

DEMYSTIFYING MEDIATION: EXPLORING THE SCOPE OF MEDIATION IN INDIA THROUGH THE MEDIATION ACT, 2023 AND VARIOUS JUDICIAL PRONOUNCEMENTS

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ABSTRACT

*Mediation, as a form of alternative dispute resolution, offers a collaborative approach to resolving conflicts that emphasizes mutual understanding and cooperative problem-solving. With the increase in Matrimonial Disputes, Civil Disputes, Trade and Commercial Disputes, the courts are bombarded with crores of cases. The traditional courts are proving to be unsuitable for such disputes. Long-drawn disputes and the intimidating and unsympathetic nature of the courts result in further hostility between the disputing parties, no practical solution and mental stress. And that's where mediation comes to the rescue, as it is a much smoother process. The mediator empathises with the disputing parties and comes up with a solution where both the parties' interests are considered, unlike the court's verdicts. The recent trends of growth and developments in the legal and business realms suggest that mediation may be poised to take precedence in effectively and efficiently resolving disputes between the parties in a better and more cost-effective manner. However, the implementation would be a little difficult as it has a few challenges to tackle first. It involves the availability of good and qualified mediators along with good institutions so that people have access to the mediation Centres. Conflict or dispute in any matter whether it is civil or matrimonial has become very frequent nowadays and the only source to solve them is our Indian Judiciary but the irony is that it is itself loaded with the burden of imminent and forthcoming cases which itself hinders the concept of potent justice and fair play and principle of Natural Justice that is **“Justice Delayed is Justice Denied.”** So, in such situations, Alternative Dispute Redressal comes into the picture which not only solves disputes but is less time-consuming and affordable at the same time, and Mediation is one of them. In simplest means, Mediation is a method in which a neutral third party helps the disputed parties in a negotiated settlement of the problems under consideration.*

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INTRODUCTION

“An ounce of mediation is worth a pound of arbitration and a ton of litigation!”

— Joseph Grynbaum¹

Disputes are a part of everyone's life. Disputes are inevitable and are sure to arise in any personal or commercial association. Every dispute has three aspects, namely: people, process, and problem. There is nothing wrong with having a dispute but what is important, is how the parties handle that dispute. There could be two modes of addressing a dispute: adversarial like litigation and arbitration and non-adversarial like mediation and conciliation.²The above quote indeed highlights and prefers mediation as a mode of resolving and addressing disputes over arbitration and litigation. In the simplest words, mediation is a flexible and consensual technique in which a neutral facilitator helps the parties reach a negotiated settlement of their dispute. The parties have control over the decision to settle and the terms of any agreement. Settlements are contractually binding and widely enforceable. Mediation involves the intervention of a third person, or mediator, into a dispute to assist the parties in negotiating jointly acceptable resolution of issues in conflict.³However, the concept of mediation is not a new thing. It has existed in India since the Vedic Ages and we can even see instances of mediation as an alternative dispute redressal in local communities by Gram Panchayats or other Local Authorities. At an international level, several organisations like the United Nations, International Centre for Dispute Resolution, International Chamber of Commerce, and World Intellectual Property Organisation also act as mediators to provide a first-step solution to resolve conflicts and disputes and maintain peace. The United Nations played a significant role as a mediator during the Cold War Era. In recent times, we also have the instance of the United Nations acting as a neutral third party to solve conflicts between Russia and Ukraine and maintain peace. Even, the World Intellectual Property Organisation's primary goal is to offer

¹ Dispute Resolution Quotes' (ADR Toolbox) <<https://www.adrtoolbox.com/library/adr-quotes/>> accessed 21 June 2024

² Ananya Singh 'Comparative Analysis of Mediation Laws in India and other countries' (manupatra, 15 February 2023) <<https://articles.manupatra.com/article-details/Comparative-Analysis-of-Mediation-Laws-in-India-and-other-countries>> accessed 21 June 2024

³ 'Mediation' (International Chamber of Commerce) <<https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/mediation/>> accessed 21 June 2024

Intellectual Property stakeholders the means to resolve their disputes in a cost and time-saving manner. The process of mediation as a means of alternative dispute redressal has been adopted by several developed and developing countries around the world and a growth of the same has also been noticed in India.

HISTORY AND DEVELOPMENT OF MEDIATION IN INDIA

• VEDIC AND PRE- BRITISH ERA

The concept of mediation is not a new one and has not been found in recent times. The practice of mediation as a means to resolve disputes be it private or commercial is quite an ancient and centuries-old concept. Arbitration or mediation as an alternative to dispute resolution by municipal courts has been prevalent in India since Vedic times. The earliest known treatise is the Brihadaranyaka Upanishad, in which various types of arbitral bodies existed like-

- The Kula dealt with the disputes between members of the family, community, tribes, castes or races.⁴
- The Shreni was a corporation of artisans following the same business and dealt with their internal disputes⁵.
- the Puga was a similar association of traders in any branch of commerce⁶.

These arbitral bodies, known as Panchayats, dealt with a variety of disputes, such as disputes of contractual, matrimonial and even criminal nature. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. The decisions by these bodies were accepted as legal obligations by the disputants.⁷

Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance." Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism

⁴Mediation and Conciliation Project Committee, Supreme Court of India 'Mediation Training Manual Of India'(Supreme Court of India) <
<https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> > accessed 21 June 2024

⁵Idib

⁶Idib

⁷ Law Pedia 'Mediation' The Times of India (April 10, 2023) <

<https://timesofindia.indiatimes.com/readersblog/lawpedia/mediation-3-52424/> > accessed 21 June, 2024

reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past.⁸

Various forms of mediation and arbitration gained great popularity amongst businessmen during pre-British Rule in India. It is a recorded fact that complicated cases were resolved not in the King's courts but by the King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate disputes between the members of a business association. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and/or decision-making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.⁹

- **POST - BRITISH ERA**

The formal integration of mediation into the Indian legal system during the post-British era can be traced to the Industrial Disputes Act, of 1947, wherein detailed procedures were prescribed for settling disputes out of court. Subsequently the enactment of the Legal Services Authority Act, of 1987 provided for the establishment of *Lok Adalat*, which gave further impetus to the concept of mediation.

The enactment of the Commercial Courts Act, of 2015, provided mandatory pre-institutional mediation in certain classes of Commercial Suits, where no urgent relief is sought, and was also an important step in favour of commercial mediation.¹⁰ It was based on the recommendation of the 253rd Law Commission of India. In 2018, the Commercial Courts Act, 2015 was amended to provide improvements including the introduction of Section 12A which stipulated that the parties must exhaust all other remedies defined in the rules notified by the

⁸ Mediation and Conciliation Project Committee, Supreme Court of India 'Mediation Training Manual Of India'(Supreme Court of India) <
<https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> > accessed 21 June 2024

⁹ *Idib*

¹⁰ Aditya Mehta et al. 'Analysis: Mediation in India' (Cyril Amarchand Blogs, 31 October 2022) <
<https://corporate.cyrilamarchandblogs.com/2022/10/analysis-mediation-in-india/> > accessed 21 June 2024

Government under the Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018 before approaching the court for adjudication of disputes.¹¹

The development of mediation as an ADR mechanism can also be attributed to section 89 of the Civil Procedure Code (CPC), 1908 which was inserted by the CPC (Amendment) Act, 1999 with prospective effect from 1/7/2002. This particular development was due to the efforts of Hon'ble Mr Justice A M Ahmadi. Ahmadi, the then Chief Justice of India, had invited the Institute for the Study and Development of Legal System (ISDLS) to India for a national legal exchange programme between India and the USA. The ISDLS examined the problems of institutional backlogs in the Indian judicial system and suggested the ADR mechanisms and legislative and structural reforms of the laws relating to these mechanisms following which, new reforms were introduced in 2002 in the form of amendment of section 89 of the CPC. However, the amendment was challenged by a group of lawyers following which the Malimath Committee headed by Justice V.S. Malimath and the 129th Law Commission were constituted. In the light of the reports submitted by the committees, the Hon'ble Supreme Court in the case of Salem Advocates Bar Association vs. Union of India, made it mandatory for the courts to refer cases to the alternative forums, if they were so pleased. This case is a landmark one in the development of mediation in India.

Since then, the judges of the Supreme Court have contributed significantly towards the development of mediation as an ADR mechanism. Under Hon'ble Mr. Justice R C Lahoti, a Mediation and Conciliation Committee was established and a Project on Mediation was also initiated in Delhi in the year 2005. In the same year, A Permanent Mediation Centre was inaugurated at the Tis Hazari court complex and judicial mediation was started at the Karkardooma court complex. Two mediation centres were also inaugurated, one at the Karkardooma court complex in Delhi and another at the Patiala court in 2015.¹²

LEGAL RECOGNITION AND MEANING OF MEDIATION IN INDIA

¹¹ Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

¹² Mekhla Chakraborty 'DEVELOPMENT OF MEDIATION IN INDIA: A BRIEF HISTORY' (VIA MEDIATION CENTRE) < <HTTPS://VIAMEDIATIONCENTRE.ORG/READNEWS/ODC=/DEVELOPMENT-OF-MEDIATION-IN-INDIA-A-BRIEF-HISTORY> > ACCESSED 21 JUNE, 2024

Mediation is a structured process where a neutral person uses specialized communication and negotiation techniques to facilitate parties in resolving their disputes. Mediation has received legal recognition through various Acts, Bills, Legislations and also various Judicial decisions.¹³

The Central Government notified the Mediation Act, 2023 on September 15, 2023. Under the Act, mediation is defined as –

"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.¹⁴

Rule 4 of the Civil Procedure - Alternate Dispute Resolution Rules, 2003 (ADR Rules) defines mediation by stating that:

Settlement by 'Mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasising that it is the parties own responsibility for making decisions which affect them.¹⁵

The Hon'ble Chief Justice of India R.C. Lahoti had set up the Mediation and Conciliation Project Committee (MCPC) in 2005 through an administrative order to encourage amicable resolution of disputes pending in the courts in accordance with Section 89 of the Code of Civil

¹³ MEDIATION AND CONCILIATION PROJECT COMMITTEE SUPREME COURT OF INDIA 'MEDIATION' (SUPREME COURT OF INDIA) < <https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf> > accessed 21 June 2024

¹⁴ The Mediation Act, 2023, Chapter II

¹⁵ The Code of Civil Procedure, 1908, s 4 – Alternate Dispute Resolution Rules, 2003

Procedure.¹⁶ Section 89 of the Code of Civil Procedure was introduced with the purpose of amicable, peaceful and mutual settlement between parties without intervention of the court.¹⁷

Commercial mediation in India was given life in 1996 when the Indian parliament amended the Civil Procedure Code (CPC) and introduced section 89, which empowered courts to direct settlement of disputes by mediation amongst other means. This provision governs mediation in the court system in India. The year 1996 also saw the introduction of the Arbitration and Conciliation Act (ACA) which governs private mediation in India.¹⁸

Internationally, India showed its support for mediation when it became a signatory to the UN Convention on International Settlement Agreement. Further, provisions have been specifically included to incentivise litigants to voluntarily choose this path. For instance, Section 16 of the Court Fees Act, of 1870, provides for the refund of the entire court fees if the matter was finally settled using the alternative dispute redressal mechanism.¹⁹

WHO IS A MEDIATOR?

The Mediation Act 2023, defines a mediator as –

"mediator" means a person who is appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as a mediator with the Council.²⁰

Any person who undergoes the required 40 hours of training as stipulated Conciliation by the Mediation and Project Committee of the Supreme Court can be a mediator. He also needs to have at least ten mediations resulting in a settlement and at least twenty mediations in all to be eligible to be accredited as a qualified mediator.

¹⁶ MEDIATION AND CONCILIATION PROJECT COMMITTEE SUPREME COURT OF INDIA 'MEDIATION' (SUPREME COURT OF INDIA) < <https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf> > accessed 21 June 2024

¹⁷ The Code of Civil Procedure, 1908, s 89

¹⁸ 'MEDIATION IN INDIA' (INDIAN DISPUTE RESOLUTION CENTRE) < <https://theidrc.com/content/mediation/mediation-in-india/> > accessed 21 June 2024

¹⁹ Kishita Gupta 'Section 89 CPC' (IPleaders, 1 September 2022) < <https://blog.ipleaders.in/section-89-cpc/> > accessed 21 June 2024

²⁰ The Mediation Act, 2023, Chapter II

A mediator is an impartial and neutral person who manages interaction and facilitates communication between the parties. A mediator identifies barriers to an agreement and, the interests of the parties and develops terms of agreement.²¹

OUTLOOK ON MEDIATION LAWS IN THE INTERNATIONAL ARENA

In countries across the globe, mediation is frequently used as a means to solve civil and administrative disputes and it is not only limited to domestic disputes but also includes cross-border and interstate disputes.

If we have a close look at the dispute resolution system in the United States of America it can be deduced that mediation acts as a norm whereas litigation acts as an exception. To facilitate an effective mediation process, the United States of America has numerous professional organisations such as the American Arbitration Association, Federal Mediation and Conciliation Service, Nation Mediation Board, Civil Mediation Council, Chartered Institute of Arbitrators, US Institute of Peace, United Nations Department of Political Affairs, and Judicial Arbitration and Mediation Services to regulate the process of mediation.²² Today 95 per cent of the disputes in the United States of America are referred for mediation and the success rates are almost 90 per cent. Most of the civil cases are referred by the courts for mediation. Since litigation is expensive and there is a risk of a heavy cost to be paid by the loser, parties opt for private mediation.

Court-annexed mediation is popular in the United Kingdom and Europe as well and there are several private mediation centres too. If a litigant unnecessarily rejects mediation as a means of alternative dispute resolution, then the court does not award costs for the same.

The courts and the judges abroad are pro-active in supporting mediation. Although Singapore is a small country, mediation enjoys the support of the government and the judiciary. Mediation is encouraged in Malaysia, Indonesia, Australia, Lebanon, Tunisia, Jordan, and

²¹ MEDIATION AND CONCILIATION PROJECT COMMITTEE SUPREME COURT OF INDIA 'MEDIATION' (SUPREME COURT OF INDIA) < <https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf> > accessed 21 June 2024

²² Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

Bangladesh. Mediation is used as a means to provide and increase access to justice for the underprivileged section of society in all of these countries.²³

The United Nations General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation on 20 December 2018 (“Singapore Convention on Mediation”), which was a step towards ensuring a harmonised framework for cross-border enforcement of mediation settlement agreements. There are fifty-three signatories for the same. India became a signatory to the Singapore Convention on Mediation on 7 August 2019.

In the European Union, to help the EU Member States create legislation governing mediation in civil and business disputes, the Directive 2008/52 (“Mediation Directive”) was issued. The Mediation Directive aims to establish a formal and uniform set of guidelines to control mediation practice and to further ensure an institutional framework to govern mediation practice across the EU Member States.²⁴

However, Court Mediation is not as prevalent in Sri Lanka. Bangalore International Mediation, Arbitration and Conciliation Centre (BIMACC) has helped lawyers in Colombo to set up a Mediation Centre and is imparting training to Sri Lankan Lawyers.²⁵

INTRODUCTION OF MEDIATION ACT 2023

In an era dominated by judicial backlog and prolonged litigation, the emphatic directive from the Chief Justice of India, Justice D.Y. Chandrachud, in April 2024, to “mediate, not litigate”, echoes with increasing urgency²⁶

Countries all over the world have pro-actively welcomed mediation as a means of dispute resolution for a long time but the scenario was not the same for India. The system of Private Mediation in India has been bereft of proper structure and legal recognition, thus, discouraging

²³ S. Rajendran ‘Mediation Finding Favour in Dispute Settlement’ (The Hindu Centre, 13 June 2020) < <https://www.thehinducentre.com/the-arena/current-issues/article31810363.ece> > accessed 21 June 2024

²⁴ Ajay Bhargava et al. ‘Mediation in India: Charting the Road Ahead’ (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

²⁵ S. Rajendran ‘Mediation Finding Favour in Dispute Settlement’ (The Hindu Centre, 13 June 2020) < <https://www.thehinducentre.com/the-arena/current-issues/article31810363.ece> > accessed 21 June 2024

²⁶ Vaibhavi Khuthia ‘Adopting a transformative vision for mediation’ (The Hindu, May 14, 2024) < <https://www.thehindu.com/opinion/op-ed/adopting-a-transformative-vision-for-mediation/article68171975.ece> > accessed 21 June, 2024

participation by the parties and consequently, increasing judicial workload. Unlike arbitration and conciliation, there was no overarching law in India that governed mediation specifically.²⁷

The Mediation Act, 2023, notified on September 15, 2023, promises a transformative shift towards alternative dispute resolution. This legislation not only formalises mediation but also provides a comprehensive definition that includes pre-litigation and court-annexed mediation, online platforms, and community mediation among its forms, all aimed at facilitating amicable settlements through the intervention of a neutral mediator.²⁸ The Act renders a comprehensive and legislative framework for guiding and implementing mediation. The primary goal of the Act is to promote the practice of mediation, especially institutional mediation, to resolve commercial or domestic disputes and enforce mediated settlement agreements.²⁹ The Act also provides for a body for the registration of mediators to encourage community mediation and to make online mediation an acceptable and cost-effective process and for matters connected therewith or incidental thereto.³⁰

Certain provisions of the Mediation Act, of 2023 are culled out as under:

- The Act provides for the establishment of the Mediation Council of India to facilitate and regulate independent and accredited mediators and mediation institutions in India. The Act also provides a detailed description of the composition and duties of the Council.
- Mediation Act recognizes pre-litigation mediation, online and community mediation and encompasses the term 'conciliation' to align with international practice and standards.³¹

²⁷ Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

²⁸ Vaibhavi Khuthia 'Adopting a transformative vision for mediation' (The Hindu, May 14, 2024) < <https://www.thehindu.com/opinion/op-ed/adopting-a-transformative-vision-for-mediation/article68171975.ece> > accessed 21 June,2024

²⁹ Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

³⁰ Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

³¹ *Ibid*

- The act provides that pre-litigation mediation in matters of commercial disputes of Specified Value shall be undertaken as per the provisions of section 12A of the Commercial Courts Act, 2015
- The Act also recognises defines and highlights the functions of a “mediation service provider”. According to the Act,

"Mediation service provider" includes—

- (a) a body or an organisation that provides for the conduct of mediation under this Act and the rules and regulations made thereunder and is recognised by the Council;
- (b) or an Authority constituted under the Legal Services Authorities Act, 1987;
- (c) a court-annexed mediation centre;
- (d) any other body as may be notified by the Central Government:

Provided that the bodies referred to in clauses (b), (c) and (d) shall be deemed to be mediation service providers recognised by the Council.³²

- The Act recognises mediated agreement as – A mediation agreement shall be in writing, by or between parties and anyone claiming through them, to submit to mediation all or certain disputes which have arisen or which may arise between the parties. A mediation agreement may be in the form of a mediation clause in a contract or in the form of a separate agreement.³³
- It includes provisions in respect of enforcing domestic mediated settlement agreements, thus, making the process more effective and binding in nature. A mediated settlement agreement includes an agreement in writing between some or all of the parties resulting from mediation, settling some or all of the disputes between such parties, and authenticated by the mediator.³⁴

³² The Mediation Act, 2023

³³ *Ibid*

³⁴ Ajay Bhargava et al. ‘Mediation in India: Charting the Road Ahead’ (Lexology, 22 December 2023) <<https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767>> accessed 21 June 2024

- The Act also provides provisions for registration of mediated settlement agreements.
- The Act also states that the court or tribunal may, at any stage of a proceeding, refer the parties to undertake mediation and may pass a suitable interim order to protect the interest of any party if deemed appropriate. However, the parties shall not be under obligation to come to a settlement in the mediation.
- Stipulates a time-conditioned process for the mediation proceedings. It states that –

Notwithstanding anything contained in any other law for the time being in force, mediation under this Act shall be completed within a period of one hundred and twenty days from the date fixed for the first appearance before the mediator.³⁵
- Introduces provisions for maintaining confidentiality between the participants involved in the process of mediation.
- Lays down guidelines for mediator appointments and termination of mandates of a mediator³⁶.
- The Act also highlights the role of a mediator, termination of mediation and cost of mediation.
- The Act provides for a framework to prevent conflict of interest, providing for disclosure requirements and obligating the mediator to be independent, neutral and impartial.³⁷
- The Act further emphasises a mediation fund. It mentions that-

There shall be a fund to be called "Mediation Fund" (hereinafter referred to as the "Fund") for the promotion, facilitation and encouragement of mediation under this Act, which shall be administered by the Council.³⁸

³⁵ The Mediation Act, 2023

³⁶ Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

³⁷ Payel Chatterjee and Suchita Choudhry 'India: The Mediation Act 2023 – will the ADR wave pick up momentum?' (International Bar Association, 11 March,2024) < <https://www.ibanet.org/india-mediation-act-2023-will-the-ADR-wave-pick-up-momentum> > accessed 21 June 2024

³⁸ The Mediation Act, 2023

- The Act also provides for disputes or matters not fit for mediation. The list of disputes which are excluded from mediation such as disputes involving criminal prosecution, serious allegations of fraud, rights of third parties, land acquisition and proceedings before the Securities and Exchange Board of India, and the Securities Appellate Tribunal, under the Securities and Exchange Board of India Act, 1992³⁹
- The Act also focuses on the powers of the Central Government to issue directions.
- The Act also introduces amendments to existing statutes, like the Indian Contract Act, of 1872 to align them with the new mediation framework.⁴⁰

JUDICIAL PRONOUNCEMENTS:

In countries like the United States of America, England, Singapore etc a large number of cases are being solved through mediation. The alternative dispute redressal system has seen growth in the past few years. With the increase in the number of pending cases and the number of undertrial people and prisoners increasing every day, it is safe to say that mediation has become the order of the day. Various cases in the Supreme Court and High Courts ranging from criminal disputes, civil disputes, matrimonial- disputes, and commercial- disputes have been referred for mediation.

Below we have a few judgements to look upon the development of mediation in India-

- **MR Krishna Murthi v. New India Assurance Co. Ltd:**

In January 2020, the apex court in MR Krishna Murthi v. New India Assurance Co. Ltd pointed out the urgent need for enacting uniform legislation for mediation in India. In furtherance to this, the court set up a committee to come up with draft legislation that will help in conferring legal sanctity to disputes settled by mediation. A uniform statute governing mediation is the need of the hour. Such legislation should ideally aim at making mediation a mandatory exercise before approaching courts or arbitral tribunals. This would

³⁹ Payel Chatterjee and Suchita Choudhry 'India: The Mediation Act 2023 – will the ADR wave pick up momentum?' (International Bar Association, 11 March,2024) < <https://www.ibanet.org/india-mediation-act-2023-will-the-ADR-wave-pick-up-momentum> > accessed 21 June 2024

⁴⁰ Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

help in altering the current status of mediation from being a particular form of dispute resolution to the mandatory first stage of dispute resolution.⁴¹

- **In Afcons Infrastructure Ltd v M/s Cherian Varkey Construction**

In *Afcons Infrastructure Ltd v M/s Cherian Varkey Construction* (2010), the Supreme Court clarified that the words 'mediation' and 'conciliation' are used synonymously. In this commentary, the words 'mediation' and 'mediator' are used; they should be taken also to mean 'conciliation' and 'conciliator'⁴². The scope, Applicability, and procedure to be followed, Anomalies in [Section -89](#) of CPC regarding words 'Judicial Settlement' and 'Mediation' were discussed. It was held that the words 'Mediation' in Clause (d) and 'Judicial Settlement' in Clause (c) are erroneously mentioned. Sense is made only when they are interchanged. [Section-89\(1\)](#), the requirement that the court should formulate the terms of settlement is a great hindrance to the court in implementing Section-89. Supreme Court, therefore, diluted this anomaly in the *Salem Bar II* case by equalling 'terms of settlement' to a 'summary of dispute'. Meaning thereby that the court is only required to formulate a summary of the dispute not the terms of the settlement.⁴³

- **Salem Advocate Bar Association vs. Union of India (UOI):**

It was held in the case *Salem Advocate Bar Association vs. Union of India (UOI)* that Section 89(2)(d), contemplates appropriate rules being framed concerning mediation. Section 89 has been inserted to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. The Alternative Dispute Resolution (A.D.R.) Mechanism as contemplated by Section 89 is arbitration conciliation or judicial settlement including settlement through Lok-Adalat or mediation.

- **Perry Kansagra vs. Smriti Madan Kansagra:**

In this case, the Court held that the process of mediation was founded on an element of confidentiality. Mediation stands on a completely different footing as against regular

⁴¹ *M. R. Krishna Murthi vs The New India Assurance Co. Ltd.* 5 March 2019 AIR 2019 SUPREME COURT 5625

⁴² 'MEDIATION IN INDIA' (INDIAN DISPUTE RESOLUTION CENTRE) < <https://theidrc.com/content/mediation/mediation-in-india/> > accessed 21 June 2024

⁴³ Jus Corpus 'MEDIATION IS AN EFFECTIVE MODE OF DISPUTE RESOLUTION: AN INDIAN PERSPECTIVE' (JUS CORPUS LAW JOURNAL, 14 JULY, 2022) < <https://www.juscorpus.com/mediation-is-an-effective-mode-of-disputes-resolution/> > accessed 21 June,2024

adjudicatory processes. Instead of an adversarial stand in adjudicatory proceedings, the idea of mediation was to resolve a dispute at a level that was amicable rather than adversarial.⁴⁴

- **Abdul Rehman Antulay and Ors. v. R.S. Nayak and Anr**

In *Abdul Rehman Antulay and Ors. v. R.S. Nayak and Anr* while holding that speedy trial at all stages is part of the right Under Article 21, it was held that if there is a violation of the right of speedy trial, instead of quashing the proceedings, a higher court can direct conclusion of proceedings in a fixed time. To render speedy justice is the duty of the state and the administration of justice is a state subject. Therefore, the States must look into the maintenance of Fast-track courts with the help of the Union Government.⁴⁵

- **Ram Janmabhoomi Case:**

In the landmark case of *M Siddiq (D), Thr Lrs v. Mahant Suresh Das & Ors* also known as the Ram Janmabhoomi case, the Supreme Court referred the parties for mediation. The mediation report was submitted by the Court-appointed mediators namely retired Justice Fakkir Mohammed Ibrahim Kalifulla, Sri Sri Ravi Shankar, and Sriram Panchu.⁴⁶

- **The “Controller General of Patent Designs and Trade Marks”,** in a joint effort with the “**Delhi Legal Services Authority (DLSA),”** directed around “500 pending oppositions and rectifications in the Trademarks Registry (TMR), Delhi, to mediation and conciliation” through a notice in 2016, under the “Legal Services Authority Act.”⁴⁷

- ***Mohd. Mushtaq Ahmad v. State of Maharashtra:***

In *this case*, The Supreme Court had clarified that the wife had filed for divorce and an FIR under [Section 498](#) against the husband at the same time. After arguments between the couple developed after the birth of a daughter child, an IPC was established. Under [Section 89](#) CPC, the Karnataka High Court ordered the parties to mediate their dispute. The wife decided to drop the FIR after the dispute was amicably resolved through mediation.

⁴⁴ Ms Sahana R ‘Legal aspect and approach to mediation in India’ (Legal Service India) < <https://www.legalserviceindia.com/legal/article-3432-legal-aspect-and-approach-to-mediation-in-india.html> > accessed 21 June 2024

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ Jus Corpus ‘MEDIATION IN INTELLECTUAL PROPERTY DISPUTES’ (JUS CORPUS LAW JOURNAL, 21 FEBRUARY, 2023) < <https://www.juscorpus.com/mediation-in-intellectual-property-disputes/> > accessed 21 June, 2024

According to the court's ruling, "The court may cancel the criminal proceedings or the FIR or complaint in appropriate instances to fulfil the goals of justice."⁴⁸

- ***K. Srinivas Rao v. D.A. Deepa:***

In this case, the Court ruled that although crimes covered by [Section 498-A](#) of the IPC are not penalised by more than one offence, the criminal court should instruct the parties to consider mediation if they are willing and if it appears to the parties that there are components of a settlement.

However, the lack of a binding factor has deterred parties from acknowledging mediation, thereby vitiating mediation proceedings in India. Overarching legislation would confer legal sanctity and provide procedural guidance to parties. Just like how the Arbitration and Conciliation Act, of 1996 revolutionized the arbitration culture in India, a mediation-specific law can instil confidence in parties to resolve their disputes through mediation.⁴⁹

NECESSITY AND BENEFITS OF MEDIATION:

There are certain disputes which are better when settled outside the courtroom but for the same purpose, the presence of a judge becomes quite necessary. Speedy Resolution of disputes leads to harmony in personal as well as societal relationships. Thus, Alternative Dispute Redressal rather than litigation is the future of the legal system. When conflict arises, there are four doors open to litigants viz.

- Negotiation
- Mediation/Conciliation
- Arbitration
- Litigation⁵⁰

Recently, former Supreme Court Judge, Justice Sanjay Kishan Kaul, emphasized the expansive flexibility of mediation over traditional legal proceedings during his keynote address at a

⁴⁸ Jus Corpus 'MEDIATION IS AN EFFECTIVE MODE OF DISPUTE RESOLUTION: AN INDIAN PERSPECTIVE' (JUS CORPUS LAW JOURNAL, 14 JULY, 2022) < <https://www.juscorpus.com/mediation-is-an-effective-mode-of-disputes-resolution/> > accessed 21 June,2024

⁴⁹ *Ibid*

⁵⁰ *Ibid*

roundtable event hosted by the Bar Council of India Trust at the India International University of Legal Education and Research (IIULER) in Goa. He said – “the flexibility of mediation is far wider. It is a party-driven process and not a legal-driven process from an outsider. Parties themselves can decide the procedure and how they would like to resolve it.” Thus, he advocated for a paradigm shift towards mediation, emphasizing its inherent flexibility and capacity to empower parties in resolving disputes effectively.⁵¹

Now, the question arises why not Arbitration? Why Mediation?

Well, there are certain advantages of mediation over arbitration as enumerated below:

- Arbitration involves the filing of pleading and documents, appreciation evidence and more often oral evidence. There are no pleadings or documents involved in mediation and the appreciation of evidence does not arise.
- Arbitration is lawyer-centric while mediation is party-centric where the parties relate their facts and problems and the lawyers assist their clients in stating the legal aspects of the case. The mediator does not hear a case based on the material facts like an arbitrator or judge but is an active listener.
- Conflicts manifest into disputes. Arbitration attempts to resolve disputes, and the conflict may remain unresolved. Mediation addresses the conflict.
- The outcome of the arbitration is determined by the arbitrators, and there is a winner and a loser, but in mediation, the outcome is determined by the parties and it is a win-win for all.
- An arbitration award can be challenged in the civil court, on the contrary, a mediation settlement is final and binding.

⁵¹ (Live Law, 23 February 2024) < <https://www.livelaw.in/events-corner/justice-sk-kaul-mediation-training-bar-council-of-india-trust-india-international-university-of-legal-education-and-research-justice-a-k-sikri-249339>> accessed 21 June 2024

- Arbitration can drag on for months or years while mediation gets over within 60 days with a few exceptions, certainly not more than 90 days. Arbitration, especially ad hoc arbitration, can be expensive whereas mediation is very affordable.⁵²

“Justice delayed is Justice denied” – this is a very famous saying which accentuates the need for mediation in a country like India where the pendency of cases, under trial prisoners is increasing every day. Let's go through data and statistics to understand the need for mediation in the current scenario.

1. Pendency of Cases:

Eminent jurist, Nani Palkhivala has reflected on the irony of the judicial system, in this fashion: “If the longevity of litigation is made an item in Olympics, no doubt the Gold will come to India”.

Cases taking a long time to conclude is not a new problem in India; much of this has also been seen as an outcome of judicial vacancies across the country.

"As of December 2022, a total of 4.9 crore cases remained pending across high courts and district courts in the country. As many as 1.9 lakh cases have been pending for over 30 years and 56 lakh cases for more than 10 years. On average, 49 per cent and 29 per cent of these cases are pending for more than 5 years in the high courts and lower courts respectively. In addition, around 70,000 cases are pending in the Supreme Court and at the High Court level, Uttar Pradesh has the highest average pendency; cases remain pending for an average of 11.34 years, and in West Bengal for 9.9 years. The lowest average high court pendency is in Tripura (1 year), Sikkim (1.9 years) and Meghalaya (2.1 years),” this was noted by the International Journal of Research.⁵³

A classic example of pendency of cases in the Indian judiciary system is the 72-year-old pending case which finally got settled last year on January 2023 by the Calcutta High Court. The case had been filed in the year 1951 and was finally settled by Chief Justice Prakash Srivastava who was born another decade later after the case was filed. However, this was

⁵² S. Rajendran 'Mediation Finding Favour in Dispute Settlement' (The Hindu Centre, 13 June 2020) < <https://www.thehinducentre.com/the-arena/current-issues/article31810363.ece> > accessed 21 June 2024

⁵³ Jahnvi Sen 'Overcrowded Prisons; Cases Pending Per Judge Rising: India's Criminal Justice System in 9 Charts' (THE WIRE, 4 APRIL, 2023) < <https://thewire.in/rights/overcrowded-prisons-cases-pending-per-judge-rising-indias-criminal-justice-system-in-9-charts> > accessed 21 June, 2024.

not the only long backdated filed case waiting for its settlement in the hands of Calcutta High Court. While the Calcutta high court would be relieved that the litigation pertaining to litigation proceedings of the erstwhile Berhampore Bank Ltd. is finally out of the way, it still has two of the five oldest pending cases in the country to deal with and all of them being filed in 1952.⁵⁴

The Indian judiciary has been saddled with never-ending litigations. As per recent statistics published by the National Legal Services Authority, a statutory body established under the Legal Services Authorities Act, of 1987, approximately 0.11 million cases were settled through mediation between April 2022 to June 2023. This shows the immediate need for a structured mediation process in the country and why mediation should be promoted in cases where things can easily be settled through mediation over litigation.⁵⁵

2. The number of undertrial prisoners is increasing:

Currently in India, 77% of the incarcerated population comprises undertrials – which means they haven't been convicted of a crime. This number, according to the International Journal of Research, has nearly doubled since 2010 (going from 2.14 lakh in 2010 to 4.3 lakh in 2021).

"Between 2017 and 2021, all states/Union Territories, except for Arunachal Pradesh, Meghalaya, Nagaland and Puducherry, showed an increase in undertrial population. Among the 18 large and mid-sized states, Punjab recorded the highest increase, at 3.75 percentage points, while among the seven small states, Goa showed the highest increase of 5.23 percentage points," the report states. The period of detention of undertrials is also increasing, indicating that trials are taking longer or bail is being granted in fewer cases and such a scenario again points out the requisite of a strong mediation system in India.

3. Prison overcrowding is getting worse.

"Prison populations have risen steadily from 4.81 lakhs (2019) to 4.89 lakhs (2020), and 5.54 lakh in 2021: while the number of people admitted to 1,319 prisons during 2021

⁵⁴ Saibal Sen '72 years on, India's oldest pending case finally settled' (THE TIMES OF INDIA, 16 JANUARY,2023) < <https://timesofindia.indiatimes.com/city/kolkata/72-years-on-indias-oldest-pending-case-finally-settled/articleshow/97012986.cms> > accessed 21 June 2024

⁵⁵ Payel Chatterjee and Suchita Choudhry 'India: The Mediation Act 2023 – will the ADR wave pick up momentum?' (International Bar Association, 11 March,2024) < <https://www.ibanet.org/india-mediation-act-2023-will-the-ADR-wave-pick-up-momentum> > accessed 21 June 2024

increased by 10.8 per cent to 18.1 lakh from 16.3 lakh the year before," the International Journal of Research reports about this. However, with infrastructure not keeping up, prison overcrowding – already a major problem – is only getting worse.

As of December 2021, the average prison in the country has an occupancy rate of 130%. In some states this number is far worse; in Uttarakhand, for instance, in December 2021, the occupancy rate was 185% – there were 6,921 incarcerated people in prisons that were supposed to have 3,741 people.

“Nationally, roughly 30 per cent (391 prisons) record occupancy rates of 150 per cent and above, and 54 per cent (709 prisons) run above 100 per cent capacity. More than half of the prisons in 23 states/UTs are overcrowded,” the report notes.⁵⁶

CHALLENGES OF MEDIATION

The scope is wide no doubt, but the implementation along with the trust of the citizens has to be of the same degree as the Judiciary in India. With a population of 1.4 billion, India is the most populated country in the world, hence the biggest challenge that comes as a hindrance is its widespread acceptance and effectiveness. Many people in India are not aware of Mediation as an Alternative Dispute Resolution (ADR). The general public lacks knowledge about Mediation and prefers the traditional method of Litigation, which is not only time-consuming but also creates a hole in the pocket. With this Indian culture traditionally places a high value on authoritative decision-making, often favouring judicial or hierarchical solutions over collaborative ones.

Along with cultural challenges, Mediation also faces legal and institutional challenges. Although Mediation is legally recognized but still lacks in constitutional framework, other than that enforcement is more challenging. The absence of a streamlined process for converting mediation agreements into legally binding orders can deter parties from opting for mediation.

And then comes the Professional and Practical Challenges, the success of mediation largely depends on the skills and expertise of mediators. In India, there is a shortage of well-trained and experienced mediators. Furthermore, there is no standardized certification process for

⁵⁶ Jahnvi Sen 'Overcrowded Prisons; Cases Pending Per Judge Rising: India's Criminal Justice System in 9 Charts' (THE WIRE, 4 APRIL, 2023) < <https://thewire.in/rights/overcrowded-prisons-cases-pending-per-judge-rising-indias-criminal-justice-system-in-9-charts> > accessed 21 June,2024.

mediators, leading to variability in the quality of mediation services. In India, the courts prescribe 40 hours of training. In my opinion, the 40-hour training is inadequate. I strongly recommend that mediators join Continuing Mediation Education programmes to improve their skills. With this, there are very less numbers of well-established and accessible mediation centres makes it difficult for people to seek mediation services. Adequate funding and resources are essential for promoting mediation and ensuring its effectiveness. However, mediation centres often suffer from insufficient funding, which impacts their ability to provide high-quality services and conduct awareness campaigns.

Also, there exists the Perception and Trust Issues, Mediation is often perceived as a secondary or informal method of dispute resolution compared to litigation. This perception undermines its credibility and deters parties from considering it as a serious option. There is a general mistrust among parties about the impartiality and neutrality of mediators. Concerns about potential biases and fairness can discourage parties from engaging in mediation. Although confidentiality is a cornerstone of mediation, parties may still have concerns about the privacy and security of the information shared during the process. Ensuring robust confidentiality measures is crucial to building trust in Mediation.

CONCLUSION

I recently came across this news, which says, "Delhi High Court rejects 17-year-old defamation case against Hindustan Times." After reading the entire article, I wondered how complex and long-drawn these situations are. In these years, one might forget why they filed the case or suit against the other party. Hence, it is high time when first move to the mediation centre for dispute resolution.

Mediation is an alternative dispute redressal system, that is, a method to resolve disputes without the regular courtroom procedure. Mediation in India is being guided by the Mediation Act 2023. With the advent of the recent Mediation Act, of 2023, the existing landscape in mediation as a method of resolving myriad disputes in the country, would be ever-evolving. Additionally, while the Mediation Act explores the adaptability of mediation in this new age digital era, where online mediation platforms and technology-assisted processes are reshaping the Alternative Dispute Redressal landscape, the question of its implementation, however,

remains to be unearthed over time. ⁵⁷The COVID-19 pandemic has increased the prominence of mediation as a means of dispute resolution. The plethora of cases initiated by the pandemic warrants a swift and effective redressal and mediation can be the perfect solution.

Mediation is a lucrative alternative to the court system as firstly, it gives the parties control over the scope of the mediation in terms of the issues discussed, and their outcome, the terms of the settlement and whether to settle or not. Control is vested not with a judge or jury, but the parties themselves and helps them in reaching a mutually agreeable solution.⁵⁸ Secondly, it is based on voluntary consent and it allows any party to opt out at any stage if they find mediation to be unhelpful. Thirdly, mediation takes less time to resolve disputes than standard legal channels. While courts may take months or years to pronounce judgements in cases, mediations take mere hours. According to figures released by the Bangalore Mediation Centre, while the mediation process can take a maximum of 60 days, the average time taken to settle a case is a mere two hours. And last but not least, since it takes less time, it is speedy, economical and efficient.⁵⁹

However, as discussed above, there are a lot of challenges that restrict the effectiveness of mediation. The existing framework of having different mediation rules for different High Courts has further contributed to the element of uncertainty in the mediation process. Anyways, there is always a way to come across challenges and in my opinion the following few steps may help overcome the challenges and make mediation a more lucrative option for justice.

Firstly, grassroots level awareness of the public at large (particularly parties, lawyers, judges and other stakeholders) and easy access to Mediation. There should be a legislative framework on Mediation and its practice (many other countries have already adopted this and India is now a signatory to the United Nations Convention on International Settlement Agreements).

Secondly, Mediation Centres need good infrastructure and a standard pattern to make parties comfortable. Mediation must develop into a full-time profession (efforts by senior lawyers, members of the judiciary and all state bar councils will be required for promotion of this

⁵⁷ Ajay Bhargava et al. 'Mediation in India: Charting the Road Ahead' (Lexology, 22 December 2023) < <https://www.lexology.com/library/detail.aspx?g=920e6d73-be01-49a8-8281-eb534a81a767> > accessed 21 June 2024

⁵⁸ Akanksha Mathur 'How Does The Mediation Process Work – Steps and Procedure' (IPleaders, 28 December 2017) < <https://blog.ipleaders.in/mediation-in-india-process/> > accessed on 21 June, 2024

⁵⁹ Akanksha Mathur 'How Does The Mediation Process Work – Steps and Procedure' (IPleaders, 28 December 2017) < <https://blog.ipleaders.in/mediation-in-india-process/> > accessed on 21 June 2024

mechanism) as it gives lawyers an excellent opportunity to demonstrate their legal, analytical and professional skills. Incentives and recognitions to lawyers to educate parties about the inner workings of the mediation process to make such informed choices.

Thirdly, high ethical standards (code of ethics and conduct) should be followed. Theoretical as well as practical training in mediation is to be included in the syllabi of law colleges and an introduction to mediation course is to be conducted for all practicing lawyers. Structured mediation training with accreditation for specialising in mediation should be provided in a cost-effective manner all over India. Continued skill-enhancing courses should be conducted from time to time for lawyers and other professionals who wish to take up mediation as a profession. Multiple Mediation drives should be conducted by courts on various levels, be it at the district level or the national level. These drives can prove to be extremely successful and can help in clearing a large backlog of cases pending before various courts. During the recently conducted Family Courts Mediation Drive conducted by the Delhi High Court, out of the 2,884 cases referred to mediation by the Family Courts, 2,171 cases were successfully disposed of, which resulted in a disposal rate of 75.27%. This indicates that the judicial system requires heavy promotion of the process of mediation.⁶⁰

Mediation aims at reducing the burden of the Indian Courts as well as bringing the parties to a harmonious settlement. Yes, it does face challenges but looking at the present scenario, the transformations are expected. Therefore, mediation must be encouraged by the Courts in India. This would strengthen the Judicial system in India and provide speedy justice. Mediation and other Alternative Dispute Resolution mechanisms are the need of the hour.

⁶⁰ Manisha T Karia ' Effective implementation of Mediation in India: The way forward (Bar and Bench, 23 December 2019) < <https://www.barandbench.com/columns/effective-implementation-of-mediation-in-india-the-way-forward> > accessed 21 June 2024.