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Mediation in Marital Disputes

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ABSTRACT

Mediation, an ancient and globally recognised method of dispute resolution, has regained prominence as a vital alternative to traditional litigation, particularly in India. This article delves into mediation's historical roots, deeply embedded in India's cultural and community practices, such as the Panchayati Raj system. The advent of British rule saw a shift towards formal litigation, overshadowing these traditional methods. The resurgence of mediation in India has been driven by the need to address the inefficiencies of the overburdened judicial system. Significant legal enactments, including Section 89 in the Code of Civil Procedure (CPC) in 1999 and the enactment of the Arbitration and Conciliation Act of 1996, have established mediation as a cornerstone of alternative dispute resolution (ADR) in India. The article highlights the disputes suitable for mediation, including marital and family disputes, civil, commercial disputes, while identifying cases where mediation is less appropriate. The mediation process, emphasising neutrality, confidentiality, and mutual agreement, offers numerous advantages over traditional litigation. It resolves disputes more efficiently, preserves relationships, and fosters a collaborative approach to conflict resolution. As India moves toward formalising mediation through legislative efforts like the Mediation Act of 2023, this article argues that mediation is an alternative and a crucial mechanism for delivering timely, accessible, and satisfactory justice. Embracing

mediation represents a return to India's traditional values and a forward-looking solution to modern legal challenges.

Introduction

Non-indigenous methods of resolving disputes outside the legal system are nothing new; people worldwide have long used them. Arbitration, negotiation, conciliation, judicial settlement, mediation, and other dispute resolution methods are becoming increasingly common in India and around the globe. The alternative dispute resolution (ADR) movement began in the United States in the 1970s as a social movement to promote mediation to settle disputes. However, it soon developed into a legal movement to deal with the issue of litigation delays and costs brought on by the overburdened court system (Brown et al., 1999).

ADR was used to resolve workplace disputes in Australia much earlier than the development of the modern ADR movement. The Commonwealth Parliament passed the Conciliation and Arbitration Act in 1904. As a result of the passage of this Act, the federal government was given the authority to enact regulations governing arbitration and conciliation to avoid and settle labour disputes across all states. Due to the creation of the Independent Mediation Service of South Africa (IMSSA) in 1984, several institutions in that country were able to develop their mediation skills during the 1980s. By this time, Codes of conduct for mediators have also been established in Canada (Jyothirmai et al., 2018).

During mediation, the mediator, known as a neutral third party, meets with the parties to discuss the disagreement and attempt to resolve the conflict during the process. The role of the mediator is to help the disputing parties understand the issues at hand, define their priorities, re-evaluate potential areas of compromise, and work towards an acceptable agreement for both parties. The focus or the common goal throughout the process is "the resolution" (Dunnu, 2022). Lawyers, disputants, and mediators all attempt to resolve the dispute. Additionally, mediation emphasises preserving the current relationship more than focusing on past events. Mediation aims to comprehend the underlying motives and interests causing the conflict by finding a way to work out a compromise between the two sides. It achieves this by reaching acceptable resolutions for both parties without delving into the intricacies of game blame (Khanna, 2018).

History Of Mediation

Mediation is on the rise and has long been prevalent in human civilisation. Informal mediation has always been a part of the culture around the globe. It has always been customary to resolve conflicts with the aid of friends, family members, elders, co-workers, etc. In industrial and international relations, formalised mediation has long been used to resolve disputes *("Mediation and Conciliation",* n.d.).

It entered all areas of conflict resolution just recently—roughly 25 years ago. Some of the earliest examples of mediation may be found in the ancient Greek and Roman civilisations (Jyothirmai et al., 2018). Mediation's roots can be traced back to the US Roscoe Pound Conference. The conference was called upon by legal scholars, judges, advocates, and the general public to review the current legal system and address the problems of delays in case closure and access to speedy justice. It was here that mediation was introduced as an alternative to lengthy court proceedings, which was considered speedy and time-bound (Devi & Sai, 2018).

Mediation has its roots in ancient times, and it has been a part of Indian culture for the ages and again gained momentum in the late 20th century. The early Aryans, around 4000 B.C., are known to have invoked the philosophy of mediation on principles of wisdom, reason and prudence. They first propounded the theory of divine law, which, according to them, governed both heaven and earth, and the cases were decided on the principles of the theory. Over time, philosophers debated the different methods concerning dispute resolution, existing laws, and other law topics. The invasion of Afghans by the British has caused racial, religious and cultural differences in the past 1000 years. However, each era from ancient times to the Mughal period provides evidence of some mediation as a dispute resolution method. (Bhati & Pandey, 2021).

The Panchayati Raj system in India is the perfect example of mediation. Even "Kautilya's Arthasashtra" can be used to identify the origins of mediation. It was widely used in India before the British arrived amongst India's business communities (Devi & Sai, 2018). Business organisations asked respected, impartial, and neutral businessmen to resolve disputes among the business community—arbitrate and mediate disputes using informal dispute resolution methods. These methods were a mix of today's arbitration and mediation (Xavier, 2006).

Another example of such type is the dispute resolution mechanism used by tribals in India. The tribal head or Pancha-Tribal Chief is the one who imposes a binding decision on the disputing parties. To find

a solution to the dispute, the disputing parties were required to meet before a Pancha to discuss their dispute. If no solution is arrived, they are again supposed to meet the Pancha, but this time, the other interested tribe members are also present for reconciliation. An effort is made to compromise in front of all, but if negotiations fail, the Pancha makes a binding decision for both parties. This decision by Pancha is made with the interest and welfare of the tribe in mind to help maintain harmony and prosperity among its people. All the proceedings are oral, and no record of them is kept. Despite the lack of legal sanctions and authority, such informal modes of dispute resolution were widely acknowledged by Indian disputants (Xavier, 2006).

The Indian Way to Mediation

As we all know, India has long practised informal means of dispute resolution. It was practised by village and tribe heads who gave binding decisions, keeping the best interests of its people at the centre. However, the formal dispute settlement system, where the disputing parties were required to file a case before a competent authority, replaced the informal method of dispute resolution with the arrival of the British in India. As a result, the Indian dispute settlement system lost its significance, and litigation rose to become a common form of dispute resolution. The current justice delivery system should be changed to one that is more cost-effective, time-saving, respects relationships, boosts satisfaction, is time-bound, and gives people the last say.

Several studies have been conducted by the Law Commission of India to find solutions to the backlog of court cases and ways to impart speedy justice in India. Several recommendations have been provided in the 124th and 129th Law Commission reports ("Law Commission Report", n.d.). Justice Malimath Committee, in a study on "Alternative Modes and Forums for Dispute Resolution", accepted the suggestions made by the law commission in their respective reports and said that there is a dire need to change the law so that the litigants make use of arbitration or mediation to resolve their disputes (Ahuja, 2020). Moreover, in 1996, Chief Justice A.M. Ahmedi established a nationwide study team to work on case management and dispute resolution practices. This study was undertaken in collaboration with the United States, and later, the team proposed procedural modifications such as legislation revision that permitted mediation (Skadmin, 2022).

The impact of Justice Malimath's Committee recommendations, law commission reports 124th and 129th, and a committee on subordinate legislations (11th Lok Sabha) was so great that 1997 an amendment to the Code of Civil Procedure was introduced in the Rajya Sabha. The bill proposed the

following recommendations: “that every effort is made to expedite the disposal of civil suits and proceedings” (Ahuja, 1997). Further, the amendment recommended inserting Section 89, referring to the “settlement of disputes outside the court”. In 1999, section 89 was inserted in the 1908 CPC, which came into force on 1 July 2002. Section 80 (1) of the CPC says that “where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement which may be acceptable to the parties, the court shall formulate the terms of settlement give to the parties for their observation and after receiving the observations of the parties, the court may formulate the terms of a possible settlement and refer the same for mediation.”. according to Section 89 (2) whenever a dispute has been referred for mediation, the court shall make every effect to settle the dispute and come to a compromise, in accordance to the procedures as describes in the section (“Law Commission Report”, n.d.).

To give the disputing parties speedy access to justice, alternative dispute resolution methods like Lok Adalat, mediation, conciliation, arbitration, etc, were adopted, reinforcing the long-standing informal modes of dispute resolution (Dunnu, 2022). Modern mediation in India is the result of three enactments, namely The Arbitration and Conciliation Act 1996, The Legal Services Authorities Act 1987 (LSA), and lastly, The Code of Civil Procedure *(“Mediation and Conciliation”,* n.d.).

The first recognised legal standing to mediation in India was given by the Industrial Disputes Act of 1947. According to Section 4 of the Act, the conciliators were tasked to responsibly mediate and promote the settlement of labour disputes. The Act established particular procedures for conciliation proceedings. After establishing the Legal Services Authorities Act of 1987, the Indian legislature created the National Legal Services Authorities Act as a central authority under the supervision of the Hon'ble Chief Justice of India. Further, to strengthen this stand, the amendment in 1997 was made by inserting section 89 in the CPC, giving it further impetus *(“Mediation and Conciliation”,* n.d.; Sharda, 2019).

Madras High Court established the nation's first court-annexed mediation centre on April 9, 2005. Mediation has advanced quickly through the court-annexed system as a result of its notable success, the then-President of India, Dr APJ Abdul Kalam's endorsement of it during a personal visit to the centre, and the efforts of the Supreme Court of India's Mediation and Conciliation Project Committee (MCPC). Today, the Supreme Court, High Courts, and District Courts all have mediation centres where many skilled mediators, primarily attorneys, resolve conflicts referred by the courts in a variety of contexts, including personal, matrimonial, commercial, civil, real estate, intellectual property, and others

("Mediation and Conciliation", n.d.). The Supreme Court's decision to employ mediation in resolving the Assam- Nagaland Border dispute and the Ayodhya Babri Masjid-Ram Janam Bhoomi dispute itself speaks of its importance. Moreover, Senior Judges and other bar members who serve as mediators have held mediation in high regard ("*BW Online Bureau*". n.d.).

India recently enacted the Mediation Act of 2023, an independent law on mediation. Many statutes contain mediation provisions, such as the Code of Civil Procedure 1908, the Arbitration and Conciliation Act 1999, the Companies Act 2013, the Commercial Courts Act 2015, the Consumer Protection Act 2019, the Family Courts Act 1984, the Hindu Marriage Act 1955, the Legal Services Authorities Act 1987, and the Special Marriage Act 1954.

The Mediation and Conciliation Project Committee of the Supreme Court of India says that mediation is a developed and one of the most effective dispute resolution methods. It has been described as an established method of dispute resolution that has been practised since ancient times. As India is a signatory to the Singapore Convention on Mediation (formally the United Nations Convention on International Settlement Agreements resulting from Mediation), it is appropriate to enact a law governing domestic and international mediation (Bajpai, 2022).

The Singapore Convention defines "Mediation" as a process "whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute". This third party is the "Mediator" (Ahuja, 2020).

Mediation Act, 2023

India recently introduced the "Mediation Act" in 2023. The Mediation Bill, 2023, received the President's approval on 15 Sep 2023 as the "Mediation Act". The act recognises the provisions for -

a. Pre-litigation, online and community mediation encompasses "conciliation" to align with international standards.
b. The Act introduced a provision for enforcing agreements mediated domestically.
c. Fails to recognise and enforce mediation settlements or agreements that did not take place in India.
d. Mentions a provision to establish the Mediation Council of India to regulate mediators and mediation institutions.

e. It has also introduced provisions for setting time limits, maintaining confidentiality, and providing guidelines for appointing mediators.

India recently enacted the Mediation Act, which was necessary (Gulati, 2023). Moreover, India required such an enactment as it is not only cost-effective and voluntary but also gives the parties the right to express themselves, and the disputants are given a chance to sit, talk, and resolve long-standing issues. This act is expected to help the judiciary provide speedy access to justice to disputants and reduce the courts' workload.

Mediation Process

The process of mediation has been effectively explained by (Neill, 2022; Gumersalls, 2022) -

a. **Mediator's Opening Statement:** Here, the mediator introduces himself and summarises the mediation process, goals, and rules. He also encourages the parties to work together to settle their dispute.
b. **Disputants' Opening Statement:** In the second stage of the mediation process, the disputing parties shed light on the dispute, how it originated, or how they are affected. Both parties keep their side one by one without interfering in between. They also propose possible terms for resolving the dispute.
c. **Joint Discussion:** This is the third stage of the mediation process. The mediator might try to elicit direct responses from the parties regarding what was expressed in the opening statements. The time has come to address the root cause of the problem by working towards it.
d. **Private Caucuses:** After discussing their issues in a joint session, the parties, if willing, are again provided a chance to discuss the dispute privately with the mediator if required. This may happen once or several times as needed. These confidential meetings are considered to be the core of the mediation process.
e. **Joint negotiation:** The mediator may actively bring the parties back together to negotiate after caucuses, which is unusual. However, the mediator does not bring the parties back together until a settlement has been achieved or the time required for the mediation has passed.
f. **Closure:** The mediation has concluded. If an agreement has been achieved, the mediator may write down the main terms of the contract. The mediator may request that both parties sign the written summary of the agreement or advise them to have it reviewed by attorneys. The parties may create and sign a binding contract if they so choose. The mediator will examine any

progress achieved and inform all parties of their choices, such as meeting again later, moving to arbitration, or going to court if no agreement can be reached.

These steps aim to establish neutrality, raise awareness of and understanding, build relationships, win the parties' trust and confidence, create an atmosphere conducive to fruitful negotiations, encourage the parties to settle their differences amicably and take control of the process.

Mediation Types:

a. **Court-Referred Mediation**: Court-referred mediation involves cases sent for mediation under section 89 of the Civil Procedure Code of 1908.
b. **Private mediation**: In private mediation, a qualified mediator provides their services privately and charges a certain amount of money for the service they will provide to the general public, businesses, and governments to resolve disputes through mediation. Private mediation is an option for cases currently in court and not yet litigated.

Cases Fit For Mediation

The cases that are suitable to be mediated and the disputes that cannot be mediated have been listed.

a. Civil nature disputes that relate to contracts, commerce, and trades;
    i. Disputes concerning suppliers and customers
    ii. Disputes related to banks and their customers
    iii. Disputes between Builders/Developers and their customers
    iv. Landlord-tenant disputes
    v. Licensor and license disputes
    vi. Disputes between the insurer and insured
b. Disputes that arise among people because of their strained or damaged relationships;
    i. Disputes Related to Marriage
    ii. Maintenance issues
    iii. Conflict related to Custody of children and visiting rights
    iv. Disputes related to the division of property
    v. Disputes arising out of a partnership
c. Any dispute/conflicts that arise out of relationships where there is a need for reestablishing the existing relationships, such as;

i. Neighbour disputes
ii. Employers and employee disputes
iii. Disputes among societies/associations/ apartment owners, etc

d. Disputes related to tortious liability, which include;
    i. Claims for compositions in motor accidents and other accidents.
e. All sorts of consumer disputes;
    i. Where a **trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or 'product popularity.**

Cases that the court thinks are not fit to be resolved in mediation include;

a. Suits involving public interest
b. Cases that involve a grant of authority by the court after inquiry (grant of probate)
c. Cases that involve severe allegations of fraud
d. Cases requiring protection from courts, such as claims against minors
e. Suits for declaration of title against the government
f. Cases that involve prosecution for criminal offences that cannot be compounded

Why Mediation?

Conflicts are an integral part of human relationships, and several factors are responsible for disputes, such as misunderstandings, greed, ego issues, and lack of trust. No society has ever been spared from them, and we can find many instances from ancient times where conflicts occurred, and the consequences were disastrous. Mahabharata is an epic example; although lord Krishna tried to intermediate, all his efforts were unsuccessful (Mathur, 2021). Similar examples can be found in all societies and cultures. With changing times, the ways to resolve conflicts have changed. Nowadays, various conflicts, such as commercial, industrial, banking, family, matrimonial, employers and employees, landlords and tenants, property disputes, and border and neighbourhood disputes, can be resolved with mutual understanding. So, the age-old litigation system is not seen as the only way out.

Moreover, litigation is assumed to be costly and time-consuming, and conflicts keep escalating because the focus is on proving one party is correct and the other is an offender. Here, only one party wins the battle. It takes years for justice to prevail, resulting in dissatisfaction for both parties as a lot of time and

effort have gone into it. At times, it also affects the parties' health, as seen in the case of other family members (*"Alternative Dispute"*, n.d.).

As a result, the transition from adversarial methods of dispute resolution to alternative methods of dispute resolution is much required, and the same is on its way. ADR has advantages, such as being economical, cost-effective, and confidential, giving the parties more control over the process and outcome (Mathur, 2021). Moreover, when parties resolve their conflicts through ADR methods, they are more satisfied, and their relationships do not get damaged, as in the case of litigation, where a prolonged process leads to strained relationships between the parties. Here, the disputing parties sit with neutral third parties and amicably come to a settlement that best suits them, and above all, these techniques provide the parties with a win-win approach. Of all the methods of ADR, mediation is the most appropriate.

In his speech on "Making Mediation Mainstream in India and Singapore", the Ex-Chief Justice of India, Justice Ramana, stated the importance of mediation by referencing the battle of Mahabharata and further said that mediation has always been part of Indian culture. However, with the establishment of British Rule in India, the Indian system of informal dispute resolution lost its significance, and litigation became the way of resolving disputes. Talking about the advantages of mediation, he said that it reduces conflict, saves time and money, and because the outcome is in the hands of the disputants, ultimately, it provides the parties with some degree of control over the process. Because of this, it is regarded as the "most powerful approach to settling disagreements" (Excelsior, 2021).

The importance of mediation has rightly been brought out in MR Krishna Murthy v. New India Assurance Co. Ltd., where the Supreme Court said that Meditation as a concept of dispute resolution, even before the dispute becomes part of the adversarial adjudicatory process, would be of great significance, and the benefits it entails are numerous. This stance is accepted by Judges, lawyers, mediators, lawmakers, and policymakers and does not require more explanation. "Mediation will never go away. It is here to thrive because its time has come, and it is here to prosper". Considering how quickly the mediation movement is spreading throughout this nation, it is imperative to pass the Indian Mediation Act (Xavier, 2006).

Mediation as a method of dispute resolution is quick and effective because, through mutual understanding, it resolves disputes that persist for years. ADR approach can transform the entire Indian legal system as it gives the parties the way to end their conflicts through amicable resolution. The Chief

Justice of Singapore, Surdaresh Menon, asserted that mediation has increasingly become important in conflict resolution. Asia holds great potential for it, he said. The CEO of Niti Aayog, Amitabh Kant, emphasised that using the DRP may deliver justice to the average person through mediation (Excelsior, 2021). While gram panchayats historically played a vital role in conflict resolution, mediation is now a key component. Justice S.B. Sinha, Judge Supreme Court of India, remarked that mediation was a kind of semi-formal discussion designed to help parties resolve disagreements amicably, economically, and promptly through a process of self- and participative negotiation (Sinha, 2006). Sethi (2020) mentions the importance of mediation as described at the Dispute Resolution Centre of Thurston Country and has also elaborated on the advantages that it possesses:

- It is affordable.
- It is fair and impartial.
- It saves time and money and is confidential.
- It helps in avoiding litigation.
- It fosters cooperation and reduces conflict.
- It identifies underlying issues and works on the root cause.
- It allows personalised solutions and works in almost all sorts of conflicts.

Confidentiality is one thing that makes mediation suitable for disputes related to family and marriage. Moreover, the need to use mediation has been stressed in several cases. In Moti Ram (D) Tr. Lrs. V. Ashok Kumar & Anr., the court, to stress the need for confidentiality, opined that mediators should not disclose whatever is being said during the mediation proceedings when submitting mediation reports to the court. They will only submit whether the mediation was successful and what settlement/ compromise was reached, if any. In India, marital and family disputes are considered of a private nature, and it has been observed that people hesitate to file cases because it would destroy the family reputation and lead to differences between husband and wife beyond repair. So, in such a scenario, confidentiality is required, which is promised by mediation (Puri, 2023).

From the above explanation, we can conclude that the adoption of mediation is helpful to parties in dispute because of the benefits it owes, but, on the other hand, it can also significantly help reduce the burden of cases in concerned courts. It has been related to reduced stress and anxiety among individuals. It is also responsible for improving the parties' health as the disputes are resolved quickly and in a friendly manner. Moreover, the satisfaction attached to the process is unlimited as the parties can find a

way out of the dispute as soon as possible. The satisfaction with the mediation process is such that more and more people are using mediation, and almost 80 countries (Houzhi, 2013) of the world promote and support mediation and have related provisions or laws. Not only this, numerous international organisations are regulating laws on it.

Judicial Overview

1. ***Manas Acharya v. State & Anr CRL.M.C. 2090/2012*** -In this case, the court, while emphasising the need for mediation, said that the agreements reached in mediation or the decision taken by the mediator are legitimate and legal and are binding upon both parties.
2. ***B. S Joshi & Ors v. State of Haryana & Anr AIR (2003) SC 1386*** – In this case, the court said that under the inherent powers given to courts under Section 482 of CRCP (Criminal Procedure Code), the court has the right to halt criminal proceedings. An appeal petition was filed in the Supreme Court, where the wife said she had filed an FIR against her husband without much consideration. She said that they have resolved their issue, and she does not want to continue with it. The Supreme Court, while quashing the said FIR, ruled out that the courts should support or encourage mediation or reconciliation, especially in matters concerning matrimonial disputes (Skadmin, 2022).
3. **S Krishna Murthy vs B.S Nagaraj and Ors—**Justice Markanday Katju, while ruling out the decision in S Krishna Murthy vs B.S Nagaraj and Ors, said that lawyers should use mediation and advise their clients to seek mediation in the first instance. He said it was mandatory in cases related to marriage and family because litigation goes on for years and decades, which is detrimental to both parties.
4. **V. Rao vs L.H.V. Prasad**—In this case, the court observed that marriage is a child-centric heterosexual institution in our society. He further said that if marriage is unsuccessful, then it requires adjustments to various relations affected by a broken marriage. So, it is advised that family laws and courts should encourage reconciliation and settlement amicably in matters concerning marriage and family using mediation instead of litigation (Skadmin, 2022).

The judicial perspective across these cases consistently emphasises the value of mediation, particularly in family and matrimonial disputes. The courts have recognised that mediation alleviates the burden on the judiciary and offers a more compassionate and effective way to resolve disputes, preserving relationships and promoting societal harmony. These rulings collectively advance the integration of

mediation into the mainstream legal process, reinforcing its role as a credible and often preferable alternative to litigation.

Conclusion

The evolution and resurgence of mediation in India highlights its significance as an effective alternative to the adversarial legal system. Rooted in ancient practices like the Panchayati Raj and supported by modern legislative frameworks, mediation offers a way to resolve disputes that is both time-efficient and cost-effective, preserving relationships and fostering mutual respect between parties. The shift from litigation to mediation is a practical response to the overburdened judiciary and a reaffirmation of India's cultural legacy of resolving conflicts through dialogue and consensus. By focusing on the needs and interests of the disputing parties rather than merely determining right or wrong, mediation allows for creative, tailor-made solutions that satisfy all involved.

However, for mediation to reach its full potential, there must be a concerted effort from the judiciary, legal practitioners, and policymakers to promote its benefits and integrate it more deeply into the legal system. Public awareness and trust in mediation need to be strengthened to ensure it is seen as a credible and effective method of dispute resolution. Mediation is more than just an alternative; it is a return to the core values of justice, equity, and social harmony that have always been integral to Indian society. Embracing mediation can lead to a more humane, efficient, and satisfying justice system.

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