MEDIATION AND ITS SCOPE FOR SOCIETAL DEVELOPMENT

By: Balabavithra M[1] & Rangarajan R[2]

ABSTRACT

When the Alternative dispute resolution opens new vistas, the system gave birth to mediation. Mediation is the Brainchild of the dispute resolution where new techniques and modern forms of negotiation are ablied under the influence of an impartial third party. Mediation allows the voices of each party to be heard, keeping in mind the fair motive. Mediation is considered the most realistic form of dispute resolution in the modern era. This article provides a wide discussion by envisaging the ways in which Mediation as a mechanism has developed and contributed towards the societal development at a large.

The Article provides a comparison of the mediation mechanism between India and the rest of the world underlining the growth throughout the history of the world and India. The article also makes a vast clarity on the laws governing mediation in International standards and in the Indian standards. Furthermore, the article walks through the advantages and the disadvantages and provides the ideas that could be used to rectify them. To enhance the better understanding very important cases have been analyzed to increase the proximity of the reader's grasp.

Keywords: Mediation, procedure, Mediation Laws, Indian laws, Societal Development, Advantages, Disadvantages, Remedy

[1] 5th Year, Law Student, School of Law, Sastra University.
[2] 5th Year, Law Student, School of Law, Sastra University.

Mediation, a type of ADR that can be defined as the interference; conciliation, or the act of a third person, interfering between two parties, contingent to disputes to reconcile them or persuade them to mutual adjustment or settlement. Under International Law, the concept of Mediation indicates a friendly interference of any state in the disputation of others which may lead to a dispute, to maintain the peace in the society[3].

It is a flexible and an informal, confidential way of proceeding among the parties to a disagreement, where the intervention a third party is applied, a Mediator, whose job include to negotiate the conflict of the opinion of the parties and to help them achieve a settlement or agreement on their own. Although the agreement achieved through the mediation is binding, the mediator has no right to make any binding resolutions[4].

Mediation is an informal way, unconventional to litigation, where the parties to a dispute meet with a neutral mediator to settle their differences and disputes. The mediators are individuals trained in negotiations, who attempts to work on a settlement or agreement, mutually agreed by both the parties to the dispute. Arbitration is more formal than Mediation and resembles a simplified version of a trial involving limited discovery and simplified rules of evidence[5].

Through this article, the authors will drive the readers to focus on the process of Mediation and its scope in the societal development by discussing the history, the practice, and the advantages and disadvantages of Mediation with the world and India scenario.

History

Law is a system of rules enforced, which exists across the nation. It can be commonly regarded as the guardian angel, which provides a source of protection against illegal and unjustness. It is difficult to define what law is, as there is no one definition, universally accepted. The legal system varies between countries. Each country has its own civil and criminal law, private and public law. The commonly followed legal proceeding is litigation. It can be described as a process of engaging in a lawsuit before a Court of law. However, due to the overburdening of the

[3] Black's Law Dictionary, https://www.latestlaws.com/wp-content/uploads/2015/04/Blacks-Law-Dictionery.pdf
[4] CPR International Institute for Conflict Prevention & Resolution, https://www.cpradr.org/resource-center/rules/mediation/cpr-mediation-procedure
[5] *Ibid*

Court, there seems to be a delay in justice. A substitute way of lessening the burden of the Court and to avail justice is through Alternative Dispute Resolution (ADR).

ADR is an alternative way of settling disputes in a non-adversarial manner, it refers to any means of settling disputes outside of the courtroom. ADR typically includes early natural evaluation, negotiation, conciliation, mediation, and arbitration[6]. The most common forms of ADR are arbitration and mediation.

The process of solving disputes among the parties without involving a lawsuit has been an age-old practice and is deep-rooted. Even before the codification law, the process of ADR especially Mediation has been existing. Historians are of the view that the earliest case dates back to the Phoenician commerce[7]. Cases of Mediation traces back to Ancient Greece, where the village elders used to mediate disputes among the villagers[8].

In the Roman Era, the practice of Mediation was a prime source of dispute resolution and the mediators were called with various names such as *internuncius, medium, intercessor phlantropus, etc.*

Mediation has been used as a tool to sort out various disputes. In the UK, Mediation came into force in 1999. When sweeping reform "Woolf Reform", aimed at making the civil litigation quicker, simpler, and less adversarial effect[9]. It has been made compulsory for separating couples to go through the process of mediation in the UK and has seen a rise in Mediation preference to settle disputes after the Children and Families Act,2014[10].

In India, the process and practice of mediation have been rooted deeply and dates back to the earlier days where the Panchayat Raj system was predominantly p prevailed. The adoption of a developed concept of ADR mechanism was an outcome of a study made by the Institute for the

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[6] Legal Information Institute, Alternative Dispute Resolution, (August.18,2020), https://www.law.cornell.edu/wex/alternative_dispute_resolution

[7] Antonello Miranda, Academia, The Origins of Mediation and the A.D.R tools, (August.20,2020), https://www.academia.edu/9611797/The_Origins_of_Mediation_and_the_A_D_R_tools

[8] Disputes Mediation, History of Mediation & Overview of Mediation, (August.19, 2020), https://disputesmediation.com/history-of-mediation/

[9] LEXOLOGY, Mediation in United Kingdom, (August.20,2020), https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b#:~:text=Mediation%20has%20been%20used%20to,and%20less%20adversarial%20took%20effect.

[10] Disputes Mediation, History of Mediation & Overview of Mediation, (August.19, 2020), https://disputesmediation.com/history-of-mediation/

Study and Development of Legal Systems (ISDLS), the USA in the year 1966 due to Hon'ble Mr. Justice A.H. Ahmedi, in respect to the causes of delay in the civil jurisdiction in our country[11].

Recent Advances in the Field of Mediation:

The term 'mediator', is used to denote a neutral third person/party in a conflict. A mediator can be defined as a person, possessing the legal knowledge and skills, required to carry out a settlement of a dispute. The mediator, in other words, is a counselor, who helps the parties in dispute, to have their resolution. Mediator's job is only of assisting the parties and not to decide the outcome. A mediator's duty involves conducting a fair and neutral proceeding of negotiation. The mediator has to, in best of his interest, tend to put an end to the existing dispute among the parties and to show them a pathway to attain a mutually accepted solution. The duties of a mediator also involve maintaining the confidentiality and to have a rational inquiry. The mediator is said to be a mode of communication between the disputed parties, providing them with legal guidance to achieve a solution.

Disputes prevail in all corners of the world. Some of them are sorted out within a week and some take months and months when approached the settlement through a lawsuit. There are numerous pending cases before the Courts, which makes it nearly impossible for the jury to provide a judgment or to come up with a solution immediately or within a week's time. The recent addition of the pandemic, to the world's priorly existing troubles, has exacerbated the case backlogs. The restrictions on travels, which have reduced the workforce have given an upward push to the use of mediation through virtual procedures.

Mediation is a frequently use and most preferred mode of dispute resolving as it includes numerous advantages such as:

- **Cost-Efficient** – Mediation charges less fee for Litigation and other legal proceedings;
- **Fast and Flexible** – It is a quicker and flexible way to arrive at a mutually agreed solution;

[11] Delhi Mediation Centre, History, (August.19,2020), https://delhicourts.nic.in/dmc/history.htm

- **Confidentiality** – what is said during the mediation, stays among the parties to the dispute and the Mediator as it only includes the parties relevant to the disputed matter apart from the mediator, unlike the procedures involved in litigation.

Procedure for Seeking Mediation:

Mediation is one of the processes, adopted for the peaceful settlement of the International disputes, whereby a third party (a country or an individual or an organization) interferes between the disputed parties for resolving the conflict. The mediating party, on its own or at the request of the disputed parties, takes part in the parley among the two to advance a mutually agreed proposition[12]. The process of Mediation, includes the gathering of the disputed parties, separately for the negotiation to take place. The individual entity, acting as a mediator carries the offers and counter-offers, demands, and propositions among both parties to help them arrive at a mutual conclusion[13]. The conclusion, arrived through mediation is non-binding unless both the parties agree.

In India, section 89[14] of the Code of Civil Procedure (CPC) provides of Alternative Dispute Resolution methods to settle the disputes pending before the court. Under section 89 CPC, the

[12] International Law Mediation, https://law.jrank.org/pages/8519/Mediation-International-Law.html
[13] FINRA, Mediation Process, https://www.finra.org/arbitration-mediation/mediation-process
[14] Section 89. Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:--

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat: or

(d) mediation.

(2) Were a dispute has been referred--

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

consent of parties referring to judicial settlement, Lok Adalat, or Mediation is not mandatory. The Judge possesses the power of compulsory reference[15]. As per Rule 5 of the Alternative Dispute Resolution and Mediation Rule,2003[16], the parties to a suit can opt for ADR procedure

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(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

[15] The Civil Procedure-Mediation Rules, 2003, contains provision for mandatory mediation under rule 5(f) (ii). As per this rule, if the parties are not ready for mediation or conciliation and if the court finds that there is an element of settlement and the relationship of the parties has to be preserved, the court may refer the case for mediation to see the chance for settlement.

[16] Rule 5: Procedure for reference by the Court to the different modes of settlement: (a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within fifteen days of the direction of the Court under clause (b) of Rule 2 and the Court shall, within fifteen days of the said application, refer the matter to arbitration and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;

(b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat, they shall apply to the Court, within fifteen days of the direction under clause (b) of Rule 2 and the Court shall, within fifteen days of the application, transfer the matter to the Lok Adalat under sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and then all the other provisions of that Act shall apply as if the proceedings were referred for settlement by Lok Adalat under the provisions of that Act; (c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within fifteen days of the direction under clause (b) of Rule 2 and then the Court shall, within fifteen days of the application, transfer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and then all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the proceedings were referred for settlement under the provision of that Act;

(d) Where all the parties are unable to opt or agree to refer the dispute to arbitration, or Lok Adalat, or the judicial settlement, within fifteen days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

(e) (i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application refer the matter to conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply, as if the proceeding were referred for settlement by way of conciliation under the provisions of that Act;

(e) (ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

(f) Where under clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within fifteen days of the direction under clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of fifteen days issue notice to the other parties to respond to the application, and

(i) in case all the parties agree, the Court shall refer the matter to conciliation or mediation, as the case may be, as stated in clause (e);

(ii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be.

(g) (i) Where none of the parties apply for reference either to arbitration, or Lok Adalat, or judicial settlement, or for conciliation or mediation, within fifteen days of the direction under clause (b) of Rule 2, the Court shall, within a further period of fifteen days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

to resolve their dispute, if all the parties to the suit, on an application made in regards to the opting of ADR methods, the court may refer the matter under respective law to such methods. If there is no mutual agreement for opting ADR methods, if one of the parties issue a notice for reference for mediation or conciliation, the court can refer the matter to the same. The mandatory reference of mediation or conciliation under rule 5(f) (ii), by the court, occurs only when the court after hearing to matter at dispute, is of the opinion that there exists an element of outside the court settlement, which may be accepted by both the parties, refers the matter for mediation or conciliation. Disputes arising out to marital relationships are made compulsory to opt mediation, before appearing in front of the Court.

Analysis – The Advantages and Disadvantages of Mediation:

The ADR mechanism has proven to be one of the most efficacious mechanisms to resolve disputes of national and international nature[17]. To reduce the backlog of cases pending in the courts, the Judiciary has encouraged the use of out-of-court settlements and for the effective implementation of the ADR mechanism, organizations such as the Indian Council of Arbitration (ICA), International centra for Alternate Dispute Resolution (ICADR) were established[18]. In 2003[19], a case was filed where issues related to the failed ADR mechanism were raised. The Apex court in the same case observed the inadequate capacity of the case management system, despite a subsist of ADR framework being available under CPC. In the "Salem II" case[20], based on the obiter dicta, the mediation came into focus.

The court enacted certain changes in the management of the cases, new rules were implemented, and court-connected mediation centers were established. This change expanded the role of court-connected mediation in the justice delivery system in India. Furthermore, In the case of **Afcons**

(ii) After hearing the parties or their representatives on the day so fixed, the Court shall, whether parties agree or not, and if there exist elements of the settlement which may be acceptable to the parties, refer the matter to:
(A) conciliation, if the Court considers that the matter is fit for conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply, as if the proceedings referred for settlement by way of conciliation under the provisions of that Act; or
(B) mediation, if the Court considers that the matter is fit for mediation and then the provisions of the Mediation Rules, 2003 in Part II shall apply.

[17] Vinay Vaish, Alternate Dispute Resolution (ADR) in India, Mondaq, https://www.mondaq.com/india/court-procedure/654324/alternate-dispute-resolution-adr-in-india

[18] *Ibid*

[19] Salem Advocate Bar Association vs Union of India, (2003) 1 SCC 49.

[20] Salem Advocate Bar Association vs Union of India, (2005) 6 SCC 344.

Infra Ltd vs M/S Cherian Varkey Constructions (2010)[21], the Supreme court of India held that all the cases related to the trade, commerce, contracts, consumer disputes, marital disputes, and even tortious liability should normally be mediated. In the case of the **Babri Masjid case** [22], the chief justice of India himself stepped into the position of a mediator to provide a mediation facility to the warring parties. In 2013[23], the family courts were directed to opt mediation to settle marital disputes with the consent of the parties, mostly for the matters concerning the maintenance, custody of the child, etc.

Mediation, being an informed way of dispute resolution, involves neutralizing communication skills and powerful bargaining strategies of facilitated negotiation, strengthens the capacity of the judiciary in delivering justice[24]. In 2011, the Apex Court of India declared that mediation proceedings are confidential, and only an executed settlement agreement or a statement that the mediation proceedings were unsuccessful, should provide to the court by the mediator[25]. Apart from being confidential, Mediation provides for additional advantages and disadvantages in the course of justice providing when compared with litigation.

The following are the major advantages of mediation on a grassroots study:

1. One of the reasons for the preference of Mediation, for dispute resolution, is the "not so lengthy litigation processes". The course of mediation can be for weeks or months to finish, at the same time it could take a maximum of a few days to arrive at a mutually agreed conclusion. It is preferred over litigation as it cut shorts the total amount of time, which involves in a lawsuit before a Court.
2. The second reason for preferring mediation over litigation is "the informal way". Mediation involves an informal way of negotiation, whereby the parties to the disputes addresses the issues to the mediator in the presence of either of the party or can also do it individually depending upon their preference. Thereby having full control over the resolution of disputes at the hands of the parties.

[21] 2010 (8) SCC 24
[22] Dr M. Ismail Frauqui and ors. vs Union of India and ors AIR 1995 SC 605
[23] B.S. Krishnamurthy vs B.S. Nagaraj S.L.P. Civil No(s). 2896 of 2010
[24] Hiram E. Chodosh, MEDIATING MEDIATION IN INDIA, http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf
[25] Moti Ram (D) vs Ashok Kumar and Anr. [2010] 14 (ADDL.) SCR809

3. Mediation provides a "control over the outcome" of the dispute. The parties to the dispute can continue the proceedings till both the parties agree upon the same agreement which gives a win-win situation to both parties, unlike the litigation proceedings which is binding on both the parties even if they disagree.
4. "Low cost" involved in Mediation as compared to litigation. Mediation costs depend upon the hourly rate and on the experience of the mediator.
5. It is a "private and confidential" proceedings, where only the mediator and the parties involved are aware of the facts and issues of the case. Unlike the lawsuit filed in a court whereby individuals other than the involved parties to a dispute are present.
6. In Mediation, "shreds of evidence not limited by normal court rules". One can submit any evidence that would not be normally considered in the proceedings, even in between of the negotiation.

And the disadvantages of the mediation include the following:

1. As there are no rules as to the submission of evidence, it can at times be a disadvantage to the proceedings as either of the party many submit "irrelevant or false evidence" to the proceedings, for one's benefit.
2. There is "no guarantee in mediation" as the proceeding might breakthrough in the between as the whole of the negotiation proceeding depends upon the parties.
3. Privacy in Mediation can at times be a "hindrance in proving one's innocence". When an accused has been made publicly, mediation can't prove to be a significant solution provider.
4. "Resolutions aren't guaranteed in mediation". A revolution can't be considered as a solution unless both the parties agree. There's no guarantee of attaining a mutually accepted agreement among the parties to a dispute unless the matter involved is of financial dispute or is of a marital dispute.

On a more vivid study if we analyze the disadvantages of the mediation, we can find the reasons for the failure of mediation :

Mediation, though it has a lot of advantages and has been made vital for any disputes before proceeding with a lawsuit, is in constant failure. At times, it causes an impasse where the disputants are unable or aren't willing to communicate with each other or with the mediator, to reach a mutually agreed solution to their disputes. This impasse becomes an obstacle in the course of mediation which results in its failure to provide a medium to procure a solution outside the court. There are few other reasons for the failure, which are dealt with in detail below-

1. **Lack of communication-** As mentioned above, lack of communication with the mediator or with the opponent party Infront of the mediator can result in the failure. Effective mediation requires a proper divulgence of the issues to acquire the expected solution.
2. **Lack of unanimity on key issues-** A major role in a successive mediation is a unanimous understanding of the key issue. At times, the disputed parties may tend to have a difference of understanding of the issues at hand. A mediator has to make sure that the parties to the dispute are having a mutual understanding regarding the issues to be resolved.
3. **Limited amount of time –** The mediator has to grasp the issues, facts, evidence and have his own interpretation of the matter at hand, to provide a better, mutually agreed solution to the parties within the limited amount of time present for a mediation. At times it tends to be difficult for the mediator to have an understanding of the matter and to come up with an appropriate solution within the time frame.
4. **Too many parties involved** – At times, in a commercial dispute, where the number of disputed personas present is more than two, it becomes difficult at the end of the mediator to arrive at an issue, mutually being agreed by all of the parties and to give a solution.
5. **Lack of key information** – Why communicating the issues, the parties may, at times leave out essential information, which may be a game-changing point in arriving at the solution. The mediator being the third party to the dispute, may believe that the information received is, to his/her best knowledge to be whole of the information at may create an agreement on the basis on it, but later, after acquiring the rest of the key information, the whole of the agreement may change or not be adequate to solve the problem.

Steps For a Successful Mediation:

1. Always find the best time to resolve the dispute while mediating – Mediation can happen at any time of the dispute but choosing the right time to initiate this mediation process promotes an orderly resolution of the dispute at hand.
2. Have a good faith – The intention of the mediator and the parties should be to resolve the dispute.
3. Investigate – Ensure proper investigation of all spheres has been made when addressing the problem/dispute.
4. Look for a strong mediator – Make sure the mediator is strong, effective, and most importantly impartial. Select a mediator preferably the one, which both the parties are comfortable with.
5. Have a clear mediation brief – Your mediation brief should not only be succinct but also persuasive. A mediation brief should contain the cogent statement of facts and all the legal arguments
6. Make a pleasing presentation – Prepare a presentation that is effective enough to resolve the dispute, while verbally presenting the arguments or case that is to be resolved.
7. Communicate with the purpose – listen to understand not to reply with a counter. Make sure the communication with the mediator is utilized during the private sessions allowed.
8. Creative – Mediation demands a huge demand for the mediator's creative problem-solving skills.
9. Conclude – Make sure the mediation concludes with the settlement agreement.

Conclusion:

The expose written, very vividly explains that the role of the mediator is the key to all the mediation procedure and shows the development of mediation in the present society throughout history. The article has given a brief about the advantages and disadvantages of the mediation procedure. Thus, according to the authors, the scope for future development in mediation can be observed by rectifying the reasons that cause the failure of the mediation and by utilizing the suggestive measures given in this article. Thus, Mediation is the most effective method of

alternative dispute resolutions. Further, development in this field of mediation – ADR could be observed post-2020 considering the movement of the larger number mass to sort dispute resolution rather than sorting the remedy through the court of law.