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# Role of Mediation in Indian Judiciary

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## ABSTRACT

*In the last several years, it has been shown that alternative dispute resolution (ADR) techniques are widely acknowledged and accepted worldwide. However, research has shown that mediation tools and strategies may really be a godsend, particularly when handling both family and business disputes. The Indian Apex Court has occasionally approved these tools as well, including the processes and methods of mediation. The mediation process will be cheaper while comparing with the normal court process in the Indian Judiciary. If the problems settled in the mediation process the court fee will be refunded. Also, in the process of Mediation there is win-win situation in the legal progress. Recently, The Mediation act 2023 enacted by our Government of India.*

**Keywords:** Mediation, speedy justice, ADR.

## I. INTRODUCTION

In the last several years, it has been shown that alternative dispute resolution (ADR) techniques are widely acknowledged and accepted worldwide. However, research has shown that mediation tools and strategies may really be a godsend, particularly when handling both family and business disputes. The Indian Apex Court has occasionally approved these tools as well, including the processes and methods of mediation. The mediation process will be cheaper while comparing with the normal court process in the Indian Judiciary. If the problems settled in the mediation process the court fee will be refunded . Also, in the process of Mediation there is win-win situation in the legal progress. Recently, The Mediation act 2023 enacted by our Government of India.

## II. CONCILIATION AND MEDIATION

It is acknowledged that two significant and successful alternative dispute resolution processes are mediation and conciliation. These are regarded as significant and successful alternatives to courtroom action for the settlement of conflicts with the advice and help of an unbiased third party. That being said, mediation and discussion as a means of resolving disagreements is not new in our nation. There are Nyaya Panchayats and Village Panchayats in the villages, and for a very long time, these Panchayats have been used for the conciliation and settlement of

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numerous village-level issues. However, since Panchayats are more accessible than courts, which are situated distant from villages, this type of remedy was sought for more out of convenience.

But as time has gone on, there has been an overabundance of litigation. Additionally, there have been delays in the resolution of legal matters due to a number of factors, including a lack of judges and other court officials, inadequate infrastructure, and population growth. The public's increased knowledge and comprehension of their rights has also resulted in an increase in the number of court proceedings being filed. Because of the excessive traffic on the main road, it was decided to open a bye pass to relieve some of the strain. As a result, a device for alternative dispute resolution, such as mediation and conciliation, was created. This form or procedure is cost-effective and settlement-oriented. It also helps the parties achieve a "win win" solution by using a problem-solving method. In this procedure of resolving disputes, there is no winner or loser because all parties accept the resolution.

Express provisions under the Code of Civil Procedure, 1908, are found in Order XXXII A, Rule 3, which requires the courts to attempt to settle actions pertaining to family affairs. Similarly, in a lawsuit against the government or a public official, the court is required by Order XXXVII Rule 5B to assist in reaching a settlement.

But it wasn't until the Arbitration and Conciliation Act of 1996 that the two ideas received a thorough statutory acknowledgment. Conciliation is covered in detail in a different chapter of the aforementioned Act. Recently, procedures have been developed for resolving disagreements through the courts even in civil action. The aforementioned approach is typically implemented following the conclusion of the document admission/denial process, as it is at this point that the issues framed in the lawsuit are brought to the court's attention. Nonetheless, it is noteworthy that even in the absence of an arbitration clause, the court has the authority and competence to send the disagreement or litigation to an arbitrator under section 89 of the Code of Civil Procedure, 1908. Consequently, whether the parties' assent would be required for such a reference is likely a matter of debate that needs to be resolved through a suitable ruling, which would likely result in an arbitration agreement. The Arbitration and Conciliation Act, 1996, has now formally recognized the idea of conciliation. However, it's not entirely clear if the terms "mediation" and "conciliation" refer to the same process or would have different meanings. The majority of authorities claim that they overlap. Nevertheless, the Act does not define the term "conciliation." Only that conciliation could be used in all disputes arising out of legal relationships, not just those involving contracts and business dealings, is stated.

### III. MEDIATOR ROLE

By the voluntary agreement of the parties, mediation is a process of resolving disputes with the help of a mediator in an effort to reach an amicable resolution. Being a good mediator is a skill that calls for a certain set of attributes. A mediator helps the parties reach an amicable agreement by supporting and facilitating the process; they do not resolve disputes on behalf of the parties. The most important thing that people look for in a mediator is trust. The parties to a dispute should be able to trust the mediator, and the mediator shouldn't jeopardize the case's specifics. Good listening skills come next on the list of attributes.<sup>3</sup> It is expected of a competent mediator to fully observe and listen to both parties before attempting to offer observations and recommendations. It is expected of a mediator to continually evaluate the merits and consistency of the claims and allegations made by the parties. It is crucial for a mediator to have a healthy emotional intelligence because mediation, like other forms of ADR, can be used to resolve conflicts of many different kinds, including guardianship, adoption, and marriage-related issues. If a mediator is unable to identify the underlying emotions that are present in the dispute and between the disputing parties, they will not be able to guide the parties in the proper direction. The next trait that is anticipated of a mediator is empathy; that is, the mediator should be able to place himself in the shoes of the disputing parties and attempt to feel their anguish and feelings; only then will the mediator be able to guide the parties toward a resolution. Knowledge is yet another attribute of a skilled mediator. There are few disputes that have legal ramifications and call for in-depth legal knowledge, but there may be some that are straightforward and can be settled with the parties' simple assistance. Being realistic is the next trait that a competent mediator should possess. Mediation is one form of alternative dispute resolution that seeks to resolve disputes out of court. But it's crucial to understand that mediation isn't always successful. It is possible that the parties to the dispute won't be able to find a solution no matter how skilled and informed the mediator is if they are unwilling to work together to find one. Understanding the process is always the first step in any dispute resolution procedure, but a mediator or even a judge in that situation must be able to identify the fundamental problem.<sup>4</sup>

#### **(A) E-Mediation:**

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<sup>3</sup> Lecture Notes in Networks and Systems, vol 161. Springer, Cham., [https://doi.org/10.1007/978-3030-60926-9\\_44](https://doi.org/10.1007/978-3030-60926-9_44) last accessed on 14 November 2023

<sup>4</sup> PON Staff, Mediation Techniques – Resolve Disputes and Manage Conflict with These Mediation Skills, DECEMBER 14TH, 2021, Programme on Negotiation, Harvard Law School, Harvard University, <https://www.pon.harvard.edu/daily/mediation/resolve-employee-conflicts-with-mediationtechniques/>, last accessed on 16 November 2023

Regardless of our perspective, this is the age of technological advancement and it is here to stay. Nowadays, technology has an impact on everything, mostly for the better, including jobs and schools. These days, the internet is a vital tool for business, as evidenced by the fact that a large number of organizations rely on online resources. Since that most businesses are moving towards digital environments, it would not be incorrect to suggest that this could be an excellent time for mediators to follow suit. To put it succinctly, in the increasingly digital workplace of today, "emediation," or online mediation, could be of great assistance to mediators in meeting the evolving needs of their clients. Although the idea of e-mediation, or online mediation, is not particularly new, it has recently gained more significance due to events and global changes. Since the pandemic, a lot of businesses have switched to a work-from-home policy. This has enabled most of the work to be completed online. Conflicts do, however, still arise in this world. A private online mediation is known as an e-Mediation. It is the procedure that litigants employ to help settle e-discovery disputes quickly and affordably. Parties can meet via email or other messaging apps in addition to video conferencing when using e-mediation.<sup>5</sup> Technology may have two drawbacks. While there are some disadvantages, it can also open up new opportunities. The fact is, though, that we are unable to avoid it. Instead of being skeptical of technology, mediators should embrace it and make the most of it. It can aid in making conflict resolution more adaptable and successful. In this more digitally advanced world, e-mediation will assist us in resolving workplace conflicts. We must accept that the internet has permanently altered the way that people do business. Since technology is here to stay, it makes sense to adjust to it and use it to create even better things.

#### **IV. E-MEDIATION: A NEW TOOL IN THE DISPUTE RESOLUTION MACHINERY**

Over the past ten years, using Alternative Dispute Resolution (ADR) mechanisms—specifically, mediation—to settle family disputes has grown in popularity. The success rate of settlements reached as a result of the courts' repeated mandates of mediation as a precondition to adjudication has increased. Speedy and effective resolution of disputes gives families a great scope to resolve their disputes, including, inter alia, divorce and separation, matters of custody, maintenance of dependents including aged parents, inheritance, and similar property-related matters. The rise in domestic violence cases has also made room for mediation. This is a result of people's and families' growing awareness. Because of Section 89 of the CPC, the Court frequently, at its discretion, refers cases of this kind to mediation.<sup>6</sup> At this point, it is important

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<sup>5</sup> Kayla Matthews, What is E-Mediation? *MEDIATE INDIA* (<https://www.mediate.com/articles/matthews-emediation.cfm> accessed On 17 November 2023).

<sup>6</sup> The Code of Civil Procedure, 1908, § 89, No. 05, Acts of Parliament, 1908 (India)

to highlight that one of the key factors influencing the outcome of the mediation process is selecting a qualified mediator. This would mean keeping an eye out for attributes like credibility, patience, persistence, impartiality, neutrality, objectivity, and alertness.<sup>7</sup> One excellent trait that a good mediator has is an attentive approach to the nuances of the dispute and the parties involved in it. An additional benefit in this case would be the involvement of an advocate, who would help the parties grasp the legal issues at stake and the ramifications of any decisions they make now or in the near future. This would provide a more complete and all-encompassing picture for them. With the outbreak of the Novel Coronavirus Pandemic forcing the entire judicial and administrative systems to shift to an online mode of functioning, a broad way has been paved for e-mediation. This essentially means the shift of mediation proceedings from a physical form, requiring the parties to appear before the mediator in person, to the same being conducted online by means of video conferencing platforms. E-mediation saves enormous sums of money that would otherwise be spent on necessities like rent, electricity, water, stationery, and other random costs. It also requires far less office space, if any at all. This translates into a significant decrease in spending, which lowers the procedure's overall cost and creates space for a more reasonable fee schedule. Lack of access to video conferencing and internet resources, particularly in rural and other impoverished areas. In a similar vein, people in less tranquil regions of the world would be prevented from choosing e-mediation due to internet outages. In conclusion, e-mediation as a curtain raiser has become increasingly popular in recent years, particularly in light of the global pandemic that has compelled nearly everyone on the planet to operate online. The pandemic may have caused a downturn, but mediation procedures' effectiveness has not diminished, and they have introduced an easy-to-use and straightforward method into the current legal system.

## **V. PRE-LITIGATION IN THE MATRIMONIAL DISPUTES**

India, a pastoral nation, has a rich cultural legacy because norms and values are highly valued.<sup>8</sup> It represents the fundamental ideals and the emotional and emotional union in addition to the physical union. But when two people join together for marriage, conflicts of interest can occur and disagreements can be resolved. In these situations, mediation is a procedure that can preserve the sacredness of the union by using the principle of compromise. Making mediation mandatory is justified by the idea that since family conflicts arise in the heat of the moment,

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<sup>7</sup> Sam Imperati, Traits of a Mediator, <https://www.mediate.com/articles/imperati1.cfm> Accessed on 28.11.2023.

<sup>8</sup> Oza Dhruv, Mandatory Mediation in Family Dispute Case During lockdown-An Exigency, LEGAL SERVICE INDIA, <https://www.legalserviceindia.com/legal/article-2931-mandatory-mediation-infamily-dispute-cases-during-lockdown-anexigency.html>.

they should be handled gently rather than going straight to court. Instead of going straight to court, all of these marital disputes ought to be referred to mediation, which is a more party-friendly procedure. Simply put, mediation refers to a cooperative process in which a mediator—a neutral third party—assists the parties involved in reaching a mutually agreeable resolution to their disagreement. It is easier to use and more cost- and time-effective.

This documentation praises the introduction of a pre-mediation procedure that is required in family and matrimonial disputes. As the name implies, mediation must be made mandatory as a procedure that the parties resolving family conflicts must adhere to before going to court. The "opt-out" principle serves as the foundation for this proposal.<sup>9</sup> Encouraging mediation serves the main purpose of fostering amicable cooperation between the involved parties. This idea aims to maintain the cherished qualities and ideals of marriage and the family while lessening the number of family disputes that are pending in the relevant courts. As evidence for the aforementioned assertion, consider the Commercial Courts Act, 2015, which underwent revisions in 2018.<sup>10</sup> This indicated a notable decrease in the length of time that commercial cases were pending and offered reliable solutions. Therefore, if a similar approach is used to resolve family conflicts, the intended outcomes could undoubtedly be achieved. The Indian legal system places emphasis on alternative methods of resolution, such as section 89 of the CPC in conjunction with Order X Rule 1A.<sup>11</sup> For the reasons listed above, it would be very beneficial if we implemented the mandatory mediation approach. First of all, since the court is overworked and overwhelmed with cases, this move could definitely help reduce the backlog of cases. Second, since family and marital disputes are fundamental to Indian culture, they must be handled amicably. A sizable number of situations with compounding factors could lead to improved outcomes. Thirdly, since kids are typically the ones who suffer the most from parental arguments, this would also allow for the preservation of their interests.

Finally, compared to hiring an attorney, this process is far more economical, efficient, and rapid.

#### **(A) Role Of Mediation In Dispute Resolution:**

Recently, the Indian courts have seen an increase in the number of divorce and judicial separation petitions. Court proceedings appear to be having a negative impact on families, who might not feel comfortable sharing the ins and outs of their failed marriages with the judges in a nation that regards marriage as a sacrament. The court has a severe backlog of cases,

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<sup>9</sup> Deepika Kinhal and Apoorva, Mandatory Mediation in India- Resolving to Resolve, 2(2), INDIAN PUBLIC POLICY REVIEW, 49, 62 (2021)

<sup>10</sup> The Commercial Court Act, 2015, § 12A, No. 4, Acts of Parliament, 2015, (India)

<sup>11</sup> Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353.

particularly given the sheer volume of these cases.

Finally, compared to hiring an attorney, this process is far more economical, efficient, and rapid. Alternative dispute resolution can come to the rescue in this situation. While things in court tend to get a little defensive when one party speaks negatively about the other in front of the judge, with techniques like mediation or conciliation, parties are much more at ease discussing the details of their current problem and more open to listening to the opposition. The unofficial process of resolving disputes through mediation is led by a trained third person known as a mediator. Through mediation, two parties can resolve their differences, discuss their concerns, and come to a mutually agreeable settlement. The process is fully optional. Every party will voice their opinion during the mediation, and the mediator will work with each side to try to reach a resolution. In the last phase, the mediator can present their observations and a better resolution to the problem. This mechanism is ideal for maintaining the integrity of the marriage because alternative dispute resolution frequently results in a settlement that appeases both parties. The mechanism gives the parties an opportunity to work out their differences, particularly in situations where children are involved. The purpose of alternative dispute resolution is to simply lighten the load on the established court system. It is not in any way undermining the parties' intention to file a lawsuit or the court. The law governing family courts also permits the court to look for alternative peaceful cohabitation strategies between couples, like mediation, which may result in a reconciliation or mutually agreeable separation. In the event that the mediation resolves the couple's contentious issues and six months have elapsed, the family court cannot mandate an additional six months before awarding a divorce through mutual consent.<sup>12</sup>

#### **(B) Development Of Adr And Adoption Of Mediation To Resolve Family Issues:**

A mechanism known as "alternative dispute resolution" refers to approaches that ultimately result in conflict resolution outside of the national court system. One of the accepted methods of resolving disputes outside of court is mediation. It's a process where a conciliator or mediator, who is an impartial third party, seeks to resolve the conflict through mutual agreement. In Indian contexts, mediation has a long history that dates back to the Vedic era. The Bhradarnayaka Upanishad, which describes the first arbitral bodies—the Puga, the Sreni, and the Kula—is the oldest source of discourse in this context. The parties' dispute chooses mediation as a mode of resolution over litigation because of its guiding principles, which include the parties' voluntary

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<sup>12</sup> Anushtha, Mediation in Divorce, Legal Service India, <http://www.legalservicesindia.com/article/1424/Mediation-In-Divorce.html>



participation, a confidentiality clause, the use of a neutral third party as a mediator, settlement through mutual consent, and timeliness. In actuality, it's been noted that family and social issues can be very patiently handled. The goal of mediation is to help the parties come to a mutually beneficial agreement, which lessens the burdens on both sides. In Indian contexts, mediation has a long history that dates back to the Vedic era. The Bhradarnayaka Upanishad, which describes the first arbitral bodies—the Puga, the Sreni, and the Kula—is the oldest source of discourse in this context. The parties' dispute chooses mediation as a mode of resolution over litigation because of its guiding principles, which include parties' voluntary participation, a confidentiality clause, the use of a neutral third party as a mediator, settlement through mutual consent, and timeliness. In actuality, it's been noted that family and social issues can be very patiently handled. The goal of mediation is to help the parties come to a mutually beneficial agreement, which lessens the burdens on both sides. When it comes to mediation in India, the practise dates all the way back to the Vedic era. The Bhradarnayaka Upanishad is the oldest source of discourse in this context; it mentions the Puga, Sreni, and Kula, the first arbitral bodies to be formed. The principles of mediation, which include mutual consent settlement, confidentiality clauses, voluntary participation by both parties, and a neutral third party mediating the dispute, encourage parties to choose mediation over litigation as a means of resolving their differences. In actuality, it is noted that family and social issues can be very patiently handled. The goal of mediation is to reach a mutually beneficial agreement for all parties, which lessens the burdens on the parties involved. Mediation is a safe, informal process that preserves the parties' anonymity in a family law dispute. Family law mediation is becoming more and more popular. The parties not only have the choice to attempt resolving their dispute through discussion, but they also receive the advice of a mediator who has experience with these kinds of situations. When mediators hear both parties out and work to find a solution that works for everyone, it also ensures that the parties are happy. They can get a second opinion from their lawyer. In addition, the parties always have the choice to contact the court if they are unhappy with the mediation's result.<sup>13</sup>

### **(C) Legal Aspects Of Mediation Governing Family Disputes:**

One form of alternative dispute resolution that helps the disputing parties reach a final settlement in a sustainable and self-determined manner is mediation. The mediation process offers positive outcomes, including the potential for both the parties to the conflict to grow personally and socially. In addition, mediation offers the potential to resolve disputes more

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<sup>13</sup> Lawgazette, The role of mediation in family disputes, <https://www.lawgazette.co.uk/practice-points/the-role-of-mediation-in-family-disputes/5107078.article>.

quickly and cheaply than other approaches. The best substitute tool for a settlement process in family and other marital disputes is mediation. This method of resolving disagreements between the parties appears to be voluntary and non-coercive. In addition to saving time, using mediation lessens the possibility that the parties' decision to proceed with litigation will leave them feeling hurt or alienated from one another.

Section 5 of the Family Courts Act of 1984 contains legal provisions pertaining to the resolution of family disputes. This section mandates that the Government establish a family court to mediate disputes. In order to facilitate family settlements, counselors are appointed permanently under Section 6 of the FCA. Furthermore, the court must give a proposed resolution an equal chance to be considered before moving forward with adjudication in accordance with Section 9 of the FCA, Section 89, and Order XXXII-A of the Civil Procedure Code of 1908 (the "CPC"). Furthermore, the Hindu Marriage Act of 1955 (the "HMA") places emphasis on the judge's endeavors to facilitate reconciliation.

In most cases, parties to a family or marital dispute may find it difficult to be open with a mediator because the issues at hand may be very personal to them and they may not feel secure enough to voice their complaints. At this point, the mediator's responsibility is to make sure all sides to the disagreement voice their opinions. In order for the parties to focus on the areas of conflict difficulty rather than just circling the issue, the mediator's job is to extract facts from both opposing parties and reformulate them in a way that makes sense. This allows the parties to come up with innovative solutions that would be unfeasible in a court case that is imposed by a third party. In order for the parties to properly communicate their areas of agreement and disagreement to the mediator, the mediator may also speak with each disputing party in private, away from the other party. The mediator must state unequivocally that he never, ever ignores the emotional components of the arguments that gave rise to the current conflict. He needs to care about the happiness and fulfillment of both partners because issues in marriage are primarily emotional rather than rational or accurate. His objective is very clear: he wants to resolve the dispute(s) at hand with the least amount of harm to the parties involved. In order to help the parties reach a mutually acceptable resolution to the disagreement or disputes and, ideally, long-term peace between them, the mediator must serve as a counselor or conciliator.<sup>14</sup> In order to convince the parties to concentrate on the advantages of a proposed solution, the mediator must offer advice and employ diplomatic techniques. A resolution to the contentious matters will be offered by the mediator or by one of the two parties. The main objective of a

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<sup>14</sup> Sharma, Dr. M.K., J., "Conciliation and Mediation".

mediator would be to consistently close the gaps between the parties' proposed solutions in order to arrive at a compromise that would satisfy each of them.

## **VI. CONCLUSION**

The purpose of alternative dispute resolution is to simply lighten the load on the established court system. It is not in any way undermining the parties' intention to file a lawsuit or the court. The law governing family courts also permits the court to look for alternative peaceful cohabitation strategies between couples, like mediation, which may result in a reconciliation or mutually agreeable separation. In the event that the mediation resolves the couple's contentious issues and six months have elapsed, the family court cannot mandate an additional six months before awarding a divorce through mutual consent. Technology may have two drawbacks. While there are some disadvantages, it can also open up new opportunities. The fact is, though, that we are unable to avoid it. Instead of being skeptical of technology, mediators should embrace it and make the most of it. It can aid in making conflict resolution more adaptable and successful. In this more digitally advanced world, e-mediation will assist us in resolving workplace conflicts. We must accept that the internet has permanently altered the way that people do business. Technology is here to stay, so it makes sense to adjust and develop even better technology.

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