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Victim-Offender Mediation: Challenges and its Importance as 'Alternate Dispute Resolution' for Cyberspace Issues

SAMRAT BANDOPADHYAY¹ AND AMAR MALLICK²

ABSTRACT

Cyberspace is a conceptual term or understanding of widespread interconnected web of digital technology. The connects system across the globe forming a web of resources, either in the form of hardware or software. The technological advancements have necessitated a relook at social, cultural, political, economical, technological and philosophical landscape of any nation, society and even the activities of individuals. The increasing number of cases pertaining to cyber hacking, cyber offences, cyber stalking, cyber fraud, cyber economic and financial malpractices and misrepresentation has warranted all to relook at legal and business framework of any country. The instant paper is an attempt to look at specific areas of criminal law which are at intersections of 'Plea Bargaining' and 'Compounding' in contrast to other criminal offences of the nature of wrong against the state where the compromise is not possible considering that 'some heinous crimes' are in domain of public wrong which are non-compoundable. Cyberspace offences have to be ascertained in the scales of nature and gravity of offences and the quantum of punishment and whether it is fit to be a case of 'victim-offer mediation' is a question which has to be analysed from the facts and circumstances of the case.

Keywords: *Cyberspace; Victim-Offender Mediation; Compoundable Offences; Plea Bargaining; IT Act 2000.*

I. INTRODUCTION

The offences in the realm of Cyberspace have to be analysed in lens of statutory provisions and judicial precedents from catena of cases surfacing before the Hon'ble Courts of Law. Technology is an enabler for progress in the society. Any wrong against the society and its remedial action acquires the character of deterrence in form of punishment, where the any compromise between the accused and the victim is generally not allowed. Offences of the nature of private nature, related exclusively to an individual, has been recognised in the Code of Criminal Procedure, 1973 as compoundable. Lack of a comprehensive and a robust, supple

¹ Author is a Student at IIT Kharagpur, India.

² Author is a Student at IIT Kharagpur, India.

and a nimble regulatory mechanism with respect to technological challenges and impediments in ascertaining the network address of hosting of services in diversified server farms across the globe, accentuating cases pertaining to Intellectual Property Rights issues particularly of Patents³, Copyright⁴, Trademark⁵ and Design⁶ Infringement issues, cybercrimes, criminal offences over the web have been taking point in this generation of present times. The Cyberspace is not constrained by limits to 'economies of scale' or physical presence or physical addressing of place of occurrence or the exact 'cause of action' resulting in complication of cases. The mushrooming of digital and economic devices with business analytical software, embedded with Artificial intelligence is posing multitude of problem which were unheard of hitherto till date.

II. CYBERSPACE AND CHALLENGES POSED

The virtual network addressing technique via Internet Protocol based technology have added to challenges related to cyber security, cyberethics and cyber culture among others. Increasing networking and *modus operandi* of functioning of trans-national and multinational companies have not only been a 'game changer' in services sector and economical development across the globe but also enables to view the whole world as a 'global village'. The positives of cyberspace include that of harnessing local, regional and national talent of 'human resources' in international arena by utilising the talent base of individuals and communities in this information era. At the same time, it has open vistas of opportunities for leveraging each other talent and for optimising the net output of the companies functioning in a global networked landscape. The challenges of taxation and foreign investment via venture capital funding, angel broking companies, greenfield investors, foreign direct investment with compulsory regulatory compliances, business with challenges of funding and sustainable growth, cultural disparities and acculturation issues, synergetic compliance of value-based model of services, Merger and Acquisition across the globe have opened the floodgate of challenges which warrants a timely and cost-effective solutions. The increasing cases of disputes with marriages happening across the globe, land disputes with various local and regional regulatory complaint procedures, lack

³ Section 2(m) of The Patent Act, 1970 defines patent means, "a patent for any invention granted under this Act..."

⁴ Section 14 of the Copyright Act, 1957 mentions the meaning of Copyright as, "For the purposes of this Act, copyright means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof..."

⁵ Section 2(1)(i)(viii)(zb) in The Trade Marks Act, 1999, defines trade mark as "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours..."

⁶ Section 2 in the Designs Act, 2000 states, "design means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye..."

of clarity on legal procedural matters, incompatibility of taxation and revenue generation issues, inordinate delays in dispute resolution via litigation oriented adversarial justice system, lack of common guidelines or understanding of laws of the land in varied jurisdiction, inability to ascertain the jurisdiction of legal cases, petty criminal offences using resources in cyberspace, have led all the legal and technological experts to deliberate on the possible cause and the ways to tackle the challenges posed with the proliferation of technological prowess in this information and knowledge era.

III. TECHNOLOGICAL BASE OF CYBERSPACE

With the advancement of technological prowess via scientific and technological inventions including that of softwares, hardwares and digital networking techniques, the issues of cyberspace have increased manifold. The usage of business analytical softwares providing possibilities of multitude of solutions ‘on the fly’ instantly and in few seconds have added to the information management and building a framework for a robust decision support system. In this context, it is pertinent to mention that Artificial Intelligence, Business Analytic Softwares, Data warehousing techniques including Multidimensional online analytical processing (MOLAP), Relational Online Analytical Processing (ROPAL) which is based on Relational Database Management System (RDBMS) and Data Mining, Data hash and encryption technology have extended the technological prowess to a new level. In the light of recent Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021⁷ read conjointly with Sections 69(A), 79(2)(c), and 87 of the Information Technology Act 2000⁸, it is obligatory on the part of the intermediaries to observe ‘due diligence’. Cyberspace Copyright issues have ramification on harmonious interpretation of Information Technology Act, as adjudicated in the case *Super Cassettes Industries Ltd. Vs Myspace Inc. & Another*⁹ where the three provisions of law including that of Section 79 and Section 81 of Information Technology Act, 2000 was read with Section 51(a)(ii) of the Copyright Act, 1957, where the Hon’ble High Court of Delhi in some instances the Intermediary cannot be liable as it held that, “ *If the Intermediary is not initiating the transmission, If intermediary is not selecting the receiver of the transmission and the question is of 'awareness of the model of Knowledge and profit', when it is not changing/modifying the*

⁷ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 in the definite Section states, “*Digital Media means digitized content that can be transmitted over the internet or computer networks and includes content received, stored, transmitted, edited or processed by-*

(i) an intermediary; or

(ii) a publisher of news and current affairs content or a publisher of online curated content”

⁸ Commenced with effect from 17th October 2000

⁹ *Super Cassettes Industries Ltd. Vs Myspace Inc. & Another* (2011) 47 PTC 49 (Del.)

contents and thereby, the Intermediary complying with 'due diligence' cannot be held liable as such Myspace, a social media website liability with respect of infringement of copyright by third party content posted on its platform was the core issue which was delved upon..."

IV. INCREASING STAKEHOLDERS' RESPONSIBILITY IN CYBERSPACE

Misutilisation and improper harnessing of digital resources in cyberspace has posed challenges of the nature of Data Privacy, bringing into question that systems are more sustainable and robust for data protection. The ramification in Data Privacy issues have accentuated issues of human rights, fundamental rights of Article 21¹⁰ as enshrined in the Constitution of India¹¹, 'policing' role of the State among others. This has also resulted in psychological and mental issues where the offender is not physical present face to face, but rather take refuge in the veil of internet and cyberspace. Addressing the challenges in an appropriate manner is the need of the hour. A classification of problems experienced helps one to segregate some of the cyberspace issues into serious heinous crimes against the society and humanity as a whole and some as minor offences which could be addressed with a synergetic and holistic efforts towards building awareness in society, constructive dialogue between the offender and the victim where the offender has admitted and confessed the commissioning of the crime. A plea-bargaining technique is based on lessening the 'quantum of punishment' in a deterrence oriented criminal justice system. Mediation brings forth a new ray of hope to address the problems in a mutually congenial environment where the parties deliberate at length the pros and cons assisted and facilitated by a trained mediator.

V. MEDIATION AS A QUINTESSENTIAL TOOL

According to Hon'ble Justice V.V. Rao, "*It would be 2330 by the time Indian Courts, working at current pace, clear the backlog of the cases that exists today*". The 129th Law Commission Report makes it mandatory for the for Courts to refer matters to Alternate Dispute Resolution including Mediation for settlement of disputes. The growing number of commercial cases in the Hon'ble Courts of the law of the land, it is imperative that there is emergent need to explore negotiated mode of settlements which has civil and criminal implications. The biggest motivation for the commercial space to explore the option of mediation is the potential saving in 'goodwill', cost and revenue avoiding the long pendency of investigation, inquiry, trial and pronouncement of judgment which is entailed in numerous instances.

¹⁰ Data Privacy as part of the fundamental rights under Article 21 of Right to life and personal liberty.

¹¹ Constitution of India, 1950

After the *Salem Advocate Bar Association case*¹², role of mediation as potential tool to resolve disputes stands more firmly established. Various doctrines in legal jurisprudence have affirmed to establish human rights as a quintessential component in justice delivery *inter alia* ‘*Doctrine of double jeopardy*’ and ‘*Doctrine of generalia specialibus non derogant*’. Though *Afcons Infrastructure Ltd. and Anr. v Cherian Varkey Construction Co. Pvt. Ltd. and Ors.*¹³, made its categorical that cases involving prosecution for criminal offences and cases involving serious fraud, fabrication of document, disputes pertaining to election to public offices cannot be fit candidate for mediation; still, the petty criminal offences including that of cybercrimes pertaining to child bulling, use of offences related to family matrimonial disputes, which are of ‘compounding’ nature should be explored in the realm of Mediation and Restorative Justice. Certain types of disputes of the nature of property disputes, family personal law specific disputes of the nature of matrimonial disputes, landlord tenant disputes, petty first-time theft¹⁴ and hurt¹⁵ incident could be in the ambit of mediation driven settlement.

The Victim-Offender Mediation strike a chord with ‘Restorative Justice’ and ‘Human Rights’ as sincere attempts are being made to “to repair or to restore and to bring back the victim from the state of the harm suffered and to make things right”. Victim Offender mediations provide the opportunity to the offender to mutually accept and to mend the harm done to the victim in a process which encourages dialogue and discussion between the offender and victim. It is increasingly becoming a sought-after resolution of conflict in developed countries like the UK, the US, Australia, Singapore and Canada, which takes the contours of ‘restorative opportunities’, ‘restitution’, ‘reintegration of the offenders in the main-stream’, ‘reformative approach’. Awareness to youth about the repercussions, and thereby tackling the delinquent behaviour of the offenders is a positive step in the direction of addressing the societal factors which may have been the cause of such offences.

There is another technique of ‘Circles’ in the realm of ‘Restorative Justice’, which is similar to Victim-Offender Mediation, but in this the participants include police officials, judge, defence counsel, family and community members, prosecutor, community residents as they deliberate and discuss at length the possible solutions and options to solve the issues.

In *B.S. Joshi v. State of Haryana*¹⁶, it was categorically held by the Hon’ble Supreme Court of India that, “*If the parties have mutually agreed to settle disputes amicably, then further*

¹² Salem Advocate Bar Association v Union of India, 2003 (1) SCC 49

¹³ Afcons Infrastructure Ltd. and Anr. v Cherian Varkey Construction Co. Pvt. Ltd. and Ors. (2002) 8 SCC 24

¹⁴ Definite Section 378 of Indian Penal Code, 1860

¹⁵ Definite Section 319 of Indian Penal Code, 1860

¹⁶ B.S. Joshi v. State of Haryana (2003) 4 SCC 675

subsequent proceedings would defeat the purpose of Section 498A of the IPC...". The matrimonial family disputes between the family members have high emotional component which practically warrants a relook from settlement by mutual consensus. In such instances, mediation could be of a vital component to address not only the matrimonial obligation on the part of the husband and wife, but also from the prism of human rights which is innate to all human being in this world.

VI. CONCLUSION

To conclude, the stakeholders understand the long-term advantages of ‘Restorative Justice’ and ‘Victim Offender Mediation’ as it enables in the words of Hon’ble Justice D.Y. Chandrachud, *“the essence of mediation is that it, (i) emphasises upon the parties needs and interests, (ii) provides for full disclosure of competing interests and positions, (iii) confers upon the parties a right of self-determination, (iv) allows for procedural flexibility, (v) maintain privacy and confidentiality. The mediator, it is well settled, is the guardian of the process and it is the mediator who has to ensure that parties maintain complete confidence in the proceedings...”* Criminal justice system is based on the tenets that criminal offence is wrong against the society and which should be discouraged, condemned, abhorred and punishment acts as a deterrence. Such a justice delivery system does not emphasise on forgiveness or reconciliation and hence, the need to review the ‘Restorative justice’ from the perspective of human rights and basic innate rights which an individual is entitled to is necessitated. Some of the crimes of the nature of defamation are essentially private in nature and may not be a wrong against the society, which warrants a relook as it excludes the victim from the process when it involves apologies and pardon and could be mended with mutual and a peaceful conflict resolution process.
