



ROLE OF STATE IN PROMOTING MEDIATION FOR DISPUTES RESOLUTION: A CRITICAL APPRAISAL OF LAWS AND POLICIES

Akshita Gupta¹, Dr. Dalliandeep Kaur Tiwana^{2*}

Abstract

Mediation, in its simplest form, is a method of helping a neutral third party reaches a voluntary and negotiated solution to the problem under consideration by the parties to the dispute. The proponents facilitate communication between the parties to the dispute and enable the parties to the dispute to clearly understand the distinction and achieve a mutually acceptable reconciliation. However, you do not have the authority to impose choices on the parties. Mediation has emerged as the most widely used dispute resolution mechanism for resolving marriage disputes. Proponents of mediation are beneficial mechanisms because mediation protects family relationships and children from experiencing the severity of the traumatic process normally associated with typical divorce, while at the same time providing prompt justice. There are many blessings related to mediation of the marriage status, including confidentiality, price validity, informal procedures, administrative authority, complete freedom of the parties who refuse the result, and reciprocity. And the most striking and essential feature is that it follows the principles of timely justice.

The focus of the legal system can be shifted from adjudication to amicable settlement of conflicts through mediation, which has the potential to make a large qualitative difference. Evaluation of the operation and implementation of the mediation process is crucial and serves as a key indicator for gauging the field's acceptance by society as it continues to grow and expand throughout India. It helps to identify the problems and needs from the perspective of the parties attending the mediation.

Undoubtedly, understanding the varied aspects of mediation, which is a dynamic process, can help the system be more responsive to the parties' demands. Many States are also taking indicative in promoting mediation as an effective tool for dispute resolution. The study focuses to make an appraisal of mediation and has comprehensive legislation exclusively for the same.

¹Research Scholar, School of Law Lovely Professional University (Phagwara , Punjab) Orcid Id: <https://orcid.org/0009-0008-0194-8086>,

E-mail: akshitagupta.vpgco@gmail.com

^{2*}Associate Professor, School of Law, Lovely Professional University (Phagwara, Punjab) Orcid Id: <https://orcid.org/0000-0001-9330-3737>

E-mail: dalliandeep.25656@lpu.co.in

***Corresponding Author:** Dr. Dalliandeep Kaur Tiwana

*Lovely Professional University (Phagwara, Punjab) Orcid Id: <https://orcid.org/0000-0001-9330-3737>

E-mail: dalliandeep.25656@lpu.co.in

DOI: 10.48047/ecb/2023.12.si5a.0615

INTRODUCTION

A mediator is an independent person who acts as a bridge or puts his personal efforts, skill, and knowledge to settle disputes between the parties. The efforts and process adopted by him is called mediation. In other words, this right of self-government is an indispensable constituent of the conciliation procedure. Its outcome is surrounded by a resolution formed by the parties themselves and is as a result suitable to them. The parties eventually have power over the outcome of mediation. Any party may perhaps extract on or after the intercession procedures at any point before its extinction and with no conveying any cause.

Mediation has not been characterized by any enactment in India yet it is commonly comprehended as intervention is an arrangement procedure wherein an outsider impartial helps the contesting parties in settling their disputes. It is the intentional procedure and non-coercive in which a fair and impartial go-between help the gatherings to arrive at a decision.

Mediation is a less formal method of negotiation between the parties than litigation or arbitration, which involve a formal evidentiary hearing and witnesses. While mediation is facilitated by a specially trained impartial advisor who is not authorized to determine the case but simply to assist the parties in properly bargaining, litigation, and arbitration are presided over by a judge who renders a verdict in the cases. In contrast to litigation, mediation is non-adversarial. The best mediators build a process in which the parties recognize their roles as active participants and work together to resolve the conflict. Unlike a trial or arbitration, mediation frequently yields a decision in which both parties are mutually agreed. The essence of mediation is its flexibility, which enables the participants to select a process suitable to their needs.¹

One of the world's most effective forms of dispute resolution is mediation. Intercession was initially used in labor and buyer issues as well as in international negotiations, but it has since developed into a legitimate addition to the legal process. It is frequently utilized in divorce, civil, business, and even public law issues. The areas for undertaking mediation are ever-expanding. Many individuals believe that mediation offers a more

efficient, satisfying, harmonic, and affordable alternative to address the issue, which is one reason for its rising popularity.²

GROWTH OF MEDIATION IN INDIA

Alternative Dispute Resolution (ADR) techniques like mediation were used in India even before the Britishers came. During that time, informal Panchayats were used to settle conflicts, with the Mahajans or other well-respected local leaders serving as mediators. In some tribes in India, Panchas or Pancha Parmeshwars still serve as unbiased arbitrators to settle conflicts between the parties or groups. But as British colonialism expanded, mediation gained traction as a recognized and authorized ADR technique.

The use of mediation as an ADR method increased after Lok Adalats were reinstated in the Indian legal system. The Lok Adalats were given statutory status for the first time in India under the Legal Services Authority Act, which was passed in 1987.

In 2002, an alteration to the Code of Civil Procedure, 1908 (CPC) was gotten. Section 89 read with Order X Rule 1A given to reference cases pending in the courts to ADR. Moreover, Order XXXIIA of the CPC suggests intervention for familial/individual connections as the customary legal technique isn't unmistakably fit the delicate territory of individual connections. Even though numerous courts in India presently have intercession focuses, there is no precise information accessible to show that this arrangement has been used effectively. A group of lawyers disagreed with the revision, nonetheless, and as a result, the Malimath Committee and the 129th Law Commission were established. In *Salem Advocates Bar Association v. Union of India*³, the Hon'ble Supreme Court mandated that "courts must refer matters to alternative forums if they so desired in light of the findings that the committees had produced". This case served as a turning point in India's mediation industry.

One often encounters conflicts in their daily lives, whether they are major or little. The persons involved may experience or develop acute stress as a result of this disagreement. People who deal with or are directly connected to problems ranging from minor family disputes to big legal concerns

¹ Justice S.B. Sinha, "Mediation: Constituents, process and Merit", Nyaya Deep p34-35
Eur. Chem. Bull. 2023, 12(Special Issue 5), 6822 -6827

² Justice Fung, "Mediation conference 2014; Mediators Qualification and Skills"

³ Writ Petition (civil) 496 of 2002.

experience extreme stress. Finding a point of agreement between us while also taking into account our shared values, beliefs, feelings, and other considerations is the best way to settle such disputes. This will allow us to not only come to an understanding but also to come up with a solution that will serve the interests of the parties involved.

One constantly looks for a resolution that may bring them peace in the middle of all kinds of problems, no matter how little or significant they may be. In light of this, it is reasonable to say that mediation is a kind of conflict resolution that may successfully reunite the parties and bring about a lasting feeling of peace. The term "mediation" refers to a kind of alternative conflict resolution in which the parties to a disagreement work to resolve their differences amicably with the aid of a third party who serves as the mediator.

Since it is believed that mediation is a process for the parties to a dispute to reach an amicable resolution while upholding the highest confidentiality and granting the parties to the dispute the greatest amount of flexibility and autonomy, the role of a mediator is unquestionably tough. The mediator mainly serves as a facilitator of the resolution, providing the parties with the highest level of autonomy outcome. Additionally, mediation may be seen as a human endeavor in the search for peace and justice, even before the establishment of law, the establishment of courts, or the formulation of different legal principles.

In the Indian context, the idea of mediation is not new and has existed for a while. It is a method of dispute settlement that the Indians have long utilized in the past when the elders would settle the conflicts. Furthermore, Panchayats assisted in doing it in Indian villages. However, the Anglo-Saxon conflict settlement system emerged with the establishment of British Rule in India, and the tradition of mediation started to disappear.

Even after India gained its independence, issues persisted, and as time went on, they became more severe. As civilization evolved, issues became increasingly complicated to the point that they could no longer be resolved sooner. Additionally, colonial control had long-lasting effects on the populace, which led to a greater attraction to the adversarial system of conflict resolution than to the conventional method and, ultimately, to the filing of an increasing number of lawsuits.

Rapidly after then, due to the expanding population and rising requirements of the populace, it became very challenging to handle the volume of cases that were filed and cases that were resolved, and at the moment India is beset by the issues of a massive backlog of cases and docket explosion.

MEDIATION UNDER VARIOUS STATUTORY PROVISIONS

Laws are not far behind either. The Companies Act refers to mediation and asks for the establishment of a mediation panel, to which the parties or the court may refer a dispute at any point throughout the proceedings to reach a mutually agreeable resolution. 2018 saw the addition of Section 12A⁴ of the Commercial Courts Act, 2015, which states that parties must first pursue pre-institution mediation before filing a lawsuit that does not call for urgent interim relief.

India joined the UN Convention on International Settlement Agreement as a signatory, demonstrating its support for mediation on a global scale.

Additionally, procedures have been included particularly to encourage plaintiffs to voluntarily follow this course of action. For instance, if the issue is eventually resolved to utilize an alternate dispute resolution procedure, Section 16 of the Court Expenses Act, of 1870 [8] allows for the reimbursement of all court fees.

Mediation is a type of alternative dispute resolution in addition to arbitration, negotiation, and conciliation (ADR). The mediator facilitates the negotiation, but unlike arbitration, mediation does not give the mediator the power to decide how to resolve the conflict. Most often, mediation is a voluntary process that requires consent from all parties involved, a provision in a contract, or a court order. The process is different from litigation in that parties have promoted discussions and reached concessions to settle the problem on their own, as opposed to having a court determine who "wins" and "loses." The mediator may even provide innovative suggestions to assist the parties reach an agreement and get exaggerated expectations. In addition, the mediator monitors the parties' information exchange and negotiation. This is one of the reasons why divorce, custody, work problems, partner management concerns,

⁴ Commercial Courts Act, 2015, s. 12, cl. A.

and arguments between neighbors make up the majority of disputes that are mediated. These circumstances don't need the filing of a lawsuit and may be settled by simple dialogue. Because it is less formal than arbitration and the mediator does not issue a ruling as an arbitrator does, mediation differs from arbitration.

Court-recommended mediation and private mediation are the two types of mediation used in India. Court-referred mediation is a procedure wherein the court, under "Section 89⁵ of the Code of Civil Procedure, 1908", recommends an issue to mediation. It is most commonly used to settle marriage problems, particularly divorces. Private mediation entails the parties reaching an agreement to mediate their disagreement with the aid of a trained mediator. Anyone may opt to use private mediation to settle conflicts, including individuals, business partners, and government appointees. The most enticing aspect of alternative dispute resolution (ADR) is that mediation allows parties to avoid the conventional litigation procedure, which is often a drawn-out and expensive battle.

Several legislative requirements require mediation before bringing a lawsuit to court since India's courts already have a significant backlog of cases. Among these laws are the following: -

- The Industrial Conflicts Act of 1947, Section 4⁶, entrusts conciliators with the duty of mediating and resolving workplace disputes and lays out the process to be followed in great detail.
- Code of Civil Procedure, 1908⁷ – The Code was revised in 2002 and now mandates that all ongoing court matters be sent to mediation. Due to their delicate nature, the amendment also mandates mediation for all family and personal issues.
- The National Company Law Tribunal and the Appellate Tribunal may submit conflicts to mediation under Section 4⁸ of the Companies Act of 2013.
- Act to Promote Micro, Small, and Medium-Sized Enterprises (2006) - When disagreements emerge, the Act requires mediation and conciliation.

- The provisions under the Hindu Marriage Act of 1955⁹ and the Special Marriage Act of 1954¹⁰ are consistent with the courts' prior declaration that marriage and divorce-related problems are more likely to be referred to and resolved via mediation.
- Section 32(g)¹¹ of the Real Estate (Regulation and Development) Act, 2016, allows for the peaceful resolution of disputes via a recognized dispute resolution forum.
- The Commercial Courts Act of 2015¹² was updated in 2018 to require mediation between the parties before filing a lawsuit. The change only permits litigation if the parties to the dispute seriously participate in mediation sessions but are unable to reach an agreement.
- The 2019 Consumer Protection Act¹³ - The newly revised Consumer Protection Act dedicates an entire Chapter to first trying mediation as a means of conflict settlement before turning to a consumer redressal body.

ROLE OF STATE GOVT. IN RESOLVING DISPUTES BY PROMOTING MEDIATION

Consider that you are in charge of a large project that involves personnel from several departments. You've made amazing strides, but the tension is rising between two team members, and what you once dismissed as a little friendly competition now seems to be a full-blown personality conflict.

At first, you tended to let things go in the hopes that they would resolve themselves on their own. But now that your two team members aren't communicating with one another, you worry that if you don't do anything, the circumstance may impair the success of your project.

There are many various types of individuals working in today's complicated workplaces, each with its own beliefs, values, and expectations. It's not unexpected that workplace disputes might occur when you take into account the increasing pressure on workers to do more with less.

The good news is that there are several effective dispute resolution methods, including mediation. This post will analyse this strategy, go through

⁵ Code of Civil Procedure, 1908, s. 89.

⁶ Industrial Conflicts Act of 1947, s. 4.

⁷ Code of Civil Procedure, 1908.

⁸ Companies Act of 2013, s. 4.

⁹ Hindu Marriage Act of 1955.

¹⁰ Special Marriage Act of 1954.

¹¹ Real Estate (Regulation and Development) Act, 2016, s. 32, cl. g.

¹² Commercial Courts Act of 2015.

¹³ Consumer Protection Act, 2019.

when to use it, and provide a step-by-step tutorial for resolving disputes within your team.

Federalism, a key component of our democratic system, is governed by Articles 245¹⁴ to 263¹⁵ of the Indian Constitution. According to the clauses, the separation of legislative, administrative, and financial responsibilities between the Centre and the State is stipulated.

Additionally, the Union List, State List, and Concurrent List are subdivided into the 7th Schedule of the Constitution, which provides detailed information on the legislative authority of the Parliament and the State Assemblies.

The problem of Centre-State disagreements has persisted despite such obvious distinctions.

These conflicts frequently arise if the Centre enacts legislation that interferes with the State's jurisdiction by addressing issues that are on the State list or whenever the Centre passes any other laws that affect the State's legal or constitutional rights.

The Disaster Management Act of 2005¹⁶, which was used in response to the COVID-19 epidemic, is the most recent illustration of the center-state disagreement. Even though public health is a concern for the states that the Parliament cannot legislate on, the Act irks states since the Central directives are obligatory on them.

Another such is the recent lawsuit brought under Article 131¹⁷ by the Kerala Government against the Union in opposition to the Citizenship Amendment Act, 2019¹⁸ (or "CAA"), which violates secularism and basic rights.

Following this, the Chhattisgarh government filed a lawsuit under the same Article to contest the National Investigating Act of 2008¹⁹ (or "NIA"), which was approved by the Centre despite "police" being a state issue.

The vagueness of Article 131²⁰, which provides Parliament the freedom to change or approve

legislation without worrying about consequences, is what motivates the adoption of Central laws that infringe on the State's rights.

Article 131²¹ of the Constitution is intended to maintain the cooperative federalism philosophy. A dispute between the States or between the Union and a State may be decided by the Supreme Court in the first instance within the terms of the Article.

ABSENCE OF COMPREHENSIVE LEGISLATION ON MEDIATION

The Arbitration and Conciliation Act of 1996²² is only one example of the outstanding work the Indian legislature has done in this area. However, it is disappointing to see that there are no written regulations about mediation as a distinct discipline of ADR.

As previously indicated, section 89 of the Civil Procedure Code is the sole law that governs mediation. This provision also only refers to mediation when the court mandates it, i.e., when the court directs the parties to resolve their disagreement via mediation. Judges seldom use this practice, and there aren't many cases when mediation is recommended.

There is no law in India that governs private or commercial mediation, which is when the parties voluntarily select mediation as a procedure to settle their issue. The Mediation and Conciliation Project Committee, which was established by the Indian Supreme Court, is the only entity that even remotely controls this practice in India. The Honourable Apex Court's wisdom and judgment served as the foundation for the creation of this committee, which lacks any formal backing or power from the Indian government.

As has previously been said, mediation is a fluid procedure that mainly depends on the mediator's knowledge, discernment, communication abilities, and conciliatory capacity. As a result, the mediator has to be qualified and trained to conduct mediation for the process to be effective. However, there is no specific government-approved organization or institution in India that teaches mediators, and there is also no rule defining the level of training that is required for someone to become a mediator.

Therefore, it is fair to state that the government urgently needs to pass a distinct piece of law that

¹⁴ THE CONSTITUTION OF INDIA Art. 245.

¹⁵ THE CONSTITUTION OF INDIA Art. 263.

¹⁶ Disaster Management Act of 2005.

¹⁷ THE CONSTITUTION OF INDIA Art. 131

¹⁸ Citizenship Amendment Act, 2019.

¹⁹ National Investigating Act of 2008.

²⁰ THE CONSTITUTION OF INDIA Art. 131.

Eur. Chem. Bull. 2023, 12(Special Issue 5), 6822 -6827

²¹ THE CONSTITUTION OF INDIA Art. 131

²² Arbitration and Conciliation Act of 1996.

regulates the mediation process, training practices, etc. It should be underlined that the aforementioned regulation should be flexible and not compromise the fundamental principles of the mediation process but rather should be designed to provide a set of universal guidelines for all types of mediation conducted on Indian soil. Therefore, the main problem facing India's legislative authorities is to pass a statute that tackles all of the issues surrounding mediation as an ADR technique in India without compromising any of its fundamental principles or qualities.

CONCLUSION & SUGGESTION

Overall, using mediation as an ADR has become more and more common as a way to resolve conflicts. It is adaptable and aids in lowering the backlog of cases before the courts. Furthermore, no side is forced to accept the solution; rather, it is accepted by both parties with their permission. As a result, it offers a calm solution.

The importance of this procedure in the future makes it crucial for law students to pay close attention to this subject since doing so will not only improve their dispute-resolution abilities but also teach them how to negotiate, interact with clients, balance two opposing perspectives, and more.

Consensual conflict resolution techniques, such as mediation, are becoming more and more popular and extensively utilized to settle all sorts of disputes. As a result, legal professionals and students must understand the benefits and significance of this technique.