THE URGENCY OF LEGISLATION FOR MEDIATION:

EFFECTIVE MODES OF ALTERNATIVE DISPUTE RESOLUTION

**BY- Yonghwan Choung & Harshul Bangia**

# ABSTRACT

The Indian judicial system is frequently criticized for high rates of pending cases, ineffective functioning and adoption of an outmoded approach to dispute resolution. The Law Commission of India, in its various reports, have dealt with the process of Alternative Dispute Resolution (ADR) in India along with some acclaimed scholars which tell the need to establish alternative ways of dispute resolution. The legal practitioners in India have identified Mediation as one of the techniques to deal with resolving disputes. However, the popularity of such alternative ways to resolve the disputes is very less due to the lack of support by any legislative sanction which becomes the reason for its underdevelopment. Mediation is nevertheless considered as a part of legislation that is usually made for resolving a dispute as there is no independent law or statute, like the Arbitration and Conciliation Act of 1996.

The difference between Mediation and Conciliation is also not clear and people get confused very often between different types of ADR. Mediation in itself sufficient to have separate legislation as it focuses on an amicable resolution which includes flexibility, self-reflection, severability and peaceful termination of pending disputes. While using the process of Mediation as an ADR, it is important to consider the challenges and roadblocks that still exist in the smooth operation of the ADR process. This paper seeks to identify the current problems with Mediation in India Legal System and provide legislative backing to Mediation to make it an effective alternative to resolving the dispute. Additionally, this paper aims to understand the use of Mediation to resolve disputes in a manner which proves to be of benefit for parties, the judicial system, and other legal associates who can act as a mediator.

# INTRODUCTION

India is a democratic country and the judiciary acts as a backbone in preserving democracy. The judiciary plays a very important role in ensuring justice through various check and balance along with equity and it also helps to maintain social order in the whole country. Therefore, it is important to have a stable, unbiased and independent judiciary to maintain the effective application of the rule of law and prevention of individual citizen rights. The judiciary usually tries to follow the procedural justice which focuses on making and implementing correct justice through a fair process. But the Indian justice system is disreputable for being biased, ineffective and inefficient since a long time in disposing of cases timely.[[1]](#endnote-1)\*[[2]](#footnote-1) As of May 7, 2019, there are over 3.03 crores cases pending only in the 24 High Courts across the country, out of which 72.36% cases are pending in the court for more than 1 year.[[3]](#footnote-2) In fact, if this pace of functioning is continued, then it will take 466 years for the Delhi High Court to clear its backlog.[[4]](#footnote-3)

Section 89 of the Civil Procedure Code provides various ways to remove the backlog of Indian courts and provide alternative settlement of dispute outside court.[[5]](#footnote-4) Also, the Supreme Court of India has found out the need for a less formal and an alternative forum in many cases that can help in providing speedy justice in comparison to the current judicial process in India which are complex, expensive and very time-consuming.[[6]](#footnote-5) The prolonged litigation is not in the interest of either party due to the high cost and time-consuming process to get justice.[[7]](#footnote-6) Once such method that provides speedy settlement of the dispute between the parties amicably, without a decision or judgment of a judge, in order to arrive at a solution is Negotiation. Negotiation includes the mechanism of ADR which comprises of Mediation, Lok Adalat, Conciliation and Arbitration.[[8]](#footnote-7) Mediation is usually seen as an effective method of ADR for amicable resolution as it incorporates “severability, flexibility, party-participation, preservation of on-going relationship and peaceful termination of pending dispute”[[9]](#footnote-8) along with speedy and cost-effective justice. These features of Mediation is unattainable in the current form of litigation making it more adverse. Internationally, Mediation is the most adaptable form of ADR as it enables justice to every citizen and makes adjudication more accommodating.[[10]](#footnote-9) Although there is an inadequacy of rules and an overlapping of Mediation with Conciliation, the benefits of an effective Mediation to parties, mediator, and courts bring out the need to have specific legislation on Mediation which will contribute to the success of the society as a whole.[[11]](#footnote-10)

# PROBLEMS WITH CURRENT MEDIATION IN INDIA

## A. INADEQUACY OF RULES

The ADR is governed under Section 89 of the Civil Procedure Code[[12]](#footnote-11) along with various other specific acts like Arbitration and Conciliation Act 1996 and many more. Section 89 gives us various alternative ways to resolve a dispute including Mediation. This section of Civil Procedure Code specifically focuses on the names of various ADR’s. Therefore, this clearly states the drawback of section 89, as none of the ways of ADR is defined under section 89 which makes the statute itself vague and ambiguous. Furthermore in the case of M/S Afcons Infra. Ltd. & Anr vs. M/S Cherian Varkey Construction Company Private Limited & others[[13]](#footnote-12), the Supreme Court points out various drawbacks of this particular section and also tries to give solutions in order to have an effective ADR. The courts also point out that when a matter is referred for Mediation, the court shall refer it to a suitable institution or a person who is a neutral party as well as has some knowledge about Mediation. This case explicitly states about the draftsman’s error in Section 89 of Civil Procedure Code and points out the solution by interchanging the word “judicial settlement” in Section 89(2) (c) with the word “Mediation” in Section 89(2) (d), like the above-said rule is only applicable to court-referred Mediation and not to private Mediation. The judges in the case of Afcons identified that the court referred Mediation will be similar to a Lok Adalat and the courts will still retain its control over the matter. This situation will lead to the anomaly and will discourage the mediators to act effectively and efficiently because their hard work in solving the dispute is not binding as well as the court has the final authority to make a decree for approving the resolution proposed by the mediators in order to solve the dispute.[[14]](#footnote-13) Therefore, in order to enforce a settlement through Mediation, a party can opt *de hors* a court reference, called a private Mediation.[[15]](#footnote-14)

Any settlement between the parties that takes place outside the court, i.e. without court’s reference, is known as a private Mediation.[[16]](#footnote-15) Therefore, the private Mediation includes pre-litigation Mediation which focuses on dispute settlement before going to court.[[17]](#footnote-16) There is currently no legislation in India that acts as a guideline for the private Mediation taking place but Justice Ranjana Prakash in her judgment of K. Srinivas Rao vs. D.A. Deepa finds that the pre-litigation mediation is also catching up at a good amount of pace.[[18]](#footnote-17) Due to this, she suggests that pre-litigation clinics should be set up to resolve the dispute at the initial stage. Although the private mediate is outside of the ambit of Section 89 of the Civil Procedure Code and other similar acts as well.

“In the judgment of the Supreme Court of India in *Salem Bar Association vs. Union of India[[19]](#footnote-18)*, the Supreme Court has requested to prepare draft model rules for Alternative Disputes Resolution (ADR) and also draft rules for Mediation under section 89(2)(d) of the Code of Civil Procedure, 1908.”[[20]](#footnote-19)

Therefore, these rules were made in order to act as a guideline for the process of different types of Mediation. Even though these rules were made but these were non-binding in nature due to the lack of authority.[[21]](#footnote-20) The Government of India never focused on providing special legislation to Mediation because it is seen to be similar to Conciliation and they try to put Mediation under the framework of Arbitration and Conciliation Act 1996 and other similar statutes. Therefore, it becomes a major reason for having a legal framework on Mediation that will help our everyone to choose wisely among all the ADR processes.

In the Indian Context, there are majorly four ADR processes which may be broadly classified as Arbitration, Conciliation, Judicial Settlement through Lok Adalat and Mediation. The Arbitration and Conciliation are covered under the Arbitration and Conciliation Act 1996, but there is no formal legislation for Mediation as well as judicial settlement. Due to the lack of a proper legal framework, there is a high possibility of confusion for the practitioners and their viewers. Therefore, it is important to draw a difference between every ADR process and providing knowledge to every person associated with it. Due to the non-availability of legislation on Mediation in India, a lack of confidence and sense of ambiguity exists in the minds of people which fails them to differentiate between Conciliation and Mediation.

# CONCILIATION AND MEDIATION

In the Indian Legal System, the Central Government through the implementation of various legal framework proved that the two processes of ADR i.e. Mediation and Conciliation are interchangeable with one another which led to a lot of confusion in minds of every person.[[22]](#footnote-21) Section 442 of the Companies Act 2013 was enforced from 1st April 2014 which focuses on maintaining a panel of experts to be known as the Mediation and Conciliation Panel.[[23]](#footnote-22) After enforcement of this section, the Government passed the Companies (Mediation and Conciliation) Rules 2016 on 9th September 2016. These Rules were made with an aim of moving towards Mediation as an Alternative option for a dispute in India but these rules seem to be blurring the line of distinction between “Mediation” and “Conciliation.”[[24]](#footnote-23) According to Rule 17 of Companies Rules, the role of Mediator or Conciliator is same but in reality, they can never be the same. There were many similarities that exist between both ADR processes such as, they seek to find the reason for the dispute and provide a solution for the same. Both are mostly court referred and are a non-adversarial process, wherein the motive of parties is to seek a solution and not to sue or compete with each other. They both are voluntary in nature, i.e. both parties should agree to conciliate or mediate and also involve a third party to carry out the ADR process.[[25]](#footnote-24) According to Bryan A. Garner

“The distinction between Mediation and Conciliation is widely debated among those interested in ADR. Some suggest that Conciliation is ‘a nonbinding arbitration’, whereas Mediation is merely ‘assisted negotiation’. Others put it nearly the opposite way: Conciliation involves a third party’s trying to bring together disputing parties to help them reconcile their differences, whereas Mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. Still, others reject these attempts at differentiation and contend that there is no consensus about what the two words mean- that they are generally interchangeable. Though a distinction would be convenient, those who argue that usage indicates a broad synonymy is most accurate”.[[26]](#footnote-25)

Therefore, it’s important to draw the distinction between them because people tend to get confused quickly due to the level of similarity they hold.

Due to the presence of such similarity between Mediation and Conciliation and lack of sufficient legislation for Mediation, people tend to think that both of them are the same. But in reality, they both are very different from each other. In Mediation, the third party acts as a facilitator and assist the parties to arrive at an agreement, while in the case of Conciliation, the third party is appointed by courts to act as a facilitator, evaluator, and intervener in order to settle the dispute by persuading parties.[[27]](#footnote-26) Therefore, the role of a Conciliator as well as a Mediator can’t be the same. Also, Mediation can be either court referred or private, whereas, Conciliation is court referred only. In the Law Commission of India’s article, Justice M. Jagannadha Rao talks about the concepts of Conciliation and Mediation.[[28]](#footnote-27) He also talked about the difference between them which is still unclear in the minds of many people. Therefore, in order to get away with this problem, he headed a Committee which worked on the Draft Mediation Rules for an effective and clear process of ADR.

# COURTS

The courts in India will be the most advantageous legal institutions after giving a legislative backup to Mediation. There is a huge backlog that exists in the judicial system in the form of pendency of cases, biases of courts, ineffective and inefficient working of the courts, etc.[[29]](#footnote-28) As per the facts of the pendency of cases in India, there are over 3 crores cases pending in only the High Courts of India with 72.36% of them are pending for more than 1 year.[[30]](#footnote-29) All the process of Alternative Dispute Resolution helps to reduce the burden of courts by solving the dispute without the court's interference. These dispute resolution ways help to dispose of the cases as soon as they reach an agreement. After arriving at a mutual agreement, the scope for appeal becomes impossible because of the term “mutuality” i.e. consent was given by both the parties. This impossibility decreases the number of cases that are pending or could have been pending in the future as in many cases appeal is filed in the higher court which combinedly leads to a backlog of the judicial system.[[31]](#footnote-30) Therefore, ADR helps in removing the backlog and pendency of cases that exist in our judicial system and making our judicial system more stable, effective and efficient.

## SUCCESS STORY IN HIMACHAL PRADESH

With the current backlog of cases that have come to define the working of the Indian judiciary, recourse to other forms of dispute resolution becomes imperative. The forms of conciliation and mediation services as viable alternatives in this regard. This can be evidenced from the success story of the Himachal Pradesh High Court, which sought to dispose of pending cases by conciliation. Additionally, the High Court sought to relieve the increasing burden by insisting on pre-trial conciliation i.e. Mediation in fresh cases. The Draft Rules for ADR were made and followed in the High Court for dispute settlement as a temporary model. The Himachal model has received widespread appreciation, with the Law Commission of India recommending it as a model for other states to emulate. The Himachal model helped in placing a greater emphasis on the process of conciliation and mediation by making it mandatory to attempt resolution of the dispute in question through conciliation and mediation.[[32]](#footnote-31) In the event that the process of conciliation fails, the court can be approached to issue a ruling on the same.

## PARTIES

All the parties involved in settlement of a dispute gets benefitted in some or the other way when they resolve the dispute through a proper mediation process which is supported by formal rules and process. In a Mediation process, the parties among whom a dispute arose to have control over the scope of mediation i.e. issues to be discussed, its outcomes, etc. Control is usually not vested with the hands of judges instead parties have it with them in order to reach a mutual agreement.[[33]](#footnote-32) Free consent of both parties is important in order to arrive at a mutual conclusion. People also prefer mediation over litigation because it saves a lot of money due to speedy negotiations which result in the reduction of wastage of resources. Due to the speedy process, this resolution could be the most efficient and economical. In addition to it, the Mediation process helps to maintain confidentiality with the terms of the agreement by making it available to only parties and not to courts where it ends up in public record.[[34]](#footnote-33) The mediator acts as an independent, neutral and impartial third-party and ensures a fair process.[[35]](#footnote-34) Therefore, being a third party to the mediation process, the mediator is also benefitted in many ways like the money they receive by carrying out the mediation process. Employment opportunities will also be generated for many legal professionals and it will create a bigger and better legal market if we will have formal rules for Mediation. Therefore, if we formalize rules for Mediation then it will be in the best interest of parties among whom a dispute arose.

# CONCLUSION

In the Indian Legal Context, under Section 89 of the Civil Procedure Code, the only ADR process which doesn’t have a legislative backing is Mediation. The definition of Mediation is not yet identified by any legislation rather a judge while giving away a judgment identified the meaning of the Mediation in its true sense. In the Afcons case, the Supreme court identified the drawbacks of section 89 and how do all the ADR processes overlap each other in terms of their functioning. This case has also depicted the enforceability of a court referred to Mediation. In the case of Salem, the court had suggested forming a committee that will work for preparing the draft rules for Mediation as well as ADR. Pursuant to this judgment, the committee made the draft rules. The name of the Mediation draft rule is “Mediation Rules, 2003.” These rules are not binding in nature and just provide a full detailed procedure and requirements that the Mediation will need to resolve the dispute. These rules can be taken into consideration while forming specific legislation for Mediation. There is an inadequacy of rules in the Indian Legal System that can properly formalize and define the process of mediation. The ineffectiveness and unpopularity of Mediation, due to the lack of specific rules, creates a kind of confusion in the minds of people with Conciliation. Even though these both are interlinked but the Mediation has a broader perspective which focuses on court referred as well as private mediation. By making a legal framework of mediation, the whole society including the parties to dispute along with courts will be benefitted in some or other way. The model of Himachal Pradesh was so successful such that they based on it legislation on Mediation can be framed and implemented for the collective good of the society.

1. [↑](#endnote-ref-1)
2. Rashika Narain & Abhinav Sankaranarayanan, *Formulating a Model Legislative Framework for Mediation in India*, 11 NUJS L. Rev. 75, 76 (2018); O.P. Tiwari, Arbitration and Conciliation Act 1996 with ADR, 365 (2010); Avtar Singh, Law of Arbitration & Conciliation and Alternative Dispute Resolution Systems 585 (2013). [↑](#footnote-ref-1)
3. *National Judicial Data Grid,* *Summary Report of India*, available at <https://njdg.ecourts.gov.in/njdgnew/?p=main/index> (last visited on May 7, 2019). [↑](#footnote-ref-2)
4. *It would take Delhi HC 466 yrs to clear backlog: CJ, THE INDIAN EXPRESS* (Feb. 13, 2009) available at http://indianexpress.com/article/india/india-others/it-would-take-delhi-hc466-yrs-to-clear-backlog-cj/ (Last visited on May 8, 2019). [↑](#footnote-ref-3)
5. Civil Procedure Code Act sec 89 (1908); Thomas Valenti & Tanima Tandon, *Mediation in India*, in Alternative Dispute Resolution: The Indian Perspective 396-97 (Shashank Garg ed., 2018). [↑](#footnote-ref-4)
6. *Shyamalika Das v. GRIDCO*, (2010) 15 SCC 268: 2010 INSC 802; Tiwari, *supra note* 1 , at 365. [↑](#footnote-ref-5)
7. *Generally see* Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 Hastings L.J. 789 (2004). [↑](#footnote-ref-6)
8. *Generally see* Valenti, *supra note* 4, at 393. [↑](#footnote-ref-7)
9. Rajiv Dutta, *Mediation in India* (internet source); Valenti, *supra note* 4, at 390-91. [↑](#footnote-ref-8)
10. Tony Biller, *Good Faith Mediation: Improving Efficiency, Costs, and Satisfaction in North Carolina's Pre-Trial Process*, 18 CAMPBELL L. Rev. 284 (1996); Avtar Singh *supra note* 1, at 583. [↑](#footnote-ref-9)
11. Riskin, Westbrook, Guthrie, Reuben, Bobbennolt & Welsh, Dispute Resolution and Layers; Cases and Materials 14-15, 17 (2014). [↑](#footnote-ref-10)
12. Civil Procedure Code Act sec. 89 (1908); Valenti, *supra note* 4, at 393. [↑](#footnote-ref-11)
13. *M/S Afcons Infra. Ltd. & Anr vs. M/S Cherian Varkey Construction Company Private Limited & others* 2010 8 SCC 24. [↑](#footnote-ref-12)
14. *Generally see* Valenti, *supra note* 4, at 397; Mallika Taly, Introduction to Arbitration 140 (2015) [↑](#footnote-ref-13)
15. Arjun Natarajan, *Mediation: More Myths Busted* (Aug. 3, 2017) available at <https://www.livelaw.in/mediation-myths-busted/> (last visited on May 15, 2019); Valenti *supra note* 4, at 404. [↑](#footnote-ref-14)
16. Valenti, *supra note* 4, at 397. [↑](#footnote-ref-15)
17. *Id.*, at 405. [↑](#footnote-ref-16)
18. *K. Srinivas Rao v. D.A. Deepa (2013) 5 SCC 226.* [↑](#footnote-ref-17)
19. *Salem Advocate Bar Association (I) vs. Union of India (2003) 1 SCC 49.* [↑](#footnote-ref-18)
20. *Consultation paper on ADR and Mediation Rules*, available at <http://lawcommissionofindia.nic.in/alt_dis.pdf> (last visited on May 17, 2019). [↑](#footnote-ref-19)
21. Avaneesh Satyang & Sohini Mandal, *India: Mandatory Pre-Institution Mediation: Commercial Courts,* available at <http://www.mondaq.com/india/x/727214/Arbitration+Dispute+Resolution/Mandatory+PreInstitution+Mediation+Commercial+Courts> (last visited on May 18, 2019). [↑](#footnote-ref-20)
22. Singh, *supra note* 1, at 584. [↑](#footnote-ref-21)
23. *See* Arjun Natarajan, *Companies (Mediation and Conciliation) Rules, 2016-“Giant Leap” Or “Achilles Heel” for Mediation in India?,* (Sep. 20, 2016) available at <https://www.livelaw.in/companies-mediation-conciliation-rules-2016-giant-leap-achilles-heel-mediation-india/> (last visited on May 20, 2019). [↑](#footnote-ref-22)
24. *See Id.* [↑](#footnote-ref-23)
25. Surbhi S, *Difference between Mediation and Conciliation* available on (Oct. 16, 2017) ,<https://keydifferences.com/difference-between-mediation-and-conciliation.html> (last visited on May 21, 2019); Mallika Taly*, supra note* 13, at 140-41. [↑](#footnote-ref-24)
26. Justice P. V. Reddi, Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions, Report No. 238, (Dec., 2011) available at <http://lawcommissionofindia.nic.in/reports/report238.pdf> (last visited on May 23, 2019). [↑](#footnote-ref-25)
27. Mallika Taly, *supra note* 13, at 297-301. [↑](#footnote-ref-26)
28. Justice M. Jagannadha Rao, *Concepts of Conciliation and Mediation and their Differences,* available at <http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf> (last visited on May 25, 2019). [↑](#footnote-ref-27)
29. Rashika Narian, *Supra note* 1, at 76; Allison Malkin & Gracious Timothy, *Commercial Mediation: An Evolving Frontier of Alternative Dispute Resolution in India*, in Alternative Dispute Resolution: The Indian Perspective 332 (Shashank Garg ed., 2018). [↑](#footnote-ref-28)
30. *Supra note* 2. [↑](#footnote-ref-29)
31. *Generally see* Valenti, *supra note* 4, at 419*; Generally see* Mallika Taly *supra note* 13, at 140-41. [↑](#footnote-ref-30)
32. Ujwala Shinde, *Conciliation as an Effective Mode of Alternative Dispute Resolving System, 4-3* IOSR J. of Humanities and Social Science 1, 3 (2012). [↑](#footnote-ref-31)
33. Generally see Riskin, *supra note* 10, at 348; Brian A Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 Harv. Nego. L. Rev. 157, 200-02 (2015). [↑](#footnote-ref-32)
34. # *The Advantages of Mediation Cases over Traditional Lawsuits*, available at <https://adr.findlaw.com/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html> (last visited on May 28, 2019).

    [↑](#footnote-ref-33)
35. # Akanksha Mathur, *How Does The Mediation Process Work – Steps and Procedure* available at <https://blog.ipleaders.in/mediation-in-india-process/> (last visited on May 30, 2019).

    [↑](#footnote-ref-34)