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Resolving disputes with an healing effect: the practice of mediation in India

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Abstract: This paper has traced the background and evolution of mediation movement in India. Discussing about the beginning of the advocacy for ADR and mediation in the late 1990, how the mediation movement has gained momentum in past two decades. It is pertinent to note the policy and legislative introduced to popularize mediation and encourage its adoption. Also, the statistical data presented from various sources reflects about the efforts undertaken towards augmenting appropriate infrastructural and human resource to strengthen its ecosystem. However, the brightness of these development must not blindfold us to ignore about the gaps that still exist. Unless these gaps are addressed the future of mediation will remain uncertain.

Keywords: Dispute resolution. Court Annexed Mediation. Singapore Mediation Convention. Online mediation. Legislative policy.

Introduction

The landscape of dispute resolution literatures enunciates a wide catalogue of aspirations involving several values identified with the effectiveness of a dispute resolution system. These aspirations continue to increase with time. With the advent of modern constitutions embedded with values of democracy, liberalism and rule of law; dispute resolution was idealized to feature characteristics of distributive fairness, impartiality and procedural independence to secure the ends of fair trial and justice. This was further fortified with some typical features that define the goals of accessibility, speed, expense, procedural flexibility and finality. Finally, the

values of collaborative problem solving, confidentiality and giving adequate attention to human emotions, feelings and relationships were intertwined into the web. Therefore, an effective dispute resolution system is a conglomeration of these aspirations not just a well-conducted or well-favoured proceeding or formula.

Adversarial adjudication in public courts has always been the primary mode of formal dispute resolution. But it is bunged with the problems of backlog, delay and its limited accessibility to many citizens. These reasons have forced to search for alternatives. This movement began in the latter half of nineteenth century globally. Many alternatives were proposed. But mediation has emerged as the most viable alternative. Mediation is a voluntary dispute resolution method that attempts to settle disputes with an amicable approach. It is usually characterized as relatively more expeditious, inexpensive and confidential process compared to adjudication. However, the intrinsic values of mediation are autonomy to parties, participatory nature of the process and disputants right to self-determine the outcome of their disputes.

Amicable methods of dispute resolution have been always part of Indian culture and tradition. But the discourse of modern mediation practice in India is about two decades old. Compared to the global movement which started in 1980, the discourse of mediation as an alternative to adversarial adjudication has started much later in India. But since the inception of the mediation discourse, it is envisaged as an initiative to make dispute resolution more affordable, accessible and save judicial resources. Policy and legislative changes are introduced to encourage use of mediation at pre and post litigation in civil and commercial matters. The apex court of India has also supported mediation. The apex court has pronounced judgements extending its support to mediation. Also, steps are initiated to sensitize the member of the bar and litigants about the advantages of mediation. The mediation movement in India although being comparatively recent, has made significant progress and continues to gain popularity and confidence among all stakeholders.

In this context this paper sets out to provide an account of the jurisprudential development of mediation practice in India and its future discourses. The paper will begin by reviewing the characteristic features of modern mediation and how it helps to resolve dispute with a healing effect. The second section of the paper will review the development of mediation in India along with the evolution of its regulatory framework for mainstreaming the practice of mediation in India. Section three will describe how the public perception, institutionalization and human resource development for mediation has evolved overtime. Finally in the fourth section the paper will be deliberating upon the issues and challenges in current mediation practice and the future discourse to strengthen mediation in India. The paper will conclude with setting out certain agendas for future discourse of mediation in India.

[I] Why to choose mediation

Mediation involves settlement of disputes by putting parties face to face facilitated by a neutral third person to work out the modalities for reaching a mutually acceptable solution to their ongoing dispute. Since, disputes are settled through a consensual approach it is generally complied by the parties without need for any additional procedure for appeal or legal enforcement. Usually compared to other methods of dispute resolution it is expeditious, inexpensive and maintain greater confidentiality. From the perspectives of administration of justice, it reduces court congestions and saves judicial resources.[1] But these factors don't sufficiently justify the benefits of mediation. One has to explore the more intrinsic advantages of mediation process. Also, it is necessary to inquire into the positive effects of mediation compared to adversarial adjudication on parties with reference to overcoming their differences and restoring future relationships.

Any dispute is generally much deeper than it is apparently visible. Looking from a purely legalist perspective every dispute is either a trade-offs involving legal claims or economic considerations measured in terms of monetary damages or compensations.[2] However, research from other disciplines like human psychology and behavioural studies has evidenced that generally a dispute has three sets of factors, or interests at work. They are categorised as three 'Es' i.e. economic, emotional and extrinsic factors. These factors form the three sides of a dispute triangle and represent competing sets of interests that all must be comprehended and addressed to reach an effective and sustainable solution.[3]

An adversarial approach of dispute resolution will only focus on the economic aspect translating it into legal language of right vs. breach/liability or damages/ compensation vs. exoneration. But focusing only on the economic interests just allow to look at the surface of the problems. They are more visible because they are more tangible and easily definable by a corresponding legal norm. But the actual root of the dispute lies much deeper, wherein lies the emotional components which causes the internal push and pull of parties and the extrinsic factors e.g. social factors (how the resolution will appear to a third party). These three sides of the dispute triangle are interrelated.[4] Paying attention to only economic factors and disregarding the emotional and extrinsic elements leads to only unsatisfactory resolution or continued impasse. Therefore, the adversarial approach with its

1 SUPREME COURT. Mediation Training Manual of India, p.16, https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf.

2 SUPREME COURT. Mediation Training Manual of India, p.11-13 https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf.

3 FOLBERG Jay; GOLANN, Dwight. Lawyer's Negotiation Theory, Practice and Law. Wolters Kluwer, 2016.

4 KOROBKIN, Russel; GUTHRIE, Chris. Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer. Texas Law Review, v.76, n.77, 1997-1998.

central attention to contestable legal questions ignores the other complexities of the dispute.[5]

Further, the adversarial attitude of '*lawful winner takes it all*' promotes a partisan view of dispute resolution that seems like its sole objective is to maximize individual gain, in a war like situation, masking the facts and information and attending polarized results or a mindless midpoint settlement. But thinking from a more realistic point of view is 'winning' the only achievable objective from a dispute resolution exercise. Sometimes even a literal 'winner' may be at loss if in achieving it the other side is so stressed or regretful that it impairs their relationship permanently or compliance of the decision becomes difficult.[6]

However, according to some scholar's adversarial system is unparallel and unique because it mitigates the existing irreconcilable social and economic differences and delivers fair and just results. Prof. Owen Fiss had argued that although courts may take a longer time, use complex procedures and relatively expensive, but still cannot be replaced by gentler methods because they will fail to effectively calibrate the pre-existing inequality and power imbalances among parties.[7] He observes "*Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment*".[8] The heart of his argument relies on a reflection of public adjudication as the only means of delivering fair justice, both in terms of distributive fairness as well as procedural fairness. But he ignores that fairness is always a subjective principle. What a winner of a lawsuit considers fair process, resulting to a fair outcome, may be completely contrary in the opinion of the looser of the lawsuit.[9] The studies on access to justice emerging globally has revealed that pre-existing inequalities can reduce parties' capacity to effectively seek resolution of their disputes in litigation.

This takes us to the question what are the criterion for a fair outcome? and it can be stated that fairness can be judged by four basic but competing principles: equality, need, generosity and equity. Any dispute resolution process that treats parties in equal footing; address their actual needs and concerns; ensures that one parties outcomes doesn't exceed the outcomes achieved by others and ensures that distribution of the outcome's benefits parties' relative outcomes, can

5 MEADOW, Carrie M. Legal Negotiation: A Study of Strategies in Search of a Theory. American Bar Foundation Research Journal, 905, 1983.

6 FOLBERG, Jay; GOLANN, Dwight. Lawyer's Negotiation Theory, Practice and Law. Wolters Kluwer, 2016.

7 FISS, Owen. Against Settlement. Yale Law Journal, v.93, n.1073, 1983-1984.

8 MEADOW, Carrie M. Legal Negotiation: A Study of Strategies in Search of a Theory. Am. B. Found. Res. J, 905, 1983.

9 WELSH, Nancy A. Perceptions of Fairness in Negotiation. Marquette Law Review, v.87, n.753, 2004.

be perceived as a fair process. Mediation portrays all these values of fairness in its procedural settings and final outcome.[10]

But this attitude of looking adjudication as only way to deliver fair justice has developed due to the mainstreaming of the '*cultural of adversarialism*'[11] in our legal system. The predominant legal culture and legal education promote a narrative about the propriety of courts in delivering justices. The narrative (thou changing now) is that justice can only be achieved by means of elaborate arguments, attacking and humiliating the other side and following the long and formalist procedures. This cultural narrative inevitably resists any other discourse about achieving justice. It legitimizes all means to attack and humiliate your opponent how degrading it may be from a moral perspective. Describing about the pitfalls of the adversarial culture Jus. Warren Burger had observed "*Our system has become too costly, too painful, too destructive, too inefficient for truly civilized people*".[12]

However, this adversarial narrative of justice is contradicted by philosophers. Max Lucado the celebrated American novelist has observed "*conflicts are inevitable but combat is optional*".[13] In the words of Abraham Lincon "*discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man".*[14] Similarly, M.K. Gandhi has expressed that "*we may attack measures and systems. We may not and must not attack men*".[15] In his works he has argued that results obtained by treacherous, coercive and ways that humiliate others leads to destruction and remorse. His works on conflict resolution renounces all those practices that promotes toughness, coercion, deception and lies and embraces more gentler and non-violent ways to resolve conflicts.[16]

Mediation as opposed to the established narrative of dispute resolution adopts a more therapeutic approach to heal parties' differences by using fair procedure and more innovative remedial imaginations. Apart from being expeditious, inexpensive, confidential, mediation promotes values of joint-gain, collaborative solution searching and produces different behaviours and different outcomes. It is as a gentler and more caring technique of problem-solving because it compels

[10] RUMMEL, Rudolph J. The Subjectivity Principle, in The Conflict Helix. New Jersy: Transaction Publishers, 1991.

[11] FISS, Owen. Against Settlement. Yale Law Journal, v.93, n.1073, 1983-1984.

[12] 1982 (*68 A.B.A.J. 274).*

[13] LUCADO, Max. When God Whispers Your Name. Nashville: W Publishing Group, 1999.

[14] LINCOLN, Abraham. Notes for a Law Lecture, Collected Works of Abraham Lincoln, Maryland: Wildside Press, v.2, 2008.

[15] WEBER, Thomas. Gandhian Philosophy, Conflict Resolution Theory and Practical Approaches to Negotiation. Journal of Peace Research, v. 38, n. 4, 2001.

[16] GANDHI, Mohandas K. An Autobiography or the Story of my Experiments with Truth. Ahmedabad: Navajivan, 1940.

parties to see each other's difficulties, probe into their underlying individual and shared interests and collaborate in exploring mutually satisfying solutions to settle their differences. It establishes an environment which promotes the values of compassion, mutual-belief, transparent information sharing and cooperation. Mediation resolves differences comprehensively, restore relationships and settle disputes with a healing effect.

Mediation therefore transforms the approach of dispute resolution narrative from naming, shaming, blaming and regressive behaviour to a healing process by adhering to the following practices:

(a). compelling disputants to change from total denial of any responsibility to making them reflect and accept that knowing or unknowingly they may also have some role in the problem;

(b). after accepting their part, they are willing to sacrifice to ensure a mutual beneficial settlement to be reached in resolution of the dispute;

(c). then having established necessary trust with each other, express their desires about the necessary compromises that they are willing to do to reach a mutually satisfactory end of the problem; and

(d). reach a mutually acceptable solution, experience a change in their emotions, reconciled with each other and heeled and renewed as individuals.[17]

[II] Evolution of mediation in India

India has a long history and rich traditions of amicable and informal institutions of dispute resolution. The institution of Panchayat[18] was very effective in settling disputes arising out of family and close relations. The Privy Council affirming the decision of a Panchayat had observed that the "village Panchayat is the time-honoured method of deciding disputes of this kind…that it is comparatively easy for the panchayatdars to ascertain the true facts, and that, as in this case, it avoids protracted litigation…".[19] But these private and informal institutions lost their relevance over time and was wholly replaced by the adversarial system. Although the Constitution of India promised to secure all citizens' access to justice, but preferred to continue with the adversarial model of centralized judicial

[17] WILLIAMS, Gerald R. Negotiation as a Healing Process. Journal of Dispute Resolution, v.1, 1996.

[18] Panchayat is the oldest system of local government in the Indian subcontinent. The word Panchayat means assembly (ayat) of five (panch). Traditionally Panchayats consisted of elderly and wise people chosen by the local community, who used to settle disputes between individuals and villages. The leader of the panchayat used to be called as Mukhya or Sarpanch. Generally, the elder-most or most senior person would be elected to this position. (For more details see What is a Panchayat (pria.org)).

[19] Sitanna v. Marivada Viranna, AIR 1934 PC 105.

system. But within passage of a short time problems started to crop in and the Indian judicial system fell into the clutches of many pitfalls like delay, arrears, lack of resource, shortage of judges, lack of adequate infrastructure etc.[20] It was inevitable to deal with these problems that alternative mechanisms for dispute resolutions are introduced.

Use of mediation for settling disputes in family matters was introduced in 1976 by way of amending the Code of Civil Procedure, 1908. It casted a duty on courts dealing with family disputes to make an endeavour at first instance, where the court think it is possible, to make a compromise with the nature and circumstances of the case and to every case and proceedings.[21] This was followed by series of other reforms in various statutes governing personal law matters to encourage parties to resort to conciliatory methods. With the establishment of family courts, it was made a mandatory obligation to make efforts for settlement by way of mediation before taking evidence in the case. To facilitate the process of mediation the statute establishing the family courts provided for appointment of permanent counsellors. Addressing the question as to whether resorting to mediation is mandatory after the introduction of the Family Courts Act, the Supreme Court has held that mediation is mandatory in family disputes and cannot be avoided or circumvented. For the purpose of settlement of family disputes emphasis is laid on mediation and achieving socially desirable results and eliminating adherence to rigid rules of procedure and evidence.[22] The Supreme Court went further to emphasize the need of even using mediation, if possible, in the cases involving domestic violence or criminal proceedings alleging cruelty on wife at matrimonial home.[23]

Conciliation under Arbitration and Conciliation Act, 1996

This was followed by introduction of private and voluntary conciliation in resolution of commercial disputes by the Arbitration and Conciliation Act, 1996. Although called as conciliation the process as adopted by this legislation is almost similar to mediation with a more interventionist role of the conciliator.[24] The legislation has introduced detailed procedure for conducting conciliation based on the UNCITRAL Rules on International Commercial Conciliation, 1985. According to this law parties are required to commence conciliation in commercial disputes by entering into an agreement in writing.[25] Parties have the autonomy to choose the

[20] LAW COMMISSION REPORT, 2009, p.222.
[21] Order 32-A which was inserted in the Civil Procedure Code, 1908 by the Code of Civil Procedure (Amendment) Act, 1976.
[22] SUPREME COURT. Baljinder Kaur vs. Hardeep Singh, AIR 1998 SC 764.
[23] SUPREME COURT. K Srinivas Rao vs. D.A. Deepa, (2013) 5 SCC 226.
[24] RAVEENDRAN, R.V. Mediation: Its Importance and Relevance, PL 2010.
[25] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 62.

conciliator/ conciliators,[26] the manner of appointment of the conciliator/conciliators[27] and the place of conciliation.[28] Conciliation proceedings are not bound by the Code of Civil Procedure and Evidence Act and the parties are free to agree upon the rules for conducting the conciliation proceeding in consultation with the conciliator/ conciliators.[29] But the parties shall in good faith participate in the conciliation proceedings and attempt to resolve their dispute.[30] The legislation also bars any party to resort to arbitration or litigation during the continuance of the conciliation proceedings.[31]

The legislation mandates conciliation proceedings to be completely confidential.[32] Even the confidentiality extends to the settlement agreements unless such disclosure is necessary for the purpose of implementation and enforcement of the settlement.[33] The legislation prohibits the conciliator/conciliators to act as an arbitrator or counsel for any of the parties in further legal or arbitral proceedings and parties right to introduce the conciliator/conciliators as witness in any further proceedings.[34] All the views, suggestions expressed by parties, admissions and proposal made including expression of willingness by any party to accept any proposal made by the other party in a conciliation proceeding is non-admissible as evidence in other proceedings between the parties.[35] The Supreme Court upholding the importance of ensuring the confidentiality of conciliation proceedings.[36] The Court has held "*It is clear, therefore, that both the conciliator and the parties must keep as confidential all matters relating to conciliation proceedings… if there are insidious encroachments on confidentiality, a free and fair settlement may never be arrived at, thus stultifying the object sought to be achieved by Part III of the 1996 Act*".[37] Also, dealing with the complex question as to whether the confidentiality norm of conciliation/mediation can be breached the Supreme Court has observed that "*the process of mediation is founded on the element of confidentiality… Instead of an adversarial stand in adjudicatory proceedings, the idea of mediation is to resolve the dispute at a level which is amicable rather than adversarial. In the process, the parties may make statements which they otherwise*

[26] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 63.
[27] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 64.
[28] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 69.
[29] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 66.
[30] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 71.
[31] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 77.
[32] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 75.
[33] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 75.
[34] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 80.
[35] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 81.
[36] SUPREME COURT. Moti Ram vs. Ashok Kumar, (2011) 1 SCC 466.
[37] SUPREME COURT. Govind Prasad Sharma vs. Doon Valley Officers Cooperative Housing Society Ltd., (2018)11SCC501.

they would not have made while the matter was pending adjudication before a court of law. Such statements which are essentially made in order to see if there could be a settlement…if the statements are allowed to be used at subsequent stages, the element of confidence which is essential for healthy mediation/conciliation would be completely lost".[38] However, the Court in this case held that this normal principle of confidentiality may be breached in exceptional cases.[39] Once there is a clear exception in favour of categories stated therein, principles in any other forms of mediation/conciliation or other modes of Alternative Dispute Resolution regarding confidentiality cannot be imported.[40]

The legislation also provides for a mechanism to reach settlements, its formulation, authentication and enforcement. It states that when the possible terms of settlement are arrived in a conciliation, the conciliator shall formulate the same and submit it for parties' consideration. If a party provides some observations, then the terms may be reformulated.[41] Once the parties agree to the terms of the settlement it shall be drawn into an agreement either by the parties themselves in assistance of the conciliator or by the conciliator. The same shall be first signed by the parties and then authenticated by the conciliator and given to the parties. A settlement agreement signed by the parties and authenticated by the conciliator shall be final and binding upon the parties or anyone claiming under them and will have the same status and force of an arbitral award on agreed terms under the Act.[42] Various High Courts have held that when a settlement agreement is reached, signed by parties and authenticated by the conciliator then such an agreement is binding upon parties and enforceable under the Act as an arbitral award and no additional requirements or technicalities can be imposed upon it.[43] But a settlement agreement drawn without following the procedure discussed above or doesn't bear the signature of the parties then the same is not enforceable under the Act.[44] The legislation finally prescribes that conciliation proceedings shall be terminated either naturally after the settlement agreement is authenticated by the conciliator and delivered to the parties or where no settlement is arrived by written declaration of the conciliator that further efforts for conciliation is not justified.[45]

[38] SUPREME COURT. Perry Kansagra vs. Smriti Madan Kansagra, 2019(3) SCALE 573.
[39] Such as matters concerning custody or guardianship issues and the Court, in the best interest of the child, must be equipped with all the material touching upon relevant issues in order to render complete justice.
[40] SUPREME COURT. Perry Kansagra vs. Smriti Madan Kansagra, 2019(3) SCALE 573.
[41] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 73.
[42] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 74.
[43] See generally DELHI HIGH COURT. Anuradha SA Investments vs. Parsvnath Developers Limited, 2017(4) ARBLR72(Delhi); Angle Infrastructure Pvt. Ltd. v. Ashok Manchanda 2016 SCC OnLine Del 1534; Rohit Ahuja v. Additional, Principle Judge, Family Court, Lucknow 2009 SCC OnLine All 312.
[44] SUPREME COURT. Haresh Dayaram Thakur vs State of Maharashtra (2000) 6 SCC 179.
[45] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 76.

Post Litigation and Court annexed Mediation

Realizing the potential value of ADR and address the problem of delay and arrears in administration of justice in India the legislature introduced by way of amendment in the Code of Civil Procedure power of civil courts to refer parties before it to resort to ADR methods to resolve their disputes.[46] Section 89 inserted to the Code in 1999 expressly granted power to civil courts in pending litigation to refer parties to ADR where in the opinion of the court exist elements of settlement. The section provides that referral can be made by courts in consultation with the parties to any of the five methods of ADR namely Arbitration, Conciliation, Mediation, Judicial Settlements and Lok-Adalat. Upholding the constitutionality of this section the Supreme Court held "*It is quite obvious that the reason why Section 89 has been inserted is to try to see that cases, which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date*".[47] However, the Court in this case observed that among the various ADR procedures prescribed by Section 89 there is no regulatory framework governing mediation and may cause difficulty in its implementation. Accordingly, Supreme Court directed the Law Commission of India to draft rules relating to practice of mediation referred by civil courts under Section 89.[48]

The Law Commission of India recommended draft ADR Mediation Rules 2003 for court mediation referred by Section 89.[49] The Supreme Court recommended all High Courts to adopt mediation rules in the line of rules drafted by the Law Commission.[50] These rules provide for the procedure to be followed by parties and courts for choosing a particular method of ADR and rules to be followed in mediation process referred under Section 89(2)(d). In sum and substance, the rules were similar to the rules provided for conciliation under the Arbitration and Conciliation Act, 1996. But three significant differences were prescribed in the ADR Mediation Rules 2003. Firstly, the role of mediator compared to a conciliator was limited to a purely facilitative role and having no power to suggest or impose upon parties any terms of settlement.[51] Secondly, fixed time limit of sixty days to

[46] Section 89 inserted by The Code of Civil Procedure (Amendment) Act 46 of 1999.
[47] SUPREME COURT. Salem Advocates Bar Association v. Union of India, (2003) 1 SCC 49.
[48] SUPREME COURT. Salem Advocates Bar Association v. Union of India, (2003) 1 SCC 49.
[49] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 (CPADRM) (http://chdslsa.gov.in/right_menu/rules_regulationslsa/pdf_files/cpadrm-rules-2003.pdf).
[50] SUPREME COURT. Salem Advocates Bar Association case, AIR 2005 SC 3353.
[51] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 Rule 15.

complete the mediation process and on process stands automatically terminated on expiry of such time limit.[52] Thirdly, once the settlement agreement was reached the mediator shall communicate such terms of settlement in writing to the court which referred the matter for mediation and court after issuing notice to the parties shall record such settlement and pass a decree in accordance to the terms of settlement.[53]

The procedure for ADR reference under Section 89 was further strengthen by the Supreme Court by providing appropriate guidelines for its implementation.[54] These guidelines states that parties can be referred to mediation with or without their consent. Where in the opinion of any civil court their exist possibility of settlement, but parties are unable to reach an agreement on choice of the appropriate ADR method. Then courts can refer the parties to mediation at its own behest.[55] Further to encourage parties to resolve their disputes in mediation courts must incentivize the parties by returning the court fees amount in cases where settlement is arrived in mediation.[56]

United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 and India

Mediation was not generally seen as a commonly used dispute resolution mechanism in international commercial disputes, this was pointed by scholars to the lack of a comprehensive legal framework for the enforcement of settlement agreements compared to arbitration and litigation.[57] Arbitration was preferred over mediation as an alternative dispute resolution because of the enforcement of arbitral awards and agreements ensured through The New York Convention. Only later did the efforts to enforce the mediation settlements come through as light was shed on mediation as a cost-effective process. There was also hope that mediation better preserves party relationships. Hence the UN Convention on International Settlement Agreement Resulting from Mediation or otherwise known as Singapore Convention on Mediation was introduced to ensure the enforcement of settlement agreements arising out of mediation.[58]

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52 LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 Rule 18.

53 LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003. Rule 25.

54 SUPREME COURT. Afcons Infrastructure Ltd. vs. M/S Cherian Varkey Construction 2010 (8) SCC 24.

55 SUPREME COURT. Afcons Infrastructure Ltd. vs. M/S Cherian Varkey Construction 2010 (8) SCC 24.

56 SUPREME COURT. The High Court of Judicature at Madras vs. M.C. Subramaniam 2021 SCC OnLine SC 109.

57 HIOUREAS, Christina G. The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward. Ecology Law Quarterly, v.46, n.61, 2019.

58 SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

The Convention provides for mandatory enforcement of settlement agreements resulting from international mediation. It envisions enforcement in a way that after the settlement agreement, the parties can approach the competent state authority of a contracting state and the state shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention.[59] The requirements for such an application insist to supply a settlement agreement signed by the parties along with the evidence that the settlement is a result of mediation and the competent authority may require any necessary document in order to verify the requirements of the Convention have been complied with.[60] Article 5 provides particular grounds on which domestic courts can refuse enforcement of settlement agreements.[61] In situations where a settlement agreement is against public policy[62] or the subject matter of the dispute is not capable of settlement by mediation under the law of that party, the authority can deny enforcement of the same.[63]

The preamble of the Convention states that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social, and economic systems would contribute to the development of harmonious international economic relations.[64] India is a signatory to the Convention, however it has not ratified it yet. Without the ratification, it is not possible to enforce the settlement agreements sought through international mediation. It is also important that when India legislates a law, it provision must be consistent with the Singapore Convention. The Mediation Bill 2021 neither included the enforcement of settlement agreements resulting from international mediation within its scope nor has it maintained coherence with the Convention in the enforcement of international mediation. The mediation settlement is enforceable as a decree or judgment from the court. Singapore Convention excludes such settlements hence parties would hardly choose India for international mediation.

The Mediation Bill 2021

Although there are significant developments to promote mediation in India there is no specific law governing mediation. An artificial difference has been

[59] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art. 3.
[60] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art.4.
[61] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art.5.
[62] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art. 5 (2)(a).
[63] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art. 5 (2)(b).
[64] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019.

established between mediation and conciliation due to Section 89 of Code of Civil Procedure and conciliation is treated differently from mediation. Similarly, the Mediation Rules enacted by High Court to govern mediation that are referred by civil courts under Section 89 also don't apply to mediation conducted under other statutes[65] or purely private mediation. In the backdrop of ongoing developments in the field of mediation and alternate dispute resolution, the Mediation Bill 2021 was introduced in Rajya Sabha in December 2021. The Mediation Bill applies to mediation conducted in India, and all or both parties habitually reside in or incorporated in or have a place of business in India, or the mediation agreement provides that the dispute shall be resolved in India or there is international mediation.[66] Although Central or state government or its entities enjoys a privilege of exemption from it unless it is a commercial dispute.

The Bill considers mediation and conciliation as synonymous with each other, a similar take is seen in a Supreme Court case[67] and the UN Convention on International Settlement Agreement Resulting from Mediation also used the terms interchangeably. Within the existing conception, a conciliator has more powers than a mediator, where the former can make a proposal and provide terms of settlement and the latter only acts as a facilitator. The role of a mediator is evolving from a mere facilitator to actively participating in decision-making and giving advice to parties. The Mediation Bill proposes to substitute Part-III of the Arbitration and Conciliation Act, 1996 by the provisions prescribed under it.[68]

The Bill list subject matter that will not come under the purview of mediation.[69] The parties can choose a mediator of their choice or else a mediator will be appointed through the mediation service provider. The bill states that the mediator shall assist the parties in an independent, neutral, and impartial manner in their attempt to reach an amicable settlement of their dispute.[70] The neutrality, integrity, and impartiality of mediators are important aspects of mediation.[71] The Bill provides for a pre-litigation mediation in matters of a civil or commercial dispute before parties approach a court or tribunal.[72] The objective behind the section

[65] CENTRAL GOVERNMENT. Companies Act, 2013. Section 442 provides for referral of company disputes to mediation by the National Company Law Tribunal and Appellate Tribunal; Section 12A of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, which provides for mandatory pre-institution mediation; Section 32(g) of the Real Estate (Regulation and Development) Act, 2016, which provides for amicable conciliation of disputes.

[66] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 2.

[67] SUPREME COURT. Afcons Infrastructure Ltd. vs. M/S Cherian Varkey Construction 2010 (8) SCC 24.

[68] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 64 and Schedule-IV.

[69] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021, Schedule-II.

[70] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021, sec.17.

[71] See, Honourable Mr. Justice N. V. Ramana, the Chief Justice of India, Supreme Court of India address at India-Singapore mediation summit: 2021 mediation for everyone: realizing mediation's potential in India. https://www.livelaw.in/pdf_upload/cji-speech-at-mediation-summit-396853.

[72] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec.6.

seems to put mediation as an easy way to dispute resolution without getting into the long proceedings of the Court.

The Bill as per section 8 provides that in exceptional cases the parties may seek interim relief before the court or tribunal before the commencement or during the continuation of mediation.[73] It further provides that the court or tribunal shall after granting or rejecting interim relief, refer the parties to undertake mediation if deemed appropriate. The language of the Bill shows that preference is given to mediation over the court proceedings. Using phrases like 'exceptional cases' and 'refer the parties to undertake mediation' while seeking interim relief shows that it is not highly entertained. Although the parties may choose this option or they have the liberty to opt-out of the mediation process after two sessions to reach the court or a tribunal.[74] The time limit for the completion of mediation is 180 days.[75] The Bill creates no distinction between international and domestic mediation conducted in India. The mediated settlement will be enforceable as a decree or judgment.[76] Settlements that are treated as a judgment are excluded from the consideration of the United Nations Convention on International Settlement Agreements Resulting from Mediation.[77] These elements reduce the scope of international mediation in India, as they would not be able to enforce them abroad. The definition of international mediation should also not be limited to commercial disputes.

Another important feature of the Mediation Bill is the provision for online mediation. Section 32 provides online mediation and for maintaining the integrity and confidentiality of the proceedings as well. The mediator may take appropriate steps to ensure this. Confidentiality of mediation is otherwise also mentioned in the Bill as the process demands that. But it is important to take extra care for individuals to feel safe and seen in the online medium. Finally, the Mediation Bill proposes for establishment of a Mediation council.[78] Mediation Council to be headed by a person appointed by the central government. The mediation Council envisaged not as a usual government regulatory body that can be handled exclusively by the executive.[79] The previous draft provided for a former judge of the Supreme Court or former Chief justice of the High Court as the head of the Council. Mediation in

[73] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 8.
[74] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec.20(1).
[75] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021Id. Sec.21.
[76] The settlement may be challenged on the grounds of fraud, corruption, impersonation, or relating to disputes not fit for mediation.
[77] SINGAPORE, Convention on International Settlement Agreements Resulting from Mediation, Art.1, 2019.
[78] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec.33(1).
[79] JIGEESH, A.M. Mediation Council can't be handled exclusively by the Executive, Dec. 28, 2021. The Hindu, https://www.thehindubusinessline.com/news/mediation-council-cant-be-handled-exclusively-by-the-executive/article38050878.ece.

India has grown with the guidance shown by judges and their unique expertise is needed in the field.

The Mediation Bill after its introduction met with very strong criticism from all stakeholders and was referred to a Parliamentary Standing Committee for reconsideration. The Committee submitted its report stating several drawbacks and recommending changes. The Committee observed that making pre-litigation mediation mandatory may actually result in delaying of cases and may prove to be an additional tool in hands of litigants to delay the disposal of cases.[80] An example of prelitigation mediation exploring its scope in India is at 'Samadhan,' a court-annexed mediation centre established in Delhi High Court in 2006. Their data shows that among 1935 prelitigation mediations registered 559 cases are settled as of now. However, there are contradictory opinion as Chief Justice of India while addressing in the India-Singapore Mediation Summit, opined that 'prescribing mediation as a mandatory first step for resolution of every allowable dispute will go a long way in promoting mediation'.[81] Studies have shown option of pre-litigation mediation should ideally bridge the gap between the persons and the justice system, but for many, making it compulsory may build a longer bridge to reach the Court itself. Italy follows an opt-out model where parties need to attend initial stages to get introduced to mediation and for a possible resolution, then they can either opt-out or continue mediation.[82] A similar system has been successful in Turkey and Brazil. In countries like Romania, mandatory prelitigation has become mere compliance before filing a case before the Court.[83] But the concern is from the perspective of a common person about the effectiveness of mediation as such. The realities of Indian litigation culture and the ability to provide a large number of mediators need to be considered before establishing such a system. It has been suggested that introducing mandatory prelitigation in a phased manner of a selected categoryof disputes and eventually expanding it to a wide range may be a more successful method.[84]

The Bill also gave powers to Supreme Court and High Court to frame rules for court-annexed mediation.[85] Court annexed mediation centres are already in existence in Supreme Court and in Various High Courts working with the guidelines established by them. The Parliamentary standing committee opposed the proposed

[80] JIGEESH A.M, Mediation Bill: House panel recommends against compulsory mediation, role for judiciary, Jul.11, 2022 22:50 IST.
[81] Honourable Mr. Justice N. V. Ramana, the Chief Justice of India, Supreme Court of India address at India-Singapore mediation summit: 2021 mediation for everyone: realizing mediation's potential in India.
[82] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.
[83] GAVRILA, Constantin A; CHEREJI, Christian R. Don't Rush. Kluwer Mediation Blog, Mar. 2, 2015.
[84] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.
[85] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 26(1).

provision and stated that when a specific statute will be in force, giving power to High Court and Supreme Court to make rules or guidelines would be unconstitutional.[86]

The Mediation Bill introduces a provision for Community mediation in matters which are likely to affect peace, harmony, and tranquility amongst the residents or families of the area or locality.[87] A panel of three mediators would conduct the community mediation. India has a long history of community-oriented dispute resolution mechanisms, although those mechanisms are rooted in caste and religious-based administration and their decisions would be detrimental to underprivileged individuals and communities. A rights-based approach to eliminating the biases is needed and an opportunity like this when implemented rightly, can solve disputes easily. Along with that, the benefits of mediation will be successfully introduced to a large group of people.

Similar concerns are also raised in mediation where the Central Government, State Government, or any of their entities is one of the parties. The Central Government and State Government can frame any schemes or guidelines regarding mediation and mediation may be conducted in accordance with those schemes or guidelines.[88] Central and State Governments, council members, mediators, mediation institutes, and mediation service providers are protected from legal action for acts done in good faith under the Bill.[89] There is no provision for mediator accountability for addressing grievances against mediators and their timely disposal, such a provision can be found in the jurisdiction of the United States.[90]

The Mediation Bill must consider the existing legal system as well as facilities and envision a growth process based on that. An important step would be education and training provided to mediators, lawyers, students, and the general public. As this intends to build trust among people to rely on mediation, the commitment must be shown by Government also. Government should not exempt itself from the process and should resolve mediation to solve its disputes.

Online Mediation

Our ideas of mediums for education, business, and even legal mechanisms have changed over the pandemic period. With the unprecedented times of the pandemic, our judicial system itself adapted well to the e-court system and video conferencing and set an example to all other fields. We could see a growth in providing online services in government departments also in the last decade. This

[86] JIGEESH, A.M. Mediation Bill: House panel recommends against compulsory mediation, role for judiciary, Jul.11, 2022 22:50 IST.
[87] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 44.
[88] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 49.
[89] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 51.
[90] US. Uniform Mediation Act, 2005.

has positively set the stage for online mediation in India. Online mediation uses emails, texts, video conferencing, etc and here the mediator or mediation service providers assist the parties through online modes of communication.

Internationally many countries have tried online mediation. Subordinate Courts in Singapore provide Online Dispute resolution for cases filed in the Small Claims Tribunal. Online mediation and arbitration are provided by Court Mediators or Judge Mediators from the Judicial system.[91] UNICITRAL adopted a non-binding, descriptive Technical Notes on Online Dispute Resolution, with the aim of assisting states, particularly developing states in Online Dispute Resolution[92] [Hereinafter ODR]. UN General Assembly adopted a resolution on the same. The scope of ODR is stated as useful for disputes arising out of cross-border, low-value e-commerce transactions. Online Dispute Resolution is an umbrella term used for all dispute resolutions conducted through online mediums. In India, NITI Ayog released a report on ODR in 2021 that considers the possibilities and challenges of Online Dispute Resolution in India.[93]

The shift from physically being present at a particular place to communicating through an electronic medium makes the process convenient, cost-effective, and fast. Mediation itself is proven to be cost-effective and quick compared to litigation, and adapting an online mode ensures a quick and low-cost result. Online mediation would be very useful for parties coming from different places or having their business established in a different place. It is also suggested that online dispute resolutions particularly through texts and emails reduce bias caused by human judgment and focus on the information and claims produced before.[94]

In various countries, private parties and institutions provide mediation services. Private corporations like eBay, PayPal, and ICANN incorporated ODR into their system where disputes are quickly decided, by this they intend to maximize the number of successful transactions. In India certain ODR service providers like Sama,[95] YesSettle,[96] Presolv 360,[97] webnyay,[98] and many other similar providers give a platform for online dispute resolution services. In the private sector, one may build an in-house ODR platform or approach third-party platforms that provide tech-driven solutions, or independent ODR institutions that offer both platform solutions

[91] HATTOTUWA, Sanjana; TYLER, Melissa C. An Asian perspective on online mediation. Asian Journal on Mediation, v.1 n.1, 2005.

[92] UNCITRAL Technical Notes on ODR, 2017 https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.

[93] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

[94] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

[95] Sector agnostic, with a focus on financial disputes, servicing Lok Adalats and consumer forums to go online.

[96] Telecom, Insurance, Banking, Business and Government disputes.

[97] Banking, Commercial, Consumer, Employment, Family, Government, IPR, Property & Tenancy disputes.

[98] Civil and Commercial disputes across all sectors, both domestic and cross-border.

and dispute resolution professionals. There are other NGOs and organizations also that work towards providing and supporting ODR.

NITI Ayog report suggests that collaboration with the private sector will be beneficial with certain examples from around the world where Government run or court-annexed ODR platforms have collaborated with the private sector.[99] Association with the private sector would probably ensure high-quality services and advanced tools in mediation, but the issue of privacy and confidentiality is huge and the government must ensure that it is conducted properly and the personal data and information of parties are protected.

Online Mediation is one of the various mechanisms of ODR. One of the mediation centres in India, named, 'Samadhan' in the Delhi High Court conducts online mediation. With the pandemic hitting, Bangalore Mediation Centre, an initiative of the High Court of Karnataka also started online mediation. A comprehensive legal framework is lacking in the area, although the Mediation Bill provides for online mediation and the issues like confidentiality is generally addressed, it lacks a proper vision about implementing such a system in India.

The uneven access to the internet and technology is a concern for a country like India. If the convenience mentioned in the online mode of mediation is divided and only certain people with greater access to technology, yield the benefits of uninterrupted communication, that creates a bias in the process and thereby results in injustice.

Hybrid models of incorporating technological tools into the mediation process will be helpful in introducing online modes to people and building their confidence in online mediation.[100] Building proper infrastructure and facilities and at the same time, building faith among people about online mediation is very important. The existing mediation centres need to be upgraded in their infrastructure and ensuring digital access to everyone must be taken as a priority. The training and education in mediation should be expanded to online modes also and online mediation competitions and workshops may be included in the curriculum. It is important that lawyers and law students are updated on the subject and they are equipped with the skills in the online medium also.

[III] Development of Mediation Institution in India

Promotion of mediation has been the thrust area of the Government and Judiciary to secure prompt delivery of justice and reduce court congestions for

[99] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.
[100] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

the past two decades.[101] Attention has been given to augment the infrastructure, manpower development to facilitate use of mediation in India.[102] The vision statement adopted jointly by the government and judiciary in 2009 emphasized on introducing steps to promote oy of court settlement and use of ADR methods.[103] Accordingly, the Supreme Court has setup the Mediation and Conciliation Project Committee (MCPC). According to the statistics available on the MCPC website there are 839 functional mediation centres in India having 6480 MCPC trained and certified mediators. The mediation services available in these centres is free of cost.[104] The MCPC has initiated a 40 hours training program for training and certification of mediators. It has also initiated training of trainers for mediation awareness among all stake holders. The MCPC has 147 expert trainers who are conducting mediation training all around the country. It has prepared the necessary curriculum, methodology and training manual for conducting theses training.[105]

The High Courts have also established mediation centres. Some of these prominent mediation centres are Bangalore Mediation Centre established by Karnataka High Court,[106] Samadhan established by Delhi High Court,[107] Tamil Nadu Mediation and Conciliation Centre established by Madras High Court[108] and Allahabad High Court Mediation and Conciliation Centre.[109] A study commissioned by Department of Justice, Government of India stated in its report that based on the data collected from Delhi and Bangalore Mediation Centres that the referral to mediation has increased over years but it is still not satisfactory. Similarly, the rate of settlement arrived is also low and less than 50 percent of the total referral.[110]

The Legal Services Authorities instituted at national to taluk level under the Legal Services Authorities Act, 1987 has also undertaken efforts to promote speedy and affordable justice by establishing and administering mediation services. The mission statement of NALSA attempts to develop a robust mechanism of ADR and mediation mechanism to attain its goal of an inclusive and integrated model of legal service delivery. Especially the role of NALSA in providing mediation service

[101] INDIAN EXPRESS, 2022, https://indianexpress.com/article/cities/ahmedabad/courts-must-actively-make-mediation-mandatory-in-cases-cji-ramana-7861453/_(visited on 27.3.2022).

[102] SUPREME COURT. Report of the Mediation and Conciliation Project Committee, https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf (visited on 27.4.2022).

[103] Vision Statement presented jointly by the CJI and Union Law Minister at the National Consultation for Strengthening Judiciary Towards Reducing Pendency and Delays, 2009 https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uploads/2022/03/2022032560.pdf.

[104] MCPC Brochure https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf.

[105] https://main.sci.gov.in/mediation.

[106] https://nyayadegula.kar.nic.in/aboutus.html.

[107] http://dhcmediation.nic.in/about-us.

[108] https://tnmcc.tn.gov.in/.

[109] https://www.allahabadhighcourt.in/mediation/mediation.html.

[110] KUMAR, Alok P; JAUHAR, Ameen; VOHRA, Kritika *et al*. Strengthening Mediation in India, A report on court-annexed mediations. Vidhi Centre for Legal Policy, 2016 https://vidhilegalpolicy.in/wpcontent/uploads/2019/05/26122016_StrengtheningMediationinIndia_FinalReport.pdf.

has become very significant after the introduction of mandatory pre-litigation mediation[111] for all commercial cases valued upto 3 lakhs.[112] Accordingly, the legal services institutions are conducting pre-institutional mediation in respect of commercial disputes across the country.[113] The latest statistics available at NALSA website states that there 572 mediation centres. These centres are manned by 16,360 mediators and overall, they have resolved 52,568 cases through mediation. Compared to this in the year 2020 only 32,042 cases were settled through mediation.[114] Therefore nearly 20000 cases were settled using mediation in 2020-21 period. This is really very optimistic piece of information regarding growing faith in mediation in India. Specially with reference of pre-litigation mediation of commercial disputes the data shows that total 32,591 cases were referred for mediation. Among these in only 1059 cases parties actually agreed to attempt mediation for resolution of their dispute and of these in 578 cases settlement were arrived by way of mediation.[115] This however remains discouraging evidence.

There are also many private ADR and Mediation service providers in the urban and metropolitan hubs of India. Among them some prominent institutions are Indian Institute of Arbitration and Mediation (IIAM),[116] Centre for Advanced Mediation Practice (CAMP),[117] and Foundation for Comprehensive Dispute Resolution (FCDR)[118] and Centre for Mediation and Conciliation (CMC)[119] etc. These institutions are engaged in providing mediation service. Every institution has developed its own institutional mediation clause that recommend to adopt to facilitate the reference to mediation under these institutional rules. There is no statistics available with regard to these private institutions. They are maintaining list of recommended mediators and their details of experience and specialist practice areas. They have also been involved in promoting training of mediator, mediation counsels and awareness programs on benefits of adopting mediation.

[IV] Existing challenges and future of mediation in India

This paper has traced the background and evolution of mediation movement in India. Discussing about the beginning of the advocacy for ADR and mediation in

[111] CENTRAL GOVERNMENT. The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015. Sec. 12A; See also the Commercial Courts Rules, 2018.
[112] One lakh is equal to 100 thousand.
[113] https://nalsa.gov.in/services/mediation/pre-institutuion-mediation-in-commercial-matters.
[114] https://nalsa.gov.in/library/statistical-snapshot/statistical-snapshot-2020.
[115] https://nalsa.gov.in/library/statistical-snapshot/statistical-snapshot-2021.
[116] https://www.arbitrationindia.com/services.html.
[117] https://www.campmediation.in/.
[118] https://www.fcdr.in/.
[119] http://centre4mediation.com/eminent-mediators/#EminentMediators.

the late 1990, how the mediation movement has gained momentum in past two decades. It is pertinent to note the policy and legislative introduced to popularize mediation and encourage its adoption. Also, the statistical data presented from various sources reflects about the efforts undertaken towards augmenting appropriate infrastructural and human resource to strengthen its ecosystem. However, the brightness of these development must not blindfold us to ignore about the gaps that still exist. Unless these gaps are addressed the future of mediation will remain uncertain.

There are not many studies undertaken till date to access the progress and effectiveness of mediation. One study was commissioned by the Department of Justice, Government of India in 2015 conducted by Vidhi Centre for Policy Research.[120] The study undertook a detailed inquiry into the working of mediation in India especially the court connected mediation under Sec 89 of Code of Civil Procedure, 1908. The empirical evidence for the study was collected court connected mediation centres in Delhi, Bangalore and Allahabad. Study also had a comparative analysis with certain foreign jurisdiction where mediation has been very successful and effective. The study after its detailed analysis highlighted some major gaps in India and recommended changes to address these gaps to strengthen mediation in future. The gaps identified by the study can be grouped in three broad head (i). legislative gap; (ii). quality control and popularizing mediation; and (ii). lack of mediation profession. These findings have been supported by other papers.[121]

In terms of the legislative gap the study identified several challenges due to lack of an appropriate legislation governing mediation. As discussed in this paper also, there is no regulatory framework on conduct of private mediation. The Arbitration and Conciliation Act, 1996 is regarded unapplicable to mediation. Also, mediation and conciliation are identified as two different processes in India. Further, the regulation of court referred mediation has a judicial status[122] and thus treated as different from a private conciliation and mediation. This regulatory gap damaging the future of mediation because several legal issues involved in the process of mediation remains uncertain. Mediation is regarded still as a voluntary method with no certainty of bindingness and enforceability of the settlement agreement.

The issue of quality control of mediators is very significant because we lack in evolving a uniform curriculum, training methodology and accreditation process

[120] KUMAR, Alok P.; JAUHAR, Ameen; VOHRA, Kritika *et al*. Strengthening Mediation in India, A report on court-annexed mediations. Vidhi Centre for Legal Policy, 2016.

[121] See RAVEENDRAN, R.V. 2010; OLLAPALLY, Tara. The Mediation Gap: Where India Stands and How Far It Must Go.

[122] SUPREME COURT. Afcons Infrastructure Ltd. v. M/S Cherian Varkey Construction 2010 (8) SCC 24.

for mediators. The current trainings are grossly inadequate and also there is no centralized regulator for mediators. The norms that govern the independence, impartiality and ethics of mediator are quite limited and no institutional framework exist for regulating the practice of mediators. So, parties have little recourse against cases where mediators commit gross malpractice. Further, in the court connected mediation majority of mediators are chosen from retired judicial officers and lawyers. They bring often with them their burdens of long adversarial experience and turns mediations into adversarial process. These mediators offer parties decision for settlement. Sometime, they take decisions also without consulting or communicating with the parties. These practices are not healthy and shakes the confidence of citizens in mediation. The legal profession of India by and large is still envious of mediation. It primarily doesn't advise their clients to resort to mediation or cooperate with the mediators. Mediation for them is still a formality which needs to be by gone. There is also lack of awareness among common citizens about ADR or mediation. Mediation compared to courts are not seen as less effective and with less authority.

Also, compared to other jurisdictions that have been successful in promoting mediation, in India there is no independent profession of mediation. It is still treated as a part-time or post court job of lawyers or retired judges. Even the ADR Mediation Rules 2003 for the purpose of selecting panel of mediators for court connected mediation states that qualified persons are retired judges; lawyers having fifteen years of professional experience; other professionals having fifteen years standing experience; or retired bureaucrats or executives.[123] This doesn't help in developing an independent profession for mediation. Mediation should be a full-time profession. Professionally trained mediators, lawyers and non-lawyers, who can devote their time and energies to the mediation centre full–time, are crucial to expand the operations at such centres. There is require to establish appropriate professional courses, psychological and communication training. Only those who undertake and complete those courses must be allowed to become mediator. Therefore, it is essential that a pan-India professional body to regulate mediation is absolute inevitable. This body should have power to regulate right to admission to the practice of mediation in India, the education and training of mediators, establish and administer code of ethics and professional responsibilities of mediators and have disciplinary powers. All this can be achieved by enacting the necessary legislation. The mediators must be also complemented in their efforts by the existing legal profession and judiciary.

[123] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003. Rule 4.

Finally, promoting increased use of online mediation is the need of the hour. However, uneven access to the internet and technology is a concern for a country like India. At present the convenience of online mode of mediation is accessible to only a certain section of the citizens. Therefore, greater access to technology, uninterrupted communication, and user-friendly mediation platforms, and privacy of online communication must be prioritized. Hybrid models of incorporating technological tools into the mediation process will be helpful in introducing online modes to people and building their confidence in online mediation.[124] Therefore, building proper infrastructure and facilities and at the same time, building faith among people about online mediation is essential. The current mediation centres are required to be upgraded by infrastructural changes. Every citizen must have digital access.

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[124] NITI AYOG, Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

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