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INCREASING POPULARITY OF MEDIATION IN INDIA, AS A DISPUTE RESOLUTION MECHANISM.

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ABSTRACT
There are two primary responsibilities of states, and they are (1) to prevent war, and (2) to enforce the law. These two factors are the bedrock upon which the development, improvement, and growth of the state rest. On the other hand, development inevitably brings about difficulties. The state's role in administering Justice is to reduce tension. The traditional idea holds that 'court' is the sole means to get justice. Historically, disputes were settled through the courts, but today, the concept of a "multi door judicial approach" is supported by both the government and the courts. Alternative Dispute Resolution (ADR) mechanisms are widely regarded as an alternative to the traditional dispute resolution process (litigation) due to their efficiency, clarity, and economy. The purpose of this piece is to draw attention to the value of one such alternative dispute resolution techniques called 'mediation'. A 'win-win' outcome can be guaranteed by both parties through the use of this voluntary method. The mediator facilitates discussions between the parties in an effort to help them reach a mutually agreeable resolution to the dispute. There is currently no comprehensive mediation law in India. This article examines the emergence of mediation within the Indian judicial system and its prospective potential in speedy disposal of disputes.

Key words: Litigation, ADR mechanism, non-binding dispute resolution system, Conciliation, Draft Mediation Bill 2021.

There is nothing novel about the fact that as time goes on and technology improves, complexity increases. It is the same with our civilised society. Time just makes our society more convoluted and prone to arguments. However, unless such complications are handled, the advancement of civilisation will be stymied. In reality, such a process is desperately needed because it facilitates development by allowing for the efficient, simple, and rapid resolution of disputes. Existing complications in the commercial arena cause loss of profit that affects both parties. Time, money, and development were lost, and businesses had to come up with a solution that was different from the RDR system they had always used. The methods used in ADR (Alternative Dispute Resolution) change throughout time. Because it gives the parties a chance to resolve the issue amicably and quickly, mediation is one of the tools of the ADR system that attracts the attention of both legal and commercial stakeholders. Time is money in the business world, but legal battles eat into both time and money, therefore parties are increasingly opting to settle out of court.

A conflict develops when one party makes an assertion or claim and the other party disputes it. There is an inherent conflict of interest in any legal matter, and the courts are the traditional forum for resolving such cases. In contrast, mediation involves the intervention of a single impartial third person in order to break the impasse.

Mediation is a tried-and-true method of conflict resolution that dates back to the Vedic era. (1)

Lord Krishna used mediation to end the ancient Indian Battle of Kurukshetra, fought between the Kouravas and the Pandavas. Before the establishment of the modern British court system in India, community disputes were settled by a council of local elders using the Panchayat system. Respected businesspeople known as Mahajans were also consulted in order to mediate conflicts outside of traditional channels.

Therefore, the idea of mediation is not novel in Indian culture, as it has long been practised by various groups. India has a rich cultural history, and one of its legacies is the practise of mediation. This same practise is being reborn in a modern form as an amicus curie of the judicial system.

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"A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution,"(2) is how Black's Law Dictionary defines mediation.

"Disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute," write Henry J. Brown and Arthur L. Mariot in their book. (3) Although the mediator cannot impose a decision on the parties, they can utilise their knowledge and training to assist them in reaching a mutually agreeable settlement of their disagreement without resorting to a court or other form of adjudication.

For example, the Cambridge Dictionary describes mediation as "the process of talking to two separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems."(4)

That "mediation is a voluntary, binding process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement" is a wise observation from India's highest court. (5) Instead of forcing one answer on the parties, a mediator fosters an atmosphere where compromise is possible. Mediation is a time-tested, non-confrontational approach of solving conflicts. Delhi, Ranchi, Jamshedpur, Nagpur, Chandigarh, and Aurangabad have all seen tremendous success because to it. The mediation procedure has been unanimously supported by the parties involved in the litigation.

The Industrial Disputes Act of 1947 is the legal document that can be used to track the formal incorporation of mediation into the Indian legal system during the post-British era. (6)

avoidance of legal action by settling differences. Further momentum was given to the idea of mediation after the Legal Services Authority Act, 1987 was passed, which allowed for the founding of Lok Adalat. (7) Additionally, Section 89 of the Code of Civil Procedure, 1908 codified aspects of business mediation. (8)

According to data collected by the National Judicial Data Grid, there are roughly 71,000 cases (9) currently pending in the Honourable Supreme Court of India, 5.9 million cases(10) outstanding in India's various High courts, and over 40 million cases(11) pending in India's various district and subdivisional courts.

According to the numbers, our courts are currently swamped with too many cases. The use of ADR mechanisms is no longer a luxury of the modern era; it is a necessity. Since it is nearly difficult to reduce the backlog using the traditional judicial system, the government and the courts have adopted several measures to promote the use of alternative dispute resolution. (12)

Alternative dispute resolution through mediation has been around for quite some time. However, agreements reached in a mediated process have no binding legal effect. The need to document this kind of agreement in some way has existed so long as there have been contracts. This is typically carried out through the filing of a consent decree with the court, the issuance of a mutually acceptable arbitration decision, or the conclusion of negotiations through conciliation. Traditionally, mediation has been used to resolve conflicts within nuclear families, such as marital disagreements or disagreements between more distant relatives (such as when brothers and sisters disagree about who gets what portion of a business). A recent increase in mediation for corporate business conflicts has been met with overwhelmingly positive results.

In India, the Arbitration and Conciliation Act, 1996, explicitly recognises conciliation as a method for resolving disputes, prompting the natural inquiry into the relative merits of mediation and conciliation. (13)

The solution to this seemingly difficult question is actually quite simple: mediation and conciliation serve unique objectives and, in most cases, rely on the intent of the parties. In mediation, each side is free to choose whatever approach works best for them to reach a settlement. The conciliator must follow the procedure outlined in the event of Arbitration and Conciliation (14) Act, 1996, in conflict resolution with initiative and vigour. Therefore, the mediator lacks the authority to actively participate in the formulation of the settlement, but the conciliator possesses such authority.

The government and the courts have made a concerted effort to encourage the use of mediation over the years. The Supreme Court and High Court Manuel each have judgements that provide directions for improving the practise of mediation beyond the statutory measures already in place.

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The Developing Mediation Practise in India

The modern form of mediation was introduced in India sometime in the nineteenth century. The first time this concept appears in law is in the 1996 Act on Arbitration and Conciliation. The arbitral panel is authorised to advise the parties to explore mediation and conciliation even after the arbitration process has begun. Incorrect use (or even formulation) of any principles of mediation has nearly eliminated this clause supporting mediation. This was partially remedied with the addition of Section 89 to the Code of Civil Procedure, 1908, which addressed the inculcation of various conflict settlement techniques. In section 89 of the Civil Procedure Code, 1908, the concept of "judicial mediation" first appeared. (15)

The Industrial Disputes Act of 1947 and the Consumer Protection Act of 2019, both recently revised, are two of the few statutes in India that provide mediation provisions.

The Commercial Courts Act of 2015, the Commercial Division, and the Commercial Appellate Division of the High Courts (Amendment) Act of 2018, and the Companies Mediation Rules, 2016 all include mediation as a method for settling disputes outside of court.

The Government of India formed the Law Commission of India as an advisory body to ensure that the Ministry of Law and Justice complies with all applicable laws and regulations. In order to actively contribute to judicial changes in India, this executive body mostly conducts research and makes recommendations in the form of reports.

The 129th Law Commission Report ushered in a period of rapid reform in India's judicial system. Judiciary officials have been trying to find a solution to their caseload overload for years. With its 129th Report from 1988, titled "Urban Legislation Mediation as an Alternative to Adjudication," the Commission actively sought out ADR mechanisms. Alternative Dispute Resolution is strongly endorsed as a necessary means of resolving conflicts. The commission also suggested setting up Conciliation Courts to settle disagreements. In addition, the Justice Malimath Committee suggested that the judicial system utilise alternative dispute resolution (ADR) methods. The parties may proceed to litigation if they are unable to resolve their differences through negotiation.

The Code of Civil Procedure (Amendment) Act of 1999 was strengthened by the findings of these two investigations. The current ADR process, arbitration, is supplemented by the addition of conciliation, Lok-Adalat, and mediation.

The mediation industry in India has expanded thanks to many landmark decisions from the country's highest court. The Court, in Salem Advocates Bar Association case(16) rejected challenge to constitutionality of amendments made to Code of Civil Procedure, by Amendment Acts of 1999 and 2002, but noted that modalities for the manner in which Section 89 of the Code and, for that matter, the other provisions which have been introduced by way of amendments must be formulated. To this purpose, a committee was established under the leadership of Justice M. Jagannadha Rao, a former judge of the Court and the current Chairman of the Law Commission of India, to oversee the implementation of the revisions and their intended improvement in the speed with which justice is administered. The Committee was also encouraged to explore establishing guidelines for the use of alternative dispute resolution (ADR) as mentioned in Section 89, as well as a sample case management formula. It was also mentioned that the concerned High Courts may adopt the prepared model regulations to implement Section 89(2)(d) of the Code, with or without modifications. Furthermore, if any difficulties are encountered in the implementation of the amendments, they can be brought before the Committee, which will consider them and make any necessary recommendations in its report. The report was submitted by the Committee.

There are three parts to the report. Report 1 contains a discussion of the various grievances regarding Code amendments as well as the Committee's recommendations. Report 2 includes a discussion of various issues raised in connection with draught rules for ADR and mediation as contemplated by Section 89 of the Code and Order X Rules 1A, 1B, and 1C. It also includes a set of model Rules. Case management is conceptually evaluated in Report 3. It also contains the case management model rules. In addition to the Salem Advocate Bar Association case, the decision in Afcons Infrastructure and Ors. v. Cherian Verkay Construction and Ors 2010 (8) SCC 24 altered the course of arbitration proceedings in India. The scope and interpretation of Section 89 of the Civil Procedure Code, 1908, the suitability

and unsuitability of arbitration for various disputes, the consent of the parties to the suit for arbitration, the mandatories or voluntariness of the ADR process, and many other co-related issues were largely resolved by the apex court, burying the hatchet once and for all.

In Afcons Infrastructure (17) case, the first respondent Cherian Varkey Construction sued the appellants Afcons Infrastructure for Rs. 2,10,70,881, which included the amount owed to the appellants by the employer plus interest. Following that, CV Construction filed an application with the trial court under section 89 of the CPC,1908, requesting that the court formulate the terms of settlement and refer the matter to arbitration. Afcons Infrastructure responded by stating that they had not agreed to the Section 89 arbitration process. As a result, the first respondent agreed to arbitration, whereas defendants 1 and 2 did not.

The trial court ruled that because the claim was related to a work contract, the dispute should be resolved through arbitration. Afcons Infrastructure, the appellants, filed a revision petition in the High Court against the trial court's order. The High Court dismissed it, holding that the apparent tenor of Section 89 of the CPC allowed the court to refer the dispute to arbitration even if the parties were unwilling. The court also stated that the pre-existing arbitration agreement mandated by the Arbitration and Conciliation Act,1996 for referring disputes to arbitration is inapplicable under section 89 of the CPC,1908.

The Amendment Act of 1999 Incorporated Section 89 into the Code of Civil Procedure, 1908 to resolve disputes without going to trial and in response to the Law Commission and Malimath Committee recommendations. In this case, the Supreme Court addressed the object, purpose, scope, and tenor of Section 89 in detail.

Section 89 of CPC deals with Settlement of disputes outside the court and it reads- 1) Where it appears to the court that there exist elements of settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

a) arbitration
b) conciliation
c) judicial settlement including settlement through Lok Adalat; or
d)mediation

2) where the dispute has been referred –

a) for arbitration or conciliation, the provisions of Arbitration and Conciliation Act,1996 shall apply as if the proceedings for the arbitration or conciliation were referred for the settlement under the provisions of that Act;

b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act,1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

c)for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be Lok Adalat and all the provisions of the Legal Services Authority Act,1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

d) for mediation, the Court shall give effect a compromise between the parties and shall follow such procedure as may be prescribed.

Order 10 Rule 1A- Direction of the Court to opt for any one mode of alternative dispute resolution- After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of Section 89.

Unlike conciliation, which is governed by the Arbitration and Conciliation Act of 1996, mediation in India is not governed by any statute. A provision in the Industrial Disputes Act of 1947 Concerning mediation. More recently, the Commercial Courts Act of 2015 and the Real Estate (Regulation and Development) Act of 2016 have included mandatory pre-litigation mediation provisions.

The Companies Act of 2013 and the Consumer Protection Act of 2019 have also been amended to allow for mediation. Most importantly, Section 89 of India's Civil Procedure Code (CPC) was revived by Parliament in 1999, allowing courts to refer parties to mediation. However, it was up to the Indian Supreme Court to bring this section of the Code to life.

The Supreme Court ruled in 2010 that the mediation process must remain private in the case of Moti Ram(D) Tr.Lrs.& Anr vs Ashok Kumar & Anr(18). Without providing any details on what transpired during mediation, the Court has expressed the opinion that, should mediation result in a settlement, both parties should return to Court for finality of settlement. The mediator's report to the court should simply state, "Mediation has been unsuccessful," if the process fails. Except than that, the mediator must not record any of the decisions, proposals, or actions taken during the mediation. This is because, in mediation, the parties frequently make offers, counter-offers, and proposals, but until and unless the parties reach an agreement and sign it, there will be no concluded contract. If the events of the mediation proceedings are made public, the confidentiality of the mediation process will be lost.
The lack of any guidelines or rules for the operation of mediation was felt keenly and was one of the reasons why mediation was not used. In response to a constitutional challenge to Section 89 CPC, the Supreme Court of India established a Committee to design Mediation Rules, which were later approved. The rules were to be drafted by all the High Courts. In India, this resulted in the development of Court Annexed Mediation.
With the intention of improving and strengthening existing mediation rules in India, the Draft Mediation Bill 2021 ("Bill") (19) has already been presented. The Mediation Council of India will be established to institutionalise mediation in India, and the Indian Civil Procedure Code 1908 ("CPC") will be amended to recognise mediated settlement agreements. Parties will also have the right to seek urgent interim relief in courts before the start or continuation of mediation proceedings. Some critical studies of specific clauses are still required to turn the draft into bulletproof legislation. A possible solution exists to the long-standing need for a unified body of law governing mediation.

"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." ABRAHAM LINCOLN
In India, mediation is still a voluntary process, and its success can be attributed to the parties' willingness to participate and the mediator's ability to effectively manage the disagreement. Skill, technical know-how, and, most crucially, a compelling psychological stance, are all required for success. Adopting mediation requires a certain mental framework. The idea of compromise can only be successful if both parties are more concerned with solving the problem than with punishing the other.
The Supreme Court and the government are actively seeking out mediation and other forms of alternative dispute resolution (ADR) due to the enormous backlog in cases waiting to be resolved through the RDR (Regular Dispute Resolution) procedure and mediation's distinctive qualities.
When mediation ceases emphasising people's autonomy, it stops empowering them to find their own solutions to social justice issues through introspection, creativity, empathy, and boldness. Similar to how mediators lose faith in dialogue's transformative potential, they begin encouraging participants to focus more on them than on each other. The mediator's role is to moderate the discussion between the disputing parties. When parties fail to negotiate, they miss out on the opportunity to learn that they can alter an unjust or unequal system, structure, or circumstance.
Some Indian statutes have institutionalised mediation, and a comprehensive law on mediation in India is now being drafted. The true test of its success, however, lies in the fact that it was accepted by both parties. The mechanism will flourish to its full potential if people are more motivated to fix the issue than to simply satisfy their own needs.

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