Mediation: Future of Dispute Resolution

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Abstract

Disputes and its resolution are inevitable to mankind. Dilatory and expensive litigation process render justice which is like dehydrated peach and remedy provided is worse than the malady. Alternative Dispute Resolution system proposed as a via media of regular justice delivery system but it has been limited to arbitration. Arbitration in India has been run on conventional model of courts which could not yield desired result and after 2015, 2019 amendments in Arbitration and Conciliation Act, 1996, one is skeptical whether it will fetch the desired result or not? Mediation and Conciliation though have been mistaken as one and not as separate branches of ADR. Mediation could not gain momentum. Mediation has largely been in India court-annexed. The notion that we cannot resolve our disputes and we need an authoritative court to resolve the same has been the real issue which did not let mediation and conciliation grow independently. Mediation and Conciliation has never been part of training of the bar and bench which has a natural training and inclination in adversarial justice dispensation process which is dilatory and expensive. Mediation Act, 2023 made an attempt to create the regulatory framework of mediation. Parliamentary Standing Committee submitted its report on bill in July, 2022. This is a new enactment which will be a breakthrough in dispute resolution in India. Mediation, Med Arb, Arb-med and Private Mediation can be a panacea for disposal and resolution of disputes between disputants. In this paper the author attempts to analyze the pros and cons of mediation and its roadmap in India.

Keywords: *Arbitration, Mediation, Conciliation, Litigation process and Parliamentary Standing Committee.*

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I. Introduction

In recent years, alternative dispute resolution (ADR) mechanisms like mediation have gained popularity in India. Mediation has become an important tool in resolving disputes due to its cost-effectiveness and expediency. Mediation allows the disputants to come together to resolve their disputes with the help of a neutral third party, the mediator. Adversarial Litigation process is suffering from 'adversariasis' which has made delivery of justice dilatory and expensive. Justice dispensation in India has largely been adversarial and we could not develop the idea that the litigants themselves can resolve their own disputes. Over the years we have found that authoritative adjudication either by judge or through arbitration is not attaining the desired results and we see the docket explosions have burdened the Indian judicial setup like never before. According to National Judicial Data Grid 43880345 cases are pending in Indian courts[2].

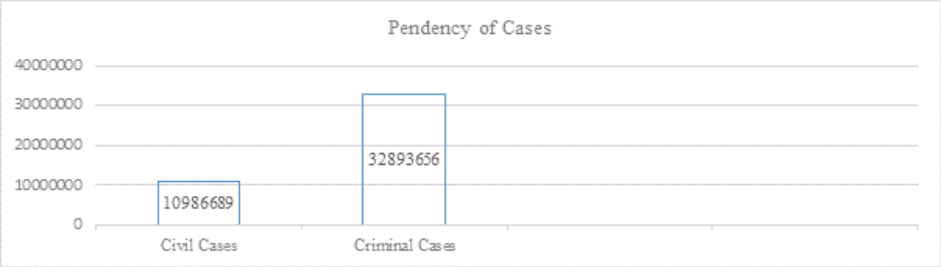

Table A

The dataset shown here depicts the clear picture of Indian litigation process and it equally shows that our current setup needs a booster otherwise the whole justice dispensation process will keep on limping like this.

In litigation and arbitration both judges and arbitrators resolve the disputes which is often not acceptable to parties. Parties even after arbitration go for litigation again. Supreme Court[3] made observation about adversarial justice dispensation in following words,

> "Interminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternative forum,

[2] https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard
[3] *Guru Nanak Foundation v. Rattan Singh & Sons* AIR 1981 SC 2075.

> less formal and speedy for resolution of dispute providing procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditions disposal of their disputes has by the decisions of the Courts being clothed with the 'legalese' of unenforceable complexity."

The dispute resolution process has failed to appreciate this perspective that the disputants must own their dispute[4] and should also learn the resolution process which is very simply possible if they resort to mediation or conciliation compared to litigation or arbitration. Owning a problem and attempting to resolve it with the help of conciliator or mediator is a new perspective which Indian litigants are gaining nowadays.

Arbitration and Conciliation Act, 1996 under its section 30 provides that an arbitrator may use mediation, conciliation or other procedures in order to reach on a settlement. We know that section 89 of the Code of Civil Procedure, 1908 provides that the judge will encourage the parties to resolve their disputes by way of ADR mechanism. The constitutional validity of section 89 was upheld in Salem Advocate Bar Association v. Union of India[5]. Supreme Court[6] observed that, "In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting

[4] Simon Roberts, 'Mediation in Family Disputes' *The Modern Law Review*, Sep., 1983, Vol. 46, No. 5 (Sep., 1983), pp. 537-557 at 538.
[5] (2003) 1 SCC 49.
[6] (2003) 1 SCC 49, para 10.

to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

In India, in order to create better and efficient conditions for investment and to promote the rule of law, the cost-effective timely resolution of disputes is necessary. Therefore, we amended Arbitration and Conciliation Act, 1996 in 2015 and 2019. We also brought the idea of fast-track arbitration and plugged all the loopholes which were making the ADR processes dilatory and expensive. Ministry of Law and Justice is trying very hard to create an ecosystem where in justice may be delivered in speedy and cost-effective manner. Litigation management via digital tools like jusIT, LIMBS NJGD is doing great however creating the digital infrastructure suited to Indian disputants and stakeholders will not bring any tectonic shift in the justice dispensation process. E-Courts services, e-legalix, eCMT, Telelaw, Nyaya Bandhu and Nyaya Mitra have been started. India released its ODR Policy in 2021.

Code of Civil Procedure, 1889, 1882, 1908, Arbitration Act, 1940, The Industrial Dispute Act, 1947, The Family Courts Act, 1984, Legal Services Authorities Act, 1987, The Arbitration and Conciliation Act, 1996, The Micro, Small and Medium Enterprises Development Act, 2006, The Commercial Courts Act, 2015, The Consumer Protection Act, 2019 and many other legislations are creating provisions for mediation. Pendency of litigations has tested the patience of litigants and now litigants seem quite unhappy about the prevailing legal system in India. Arbitrations and tribunalization of Justice could not deliver what was desired and now this is high time that mediation be invoked in any form and every form to resolve disputes in India. Law Commission of India in its 129th Report recommended for referring disputes to mediation for resolution.

However, role of ADR must be seen as a supportive to regular litigation and justice dispensation process and we are totally mindful of the fact that ADR processes including mediation cannot be a replacement of regular litigation process. This idea that a neutral third-party technical expert having no legal expertise can dispense justice is a folly. ADR and mediation may open a floodgate for people having no legal knowledge venture in dispute resolution

process affecting the quality of delivery of justice[7]. Creating a balance between ADR and regular litigation is challenging.

II. Mediation, Arbitration and Conciliation

We often confuse that mediation, arbitration and conciliation are same. However, these three are very distinct and separate in its meaning, contour and colour. Arbitration is like adjudication where the arbitrator arbitrates the issues referred by the parties. Mediation and conciliation are different from arbitration. Arbitration and Conciliation Act, 1996 does not define these terms. These are amicable processes where in mediator or conciliator resolves disputes in amicable manner. Conciliator attempts to bring a settlement between disputants and mediator helps disputants to make their own solutions to problem. Mediation is a self-determined solution, while conciliation and arbitration solutions are imposed by neutral third party. Section 3(h) of Mediation Act, 2023 defines mediation[8].

Yajnavalkya Smriti provides for three kinds of courts e.g., Puga, Sreni, Kula.[9] Puga were locals, sreni was merchant guilds and kula were members of particular community authorized to adjudicate upon disputes. Panchayat Raj system and the idea of 'Panch Parmeshwar' is very akin to mediation proceedings. Role of conciliator and mediator is very different in negotiation of a dispute mediator plays a very proactive role compared to conciliator. Mediator helps the parties to own the dispute and work out and accept the available resolutions upon the disputes.

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[7] Harry T. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' *Harvard Law Review*, Vol. 99, No. 3 (Jan., 1986), pp. 668-684 at 683

[8] "Mediation" includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute."

[9] M.K. Sharan, *Court Procedure in Ancient India* (Abhinav Publications, 1978).

In developing nations, the use of mediation has been very successful like in South Africa mediation is used in complex disputes and arbitration is seen with revulsion. In all government contracts mediation clauses are almost must[10].

Section 12A of Commercial Courts Act, 2015 provides for pre-institution settlement and mediation. Mediation proceedings in India commence with the appointment of a mediator. A mediator can be appointed by mutual agreement between the parties or by the mediation centre. The mediator must be an impartial and independent third party with no personal interest in the outcome of the mediation.

Once a mediator is appointed, they will meet with the parties separately to discuss the issues in dispute. The mediator's role is to facilitate communication between the parties and assist them in reaching a settlement. The mediator will not impose any decision on the parties but will suggest possible solutions to resolve the dispute. The mediation proceedings are structured in a way to ensure confidentiality of the mediation process. Section 75 of the Arbitration and Conciliation Act, 1996 states that all mediation proceedings are confidential, and the mediator and the parties involved are bound by confidentiality. This ensures that any proposal, statement or admission made during the mediation sessions remains confidential and cannot be used as evidence in any legal proceedings. In India many private mediation institutions like Indian Institute of Arbitration and Mediation (IIAM), Centre for Advanced Mediation Practice (CAMP), and Foundation for Comprehensive Dispute Resolution (FCDR) are working.

Mediation may be online, ad hoc/private, court-annexed, institutional, community, municipal and international. The Mediation Act, 2023 provides for establishment of a Mediation Council of India, Mediation Service Providers, Mediation Institutes and provides for community mediation also. Mediators will not be bound by Code of Civil Procedure, 1908 and Indian Evidence Act, 1872 but will be guided by the principles of objectivity and fairness and protect the voluntariness, confidentiality, and self-determination of the parties, and the standards for professional and ethical conduct. The first schedule of Act provides

[10] Ronald E. M. Goodman, 'Conciliation, Mediation and Dispute Resolution' *Proceedings of the Annual Meeting* (American Society of International Law), Vol. 90, Are International Institutions Doing Their Job? (March 27-30, 1996), pp. 75-78 at 77.

for unfit cases of mediation. Mediation Act, 2023 provides for mandatory pre-litigation mediation. The Act also provides for mandatory registration of mediated settlement agreement, completion of mediation in 120 days and if needed an extension of 60 days may be given. The Act also provides for pre-litigation mediation and interim relief may be sought in exceptional circumstances. The Act provides for maintaining confidentiality in mediation proceedings. The Act also provides for online mediation.

The Mediation Act has been drafted akin to Arbitration and Conciliation Act, 1996 wherein Court plays a supportive role and mediation settlement agreement is binding like a decree of civil court. Mediation is highly flexible in its character and it can be blended with other ADR techniques like conciliation and arbitration. Mediation-arbitration (Med-Arb) and arbitration-mediation (Arb-Med) are such hybrid blended process which can cater the needs of disputants. In Med-Arb if mediation fails the mediation converts in arbitration[11]. In Arb-Med once an award is drawn the same is kept in sealed cover till mediation succeeds and if it does then award is destroyed[12]. Hybrid form of dispute resolution can be very promising for managing conflicts. However, what shall be the best procedure to be adopted shall be left to the parties, counsels and mediators. If procedural justice and compliances are issues parties may adopt Med-Arb an if high quality voluntary settlement is of paramount value parties may resort to Arb-Med[13].

III. Legality of Mediation

We know that still Mediation Act is a newly passed Act and now a pertinent question arises whether Indian litigants can resort to mediation even now. As we know that section 30 of Arbitration and Conciliation Act, 1996 allows the use of mediation. Supreme Court of India in Afcons infrastructure and Ors. v. Cherian Verkay Construction and Ors[14] held that ADR processes can be resorted to even

[11] HENRY J. BROWN AND ARTHUR MARRIOTT Q.C., ADR PRINCIPLES AND PRACTICE, 3rd ed (Sweet & Maxwell, 2012).
[12] *Ibid.*
[13] William H. Ross and Donald E. Conlon, *Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration,* THE ACADEMY OF MANAGEMENT REVIEW, Vol. 25, No. 2 (Apr., 2000), pp. 416-427 at p. 425.
[14] (2010) 8 SCC 24.

without a prior agreement to this effect provided all parties are consenting to resort to ADR processes and the settlement may be converted in decree of Civil Court under Order 23 Rule 2 of Code of Civil Procedure, 1908. The parties to the agreement are bound by the terms and conditions of the settlement agreement. If one of the parties breaches the terms of the settlement agreement, the other party can initiate legal proceedings for enforcement. The enforceability of a mediated settlement agreement is similar to that of a court judgment. However, the entire mediation process is confidential, and the settlement agreement cannot be challenged or altered in any other legal proceedings.

Speaking about importance of mediation Supreme Court[15] observed that,

> "Lawyers should advise their clients to try for mediation for resolving the disputes especially where relationships like family relationships, business relationships are involved, otherwise the litigation drags on for years and decades often ruining both the parties. Hence, the lawyers as well as litigants should follow Mahatma Gandhi's advice in the matter and try for arbitration/mediation."

The fit cases for a mediation are, dispute between employer and employee, dispute among shareholder, dispute amongst neighbours, partners, family members, husband and wife, insurer and insured, licensor and licensee, landlords and tenants, real estate developers and customers, bankers and customers, suppliers and customers. However, suits like, representative suits, dispute of election of public office, suit for grant of probate, cases of fraud, falsification of documents, forgery, impersonation, coercion, claims against minor or mentally challenged, suit for declaration of title and criminal offenses are not amenable to mediation proceedings[16]. Mediation may also be used for religious conflicts[17]. In

[15] *B.S. Krishna Mutry & Another v. B.S. Nagaraja & Ors.* (2011) 15 SCC 464.
[16] Schedule I of Mediation Act, 2023 and *Afcons infrastructure and Ors. v. Cherian Verkay Construction and Ors* (2010) 8 SCC 24.
[17] Sukhsimranjit Singh, 'Dispute Resolution' *GPSolo*, Vol. 36, No. 1, Access To Justice (January/February 2019), pp. 62-63 at 62.

resolving intellectual property disputes mediation has been found very useful due to its speed, confidentiality, cost-effectiveness, informality and voluntariness[18].

Mediation is advantageous for variety of reasons. It brings autonomy, empowerment, speed, confidentiality, creativity, real and effective solutions to the problems. Mediation offers several advantages over traditional legal methods of dispute resolution. The first advantage is that mediation is cost-effective, and the parties involved can save significant amounts of money in legal fees. The mediation process is generally quicker than traditional legal methods, and the parties can avoid lengthy court proceedings and legal battles. Another advantage of mediation is that it is less adversarial than traditional legal method. Mediation prioritizes co-operation, negotiation and compromise over litigation. The parties involved can work together to reach a settlement that works for both parties, rather than having a judge to impose a decision on them. Mediation focuses also on preservation of relationship of parties and removes animosity[19].

The issue of confidentiality is very important in the whole process of mediation. Section 75 of Arbitration and Conciliation Act, 1996 and section 23 of Mediation Act, 2023 provide for it. It applies in the whole mediation process at every stage to all admissions, proposals, contracts, apologies, opinions, suggestions, promises, preliminary emails, phone calls and written statements.

Supreme Court[20] on confidentiality in mediation held that,

> "If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the 'Mediation has been unsuccessful'. Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not

[18] James F. Smith, 'Mediating International Intellectual Property Disputes' *Journal of the Indian Law Institute*, Vol. 39, No. 2/4 (April-December 1997), pp. 238-259 at 259.
[19] Neha Lakra, 'Need of Mediation Laws in India' 2.2 *JCLJ* (2022) 482 at 487.
[20] *Moti Ram(D) Tr. Lrs. & Anr. v. Ashok Kumar & Anr.* (2011) 1 SCC 466; *Perry Kansagra v. Smriti Madan Kansagra* (2019) 20 SCC 753.

> amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process."

In custody of child cases the court may have access to natural and spontaneous interaction of child with counsellor to know the best interests of child and confidentiality of mediation here will not constrain the court[21].

No information can be sought about mediation through Right to Information Act also[22] such information is exempted as the same is passed in fiduciary capacity and disclosure of same serves no public interest.

IV. Mediating a Dispute

Mediating a dispute involves many stages and the process of mediation is highly flexible. Mediator is in-charge of process and parties are in-charge of problem. Mediator makes opening statement, sets the agenda for mediation, deploys suitable negotiation techniques, assists parties to reach a settlement. At every stage verbal signs e.g., reflection, reframing, extending, clarifying, summarizing and non-verbal signs like smile, eye contact, posture, mirroring and tapping are very important. Mediator must be trained in all these verbal and non-verbal communication.

Mediation style is not dependent on 'one size fit all' formula. It can be facilitative or evaluative. The negotiations may also be position-based or interest-based in the whole mediation process. Facilitative mediation is that disputants can resolve dispute in a neutral, safe and supportive environment[23]. Evaluative method believes that disputants get the best guidance in resolution when the mediator is objective, knowledgeable and experienced[24]. Position-based bargaining is first negotiation strategy. Parties due to high ego and their position do not move away from the position of being proven right at all costs. But if a mediator can help the

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[21] *Perry Kansagra v. Smriti Madan Kansagra* (2019) 20 SCC 753.
[22] *Rama Agarwal v. PIO, Delhi State Legal Service Authority*, CIC/SA/A/2015/000305.
[23] Ellen A. Waldman, 'The Evaluative- Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence" *Marquette Law Review* 82(1), 1998
[24] Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding To Conflict Through Empowerment and Recognition* (San Francisco, Jossey-Bass Publishers, 1994)

parties to understand the fears, needs, desires, real interests and concerns then they may move from position-based bargaining to interest-based bargaining. Position-based bargaining is akin to adversarial bargaining, in this the goal is victory, and it digs into position. This kind of bargaining is misleading uses tricks, applies pressure, and insists on position. While interest-based bargain is wisdom-based, problem-solving, wherein both parties search for solution. It focuses on interests of parties, uses fair principles and is open about interests, it insists on alternatives available to parties, uses reason for solving problems of parties.

The techniques adopted by mediator oriented to disputant may be for gathering information from the party, pressing the party for something, compensating the party for making concession, educating party for specific agreement, reflexive for adding humour and bringing lightness in negotiation, empowering party to reach an agreement, uses distributive technique to criticize a side's position, using techniques of inaction to monitor the dispute. Regarding the relationship between disputants, the mediator uses smoothing and cooling technique to develop trust, fixes agenda of mediation, integrates the package issue, uses problem solving technique and represents parties to each other. He also uses third parties to obtain assistance on technical issues and if the need be he shares the conflicts with others[25].

The outcomes and benefits of mediation regarding disputants are reaching agreement, bringing satisfaction, improves efficiency, improves relationship, brings favourable agreements, restores justice, and secures higher compliances of settlement. The successful mediation also builds reputation of mediator and improves his social skills. It also decreases violence by third parties and brings favourable agreements for third parties[26].

In divorce and custody cases structured mediation has been found very useful. Explicit and implicit structuring has potential to deal with negotiation and mediation of divorce cases and custody cases where egos are very high and

[25] James A. Wall, Jr., John B. Stark and Rhetta L. Standifer, 'Mediation: A Current Review and Theory Development', *The Journal of Conflict Resolution*, Vol. 45, No. 3 (Jun., 2001), pp. 370-391 at 376.
[26] *Ibid* at 381.

emotions are very high. This process has potential to show the negative deadlocks in different perspective to parties and to help them reach a possible settlement[27]. This way it removes a lot of negativities from the disputes.

Negotiating the dispute as position or interest best bargain is really very challenging. If two persons are fighting for an orange, then adversarial remedies will encourage parties to take half-half each. But ADR processes may be interested to know whether parties need 'peel' or 'pulp'. That will be a completely win-win position for the parties.

A mediator identifies the issues in case at hand, plans his presentation, and prepares a case summary. He keeps himself detached from the problem and does not work like a 'messiah' rather encourages the party to own the problem and prepare a solution for the same. Mediator understand the needs, fears of opponent and adopts a problem-solving attitude, breaks the coldness in the relationship of parties, helps to create a dialogue, and finally by deploying a mix of strategies help the parties to reach an amicable settlement. The mediator has to maintain confidentiality at all level of mediation. He has to be very clear about sharing of information as to what is to be shared and what not. Mediator must be fully familiar to all sets of facts, objective criteria, BATNA, WATNA, Realistic alternatives, cost-benefit analysis of adversarial remedies, carefully negotiating settlement package. Mediator has to encourage all the time to parties to reach on an amicable settlement. A mediator introduces himself and help the parties to understand the problem and he also understands the needs and interests of the parties. He defines the problem and creates options. He evaluates the options and help the parties to reach settlement.

V. Challenges

Mediation is a challenging job. Mediation often fails due to Issues relating to reputation, egos of parties, face-saving attitude, high emotions and a being seen

[27] Lois Vanderkool and Jessica Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' *Family Relations,* Vol. 32, No. 4 (Oct., 1983), pp. 557-566 at 563.

as a sign of weakness[28]. Often it is reported in cases where party is a giant enterprise that mediating a dispute looks like a sign of weakness. Such giant may take a position that their business position does not let them use the mediation technique for dispute resolution. The hierarchies in institutions may also create constraints in mediating a dispute. A senior might overlook the insightful and pragmatic solutions suggested in forms of mediation by junior colleague. The commercial reputation of enterprise may also create a constraint as it may not let the enterprise opt the technique of mediation as it may give a message to the society that enterprise has compromised with the opposite party and it might be seen as a sign of weakness. In competitive worlds losing to opposite party may result in loss at many levels and this may be a reason why often mediation is not resorted by commercial enterprises. Top executives of an enterprise may not be interested to take part in the mediation process as they might feel that they are too senior to participate in mediation process. Making mediation popular in India is very challenging task as litigation often is seen an instrument of victory against the party and not like an instrument of delivering justice. In such situation parties may always feel that mediation is a sign of weakness and this will repel them not to resort the process of mediation for dispute resolution.

The next big challenge in the process of mediation is to use 'Online Dispute Resolution' process. India is a very upcoming economy which is creating a digital infrastructure on an unprecedented scale now. In days to come the Indian cities will be equipped with all efficient technologies and internet facilities like robotics, technology 4.0, artificial intelligence, encryption, ChatGPT, LML etc. which will make online dispute resolution process supported by mediation easy. India launched its ODR policy by NITI Aayog on 26th November, 2021[29]. Online dispute resolution is becoming popular day by day. However, resorting to ODR for dispute resolution needs a lot of encouragement.

In India mediation has largely been court-annexed and switching over to institutional and private/ ad hoc mediation will be a transitory process which will

[28] THOMAS P. VALENTI AND TANIMA TANDON, 'MEDIATION IN INDIA PRACTICAL TIPS AND TECHNIQUES' at 406 in Shashank Garg (Ed.), *Alternative Dispute Resolution The Indian Perspective* (New Delhi, Oxford University Press, 2018).

[29] pib.gov.in/PressReleaseIframePage.aspx?PRID=1776202#:~:text=ODR is the resolution of outside the traditional court system.

take time to evolve in India. In mediation maintaining the ethics and high level of professionalism is very challenging A mediator is an ethical, neutral third party which analyzes the interests of parties and facilitates them to evaluate their interests and solve their problem. He is not messiah. He is a perceptive facilitator who helps the parties to find realistic solutions for their problems. Mediation is not panacea for all problems.

Statistical analysis of data of cases referred for mediation at Delhi and Bengaluru are not very encouraging. This shows that on average 2 to 4% cases were referred for mediation[30]. Likewise in Bombay also data is not very encouraging in year 2019 out of 1168 only 2 cases were settled by mediation and in the year 2020 out of 1259 cases only 4 cases were settled by mediation[31]. The mediation is still in its nascent stage and it needs a lot of encouragement. Outbreak of COVID-19 has raised the number of applications for dispute resolution via mediation. Voluntary meditation by parties has not taken off in India and it needs a strong push by everyone[32]. According to NALSA Mediation Report April 2022 to May 2022, 398 ADR Centres are functional in India, 569 Mediation Centres are functional, 5320 Judicial Officers Mediators, 8423 Lawyers Mediators, 2863 Any other Mediators are available and 11820 cases were settled via mediation[33]. In India currently 958 mediation centres are working and 19158 cases have been settled via mediation[34]. NALSA has created a web portal where parties can register for dispute resolution via mediation[35].

On Mediation Bill, 2021 a standing committee was appointed to report on certain clauses of bill in the chairmanship of Mr. Sushil Kumar Modi. The committee held 10 meetings and taking in to consideration the recommendation of Mediation and Conciliation Project Committee of Supreme Court, lawyers,

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[30] https://delhicourts.nic.in/dmc/statistical.html and http://nyayadegula.kar.nic.in/statistics.html

[31] Maharashtra State Legal Services Authority, 'Statistical Data' (2020) MSLSA <https://legalservices.maharashtra.gov.in/1122/Statistical-Data>

[32] Sahil Kanuga and Shraddha Bhosale, 'Mediation of Commercial Disputes in India' 7.2 *NLUJ LR* (2021) 281 at 295.

[33] https://nalsa.gov.in/statistics/settlement-through-mediation-report-april-2022-to-may-2022

[34] https://nalsamediation.nic.in/

[35] https://nalsamediation.nic.in/registration.php

judges, academicians made many recommendations[36]. The committee submitted its report on 13th July, 2022 with many suggestions like mandatory pre-litigation mediation might delay institutions of suits in court and tribunal. The committee suggested that mediation must be completed in 60 days and extension of 60 days must be allowed in place of 180 days. The committee also recommended that for interim relief in pre-litigation mediation and said that the exceptional circumstances must be properly defined for such interim relief. The committee recommended that Mediation Council of India must be a lone regulator for all mediation institutions and all mediation service providers. In appointment of members for Mediation Council of India, persons having expertise in mediation, must be appointed. The committee also recommended that breach of confidentiality must be penalized and registration of settlement agreement must be made optional by parties. The committee recommended that international mediation must be brought under the coverage of mediation bill. Many changes have been incorporated in the Mediation Act, 2023.

Rashika Narain and Abhinav Sankaranarayanan[37] recommend that India must have a formal legislative regulatory framework of mediation in the line of The European Directive on Mediation, National Consultative Council on Family Mediation (France), The Act on Promotion of Use of Alternative Dispute Resolution (Japan), Uniform Mediation Act (USA). Singapore which is a hub for international commercial arbitration passed Mediation Act in 2016 and even this Act could not cover all aspects of mediation[38]. Legislative regulatory framework needs time to evolve and India is not exception to it.

In India mediation has been largely court-annexed. There are many myths about private mediation like it is anti-lawyer, after opting mediation parties cannot go for litigation, private mediation settlement is not recognized by courts, private mediators are not recognized by court, litigation is a precondition before any business mediation, after arbitration mediation cannot be resorted to, mediation

[36] Poorna Shree, *The Saga of Mediation Bill, 2021'* 2.4 JCLJ (2022) 1916 at 1922.
[37] Rashika Narain and Abhinav Sankaranarayanan 'Formulating a Model Legislative Framework for Mediation in India Formulating A Model Legislative Framework For Mediation In India' (2018) 11 *NUJS L Rev* 75 at p. 102
[38] Dorcas Quek Anderson 'Comment: A Coming of Age for Mediation in Singapore? Mediation Act', 2016 (2017) 29 *SAcLJ* 275.

settlement agreement are inaccessible due to confidentiality issues. All these myths are not tenable. Mediation process does not create any of aforementioned constraints[39].

Mediation has been projected as anti-lawyer process but the reality is that a lawyer can be a better mediator compared to others as the lawyer only knows the legal intricacies and demerits of adversarial processes so he is always in better position to suggest the parties the BATNA & WATNA which can ultimately help the parties to reach a settlement[40].

Mediation has to maintain the essence of voluntariness and if we resort to idea of making the mediation mandatory it will lose its sheen and efficiency and mediation needs to seen as strength of parties not as their weakness[41]. The mediation process will need a lot of work in development of infrastructure in India and training of human resources and support staff is the biggest challenge. Establishment of mediation centres at district level and appointment of coordinator is very challenging[42].

In negotiating a mediation, it has been found that minority disputants and mediators have been treated less fairly and disputants have been settled for less money as compensation. Attorneys have not chosen mediators from diverse group which has resulted in poor representation of ethnic minorities. Professional association and mediation service providers have to create opportunities for mediators from diverse background and have to make mediation equally strong as traditional litigation process[43].

One of the challenges will be about quality of mediation services provided by mediators. Wealthy disputants may resort to professional mediation services and

[39] Raj Panchmatia and Jonathan Rodrigues, 'Legitimacy of Private Mediation in the Pre-Legislation Era: Busting Myths with Facts' 2021 SCC OnLine Blog Exp 87.
[40] Lim Lei Theng and Joel Lee, 'A Lawyer's Introduction To Mediation' (1997) 9 *SAcLJ* 100 at 114
[41] Tanisha Jain, *Increasing Importance of Mediation*, 2.3 JCLJ (2022) 1209 at 1213.
[42] Sudhir Kumar Jain, 'Implementation of Mediation in District Courts: Issues, Challenges and Solutions' 1.1 *VSLR* (2019) 1 at 4.
[43] Sharon Press, 'Dispute Resolution: Court-Connected Mediation And Minorities' *GPSolo*, Vol. 30, No. 6, Holiday Legal Themes (November/December 2013), pp. 72-73 at 73.

others may resort to public agencies. Likewise complex matters requiring expertise may go to professional mediators and non-complex matters may go to lay mediators of public agencies[44]. Especially in Indian context cost of mediation will be very important and containing it will be very challenging for Indian administration.

Maintaining neutrality in mediation is very challenging. Keeping mediation free of biases is very challenging. Mediators have a lot of information and if he holds certain biases against either of parties it can affect the success of mediation. On average biased mediator in favour of one of disputants succeed more than unbiased mediator. Likewise, mediator having more information of disputants is likely to succeed more compared to a mediator having less information of disputant[45]. However, learning about the biases and turning it in favour of party needs skill which mediator needs to evolve.

VI. Conclusion and Suggestions

The legal framework of mediation in India has evolved in recent years to promote mediation as an alternative method for dispute resolution. Mediation offers several advantages over traditional legal methods of dispute resolution, including cost-effectiveness, expediency, confidentiality, and a less adversarial approach. Mediation provides a way for the parties to take control of their disputes and work together to reach a mutually beneficial solution. Prof. V.K. Ahuja says that mediation should be resorted to all pending cases and court must come down heavily upon those who are deliberately failing mediation[46]. On the basis of above deliberations following suggestions may be submitted for effective use of mediation in dispute resolution process.

i. Mediation Act must be encouraged and used as much as possible.

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[44] Ronald M. Pipkin And Janet Rifkin, 'The Social Organization In Alternative Dispute Resolution: Implications For Professionalization Of Mediation' *The Justice System Journal*, Vol. 9, No. 2, Alternative Dispute Resolution (Summer, 1984), pp. 204-227 at 223.

[45] Burcu Savun 'Information, Bias, and Mediation Success' *International Studies Quarterly*, Vol. 52, No. 1 (Mar., 2008), pp. 25- 47at 44.

[46] Prof. (Dr.) V. K. Ahuja, *Krishna and Mediation*, at 186 (National Law University and Judicial Academy, Assam, 2023)

ii. Mediation negotiation training and courses must be started in universities and academic institutions.
iii. Parties must be encouraged to adopt mediation as a dispute resolution process.
iv. Ad hoc/private mediation and institutional mediation both must be promoted.
v. Training of mediators and their certification must be done by any agency certified by Government.
vi. Training judges and advocates for mediation must be promoted at all level.
vii. Fees of mediators must be regulated by government.
viii. The fit cases and subjects of mediation must be promoted for dispute resolution.
ix. Blending of mediation with other forms of alternative dispute resolution or adversarial resolution processes must be promoted.
x. Time-bound mediation must be encouraged like fast-track arbitration.
xi. Mediation must be seen as a noble profession like lawyering.
xii. Mediation has to be promoted at District level especially in rural areas because access to justice in rural areas has a lot of constraints.

"An ounce of Mediation is worth a pound of Arbitration and ton of Litigation".

Joseph Gymbaum