



ADR as a means of restorative justice in criminal justice system: An analytical appraisal

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Abstract

The restorative justice focuses on resolving the disputes between the parties and maintaining the harmonious relations between them. It creates opportunities for parties to crime to discuss the crime and its ramification, to repair the harm caused, and restore the amicable relations between the parties.

This research paper is an attempt to analyze the concept and need of restorative justice. It also contains brief overview of restorative justice in Indian Criminal Justice System and its limitations.

Keywords: Restorative Justice, ADR, Criminal Justice

1. Introduction

In any state-based formal justice system involving civil and criminal justice, institutions like police, public prosecution, and courts form the basic foundation of justice administration^[1]. However inspite of well established, formal mechanism of criminal justice system in India, huge backlog and pendency of cases, the justice has often been delayed (denied). ADR system being more accessible and speedy alternative dispute resolution system^[2] may provide a solution on this problem, particularly in case of compoundable offences.

1.1 Restorative Justice and ADR

Tony Marshall, defined the term in following words; *“Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future.”*^[3] United Nations Office on Drugs and Crime defines the term Restorative justice as, *“a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict”*^[4].

From above definitions it can be concluded that, the primary goal of Restorative Justice is to restore the relationship between the parties to the disputes (in case of criminal matters, between offender and victim). ADR, Particularly mediation, focuses on resolving the disputes between the parties and maintaining the harmonious relations between them. Hence it is perfect tool for rendering the restorative justice in criminal matters.

Lon L. Fuller Describes ADR as: *“a road the parties must travel to arrive at their goal of mutually satisfactory settlement.”*^[5]

1.2 Crime and State

Today crime is treated as violation against not the victim but the state, and accordingly the state and not the victim has the jurisdiction to address it. This is a continuation of the change that came with the Norman invasion of Britain in 12th century. Prior to it, Western law had viewed crime as conflict to be dealt with between the individual victim and the offender. It

was only under William the Conqueror that crime began to be conceptualized as breach of king's peace^[6].

1.3 Need of Restorative justice

A retributive perspective (on which today's criminal justice system of most of the countries is based upon) punishes the offender because the offender “deserves it” due to his being morally culpable (to the society at large)^[7].

The term restorative justice was coined by Albert Eglash who sought to differentiate between what he saw as three distinct forms of criminal justice^[8]. The first is concerned with retributive justice, in which the primary emphasis is on punishing offenders for their wrong deeds. The second relates to what he called ‘distributive justice’, in which the primary emphasis is on the rehabilitation of offenders. The third is concerned with idea of ‘restorative justice’, which he broadly equated with the principle of restitution. He claimed that the first two focuses on the criminal act, deny victim participation in the justice process and require merely passive participation by offenders. The third one, however, focuses on restoring the harmful effects of the act of crime, and actively involves all parties in the criminal process^[9].

the theory of restorative justice is not to punish the offender, but rather to guide him/her to repent for his/her crime, strive to mend the injury he/she has done, and reintegrate him/her into the community^[10]. Revenge does not restore the losses of victims, answer questions, relieve fears, provide closure, or help to make sense of a tragedy^[11].

The fact that restorative justice creates opportunities for crime victims, offenders and community members who want to do so to meet to discuss the crime and its ramification; expects offenders to take steps to repair the harm they have caused; seeks to restore victims and offenders to whole, contributing members of society (reintegration); and provides opportunities for parties with a stake in a specific crime to participate in its resolution (inclusion)^[12].

Restorative justice, the model which victim-offender mediation subscribes to and practices, is a reaction against this model of conventional retributive justice^[13]. For the victims, that the offender has been punished by the state does not necessarily restore the losses they have suffered—it does not “answer their

questions, relieve their fears, help them make sense of their tragedy or heal their wounds^[14].”

The above discussion underlines the need of ADR, as it facilitates the communication and resolution between the parties rather than, deterrence. As results of this, western countries like USA, have adopted ADR models like victim-offender mediation, in their criminal justice system.

Moreover, lack of victims ultimate control over the adjudicative process and the outcomes of the dispute, hampered the need to address the psychological needs of the victim in restoring the status quos^[15]. The criminal justice system has attracted a particular set of criticisms: it is seen as unsuccessful in reducing rates of recidivism (and even may increase the likelihood of reoffending for particular groups, such as juveniles and Indigenous persons); it ignores the victims of crime and fails to recognise crime as a form of social conflict^[16].

Margery Fry, a British reformer, claimed that victims were being ignored by the criminal justice system, and proposed a formal use of restitution^[17].

In Braithwaite’s opinion, where offenders enter into constructive dialogue with victims and community members about their behaviour, they may restore self-esteem and self-worth and move closer to reintegration within the community^[18].

Dispute and Crime

Majority of crimes originates from dispute between individuals and communities. Hence, use of ADR, which aims at resolution of dispute, will not only resolve the dispute but will also prevent the future crime likely to arise out of such dispute.

1.4 ADR and Restorative Justice in Practice

Victim-offender mediation

it is a process wherein, the victim and the offender of the crime are brought together to meet face-to-face under the structured guidance of a mediator^[19]. The mediation may take place at any time during the course of the justice process, but almost all of them take place after court involvement^[20]. According to a national survey conducted by the U.S. Department of Justice, about a third of the mediations take place prior to any formal finding of guilt, but over half take place after^[21]. the U.S. Department of Justice survey found that the mediators judged “facilitating a dialogue between the victim and offender” to be their most important task (28% of the respondents), followed by “making the parties feel comfortable and safe (24%)”. “Assisting the parties in negotiating a restitution plan” came in as a relatively distant third (12%)^[22]. Even the severe violent crimes such as serious assault and homicide have been successfully mediated in USA^[23].

In Australia, all the states and territories except Victoria have statutory-based schemes which provide for conferencing as an element in the hierarchy of responses to youth crime. The overarching purpose of such legislative schemes is to divert young people from the formal justice system, to contribute to the development and reintegration of offenders, and to develop a response to crime which meets the needs of both the victim and the offender^[24].

Mediation in Criminal justice in Ethiopia

In Ethiopia, in rural areas, particularly criminal dispute resolution processes dealing with victims and criminal offenders are widely practiced and deep rooted with varying degrees among the different ethnic groups in the country. For

instance, the use of mediation process through *Jaarsa Biyyaa* or *Jaarsa Araaraa* among the Oromo and the other ethnic groups has been used^[25].

Studies have underlined the utility of Victim offender mediation programme wherein, victims and offenders going through mediation were far more satisfied with the criminal justice system than those who went through regular court (79% to 57%)^[26]. Even the United Nations has supported the use of “informal mechanisms for the resolution of disputes, including mediation,” where it is appropriate to “facilitate conciliation and redress for victims^[27]”.

1.5 ADR, Restorative Justice in Indian Criminal Justice System

Lok-Adalat

Section 19 (5) A of the Legal Service Authorities Act, 1987 expressly bars reference of non-compoundable offences to the Lok Adalat^[28]. In other words, it impliedly permits referral of compoundable offences to Lok Adalat.

1.6 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^[29].

The Law Commission of India recommended Plea Bargaining in Criminal Cases^[30]. It was one of the first step towards adopting ADR in Criminal justice system. Justice V.S. Malimath Committee on Criminal Justice Reforms endorsed these recommendations by the Law Commission. Plea Bargaining was formally introduced in India through the code of Criminal Procedure in the year 2005^[31].

The Plea Bargaining is applicable only in respect of those offences in which punishment extends for a period of 7 years^[32].

1.7 Limitations of ADR in Criminal System

- ADR can be used only in moderate criminal offences.
- Existence of dispute is one of the prerequisite of ADR. In certain criminal cases there may not any dispute between the parties for e.g. rash and negligent driving resulting in injuries to pedestrians.

2. Conclusion

Use of court administered ADR mechanism (use of other Models in addition to Lok-Adalat) in compoundable offences my help in rendering speedy trial in Criminal matters which has been recognized as the fundamental right by the Supreme Court^[33]. It may also help in reducing the burden on courts and allowing them to concentrate on serious crimes. Reduced burden on courts will substantially expedite the Criminal Justice mechanism.

3. Reference

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28. A, Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of - (i) any case pending before it; or (ii) any matter which is falling within the jurisdiction of and is not brought before, any court for which the Lok Adalat is organised : Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law, 19 (5).
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