**LEGISLATION ON MEDIATION – THE WAY FORWARD**

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**ABSTRACT**

The evolution of justice marked its shift from trial by ordeal to trail by evidence and then to reconciliation. With the government's commitment to relieve the overburdened courts and judges, with growing consensus on the need for alternatives to tackle the shortcomings of litigation, India witnessed the advent of alternative dispute resolution. The suitability of Alternative dispute resolution mechanisms to India has been a matter of concern, for which answer lies in the consensual dispute resolution mechanisms of ancient times like Panchayath system. Unfortunately, failure of Arbitration to serve its purpose, as it has earned the description of highly expensive dispute resolution method, has again opened up discussions on the need for legislation on mediation. As the corporate entities prefer efficient and time-saving methods, the potential advantages of such enactment of legislation on mediation cannot be left unnoticed. While addressing the issue of legislation, lawmakers usually encounter diversity-consistency dilemma, which needs to be balanced. With the hope that the justice system shall be invigorated and people shall regain their eroded faith in the justice system by the efficient functioning of mediation, this paper has provided an overview of the reasons justifying the need to regulate private, court-annexed and online mediation. The special mention has been made with regard to the untapped potential of online and private mediation. Whenever the issue of legislation was raised, many academicians criticised it by stating that such legislation would inhibit the flexibility leading to an end of innovative exploration in the sphere of mediation. Taking such criticisms into consideration, this paper has made efforts to suggest a regulatory mechanism suitable for the needs and interests of the people.

**Keywords:** Mediation, Mediation Mix, Alternative Dispute Resolution, Private Mediation, Legislation.

**INTRODUCTION**

The efficient functioning of the court, well defined legal framework with the potential to ensure implementation of contractual agreements are the factors which influence the economic growth of the country. Piling up of cases has reduced the efficiency of the courts, further impacting the economy, which has made it relevant for us to explore the alternatives to litigation.[[1]](#footnote-1) The alarming issue of pending cases in the courts across the country made Former Hon'ble Justice Kurian to assert the need for utilizing ADR mechanisms to its maximum. In the National Conference organized by SC of India in the month of July 2018, Justice further substantiated his stands by putting forth statistics and informing the august gathering that there were 2.75 crore pending cases in various courts [[2]](#footnote-2)

The advent of consensual dispute resolution mechanisms gave hopes of reinvigorating the justice system and reinstating the lost hope of the people.[[3]](#footnote-3)Mediation by providing amicable solutions can make parties become partners in solution rather than partners in problems. This form of dispute resolution provides an opportunity for the parties to communicate in real sense and to resolve their disputes voluntarily in a shorter period of time without being compelled against their wishes[[4]](#footnote-4). Unfortunately, the skepticism of legal fraternity, common myths and misconceptions surrounding the concept of mediation, has resulted in its failure to serve as an efficient alternative to litigation.[[5]](#footnote-5) However, the academicians have opined time and again that mediation is advantageous than arbitration and litigation. Delay, expense, rigidity of procedure, reduction in participatory role of parties, uncertainty of outcomes are some of the shortcomings of litigation, for which mediation can successfully act as an antidote. If these shortcomings are left untacked, it might result in erosion of the trust of the people in the justice system of the country. [[6]](#footnote-6) Arbitration's failure has paved the way for the discussions on tapping the potential of mediation. ONGC's plea in which it voiced out its reluctance to resort to arbitration, acted as a reality check, drawing everyone's attention to the fact that arbitration has utterly failed in its purpose. This alternative tool has often been described as a highly expensive and time-consuming tool.[[7]](#footnote-7) The failure of the arbitration to be an end in itself was expressed by the Honorable High Court at Calcutta.[[8]](#footnote-8) Thus the promotion of mediation is in the best interest of the country and the people.

**SUITABILITY OF MEDIATION IN INDIA**

The need for and relevance of mediation in our country can be analysed by looking at a range of factors. Firstly, the cultural factor. Mediation is not new to the Indian System, as its prevalence can be traced back to pre-British India where wise village elders resolved the community disputes and respected businessmen called Mahajanas rendered assistance in resolving the disputes.[[9]](#footnote-9)The journey from panchayath system to the legally recognised mediation system is worth noting.[[10]](#footnote-10)With the passage of time, there was a shift to a more complex, well-structured framework for dispute resolution. As time passed, the traditional community mediation witnessed a backseat and newly introduced formal litigation became a source of never-ending problems.[[11]](#footnote-11)

 Secondly, economic factors also prove the suitability of mediation to the Indian system. All over the world, corporate entities have opted for mediation to resolve their conflicts at a lower cost. As India is heading towards establishing its stronghold as the powerful economy, as the government is fostering the aim of making India business-friendly, it can be inferred that the economic dimensions also necessitates the development of mediation.[[12]](#footnote-12) In the World Bank's Ease of Doing Business Report, India has secured 77th position. But the matter of concern is that India is placed at 163rd position, which clearly indicates the need for mediation.[[13]](#footnote-13) Lengthy judicial proceedings, lack of contract enforcement mechanisms, reduce the legal certainty and increase the risk of economic activities. When the risk factor increases, it might finally disincentive many from investing or functioning in that particular country. This further proves the interlink between economic growth and the judicial system.[[14]](#footnote-14) Further, the economic analysis of ADR and mediation in particular, is worth noting. It is pertinent to note here that mediators by controlling the flow of information among the disputants can successfully mitigate the problems of adverse selection and moral hazard.[[15]](#footnote-15) By analysing from an economic perspective, it can further be stated that mediation reduces the transaction costs as well.[[16]](#footnote-16)

Thirdly adversarial factor also favours the development of mediation culture in the country. The problem with adversarial system is that an unsatisfied litigant by going on appeal till the apex court of the country, by initiating execution proceedings, can delay the dispensation of justice. In an example of a young couple who have filed for divorce, if the case is decided after 15 years, the decision would not be of any use to the aggrieved parties. Hence it is a matter of fact that mediation can come to rescue in such a situation.[[17]](#footnote-17)

**NEED FOR LEGISLATION**

In ancient times, the main concern was to find out which of either party was guilty. As time passed by, search for truth lost its significance and gave way to reconciliation. It is believed that justice can be served to masses only when the arena of justice provides many options of appropriate mechanisms tasked with the function of resolving disputes.[[18]](#footnote-18) This paper looks at the need to serve justice to the people of India by providing options like mediation and by taking steps like giving legal backing to ensure its full growth. At this juncture, it becomes important to look at the current legal position of mediation. In the year 2002, S.89 was incorporated which mentions several methods of settlement of disputes outside the court. The courts by using their discretion could refer those matters which in their opinion involved elements of settlement to mediation. In the absence of legislative framework in place to bring into effect section 89 of CPC, Supreme Court realized the need of the formulation of modalities for the effective operation of Section 89 in the case of Salem Advocates Bar Association, T.N v Union of India.[[19]](#footnote-19)And in Salem Bar Association, Tamil Nadu v Union of India[[20]](#footnote-20), Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 was laid down which has provisions with regard to the panel of mediators, appointment, disqualification of mediators, procedure of mediation, duties of mediators etc. But these are non-binding guidelines laid down by the court. Hence the debate on the need for legislation has gained momentum. When the question of regulating mediation arises, the crux of the debate initiated in this regard can be better understood as diversity-consistency dilemma. This dilemma involves a question of either choosing diversity through innovation and flexibility or a uniform law, which can succeed in bringing about consistency but would inhibit the growth of mediation process. Further, the matter of accreditation reflects this tension.[[21]](#footnote-21) The need for legislation has been substantiated with the following arguments.

The need for mediation law can be better explained by giving examples of various instances where parties in spite of their requirement of a dispute resolution mechanism which could assure them absolute privacy, might end up choosing litigation over all other options. As consequences of their choice, they would get trapped in courts proving their claims and defences. Regulatory framework favouring one particular method of dispensation of justice might be the reason behind such wrong choices made. In India, on one hand, there are laws for arbitration and conciliation and on the other hand, mediation has no such legal backing.[[22]](#footnote-22) Mediation legislation would be a significant step in fostering trust and confidence. Such law acts as a pillar giving recognition, credibility and legitimacy.[[23]](#footnote-23)

UNCITRAL International Commercial Conciliation Law has taken the view that mediation is synonymous with conciliation, to which internationally consensus has been expressed. On one hand, Supreme Court in the matter of Afcons Infrastructure Ltd. And Ors. v Cherian Varkey Construction Co. (P) Ltd [[24]](#footnote-24) expressed the same view. On the other hand section 89 still continues to address these aspects separately, which has further led to confusion with regard to the position of law.[[25]](#footnote-25) Companies (Mediation and Conciliation) Rules has further resulted in ambiguities. Section 442 of Companies Act requires the Central Government to maintain a panel of experts called as Mediation and Conciliation Panel.[[26]](#footnote-26) This statutory requirement was met with the formulation of Companies (Mediation and Conciliation) Rules.[[27]](#footnote-27).Surprisingly the rules prescribe the same role to both mediator and conciliator under Rule 17.[[28]](#footnote-28) It is mentioned that the mediators or conciliators shall attempt to facilitate the resolution of disputes by recognizing issues, by resolving misunderstandings, by making efforts to effect compromise, by generating options to achieve compromise, by making parties aware of their responsibility to decide.[[29]](#footnote-29)

In the Afcons Infrastructure Ltd. And Ors.v Cherian Varkey Construction Co.(P) Ltd.[[30]](#footnote-30) , the first anomaly recognized is that of mixing up of mediation and judicial settlement. Section 89(2)(c) of CPC states that the reference for judicial settlement shall be made to a person or institution, who or which shall be deemed to be Lok Adalat and for mediation, the compromise shall be affected by the court. As these terms worldwide have a different meaning than the one provided under CPC, it has given way for never-ending complexities. The court after pointing out the anomalies held that when the words of the statute are vague, when the literal compliance of the statute would defeat the purpose with which legislators legislated, then it would be justifiable to deploy purposive interpretation and to omit or substitute the words.[[31]](#footnote-31)The court also brought out the need to interchange the concepts in order to rectify the draftsman's error. Further, in case of mediation, the new definition defined that for mediation, reference shall be made to the person/ institution which shall be deemed as Lok Adalat and Legal Services Authority Act shall govern the procedures. The lack of clarity can further be illustrated with the help of Section 30 of Arbitration and Conciliation Act, 1996. Section 30 lays down that arbitrator while resolving the dispute may utilise mediation, conciliation or other techniques.[[32]](#footnote-32) As there has been constant emphasis on giving impetus to the growth of Alternative Dispute Resolution Culture in India, providing conceptual clarity and definitional clarity through legislation should be prioritised without any delay.[[33]](#footnote-33)

In the case of Krishna Murthi v The New India Assurance Co. Ltd[[34]](#footnote-34), when the senior advocate advocated the need for establishing Motor Accident Mediation Authority to prevent the delay in awarding compensation to the accident victims, the court accepted the same. The Honorable court also explained the emerging trend in India, by pointing out the fact that Commercial Court Act, Insolvency and Bankruptcy Code have provided for mediation. The court further asked the government to reconsider the feasibility of formulating Indian Mediation Act as the time is ripe for embracing and adopting the new statute.[[35]](#footnote-35) Another emerging trend further substantiates the need for mediation law. In the Global Pound Conference series held at Chandigarh in the year 2017, parties selected non-adjudicative process as an effective method of resolution of dispute.[[36]](#footnote-36)

Standalone legislation covering all types of mediation and all aspects is the need of the hour. One of the concerns which the legislation can address is that of consumer protection. There are chances of consumers being deceived by those private mediators who lack the qualifications essential for a mediator. Fly-by-night mediators, Inexperienced and Unqualified mediators pose risk to those consumers who are unaware of the legal intricacies. Codifying set of standards, system of registration and accreditation of mediators is the viable solution. [[37]](#footnote-37) From perusing the data collected from various mediation centers, it was clear that Ahmadabad Mediation Center had less than 25 percent of the total number of cases settled. Interviews of mediators, included in the interim report titled 'Strengthening Mediation in India' further clarified the existence of a direct link between qualifications and settlement rates. This study has further advocated the need for accreditation, standard settings.[[38]](#footnote-38)

An interim report was submitted by the Vidhi Centre for Legal Policy from the data made available to them by Bangalore Mediation Centre, Delhi High Court Mediation and Conciliation Centre. After observing the functioning of mediation centers, some of the legislative reforms have been suggested which includes listing out cases which have to be referred to meditation mandatorily and specifying yet another set of case types, for which the referral to mediation shall depend on the discretion of the judge[[39]](#footnote-39). The need for mandatory mediation can be justified by putting forth biological explanations. The matter of fact is that humans are not programmed to compromise but are programmed to win. Whenever we experience threat, amygdala initiates the reaction which overrides neo-cortex (rational thinking part of the brain). Instead of deciding matters rationally, a person guided by emotions might opt for irrational choices. Hence the mandatory mediation can bring one to the right path.[[40]](#footnote-40) It is relevant to note that mandatory mediation can rejuvenate the justice system by reducing piled cases.[[41]](#footnote-41)One of the findings was that in Bangalore Mediation Centre some of the case types conventionally considered to be unsuitable for mediation had higher rates of settlement. From this, one can come to the inference that the judges need to explore the feasibility of matters getting settled, accordingly refer it to mediation and legislation providing provisions allowing judges to use their discretion in a set of cases would undoubtedly increase the settlement rates of those cases which are rarely referred to mediation. Hence, if legislation is formulated, it can provide guidance to the judges by listing the cases. The legislation can also provide code of ethics to be followed by the mediators and punishment for non-compliance, an exception to the general rule of confidentiality and the grounds on which appeal can be sought.

Section 28 of Indian Contract Act states that any agreement which restricts a person absolutely from initiating legal proceedings in ordinary tribunals to enforce his rights or any agreement which limits the time limit within which one can approach the court shall be void in the eyes of law.[[42]](#footnote-42)The current position of law is that an agreement to refer matter to mediation is void. Hence there is an acute need for legislation which can validate and give an element of enforceability to such agreements.

The problem with court-annexed mediation is that, by the time the matter is referred to mediation, the parties would have incurred huge cost of litigation and their dispute would be a public record. Unlike court-annexed mediation, private mediation assures absolute confidentially and cost-effectiveness.[[43]](#footnote-43). Sadly, legislation has not been devised to regulate private mediation and to provide enforceability to the contractual settlements. In such an absence, parties have no option but to file a suit and subsequently make application to effect compromise. Another way of getting it enforced is on the basis of contract law.[[44]](#footnote-44) Resorting to these ways would further overburden the already burdened courts. If the settlement is enforced on the basis of contract law, the court might look at whether the parties have contracted without being subject to coercion, fraud. The problem with this is that the scrutiny by the court would hamper the confidentiality.[[45]](#footnote-45) As the world bank in its document titled ‘Making Mediation Law’ stated formulation of reliable framework applicable for both private and judicial mediation without affecting the flexibility as one of the important success factors for the regulation of mediation, it would be beneficial if same approach is adopted in our country.[[46]](#footnote-46)

In the present times, online platform has marked its presence in the justice system as well.[[47]](#footnote-47)Online dispute resolution is one of the forms which resolve disputes by employing alternative methods of dispute resolution in the online platform. There are two types of ODR systems- synchronous and asynchronous communication. In first system, communication takes place in real time through Skype or messenger. The second system can be termed as an indirect way of communication via email or such other ways. Online Mediation has been gaining prominence in the recent past and it has been observed that text-based communication has been used widely than teleconferences. In the case of asynchronous system, confidentiality becomes a major concern.[[48]](#footnote-48)

Especially in India, a shift from traditional litigation methods to online mediation requires a strong legislative framework with an enormous potential to garner the confidence of the people in mediation system and mediators. Transparency and Privacy tensions have further led to speculations. Transparency requires all the information, disclosures, important points provided to be accessible, printable. As privacy has been declared to be a guaranteed fundamental right, it can be concluded that there is a need for legislation which covers confidentiality under one of its provisions.[[49]](#footnote-49) In the recent past, Department of Justice expressed its commitment to facilitate government departments to opt for alternates like mediation, arbitration, conciliation, online or otherwise by listing the agencies or institutions involved in online resolution of disputes. The alarming issue is that there is no legislation governing any aspects including the IT tools.[[50]](#footnote-50)

**CONCLUSION**

At present, a model combining private and public mechanisms and giving options for exploring and considering the needs and interests of the people is observed to be the best model as it can guarantee more compliance. Mediation law can include triggering, standard setting, procedural, beneficial laws and provisions. Procedural provisions are those which regulate the commitment, protocol, and termination of mediation. Standard setting provisions would mainly be concerned with qualifications, competency, standards, registration and certification of mediators. Beneficial mediation laws are those which lay down rights, duties of the parties and other participants, including the provisions on privilege and confidentiality. In concluding note, it becomes essential to point out Mediation Mix as the viable option. In order to ensure that the legal certainty does not get hampered, the legislation formulated can be made to regulate only the beneficial provisions which include admissibility, enforceability and limitation. Procedural provisions should be left to self-regulatory and market place contract approach, in order to facilitate party autonomy, flexibility. The legislature should be formulated in such a way that the act should include both default and mandatory laws but in no circumstance, should the parties be allowed to enter into such contracts which can override the basic principles of procedural fairness and impartiality. Finally, triggering provisions to be left to the legislative framework.[[51]](#footnote-51)Even the World Bank report has stated that overregulation of mediation might pose a risk of failure by hampering the diversity and flexibility of mediation.[[52]](#footnote-52) Diversity among the practitioners has to be preserved and nurtured as mediation's response to the human dimension of conflict is the reason behind its successful journey.[[53]](#footnote-53)

Austrian law has also incorporated mediation mix. Austrian Law on Mediation in Civil Cases, 2003 provides legitimacy to the mediation process by regulating the approval and practice of mediators. Though legislation has laid down beneficial laws and standard settings, many aspects have been left unregulated.[[54]](#footnote-54) In Austria, there is a coexistence of general framework and other rules regarding specific areas of laws and the interplay between these two has been witnessed in many instances.[[55]](#footnote-55)This legislative framework provides for the registration of mediators, whose name shall be displayed on the website of Ministry of Justice.[[56]](#footnote-56)Registered mediators have to abide by the professional duties laid down. The registered mediators should keep that information received by them during the mediation session, confidential. Though the non-registered mediators are bound by the terms of the contract to which they have entered, they cannot refuse to testify in the court. Further, Section 31(1) of Austrian Mediation Act prescribes punishment to those offenders who breach their obligation of maintaining secrecy. The responsibility of the settlement solely depends on the form of contract the parties have entered into. The settlement is enforceable if it is acknowledged by the court under 433a of Austrian CCP or notarized by a notary.[[57]](#footnote-57)

As Austrian jurisdiction has incorporated mediation mix, deriving inspiration from this model legislation, Indian lawmakers can make laws with certain modification to meet the needs of the people. As enforceability is a matter of importance, mediation settlements concluded by the registered mediators can be given effect of arbitration awards and the agreements settled by non-registered mediators should be allowed to be enforced as per Indian Contract Act, 1890. In concluding note, it becomes imperative to stress on the role lawyers, judges and government have to play for fulfilling the dream of initiating the trend favoring ADRs in India. As the mediators can be saviors, resolving the cause of stress of many, it can be concluded that mediation which has a health dimension to it, contributes to the health and social welfare. Thus promoting it becomes essential.[[58]](#footnote-58)

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