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# Mediation: Prospects and Problems

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## ABSTRACT

*Mediation has gained popularity as a cost-effective and efficient means of resolving disputes. It offers parties in a conflict the opportunity to engage a neutral third-party mediator to facilitate communication and negotiation, leading to a mutually acceptable agreement. This essay explores the prospects and problems associated with mediation, focusing on its impact on access to justice, procedural fairness, confidentiality, and enforceability.*

*Mediation offers numerous advantages compared to traditional dispute resolution methods. It promotes cooperation and non-adversarial approaches, allowing parties to find mutually acceptable solutions. It is particularly valuable in preserving relationships and is faster and more flexible than litigation. Mediation's confidentiality protects discussions and encourages transparent conversations. However, mediation faces challenges, including power imbalances, procedural fairness, enforceability concerns, and mediator biases. It is crucial to ensure equal participation, maintain mediator impartiality, and provide adequate training and expertise. Mediated agreements may lack enforceability, requiring voluntary commitment. Certain conflicts may not be suitable for mediation. Solutions such as a uniform mediation statute, mediation-focused institutions, regulatory bodies for mediator qualifications, and public awareness initiatives can enhance the effectiveness of mediation. By addressing these challenges and implementing appropriate strategies, mediation can flourish as a valuable tool for achieving justice and resolving conflicts harmoniously.*

**Keywords:** *mediation, dispute resolution, conflicts, cost-effectiveness, confidentiality, collaborative process, prospects, problems, access to justice, procedural fairness.*

## I. INTRODUCTION

Mediation has gained popularity in recent years as a cost-effective and efficient means of resolving disputes. It is a process where parties in a dispute voluntarily agree to engage a neutral third-party, the mediator, to help resolve their conflict. The mediator facilitates communication and negotiation between the parties to help them reach a mutually-acceptable agreement.

Mediation's appeal lies in the fact that it is a remarkably adaptable approach, surpassing conventional methods of resolving conflicts. Unlike rigid legal frameworks, mediation

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empowers parties to create an agreement tailored precisely to their unique requirements and wants. This remarkable flexibility allows for the exploration of inventive solutions, ensuring a fair and mutually beneficial resolution to disputes. Furthermore, mediation boasts the advantage of being a swifter and more cost-effective alternative to traditional means of dispute resolution. By circumventing lengthy court proceedings and complex arbitration processes, mediation significantly reduces expenses and expedites the resolution timeline, greatly benefiting all involved parties. It also upholds a sense of confidentiality that is often lacking in conventional approaches. In most instances it is a private procedure that ensures that discussions and agreements remain shielded from public scrutiny, safeguarding the parties' desire for discretion and maintaining the confidentiality of their disputes and agreements. Ultimately, mediation embodies a collaborative process that prioritizes the parties' needs and interests, leading to resolutions that are not only robust but also sustainable in the long run.

The appeal of mediation has grown significantly in recent years due to its potential benefits, including efficiency, cost-effectiveness, and preservation of relationships. However, it is a multifaceted idea, and this essay examines both the prospects and problems associated with mediation, while considering its impact on access to justice, procedural fairness, confidentiality, and enforceability.

## **II. PROSPECTS OF MEDIATION**

One of the key advantages of mediation compared to other dispute resolution methods is that it provides a cooperative and non-adversarial approach to resolving conflicts. Unlike litigation and arbitration, which often result in a winner-loser outcome, mediation focuses on finding mutually acceptable solutions. This approach helps maintain relationships between parties and is especially valuable in situations where continued cooperation and future interactions are important. The remarkable potential of mediation lies in its capacity to alleviate the strain on overwhelmed court systems. By redirecting cases away from the arduous litigation process and towards the amicable realm of mediation, courts can allocate their valuable resources to more complicated legal affairs, thus reducing the unending backlog of cases and providing a faster end and resolution to disputes. This not only serves the interests of the involved parties, but also enhances the overall efficiency and efficacy of the justice system as a whole.

Mediation presents an opportunity for quicker resolutions, avoiding the lengthy procedures of conventional litigation. This process not only preserves precious time and resources for all involved parties, but also encourages a more harmonious collaboration, empowering each party to steer the course of the process and actively contribute to the creation of more unique

solutions. By doing so, mediation cultivates a profound sense of ownership over the outcome, fostering a sense of reassurance amongst the parties involved. The possibility of a resolution that is more specifically suited to the parties' needs often ends up being a compelling alternative to traditional dispute resolution.

The inherent confidentiality of mediation is another advantage. Diverging from the public and exposed nature of courtroom proceedings, mediation takes place in a private and confidential realm. This crucial feature encourages an atmosphere wherein parties can engage in candid and transparent conversations, unburdened by apprehensions of their words being wielded against them in the future. By safeguarding the confidentiality of discussions, mediation cultivates a secure environment, empowering parties to accept innovative solutions and voice their concerns unhindered. The often tiring nature of litigation, characterized by its adversarial atmosphere and formal courtroom proceedings, can be emotionally exhausting. In contrast, mediation emphasises collective resolution of conflicts. Parties are afforded the opportunity to articulate their sentiments, anxieties, and viewpoints in a more structured manner.

### **III. PROBLEMS OF MEDIATION**

However, the mediation process is plagued by certain problems as well. Even with its potential to expand the reach of justice, is not without its challenges. While mediation holds promise in widening access to justice, it is essential to address the potential power imbalances, procedural fairness, and enforceability concerns that can arise within its framework. The informal nature of mediation, which offers its own advantages, raises valid concerns about procedural fairness. Without the presence of strict rules and legal formalities, disparities in negotiating power can emerge, potentially compromising the procedural safeguards that are crucial to upholding justice. Additionally, while confidentiality is typically regarded as a cornerstone of mediation, doubts arise regarding the enforceability of mediation agreements. Unlike court judgments, these agreements may lack the same legal weight and formal mechanisms for enforcement. One concern lies in the power dynamics that can exist between parties, particularly in cases involving vulnerable individuals or unequal bargaining positions. The voluntary nature of mediation, while intended to promote flexibility, may inadvertently limit access for those who are unfamiliar with or unable to effectively navigate the process.

The mediator's role as an impartial facilitator is of utmost importance in the mediation process. However, there are obstacles that arise when mediators unintentionally or purposely show bias or lack the necessary skills to maintain impartiality. The integrity of the process heavily relies on the mediator's neutrality, necessitating continuous training and ethical considerations. While

mediation empowers parties to control the outcome, power dynamics and imbalances may persist, particularly when parties have unequal resources or legal knowledge. It is imperative to ensure that all parties have equal opportunities to fully participate and make well-informed decisions during the mediation process. An additional concern lies in the possibility that the mediator may lack the essential skills and expertise required to proficiently guide the process. It is imperative for the mediator to possess comprehensive training, impartiality, and pertinent experience and knowledge in order to effectively facilitate mediation. Unlike the judiciary, which adheres to rigorous training and licensing prerequisites, the calibre of mediators can significantly vary. This discrepancy can lead to unequal treatment of parties involved, consequently yielding inconsistent outcomes. The involvement of legal professionals in mediation poses a distinctive challenge. While lawyers can offer valuable guidance and support, their presence may inadvertently impede the open and collaborative environment that mediation aims to foster. Striking the right balance between legal advice and empowering the client is of utmost importance. “One of the reasons for the sluggish growth of Mediation is that there are hardly any national and international mediation centres that are providing affordable and quality training. Unfortunately, mediators can currently exaggerate their skills and experiences in ways that cannot be contradicted, as mediations are conducted in closed rooms and in confidentiality. Thus evaluating the competency of a mediator is challenging. Therefore, there is an urgent need to create a regulatory framework for fostering confidence and ensuring that ethical practices are followed in the mediation process.”<sup>2</sup>

Another significant challenge is the lack of enforceability of mediated agreements. Unlike settlements mandated by the court, mediated agreements lack the same level of enforceability, necessitating the parties to depend solely on their own voluntary commitment. This predicament poses a considerable obstacle to the adoption of mediation, as parties may hesitate to partake in the process if they cannot ascertain whether their agreement will be respected. Moreover, a notable power asymmetry between the parties may arise, whereby one party may feel compelled to accept an outcome that does not align with their optimum interests. It is crucial to acknowledge that mediation may not be the most fitting approach for certain types of conflicts. Cases involving severe criminal charges or disputes entailing substantial sums of money may not find mediation to be a suitable resolution strategy.

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<sup>2</sup> Manisha T Karia, *Effective implementation of Mediation in India: The way forward*, Bar and Bench, 1 July, 2023, 7:21PM, <https://www.barandbench.com/columns/effective-implementation-of-mediation-in-india-the-way-forward>

#### IV. CONCLUSION

Mediation represents an alluring alternative to conventional litigation, presenting a highly effective and economically viable approach for resolving conflicts while preserving relationships. Nevertheless, it is imperative that we confront the issues and obstacles linked to mediation to guarantee its efficacy. Some possible solutions for India include: “Uniform statute for resolving disputes through mediation is the need of the hour. Such a statute should make it mandatory for the parties to resort to mediation first before addressing their disputes before courts by way of litigation or arbitration before an Arbitral Tribunal. In all the commercial, contractual, consumer disputes and those having tortious liability, it should be mandatory to make efforts to resolve such disputes first through mediation before approaching the courts or Arbitral Tribunal. Need to have mediation focused institutions with trained professionals. Additionally, there is a need to have a regulatory body which lays down the qualifications for a person to be a mediator and reviews the performance of existing mediators from time to time. Requirement of public awareness about mediation. Such an awareness may be created through training sessions, courses, webinars and legal discourses by experts and qualified mediators.”<sup>3</sup>

We must strive to address concerns regarding access to justice, uphold procedural fairness, reinforce mechanisms for confidentiality and enforceability, preserve mediator impartiality, empower the parties involved, and establish clear guidelines for the involvement of legal experts. By persistently researching and thoughtfully implementing these strategies, mediation has the potential to flourish as an invaluable instrument in the noble quest for justice and harmonious resolution of conflicts.

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<sup>3</sup> Geetanjali Sethi, *India: Mediation : Current Jurisprudence And The Path Ahead*, Mondaq, 1 July, 2023, 7:28PM, <https://www.mondaq.com/india/arbitration--dispute-resolution/957898/mediation--current-jurisprudence-and-the-path-ahead>

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