MANDATORY COMMERCIAL MEDIATION IN INDIA AND ITS IMPACT ON THE COURTS OF LAW

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# ABSTRACT

We all are familiar with the term mediation as it is a volunteer process of resolving the disputes between parties where there is a third party appointed to act neutrally between them and the conflict is thereby resolved by using special communicating skills and techniques of understanding. These techniques are designed especially for the purpose of only resolving the disputes out of the court in case of a conflict arise. The main concept of mediation took place in the latter half of the 20th century. However the main origin of the mediation can be traced back from the ancient times in India.

However the first legislation named Arbitration and Conciliation Act, 1996 was the first statute to introduce and expose the legal system of India to commercial mediation. This legislation however inspires the public to opt for the process of mediation that provides power to the arbitral tribunals to use mediation as a way for resolving the dispute between the parties. However there has been a shortage of implementation as well as there has been no specific formation of rules of mediation, thereby leaving the process of mediation almost absolute in India. It was only in the year of 2011 that the Supreme Court of India stated that the process of mediation carries secrecy with itself. Presently, it has been also noticed that many of the corporate sectors, banking institutions and insurance sectors in the country have been relying on the process of mediation to a great extent.

Hence, this positive reaction can be always used as a purpose of encouraging the provisions for Alternate Dispute Resolution to be applicable. Therefore this paper will deal with the pros and cons of the mandatory mediation and make a study on the fact that how far it should be made applicable upon the people in the society. This paper would further deal with the point that although mediation is considered to be a quick, well organized and cost operative system as a mean for the purpose of settling disputes, but it should also be borne in mind of the legislature that such a process should be not be made mandatory and binding on all the citizens of India. Therefore the paper will further deal with the aspect that though mediation should be encouraged but it should be not made mandatory to such an extent so that it prove to be a burden on the citizens. Mediation is such a process that is also adopted by the Legal Services Authority in order to assist the courts. Therefore this paper will also further deal with the various scopes and aspects of mediation in the Legal Services Authority. And finally it will conclude with the present situation of mediation in India and certain suggestions with respect to the same.

# INTRODUCTION: BACKGROUND

Mediation is a process whereby two parties through voluntary process and talk about how they are about to tend with the disputes between them. The concept of mediation is not new to India. Even before the British arrived in India mediation was highly practiced by the businessmen and the Panchayat system comprising of group of person played important role of resolving disputes, and this traditional mediation system is still being practiced in many rural areas in India. After that the British adversarial system of litigation was followed in India and arbitration was accepted as the legalized ADR method and is still one of the most often utilized ADR methods.[[1]](#footnote-1)

Mediation encourages the parties to voluntarily reach an agreement that suits their needs and has been growing tremendously. In mediation parties are given opportunity to participate in the process through discussion and an expert also known as the mediator plays the crucial role of peacemaker. The process involves simple mode whereby the parties intend and negotiate and resolve disputes between them out of the court. Commercial mediation is considered as most cost effective way of resolving disputes whereby the parties can arrive at a conclusion by negotiation rather than hiring legal counsel and undergoing the court proceedings which may even be time consuming.

 So keeping this rationale in view commercial mediation involves processes whereby parties to the dispute with intention of resolving disputes between them sit together and negotiate the cause of their dispute and reach to one agreement. Lok-Adalat is another form of dispute resolution process, which was introduced in 1980s and granted statutory recognition under The Legal Services Authority Act (1987). Lok-Adalat comprises of judges who thereupon decide and resolve the disputes between the respective parties and the parties are free to initiate litigation if they are not satisfied with the decree of the presiding judge. The development of mediation in India holds enormous promise particularly the neutralizing communication skills and powerful bargaining strategies of facilitated negotiation can strengthen the system's capacity to bring justice to the society.[[2]](#footnote-2)

 Exposure to these facilitated negotiation processes, though spreading rapidly, remains limited.[[3]](#footnote-3) Mediation first came to be legally recognized as a method of dispute resolution in the Industrial Disputes Act, 1947. The Code of Civil Procedure Amendment Act was passed in 1999, which allowed the courts to refer to alternative dispute resolution (ADR) methods to settle pending disputes under Section 89 of Code of civil procedure. Under this, consent of the parties was made mandatory and the court could refer cases for arbitration, conciliation, judicial settlement through Lok Adalat*,* or mediation.[[4]](#footnote-4)

* 1. **What does mediation mean?**

Mediation is a process of facilitating dialogue, discussion or negotiation between the parties in dispute through a third party who is called as the ‘Mediator’ who helps them arrive at a conclusion and mutually resolve the disputes between them. What makes the process of mediation distinct from that of arbitration and other proceeding is that it is not binding upon the parties and it gives the parties an outlook to understand where they went wrong and what was the point and the cause of their dispute and arrive at a conclusion and resolve the conflict.

* 1. **Stages of Mediation :**

Mediation begins with opening statement by the mediator who will establish his position, explain processes to the concerned parties and assure them regarding the confidential nature of the proceeding, the difference between mediation and the proceedings before the court of law and thus promote negotiation between the parties. The mediator then helps the parties focus upon the issues and give them opportunity to resolve their differences and facilitate them to reach in one settlement. Although the mediator plays crucial role in settling conflict between the parties yet the final decision shall be that of the parties which shall be voluntary settlement.

* 1. **Necessity of Mediation :**

Judicial processes sometimes take too long and in some cases more than 10 years and even more by that time the actual parties are replaced by their representatives, such disturbing situation in litigation makes people lose their spirit and faith in law, and thus in order to avoid such situation mediation processes are considered as the most cost effective mode whereby the parties not only reconcile through a mediator who helps them to facilitate their differences but it also leads to speedy disposal of cases rendering speedy and fair remedy to the parties.

The present day debate on the need to develop Alternative Dispute Resolution mechanism lays prominence upon the bulk of litigation before the court and to reduce the number of pending cases in courts.

## THE ARBITRATION AND CONCILIATION ACT, 1996 –

The Indian Arbitration Act is based on UNCITRAL Model Law. General Assembly of the United Nations recommended that all countries should give due consideration to the said model Law, in view of the desirability of uniformity of the law of arbitral procedures. The Indian legislature enacted the Arbitration and Conciliation Act in view of this recommendation in 1996 with the object to consolidate and amend the law relating to international and domestic commercial arbitration and enforcement of foreign arbitral awards. The objective behind enactment of this Act was to prevent the intervention of judiciary. Section 30 of The Arbitration and Conciliation Act has been enacted in conformity to the Article 5 of the UNCITRAL Model Law on International Commercial Arbitration 1985, which eliminates and narrows the scope of judicial intervention and enumerates that no judicial authority shall intervene except where so provided by the Act. TheArbitration and conciliation (Amendment) Bill, 2018 was introduced in Lok Sabha on July 18,2018. The Bill seeks to amend the Arbitration and Conciliation Act, 1996 and contains provisions to deal with domestic and international arbitration.[[5]](#footnote-5) All details of arbitration proceedings will be conducted and kept confidential.

## HOW FAR MEDIATION SHOULD BE MADE MANDATORY IN INDIA –

Mediation is regarded as a mode of reducing the arrears whereby parties come together and agree to facilitate solutions for their disputes. Mediation must be made an intrinsic part of litigation so that it is perceived and preferred by the parties as the first means of resolving their disputes and it is a great responsibility on part of the bench and bar to work towards achieving this goal. Every litigant pleading before the court is entitled to seek justice and speedy remedy. Courts in India frequently refer suits to mediation and settle disputes between parties through negotiation and thereby avoiding long procedure of litigation however due to absence of any law imposing time limit for completion of such mediations, such suits often go on for months without any resolution. Therefore there is need to develop and make mediation a time-bound process.

# ADVANTAGES OF MEDIATION

Mediation provides opportunity to the parties to share their perspective and resolve disputes between them. Mediation process takes very less time and is usually conducted in few days as compared to that of civil litigation and is easier and simpler. Whereas on one hand litigation cases take months and sometime even years mediation process is much more expeditious and simpler and convenient. The time bound process saves time and costs incurred by the parties involved[[6]](#footnote-6).

**Empowerment:**

Mediation process involves resolution of disputes between parties where they sit face to face and negotiate their differences through a mediator who will assist and help them arrive at a common agreement. It is a voluntary resolution of dispute based on interest and satisfaction of both the parties.[[7]](#footnote-7) However the role of mediator is only that of assisting and supervising but the ultimate decision is that of the parties themselves. Parties are empowered to decide for themselves as to how they would like to resolve the situation.[[8]](#footnote-8) This ensures full liberty of the parties and thus they are not bound to obey the decision of any third party.

**Restoration of Justice:**

The focal point of Mediation is to mend the harm and restore relationship. So much so that recently Supreme Court has approved mediation in resolving the Ayodhya land Dispute case. The mediation process as directed will be held confidentially and court has banned the media from disclosing and reporting any matter related therewith. A five-judge constitution bench headed by Chief Justice Ranjan Gogoi supporting mediation to reach solution observed that even if there is ‘one percent chance’ of settling the dispute amicably, the parties should go for mediation. [[9]](#footnote-9)

**Maintains confidentiality:**

Unlike in open court room, mediation processes are conducted in private room and the parties enjoy protection from the glare of public upon their matters. It gives opportunity to the parties to share every private details and it also helps the mediator to understand the problem of the parties, gather information understand their perception at a deeper level which helps him in resolving the conflict upholding the interest of both the parties. Parties have greater say and they make the final decision. Parties are free to agree on the conclusion reached in confidentiality. Every submission and evidence are kept confidential and are safe from the glower of public. Under section 75 of the said Act it has been expressly laid down that the conciliator and the parties shall keep all matters of conciliation proceedings confidential except unless its disclosure is necessary for the purpose of enforcement. Supreme court of India **in** Moti Ram (D) Tr. LRs and Anr. Vs Ashok Kumar and Anr (Civic Appeal No. 1095 of 2008) declared that mediation proceedings were confidential in nature.[[10]](#footnote-10)

**Convenient:**

Resolving disputes through mediation process is much more convenient to the parties. Parties are acquiescent to work mutually and form conclusive solution which also aids in restoring the relationship and peacefully settles the disputes. The parties are free to decide upon the date and place of settlement as per their choice and convenience unlike the court proceedings where it is decided by the presiding judges. There is no complexity in mediation proceedings and is relatively very simple and fair. The relief so obtained are fair and basically outcome of consent of the parties.

# DISADVANTAGES OF MEDIATION

**Informal**

Lack of informal rules and procedures deprives the mediator from having access to efficient tools and evidences required to identify the complete truth. Since there are no formal rules there is lack of fairness. There is greater chance of parties trying to meddle with the facts often leading to fairness and detrimental towards justice. In the absence of such formal rules if the parties fail to employ a skilled and accountable mediator the process can end in failure.

**Unwarranted Waste of Money and Time:**

Mediation may not always result in settlement agreement and it always involves risks of disparity and the parties cannot compel other party for disclosure of information. Since mediation process always involves risks of failure of settlement agreement it may not always result in peaceful compromise. Although the time and cost incurred in mediation process are far less as compared to that of litigation proceedings before courts yet they are not refundable and the parties will have to undertake the cost and time of instituting suit before court all over again.

**Lack of Accountability of Mediator:**

Mediator though not an adjudicator plays a crucial role of reconciliation between the parties. One may not always end up with expert and experienced mediator. There may be chances that the mediator may even be bias to one party. It is therefore very important that the parties to choose a accountable mediator since he will play prime role in bringing parties to a settlement and moreover he will be acquainted with all the confidential matters of the parties the disclosure of which is strictly forbidden except otherwise so required.

**Parties may withdraw anytime:**

Another big drawback or disadvantage of mediation is that either of the party can withdraw from the proceedings at any time. In litigation only the plaintiff can make withdrawal of the suit and not the defaulting party. But in case of mediation both the parties are free at any time to withdraw thus thereby placing both the parties at fault.

CHALLENGING MEDIATION AGREEMENT

A successful mediation agreement takes the form of contract between the parties and thus they are prevented from bringing any litigation in respect of same dispute. Nevertheless parties are not barred from bringing action by challenging the agreement under contract law.

HOW FAR MEDIATION SHOULD BE MADE MANDATORY IN INDIA

There is strong disputation as to making mediation a mandatory process for fast disposal of suits and is also globally entrenched in legal process. As already discussed mediation may not always result in successful settlement and since the conclusion are not binding upon the parties they are free to institute or raise another dispute in that regard, thereby leading to multiplicity of suits. Therefore there is strong contention for making mediation a mandatory process. However the extent of such mandatory mediation should not prove to be burden on the parties. The main objective of mediation process is to give full liberty to the parties to reach a settlement free from judicial intervention and indeed some of the well-known advantages of mediation are tied to the free willing acceptance of mediation proceedings.[[11]](#footnote-11) From another point of view the mandatory mediation can prove to be a clog on free approach to justice which is the fundamental right recognized under Indian constitution as well as many other international conventions.

There is strong contention that mediation is already compulsory in most of the cases and the parties are mediating before issuing proceedings to save time and costs. Moreover judges are also directing and encouraging parties to resort to mediation making mediation compulsory in many civil and commercial cases. In Italy in 2013, a new law was passed to make mediation compulsory in certain types of civil and commercial disputes. In the USA most states have passed legislation either requiring courts to establish Alternative Dispute Resolution (ADR) methods such as mediation or enforce ADR judgments. China has enacted a People’s Mediation Law with over 70 regulations to promote the use of mediation to resolve disputes.

In India, ADR is required before cases can proceed to court, under Section 89 of their Code of Civil Procedure (Amendment) Act. Gradually mediation is becoming globally accepted as an effective tool to manage the huge accumulation of court cases and resolve disputes in a way that works for all parties involved[[12]](#footnote-12).

## EVOLUTION OF MEDIATION THROUGH THE YEARS

The term mediation refers to the concept where there is an involvement of third party for the purpose of resolving the dispute between the people. The mediators always use good communicative skills and techniques for the purpose of providing remedies and solutions to the parties having grievances. However the origin of the concept of mediation can pull back to the last half of the 20th century where there was a prevalence of raj panchayat system[[13]](#footnote-13). In the ancient India for example the Gram Panchayats and the Nyaya Panchayats were very much prevalent in the rural areas. However this system has been still said to have been existence in many other parts of the rural areas of the country, the people who have been trusting and depending on this legal system of the judiciary of this country have lost their reliance and devotion in them.

The Indian Government has addressed this issue and has tried to make never-ending efforts for the purpose of resuscitating those native and the aboriginal methods for the purpose of delivering justice to the society by making better rules in order to strengthen the judiciary system and abolish the unbiased functioning of the mediating system[[14]](#footnote-14). Recently studies have shown that till the year of 2011, the programme for mediation have been taking place in courts and most of the cases referred for mediation have been revolving around matrimonial cases and the disputes those concerned with matrimonies of the parties to the suit. Commercial mediation has been concerned with the subjects and matters of only intellectual property rights, extensive bankruptcy across the country and matrimonial disputes. It was then evolved that the basic fundamental of commercial mediation follows the concept of only confidentiality, secrecy, intentional and dedication.

Further not only this the concept of commercial mediation all together requires a high level of eradication, a well-trained ambience and high efficient skill mediators for the purpose of mediating the concerned disputes that would lead to managing services in an efficient manner. However in India the mediation programmes are managed and conducted in the country like India without any charge and the mediation programmes are managed by the Indian courts. This is so because it is not at all possible to provide commercial mediation services individually to all the citizens. The parties are not given an option to choose between the mediators and the mediation programmes are whenever carried in the courts, still there is a flavor of the court proceedings that usually takes place. Therefore it can be said that the mediation system has been evolving the years and the entire process of the mediation has gone beyond the system of judiciary and the court proceedings.

## IMPACT OF MEDIATION IN JUDICIARY

The functioning of judiciary in an efficient manner is very essential for country and the citizens as well. All the courts in India operate within the boundary of the law and in no manner they can ignore the proceedings of the court that takes place in the court in accordance with the law. We all know that it is an important aspect that everyone is treated equally in the eyes of law and everyone deserves to be subjected to a fair trial before the court. However there is always an element of delay in the court proceedings and therefore the process of mediation comes to the rescue. In such a situation there was a need to adopt the alternative method for resolving the dispute without any defect in the court proceedings also. The alternative method for resolving the dispute has been originated from the Article 39A cherished in the Part IV of the Constitution that states that all citizens are subjected to free legal aid for the end of the equal justice.

Therefore keeping in mind Article 39A of the Constitution of India, Section 89 of the Code of Civil Procedure was enacted with the purpose of settling the dispute between the parties mutually that too without the interference of the courts in the settlement of the dispute. It is under Section 89(1) of the Code of Civil Procedure that states about the settlement of the dispute between the parties outside the jurisdiction of the courts and refer the cases for mediation. Even the Law Commission in the 129th Report stated about the requirement of cordial settlement of the dispute between the parties and the Malimath Committee endorsed to make it mandatory for the courts to refer the disputes out of the courts for the settlement through adopting the alternative method for resolving the disputes other than the judicial proceedings. In the case of Afcons infrastructure Limited and another v. Cherian Varkey Construction Company Private Limited and others***[[15]](#footnote-15),*** the Supreme Court held that in condition of complicated cases and cases those have various rounds of negotiations, then in that particular case the matter should be referred by the courts to the mediation center for resolving the dispute. It further stated that after the matter has been settled by the Mediator, the Mediator shall submit a report of the mediation to the court, so that the latter can after proper scrutiny can pass a decree accordingly that would comprise the compromise between the parties mutually[[16]](#footnote-16).

IMPACT OF MEDIATION IN LEGAL SERVICES AUTHORITIES

National Legal Services Authority is the central body that is empowered to receive and take into power the matters for mediation from the Supreme Court. There are State Legal Services Authorities also in all the states respectively and they all have their respective High Courts which refer the matters for mediation. Similarly there are also District Legal Services Authorities have mediation centres for the purpose of mediation in the district level. All these institutions form a very major part of the Indian judiciary that work parallel with the Indian court system. The Courts refer the cases for the mediation to the Legal Services Authorities at different levels within the jurisdiction.

During the pendency of the judgments in the case, and while the proceedings are still going on, the Courts refer the disputes for mediation in case it deems fit to do so. Mediation at different levels of the Legal Services Authorities contribute towards the reducing the burden of the courts and the judiciary to a great extent. Usually courts are overburdened with any cases that can also be settled outside the court; therefore the process of mediation is an effort to settle the matter.

It is therefore very important to note that once any matter is settled by the process of mediation, then it becomes binding on the parties to the disputes and the litigation proceedings that goes on, as a result that also comes to an end[[17]](#footnote-17). In the case of Salem Advocate Bar Association (II) v. Union of India***[[18]](#footnote-18),*** the Supreme Court stated that when the parties came to an amicable settlement under the method of mediation, then there has to be a public order of the entire mediation process of the suit and the manner in which it was conducted and the matter is disposed of. Therefore the first task of the Court is to record the settlement and then pass the decree in the terms of the mediation proceeding and then pass the accordance in parlance with law.

The Supreme Court recognized that some sort of regulation is needed for conducting the process of mediation because the mediation is entirely an informal process and the particular method in which the mediation takes place requires to be modified. With regard to this the Mediation and Conciliation Project Committee was formed and this led to the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003, those are not binding in the parties. Therefore the system of mediation has different level of its working[[19]](#footnote-19). The process of mediation is not possible to a great extent because most of the advocates want to serve their own interest and they tend to shift the mind-set of the people to opt for the litigation as they can earn more through the process of litigation because it takes years long to deliver and come up to a final form a judgment due to the options of appeals and revisions of the case[[20]](#footnote-20). It is nothing new and there have been many cases where the parties have been blindly relying on the decisions and the words of the lawyers and if any kind of misleading advice is given by the advocates to their clients, then it would affect the entire system of mediation between the parties.

# CONCLUSION

Even though the process of mediation has been successful in many countries but in country like India it has not attained that much of success due to the lack of awareness among the people in the society. There appears to be a lacuna on the part of the Government to take initiative to spread awareness. The Indian lawyers are hesitant to a change and therefore they hesitate to advice and expose their clients to the ADR process. Therefore a new era and a time has come to look into the concept of mediation for the purpose of resolving the dispute and conflict, a system that would harmonies the demands of the public and the ethics of law. It cannot be said that the adversarial system must be totally done away with. The adversarial system is the appropriate method in a number of situations especially those needing authoritative interpretation or establishment of rights or which manifest severe negotiating imbalance. Meeting the resistance to changing from adversarial litigation to methods of alternate dispute resolution such as mediation, creating awareness in society of the benefits of the mediation process, and developing capacities and involving the Bench and the Bar in a co-operative effort are critical elements in the success of the process[[21]](#footnote-21).

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