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Scope of Mediation in India

***Sravani K**
NLU, Visakhapatnam

****Guna Sekhar K**
Law Clerk at AP High Court

Introduction

"... AS A LITIGANT I SHOULD DREAD A LAW SUIT BEYOND ALMOST ANYTHING ELSE SHORT OF SICKNESS OR DEATH".
- JUSTICE LEARNED HAND

There are two types of dispute resolutions. The first is by adjudication, a binding-process resulting in a decision by a third party. The second is by negotiations, a non- binding process dependent upon the volition of parties, which if successful, does not result in a 'decision', but in a 'solution' agreeable to the parties.

A binding dispute resolution can be achieved in two ways. First is adjudication by a public forum (courts or statutory tribunals). Second is adjudication by a private forum (arbitral tribunals). In the first method, a party raises a dispute by petitioning to the court or statutory tribunal, presided by adjudicator/s appointed by the state, for a decision. The parties have no choice in the selection of the adjudicator and the decision- making is governed by the procedural laws and the decision is based on the substantive laws of the country. In the second method, a reference is made to an Arbitral Tribunal consisting of person/s chosen by the parties for adjudication and decision. The adjudication process is governed by the Arbitration & Conciliation Act, 1996. The decision of the Arbitral Tribunal is based on the substantive laws, unless parties authorize the arbitral tribunal to decide the disputes ex acquo et bono or as amiable compositeur. In the binding mode, there is always a certainty of a decision with one party ending up the winner and the other being the loser. However, the decision may or may not be to the liking of one of the parties, or sometimes both parties. Usually, the decision is open to challenge before an appellate or other forum as provided by law.

The non-binding dispute resolution can also be by two methods - either by direct negotiations or by negotiations with the assistance of a neutral third party. Direct negotiations are the process by which parties to a dispute endeavor to settle it by adopting a friendly and not in antagonistic attitude towards each other. There are no set rules governing this mode of settlement. Any agreement reached is governed by the Contract Act, 1872. Negotiations with the assistance of a neutral third party can be by any of the three modes- Mediation, Conciliation and Lok Adalats.

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Outline to Mediation

First of all we consider about the history of the mediation. This mediation is not new to India. They have been in vogue in our villages from time immemorial as Dispute Resolution Panchayats. A brief history of mediation in India Mediation bears a striking resemblance, in some respects, to the ancient and traditional dispute resolution processes practised in India. It can therefore be said that the process is not new. In ancient India, disputes were often resolved by bodies not established by monarchs. There were village councils known as Kulani and other village assemblies known as Gorth or Puga that decided disputes.[1] These institutions had representation from all groups and communities. They have sometimes been compared with present day arbitral tribunals.[2]

Centuries before British rule, India had a village governance system called the Panchayat which was essentially a body constituted by respected village elders who assisted in resolving community disputes. Such traditional mediation continues to be utilized even today in villages. Decisions of pancha, the members of the Panchayat, are often made in accordance with the long-term interests of the tribe or community in maintaining harmony and prosperity. All proceedings are oral; no record is made of the proceedings or the outcome. Despite their lack of legal authority or sanctions, such mediation processes were regularly used and commonly accepted by Indian disputants.

Popular among businessmen in pre-British India were consensual dispute resolution processes that were similar to modern mediation. Mahajans – impartial and respected businessmen of the villages – were requested to resolve disputes by using an informal procedure and trying to come to an amicable solution.[3] Another traditional consensual dispute resolution process in India is the system of Lok Adalat. The word lok signifies 'people' and adalat means 'court'; Lok Adalat collectively means the 'people's court', thereby implying that it is the people who decide a dispute. Although Lok Adalat has been in existence for a long time, it has received greater recognition since the passage in 1987 of the Legal Services Authority Act, which introduced the system into the formal statutory structure of dispute resolution.

So long as the village wise men, committed to the welfare of the villagers, were the Panchayatdars, mediation by such Panchayats flourished. Their neutrality, impartiality and wisdom enabled them to find a mutually acceptable solution which benefited the parties to the conflict. But things began to change when respected village elders were gradually replaced by leaders based on caste, money or political affinity, for which neutrality and impartiality were not important. Instead of attempting to serve the interests of the parties to the conflict, they started flaunting their power by issuing fiats based on their own superstitions, moral beliefs, political

[1] Justice SB Sinha, Courts and Alternatives' – http://delhimediationcentre.gov.in/articles.htm.
[2] R Thapar, Early India: From the Origins to AD 1300 (2002, New Delhi: Penguin Books), p 213.
[3] RS Sharma, India's Ancient Past (4th Edn, 2008, New Delhi: Oxford University Press), p 298.

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compulsions and personal financial interests and started enforcing them by imposing sanctions like ex-communication, honour killing or levying penalties for disobedience or non-compliance. As a result, the system of such Panchayats resolving disputes, slowly and steadily lost the respect, trust and confidence which they earlier enjoyed. Courts, functioning under codified laws, replaced them as arbiters of disputes.

If the advantages of mediation are to be highlighted, it will be necessary to set out the disadvantages of litigation as a dispute resolution process. But that does not mean that the adjudicatory process by way of litigation in courts is outdated, impractical or has lost its relevance. It only means that for certain categories of litigation, non-adjudicatory dispute resolution process is better-suited and beneficial to the parties. The question therefore, is not whether mediation is better or litigation is better. The question should be: "Which process is more suited for a particular type of dispute?"

Criminal cases, cases involving public interest, cases affecting a large number of persons, matters relating to taxation (direct and indirect) and administrative law have to be decided by courts by adjudicatory process. Even among civil litigations, cases involving fraud, forgery, coercion, undue influence, cases where a judicial declaration is necessary as, for example, grant of probate or letters of administration, representative suits which require declarations against the world at large, election disputes have to be necessarily decided through adjudicatory process by courts and not by negotiations.

On the other hand, settlement by negotiations would be the appropriate method of dispute resolution in the following types of civil cases. They are:

i. Cases arising from soured personal relationships, which include matrimonial causes, maintenance, custody of children etc.
ii. Cases relating to commerce and contracts
iii. Cases where there is a need to maintain the pre-existing relationship in spite of the disputes, which include disputes between neighbours, disputes between employers and employees etc.
iv. Cases arising out of tortious liability, which include claims for compensation in motor accidents/other accidents etc.;
v. Consumer disputes where a trader or service provider is keen to maintain his business/professional reputation and credulity.

Of course, if the parties are willing, other categories of civil disputes may also be referred to mediation.[4] So whether a litigant approaches a court, what requires to be seen is whether the dispute requires to be adjudicated by a court or could be settled by mediation. If the dispute falls under the category of cases suited for mediation, it has to be referred to mediation. Let's consider

[4] Mediation- An introduction by Mr. Justice RV Raveendran.

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an example. The hospital should not only be equipped with an operation theatre but also with an out-patient clinic. It is not sufficient to have only a surgeon to perform surgeries, but also a physician to treat aliments which do not require surgery. In fact, the number of patients requiring prescription of medicines and medical advice will be many times more than those who have to be admitted as in-patients and subjected to surgery. Of course if the physician finds that the patient is suffering from a serious ailment requiring surgery, he may refer him to surgeon. Imagine a hospital without a clinic and physician but only an operation theatre and a surgeon. Imagine what will happen if all persons with all types of ailments, howsoever minor they are, are admitted as in-patients and made to undergo surgery, simply because there is no physician to attend to them. Courts without mediation centers are like hospitals without out-patients clinics and physicians. Courts should have mediation centers to settle those cases which do not require a trial and adjudication, so that the courts can concentrate upon those which require adjudication.

Similarly, if cases which do not really require adjudication by trail and which are fit for negotiated settlements are not referred to mediation, those cases will fill the courts' board and take up the entire time of the court, thereby preventing court from taking up cases which require their urgent attention and decision. Also when the advantages of mediation or the disadvantages of litigation are highlighted in the context of encouraging ADR processes, it does not mean that mediation is 'better' than the adjudication by courts. It only means that the mediation is more suitable and appropriate for resolving certain types of disputes. For other types of cases, and in cases where mediation though appropriate, has failed, courts alone can provide a remedy.[5]

The object of mediation is to offer to the litigant public, a speedy and satisfactory alternative dispute resolution process in certain types of civil cases. When the cases suitable for negotiated settlements are referred to mediation, the benefit is two-fold. First, the parties find an amicable solution by the negotiated settlement. Second, the courts will have more space to deal with cases which require to be adjudicated by courts. Building awareness regarding mediation and invoking mediation as an alternative dispute resolution process is only to supplement the functioning of courts, with reference to certain types of civil cases. Mediation is not intended to, and in fact cannot, replace courts. With this clarification, we may proceed to see the need for urgency in introducing court annexed mediation.

Now let's further consider the meaning of mediation. Mediation is a non-adjudicatory dispute resolution process, where a neutral third party renders assistance to the parties in conflict to arrive at a mutually agreeable solution. To put it differently, it refers to a voluntary and flexible negotiated conflict reduction process with the assistance by experts. It involves a structured negotiation where the mediator listens to the parties, ascertains the facts and circumstances as also the nature of the grievance, conflict or dispute, encourages the parties to open up to identify the causes therefore, creates a conducive atmosphere to enable the parties to explore various

[5] Ibid.

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alternatives and ultimately facilitates the parties to find a solution or reach a settlement. In short, it is a professionally and scientifically managed negotiation process.

Mediation Versus Conciliation

When discussing about mediation and conciliation, they are the same in principle, in practice, conciliation and mediation are understood to be different processes. One view is that where the person facilitating the settlement also suggests the terms of the settlement, the process becomes conciliation; and where person facilitating the settlement merely facilitates the disputing parties to arrive at a settlement without suggesting any terms, so that the parties themselves find a solution and reconcile their differences, the process is mediation. There is also an opposite view. The third view is that both refer to the same process, and where the third party - facilitator is a non-professional then the process is 'conciliation', and where the third party – facilitator is professionally trained in assisting parties to settle disputes, the process is known as 'mediation'. The fourth view is that if the settlement process is through a third party on a reference by a court in a pending litigation, it is mediation, and if the settlement is attempted with the help of a third party, it is called as 'conciliation'. In other words, a pre-litigation third party assisted negotiated settlement is 'conciliation' and a neutral third party assisted negotiated settlement in a pending litigation is 'mediation'. But none of the four views is accurate.

In other words conciliation is a negotiation process commenced with the consent of parties, where the conciliators are appointed by the parties themselves, under Section 64 of the Arbitration & Conciliation Act, 1996. When a settlement is arrived at by conciliation, it will have the status of an executable decree under Section 74 of the Arbitration & Conciliation Act, 1996. On the other hand, if a court refers a case to mediation centre or third party, to enable the parties to negotiate with the assistance of a neutral third party, the ADR process is mediation. In mediation, the reference is by court to the mediation centre or a mediator, either with or without consent of the parties. In mediation, the court retains control over the entire process, and the settlement does not have the statutory status of a decree. Consequently whatever settlement is arrived at the mediation has to be placed before the court and the court makes an order or decree in terms of the settlement.

Mediation – Disadvantages of Adjudicatory Process

The dispute resolution by courts, as noticed above, is adjudicatory and adversarial in nature resulting in a binding decision, whether the parties like it or not. Litigants have identified the following six short-comings with reference to adjudications by courts:

a) Delay in resolution of the dispute;
b) Uncertainty of outcome;
c) Inflexibility in the result/solution;

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d) High cost;
e) Difficulties in enforcement; and
f) Hostile atmosphere

The delay, the uncertainty and inflexibility, the technicalities and frequent changes in laws, the absence of choice in solutions, the hostile atmosphere in courts, the difficulties in execution and the enormous expenditure of time, energy and money associated with adjudicatory process take a toll on the litigant. Many a time, the litigant feels that the remedies, reliefs and solutions, are all illusive and elusive. This leads to frustration, dissatisfaction and erosion of faith in courts and the adjudicatory process. As a result persons with grievances start looking for a quicker and satisfactory remedy. They are tempted to approach the underworld or unscrupulous elements in police and politics, to secure relief. This leads to criminalization of civil society and weakens the rule of law. Therefore, there is an urgent need to introduce quicker alternative dispute resolution processes and also improve the adversarial adjudicatory process by giving speedy, satisfactory and cost-effective justice.[6]

Weaker and downtrodden sections, who are subjected to injustices, being ignorant of their rights and remedies, and not being able to get effective and speedy justice, tend to take law into their own hands. Several disputes which ought to have found solution in civil litigations end up in crimes. It has, therefore, become necessary to educate the weaker and downtrodden sections of the society, about their rights and obligations, as also about the remedies and for a that are available for securing justice, and also make available free legal aid to approach relevant for a, for securing relief. When there is a gradual increase in such awareness, there will be more and more seekers of justice demanding enforcement of rights and claiming equitable and effective distribution of nation's resources. The overloaded adjudicatory dispute resolution process will not be capable of effectively taking such additional load, resulting in further frustration and again driving justice-seekers towards extra-judicial remedies.

Scope of Mediation

Prompted by academia, the Indian legislature has grown increasingly interested in reviving or extending traditional forms of dispute resolution (such as those described above) and integrating them into the formal civil justice system. The scope of mediation under various Acts and different types of mediation is discussed below.

i. <u>Legal Services Authority Act 1987:</u>

This statute was aimed at reviving the Lok Adalat system to provide litigants with the means to resolve their disputes early and affordably. Lok Adalat panels preside over a lengthy calendar of cases that are set on a single day, with the matters usually being heard in the open in the presence

[6] Supra Note. 4

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of other parties and attorneys. Because Lok Adalat has resulted in the disposal of a large number of disputes and is considered to be an effective and affordable alternative to trial, it will continue to be an important dispute resolution mechanism.

ii. Arbitration and Conciliation Act 1996:

This statute (the 1996 Act) substantially adopted the UNCITRAL Model Law on International Commercial Arbitration[7] ('the Model Law') and repealed the old Arbitration Act of 1940. The legislature realized the importance of conciliation and gave it a statutory basis and recognition in the 1996 Act. Mediation was, however, omitted and it was only in 1999, following amendment of the Code of Civil Procedure 1908 (the 1908 Code), that mediation was given some statutory recognition. In general practice, the term 'conciliation' was considered synonymous and was used interchangeably with 'mediation'. The statutory language of the 1996 Act and of s 89 of the 1908 Code, however, demonstrates differing definitions and meanings for each term and the separate existence of each process. The definition of 'conciliator' in the 1996 Act is consistent with the UNCITRAL Conciliation Rules (1980 Edn). Furthermore, s 30 of the 1996 Act provides that the arbitral tribunal may use mediation, conciliation and other procedures at any time during the arbitral proceedings to encourage settlement.[8]

iii. Amendments to the 1908 Code:

In 1999, the Indian legislature enacted amendments to the 1908 Code that were based on the UNCITRAL Model Law. The 1908 Code divides into Sections and Orders and the amendments are to Section 89 and Order X (1A).[9] These provide for court annexed ADR, permitting the court to direct the parties to choose from among several mechanisms, including Lok Adalat, arbitration, conciliation, and mediation (collectively called the 'four ADR methods'). Section 89 as amended contemplates the following process:

1. The judge should first determine whether there exist "elements of a settlement which may be acceptable to the parties."
2. If so, the court secondly "shall formulate the terms of settlement and give them to the parties for their observations."

[7] SBP & Co v Patel Engineering Ltd, AIR 2006 SC 450.
[8] Law Commission of India, 176th Report - The Arbitration and Conciliation (Amendment) Bill, 2001 (2001) - http://lawcommissionofndia.nic.in/arb.pdf.
[9] The 1999 amendments to the 1908 Code incorporated several recommendations made by the Malimath Committee in July 2002

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3. Thirdly, after receiving the observations of the parties, the court may reformulate the terms of a possible settlement" and refer the same for arbitration, conciliation, judicial settlement (including Lok Adalat) or mediation.[10]

There was, however, initial opposition to the amendment by the practising Bar, as a result of which it was suspended indefinitely. In July 2002, however, Parliament gave Section 89 full effect. The constitutional validity of the amendment was challenged in the Salem Bar Association case[11]. The Supreme Court upheld the constitutionality of the law and established a five-person committee to study the reforms and to make recommendations on the need for any amendments or additional rules to facilitate their implementation[12]. With the constitution of such a Committee –

"Any creases which required to be ironed out were attempted to be identified and apprehensions which existed in the minds of the litigating public or the lawyers were tried to be clarified." [13]

The Law Commission conducted a national conference in 2003 and then promulgated guidelines for the use of mediation. Significantly, the decision in Salem Advocate Bar Association Case was affirmed in 2005.[14]

The intention of the legislature in enacting Section 89 is that, where it appears to the court that elements of an acceptable settlement are present, the court may direct the parties to select one of the four ADR methods, failing which, the court shall refer them to one or other of the said modes.[15] Section 89(2) refers to the 1996 Act and the Legal Services Authority Act 1987 with regard to arbitration, conciliation or settlement through Lok Adalat. With regard to mediation, however, Section 89(2) (d) provides that the parties shall follow such procedure as may be prescribed, thus contemplating appropriate rules being framed. In upholding the validity of the amendments to the 1908 Code in the Salem Advocate Bar Association case[16], the Supreme Court directed the drafting of a model case management formula as well as rules and regulations that should be followed in taking recourse under Section 89. The Supreme Court also stated that – "mediation of disputes is a highly evolved method of resolving conflict and manifests a more

[10] HE Chodosh, SA Mayo, AM Ahmadi & AM Singhvi, Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process, 30 NYU Journal of International Law and Politics 1 (1998).
[11] Salem Advocate Bar Association v Union of India (2002) 8 SCC 35, 146–52
[12] HE Chodosh, The Eighteenth Camel: Mediating Mediation Reform in India, German Law Journal, Vol 09, No 03, http://www.germanlawjournal.com/pdfs/Vol09No03/PDF_Vol_09_No_03_251284_Articles_Chodosh.pdf.
[13] Ibid, p. 257, n 12
[14] Salem Advocate Bar Association II v Union of India (2005) 6 SCC 344.
[15] Ibid.
[16] Ibid.

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sophisticated political order; also, that government and public authorities can and should rightly include that process in the established legal order to encourage settlement of disputes."[17]

iv. Nyaya Panchayat Bill 2009:

A Bill has recently been proposed by the Government to resurrect the Panchayat system in villages. The word nyaya means 'justice' and panchayat refers to traditional consensual dispute resolution system under that name. The Nyaya Panchayat Bill, which recognizes the State's commitment to secure justice to the people under article 39A of the Constitution, aims to promote people's participation in dispute resolution in rural areas and to secure access to justice to citizens at grass roots level. Chapter V of the Bill deals specifically with dispute resolution. Section 23(1), requires the Panchayat to reach an amicable settlement, seek to ensure a fair, speedy, decentralized, participatory and people-oriented system of justice with greater scope for mediation, conciliation and compromise.[18]

v. Pre-Institution Mediation under the Indian Commercial Courts Act:

A 2018 amendment to the Indian Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("Commercial Courts Act") makes it mandatory for a party to exhaust the remedy of mediation before initiating court proceedings under the Commercial Courts Act, with the limited exception of cases where urgent relief is being sought.[19] Patent infringement disputes, being disputes of a commercial nature, are governed by the Commercial Courts Act and, therefore, the mandatory pre-institution mediation provision applies to such disputes. The time bound mediation procedure envisaged in this provision allows a patentee to not only bring a possible infringer to the negotiation table under the threat of future litigation but also allow patentees to resolve disputes in a timely manner by avoiding long-drawn litigation in Indian courts. Patentees can now consider a different strategy when considering steps for enforcement of patent rights in India in view of the possible advantages of such mediation proceedings

vi. Online Dispute Resolution:

Mediation in India gained strength through the Arbitration and Conciliation Act, 1996 and through Section 89 of CPC as amended with effect from 1-7-2002. The Arbitration and Conciliation Act empowers the Arbitral Tribunal to use mediation to encourage settlement

[17] RD Benjamin, Mediation as a Subversive Activity: Remembrances of Times Past - A Brief History and the Origins of Mediation http://www.dcba.org/brief/sepissue/1998/art10998.htm.

[18] Ministry of Pachayati Raj, Empowering Panchayats for Actual Devolution of Power (Press Release, 23 January 2010) - http://www.pib.nic.in/release/release.asp?relid=57236. See also the Preamble to the Bill – http://panchayat.nic.in/data/1257506146945~THE%20NYAYA%20PANCHAYATS%20BILL%202009.pdf.

[19] Section 12A of the Commercial Courts Act provides parties with an alternative means to resolve disputes through discussions and negotiations with the help of a mediator. The provision states that a plaintiff must initiate mediation before filing a suit, with a limited carve out for suits filed with applications for urgent interim relief.

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during arbitral proceedings (Section 30). In adversary litigation through court, the CPC guides the proceedings. Section 89(d) of the CPC speaks about court-annexed or court-controlled mediation. This Function is through trained mediators under the Supreme Court Mediation and Conciliation Project Committee. Each HC has a mediation centre attached to it. Functions of the court in relation to ADR methods are further regulated by the rules made by the respective High Courts in exercise of the powers conferred under Section 122 of CPC.[20]

Private mediation in India is yet to take its wings, through several private mediation centres have sprung up. As in other jurisdiction settlement private mediation centres have effect of a contract even if such settlement is arrived at by electronic means. Section 10-A of the Information Technology Act, 2000 recognises the validity of contract formed through electronic means.

In ***State of Maharashtra v Dr. Praful B. Desai,*** a question arose before Supreme Court of India whether in criminal trial evidence can be recorded through video conferencing. After quoting Francis Bennion in his commentaries titled Statutory Interpretation, 2nd Edition, and Page 617:

"It is presumed that parliament intends the court to apply to an ongoing Act a construction updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law"

Hence, held that even under the rigour of the Evidence Act video conferencing is permissible in a criminal trial.[21]

vii. <u>Private Commercial Mediation:</u>

The prevailing semblance of a legal regime governing private mediation is confusing and inconsistent which only serves to devalue mediation in the minds of stakeholders, particularly parties.[22] A summary of the regulatory framework and connected problems is as follows:

i. In line with the growing consensus internationally and the UNCITRAL International Commercial Conciliation Law, mediation has been interpreted as synonymous with conciliation under Part III of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), which only mentions "conciliation" expressly. This was affirmed by the Indian Supreme

[20] Online Dispute Resolution with Special Emphasis on Mediation in India, A. Mohamed Mustaque
[21] (2003) 4 SCC 601
[22] Afcons InfrastructureL td. and Anr. v. M/s Cherian Varkey Construction Co. (P) Ltd. and Ors., JT 2010 (7) SC 616

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Court in Afcons Infrastructure[23] wherein the Court undertook an exhaustive interpretation of section 89. Accordingly, Part III is presumed to govern private mediations.[24]

ii. However, in the author's view, the position is unclear.[25] In Afcons Infrastructure itself, subsequent to observing that mediation is a synonym of conciliation, the Court refers to both processes individually in different parts of the judgment as if they are distinct.[26] The Court even expressly states that mediated settlements will be governed by another statute altogether, namely the Legal Services Authority Act, 1987.[27] Further, mediation and conciliation continue to be stated separately under section 89 of the Code of Civil Procedure, and under section 30 of the Arbitration Act itself that addresses settlement in the course of arbitration. It has also been commented that notwithstanding the commonality of involvement of a neutral third party, the processes are different because conciliation envisages a significantly more proactive and evaluative role for the conciliator who can propose solutions suo moto.[28] Accordingly, conciliation has also been referred to as evaluative mediation wherein the mediator's intervention is at a peak.[29]

iii. Following from the above, the lack of conceptual clarity, and statutory definition of mediation, has directly impacted the enforcement of privately mediated settlements. The current position is confusing and convoluted. Although the Afcons case court attempted to carve out different avenues to enforce such settlements and provide legal and judicial legitimacy, it only ended up creating confusion and conflating the processes of mediation and Lok Adalat, which are distinct. The outcome is that private mediated settlements are only enforceable as ordinary contracts under the Indian Contract Act, 1872, unless parties satisfy the terms of any of the avenues carved out in Afcons Case.[30]

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[23] Sriram Panchu, MEDIATION PRACTICE & LAW: THE PATH TO SUCCESSFUL DISPUTE RESOLUTION 31, 358 (2 nd edn., 2015).

[24] Anil Xavier, Mediation: Its Origin and Growth in India 27 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY 275, 282 (2006).

[25] Supra Note 22

[26] Ibid.

[27] Supra Note 24

[28] Anil Xavier, Mediation: Its Origin and Growth in India 27 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY 275, 282 (2006).

[29] Allison M. Malkin and D. Gracious Timothy, Commercial Mediation: An Evolving Frontier ofAlternative Dispute Resolution in India in ALTERNATIVE DIsPuTE RESOLUTION: AN INDIAN PERSPECTIVE 321 (Shashank Garg ed., 2018). See generally. Promod Nair, Surveying a Decade of the 'New 'Law of Arbitration in India 23(4) ARBITRATION INTERNATIONAL 699 (2007); Fali S. Nariman, Ten Steps to Salvage Arbitration in India: The First LGIA-India Arbitration Lecture 27(2) ARBITRATION INTERNATIONAL 115 (2011); Badrinath Srinivasan, Developing India as a Hub oflnternational Arbitration: A Misplaced Dream? (2016), available at https://papers.ssm.com/sol3/papers.cfm?abstract-id=2849269 (last accessed 05 April 2020).

[30] Interview conducted via email dated 25 March 2018 with Mr. Arjun Nataraj an, advocate and certified mediator based in Delhi, India; Interview conducted via email dated 26 March 2018 with Ms. Chitra Narayan, advocate and certified mediator at Foundation for Comprehensive Dispute Resolution based in Chennai, India; Interview conducted via email dated 15 March 2018 with Center for Advanced Mediation Practice (CAMP) based in Bangalore, India.

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iv. A private commercial mediation that occurs under an institution's auspices is currently governed by the institution's rules. For example, Rule 10 of IIAM's rules states that "when the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them. The settlement agreement shall have the same status as that of an arbitral award and can be executed and enforced as a decree of a court". On the other hand, rules of the Centre for Advanced Mediation Practice (CAMP), an institution providing private mediation services, are silent on enforceability. Therefore, a settlement mediated at CAMP can only be enforced as an ordinary contract.

v. Examples of statutes providing for mediation and/or conciliation include the Companies Act, 2013 that requires establishment of the Mediation and Conciliation Panel at the National Company Law Tribunals and the Real Estate (Regulation and Development) Act, 2016 that requires "amicable conciliation" of disputes between promoters and buyers. Once again, there is a high potential that the implications of using "mediation" or "conciliation" have not been considered which only perpetuates the legal confusion. The central government's Ease of Doing Business Task Force had asked the Ministry of Law and Justice to introduce a law to regulate private voluntary mediation in May 2017. However, the Ministry does not appear to have made any progress since then.[31]

vi. Sriram Panchu, widely acknowledged as the pioneer of mediation in India, makes the following pertinent observations as regards the regulatory framework governing private mediation:[32]

a) A legislative framework must be established to assist in realizing and achieving the potential of private mediation.

b) The conduct of mediators in the private realm must be regulated in order to ensure success and accountability. Presently there is a glaring lacuna in enforcing requirements of training and certification. And equally, there is a vacuum in protecting mediators for bona fides things done or omitted in the course of private mediation.

Judicial reform of mediation

The procedural amendments discussed above were largely due to prompting by Indian Supreme Court judges. In 1996, a national study team was formed, at the initiative of Supreme Court Chief Justice AM Ahmadi to examine case management and dispute resolution as part of a joint project with the United States. This Indo-US study group suggested procedural reforms, including legislative changes that authorized the use of mediation. New procedural provisions –

[31] Sriram Panchu and Avni Rastogi, "Mediation: India" (November 2017), available at https://gettingthedealthrough.com/area/54/j urisdiction/13/mediation-india/ (last accessed 05 April 2020).

[32] Sriram Panchu, MEDIATION PRACTICE & LAW: THE PATH TO SUCCESSFUL DISPUTE RESOLUTION 31, 358 321-322 (2nd edn., 2015).

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Section 89 of the 1908 Code – were eventually included, providing for case management and the reference of cases to ADR (including mediation) by courts.[33]
Furthermore, by upholding the constitutionality of the 1999 amendments to the 1908 Code in the Salem Advocate Bar Association case[34], the judiciary reaffirmed its commitment to support the early settlement of disputes. Various High Courts have opened mediation and conciliation centres, such as the highly successful and efficient centres at the Delhi High Court and the Madras High Court. These centres encourage parties to try mediation before going to litigation. Some centres maintain lists of judicial and advocate mediators. The High Courts also maintain the websites of the centres in order to spread their message widely.[35]

"Mediation of disputes is a highly evolved method of resolving conflict and manifests a more sophisticated political order; also, that government and public authorities can and should rightly include that process in the established legal order to encourage settlement of disputes." – Salem Advocate Bar Association case (2005), per Indian Supreme Court.

In addition to these steps, however, the judiciary also need to understand that what the ADR process needs is not a supervisory judicial role but a supportive one i.e., of assisting ADR processes and procedures to function freely and independently and to develop their full potential in their respective spheres. Along with the above the following two should also be done in the field of mediation.

a) <u>An attempt for mandatory application of mediation by civil courts in pending litigation:</u>

The proliferation and pendency of litigation in civil courts for a variety of reasons according to author, has made it impracticable to dispose of cases within a reasonable time. This has led to the overburdening of the judicial system, thereby placing it in a position of not being able to cope up with the heavy demands on it, mostly for reasons beyond its control. Hence, I feel, speedy justice has in turn become a casualty, through the disposal rate of the judge is quite high in our country. 'An effective judicial system requires not only that just results be reached but that they be reached swiftly.' But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within a reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for a long as a life time, and sometimes litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from suffering harassment. Thus, there is a chain reaction of litigation process and civil

[33] A Xavier, Mediation: Its Origin & Growth in India, 27 Hamline J Pub L & Pol'y 297 (2006)
[34] Salem Advocate Bar Association II v Union of India (2005) 6 SCC 344.
[35] For example, the Delhi High Court Mediation Centre – http://www.delhimediationcentre.gov.in

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cases may even give rise to criminal cases. Speedy disposal of cases and delivery of quality justice is an enduring agenda for all who are concerned with the administration of justice.[36]

Hence, the need to put in place ADR mechanisms has been immensely felt so that the courts can offload some cases from their dockets. The ADR systems have been very successful in some countries, especially USA wherein the bulk of litigation is settled through one of the ADR processes before the case goes for trial. In fact Article 39A also secures the operation of the legal system which promotes justice, on basis of equal opportunity and shall in particular; provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent judiciary within a reasonable time are the cherished goals of our constitutional republic and for that matter of any progressive democracy. So there should be mandatory reference of cases to Mediation would help to dispose cases.

b) Promotion of mediation by arbitral and other ADR institutions:

Various ADR institutions, most prominently the Indian Council of Arbitration (ICA), have continuously been playing a vital role in the development and promotion of mediation. The ICA – the apex arbitral institution in the country - regularly holds seminars and conferences, inviting both Bar and Bench first to understand and then spread the message about the benefits, utility and the need to promote and use mediation. The most important activity undertaken by these institutions – in which they have been greatly successful – has been dispelling misapprehensions from the minds of lawyers and convincing them of the benefits of the process.

Conclusion

The development of mediation in India holds enormous promise. However, exposure to mediation, though spreading rapidly, remains limited and current awareness needs to be improved, for lawyers, judges and users. It is argued that judges and lawyers harbor understandable apprehensions about the relationship between mediation and the formal judicial process and deep scepticism over the application of mediation to a wide variety of Indian legal disputes[37]. Without proper promotion of use of mediation, these misapprehensions cannot be dispelled.

Approaches towards reform of the mediation process and encouragement of its use should not be restricted to urban and commercial disputes, which are strictly legal and contractual, but should also be promoted as a resolution process for disputes between communities and groups, thus

[36] An Endeavour: Mandatory application of Mediation by Civil Courts in Pending Litigation by Mr. Justice FM Ibrahim Kalifulla.

[37] H Merryman, Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement, 25 American Journal of Comparative Law 457, 481 (1977).

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extending mutual cooperation and harmony in society.[38] Amongst the different ADR mechanisms, arbitration has gained some recognition and acceptance in India by the business and corporate worlds. The scope and benefits of other processes, including mediation, have not yet been explored and utilized, however, and are still far from being accepted. The main reason for this may be doubts about the validity of mediated settlements when compared to a court decree.

Mediation may, in particular, serve to relieve some of the pressures currently impeding the performance of court systems. First, it may have a modest effect on political interference with the courts. By placing control for resolution of disputes in the hands of the parties, the State has less power to interfere with the resolution of private disputes. Second, mediation reduces incentives for corruption because the neutral third-party has no authority to bind the parties to an outcome of his or her choosing. Finally, mediation may be utilized in attempts to reduce court backlogs and delays. The most valuable contribution of mediation to society, however, may actually lie in the internalization of communication and negotiation techniques within the legal process and broader society. Adjudicatory dispute resolution is like a surgery intended to be curative. Negotiated settlements, on other hand, may prove to be palliative, curative and even preventive.

Suggestions

1. For promoting mediation, the judges, the lawyers and the public should understand the relevance and importance of mediation and its impact of mediation.
2. Lawyers should understand that mediation helps and benefits the litigants; and their apprehension that mediation will adversely affect their practice or income is baseless and this would help to steadily and slowly wean the citizens away from extra-judicial solutions to tradition civilized methods of dispute resolution with active assistance of the bar.
3. Conduct programmes for increasing the awareness relating to mediation and its advantages.
4. Provide necessary infrastructure for Mediation Centres.
5. Provide appropriate training to those who want to become mediators.
6. Ensure reference of adequate number of suitable cases to Mediation.

[38] HE Chodosh, Mediating Mediation in India, http://lawcommissionofndia.nic.in/adr_conf/chodosh4.pdf.