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Need for Mediation Laws in India

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ABSTRACT

Humans are social animals and their active interaction within society leads to various types of conflicts and disputes. From budding cultures and societies to already developed ones, these conflicts and disputes are inevitable. The history of humankind has witnessed the rise of disputes with the evolution of the human species along with the evolution of nature and kinds of disputes have also evolved. Amicable settlement of disputes in various forms has always been an integral part of any civilized society and our Indian society being one of the oldest civilizations in the world has also witnessed this over a while; be it formal or informal. With the evolution of various laws and professionalization of the judicial setup, these modes of dispute settlement have been attributed with different names e.g. mediation, negotiation, conciliation, etc.

Moreover, an increase in general awareness amongst individuals about their rights has also led to a massive rise in judicial pendency of cases in the Indian Courts. At present, in India, 3.9 crore cases are pending in the district and subordinate courts, 58.5 lakh cases in the various high courts, and more than 69,000 cases in the Supreme Court and this has become a major concern for the Indian legal system.

It is often said that justice delayed is justice denied and to avoid such a situation, we need to adopt various alternative modes and mediation comes out to be one of the most favoured choices, due to its efficiency, accountability and convenience. However, when it comes to its acceptance in the Indian legal setup, it has a long way to go. We do have laws that talk about mediation, yet all these provisions are scattered across various rules and statutes and this makes the ongoing system less accountable. Thus, the need for separate mediation laws in India is the need of the hour.

Therefore, this paper will deal with the need and urgency of mediation laws in India.

"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." - Abraham Lincoln

I. INTRODUCTION

Disputes have been a part of the daily life of living creatures since their existence. Every species

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faces disputes of their own though in different forms or ways and solve them through their primitive instincts, however, these disputes are more emphasized and complicated with humans. Since the day, humans are known to this world, the conflicts, disputes etc, have walked hand in hand with them. In the early ages of human civilization, there were no rules, so ideally disputes were sorted through fights or other violent activities but slowly and gradually as humans have grown, their methods to solve disputes have also changed or in a way have become less violent and sophisticated. Earlier, disputes were solved among the people by their tribe leader or with the help of council members. Later on, when the King Era arrived, the disputes were sorted out in the court of the king where he with his ministers took decisions. History has also been a witness which tells us that war has also been a method to solve disputes though it wasn't a one to be commonly used. As humans became more knowledgeable with time and started asking for their rights rather than simply following the king or the leader we landed into the new era of law where it was for the people, by the people and of the people. For a very long time, in villages, disputes were solved with the help of Panchayats, the Panchayati Raj was a highly accepted method in villages and its work was to look after the villagers, the growth of the village and solve the disputes among the villagers. The Panchayati system still exists in India in full form on village levels but in a modified version where it does not hold the future or life of a person in their hand like earlier

The method to solve disputes also evolved with the same and today we have a proper judicial system to solve disputes among the people. However, it should be noted that under the judicial system there are various methods to solve disputes. It may be filing a case in the court or taking the approach of negotiation or mediation but it should be noted that one of the most feasible and less conflicted methods to solve disputes is Mediation.

Mediation has been a part of Indian civilization since ancient times, but it was formally integrated into the Indian judicial system in 1996 when the Indian Parliament revised the Civil Procedure Code and included Section 89, which refers to "Commercial Mediation in India."

II. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution, as the name implies, is a viable alternative to traditional dispute settlement procedures. This term includes the various methods of dispute resolution without the use of litigation. It resolves matters from corporate, civil, industrial to matrimonial disputes, etc., where people cannot reach a conclusion or judgment without using a typical dispute resolution mechanism of litigation. ADR indulges a third neutral party in the dispute who helps facilitate communication between the parties in conflict, discuss possible solutions, and

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differences among the competing parties.

Section 89 of CPC gives the arrangement for the settlement of dispute outside the courts. It states that "where it shows up to the court that there exist components of a settlement which may be worthy to the parties, the court might define the terms of settlement and provide them to the parties for their perceptions and after accepting the perception of the parties, the court may reformulate the terms of a conceivable settlement and elude the same for –

a) Arbitration
b) Conciliation
c) Judicial Settlement including Settlement through Lok Adalat or
d) Mediation.[3]

Section 89 of CPC was challenged for its constitutional validity before the supreme court in the case of Salem Advocate Bar Association v. Union of India[4], the honourable supreme court upheld the constitutionality of the section and constituted a committee to formulate rules for the smooth functioning of sec 89. The committee submitted its report to the apex court in 2005 and since then the supreme court accepted the rules and asked all the high courts to implement the rules created by the committee. In the case of Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) LTD,[5]The Supreme Court has further issued extensive guidelines, including information on how to send a matter to each ADR mechanism and what types of civil disputes can be referred under Section 89. The court concluded in this case that if the disagreement is to be brought to arbitration or conciliation, both parties must consent; however, if the matter is to be referred to mediation or Lok Adalat, the parties' consent is not required. The apex court also identifies the types of issues that are and are not amenable to resolution through ADR processes. Matters of public interest, the election of public offices, cases related to grant of authority by the court after inquiry, serious allegations and matters of fraud, coercion, impersonation etc cases that require protection of courts and prosecution of criminal offences cannot be resolved through the ADR method. But in the case of K. Srinivas Rao v. D.A. Deepa[6]The court held that though, offences under section 498-A IPC comes under non-compoundable offences, in the eligible cases if the parties are willing and the court also observes the possibilities of settlement, it should direct the parties to try to reach an agreement through mediation. With their experience, the Judges must guarantee that this exercise does not

[3] Civil Procedure Code (Amendment) Act 1999, No. 89, Acts of Parliament, 1999 (India).
[4] Salem Advocate v Union of India, (2005) 6 S.C.C. 344 (India).
[5] Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) LTD, (2010) 8 S.C.C. 24 (India).
[6] K. Srinivas Rao v D.A. Deepa, A.I.R. 2013 S.C. 2176 (India).

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result in the defaulting spouse utilising the mediation process to avoid the law's grasp. If a settlement is reached, the parties will be spared from the hardships of a criminal prosecution, and the burden on the courts will be reduced, which could be possibly best in the public interest.

III. MEDIATION (AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM)

It is an alternative dispute resolution method used for resolving the disputes between the competing parties through a third neutral party named a mediator. The mediator facilitates the conversation and helps the parties to reach an agreement through negotiation techniques and appropriate methods of communication. The parties in dispute control the process of mediation and the mediator is not allowed to impose their opinions on the parties and are not in power to decide as to what constitutes a fair settlement. The process of mediation runs through various stages of opening statement, joint session, separate session and closing. The mediator has to make sure that the parties and their counsels are present during the process of mediation. A brief through the mediation process is as follows:

The mediation process starts with an opening statement by the mediator equipping the parties with the details of his appointment and ensuring no connection with either party. Next comes the joint session where the mediator gathers all the facts, acknowledges the issues by inviting both the parties to present the case and their perspectives on the given matter. The mediator tries to facilitate the conversation between the parties calmly and harmoniously where each party's perspective could be considered and taken into consideration and also attempts to contain the outbursts during the 1980s. Following the joint session, comes the separate session that the mediator conducts with both parties and in this session, the mediator goes into a deeper level of facts and issues by inviting the parties separately and taking each one of them in confidence. Subsequently, the mediator questions the parties based on the facts presented and discusses the strengths and shortcomings of the matter presented by each party. After hearing both parties, the mediator begins to create the issue for resolution and possible settlement between the parties.

IV. NEED OF MEDIATION LAWS IN INDIA

Looking at the number of cases getting filed regularly in India and the plethora of cases that are already pending in the Indian Courts, it is high time we look for alternative measures for justice, other than courts. Mediation is a far different process from the traditional working of courts where the focus is more on the point of who is right and who is wrong and the winning or losing of one of the parties. Mediation presents us with an approach that is much more feasible and an interest-based process that provides more win-win remedies to both parties.

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Mediation is considered as the perfect future for dispute resolution as well as an alternative to Court Litigation. It is known to all that litigation can take a longer duration before reaching a decision in a matter and serving justice. The fact that through litigation there is a very high possibility of relationships turning estranged between both the parties especially in the matters related to family or other personal matters of a person, therefore it is now an urgent need that we revise our Justice providing system and work towards the betterment of our Indian Judiciary.

The process of mediation is not new to India, it has been there as long as history goes but keeping in mind the modern times and the advanced modern world we are living in, the laws regarding mediation are not yet fully developed in our country.

It is very important to understand the need for mediation laws and for the same, the 'Dispute Resolution Centre' of Thurston Country has provided ten main reasons to prefer mediation against the traditional model of litigation.[7] These are:-

- Mediation is Affordable
- Mediation saves time.
- Mediation keeps the matter confidential.
- It fosters cooperation
- It identifies the underlying issue
- Mediation also provides personalized solutions.
- Mediation is fair and Impartial.
- Mediation works
- It avoids litigation
- Mediation improves communication

All the ten reasons provided give us an idea of what positive changes can Mediation bring if it is included in our Judicial system. However, one thing that should also be kept in mind is that Mediation cannot be used for every dispute, it only works for some particular dispute settlements. Though the laws of mediation are not fully developed in India, it does have certain statutes which deal with it. For example-:

[7] Geetanjali Sethi, Mediation: Current Jurisprudence and The Path Ahead, Mondaq (Jun. 24, 2020, 10:00 AM), https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead.

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1. Alternate Dispute Resolution and Mediation Rules, 2017 - It describes the role, appointment, ethics of mediators, their removal, the time limit for completion of mediation etc. This is also considered as one of the latest legislation for mediation in India.
2. Code of Civil Procedure, 1908 - Due to the sheer delicate nature of family and personal concerns, it was changed in 2002 to encourage the use of mediation. The amendment also allows for the transfer of all pending court matters to mediation.
3. Consumer Protection Act, 2019 - The Consumer Protection Act of 2019 has been amended to include an entire chapter for dispute settlement through mediation before going to a consumer redress agency.
4. Under Section 442 of the Companies Act 2013, read with the Companies (Mediation and Conciliation) Rules, 2016, the National Company Law Tribunal and Appellate Tribunal can refer matters to mediation.
5. Conciliators, who are appointed under Section 4 of the Industrial Disputes Act of 1947 are responsible for mediating and promoting the resolution of industrial disputes through rigorous conciliation processes. It's a low-cost and rapid technique when done correctly.
6. In the case of MR Krishna Murthi v. New India Assurance Co. Ltd,[8] The Supreme Court ordered the government to look into the feasibility of creating an Indian Mediation Act that would include various aspects of mediation in general. The government was also directed to look into the possibility of changing the Motor Vehicles Act to create a Motor Accidents Mediation Authority (MAMA). Meanwhile, NALSA has been directed to establish Motor Accident Mediation Cells, which can either operate independently under NALSA's supervision or be handed over to the MCPC.

In the same instance, the court recognised the value of mediation and stated that formalizing mediation through legislation will help to standardize the process. It is currently dispersed throughout a number of provisions. Comprehensive legislation that establishes an institutionalized framework for mediation will aid in the clarification of issues and encourage parties to participate in mediation (either private or court-sanctioned mediation). It is more important than ever to establish a uniform legal framework for Mediation in order to protect

[8] MR Krishna Murthi v New India Assurance CO. Ltd, A.I.R. 2019 S.C. 315 (India).

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the rights of the parties engaged and to provide a quick and cost-effective course of action for enforcing the settlement agreement.

7. In the famous Ayodhya Dispute, which is also known as, M.Siddiq v Mahant Suresh Das and others[9], the five-judge constitution bench of the Supreme Court of India also ordered for a court-monitored mediation via its order dated 8th of March, 2019. The bench in the relevant portion said; "we have considered the nature of the dispute arising. Notwithstanding the lack of consensus between the parties in the matter we are of the view that an attempt should be made to settle the dispute through mediation."

It should be noted that even in such a highly sensitive and critical case of the Ayodhya Dispute, the bench thought that "mediation" can be helpful. This in itself shows how the importance of mediation is growing and why there is a grave need for proper mediation laws to be there in India. The process of mediation not only reduces the burden of the court but also can save many relationships and together help our justice system to become more efficient without delaying Justice.

There are some other provisions as well in other statutes which provide for resolution through mediation but the key issue which needs the utmost attention of the government is that there is no proper legal framework for mediation in India. The need for it is rising with every passing day but there are very few developments. However, recently, the law minister Mr Kiren Rijiju said that the government is aiming to make India an arbitration hub and in this upcoming winter session of the parliament, there will be a bill that would be proposed on the table for mediation[10].

Recently, in December 2021, the Chief Justice of India NV Ramana and Telangana Chief Minister K. Chandrasekhar Rao also inaugurated India's first International Arbitration and Mediation Centre (IAMC) at Nanakramguda which is located on the outskirts of Hyderabad[11].

With this new development, it can be said that steps are being taken considering the dire need for mediation in law in India and it can be hoped that India will very soon have an appropriate legal framework for the mediation and it will help in strengthening our Judicial system.

[9] M. Siddiq v Mahant Suresh Das and ors, (2019) 4 S.C.C. 656 (India).
[10] Areeb Uddin Ahmed, Centre will introduce new law on mediation: Law Minister Kiren Rijiju, Bar and Bench (Sep. 11, 2021, 1:30 PM), https://www.barandbench.com/news/law-policy/centre-will-introduce-new-law-on-mediation-law-minister-kiren-rijiju.
[11] Express News Service, CJI inaugurates International Arbitration & Mediation Centre in Hyderabad, The New Indian Express (Dec. 19, 2021, 8:14 AM), https://www.newindianexpress.com/states/telangana/2021/dec/19/cji-inaugurates-international-arbitration--mediation-centre-in-hyderabad-2397204.html

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V. COMPARISON OF INDIA'S MEDIATION PROCESS WITH OTHER COUNTRIES

India with the USA - acceptance of mediation in the USA was much easier and faster than in India. The lawyers in America during the 1980s acknowledged the overburden of courts with disputes that can be easily resolved through the process of ADR. By the mid-1980s, lawyers and the State Bar Association introduced and regulated mediation in the USA, by developing mediator training schedules and by directing ethical standards for lawyers while acting as a mediator or an advocate in the mediation. As a result, the lawyers in the USA welcomed the process of mediation and incorporated it into their practice. Lawyers have gained the status as mediators and acted as the guardians of the mediation in the US legal system by responding favourably and vehemently to include mediation as an effective ADR instrument in the country. Although lawyers in the United States initially viewed mediation as a threat and opposed it as an unwelcome shift in the status quo but soon learned that mediation was just another instrument in their legal toolbox. While judges in India have been prompt to recognise the expanding use of mediation as a useful tool for decreasing case backlogs and delays, Indian lawyers have been reluctant to accept the mediation. The lawyers of India fear the change and are apprehensive about exposing their clients to the unknown dangers of an ADR process. In addition, Indian lawyers comprehensively see mediation as having the potential to deprive them of earnings by settling disputes early and thus avoiding legal fees that would otherwise be obtained.

Comparison with Europe and Asia - Multinational corporations ("MNCs") are driving the development of mediation in Europe and Asia, as they look for speedier, cheaper, and less troublesome ways to resolve internal disputes, administration, and shareholder disagreement, as well as outside commercial disputes with exchange and dissemination accomplices around the world. The CPR Institute of Dispute Resolution held its first annual European Business Mediation Congress in 2004 where 140 people attended the event (including representatives from most of the world's largest law firms) and responded to a survey on European Business Mediation, resulting in that 60% of respondents saw multinational corporations as essential leaders of globalization of mediation, while 25% saw lawyers as leaders, and only 7% saw courts as leaders[12].

[12] WLA, Mediation In India As Compared To Mediation In United States Of America, World Law Alliance (Dec. 30, 2020, 12:20 PM), https://worldlawalliance.com/mediation-in-india-as-compared-to-mediation-in-united-states-of-america/

VI. CONCLUSION

The core aim of our justice system can be eroded when a regular citizen becomes engaged in a years-long court battle. In developing countries such as India, where the majority of individuals are inclined toward settling disputes through litigation. Often resulting in the overburdening of cases in the courts, leading to open disappointment with the legal system's capacity to provide justice and therefore, regularly affirming the well-known belief that "justice delayed is justice denied". Mandatory mediation could be the possible solution for the assigned problem and people would be coerced into opting for mediation, however, mediation is simply a method that parties are exposed to; further persuasion to use the process can be used for their gain, but there is no coercion to accept or compromise on the decision; parties can easily initiate a lawsuit if this alternative does not work out. Mandatory Mediation can protect relationships among the families as most of the families go to the court to settle the disputes and tear each other down with bitterness and ugliness of the words and slurs used against each other. Also, order 32A of the Code of Civil Procedure suggest mediation for familial/personal ties because the standard judicial procedure is not ideally adapted to the sensitive area of personal relationships. Besides, the need for proper mediation laws is in demand all around the globe and it is also true that it is one of the key factors to become a prosperous nation all around the world. The two main factors affecting the ranking in the World Banks' "Ease of doing business Index" are solving insolvency and enforcing contracts, now, it should be noted that providing proper legislation for mediation will only increase the pace at which both these parameters will be dealt with and in return, it will improve the country's ranking in the Index. Hence, having well-framed mediation laws will not only help in increasing the efficiency of the Judicial System in the country but will also be beneficial for the economy of the country as well as in the countrys' international growth. Now that the major corporate clients have recognized the process and benefits of mediation and have also advocated for it, the lawyers who oppose the growing use of mediation in India will certainly lack legitimacy with existing or new MNC clients. The apprehensions may swiftly vanish once it is clear that mediation is meant to complement the judicial process and not to replace it. Till then, the judiciary must recommend and encourage the process of mediation in the country.

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