

Balancing the Force in Criminal Mediation

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Received 6 June 2016; accepted 28 July 2016; published 1 August 2016

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Abstract

There is a paradigm shift in the manner in which criminal cases are processed and resolved in the criminal justice system. Criminal mediation has become a fixture of the criminal justice system, running parallel to traditional adversarial system of adjudicating crimes. It is no longer a means to the end but rather an end in itself. Singapore's criminal mediation is at its infancy having started only in 2010, whereas in other jurisdictions it has been existence since 1990s. Hence it is important to cultivate the right environment for criminal mediation to grow and evolve. The objectives of this paper are as follows: first, to consider the process and genesis of criminal mediation in general; references are made to the criminal mediation model practiced in Singapore and variants in other jurisdictions, particularly the American states; second, the benefits of such a process in the criminal justice system; and third, the importance of maintaining integrity of the criminal mediation process and the end product, i.e. the negotiated plea settlement.

Keywords

Criminal Mediation, Judge Mediator, Victim-Offender Interaction, Mediation Confidentiality, Negotiated Plea Settlements, Plea Bargaining, Due Process

1. Introduction

There has been a paradigm shift in the manner crimes are processed within the criminal justice system. Traditionally in an adversarial system, prosecution representing the state takes the lead, prosecutes the defendant and leads the criminal process.

Criminal mediation¹ on the other hand spells a different note in resolving crimes against the state. Simply put, although the prosecution still initiates the criminal process, a Judge mediator acts a neutral party to mediate the resolution of the case between the adversaries in an informal setting. It provides a “neutral forum, facilitated by a judge, for parties to discuss and explore the possibility of early resolution of criminal cases” (Subordinate

¹Referred to as criminal settlement conferences, in some jurisdictions, including America.

Courts, 2011) so as to avoid, amongst others, “cracked trials” or withdrawal of prosecution on the day of trial.

Criminal mediation is not new. It has been in existence for more than a decade.² However in Singapore, criminal mediation is in its infancy, having only started in 2010.

There are variants in criminal mediation models across jurisdictions. Essentially the variation is dictated by the role played by the judge in mediating the session. In certain American jurisdictions,³ the Judge mediator plays an extensive role in resolving/facilitating the session. He is allowed to give an evaluation of the strengths and weaknesses of the case (Gottsfeld & Michowski, 2007). The sessions may end with a negotiated plea settlement or is used to crystallize and/or narrow the factual and legal issues in dispute between parties for purposes of the trial. Generally the mediation starts with the Judge mediator informing the defendant of the charge and the sentence range of each charge, followed by him giving advice on the evidence to be introduced at trial and examining the plea offered by the prosecution. The settlement judge makes it clear that the purpose of the session is really to allow the defendant to make an informed decision, given the strength and weaknesses of the case, as opposed to coercing the defendant to enter a plea. In cases where the plea is unduly harsh, the settlement judge does exert “...some influence on the offer by contacting higher levels of management in the prosecutor’s office” (Gottsfeld & Michowski, 2007). The Judge mediator, in assuming an evaluative role, brings balance to a criminal justice system which is otherwise tilted in the prosecution’s favor in an informal plea bargaining system for reasons mentioned below. Besides, the evaluative stand encourages parties to be realistic about the merits of the case and to arrive at a negotiated plea settlement that serves the interests of justice and also those of both parties (Paisley, 2008).

In Singapore, the criminal mediation is initiated through the Criminal Case Management System (CCMS). A criminal case goes through the CCMS between the Attorney General’s Chambers (AGC) and defense counsel prior to criminal mediation, known as Criminal Case Resolution (CCR). An unresolved case may only be referred for criminal mediation by the pre-trial judge or by both consenting parties where the defendant is represented. The role of a Judge mediator is limited to the extent that he or she is only allowed to facilitate the session and not evaluate the case (Subordinate Courts, 2011). The number of sessions required for criminal mediation will depend on the complexity of the case.

Generally, criminal mediation is conducted in an informal setting. The judge usually conducts the sessions in chambers.

2. Benefits of Criminal Mediation

In most jurisdictions, criminal mediation initially started as a process that was outcome-driven. Often referred to as promoting “judicial economy”, it was a means to an end. Its genesis was traditionally premised on reducing caseloads where criminal case dockets were weighing down an otherwise efficient, effective and systematic resolution of cases. Given increasing criminal caseloads, challenged court resources and indigent defendants, criminal mediation provided an alternative, efficient and innovative method of resolving criminal cases.

In so doing, most jurisdictions, including Singapore, noted that criminal mediation weeded out cases that would have otherwise resulted in a guilty plea on either the day of trial or after the commencement of trial, or in a withdrawal where the Prosecution chose not to proceed on the day of trial. These cases are known as “cracked trials” in the criminal justice system (Subordinate Courts, 2011). By weeding out “cracked trials”, criminal mediation saved judge days and judicial resources.⁴ Simply put, criminal mediation appeared to resolve cases that were appropriate for negotiated plea settlement/s. The process of criminal mediation is faster than a regular trial as a negotiated plea settlement requires far less criminal settlement sessions than a full-blown trial, including the pre-trial conferences prior to the trial.

Third, in an American criminal mediation⁵ the Judge mediator may be able to advise the defendant or his counsel on the merits of the case relating to acceptance of the plea agreement (Gottsfeld & Michowski, 2007; Simms, 2006-2007). This is especially helpful to a defendant where his counsel has recommended acceptance of

²Some jurisdictions started experimenting with criminal mediation in the 1990s. According to Gottsfeld & Michowski (2007), the Arizona Supreme Court adopted Rule 17.4 (a) in 1997 for a 2-year experimental period in conducting criminal mediation conferences.

³This appears to be the general practice in most American jurisdictions with slight variations occasioned by Rules of Court in each County.

⁴The saving of resources to this end has been noted in most jurisdictions. In Singapore, it was noted by then Chief Justice Chan Sek Keong during his keynote address in the Subordinate (State) Courts Workplan 2011 that since the pilot CCR began in 2010, 26 cases were heard till December 2010, there was a saving of 60 judge days and limited judicial resources were more efficiently relocated.

⁵There are subtle differences on the role of the Judge mediator depending on the state and court rules advocating criminal mediation.

a plea offer. Such a model is particularly instrumental in moderating unduly harsh plea offers by the Prosecution.

In Singapore, the situation is otherwise. The judge in a CCR session “only plays a facilitative rather than an evaluative role...” Hence the Judge mediator would not give any indicative assessment of the relative merits of the case for the Prosecution and/or the Defense. However, he is free to comment on specific aspects of evidence and possible inferences or legal issues as appropriate (Subordinate Courts, 2011). Further the CCR Judge in Singapore can consider giving a sentence indication in appropriate cases (Subordinate Courts, 2011) if this is sought by the defendant. Where a defendant decides to plead guilty during the CCR process, the CCR Judge, with consent of the parties, can proceed to take the plea and pass the sentence or alternatively refer the plea to another Judge (Subordinate Courts, 2011).

Generally, subject to the facilitative role played by the Judge mediator in Singapore, rendering an impartial view of the strengths and weaknesses of the case at an early stage facilitates a balanced outcome in an adjudicatory criminal process. This makes a possible negotiated plea settlement more probable. Second, such a rendering will additionally allow the defendant to be aware of the case against him/her so as to allow an opportunity for him/her to make an informed decision for early resolution of the case. Third, an impartial view of the strengths and weaknesses of the case by the Judge mediator may avoid potential disciplinary hearings against a defense counsel for allegedly not properly advising the defendant on the merits of the plea offer and derailing a potential negotiated plea settlement.

The aforementioned augments party autonomy as the Judge mediator is seen as a neutral third party facilitating the possibility of an early resolution to the case.

Last, criminal mediation has a significant impact on criminal cases that would have otherwise been the subject of informal plea bargaining. Every criminal justice system, including that of Singapore, has a plea bargaining system wherein at an early stage of the criminal proceedings, an appropriate plea offer is made by the Prosecution to the Defense. It is indubitable that plea bargaining plays a vital role in the criminal justice system because, *inter alia*, it weeds out appropriate cases that can be settled at an early stage of the criminal process without the need for a trial, hence saving courts’ resources. Singapore does not have a formalized plea bargaining model. However, the Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence (the Code), as issued by the AGC, obligates both parties to attend the CCMS to narrow issues and resolve disputes in an effective and timely manner and that an accused person should be accorded complete freedom of choice on whether to plead guilty or claim trial (Attorney General’s Chambers, 2013).⁶ The Code also encourages good faith efforts when conducting plea bargaining.

The traditional model of plea bargaining does tend to accentuate or exaggerate prosecutorial power. In an informal plea bargaining model, the Prosecution generally holds an upper hand at the negotiating table and “this resulting unequal power between the parties can detrimentally impair the negotiation process for the defendant” (Simms, 2006-2007). Besides, the negotiations done during a plea bargain is not the subject of due process. Given the setting of an informal plea bargain, the Judge Mediator acts as a neutral overseer of the plea bargaining process, bringing balance to the system. The review by the Judge mediator of the “strengths and weaknesses of each party’s case tends to encourage a realistic understanding of the merits and issues of the case” and reduces the probability and dangers of unconscionable plea bargains (Simms, 2006-2007).

3. Integrity of the Criminal Mediation Process and the Outcome

Criminal mediation has become part of the criminal justice system. It impacts fundamental liberties of the defendant and changes the manner in which criminal cases are traditionally processed. In order to ensure confidence, transparency and accountability in the criminal justice system in these circumstances, it is essential to ensure the integrity of both the process and outcome of criminal mediation.

The public and stakeholders of justice must have confidence in the criminal mediation system for it to be accepted and successful at all levels.

Integrity of a process/system has many levels. At the minimum, when considering the criminal mediation process, the criminal justice system must pay heed to the following issues:

⁶This Code merely seeks to encourage best practices in the conduct of criminal prosecutions and encourages good faith efforts, *inter alia*, in conducting plea bargaining. The Code does not lay down any rule of law. It does not create any right, entitlement, legitimate expectation, or provide for any disciplinary action or any other action or consequence (including judicial review) based on any non-alleged non-compliance.

- The requisite qualifications and experience of the Judge mediator helming the criminal mediation;
- The transparency of the process *per se*;
- Whether the criminal mediation process should be voluntary;
- Whether the process should be limited to certain types of offences and/or offenders;
- Disclosure of information and documents during the process;
- Confidentiality of information disclosed during the criminal mediation process;
- Whether observers should be allowed during criminal mediation;
- Whether criminal mediation should cover victim-offender interaction after determination of guilt; and
- Issues of due process or the lack of it in criminal mediation: the defendant's rights in criminal mediation vs. the defendant's rights in the traditional adversarial system.

With respect to the end product i.e. the negotiated plea settlement, the following issues must be considered:

- Judge mediator checking the integrity of the plea offer and the negotiated plea settlement;
- Judge mediator allaying the defendant's misconceptions regarding criminal mediation; and
- Ability of the Judge mediator to refuse a negotiated plea settlement made between the Defense and the Prosecution.

3.1. Integrity of the Mediation Process

3.1.1. Mediator Qualifications

In the American state of Kentucky, a Judge mediator must be qualified prior to serving as a Judge mediator. The Judge mediator must have specific qualifications and experience which includes experience with civil mediation, mediation training either through the Administrative Office of the Courts course or its equivalent, and experience as both a circuit judge and as a prosecutor or defense attorney. Additionally the Judge mediator must inform the participants of his qualifications and experience ([Supreme Court of Kentucky, 2005](#)).

Given that the mediation relates to criminal matters, it is important that a Judge mediator is familiar with sentencing philosophies and benchmarks. Such familiarity will ensure that sentence indications are in sync with reality and so allow parties to make a realistic decision based on the merits of the case as expounded by the Judge mediator. In Kentucky, the Judge mediators additionally familiarize themselves with the presiding judge's sentencing philosophies ([Frohlich, 2008-2009](#)).

In Singapore, the Judge mediator is a senior and experienced judge ([Subordinate Courts, 2011](#)). Hence the Judge mediator is pooled from the resources of the Court and the system. Though the judge conducting criminal mediation is a senior judge with much experience and knowledge of the system, including sentencing philosophies and benchmarks, perhaps it may be useful for the Judge mediator to undergo formal specialized training in criminal mediation, as has been done in the circuit courts of Kentucky. Such training can be organized by the Court's Office or an independent professional body. Mediation is an art and a skill and it is not instilled with mere experience at the bench. When combined with specific mediation training however, such experience can be invaluable and most effective in arriving at justiciable resolutions.

3.1.2. Transparency

Transparency of the criminal mediation process is vital as justice must not only be done but also seen to be done. Hence it is important that the ambit of criminal mediation and its process be clearly provided in Circulars or Rules of Court to allow a defendant and/or his counsel to make an informed choice when confronted with an opportunity to elect criminal mediation where the process is voluntary. Jurisdictions that provide criminal mediation do clearly provide for it in their Orders or Circulars for purposes of transparency.

In Singapore, the Registrar's Circular of the State Courts clearly states the aim of CCR, cases that can be referred to criminal mediation, the conduct of the process, the facilitative role of the Judge mediator, when the Judge mediator may give indication of sentence where appropriate or pass sentence, the confidentiality of the criminal mediation sessions etc. ([Subordinate Courts, 2011](#)).

3.1.3. Right to Elect for Criminal Mediation

Given the informal nature of criminal mediation and the fact that it impacts civil liberties, the criminal mediation is traditionally voluntary. Hence either party may request, or both parties consent, to the process or the Judge mediator at his/her sole discretion requests both parties to participate in good faith discussions with the court

regarding a non-trial or non-jury trial resolution which conforms to the interests of justice.⁷ The latter is practiced in Arizona criminal settlement conferences. However in Kentucky, where a referral is initiated by either of the party, the Judge mediator approves the referral (Gottsfeld & Michowski, 2007).

It must be noted that where the criminal mediation process is referred by either party or the judge, the rules or circulars governing such process must clearly state the selection criteria and who ultimately decides that mediation should proceed. This will clearly inform the ground rules for a party to decide on the manner to proceed. At the end of the day, the success of criminal mediation is dependent on two crucial factors: first, the prosecuting authority and defendant keeping an open mind and second, both parties cooperating in good faith. Without a willingness to listen and to keep an open mind, it would be impossible to negotiate a successful plea settlement and the time spent on mediation may well be wasted.

In Singapore, the requirements for criminal mediation are slightly different. There are 2 requirements to be satisfied prior to the case being referred for CCR. First, the defendant must be represented, and second, there must be a reasonable prospect of early resolution. As for the latter merits test, it has been stated that CCR could be considered where the defendant has indicated an intention to claim trial to the charge, or is undecided and intends to plead guilty but there are disputed areas.⁸

The first requirement automatically shuts out all unrepresented criminal cases even though they satisfy the requirement for CCR in all other respects. One can only surmise that the first condition is necessitated because of the Judge mediator's restricted and facilitative role.

It is recommended that given the genesis of criminal mediation and its purpose, the Judge mediator should be allowed to comment on the merits of the case, taking on an evaluative role. First, such an evaluative role will augment the primary aim of CCR, which is to provide a neutral forum for early resolution of the case. Second, such an evaluative role will allow the Judge mediator to balance the force between the parties' competing interests where a defendant is unrepresented. An extension of powers will also allow unrepresented defendants to elect for CCR, particularly where the case is worthy of early resolution. Third, if the aim of the CCR is to reduce wastage of valuable resources due to "cracked trials", the Courts must not shy away from mediating criminal cases where the defendant is unrepresented, as "cracked trials" can occur even when a defendant is unrepresented. Fourth, such an evaluative role will identify and/or crystallize material triable issues and thereby utilize allocated trial dates in a more focused and efficient manner,⁹ where the mediation fails to result in a negotiated plea settlement.

Last, an evaluative role will also augment confidence in the process as the parties see the Judge mediator in a neutral role aside from the system, hence fostering a willingness to listen and to cooperate in good faith. As earlier mentioned these factors are crucial for a successful mediation, be it to achieve a negotiated plea settlement or to crystalize or narrow the issues in dispute for purposes of the trial.

3.1.4. Offences Eligible for Criminal Mediation

Should criminal mediation be applied to all types of cases, regardless of whether they are serious or minor?

Case has been made that criminal mediation should only be applied to minor cases as it creates effective efficiency in the criminal justice system. Minor or low impact crimes include simple offences against persons such as assaults and threats, unlawful entries, offences against property such as destruction of property, theft etc.

Apart from clearing the criminal docket for more serious crimes, criminal mediation of minor/low impact crimes is seen to be more effective in addressing the underlying issues of these crimes (Simms, 2006-2007). This latter reason particularly recognizes the need for restorative elements in the criminal justice model, whereby society is restored by addressing the causes and consequences of a crime.¹⁰ The District of Columbia United States Attorney's Office and the New Castle County Common Pleas Court in Delaware both adhere to criminal mediation of low impact crimes for the reasons mentioned.¹¹

⁷According to Gottsfeld & Michowski (2007), all three permutations are possible when requesting a criminal mediation in the Maricopa County Superior Court of Arizona.

⁸For instance where there are issues of fact in the Statement of Facts or the mitigation plea, which may otherwise require a Newton hearing: see the *Registrar's Circular No. 4 of 2011*, paragraph 3.

⁹This is noted as one of the aims of CCR in Singapore: see the *Registrar's Circular No. 4 of 2011*, paragraph 2.

¹⁰Currently Singapore uses the Community Court regime to resolve disputes relating to property disputes between neighbors and other minor disputes: see the *Community Court* webpage at the [State Courts \(2016\)](#) website.

¹¹The District of Columbia United States Attorney's Office adheres to mediation of low impact crimes for reasons mentioned above, according to [ADRWORLD.COM \(2003\)](#). In the New Castle County Common Pleas Court in Delaware, likewise, criminal mediation is used to resolve misdemeanors and criminal disputes that usually do not result in convictions, according to [Batchelor \(2004\)](#).

In Singapore, so long as the matter is within the State Court Jurisdiction and satisfies the requirements mentioned earlier for referral to CCR, it will go through the mediation process. Hence Singapore recognizes the need to consider all appropriate cases, minor or otherwise, for criminal mediation. This is prudent and a wise approach as it is obvious that all cases subject to State Court jurisdiction are capable of becoming “cracked trials”. Hence if the main aim of CCR is to supplement the adversarial system in a most efficient manner with effective utilization of state resources, it must be the case that criminal mediation should not just be limited to low impact crimes.

Should criminal mediation process be applied to a defendant who pleads innocence? There is merit in considering criminal mediation for a defendant who pleads innocence as the process may enable the parties to crystallize and narrow the issues in dispute, thereby enabling a resolution that may result in a withdrawal of the charge. In the alternative, such a process may enable the defendant to reconsider his/her stand and merits of the case having regard to the disclosed evidence or the case against him/her.

3.1.5. Mediation Confidentiality

The general rule in mediation is that the information and documents disclosed during the session are confidential and privileged and therefore neither subject to discovery nor admissible in evidence. The rationale is simple and threefold. First, it encourages candor and effective communication between parties and Judge mediator. Hence communications, information and documents are disclosed on a without prejudice basis as in civil mediation. Second, it is imperative to have all relevant documents disclosed so that there is an effective justiciable resolution of the matter. Third, keeping confidential information and documents disclosed during criminal mediation instills confidence and trust in the criminal mediation process. The Judge mediator is supposed to be a neutral person. Hence it is important that he/she should not testify to communications made during the session which favors either party. Judge mediator neutrality is an important rationale for public trust in the criminal mediation process.

Singapore has a blanket provision on confidentiality of the discussions at the CCR. Where a case cannot be resolved during the CCR process, notes taken by the Judge mediator and discussions and communications at these sessions remain confidential and without prejudice. Additionally, the CCR Judge will not be assigned to hear the case as trial judge should the matter not be settled (*Subordinate Courts*, 2011). Though the rule seems to suggest that the confidentiality is absolute, it is not altogether clear whether derogations will be made under certain circumstances. Given the incipient stage of criminal mediation in Singapore, the ambit of this blanket provision has yet to be tested.

In criminal mediation, the Judge mediator should be bound by confidentiality in the same manner as a lawyer is bound by solicitor-client privilege. Such a privileged status should extend to communications and documents disclosed during the session where the Judge mediator meets the prosecuting attorney and defendant separately to facilitate candor and information privy. If a Judge mediator is bound by the same rules governing solicitor-client privilege, then it would seem that such privilege can be waived if the defendant so desires.

Where the Judge mediator meets both parties together, it is imperative that the confidentiality should generally extend likewise to the prosecutor, as this will otherwise derogate the confidence and trust that one may have in the criminal mediation system. Alternatively a limited confidentiality rule should apply at the very least to the prosecutor except for documents and information which disclose the commission of ongoing or future crimes, in the interests of justice (*Davisson*, 2007).

Though arguments on ensuring confidence and trust in the criminal mediation system have been the main advocates of maintaining confidentiality, it can also be argued that criminal mediation privilege should not apply under the following circumstances:

- Information and documents disclosing future or ongoing crimes;
- Mediator malpractice;
- Breach of ethical disclosure requirements;
- Criminal conduct within criminal mediation;
- Interests of justice outweighing interests of mediation privilege etc.

The first circumstance merely lays out the boundaries of criminal mediation privilege in that the interests of justice dictate that the confidentiality rule should only apply to the crime/s subject of prosecution and not information and documents that evidence ongoing and future crimes. With respect to the next three circumstances, the claim for limited privilege under these circumstances seeks to ensure the integrity of the criminal mediation

and where that integrity is in question, the veil of confidentiality must be lifted.

The last exception is the classic traditional catch-all provision justifying removal of confidentiality in circumstances that do not fit under any of the other enumerated circumstances. Given the wide ambit of this exception, it is imperative that the party seeking to rely on the exception should bear the burden of proof and it must be shown that such information could not be obtained by any other non-privileged means, and that the probative value of the information/documents outweighs the prejudicial effect (Davisson, 2007). Additionally it is important that prior to lifting the veil of confidentiality in the last exception, it is shown that the need to protect individual justice clearly outweighs the benefits of criminal mediation (Davisson, 2007).

3.1.6. Duty to Disclose

The CCR rules in Singapore do not specifically address the issue of disclosure of information during CCR but it stands to reason that for an effective and justiciable resolution of the case under criminal mediation, the legal rules on disclosure regime as stated in the Criminal Procedure Code and the Code (Attorney General's Chambers, 2013) would likewise apply in the interests of justice.

3.1.7. Observers during Criminal Mediations

Given the confidential nature of criminal mediation, should observers be allowed to attend the process? The Singapore rules on criminal mediation do not expressly provide for the presence of observers.

Criminal mediation is often a closed door process, i.e. a closed mediation, because it impacts the fundamental liberties of a defendant. This is also due to the need to maintain confidentiality as mentioned above. Hence, the presence of third parties not *per se* involved in the criminal mediation process may raise concerns/issues of transparency and confidentiality for the Defense and/or the Prosecution. As indicated earlier, the integrity of the criminal mediation process is fundamental for its success.

The presence of observers understudying the Judge mediator during criminal mediation should not be an issue if controls are practiced. Since strict rules of confidentiality apply to the Judge mediator and the parties, it is important that where observers are allowed for purposes of understudy or otherwise, consent of the parties is obtained. Where such consent is given, the rule of confidentiality should likewise bind the observers. This rule will only seek to reinforce the confidence and trust in the criminal mediation process as all parties present in a criminal mediation are bound by rules of confidentiality and are accounted for in terms of their role/need in the process.

3.1.8. Victim-Offender Interaction in Criminal Mediation

One of the issues that needs to be considered in criminal mediation is whether the process should additionally facilitate mediation between the victim and the offender after acceptance of the negotiated plea settlement. Victim-offender mediation is currently not offered in Singapore.

It is important to establish at the outset two preconditions for victim-offender mediation. First, it should only take place after the negotiated plea settlement so that the defendant does not use the victim-offender mediation as a show of remorse and hence seek a reduced sentence. Second, victim-offender mediation should be a voluntary process, as the victim and the offender must be willing and open to discuss the causes and consequences of the crime for a psychologically healthy resolution of the matter.

Victim-offender mediation is advantageous to the victim and the defendant and assists in humanizing the crime. Such an interaction is supposed to provide “psychological solutions for relief, closure and reconciliation” for victims and/or families given the absence of a public forum in resolving the matter (Simms, 2006-2007). Victim-offender mediation further augments the transparency of the process. Such a facilitation may be necessary to ensure that the resolution via criminal mediation process, if any, is transparent to the victim, and that justice has been upheld. Perhaps an assurance that an unconscionable bargain has not been struck. Additionally, in the absence of a public forum, parties may be willing and open to discussing the causes and consequences of the crime. Last, psychologists argue that victim-offender mediation allows victims to overcome resentment and learn to see the defendant as a potentially redeemable being (Bibas & Bierschbach, 2004-2005),¹² thus restoring and empowering the victim of the crime. Seen from this perspective, criminal mediation takes on a restorative

¹²Often criminal justice system tends to deal with the offender and his crime against the state. Hence the victim offender mediation is seen as empowering the victim to the extent that the occurrence of the crimes is not seen as their fault, and de-minimizing the experience of the crime by reducing the pain, fear, anxiety etc. See also Simms (2006-2007).

role in the criminal justice system which traditionally takes a retributive role.

By this process, the defendant is also able to see the consequences of the crime on the victim and society. This thus gives the defendant an opportunity to accept responsibility for the crime and offer amends, if any, to the victim and the community (Simms, 2006-2007).¹³

It has been argued that it is important to have a screening process prior to agreeing to a victim offender mediation. On the part of the victim, the screening is supposed to check whether they are psychologically ready to deal with the defendant, are able to vocalize the issues relating to the crime, and have a genuine interest to put the crime behind rather than using the process to taunt the defendant. As for the defendant, the defendant's level of remorse and ability to communicate are some of the issues that need to be the subjects of control (Simms, 2006-2007). Last, it is important to consider party inequalities as this has the potential to create mediation power imbalances which prevent a successful victim-offender mediation.

3.1.9. Due Process or Lack Thereof in Criminal Mediation

One of the main arguments against criminal mediation has been the lack of due or criminal process rights for the defendant which are traditionally available in an adversarial system (Brown, 1994).¹⁴

Granted that the criminal mediation is an informal procedure without the procedural controls of a regular criminal trial,¹⁵ the fact remains that in Singapore, the purpose of criminal mediation is to provide a neutral forum for cases with the potential of becoming "cracked trials". Second, the mediation is facilitated by an experienced judge who equalizes the power imbalance between the parties. Third, in Singapore CCR is only available to a represented defendant. Fourth, the process is only available if both parties consent. Hence a defendant can seemingly opt out of the process. Last, given the blanket confidentiality provision in criminal mediation in Singapore, the defendant's rights are not compromised should mediation fail and the matter proceeds to trial. The aforementioned reasons should prevent and/or diminish transgressions, if any, of defendant's due process rights.

Besides, plea bargaining is present in Singapore, as in most other jurisdictions, albeit as an informal system as mentioned earlier. Hence the arguments relating to lack of procedural controls would apply perhaps to a greater extent in plea bargaining than in criminal mediation, given the lack of a formal structure and a neutral forum facilitated by a judge. If the criminal justice system is accepting of an informal plea bargaining structure, a stronger argument can be made for the practice of criminal mediation with controls. Criminal mediation formalizes the plea bargaining process in an informal and controlled way, thus balancing the force between the respective adversaries.

3.2. Integrity of the End Product: Negotiated Plea Settlement

Confidence in the criminal mediation system also requires ensuring the integrity of the end product—primarily the integrity of the negotiated plea settlement.

3.2.1. Checking Integrity of the Plea and/or Negotiated Plea Settlement

Given that the criminal mediation may result in a negotiated plea settlement, it is important to ensure that the agreement was properly obtained and there were no vitiating factors or undue influence that would nullify the plea. Criminal mediation can only be successful if the plea taken after the process is voluntary, informed and not corrupted. In Singapore, as previously indicated, the CCR judge in charge of the criminal mediation may take the plea with the consent of the parties where the defendant decides to plead guilty. In these circumstances, the presiding judge would ensure that the integrity of the guilty plea is not sullied (Subordinate Courts, 2011). However under the rules, the guilty plea can also be referred to a judge other than the presiding CCR judge. In these circumstances, the rules do not prescribe for any procedural controls to check the integrity of the plea.

It is recommended that in situations where the judge taking the plea did not preside on that matter, the defendant should be asked detailed questions about the criminal mediation process prior to the taking of the plea. The questions can relate to whether the defendant thought the criminal mediation process was fair and voluntary. The

¹³It has been said that the process allows the defendant to address issues relating to guilt, anger, low self-esteem and the victim offender mediation allows an opportunity to address the consequences of the crime.

¹⁴Though Brown (1994) focuses on the procedural dangers of using victim offender mediation in criminal mediation process, the arguments on lack of procedural controls remains the same for criminal mediation *per se*.

¹⁵Procedural controls such as strict rules of evidence, due process rights etc.

questioning of the defendants on the process seeks to ensure that the negotiated plea settlement was voluntary and an informed decision and "...not corrupted by the mediation process" (Frohlich, 2008-2009). Such detailed questioning is done in Kentucky circuit courts prior to taking of the negotiated plea after the criminal mediation and enables the defendant to reflect on the process. It also presents an opportunity to renege the plea in circumstances where the integrity and process may have been compromised.

3.2.2. Mediator's Duty to Explain and/or Power to Refuse a Negotiated Plea Settlement

Success of criminal mediation also depends on the defendant's understanding of the process and its purpose. Thus, it is important that prior to the commencement of the process, the Judge mediator explains the process and purpose in detail and allays any misconceptions that the defendant may have about criminal mediation.

Last, it is important that since the Judge mediator is a neutral person presiding in a neutral forum in a facilitative role, he must be vested with the ability to refuse a negotiated plea settlement arranged between parties. An ability to refuse the negotiated plea settlement for valid reasons will add confidence and integrity to the criminal mediation system and to the neutrality of the Judge mediator. For instance the Judge mediator should refuse the plea or to endorse the negotiated plea settlement where it does not truly reflect the merits and issues of the case or in cases where the negotiation process has been detrimentally impaired due to unequal bargaining power. Additionally it will imbibe confidence in the defendant to trust the criminal mediation to serve the interests of justice at the end of the day. Currently the Judge mediators in the Kentucky circuit courts are vested with the power to refuse a negotiated plea settlement to ensure the integrity of the plea and the criminal mediation process (Frohlich, 2008-2009).

4. Conclusion

Criminal mediation per se is not new to the criminal justice system. In some jurisdictions it has assumed an important and pivotal role in resolving crimes, whereas in Singapore though gaining in momentum and success in reducing cracked trials, it only assumes an ancillary role at this juncture. Given the accruing benefits of such a process and its success, it is patent that Singapore criminal mediation is here to stay and will assume a greater and important role in processing crimes in future. It is no longer a means to an end but rather an end in itself. In the circumstances, perhaps it is timely to embrace a more challenging and "active" mediation model seen in other jurisdictions.

It is laudable that Singapore has specific and clear rules governing the process and the outcome of criminal mediation augmenting transparency. It has set the right tone. However, it is perhaps timely to consider a more evaluative than a facilitative role for the judge, given the innumerable benefits, including but not limited to being a neutral overseer of the plea bargaining process. An evaluative role will open CCR to unrepresented defendants, who are currently shut out. Additionally, a specialized criminal mediation training for Judge mediators, similar to the training done in courts of Kentucky would definitely boost the process. A specialized training is indispensable given that in future, criminal mediation has the potential to assume a greater role in processing crimes and will affect the manner in which informal plea bargaining is done. In years to come such specialized training will assume a fundamental role in equipping the Judge mediators adequately in their evolving role to come in the criminal justice system. Though currently we have a blanket confidentiality provision of discussions at CCR, the jury is still out on whether the veil of confidentiality will be lifted by the courts in cases of mediator malpractice, breach of ethical disclosures, etc. Mediation confidentiality need not be sacrosanct. The veil must be lifted in deserving cases where interest of justice is at heart. Finally in the interests of ensuring integrity of the outcome of criminal mediation the Judge mediator must be imbued with the power to refuse a negotiated plea settlement and/or the plea in circumstances where unequal bargaining power between parties has detrimentally impaired the negotiation process or where the settlement does not reflect the merits and issues of the case.

Future trends will dictate a more active, restorative imbued criminal mediation. Whether this will be limited to low impact or all crimes remains to be seen. If this comes to pass, institutionalizing and formalizing criminal mediation like in civil cases is not unfathomable. Times are changing and also the process by which crimes are processed/resolved. It is important to keep abreast and move with the times. Being shackled to the past is not an option.

Acknowledgements

Rathna N. Koman would like to thank Tan Siew Ann, her RA for her research and editorial assistance.

References

- ADRWORLD.COM (2003). *Justice Department to Fund DC Criminal Mediation Program*.
- Attorney General's Chambers (2013). *The Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence*.
<https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/Code%20of%20Practice%20for%20the%20Conduct%20of%20Criminal%20Proceedings%20-%20FINAL.pdf>
- Batchelor, J. (2004). Changes and Challenges: C.P. Court Administrator Carole Kirshner. *Delaware Law Weekly*, 7, 35.
- Bibas, S., & Bierschbach, R. A. (2004-2005). Integrating Remorse and Apology into Criminal Procedure. *Yale Law Journal*, 114, 85-148. <http://dx.doi.org/10.2307/4135717>
- Brown, J. G. (1994). The Use of Mediation to Resolve Criminal Cases: A Procedural Critique. *Emory Law Journal*, 43, 1247-1309.
- Chan, S. (2011). *Keynote Address by Chief Justice Chan at the Subordinate Courts Workplan 2011*.
<http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/keynote-address-by-chief-justice-chan-at-the-subordinate-courts-workplan-2011.pdf>
- Davisson, S. P. (2007). Balancing the Scales of "Confidential" Justice: Civil Mediation Privileges in the Criminal Arena—Indispensable, Impracticable, or Merely Unconstitutional? *McGeorge Law Review*, 38, 679-727.
- Frohlich, A. W. (2008-2009). Criminal Mediation. *Dispute Resolution Magazine*, 15, 11-15.
- Gottsfeld, R., & Michowski, M. (2007). Settlement Conferences in Criminal Court. *Arizona Attorney*, 43, 8-16.
- Paisley, C. (2008). Felony Mediation: Essential Elements and Potential Hurdles. *Dispute Resolution Magazine*, 15, 12-13.
- Simms, L. (2006-2007). Criminal Mediation Is the BASF of the Criminal Justice System: Not Replacing Traditional Criminal Adjudication, Just Making It Better. *Ohio State Journal on Dispute Resolution*, 22, 797-838.
- State Courts (2016). *Community Court*. <https://www.statecourts.gov.sg/CriminalCase/Pages/CommunityCourt.aspx>
- Subordinate Courts (2011). *Registrar's Circular No. 4 of 2011*.
<https://www.statecourts.gov.sg/Lawyer/Documents/RC4Of2011.pdf>
- Supreme Court of Kentucky (2005). *Supreme Court of Kentucky Order 2005-02*.
http://courts.ky.gov/courts/supreme/Rules_Procedures/20052.pdf



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