MEDIATION IN INDIA: REALISING POTENTIAL AND OVERCOMING OBSTACLES

Aakanksha Bhola[1]

"To none will we sell, to none deny or delay, right or justice."

Clause 40, Magna Carta (1215)

Introduction

Article 14 of the Indian Constitution guarantees equal protection before law. Article 39A mandates the state to ensure that justice is not denied to any citizen by reason of economic or other disability. Several other laws guarantee the same. But these mere indiscriminate provisions have not succeeded in puttingall citizens at an equal footing. The complexity, cost, and delays put the people who cannot afford thisjustice at a distance from the judicial system. According to the National Judicial Data Grid,2,01,97,956 cases are pending in all courts of India (in courts where the data is available). Out of these, an astounding 10.41% have been pending for over 10 years.[2] This is not merely a number, but people who have been waiting for years to get justice. Many others do not approach the system fearing the delay. This pendency can be attributed to several factors, the foremost being- an unbalanced judge to population ratio, lack of proper government administration, and a weak Alternative Dispute Resolution (ADR) system.

Alternative Dispute Resolution is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation.[3]Globally, it includes methods such as arbitration, conciliation, mediation, and negotiation. It has various benefits like low litigation costs, amicable settlement, quick decision, and preservation of relationships. The ADR system known today originated in the United States of America during the 1970s. From there, this system spread to other parts of the world. Despite the emergence of the modern ADR in the USA, the concept was always known to the world. Different forms have always been used especially for settling international disputes. The first documented use can be dated back to

---

[1] B.A. LL.B. (2nd year),Army Institute of Law, Sector 68, Mohali.
[2]http://164.100.78.168/njdg_public/main.php (The Indian government's e-courts website) accessed on 10/10/2015, at 1128 hours.
[3]*Black's Law Dictionary,* 91, (9th ed., 2009).

1800 B.C.E. in the Mari Kingdom (modern day Syria) to settle disputes with other kingdoms.[4]After that, various other nations, all over the world, have consistently used ADR. A later example is the establishment of the Permanent Court of Arbitration in 1899, to peacefully settle international disputes, primarily through arbitration.[5]

Adopting the several ADR techniques has become necessary in a country like India. In the case of *Salem Advocate Bar Association v. Union of India*[6], the Supreme Court observed, "Keeping in mind the laws' delays and the limited number of Judges which are available, it has now become imperative that resort should be made to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date." It was also observed that in countries where ADR had been successful, 90% of the cases had been settled out of court.

Alternative Dispute Resolution in India

Various ADR techniques have been used in India historically. Through the different dynasties that ruled India, the system evolved over the years. But the basic processes have remained the same. The various disputes were settled by *kulas* (family assemblies), *srenis* (trade guilds), and *puga* assemblies (groups of communities or tribes) through compromises and mediation. The Panchayat system was also prevalent, and is popular to this day.

The pendency of the large number of cases and an increase in litigation has necessitated a strong ADR framework in modern India. According to the Law Commission, developing ADR "will go a long way in improving not only the access to justice, but even the quality of justice." [7] But unfortunately, its development has not been as anticipated. The Law Commission in its 131st report, in 1988 had issued a warning that is equally worrying today. It had said, "A time has come when, as the system is under such a stress that it is likely to collapse, alternative modes of resolution of disputes must be seriously explored".[8] There has been a presence of ADR in post-Independence India, but it is yet to achieve the success it aimed for.

[4] Jerome T. Barrett and Joseph P. Barrett, *A History of Alternative Dispute Resolution*, (accessed on 25/9/2015, at 1559 hours),http://www.adr.gov/events/2009/may7-2009-materials-history.pdf.
[5]http://www.pca-cpa.org/showpage1d71.html?pag_id=1027, accessed on 25/9/2015, at 1606 hours.
[6](2005) 6 SCC 344.
[7] Law Commission of India (2009), 222nd report, *Need for Justice-dispensation through ADR, etc*.
[8]Law Commission of India (1988), 131st report, *Role of Legal Profession in Administration of Justice.*

In pre-Independence India, there were a few provisions for ADR, largely based on English

Law like the Indian Arbitration Act,1899 and the Arbitration Act, 1940[9]. After 1947, the following efforts were made in the field of ADR. In 1976, a provision under Order XXXIIA of Code of Civil Procedure, 1908 (CPC) was made, that called for conciliation in case of family matters. But the real efforts to establish an effective ADR system actually began in the 1980s and 1990s. In 1992, the Panchayati Raj system was implemented, which gave greater powers to the village assemblies that decide disputes at village level. In 1982, the concept of Lok Adalats started. It got a statutory standing when the Legal Services Authority Act, 1987 (enforced in 1995) made a provision for the same. It also called for the settlement of disputes through negotiations, arbitration, and conciliation.[10]The International Centre for Alternative Dispute Resolution (ICADR) was also set up in 1995 for the same purpose. The Arbitration and Conciliation Act, 1996 was enacted in consonance with United Nations Commission on International Trade Laws (UNCITRAL) Model Law, to which India is a signatory. In 1999 the CPC was amended to implement the 129th Law Commission[11] report. The new Section 89 and Order X Rule 1A, 1B, and 1C, prescribe modes such as arbitration, conciliation, Lok Adalats, and mediation and the procedure thereof. Several other statutes like the Industrial Disputes Act, 1947, Hindu Marriage Act, 1955, Special Marriage Act, 1954, and the Family Courts Act, 1984 also contain certain provisions relating to ADR.

Despite the fact that a good ADR framework exists in India, it has failed to trickle down to all sections of the society. It has not attained the popularity that it has seen in the west. Many people, especially people belonging to backward socio-economic conditions, are completely unaware of its existence.

Mediation as a Distinct Part of ADR

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques.[12] The neutral third party is the trained mediator. It can also be called an assisted negotiation process. Like negotiation, it is not governed by the

[9] P.C. Rao, *Arbitration and Conciliation Act, 1996: The Context,*inALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS?, 34, (P.C. Rao and William Sheffield eds.,1st ed., 2007).
[10] Section 4(f), Legal Services Authority Act, 1985
[11] Law Commission of India (1988), 129th report, *Urban Litigation: Mediation as an Alternative to Adjudication.*
[12] Mediation and Conciliation Project Committee (MCPC), *Mediation Training Manual of India*,16,http://supremecourtofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf(accessed on 29/9/2015, at 1831 hours).

rules of evidence and formal rules of procedure[13]. Mediation can be sought at both, the instance of the court under Section 89 CPC (court referred), or privately by the individuals when the dispute is pending in the court, or at the pre-litigation stage itself. The service of mediation is usually provided by the Mediation Centers of the court, but the concept of private mediators is not unknown.

Mediation in India is not governed by any statute unlike the other modes discussed under Section 89 of the CPC, namely- arbitration, conciliation, judicial settlement, and Lok Adalats. The provision regarding the procedure of mediation simply states that cases referred to mediation "shall follow such procedure as may be prescribed"[14]. What is essential about the introduction of Section 89 is that it explicitly established mediation as a separate ADR method. Before the 1999 Amendment, a reference to mediation was either made along with conciliation, or simply described as settlement. Today, the views regarding mediation being distinct from conciliation differ. The first view is that mediation is inter-changeable with conciliation. This view was subscribed by the Supreme Court in*Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Construction*[15]when it explained that mediation is a synonym of the term 'conciliation'. The Law Commission[16] has also supported this viewpoint. The second view is that they both are different terms that mean something different. According to Justice M. Jagannadha Rao, the Parliament has made a distinction between mediation and conciliation. He says thatthe 'conciliator' can make proposals for settlement, formulate the terms of a possible settlement and play a more proactive role while a 'mediator' would not do so but would merely facilitate a settlement between the parties.[17] The Mediation and Conciliation Project Committee (MCPC) also prescribed this very difference. The MCPC has also said that for referring the dispute to conciliation, the consent of the parties is necessary; this is not so in case of mediation[18]. Justice R.V. Raveendran also supports this view, though his take on the difference is a not same as Justice Rao's. He simply highlights the difference on the basis on presence and absence of statutes governing conciliation and mediation

[13]*Id.*
[14] Section 89(2)(d), Code of Civil Procedure, 1908
[15] (2010) 8 SCC 24.
[16] Law Commission of India (2011), 238th report, *Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions.*
[17] Justice M. Jagannadha Rao, *Concepts of Conciliation and Mediation and their Differences,* http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20rao%201.pdf (accessed on 28/9/2015 at 1350 hours).
[18]*Supra* Note 11, at 21.

respectively.[19]

Hence, it can be concluded that though mediation and conciliation are considered synonyms in common parlance, they are different in law, as is evident from the definition under Section 89 of the CPC.

Rules and Procedure

In 2003, the Supreme Court of India requested the opinion of the Law Commission to iron out the creases in the mediation procedures in civil courts. The Law Commission through various consultation papers formulated model rules that were circulated in all the High Courts, which in turn amended and adopted the same[20] according to the peculiar needs of the citizens of the respective states. Rule 10 of the mediation rules adopted by the Punjab and Haryana High Court concerns the procedure to be followed. The parties are free to fix any procedure, but in the absence of their consensus, the following procedure may be followed:

1. 10 days before the commencement of a session, both the parties are required to give a memorandum putting forth the issues that are required to be resolved.[21]
2. Once the session begins, the mediator gives his opening statement. Through his opening statement, the mediator establishes his neutrality[22] and encourages the parties to come to an amicable settlement.
3. After the introduction, a joint session is conducted. The objective is to establish the issues in dispute, and to provide an opportunity to both the parties to understand the other side.
4. If the need arises, a separate session for each party may also be conducted. The mediator gathers further information, and explains to the parties the possible outcome if they approach the court. The number of such sessions conducted differs from case to case.[23]
5. If a settlement agreement is reached, the dispute is considered settled. If such an agreement cannot be reached, the mediator shall convey the same to the court.[24]

[19] Justice R.V. Raveendran, *Mediation-An Introduction*, http://mediationbhc.gov.in/PDF/mediationIntroduction.pdf(accessed on 28/9/2015 at 1357 hours).
[20] *Supra* Note 11, at 8.
[21] Rule 10(b)(iv), (Draft) Mediation Rules, 2003.
[22] Rule 7(a), (Draft) Mediation Rules, 2003.
[23] Rule 10(b)(iii),(Draft) Mediation Rules, 2003.
[24] Rule 23(3),(Draft) Mediation Rules, 2003.

Need for Mediation in India

In *Guru Nanak Foundation v. Rattan Singh & Sons*[25], the Supreme Court observed, "Interminable, time consuming, complex, and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap". Though the Honourable Court was referring to the acquired complexity of the Arbitration Act, the words perfectly summarize the need for mediation.

The various ADR methods prescribed under Section 89 of the CPC, and other statutes, are increasingly becoming popular in India. But a quick look at Arbitration and Conciliation Act (adopted from the UNCITRAL model rules), or the ICADR rules reveals that these provisions were enacted to primarily to cater to the needs of commercial and high level transactions. For a common man to approach a conciliator or an arbiter is difficult under these laws. This has also lead to the creation of rules of procedure, something that had ADR aimed to eliminate. Statutes govern the other ADR methods mentioned under Section 89 also. This, to a certain extent, makes them rigid.

Mediation is an exception. No particular statute governs the process of mediation. The text of Section 89(2)(d) states, "the court shall follow such procedure as may be prescribed". This helps the rules to fit the needs of the people, making the law for the man, and not the man for the law[26]. The procedure is the model rules adopted by all High Courts in accordance with the socio-economic conditions of their respective states. They have been successfully molded to cater to the needs of all citizens, whether personal or business. The referral judge can also modify the settlement, with the consent of the parties, to overcome any procedural difficulties[27]. This has made mediation flexible, one of the best[28], and the most potent[29] ADR method.

An important aspect of mediation is that it is less expensive than adversarial litigation. The model mediation rules provide that the parties themselves shall fix the mediator's fee. In some

[25] AIR 1981 SC 2073.
[26] *Supra* Note 6.
[27] Justice F.M. Ibrahim Kalifulla, *An Endeavour: Mandatory Application of Mediation by Civil Courts in Pending Litigation*, http://www.tnsja.tn.nic.in/Article/Mediation%20Speech-FMIKJ.pdf(accessed on 8/10/2015, at 2143 hours).
[28] *Vikram Bakshi & Ors. v. Sonia Khosla by Lrs.*,SLP (Criminal) No. 6873 of 2010
[29] Justice M.M. Kumar, *Relevance of Mediation to Justice Delivery in India*, http://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/NCMediationNewDelhi.pdf (accessed on 4/10/2015, at 1823 hours).

cases however the respective State governments have fixed the fee in the absence of consensus. For example, the mediation rules of the Punjab and Haryana High Court have fixed the upper limit of the mediator's fee at four thousand rupees, equally contributed by both parties[30].This is only a fraction of the expense of litigation. Also, the plaintiff is entitled to receive from the court a certificate authorizing him to receive back from the collector, the amount paid as court fee, once his dispute is referred to any ADR mode[31]. The mediator's fee may not even have to be paid, if a party to the dispute is eligible for getting free legal aid[32]. This increases the accessibility of mediation among all classes.

Mediation is also known for dispatch in settling disputes.The rules mandate that the mediation must be completed within ninety days, unless the referral court extends the time (but such extension must not be beyond thirty days)[33]. A typical mediation session lasts for thirty to sixty minutes, but may be more or less depending upon the complexity of issues.[34]The numbers of sessions also depend case to case, but are usually limited to two or three. Thus, the average time taken to solve a dispute through mediation could be a mere two hours, against years of litigation.

A settlement reached by mediation cannot be appealed. Mediation, by the very definition, is an agreement voluntarily reached by both the parties to a dispute. It is a party-oriented process. Appealing this amicable settlement will be an anathema. But this question is rarely, if ever, raised. Mediation plays a major role in not only resolving the dispute, but also remedying the parties' sore relations by addressing the emotions underlying the dispute[35]. It has cascading effects of eliminating bad blood between the parties.[36]The mediator, or the

[30] Rule 25(1), Mediation/Conciliation Rules Punjab and Haryana High Court.
[31] Section 16, Court-fees Act, 1870.
[32]According to Section 12 of the Legal Services Authorities Act, 1987, the following categories of persons are eligible for free legal aid:

a) Member of SC or ST
b) A victim of human trafficking, or beggar
c) A woman or a child
d) A person with disability
e) A person of circumstances of undeserved want
f) An industrial workman
g) A person in custody
h) Persons in receipt of an annual income of rupees nine thousand or less, or any other limit as prescribed by the State government.

[33] Rule 18, (Draft) Mediation Rules, 2003.
[34]http://delhi.gov.in/wps/wcm/connect/doit_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/FAQs (accessed on 5/10/15, at 1956 hours).
[35]*Supra* Note 6.
[36]*Supra* Note 25.

parties are not obliged to think of judicial remedies[37]. This is especially relevant if the parties intend to continue a pre-existing relationship. Mediation also does away with the issue of enforcement of settlement, as the decision arrived at is voluntary and acceptable to both parties. The sense of justice that mediation delivers is consistent with the discovery of the good of self and working together to uphold a just scheme[38], and thus proving more permanent than adjudicative justice.

An indirect effect of mediation would be speedy delivery of justice by the courts. With the increase in its popularity, the load of the courts will reduce, and serious cases (unsuitable for mediation) will be settled with much needed dispatch.

For all the above-mentioned reasons, mediation is needed. Itwill achieve the goal of rendering social justice to the people, which really is the goal of the successful judicial system[39].

Cases Suitable for Mediation

Despite the various benefits of mediation, it is not possible or recommended to settle all the disputes through mediation. The Supreme Court in *Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Construction*[40] observed that the following cases are suitable for mediation:

1. All cases concerning trade, commerce, and contracts
2. All cases arising from strained and soured relationships
3. Cases where there is a need for continuation of the pre-existing relationship
4. Disputes relating to tortious liability
5. Consumer disputes

The court also mentioned the category of cases that are unsuitable for mediation:

1. Representative suits
2. Disputes relating to election to public offices
3. Cases involving grant of authority by the court after enquiry
4. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
5. Cases requiring protection of courts

[37] Justice Dhananjaya Y. Chandrachud, *Mediation-Realizing the Potential and Designing Implementation Strategies*, http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf (accessed on 9/10/15, at 1859 hours).
[38] JOHN RAWLS, ATHEORY OF JUSTICE, 453 (1st ed., 2000).
[39] *Supra* Note 6.
[40] (2010) 8 SCC 24.

6. Cases involving prosecution for criminal offences

The court has, however, clarified that the lists are not exhaustive, and can be altered as per the discretion of the courts. However, it is humbly submitted that the court should refrain from referring serious cases to mediation, where the purpose of justice will be defeated. Recently, the Madras High Court referred a rape case to mediation. It caused much uproar, since the very essence of mediation is amicable settlement, and in cases as grave as rape, no goodwill is possible. Settling, when the perpetrator deserves strict punishment, will be the defeat of justice. The Supreme Court later overruled and condemned the order with reference to above.

Overcoming Challenges to Mediation

Despite the urgent need for the use of mediation, it has not gained mass popularity in India. Where applied, its success is unprecedented-in the various Delhi district court Mediation Centers the settlement rate ranged from 62% to 77% till the end of 2014.[41]But mediation is not often resorted to. This has inhibited it from achieving the kind of success it has achieved in various other nations. This can be attributed to several factors.

The role of judges is very important in mediation. When a case is put before them, it is for them to see whether elements of settlement appear[42]. But a judge may be reluctant to do so. In the traditional judicial system, it was for him to decide all cases before him. In the parallel ADR system, it is not so. Parties are the major decision-makers in mediation. Knowing this, the judge may feel that his authority is undermined[43]. This potential attitude could be detrimental to the success of mediation. The judges must realize that the mediation process is complementary to the judicial process. An important part of the mediation process consists of informing the parties of the possible adjudicative outcome if the issue is settled by mediation. In vacuum, mediation can never dispense justice. It is merely a tool to reduce the burden on the courts, so that they can concentrate on pressing matters. Furthermore, retired judges are qualified to be appointed as mediators[44], with regard to their knowledge of law and human nature.

Reservation may also come from lawyers. They may feel that with the drop in litigation, their revenues will drop. But it is important for lawyers to realize that it is the lawyer's duty to

[41] http://www.delhimediationcentre.gov.in/statistical.htm(accessed on 9/10/15, at 1917 hours).
[42] Section 89, Code of Civil Procedure, 1908.
[43] Hiram E. Chodosh, *Mediating Mediation in India,* http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf(accessed on 10/10/15, at 1532 hours).
[44] Rule 4(a), (Draft) Mediation Rules, 2003.

resolve disputes, and only as a last resort the matter should be permitted to go to court[45]. His profession is to serve his clients in their best interests, and if that interest is not litigation, it should be discouraged. They must also realize that mediation is not limiting their profession, but expanding it. Parties are free to avail the services of lawyers in relation to the mediation proceedings [46] . Lawyers, with a minimum of 5 years standing at the Bar of the Supreme/High/District Court, can also be appointed as mediators[47]. This will increase the scope and further develop their profession. However, for this to happen, it is important to train the lawyers so. The legal education system only trains the students in the adversarial techniques. It should, rather, be oriented towards innovative approaches[48]like mediation also.

Another issue is the lack of awareness among the parties. Several efforts have made to make people aware of the Mediation Centers and the services they provide. But these efforts have not been wholly successful. The result is that people have not heard of mediation till the court refers the matter to mediation. By this time, the matter is already in court, the issues ascertained. Not only has this already caused a reasonable delay, the parties are now reluctant to approach these Centers. They feel that they stand a chance of winning, and mediation will merely be a "compromise". To counter this situation two steps have to be taken urgently- first, to spread awareness at the grass-root level more aggressively, and second, to make amendments in such a way that the when the courts refer disputes to mediation, the issues must not have been determined by appearance of both the parties. This makes the dispute adjudicative in the eyes of the parties. The reference must be made at an earlier stage, when the petition is first presented, if the court finds elements of settlement. This increases the chances of success, as neither party feels that the case could be ruled in its favour.

Conclusion

Mediation is a highly desirable development. But as every other development, it is important to introduce it cautiously. The flexible mediation rules have proven suitable. However, with the slow but steadily increasing references to mediation, it has become imperative to amend the rules to adjust to the growing numbers of persons seeking to mediate.

---

[45] *Supra* Note 7.
[46] *Supra* Note 11, at 71.
[47] Rule 4(b),(Draft) Mediation Rules, 2003.
[48] Department Related Parliamentary Standing Committee on Home Affairs (Rajya Sabha, 2009), 85th report, *Law's Delays: Arrears in Courts.*

The mediation rules prescribe a set of ethics for the mediators.[49]But a violation of these ethics invites no liability under these rules. As the numbers grow, it must be realized that the chances of one party becoming susceptible to exploitation increases. A settlement could be forced upon a party against its will. This is especially possible if the party belongs to a backward socio-economic environment. To prevent such incidents it is essential to fix the mediator's liability in case of his negligence or failure to protect the interests of either party. Such liability must be explicitly mentioned under the said rules.

It is also submitted that Section 89 of the CPC should prescribe a list of cases where mediation may be referred to, in case elements of settlement exist. Although this will result in the reduction of the discretion of the court, it will keep a check on referrals made contrary to the interest of justice in serious cases. The Supreme Court in the *Afcons Infrastructure Ltd. & Anr v. Cherian Varkey Constructions*[50]laid down cases where mediation is suitable, but it also gave the freedom tothe courts to add other disputes to this list. Moreover, consent is not essential for mediation.[51]Combined with the wide discretion of the court, it can prove harmful to the interests of justice. A *laisiez-faire* attitude, hence, must be avoided.

Mediation is fast, non-expensive, and free from procedural norms. Parties control the process, and also the settlement agreement. Its success will lead to the reductionof pendency of cases in courts. However, the increasing cases in law courts cannot be reduced by this one-dimensional step. Mediation alone will bear no fruits. It has to work alongside the adjudicatory system. Together, they must ensure that justice is dispensed to the maximum number of people in the minimum time. It is important to understand that law is different from justice. Though the aim of law is to deliver justice, it does not always succeed. In such a situation, informal procedures satisfying natural justice are enough, and the keynote should be justice rather than law.[52]The common man approaching the courts seeks justice; he does not know law. And it is as much his right as it is the duty of the State. As thenumber of people approaching the doors of justice increases, the judicial system has to change. To incorporate and accept mediation as a part of this change has become essential to the system's existence.

[49]Rule 27, (Draft) Mediation Rules, 2003.
[50] (2010) 8 SCC 24.
[51]*Supra* Note 11, at 21.
[52] Report of the Expert Committee on Legal Aid (1973), *Processual to Justice to the People.*