

# VICTIM OFFENDER MEDIATION IN INDIAN CRIMINAL JUSTICE SYSTEM

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## ABSTRACT

The criminal justice system of India is largely based on the premise that crime is a wrong against public and not against a private individual. This approach often neglects the fact that victim is the party who directly suffers the harm caused by the offender. The broad principle that forms the basis of the present scheme is that where the offence is essentially of a private nature and relatively not serious, it is compoundable.

### Legislative approach

The Indian scenario is such that alternate dispute resolution mechanisms, other than the traditional adversarial litigation before courts, are given statutory recognition and have also received judicial recommendation since they are found increasingly suited for various classes of cases. Several enactments provide for alternate dispute resolution mechanisms to parties which include Legal Services Authorities Act, 1987, Arbitration and Conciliation Act, 1996 as well as Code of Civil Procedure, 1908. Some other statutes that recognize and prescribe alternate dispute resolution attempts mandatorily include the Hindu Marriage Act, the Family Courts Act, 1984 and the Industrial Disputes Act, 1947.

## INTRODUCTION

So far as criminal proceedings are concerned, statutory recognition stands given to settlements between complainants or victims and accused persons under Section 320 of the Code of Criminal Procedure<sup>1</sup> (hereafter mentioned as Cr.P.C) which also provides the limits of permissibility and the procedure to be followed by the court in compounding of offences. In India, settlement is allowed in minor cases which are compoundable under the law. Such settlement is allowed through Lok-Adalat also. The Legal Services Authorities Act, 1987 empowered the

Lok-Adalat to settle those criminal cases which are compoundable in nature. Criminal Procedure allowed the parties concerned to compound such offences which are specified therein. Moreover, criminal procedure authorises the prosecutor to withdraw a case which can also be a result of settlement between the state and the accused. Thus, there are different ways, some time with legal backing and sometime irrespective of legislative recognition, courts annexed or outside court settlement were being used for criminal cases in one form or the other.

The policy of the legislature adopted in Section 320 of the Code of Criminal Procedure is that the complainant should be permitted to come to terms with the party against whom he complains in respect

<sup>1</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1973) s. 320.

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of certain minor offences specified in the section because in such cases, the interest of the public or society is not vitally affected. Some other legislations like Legal Services Authorities Act, 1987 also made the provisions for compounding of offences in respect of compoundable offences through Lok-Adalat. Moreover, the complainant and the prosecutors are permitted by law to withdraw the cases under certain circumstances. The mechanisms for compounding of offences as well as withdrawal from prosecutions are instrumental in inculcating restorative justice programs within Indian Criminal Justice System.

The term compounding of offences signifies that the person against whom the offence has been committed has settled his dispute with the accused in respect of cases which falls within the purview of Section 320 Cr.P.C and do not want to continue prosecution. It is also defined as arrangement or settlement of difference between the injured party and the person against whom the complaint is made. The purpose of allowing compounding of offences was that certain offences principally concern individual person and not people at large. Sometime it is being alleged that this abstention from prosecution was the result of some gratification, not necessarily of a pecuniary character, to act as an inducement for it. Accordingly, if the parties are agreeable to settle those cases themselves, the law should recognize such desire of the parties, the legislature has enacted the provision on compounding of offence.

Section 320 of Cr.P.C permits compound of the offence. The offences which are mentioned in first column can be compounded by the parties referred in last column<sup>2</sup>. The other offences in the list can be compounded with the permission of the court by the parties referred in the list<sup>3</sup>. Most of these offences are minor or individualistic in nature. When the offences under the law are compoundable the abetment to such offence are also compoundable<sup>4</sup>. The law further permits the compounding of offence by legal guardian if the offences committed against children or lunatic etc<sup>5</sup>. In cases when the accused has been committed for trial or when he has been convicted and an appeal

is pending, Section 320 clause (5) provides that no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard. The provision further allows the High Court and Court of Session to compound the offence while exercising their revisional power<sup>6</sup>. The Act has created a limitation in respect of habitual offender. It provides that no offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence<sup>7</sup>. Most importantly the Act provided that the effect of compounding shall be amounted to acquittal of the accused<sup>8</sup>. Lastly the Act provides that no offence shall be compounded unless they are permissible under Cr.P.C.

### Judicial approach

In the case of *Asha Ranjan v. State of Bihar*<sup>9</sup>, although the primary concern of the Court was fair trial, but it was acknowledged by the court that “the criminal justice system consists of the accused, the victim and the society. The court also observed that criminal jurisprudence is not one way traffic, but includes the accused and the victim and it is the duty of the court to weigh the balance. The grievance of the victims, who have enormously and apparently suffered deserves to be dealt with as per the law of the land and should not remain a mirage and a distant dream.” Similarly, in the case of *Mukesh and Anr. v. State for NCT of Delhi and Ors.*<sup>10</sup>, the court held that the courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

In the case of *Anupam Sharma v. NCT of Delhi and Anr.*<sup>11</sup>, it was observed by the Hon’ble Delhi High Court that “Restorative justice may be used as a synonym for mediation. The object and nature of restorative justice aims at restoring the interest of the victim. Involvement of the victim in the settlement process is welcome in the process of restorative justice. It is a process of voluntary negotiation and concertation, directly or indirectly between the offender and the victim.”

2 Supra note 10, s. 320(1).

3 Id, s. 320(2).

4 Supra note 10, s. 320(3)

5 Id, s. 320(4)

9 *Asha Ranjan v. State of Bihar* (2017) 4 SCC 397.

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The approach of Indian judiciary while dealing with the non-compoundable offences is worth notice here. As the offence under Section 326 of Indian Penal Code was not compoundable in law, the Supreme Court having regard to the long lapse of time and settlement of the dispute between the parties reduced the sentence to already undergone three months' imprisonment<sup>12</sup>. Yet another approach adopted by the apex Court in dealing with the situations arising from the amicable settlement arrived at between the complainant and the accused in respect of a non-compoundable offence was observed in *B.S. Joshi v. State of Haryana*<sup>13</sup> and *Manoj Sharma v. State*<sup>14</sup>.

In the first case of *B.S. Joshi*, the accused were charged with offences under Sections 498A and 406 IPC. An affidavit was filed by the complainant wife that the disputes were finally settled and the accused and the victim prayed for quashing the FIR. The High Court declined to exercise its inherent power under Section 482 Cr.P.C on the ground that power under the said Section cannot be exercised to quash the prosecution for non-compoundable offences even if the parties have settled the dispute. In appeal, the Supreme Court reversed the order of the High Court and held that the High Court in such cases can quash criminal proceedings/FIR/complaint in exercise of its inherent powers under Section 482. The Supreme Court laid down, after discussing the case law on the subject: "We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing". The Court, however, guardedly said: "It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power". In *B.S. Joshi's* case, the Supreme Court justified the exercise of power under Section 482 to quash the proceedings to secure the ends of justice in view of the special facts and circumstances of the case, even where the offences were non-compoundable.

The same course of action was adopted in *Manoj Sharma's* case. Also, the Supreme Court in *Shiji v. Radhika*<sup>15</sup>, held that "simply because an

offence is not compoundable under Section 320 CrPC is by itself no reason for the High Court to refuse exercise of its power under Section 482 to quash the prosecution." The Law Commission of India, in its 154<sup>th</sup> report, recommended the inclusion of S. 498A in the Table appended to Section 320(2) so that it can be compounded with the permission of the Court. The related extracts from the Report are as follows: "Of late, various High Courts have quashed criminal proceedings in respect of non-cognizable offences because of settlement between the parties to achieve harmony and peace in the society. For instance, criminal proceedings in respect of offences under Section 406, IPC, relating to criminal breach of trust of dowry articles or stridhan and offences under section 498A, IPC relating to cruelty on woman by husband or relatives of husband were quashed in *Arun Kumar Vohra v. Ritu Vohra, Nirlap Singh v. State of Punjab*."<sup>16</sup>

In continuation of what was said in the 154<sup>th</sup> Report, it may be pointed out that the apex court, in the case of *B.S. Joshi v. State of Haryana*, has firmly laid down the proposition that in order to subserve the ends of justice, the inherent power under Section 482 Cr.P.C can be exercised by the High Court to quash the criminal proceedings at the instance of husband and wife who have amicably settled the matter and are desirous of putting end to the acrimony. However, a coordinate Bench<sup>17</sup> doubted the correctness of these decisions and referred the matter for consideration by a larger Bench. According to the referring Bench, the Court cannot indirectly permit compounding of non-compoundable offences.

Non-Compoundable Offences under the Indian Penal Code cannot be settled because of their grave nature and the impact they have on the society. Earlier, sexual harassment under IPC Section 354 was compoundable. Then in 2009, settlement under the section was barred via amendment. Over expanse of many cases, another legal mechanism developed which allowed for mediation against non-compoundable offences. It has to be noted that the Supreme Court in many instances, has authorized for alternate dispute resolution such as mediation in

12 2011 (12) SCALE 625.

13 *B.S. Joshi v. State of Haryana* (2003) 4 SCC 675.

14 *Manoj Sharma v. State* 2008 (14) SCALE 44.

15 *Shiji v. Radhika* 2010 (12) SCALE 588.

16 Law Commission of India, "154th Report on The Code of Criminal Procedure, 1973" (August 1996).

17 *Supra* note 21 at 461.

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non-compoundable cases.

In *K. Srinivas Rao v. D.A. Deepa*<sup>18</sup>, the apex court noted that “in appropriate cases, if the parties are willing and if there exist elements of settlement, the criminal court should direct the parties to the possibility of settlement through mediation while not diluting the rigour, efficacy and purport of the non-compoundable offense. The High Court will quash the criminal complaint only if under all circumstances it finds the settlement to be equitable and genuine.” Such a course, in the court’s opinion, will be beneficial to those who genuinely want to accord a quietus to their disputes.

In *Gian Singh v. State of Punjab*<sup>19</sup>, the Apex Court has recognized the need of amicable resolution of disputes, by observing as under:- “*The High Court may quash the criminal proceedings if in its view, if it would be unfair or contrary to the interest of justice to continue with the criminal proceedings would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceedings.*”

In the case of *Parabatbhai Aahir and Parabatbhai Bhimsinhabhai Karmur and Ors v. State of Gujarat and Anr*<sup>20</sup>, the Supreme Court stated that the power under Section 482 is to be exercised sparingly and with caution. The High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape cannot be quashed because these offences not private in nature but have a serious impact upon society. Thus, it can be concluded that criminal cases pertaining to sexual harassment may be mediated in the court of law under special circumstances. It is possible on the discretion of the respective High Court under section 482 of the Cr.P.C, that too only when both parties are

equally willing to reach a compromise and resolve the dispute using mediation.

The Supreme Court of India in the case of *Ramgopal v. State of M.P.*<sup>21</sup> in a brief order, observed thus: “There are several offences under the IPC that are currently non-compoundable. These include offences punishable under Section 498-A, Section 326, etc. of the IPC. Some of such offences can be made compoundable by introducing a suitable amendment in the statute. We are of the opinion that the Law Commission of India could examine whether a suitable proposal can be sent to the Union Government in this regard. Any such step would not only relieve the courts of the burden of deciding cases in which the aggrieved parties have themselves arrived at a settlement, but may also encourage the process of re-conciliation between them. We, accordingly, request the Law Commission and the Government of India to examine all these aspects and take such steps as may be considered feasible”.

Again, the same learned Judges in an Order passed later and made similar observations which are extracted hereunder: “Further, we are of the opinion that Section 324 IPC and many other offences should be made compoundable. We have already referred to the Law Commission of India and the Ministry of Law & Justice, Government of India our suggestion that suitable amendments should be made in the Code of Criminal Procedure for making several offences which are presently treated as non-compoundable under Section 320 Cr.P.C as compoundable. This will greatly reduce the burden of the courts. The Law Commission of India and the Ministry of Law & Justice, Government of India may also examine this suggestion. The Law Commission may also examine several other provisions of the Indian Penal Code and other statutes in order to recommend that they may also be made compoundable even if they are presently non-compoundable.” Pursuant to these observations of the Supreme Court, the Law Commission of India embarked on the task of identifying appropriate offences which could be added to the list of compoundable offences under Section 320 of the Cr.P.C.

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18 K. Srinivas Rao v. D.A. Deepa (2013) 5 SCC 226.

19 Supra note 26.

20 Parabatbhai Aahir and Parabatbhai Bhimsinhabhai Karmur and Ors v. State of Gujarat and Anr 2017 SCC Online SC 1189.

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21 Ramgopal v. State of M.P.2010 (7) SCALE 711.

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Pursuant to the abovementioned orders of the apex court, Law Commission, in its 237<sup>th</sup> report<sup>22</sup>, made the following recommendations: the offences which affect the security of the State or have a serious impact on the society at large ought not to be permitted to be compounded. So also, crimes of grave nature should not be the subject matter of compounding; that the Courts are flooded with cases and, therefore, more and more offences should be identified for compound ability is only a secondary consideration; in sub-section (3) of Section 320 Cr.P.C after the bracketed words and before the words “or where the accused is liable”, the following words shall be added- “or a criminal conspiracy to commit such offence”. Section 498A IPC should be made compoundable under Section 320(2) of CrPC so that it may be compounded with the permission of the Court. However, in order to ensure that the offer of composition is voluntary and free from pressures, it is proposed to introduce sub-section (2A) in Section 320 laying down the procedure for dealing with an application for compounding of an offence under Section 498A. Section 324 IPC should be made compoundable subject to the permission of Court. Accordingly, it shall be brought within the ambit of Section 320(2) Cr.P.C. Section 326 IPC (causing grievous hurt by dangerous weapons) should not be made compoundable. The offence of rioting under Section 147 IPC should be made compoundable by including the same in the Table appended to Section 320 (2) Cr.P.C subject to the addition of proviso: “provided that the accused is not charged with other offence which is not compoundable”. The following six offences in IPC may be made compoundable: Section 380 (theft in dwelling house) subject to the proviso that the value of property stolen is not more than Rs.50,000/-; Section 384 (extortion); Section 385 (extortion by putting a person in fear of injury); Section 461 (dishonestly breaking open receptacle containing property); Section 489 (tampering with property mark with intent to cause injury); Section 507 (criminal intimidation by an anonymous communication) subject to the rider that compounding shall be confined to criminal intimidation falling within the first part of Section 506. These recommendations

have not been incorporated in Cr.P.C. till date.

### 5. Conclusion

The Victim Offender Mediation model is the foremost manner of resolving criminal conflicts through the practice of restorative justice. This model brings the victim and the offender together to resolve their disputes. The Indian Criminal Justice system has categorized less serious offences as compoundable offences and serious offences as non-compoundable offences under The Code of Criminal Procedure. While acknowledging the victim, accused and the society as part of Criminal justice system, Indian courts have been observed promoting the mediation in less serious criminal cases, though quite gradually. Regarding the process of mediation in non- compoundable offences, the approach of Indian judiciary has changed with different cases. In earlier cases, Honourable Supreme Court has justified the exercise of power of quashing of criminal cases by High Courts under Section 482 of Cr.P.C. to secure the ends of justice in view of special facts and circumstances of the case, even where the offences are of non- compoundable nature. But, in later cases, the apex court changed its view such that it observed that High Courts can quash the criminal proceedings in non- compoundable cases only in order to avoid the miscarriage of justice.

Also, in cases of grave offences, Victim Offender Mediation does not seem to be ensuring justice. To this extent, the author agrees with the recommendations of Law Commission given in its 237<sup>th</sup> Report. Clearly, Victim Offender Mediation is not a viable option for all offences. Prior to adopting Victim Offender Mediation into the present system, a classification of offences to which it will be applicable, is imperative. As it has already been established that the only flaw in the current provision for compounding under the Cr.P.C lies not in its substantive, but its procedural aspect, Victim Offender Mediation may be applied to the same set of offences set out in Section 320 of the IPC, 1860. The author is of the opinion that compounding of offences was an attempt towards the incorporation of restorative justice into the present system. Thus, the legislative application of mind with regard to classification of compoundable

<sup>22</sup> Law Commission of India, “237th Report on Compounding of (IPC) Offences” (December, 2011).

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offences would suffice with regard to Victim Offender Mediation as well. However, it is recommended that while referring cases to Victim Offender Mediation, the Court should be allowed to exercise its discretion in determining whether the existence of power relations between the victim and the offender would adversely influence effective meditation.

The policy of law on compound ability of offences is complex and no straightjacket formula is available to reach the decision. A holistic and not an isolated approach is called for identifying the compoundable and non-compoundable offence.