THE TRADITION AND SIGNIFICANCE OF MEDIATION IN INDIA

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Abstract

Alternatives to litigation for dispute resolution are receiving significant attention around the world. Everyone agrees that litigation is one (not only) technique of resolving disagreements. However, litigation has its own set of benefits, drawbacks, and constraints. As a result, it is our common responsibility to investigate other dispute resolution techniques. The British brought an adversarial legal system with a strong emphasis on common law and litigation to India. The Indian Parliament took the first step in 2002, amending the Code of Civil Procedure 1908 to include Lok Adalat, Arbitration, Conciliation and Mediation as alternatives to litigation.

Because of its efficiency, clarity, and economy, Alternative Dispute Resolution (ADR) processes are frequently recognized as an alternative to the traditional dispute settlement process (litigation). The goal of the article is to highlight the history and importance of one such Alternative Dispute Resolution strategy known as 'Mediation.' Through the employment of this voluntary strategy, both parties can ensure a 'win-win' outcome. The mediator encourages discussions between the parties in order to assist them in reaching a mutually satisfactory resolution to the issue. In India, there is currently no comprehensive mediation statute. This article discusses the existence of mediation in ancient India as well as its growth within the Indian legal system and its potential for expediting dispute resolution.

Keywords: ADR, RDR, Dharma, Danda Niti, backlog of cases, dispute-settlement, confidentiality.

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PRESENCE OF MEDIATION IN INDIAN MYTHOLOGY

The Hindu worldview involves the concept of a pre-existing macrocosmic order, or 'rta'. This worldview arose from the fact that some realities are incomprehensible to human comprehension. Nobody knows what causes natural disasters such as the Indian and Thai tsunamis, Hurricane Katrina in 2004, Hurricane Rita in 2005, and the recent terrible earthquake in Pakistan, Nepal which killed tens of thousands of people. Despite our greatest efforts, certain things are simply beyond our comprehension or control. The Hindus refer to this as the rta, or pre-established macrocosmic order. Hindus do not regard written law as authoritative because they believe there will always be a "Higher Entity" beyond human comprehension. Written laws are, at best, "potential aid in resolving problems, but not legally obligatory.... Hindus believe that, in addition to the pre-existing macrocosmic order, or rta, there is a self-controlled microcosmic order, or dharma. Dharma is central to Hindu theology. Although the term "dharma" cannot be exactly translated into English, it refers to a person's "privileges, duties, and obligations," as well as their "standard of conduct" in their society, profession, and at a certain period in their life. Hindus believe in their competence to determine dharma. As a result, "Hindus do not all hold the same set of beliefs about religion, morality, or the law." As a result, Dharma makes it difficult for Hindus to believe in or follow a rigid set of laws. Dharma also made it impossible for Hindu monarchs and queens to pass laws. According to Hindu elders, any conduct is "allowable depending on the circumstances," even the most wicked. For example, in the Mahabharata, Krishna tells Arjuna that murdering his own people in war is his dharma.

As a result, neither dharma nor adharma can be considered absolute concepts of virtue or evil. According to Hindus, peace and harmony can only be created when everyone acts in line with dharma. They believe that "cosmic order [could] be sustained... by adhering to dharma: through each individual's self-control and conscious subordination of personal desires to higher concerns." Adharma is the pursuit of the dharma's opposing path, which rejects justice and leads to conflict.

In truth, there is no "guidance beyond the rule of righteousness": if a Hindu is unsure what to do, they are "at sea," floating on a bed of conceptual pillars that necessitate ongoing effort on the part of every individual to maintain their place.

The Hindu idea of karma is linked to the Hindu concept of dharma. "Action" in Hinduism can be either "good" (according to dharma) or "bad" (according to adharma), but the two are not interchangeable. Depending on whether one practises good or bad karma, one's fortunes can improve or deteriorate. As a result, "dharma and karma create a complex system of moral demands, retribution threats, and promises….."

LORD KRISHNA'S ATTEMPT AT SETTLEMENT

The Mahabharata devotes approximately 80 chapters to Krishna's attempt at peace making. As a result, it is equally useful to consider the methods God uses to achieve peace through negotiation and compromise.

The Pandavas were the ones who persuaded every one of the values of peace.

Three major insights can be drawn from the Krishna settlement: This attempt is divided into three parts: counsel from a mediator, advise from a client, and when to seek peace. When is it appropriate to begin looking for peace and quiet? Unmet needs, according to Krishna, were a fate worse than death. As a result, it was everyone's responsibility to ensure that their fundamental needs were supplied. He preached that actively pursuing peace was a morally sound way to follow the dharma (the holy path). While he opposed pursuing peace just to avoid battle, he was willing to accept it if it was driven by goodwill towards the enemy or compassion for their suffering. Krishna believed that seeking conciliation was the ideal first step to take if done correctly and without jeopardising one's own interests. Even if the victim has been wronged to the extent where vengeance is the only choice, this remains true. However, if one's own demands cannot be addressed by peaceful means, conflict is unavoidable. Furthermore, Krishna believed that individuals should keep striving to obtain serenity even if it appeared hopeless for at least five different reasons. First, even an ineffective deed performed to the best of one's capacity has merit. Second, wherever possible, a friend should attempt to resolve problems between blood relatives. The third advantage of making peace is that no one can accuse you of not attempting to make the world a better place. Fourth, one can relax knowing that they did their utmost to find a peaceful solution. Last but not least, just because peace appears hard to achieve now does not imply that it will never be achieved. Krishna believed that even after thorough deliberation by specialists, no one could predict how an action would play out in the future. He believed in his formula, which was, Man's

Effort + Luck = Achievement. If providence intended for an action to succeed and an individual contributes to that accomplishment, the activity will succeed. If peaceful dialogue fails, the Mahabharata teaches that one should endeavour to secure one's needs through combat without fear.

Recommendations for Peacemakers

The Mahabharata teaches us four things about mediators:

- first, the qualities they should have,
- second, the principles they should follow,
- third, their strategy, and fourth, their method of communication.

Qualitatively, a good mediator would be impartial and knowledgeable." A mediator should wait to accept gifts or bribes from either side until after the mediation has been successful. When it comes to mediating conflicts, the Mahabharata recommends three main rules that should be followed. Their first duty is to speak kindly. Second, they should work to convince the other side's legal representation that making peace is preferable. Next, they should be adaptable and responsive to changing conditions. The mediator's strategy for achieving a settlement may need to evolve if the parties' respective situations alter. On the count of 30, Krishna explained his strategy for mediating the dispute. He tried to forge a bond of fraternal affection between the two sides.

When that did not work, he tried sowing discord by stirring up party-wide panic instead. When his advice was ignored, he attempted to sow discord within the party so he could return to mediation. At last, he made a generous offer in the hopes of fostering a climate of harmony. Advice on how to communicate with another party is provided by Krishna's attempts at mediation with Duryodhana and Dhritarashtra. Like Krishna, a mediator should explain why they are talking. The mediator should then remind the parties of their dharma and that the path of virtue, profit, and desire leads towards peace. The mediator should then make it clear that any form of adharma is unacceptable. The mediator's role is to help the disputing parties realise that they could reject unjust behaviour (adharma) and embrace more moral conduct (dharma) in their lives.

The Mahabharata offers a few specific recommendations. It is inappropriate for a client to attempt to bribe a mediator in order to influence their impartiality. Furthermore, a client who is stubborn or vain is unsuitable because they will only serve to sabotage the peace process.

The Procedure Prescribed in Arthashastra of Kautilya for Dispute Management

The Arthashastra of Kautilya, also known as Danda Niti in the early Smritis and Puranas and whose contents were a crystallisation of Arthashastra and Dharma Shastra tradition, has a history as old as the Vedas. There are references to political books dating back before the fourth century B.C., but the Kautilya Arthashastra, published around 800 B.C.E., is largely regarded as the most popular, thoroughly scientific, and authoritative interpretation of the traditions. Kautilya (or Chanakya, c. 350-275 BCE) was a notable Indian statesman and philosopher who served as Prime Minister under the first ruler of the Mauryan Empire, the great Indian emperor Chandragupta. Kautilya was a professor of Political Science and Economics at the University of Taxila. He was from Northern India and belonged to the Brahmin caste (the priestly elite).

The "Arthashastra" of Kautilya is divided into fifteen books, or Adhikarans. Five of them are concerned with internal country management, eight with engaging with neighbouring countries, and the remaining two are more generic. The book is more concerned with management, planning, covert action, covert economy, and diplomatic endeavours than with fighting. Because the basic behaviour of the 5Ms of business (man, materials, machines, minutes, and money) has remained consistent over time and form, Kautilya's management theories, tools, and approach are relevant and suitable to modern business and organisational behaviour.

KAUTILYA'S CONFLICT RESOLUTION METHOD

In the Arthashastra, Kautilya offers three techniques before engaging in combat, or Bheda: Sam (implying patience to understand your adversary), Daam (persuasion by gifts or financial wealth), and Dand (imposing appropriate punishments). When everything else fails, a king should use Bheda (or raw force) to bring an opponent to their knees.

The 15th-century Kautilya's Saam, Daam, Danda, and Bheda can be described as a complex instrument for long-term organisational and behavioural management. Maslow's hierarchy of needs is well-known, but few comprehend that they are also employing the Chanakya theory, which originated in India in the third century B.C. While Kautilya's Arthashastra is broad and profound, it is not widely studied or implemented in business today. This is owing to a lack of study establishing the continuous applicability and utility

of Kautilya's Arthashastra teachings in the context of modern management practise.

INCORPORATION OF MEDIATION IN INDIAN LEGAL SYSTEM.

The welfare state notion is important to India's Constitution. In order to protect their legal and constitutional rights, the state has an obligation to provide citizens with a fair and expedient means of resolving legal issues, both in and out of court. Justice should not be hampered by conditions such as illiteracy, low income, or other societal problems. Articles 39-A and 21 of the Indian Constitution now expressly demand the provision of free legal aid to destitute individuals who are unable to defend themselves in court due to financial or other constraints. The measure will aid those in need who are powerless to change their situation. Those in need who are powerless to change their circumstances will benefit from the law. To challenge the right of the law court from the Munsif courts to the Supreme Court, the weaker section was rescued by justice V.R. Krishna Iyer and the Committee Report of justice P.N. Bhagwati.

This objective is stated in the preamble of the Constitution, which tackles social, economic, and political justice. In the Preamble, all Indians are assured of their legal, cultural, economic, and political rights. When the word "justice" is used, a few instances of the various components that make up a well-functioning alternative conflict resolution system are highlighted; legal aid camps, family courts, village courts, mediation centres, commercial arbitration, women's centres, consumer protection forums, and so on are examples.

The Indian Constitution is the country's guiding document, containing measures aimed at achieving justice by balancing the needs of the individual with those of society at large. As a result, justice entails working for the collective good rather than chasing personal benefit. Court justice is essential in establishing social justice. People in the culture become enraged when the law refuses to fulfil its duty. The legal system of a state is critical to maintaining peace and preventing social unrest. Cases in India must be settled promptly since the courts alone cannot handle the massive backlog of cases in a country that seeks to preserve citizens' socioeconomic and cultural rights. In this aspect, Alternative Dispute Resolution techniques can be quite effective.

No one's freedom or life can be taken away without following the proper legal process, as stated in Article 21. The terms "life" and "liberty" are intended to be understood widely, not narrowly.

The Promise of a Quick Trial: The right to a timely trial is a fundamental human right, according to the case Hussainara Khatoon v. Home Secretary of Bihar. To the greatest degree possible by law, the Supreme Court approved Article 21's broad goal-setting. The reasoning behind this broad interpretation was simple: Article 21 is intended to reduce the stress, cost, and burden of litigation, all of which can have a negative impact on a person's mental health and, when combined with delays, can jeopardise an accused's ability to mount a defence.

Article 39-A requires the State to guarantee that no citizen is denied access to justice on the basis of economic or other disabilities by establishing and maintaining a legal system that promotes justice on the basis of equal opportunities and, in particular, grants free legal assistance. All of this points to the importance of a state's role in protecting justice and the role that ADR processes play in this. This is why there is so much legislation in place, like the Arbitration and Conciliation Act of 1996, Section 89 of the Civil Procedure Code, and the Legal Services Authority Act of 1987, to make achieving justice easier.

Since the late nineteenth century, arbitration in India has been formally recognised by law as a method of resolving legal disputes. Early arbitration was governed by the Civil Procedure Code and other statutes; the first India Arbitration Act was enacted in 1899 and was superseded by the Arbitration Act of 1940; and arbitration was already a commonplace practise as an alternative to litigation. This Act, however, subjected arbitration to the same ills as the courts, compelling parties to appeal to the courts in every minor matter and undermining the original intent of arbitration as a substitute for litigation.

The original Indian Arbitration Act was passed in 1899. The Act was modelled after the English Arbitration Act of 1889 and applied only to situations in which a lawsuit could be filed in a town designated by the president, with or without his permission. The Act's intent was to facilitate voluntary arbitration without judicial involvement. The 1940 Arbitration Act was a watershed moment in the history of arbitration law in British India. The Indian Arbitration Act of 1899 and the Second Schedule to the Civil Procedure Code of 1908 were updated and revised to reflect these changes. The main inspiration for it came from the English Arbitration Act of 1934. However, it was pointed out that some proceedings were still ongoing and that there were some drawbacks to enforcing this Act. As a result, in 1996, Parliament passed the Arbitration and Conciliation Act. The legal system recognises conciliation as a valid strategy for

resolving labour disputes with the employer. The Industrial Dispute Act of 1947 mandates both conciliation and arbitration as methods for resolving workplace disputes.

Supreme Court in its decision in Rajasthan State Road Transport Corporation v/s V. Krishna Kant wrote, "the policy of law emerging from Industrial Disputes Act, and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism, which is swift, inexpensive, informal, and unencumbered by the plethora of procedural Laws and appeals and revisions applicable to civil courts."

As a result, the Constitution places a premium on finding peaceful solutions to conflicts outside of the court system. The State must establish an Alternative Dispute Resolution forum by passing legislation to that effect. In the context of the adoption of the Alternative Dispute Resolution Process, the same has been acknowledged by the legislature and by separate legislation.

There is an urgent need to create a new system of access to justice. Some say that Alternative Dispute Resolution (ADR) is superior to traditional legal processes since it is more flexible, less expensive, faster, and less formalistic. Rather than rushing to court over a minor disagreement, the parties should attempt a different approach. The framework for ADR serves as a spark on the path to equal justice. In India, the dawn of judicial equality is breaking. The ADR movement should be pushed forward with greater zeal. If they are successfully granted this effect, it will significantly decrease the burden on the judiciary while simultaneously offering instant door-to-door justice at no additional expense.

SIGNIFICANCE OF MEDIATION IN INDIA

After 74 years of the Indian Constitution in force, people have begun to wonder if the Constitution has failed us or whether we have failed the Constitution. Who is to blame if the justice system failed us, or if we failed the justice system? These considerations, however, are unimportant to the parties involved in the action. They simply want their argument resolved as quickly as possible, using a system that is as inexpensive as possible, allows for some flexibility, and is not based on any set of legal principles or technicalities. All these issues should be addressed through the Alternative Dispute Resolution (ADR) mechanism. The concept of alternative dispute settlement is not new. This topic has been raised and addressed in several legal settings over the last three decades, and it has lately received legislative support. According to Black's Law Dictionary, alternative implies "to provide a choice." At that time, jurists began to advocate for investigation into the potential of developing alternative conflict settlement methods before the Court. The importance of a peaceful dispute resolution atmosphere was underlined both during and after court processes. In its 14th Report, the Law Commission advocates for the creation of ways to make justice more accessible, user-friendly, low-cost, dependable, and definitive. The communication strategy of "setting an agenda" is used by mediators to determine the sequence in which the parties will discuss the issues, viewpoints, claims, or proposed settlement conditions. Order XXXII-A of the Code of Civil Procedure, Section 23 of the Hindu Marriage Act,1955, The Industrial Disputes Act,1947, the Family Courts Act, the Legal Services Authorities Act,1987 and the Arbitration and Conciliation Act,1996…. all rely on ADR. The court may give the contesting parties an option of ADR through a) Arbitration, b) Conciliation, c) Judicial settlement (including settlement through Lok Adalats), and d) Mediation, according to Section 89 of the CPC. Mediation appears to be the most popular alternative dispute resolution (ADR) method, which is similar to conciliation but gives the neutral third party a larger opportunity to provide solutions to the parties' difficulties. When it comes to dispute resolution, mediation is not a new concept, but rather one that is firmly ingrained in our cultural traditions. Usually, parties desire to settle their issues peacefully. Many indigenous groups in our country have used a village council made up of respected community leaders to resolve conflicts. Mediation is fast gaining favour in the corporate world as a technique of resolving legal issues. Attorneys and clients seeking a rapid, inexpensive, and discrete resolution of their conflicts are increasingly resorting to mediation in court-annexed and private, fee-based settings. In contrast to the more formal processes of litigation and arbitration, mediation is a sort of informal negotiation between the parties that does not involve the use of evidence or witnesses. In a mediation session, a neutral third party known as an advisor act as a mediator, as opposed to a judge who determines a matter in court or an arbitrator who makes a ruling in arbitration. Another distinction between mediation and litigation is that it is not adversarial. Indeed, the finest mediators design a method in which both parties play an active role and collaborate to find a solution to the disagreement. Instead of going to court or arbitration, mediating a dispute can result in a settlement that is acceptable to all parties. Mediation works because it is adaptive, allowing the parties to select the procedure that works best

for them. The mediation process was formally recognised by Parliament when Section 89 of the Code of Civil Procedure was updated to allow for mediation as a way of dispute resolution where the court judges that a settlement is possible and may be acceptable to the parties. In the case of Salem Advocates Bar Association v. Union of India, the Supreme Court maintained the legality of the statute and instructed the formulation of relevant guidelines. Mediation is widely respected in India as a method of resolving legal issues due to its confidentiality. The topic is strictly between the disputants and the mediator when only the disputants and the mediator are concerned. In mediation, the mediator serves as a neutral third party to assist the parties in reaching their own agreement. All statements made during mediation in India are secret and may not be used in any civil proceedings or other forum unless all parties concerned have given their written approval.

In Indian mediation, the mediator collaborates with the opposing parties to facilitate the mediation process rather than imposing a judgement on them. A mediator's role comprises characteristics of both assisting and judging. A mediator will manage the parties' interactions, encourage and promote communication between them, and deal with any interruptions or outbursts that may occur in India. All information provided by either party during the mediation process, as well as any documents either party may prepare or submit, are strictly confidential. Because mediation is private; neither party's words nor any information provided to the mediator, may be used against them in court unless both parties agree otherwise. The mediator is not required to testify and must keep all information confidential.

Mediation is a type of alternative conflict resolution that has been used successfully in divorce disputes and business issues to rapidly resolve the dispute in a cost-effective manner that does not violate the privacy of the parties involved. In India, mediation is a flexible process that helps all parties concerned by promoting a collaborative resolution to a conflict and reducing the backlog of cases in the legal system.

CONCLUSION

Mediation is still a voluntary process in India, and its success can be related to the willingness of the parties to engage and the mediator's skill to properly handle the issue. Success necessitates skill, technical knowledge, and, most importantly, a compelling psychological perspective. Adopting mediation necessitates a specific conceptual framework. Compromise can only work if both parties are more interested with addressing the problem than punishing the other.

Due to the massive backlog of cases awaiting resolution through the RDR (Regular Dispute Resolution) procedure, the Supreme Court and the Government are aggressively exploring mediation and other types of Alternative Dispute Resolution (ADR). The 129th Law Commission Report ushered in a period of fast judicial transformation in India. For years, judicial officials have been attempting to find a solution to their workload congestion. The Commission actively searched for ADR procedures in its 129th Report, titled "Urban Legislation Mediation as an Alternative to Adjudication," published in 1988. Alternative Dispute Resolution is strongly supported as an essential method of dispute resolution. The Commission also proposed establishing Conciliation Courts to settle disputes. Furthermore, the Justice Malimath Committee advocated for the use of ADR approaches in the court system. The National Litigation Policy of 2010 provided major funding and relevance ADR in India. Since 2005, Supreme Court justices have done a lot to help make mediation a better approach to resolve problems. A Mediation and Conciliation Committee was formed under the direction of the Honourable Mr. Justice R. C. Lahoti, and a Project on Mediation was launched in Delhi in 2005. According to former Chief Justice of India Justice R.C. Lahoti, nothing is as powerful as a concept whose time has come, and Alternative Dispute Resolution is such an idea.

REFERENCES

1. Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity*, (Oxford University Press, 2008), p.78.
2. Ibid at 80
3. Menski, supra note 40, at 80
4. Ibid at 85
5. Menski, supra note 40.
6. Ibid at 40.
7. Menski I, supra note 40, at 95.
8. Ibid
9. Menski, supra note 40, p.108.
10. Ibid
11. Ibid, section 87.
12. Kumar, N.& U.S.Rao "Guidelines for value-based management in Kautilya's Arthashastra", 15(4), *U.S. Journal of Business Ethics*, p. 415-423(1996).
13. Larfela, R. A." Interdepartmental Conflict".2, *IPM Manpower Journal p.* 29-32 (1988).
14. P.N. Bhagawati on the need to create adequate and effective delivery system of justice in Chapter VI of ―Social Justice – Equal Justice‖ P.33
15. Ibid.

16. R E Miller; A Sarat, "Grievances Claims and Disputes: Assessing the Adversary Culture‖" *Law and Society Review.* NCJ Number 83667, Volume: 15 Issue: 3-4, p. 525-566, special issue (1980-1981) p525 ,527.
17. Indian Constitution AIR 1979 SCR (3) 169
18. The Arbitration and Conciliation Act, 1996, Act No26 1996
19. India Arbitration Act, 1899, Act IX of1899
20. AIR 1995 SCC (5) 75
21. Law Commission of India 14th Report on the Judicial Administration- India,1958.
22. AIR 2003 (1) SCC 49.
23. Law Commission of India 129th Report on the need for amicable settlement of disputes between parties,1988
24. Law Commission of India ,188th Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts"(December ,2003).