



MEDIATION: AN EFFECTIVE TOOL IN THE PURSUIT OF JUSTICE

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ABSTRACT

The Indian Judiciary has often been criticised for an inefficient administration, backlog of cases and an archaic approach to the resolution of family disputes. The need to establish alternatives to the aforesaid has often been weighed upon by Law Commission of India,¹ acclaimed scholars² and Judges³ alike. The use of mediation as a tool to effectuate justice in matrimonial disputes holds enormous promise. With an increase in India's divorce rate, and the incapacity of the adversarial system to handle such conflicts, divorce mediation has attracted a lot of attention in recent years as a possible alternative to the traditional adversary system. The balanced, practical, and fair approach adopted in facilitated mediation can strengthen the system's capacity to bring justice. Divorce mediation helps

the disputants to not only negotiate an agreement but also to renegotiate their relationship in a way that contains conflict, manages feelings and ensures a degree of future cooperation. At the heart of mediation lies the inherent understanding that, disputes must be resolved efficiently, at minimal costs (both financially and emotionally) with parties in full control of the process becoming the rule-makers for the resolution of their own dispute. In contrast, when a family dispute enters the adversarial web, anger and distrust are escalated, control is often lost and the players become pawns and consequently are relegated to a reactive rather than a proactive role. Mediation employs principles of cooperation and conflict resolution enabling the disputing couple to become rational and responsible enough to cooperate toward making compromises acceptable to both. This paper offers an overview of mediation process and other forms of ADR practices, including a discussion on the reasons for the rapid development of this practice, gives recommendation for further improving use of mediation and briefly outlines the role of lawyers including ethical considerations in this crucial process.

¹ Law Commission of India, *Delay and Arrears in Trial Courts*, Report No. 77 (November 1978); Law Commission of India, *Delay and Arrears in High Court and other Appellate Courts*, Report No. 79 (May 1979); Law Commission of India, *The High Court Arrears- A Fresh Look*, Report No. 124 (1988).
²Hiram E. Chodosh, *Mediating Mediation in India*, available at:
http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf (Last accessed, September 9th 2018).

³*K. Srinivas Rao v. D.A. Deepa*, (2013) 5 SCC 226 ¶38.

INTRODUCTION

Divorce, the dissolution of marriage is an emotional and legal whirlpool. The collapse of family life takes its toll on not only the married partners but, family members as well. Matters further get complicated on account of custodial claims. Children suffer



harassment and are scarred for life. To add to this, civil courts in India seldom offer alternatives to litigation. As the dispute enters the realm of litigation, quarrels, egos and manipulation take centre stage. In all this noise, sound is lost; it's no longer just about divorce and moving on but also about denting and painting the other side with one's all might.

Abraham Lincoln⁴ once said "*Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser--- in fees, expenses and waste of time.*"⁵ In similar spirit, it is the duty of the State, its functionaries and lawyers alike to promote alternatives to conventional dispute resolution. The adversarial system promotes quarrels, leads to ego inflation, and encourages disharmony.⁶ Conversely, Alternative Dispute Resolution (i.e. ADR) Mechanisms reduce tension, encourage mutual understanding and help foster a safe environment for negotiations.

The term "Alternative Dispute Resolution" takes in its fold, various modes of settlement. Primarily, there exist 4 types of ADR processes such as Arbitration, Conciliation, Mediation and *Lok Adalats*.⁷

These can broadly be distinguished as falling within the following two broad heads viz:-Adjudicatory Process (i.e. Arbitration) and Negotiatory Processes (i.e. Conciliation, Mediation and *Lok Adalats*).

Arbitration is somewhat similar to the adversarial process. Both the parties present evidence to the Tribunal (generally comprised of either one or 3 Arbitrators), they hear arguments and then pass an order (i.e. an award) which is legally binding and enforceable in between the parties.⁸ Though, the parties have a right of appeal against the award, in India, such right is limited.⁹ Arbitration can either be voluntary or mandatory.

In **conciliation**, the parties refer their dispute to a conciliator who meets with the parties in order to resolve their differences. The terms conciliation and mediation are often used interchangeably in common parlance yet,¹⁰ the difference between the two is that, in mediation, the mediator is mandated to be impartial and its role is restricted to that of a mere facilitator¹¹ whereas, the role of a conciliator is more pro-active and interventionist.¹²

Lok Adalats or the People's Courts are established by the government to settle

⁴ American statesman and lawyer who served as the 16th President of the United States.

⁵ <https://www.nytimes.com/1991/07/12/opinion/1-persuade-your-neighbors-to-compromise-218791.html> (Last accessed, September 3, 2018).

⁶ Harry T Edwards, *Alternative dispute resolution: Panacea or anathema?* 99 HARVARD LAW REVIEW 669, 670 (1986).

⁷ *Different Modes of Alternative Dispute Resolution (ADR)*, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09_chapter%203.pdf (Last accessed August 23, 2018).

⁸ The Arbitration and Conciliation Act, 1996, §§ 35, 36.

⁹ *Id.* §34.

¹⁰ Justice M. Jagannadha Rao, *Concepts of Conciliation and Mediation and their Differences*, available at http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20rao%201.pdf (Last accessed, September 05, 2018).

¹¹ The Arbitration and Conciliation Act, 1996, §§ 67, 69.

¹² *Supra* Note 10.



disputes through compromise. The LokAdalat is presided over by a chairman who usually is a sitting or retired judicial officer.¹³ The panel also comprises of two other members, usually a lawyer and a social worker. No court fees is charged for the settlement of dispute. A LokAdalat is not strictly bound by rules of procedure and evidence like ordinary courts thus making the process more easily understandable to the less educated section of the society.

Mediation is a process wherein a third party, (the mediator) sits with the disputants encouraging them to find a mutually agreeable agreement by helping them define issues, clarify priorities, find points of agreement, and explore areas of compromise. The word mediation is derived from the latin word ‘*mediare*’ which means ‘to be in the middle.’¹⁴ A properly executed mediation process incorporates all of the essential players to the dispute, depolarizes them and focuses on the common goal-- ‘the resolution.’ Rather than attacking each other, the parties attack the problem. It can be voluntary or court imposed. Mediation does not seek to cultivate the objective truth rather, aims at resolving dispute¹⁵ in a manner which either preserves the relationship or, completely terminates it allowing the parties to move forward either

together, or apart. Mediation seeks to understand the underlying interests and motives driving the dispute, it is a simple exercise to find the middle ground between two conflicting parties. It aims to achieve a mutual settlement without necessarily going into the contours of blame labelling.

WHY MEDIATE?

Mediation is not a cure for all diseases, it’s not a one stop shop for all Litigation woes. However, it does offer certain distinct advantages which give it an edge over the conventional forum.¹⁶ Mediation as a processual intervention in the legal system fulfils other instrumental and intrinsic functions apart from reducing court burden. Mediation both quantifies and expands the qualitative capacity of the system to resolve conflicts. Following are the advantages mediation has to offer over litigation:

1. Confidentiality: Confidentiality is essential for any mediation proceeding to be successful. Maintaining secrecy vis-à-vis mediation proceedings is the hallmark of mediation and helps create a safe environment allowing the parties to directly target the issue. The Supreme Court when discussing mediation as a process held in *Moti Ram v. Ashok Kumar*¹⁸, that mediation proceedings ought to be strictly confidential, and the mediator must simply place the

¹³ The Legal Services Authorities Act 1987, § 20.

¹⁴ *Mediation as an ADR* available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/10/10_chapter%204.pdf (last accessed, September 04th 2018);

¹⁵ Justice Sikri at the International Alternative Dispute Resolution Summit, available at: https://www.business-standard.com/article/pti-stories/objective-of-mediation-is-to-deliver-justice-justice-sikri-118020601341_1.html (Last accessed, September 8th 2018).

¹⁶ Kenneth R. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. 5 (1989).

¹⁷ Dr. Justice Dhananjaya Y. Chandrachud; *Mediation- Realizing the Potential and Designing Implementation Strategies* available at http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf (Last accessed, September 12, 2018)

¹⁸ *Moti Ram v. Ashok Kumar*, (2011) 1 SCC 466.



agreement before the court without conveying to the court what transpired during the proceedings.¹⁹ The element of confidentiality gives the disputants the capacity to talk freely, bring issues to the fore and engage in open, honest and informal discussions. Parties may negotiate freely and openly, without fear of jeopardizing their legal rights or positions.

2. Privacy: Don't wash your linen in public goes the old adage. Keeping in line, Mediation proceedings are strictly private.²⁰ The dispute or the pleadings are not public record nor are they subject to public scrutiny. This is especially critical when reputation of the disputants is at stake. Privacy breeds security and comfort, the antithesis of intimidation and fear. The element of privacy not only reduces psychological inhibitions but proves to be a great catalyst for honest conversations thereby expediting the process.

3. Party Control: The central theme of mediation is self-determination. Partners best know how to resolve their own disputes. In mediation, the parties remain in full control of the entire process. The beauty of mediation is that, even the mediator's role is relatively small and non-interfering in contrast to other forms of ADR. The parties embrace their inherent power to become their own rule makers for the resolution of their own dispute. In contrast, while ensuring adjudication in the conventional format, the parties delegate this capacity to the courts, risks increase and the dispute lingers on without allowing the parties to either move on, or shed their past.

¹⁹*Id.* ¶2

²⁰ *Supra* note 2.

4. Procedural Flexibilities: Being in full control, the parties chart out their own way. Simplified procedure designed by the parties themselves helps create a comfortable environment which is the *sine-qua-non* of a successful mediation setting. Not being dependent on formalities of court, the parties have the capacity to think out of the box, schedule meetings as per their own convenience and design their own settlement.

5. Time: Protracted litigation characterizes the Indian Judiciary and is a blot on what otherwise could have been called a near efficient system. Indian courts are jammed and packed. As of 2018, there are over 2.6 crore cases pending in High Courts across the country²¹ and Seventy-five lakh civil suits are pending in India's District Courts.²² In contrast, time as a factor is in complete control of the parties in the mediation process. From few weeks to months, the probability of the dispute being elongated is less. It helps the parties get over the dispute fast and simple, leave their baggage behind and move on in life. Mediation has proven to be quick and efficient, with two-thirds of mediated disputes being resolved at an average rate of 173 minutes per case in 2015.²³

²¹ NATIONAL JUDICIAL DATA GRID, *Summary Report of India*, available at http://njdg.ecourts.gov.in/njdg_public/main.php# (Last accessed, September 10th 2018).

²²*Id.*

²³ VIDHI CENTRE FOR LEGAL POLICY, *Strengthening Mediation in India: Interim Report on Court Annexed Mediations*, 42, (July 29, 2016), available at <https://static1.squarespace.com/static/551ea026e4b0adb21a8f9df/t/579ee7be5016e10ca2ae65f0/14700319>



6. A Win for Both: Mediation allows both the parties to be creative so that a novel solution can be carved out which would be in the best interests of both the parties. In the adversarial process, each side must prove they were right and blameless or lose. In litigation, you are either right or wrong, there is no middle ground. Mediation talks about what is right, whereas adversarial system talks about who is right. In mediation, the parties adopt a more balanced, facilitative and future looking process. They identify the area of miscommunication, rectify the error, create a new design and reach a mutually beneficial settlement. Settlements so reached are durable as they tend to make arrangements for certain future adjustments. For example, a child custody settled via mediation will make suitable arrangements for re-marriage of one of the erstwhile spouses.

7. Emotional Stability: Courts in India can be intimidating. Continuous visits can damp an individual emotionally and can hamper her/his professional prospects. Further, getting involved in the judicial web can impose certain social prejudices which further dent an individual. The court room debates over ones erstwhile married life can be overwhelming and thus, mediation being offered in a private setting away from public glare is certainly a better alternative.

8. Costs: Expenses in a divorce litigation are many and vary from lawyers' fees, court fees, filing fees, clerical fees to expenditure for securing documents and witnesses. Innumerable adjournments mean increased

expenditure on transport and in some cases, even lodging.²⁴ Spread over a considerable period of time, these costs increase substantially. In contrast, mediation being flexible and relatively short offers the disputants the less expensive way out thereby reducing monetary costs.

9. Closure: Last but not the least, mediation offers closure to both the parties once and for all. Once the terms of a mediated settlement is written and signed by both the parties involved, and presented to the court, it becomes binding.²⁵ A mediated settlement tends to have a high rate of compliance as it is mutually agreed to by the parties and has more durability than a court decree. Furthermore, it's not just the cases referred for mediation which are settled once and for all but all the other cases pending adjudication can be settled in one go.

AN IDEAL MEDIATOR:

The essence of mediation lies in the role of the mediator as a facilitator. The aim of divorce mediators is to assist the parties and not to make decisions for them. Mediation works best when the mediator's role is solely restricted to the facilitation of the disputants to broker their own agreement, while raising questions about the fairness, equity, and feasibility of proposed options for

²⁴ Justice R.V. Raveendran, *Mediation-- Its Importance and Relevance* available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=19353 (Last accessed, September 8th 2018).

²⁵ *Ravi Aggarwal v. Anil Jagota* 2009 SCC OnLine Del 1475.

20694/Interim+Report_Strengthening+Mediation+in+India.pdf (Last accessed, September 10th 2018).



settlement.²⁶ Unlike the Judge in traditional Courts or an arbitrator, the mediator is neither a trier of fact nor an arbiter of disputes. There are certain attributes which are a must have for a mediator. These characteristics are simple and easily adoptable; reflections of which can be seen in Lord Ganesh.²⁷



- 1) **Big Ears:** The mediator must have big ears i.e. he must be a good listener so as to enable him to understand the underlying issues.
- 2) **Big Head:** A Mediator must have a big head in order to enable him to think big and think in a liberal manner.
- 3) **Big Stomach:** A mediator must have the capacity to digest everything that comes from the respective parties.
- 4) **Long Nose:** As a mediator, one must poke her/his nose into separate essential

from the non-essential and learn to distinguish between position and interests.

5) **Small Eyes:** A Mediator must have small eyes thereby enabling him to concentrate more on the subject matter and do away with any distractions.

6) **Small Mouth;** A mediator must have a small mouth thereby enabling him to talk less so as to has to enable the parties to understand their own interests.

LAWYERS AND MEDIATION

A. THE LAWYER MEDIATOR:

Lawyers are best suited for setting the mediation process in flow.²⁸ A good mediator utilises the resources of law and not of therapy or psychology. A lawyer mediator can do much good, help distinguish the grain from the chaff and provide legal information as distinguished from legal advice. Legal information is general and impartial whereas legal advice involves specific suggestions to pursue or refrain from pursuing a particular course of action.²⁹ Legal information is a very important aspect of mediation. It helps the disputants outline available options and review the advantages and disadvantages of each, it helps the parties gain a certain perspective about their respective positions, how they stand and what lies in store if they go to courts as opposed to mediating the dispute.

Furthermore, a lawyer-mediator's draft of an agreement also helps move things along. It

²⁶Dispute Resolution CentreAustin, Texas Code of Ethics for Mediators, ¶4.4, available at <http://austindrc.org/wp-content/uploads/2013/09/CodeofEthicsforMediators.pdf> (Last accessed, September 10TH 2018).

²⁷ FirdoshKarachiwala, Lecture at Symbiosis Law School, Pune dated 19th July 2012.

²⁸Lawrence d. Gaughan, *Divorce Mediation: A Lawyer's View* FAMILY ADVOCATE, VOL. 9, NO. 1, SPECIAL ISSUE: LAWYERS AND PSYCHOLOGISTS, pp. 34-37, (1986)

²⁹*Id.*



helps the parties to identify areas of agreement / disagreement, recognise the broad parameters of the settlement. It also gives them a preview of what the final product would look like making the entire process more constructive and appropriate.

B. LAWYERS, MEDIATION AND THE CLIENTELE:

The role of the lawyer is all the more crucial when it comes to advising a client involved in divorce mediation. The attorney must make the client understand how mediation works, the mediator's role and the alternatives available with the client apart from mediation. The attorney on her/his part must have an understanding of the psychological and emotional makeup of the client, the relevant law and facts.

In preparing the client for mediation, the lawyer must focus on emphasizing what mediation truly stands for, the confidential and private character of the proceedings and the impartiality and non-interventionist role of the mediator must also be highlighted. The client must be made aware that his participation in the process does not necessarily mean that she/he is bound by the outcome of the process.

Psychological conditioning of the client is important. It is the duty of the lawyer to prevent the client from being disillusioned by the process of mediation. Clients who see divorce mediation as a painless and amicable process may become fixated on that as a goal.³⁰ A lawyer though determined

to make the mediation process a success shouldn't allow the client to enter the process with too many hopes so that, the client invariably does not end up signing away important economic, social and emotional benefits away.

Post mediation, the role of a lawyer assumes more significance. In the event of a breakdown of the mediation proceedings, the lawyer must guide the client as regards the next course of action. In the event the mediation proceedings are a success, it is imperative that the lawyer scan through each and every term of the settlement, examine the scope of future conflicts and bear in mind the legal consequences that would flow from the settlement.

MEDIATION IN INDIA, ISSUES AND SOLUTIONS

Many legal systems worldwide have made sweeping commitments to the use of ADR mechanisms. Studies indicate that an effective Justice system has a profound impact on the efficiency of the economy.³¹ The Code of Civil Procedure ('CPC') was amended in 2002 to incorporate Section 89 which includes mediation as an ADR mechanism.³² However, the Hon'ble Supreme Court of India in the case of in Salem Advocate Bar Association v. Union of India ('Salem I') recognised the need for regulating mediation proceedings on account

³⁰ Terrence Kapp, *Divorce Mediation: What You Should Tell Your Clients*, THE COMPLETE LAWYER, VOL. 8, NO. 4, pp. 38-39, 52-53 (1991).

³¹ RM Sherwood, *Judicial Systems and Economic Performance*, 34 QUARTERLY REVIEW OF ECONOMICS & FINANCE pp. 101-116 (1994), Supra Note 17.

³² Civil Procedure Code (Amendment) Act, 2002



of the absence of a framework rendering Section 89 ineffective.³³

The Judicial branch of the state is the most important yet, most neglected branch in India. From the highest court of the land to the court of a *Musnif*, the Judiciary is under-supported, underfunded, under-protected and undertrained. Administration of Justice still favours the powerful over the weak and cultivates conditions conducive to corruption, and delay. Resultantly, majority of Indians have become averse to the idea of going to courts.³⁴

It is imperative that, alternate forums be developed and promoted for adjudication of disputes. Mediation bears a comforting alternative to the traditional system. Mediation is not intended to supersede or supplant the judicial set-up rather, complement the same, help achieve objectives of the judicial branch and relive traditional courts of several cases.

Apart from statutory mandates,³⁵ creation of mediation centres and rule making by High Courts and efforts by state governments³⁶

have played a significant role in the popularisation of mediation. Mediation though on the rise in India faces a lot of obstacles too. From lack of public awareness to almost negligible institutional / legislative back up, mediation's step-son treatment continues till date.³⁷ In light of the aforesaid, let's discuss issues which beset the development mediation in India and further look into the possible solutions to the same.

A. ISSUES

1. Lack of legislative / Regulatory framework: The success of mediation in a mature legal system cannot be solely based on random rule making / judicial precedents but requires a concentrated legislative effort promoting and securing the entire process.

True that the Indian state has made rules and regulations but almost all of them have been half-hearted attempts. The Mediation and Conciliation Rules, 2004 were brought into effect from 11th August, 2005. A cursory look at these rules in contrast to those surrounding other forms of ADR mechanisms reveal that the rules have not been framed adequately, do not cover the entire landscape of mediation and are a superficial attempt at mediation, lacking conviction. There is no regulation of mediation, its process and mediators outside that of the court scheme including requirement for training, certification or code of conduct / behaviour.³⁸ In the absence of any specific legislative mandate,

³³*Salem Advocate Bar Association. vUnion of India*, (2003) 1 SCC 49.

³⁴DAKSH INDIA, *Access to Justice Survey 2015-16*, available at <http://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf> (Last accessed, September 9th 2018).

³⁵ The Industrial Disputes Act, 1947, §§4,5,12; Hindu Marriage Act 1956 §§ 23(2), 23(3); Family Courts Act 1984, § 9; Companies Act § 442; Companies (Mediation and Conciliation) Rules, 2016, Rule 17.

³⁶For Eg. The Delhi Disputes Resolution Society set up under the aegis of the Government of NCT of Delhi and the Delhi High Court; SaurabhKulshreshtha, *Alternative Dispute Resolution Mechanism: A Case Study Of Delhi, Chapter II*, available at: <http://shodhganga.inflibnet.ac.in/bitstream/10603/266>

[66/8/08_chapter%202.pdf](#) (Last accessed, September 12, 2018)

³⁷Supra note 17

³⁸SriramPanchu, "*Mediation Practice & Law The Path to Successful Dispute Resolution*", Second Edition, 2015, LEXIS NEXIS, p. 321.



the mediation ecosystem in India continues to be plagued with confusion and lack of public confidence.

2. Lack of reputed mediation centres: In the absence of institutes / centres offering mediation services by trained professionals, the natural recourse of any litigant lies ultimately with the courts of the country.

3. Enforceability: Unlike the law on arbitration, mediation settlements are not enforceable with similar mandate. There are no set rules governing enforcement of settled agreements. Any agreement reached in a private mediation is governed by the Contract Act, 1872. In court referred mediations, parties need to approach courts to enforce the settlement; something, which the parties sought to avoid by going for mediation in the first place. This lack of enforceability decreases the confidence of not only the public at large but also practitioners of mediation. Eventually, the possibility of the parties not complying with the final outcome of the settlement makes the entire mediation process redundant and fruitless.

4. The Adversarial system: The Indian court system inherently has had a right v. wrong, Party 1 v. Party 2 approach. The adjudicatory nature of the system as opposed to a settlement based approach has led to a generations of lawyers, litigants and judges trained to follow and approach a particular case in this binary fashion. The resultant consequence of this has been the stunted growth of mediation culture as a result of which, mediation lacks popularity and support.

5. Lack of Public Awareness: The lack of public awareness vis-à-vis mediation and its advantages is a major impediment in the use of mediation as an effective tool in India. Steps taken to promote mediation are still haphazard and have not garnered much attention nor do they seem to have met the desired objectives. A lack of dissemination of data highlighting advantages of mediation over litigation such as cost efficiency, success rates and overall expediency has led many to opt for the conventional forum.

6. Reluctance of the Bar: The general perception of mediation having a negative impact on incomes of advocates contributes as a major factor in mediation still not being the preferred mainstream dispute resolution process.

B. RECOMMENDATIONS:

After having discussed the problems let's have a look at the possible solutions which if adopted can go a long way in promotion and use of mediation. For the sake of convenience, the following recommendations have been broadly divided in four aspects dealing with statutory and regulatory framework, role of the bar and the bench and role of the executive in promotion of mediation.

1. Regulatory and Statutory Framework:

Unlike arbitration and conciliation, mediation in India still suffers from a legislative and regulatory void. Following the framework laid down for arbitration and conciliation, a legislation on mediation must address the following issues:-

- Mediator training, standards and accreditation to protect the mediation



eco-system from unscrupulous and/or under trained mediators.

- Enforcement of mediation settlements to promote confidence of the public and practitioners of mediation in the final outcome of the result.
- Confidentiality of mediation proceedings to facilitate a safe and secure environment for conduct of mediation proceedings.
- The conduct, initiation and termination of mediation proceedings.
- Establishment of Central oversight regulatory authority.
- The requirement of compulsory recourse to mediation in certain categories of cases, before the Court is moved.

Though, the aforementioned list is not exhaustive yet, it offers a starting point for law and policy makers. A legislation would codify and align the law. This will not only increase public confidence but would also serve as a referral point for those practicing mediation and would boost the use of mediation in India.

2. Role of law schools and the bar:-

2.1 Law schools curricula and training:-

Law schools are seminal in cultivating a culture surrounding mediation. Law students are often subject to a rigorous court training curricula in their final year of law school. From drafting pleadings and conveyance to mock trials, moot courts, it is mandatory for law students to undergo such training as per the rules of the Bar Council of

India.³⁹ However, a detailed and thorough course on mediation skips the bus. Mediation training at this nascent stage of learning in contrast to learning mediation in a belated manner while at the bar has several advantages. Among other things, young emerging lawyers would always consider mediation before considering the option of litigation. Furthermore, law students would consider mediation as a full time career and thereby contribute in further advancing the intellectual capacity of the field.

2.2 Role of the Bar:-

Lawyers and the Bar play a pivotal role in promoting and improving the use of mediation in India. The lack of confidence by the bar in the mediation process is a huge impediment. From mandatory pre-litigation efforts to training of mediators and providing infrastructure for the same, the Bar Associations should frame rules of conduct for members to follow. Such efforts would help advance public confidence in the use of mediation. Lawyers must advise their clients to opt for mediation over litigation as the first step in the resolution of a dispute. Rules such as this should be made mandatory and Bar Council's rules of practice should be amended accordingly.

3. Role of the Bench:

3.1 Penalise Litigative mind-set:

Imposition of costs on frivolous and mischievous litigations is not new to the Indian landscape. Yet, the bench has not been as pro-active in penalising the mind-set

³⁹Bar Council of India, Rules of Legal Education, Sch. II, Part II(B), S.No. 21 available at: <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf>



behind litigation. The Judiciary must try to discourage parties wanting to opt for the litigation process. As a natural consequence thereof, parties would instinctively opt for ADR mechanism as the first step in resolution of a conflict. This move would also reduce the burden on the courts.

3.2 Judicial Training: Sensitising the judiciary at all levels, towards understanding the need and purpose of mediation is necessary to popularise and tap into the potential of mediation. Mediation should be a central part of Judicial Training at all levels so as to increase the utility of mediation.

3.3 Supervision of Mediation Centres: District Mediation centres / Court-annexed mediation centres though having been established rarely are accountable vis-à-vis targets met. The Judicial system must set a certain target for cases in each year that must be solved via ADR processes. Judicial supervision, particularly by the Superior Courts would serve as sufficient mechanism of checks and balances ensuring realisation of targets.

4. Role of the Executive:

4.1 State Investment: There is need for state governments to invest greater funds to bolster the infrastructure of mediation centres within their territories. Better infrastructure, enhanced facilities, mediator training and government mediation centres will not only boost public confidence but would also attract young professionals who would see mediation as a full time career. These efforts would prove to be conducive towards making mediation an everyday affair rather than a one-off event.

4.2 Public Awareness: Awareness by way of advertisements, prominent display hoardings highlighting benefits of mediation in court premises and information dissemination about mediation in court premises at designated permanent offices would help boost public awareness. Naturally, any potential litigant would first want to follow through with mediation, and perhaps even force his/her lawyer to go for mediation over litigation.

CONCLUSION

Mediation has globally surfaced as an extremely popular ADR mechanism to supplement the existing formal adjudicatory mechanism.⁴⁰ In India, settlement of disputes via Mediation holds significant promise yet, it is still to gain a significant foothold as a popular dispute resolution mechanism.⁴¹ Though, the Judiciary and the executive have taken several positive steps yet the same remain unmethodical, casual and most importantly unpopular. Development of mediation centres in India, their supervision and conduct have mostly been isolated and sporadic. An all-inclusive legislation on mediation is the need of the hour which would not only widen the horizons of mediation but, would also add to its efficacy, popularize it and put in order the mediation ecosystem.⁴² My attempt in writing this paper is not to demean valuable

⁴⁰ Laura Fishwick, *Mediating with Non-Practicing Entities*, 27(1) HARVARD JOURNAL OF L. AND TECH. pp. 331-349 (2013).

⁴¹ Anil Xavier, "Mediation: Its Origin and Growth in India", 27 HAMLIN J. PUB. L. & POL'Y 275 (2006).

⁴² Laila Ollapally & G Aparna, *Mediation an omission in the ADR Legislation*, BAR & BENCH, available at <http://barandbench.com/mediation-an-omission-in-the-adr-legislation/> (Last accessed, August 31st 2018).



contributions made by the state but to highlight the scope of mediation and our systems incapacity, both physical and mental to tap into the potentialities of mediation. Above all, the legal system exists to serve Justice. This service is a sacrosanct responsibility. Therefore, execution of this service bereft of access is no true service rather a failure to honour responsibility. Mediation is not a means but an end in itself.

