member towards another family member. The use of mediation in the context of domestic abuse is a contentious issue since there is disagreement regarding the consequences of not punishing the victim in this circumstance. Some claim that mediation makes the case against domestic abuse as a criminal less strong. Instead of being punished, the perpetrator gets away unnoticed. It is feasible to assume that if the abuser takes part in the conciliation phase, there won't be any bad repercussions. Because of this, the abuser will be able to escape punishment, and the victim will believe they are partly a fault. The argument is that counselling can decriminalise domestic abuse and give the perpetrator permission to continue victimising them. The alternative argument claims that when the perpetrator admits to having committed the offence, the victim's sense of self-denial lessens.

Mediation is victim-centric rather than a society-centric process. As a result, arbitration through mediation between the victim and the perpetrator modifies the traditional model of criminal law by putting the victim at the center rather than the periphery of the entire process.

To resolve the conflict and impose conditions on the victim's will, the victim is replaced for the victim rather than the best feasible solution, which the state believes to be a generic analysis. Even if the state has spent a lot of work identifying and criminalising these infractions and discriminating against women, women should be given a choice because the offence is against them and they are at the mercy of this criminal act.

It was discovered that the victims were not initially recognised or objected to the worry that they were disgraced across society since the legal process was not private and the party's identity was known, which contributed to a worsening of the family situation. The abuse in the family is heavily mimicked, and the perpetrators are unwilling to file a lawsuit out of fear of being exposed to society. The crime's undisclosed and unrecognised seriousness is attributable to the victim's efforts to keep the incident secret to ease family tensions. This makes it simple to handle the crucial secrecy issue in ethical mediation, and mediators should be professionally qualified to maintain a power balance in such circumstances.

Societal Perception of Divorce

Divorce is a complex social and legal process that can have far-reaching consequences for families, communities and the nation as a whole. India is a collectivist society where “marriage is perceived as a vehicle for maintaining social order and for forming links between families rather than as a means of fulfilling personal desires¹”. Dissolution of marriages can result in the destruction of these traditions and values and can often cause a great deal of stress and confusion within the family unit and societal structure.

In India, the number of couples seeking a divorce has increased substantially in recent years. There are several factors that have contributed to this trend. These include a rising incidence of crime, alcoholism, drug abuse, inter-caste marriage and the loosening of traditional social structure. The breakdown of the traditional joint-family system is another major factor which has contributed to an increase in the incidence of divorce in the country. In the past, most Indian families were extended and consisted of several generations living under one roof, including the husband's parents, his brothers and sisters and their children. However, with rising urbanization and economic changes, the traditional joint-family system has been replaced by nuclear families consisting of the husband, his wife and their children.

In a traditional joint-family system, all members depend on one another for support and help, and this extended family helps provide guidance and stability for the members in times of need. On the other hand, nuclear families have fewer family members living with them and are relatively more independent. However, the patriarchal outlook of society has not seemed to change much even after so many years. Traditionally, Indian men are seen as the head of the household and their decisions are respected and regarded as final by all members of the family. Even today, fathers are considered responsible for the well-being of their children, and their wishes are taken to be the norm for the entire family. Although there has been some progress in this regard over the years, the influence of the male head of the household is still very strong in Indian society, and it often leads to unnecessary conflicts within the family.

Despite the increasing number of divorces in India, the divorce rate remains relatively low compared to that of many Western countries. This may be due to the cultural and religious values which are strongly entrenched within Indian society, as well as the strong social taboos

¹ Breckenridge, L. J. (2023). Collectivism. Salem Press Encyclopedia of Health.

against divorce in most parts of the country. However, a large number of marriages also end in divorce due to irreconcilable differences between the husband and wife. These conflicts and differences often lead the couple to courtrooms to seek divorce. Divorce has a negative social, psychological, and financial impact on everyone in the family, not just the divorcing spouse². As diverse families are served by mental health professionals, they are often placed within the Western value systems of psychology and counselling, in which individuation is expected to place boundaries on cohesion and individual goals³, and subsequently, marriage counselling on the same scale, quite often do not prove to be helpful. It is imperative, therefore, for an appropriate mechanism for Divorce to be in place. The Indian Judicial System has recognized this and has provided laws that ensure that a divorced couple has access to legal remedies if needed.

Even in the presence of the mechanism, the judicial system in India tries to protect these familial units. Furthermore, if the divorce is contested in India, the process may be prolonged and expensive, to overcome this Courts often refer these cases to Mediation under section 89 of the CPC, even so in cases filed under section 498 A of the IPC. As with other personal matters like marriage, inheritance, etc., religion plays a significant role in the determination of applicable Indian divorce laws. The Hindu Marriage Act was passed in 1955 that governs the dissolution of marriage among Hindus, Buddhists, Sikhs, and Jains. A Muslim Marriage Dissolution Act of 1939 governs Muslims. The Parsi Marriage and Divorce Act was passed in 1936 to regulate the marriage and divorce of Parsis, and the Indian Divorce Act was passed in 1869 to govern Christian divorces while a Special Marriage Act was passed in 1954, to govern all civil and inter-community marriages. A divorce application filed under any of the aforementioned acts has to meet certain pre-requisites, i.e. the application can only be filed if it meets the grounds of divorce as given in legislative provisions.

This paper concentrates on one of such grounds, Cruelty. Cruelty in a marriage is the hardest to define of all marital offences, as ascertained in the case of *Sheldon v. Sheldon*⁴, where Lord Denning had stated “The categories of cruelty are not closed. Each case may be different. We

² Mirzadjanovna, M. (2022). The effects of divorce on Modern Society. *International Journal of Advanced Research in Innovation, Management & Social Sciences*, 11(2), 53-57

³ Ibid. 1

⁴ (1966) 2 All E.R. 257

deal with the conduct of human beings who are not generally similar. Among human beings, there is no limit to the kind of conduct which may constitute cruelty. In any case, a new type of cruelty may crop up depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty⁵.” Cruelty in a marriage can be verbal, psychological, emotional, or even sexual. Indian society has historically viewed women less favourably than men due to its patriarchal structure. Cruelty comes in many different forms, making it challenging to define it precisely. Inflicting pain and suffering on a relationship in a way that makes it challenging for either person to live with, is referred to as mental cruelty. On the other hand, beatings slaps, and other physical aggression constitute physical cruelty.

The legislators in India have however tried to throw some light on the definition of cruelty in section 498A of IPC. As mentioned earlier it does not have a fixed pattern rather it depends on different circumstances and factors. Cruelty has been explained as-

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- (b) harassment of the woman where such harassment is to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

To prevent spouses' and in-laws' abuse on women, the Criminal Code includes cruelty committed by a husband or a husband's relative. In addition, a corresponding modification to the Evidence Act was adopted, transferring the burden of proof of innocence from the prosecution to the accused in cases involving the abetment of a married woman's suicide and a wife's passing within seven years of marriage. Section 498A mandates a three-year prison term as well as a fine for a woman's spouse who subjects her to cruelty in order to make the offence deterrent.

The cases reported under Section 498A are cognizable if the information related to the commission of the act is given to the police. Cognizable offences are those offences that the police can arrest without any warrant by the First Schedule. Cases under Section 498A are also non-bailable and bail can only be given at the discretion of the magistrate. Non-bailable

⁵ Ibid.4

offences are serious offences where bail is a privilege and only the court can grant it. These offences are also non-compoundable where the complaint cannot be withdrawn e.g. rape, death, murder, dowry. The case registered under 498A is non-compoundable except in the state of Andhra Pradesh.

Role of ADR in Divorce Proceedings

ADR in contrast, to judicial proceedings, can address disputes and discords agreeably and appropriately by facilitating dialogue. The confrontational character of litigation and vituperative arguments, however, on the contrary, can cause resentment and even aggravate already strained familial ties.

In 2013, The Supreme Court of India while hearing the case of K. Srinivas Rao Vs D.A. Deepa⁶, instructed the criminal courts not to take up any cases brought under Section 489A of the IPC unless the matter has first been resolved through mediation centres, but in a select few instances where the cruelty amounts to be particularly severe and dangerous, the criminal courts may do so. Also, it has been decided that every mediation centre should establish its private litigation clinics so that marriage conflicts can be settled out of court.

During the course of the trial, counsellors assist the Family Courts in resolving marital disputes as per section 9 of the Family Court Act 1987. Even after counsellors have filed failure reports post counselling sessions, the Supreme Court insisted that family courts try to settle disputes through mediation. The Court also said that the mediation centre should give the family court a reasonable amount of time to finish the mediation process so that the family courts don't have to wait any longer to settle disputes. The court also said that the mediation process could take longer. In addition, the Supreme Court mandated that criminal courts hearing complaints under section 498 A of the Indian Penal Code (IPC) refer the parties to mediation centres prior to the complaint's hearing stage. The court observed that this reference should only be made if the parties to the dispute are willing to settle the dispute or the facts indicate that a settlement exists. Non-compoundable offences under Section 498 A of the Indian Penal Code cannot be resolved through compromise, so the court issued this directive.

⁶ (2013) 5 SCC 226

In *Mohd. Mushtaq Ahmad v. State*⁷, a wife sought a divorce and lodged an FIR under Section 498 against her husband. Once the couple's problems arose following the birth of their daughter, an IPC was filed. Section 89 CPC was used by the Karnataka High Court to order the parties to arbitrate their conflict. After the conflict was resolved peacefully, the wife opted to drop the FIR, allowing the court to dismiss criminal proceedings, the FIR, or the complaint in appropriate cases to achieve the aims of justice.

Mediation

Due to the nature of our society, the use of mediation in domestic violence cases is questionable. The patriarchal nature of Indian society is a big factor in the enactment of numerous laws aimed at safeguarding the rights of women. If courts began to refer more domestic violence cases to mediation, the very aim of enacting laws like Section 498A would be undermined. The probability of an abusive partner going unpunished for an offence by simply paying a settlement amount is a significant disadvantage of the criminal mediation process, only civil disputes can be mediated; criminal disputes, particularly those that are non-compoundable, cannot be mediated. However, Indian courts have taken a different approach in certain judgements, stating that pre-litigation mediation in matrimonial disputes should be encouraged if they are suitable for mediation. The Supreme Court of India held in the *B.S. Joshi* case⁸ that the High Court can quash a criminal charge in a non-compoundable offence if the parties have amicably resolved their differences while exercising their underlying power under Section 482 of the Criminal Procedure Code.

To ensure that mediation is conducted fairly in matrimonial disputes, the Court issued a few guidelines, including obtaining the consent of the parties before having to refer them to mediation, setting a rational time limit for court-referred mediation so that the settlement is not delayed, and referring complaints under Section 498A to mediation only when there is an element of the settlement. As an outcome, the Supreme Court has taken a pro-mediation stance while providing a few guidelines to ensure that the mediation process is not abused by the partner.

Mediation is a type of dispute settlement that is typically used in the case of compoundable

⁷ 2015(3) AKR 363.

⁸ AIR 2003 SC 1386

offences. In this case, the main issue arises because the offence of cruelty under 498A is classified as a non-compoundable offence under the IPC. This problem has been discovered and discussed in several cases over the years. The Supreme Court of India has issued numerous decisions in which it has advocated for mediation. The court has mentioned that while issues may be kept referring to mediation, the court retains jurisdiction and may track the settlement before disposition.

Procedure for Mediation

1. The courts, by Section 89 and Order X Rule 1A of the CRPC refer the case for mediation.
2. The referring judge is referred to as a referral judge. He only looks at the facts of the case to determine whether it is appropriate for mediation or not.
3. The parties mutually agree on the appointment of a mediation officer to assist the mediation process.

To determine whether mediation can be used in cases involving domestic violence, it is essential to identify interests. The first is trying to keep a family together for the sake of the child, and the second is that society has a common interest in matters of a criminal nature. As a result, the protection of the family relationship, the child's interest in the relationship, and easing the burden on the courts to settle all disputes are identified as the primary interests.

Section 498A was enacted to prevent women from being tortured by their husbands or relatives, the Court stated that the view would be counterproductive and would act against the interests of women and against the purpose for which it was added. The difficulty of mediation in cases of domestic violence comes down to balancing interests. The fact that domestic violence is a crime and that society generally holds the belief that the accused must be punished is one of the reasons why many people would oppose the idea of mediation in cases of domestic violence. In addition, imposing a criminal penalty, such as a fine or imprisonment, acts as a deterrent for other citizens and, as a result, may reduce the number of cases of domestic violence in the community. As a result, the other aspect of domestic violence cases is one in which the perpetrator is made to pay for his actions and societal norms of acceptable and unacceptable behaviour are established. The second interest is this societal desire for criminals to be punished. Due to the nature of Indian society, it is questionable to use mediation in cases of domestic violence. Numerous laws for the protection and advancement of women have been

enacted as a result of the patriarchal nature of Indian society. The very purpose of laws like section 498A would be undermined if courts were to refer domestic violence cases to mediation more. The most significant disadvantage of the mediation process in criminal cases is the possibility that an abuser will not be punished for an offence by simply paying a settlement amount.

The fact that the victim has the option of having the criminal proceedings against the abuser quashed if the parties settle through mediation is the main obstacle in such cases and also the primary criticism of cases. This sets a bad example for society and in the mind of the offender, who tends to become less afraid of the consequences of their crimes because they know they can get away with them without being caught or punished. This could result in an even higher rate of domestic violence in society because people who would normally avoid it out of fear of being punished may now be more likely to do so as the above threat can be eliminated.

Furthermore, ignoring the fact that a crime is committed not only against the victim but also against society as a whole and should be punished severely, as well as the fact that the action is typically brought against the offender by the State, undermines the fundamental foundation of criminal law by permitting the abuser or abusers to go unpunished at the victim's discretion. Due to the nature of the crime, which typically takes place in the privacy of households and is not typically incident-specific, domestic violence cases fall into the category of those few cases in which the victim must bring legal action against the perpetrator.

In general, only civil disputes can be mediated; non-compoundable criminal disputes, in particular, cannot be mediated. In some judgments, Indian courts, on the other hand, have stated that pre-litigation mediation should be encouraged in matrimonial disputes if they are suitable for mediation.

However, in the case of Ram Gopal vs State of Madhya Pradesh⁹, for instances involving matrimonial and family issues to be resolved through the use of mediation and to lessen the burden on the subordinate Court, the Court had requested the competent Law Commission that the offence under Section 498A of the IPC be made compoundable.

⁹ Criminal Appeal No. 1489 of 2012

In the case of *In Gian Singh v. State of Punjab and Anr*, according to the High Court, certain offences that predominately and largely have a civil favour, such as those that stem from matrimonial or family disputes, where the offender and victim have amicably resolved all of their differences, are still punishable even though they have not been made compoundable. If the concerned High Court believes that continuing with the criminal proceedings will contradict the goals of justice, it may order their dismissal.

Analysis

The main argument of this paper is that the victim may choose to have the abuser's criminal charges dropped in cases where the parties settle through mediation. Offenders tend to become less fearful of the consequences of their criminal acts as they occur, setting a negative example for society and in their minds because they are aware that they can avoid punishment by meditating. Those who have previously abstained from committing domestic violence may now begin doing so because they are aware that the aforementioned threat can be eliminated. This is because the possibility of punishment may no longer exist.

The fundamental principles of criminal law, particularly the idea that a crime must be punished with severe penalties because it is committed not only against the victim but also against society as a whole¹⁰, are also undermined by allowing the abusers to escape punishment at the victim's discretion. Domestic violence cases are one of the few that must be brought against the perpetrator by the victim because of the nature of the crime, which typically takes place in the privacy of a household and is not typically incident-specific¹¹.

Even though the abuser needs to be punished for the crime and there is a legitimate issue at hand, a strict approach in this regard may prevent mediation settlements. This is because the abuser would have little incentive to settle. After all, he would still be subject to punishment regardless of whether a settlement was reached. This problem is similar to one in economics, where underproduction is caused by a lack of investment incentives due to poor investment returns¹². As a result, the abuser needs to be given a financial incentive to make a deal.

¹⁰ Seymour F.; Force Harris, M. F. *Principles of Criminal Law* (1880).

¹¹ Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence*, 17 *Fam. Advoc.* 14 (1995).

¹² William H. Oakland, *Public Goods, Perfect Competition, and Underproduction*, *Journal of Political Economy*, Vol. 82, No. 5 (Sept. – Oct. 1974), Pg. 927- 939.

Consequently, a middle path must be taken. Mediation and the subsequent settlement of domestic violence cases must be encouraged, even though the court must have the discretion to reduce the offender's sentence based on the severity of the violence. The victim must not be allowed to request that the criminal case be dismissed if these procedures are successful. This will assist in achieving both the goals of mediation in such circumstances by encouraging the abuser to attempt to reach a settlement and fully utilizing the mediation process. Additionally, it will ensure that no crime goes unpunished and that no negative social precedent is established.

The plea-bargaining theory, which is widely used in the United States of America, serves as the foundation for this tactic. Plea bargaining is the process in which the prosecutor and the defendant "negotiate an agreement whereby the defendant is permitted to plead guilty to a reduced prosecution charge¹³." In other words, it is the process of negotiating a deal between the prosecution and the defence in which the prosecution offers the defendant leniency, dismissal, or recommendations in exchange for a guilty plea. Even though India's overall set of laws doesn't perceive supplication haggling, giving a lesser sentence in return for the wrongdoer's confirmation of culpability can be changed and applied to abusive behaviour at home situations where a settlement has been reached with the victimizer's participation through the intercession cycle. In keeping with the same idea, it is suggested that the court might reduce the abuser's punishment by taking into account the abuser's agreement and a mutual settlement reached through mediation. It is necessary to develop guidelines for the same to reduce arbitrary decision-making.

Another significant disadvantage is the possibility that the victim of domestic violence will be persuaded or put under pressure to reach a settlement that goes against the mediation's fundamental goal of empowering the parties. It is common knowledge that the abuser has greater control over the victim—physical, financial, or emotional—and that there is a power imbalance between the two parties—especially when the victim belongs to a vulnerable group like women, minors, or those who are economically disadvantaged¹⁴. This is one of the main factors that contribute to domestic violence.

¹³ *Plea Bargaining*, 9 Jailhouse Law, Manual 1 (2011).

¹⁴ Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 Fam. L.Q. 53 (2005).

Likely, this will also have an impact on the mediation procedures. In addition, the victim may be pressured to accept a settlement with terms that she does not agree with her family and friends or by widespread public criticism. In addition, it is important to keep in mind that domestic violence lacks the fundamental elements of trust, honesty, and transparency necessary for successful mediation¹⁵. Victims of such violence find it nearly impossible to participate in alternative dispute resolution processes on a level equal to that of the abuser due to the very nature of such offences, in which the abuser experiences a sense of dominance and power while the victims are consistently left feeling vulnerable and helpless following the abuse.

It is essential to avoid using mediation as a means of coercion. It is essential to keep in mind that mediation's primary objective is not only to settle the disagreement but also to address the psychological needs of the victim so that they can attempt to move past their trauma and forgive the abuser.

In addition, for the mediation process to be successful, the mediator must be able to restore the parties' relative balance. As a result, for a mediation to be successful, the mediator's training becomes an essential requirement. Additionally, the mediator must be knowledgeable about the parties' psychological circumstances, the cycle of violence, and the causes of domestic violence.

Because of the aforementioned factors, it is evident that the mediator's role is more important in cases of domestic violence because if it is carried out improperly and without adequate supervision, mediation in these situations may result in the suppression of the weaker party and unfair outcomes. As a result, it is suggested that mediation guidelines for cases involving domestic violence be developed and that only mediators who have undergone training and carefully adhere to the necessary standards be permitted to act in such cases.

¹⁵ Olga Sitarz, Dominika Bek & Anna Jawarska-Wieloch, Mediation and Domestic Violence: Theoretical Reflection on the Polish Background, *International Journal of Criminal Justice Sciences*, Vol. 13 (2), July-December 2018, Pg. 356 – 369.

Conclusion

In conclusion, it is possible to assert that mediation is an excellent method for resolving several disputes and that disputes involving domestic violence can also be mediated successfully; however, a significant revision to the criteria for mediation is required. For dispute mediation, it is inappropriate to distinguish between compoundable and non-compoundable cases. A case must be independently screened before it can be referred for mediation, and any incident involving severe domestic violence harassment should not be kept referred for mediation. If the victim does not have equal negotiation power in a domestic violence dispute, she or he may be easily manipulated to serve the accused's interests and desires, which would defeat the whole purpose of the exercise. To overcome this barrier, mediators must receive specific training to ensure that the complainant is not emotionally or mentally abused and is comfortable accepting the accused's choice to overcome this barrier. If serious changes are made to the process, mediation can be very successful and can ensure that the family structure does not collapse while the abuse is stopped.

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