

# Kluwer Mediation Blog

## Mediation: Justice for Whom?

Anil Xavier (Indian Institute of Arbitration & Mediation) · Tuesday, August 25th, 2015

### “Mediation” in some Criminal Cases

Recently (24<sup>th</sup> June 2015) a Judge of the Madras High Court (India) while hearing a bail appeal of a man convicted of raping a young girl, agreed to the bail request on condition that the man try “mediation” with the victim.<sup>[1]</sup> Mediation is aimed at marriage. “The case before us is a fit case for attempting compromise between the parties...he [the rapist] should be enabled to participate in the deliberations as a free man and vent his feelings, open his mind and moorings. Where there is a will, there is a way,” the judge has been quoted as saying. The logic behind this “reference to mediation” seems to be that an unwed mother and her child are “lepers” in Indian society and they are better off enjoying the “respectable” status of a married woman, even if the husband is her rapist. The Judge further added that in another similar case “mediation was proceeding towards a happy conclusion”. In other words, wedding bells were ringing. This order provoked widespread protests mainly on the ground that there cannot be a compromise or settlement as it would be against the honour of the victim which matters the most.

Though not linked with the Madras High Court decision, the Supreme Court of India in another appeal relating to a rape case involving a minor in Madhya Pradesh (India), held on 1<sup>st</sup> July 2015 that mediation should not be encouraged in cases of rape or attempted rape.<sup>[2]</sup>

Both the orders of the Madras High Court and the order of the Supreme Court of India has considered whether there could be “mediation” in a rape case. The fundamental test as to whether there could be mediation in a matter is to identify whether the parties to the dispute has the right or power to make a settlement. Under the criminal jurisprudence, in a case of rape, the prosecution is by the State and not by the victim. Section 376 of the Indian Penal Code, by which rape is made a criminal offence is a non-compoundable offence and therefore is not a matter which could be compromised by the parties.

Apart from the above, even if a matter could be resolved through mediation, it requires the consent of both parties. In the case which was referred to mediation by the Madras High Court, the consent or even the opinion of the victim was not sought by the Judge. The Judge decided that it was for her “benefit” that she participates in mediation. In fact when the press approached the girl, she expressed incredulity and dismay. She said, “It is unfair of the judge to do this to me. How can he do this without seeking my opinion? The rapist only wants to get out of jail which is why he agreed to mediation. Can the judge guarantee my safety if he is in this area? or my daughter’s safety? I am

being forced to suffer again”.<sup>[3]</sup>

I am reminded of a case that happened in 2005 in a village in Uttar Pradesh (India), where a 28 year-old Muslim woman – Imrana, was raped by her father-in-law.<sup>[4]</sup> The local Muslim panchayat (council of elders) treating the case as adultery rather than rape, instructed her to divorce her husband and marry her father-in-law. Once she had done this, she had to treat her husband as her son. Imrana ignored their orders and continued living with her husband.

This was by a Panchayat, which we could say did not have the presence of any learned jurists. But what can we say about the orders of courts. This is not the first time that such shocking orders have been passed by some courts. Are courts stretching Alternative Dispute Resolution (ADR) to illogical levels? It seems some Judges are more anxious to become ambassadors of “mediation”, much more than their mandate.

### **Compulsory Mediation**

Mediation should be at heart a voluntary process. Of course in some countries such as the USA and England, courts have encouraged parties to mediate and such court ordered mediations have been shown to be successful. But the issue is: Can such court-ordered mediations be compulsive?

Mediation puts the responsibility for finding a solution into the disputant’s hands, giving them back the power to resolve it themselves, with the assistance of an impartial facilitator. When we give such empowerment to the parties, I feel compulsive mediation cuts the root of that empowerment.

There is a very strong argument that courts’ refusal to hear cases and referring them to mandatory mediation is a breach of Article 6(1) of the European Convention of Human Rights,<sup>[5]</sup> which provides for the right to a fair trial. Mediation should be promoted with the needs of the people in mind and not as an argument for decreasing courts backlogs.

### **Mediation & Restorative Justice**

Coming back to the issue of settlement of criminal matters, we need to keep in mind that a crime is not just the violation of the law, but also the violation of people and relationships. This violation creates an obligation rather than a guilt and justice, in its true sense. This could be resolved ideally only when there is involvement of all the stakeholders of a crime, i.e., the victims, the offenders and the community members, in an effort to put things right. The central focus is, not on the offenders getting what they deserve, but on attending to the needs of the victim and offender, for repairing the injury caused in the best possible manner.

Justice is a nebulous concept. Aristotle divided justice into two main parts: distributive justice – the sharing of social benefits and burdens – and corrective justice – the rectification of injustice.<sup>[6]</sup> Bentham also dichotomised justice, considering procedural justice – fairness in processes – and substantive justice – fairness in rights and obligations.

Taking these approaches together, we need to have a legal system which allows parties to fairness in process and rectification of injustice. There cannot be a total ban of any opportunity to settle, if the parties “so desire”. The order of the Supreme Court has closed the doors for settlement.

When we talk about criminal offences, we also need to consider related emotions of the parties like hurt feelings, trauma, dignity, social reputation etc. This could change in varied circumstances and there has to be a way to address these issues. There is a good example of this issue in an old Chinese movie, viz., “The Story of Qiu Ju”<sup>[7]</sup> Qiu Ju is a peasant who lives in a small village with her husband. She is in the final trimester of her pregnancy. One day while her husband was conversing to the head of the community, a miscommunication ensued and the headman beats her husband. Even though she goes to the Police she does not get justice. For almost the entire part of the movie she goes to different authorities for getting justice. Finally when Qiu Ju goes into labor and there was no one to help her, the headman with a group of local men carries her to the hospital, where she gives birth safely to a healthy baby boy. Qiu Ju and her husband thank the headman for saving her life and invite him for the “one-month party” of the child. But he doesn’t come for the party and the local policeman shows up to tell Qiu Ju that the headman has been arrested and sent to jail based on her complaint. The movie ends with Qiu Ju looking tormented!

Our traditional criminal justice system is a system of retributive justice – a system of institutionalized vengeance. The system is based on the belief that justice is accomplished by assigning blame and administering pain, where it is believed that “justice equals punishment”. But in the recent years, a relevant question is being asked – “justice for whom?” In many cases, punishment often leaves them unsatisfied and it fails to address the other important needs of the victim, such as, consolation for their loss, easing their trauma or mending their wounds.<sup>[8]</sup> This failure of the criminal justice system to cater for the complete needs of the victims has, over the past years, seen the emergence of alternate methods of criminal justice, the prominent one being the theory and practice of restorative justice.

Restorative justice is a new way of looking at criminal justice that focuses on repairing the harm done to people and relationships rather than punishing offenders. This should not be confused with mediation in its present form. We need to have clear guidelines for settlement though restorative justice mediation. Restorative justice is about the idea that because crime hurts, justice should heal.

A developed or culturally matured society should have this option for resolving criminal offences through restorative justice mediation. Right now we find that when parties settle criminal matters outside court, the law compels them to tell lies or file false statements in court to wriggle out of criminal trials. We have seen in umpteen numbers of criminal cases where the victims or de-facto complainants turn hostile and speak against the prosecution case. They are left with no choice of telling the truth because that would upset the settlement and again wreck the relationship.

The index of a developed community should necessarily have laws that would encourage people to speak truth without fear and uphold their dignity and integrity and not compel them to speak falsehood.

## **Conclusion**

I hope the ongoing discussion about mediation in rape cases would help to develop mediation at

various levels and also help to advance mediation activities towards a higher level of understanding, acceptance, respect and use. It also shows that what is needed is a culture change about mediation, supported by relevant guidelines.

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