



## RESOLVING FAMILY MATTERS - THE IMPACT OF MEDIATION IN FAMILY LAW DISPUTES

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### ABSTRACT

In today's times, the perspective on marriage has undergone a significant shift, moving away from the traditional notion of it being a lifelong commitment. The concept of lifelong commitment has faded, leading to a societal acceptance of family disputes and divorces. Regardless of cultural background, the significance of family remains paramount, serving as a unit that addresses not only economic but also emotional needs. Various factors contribute to divorces, including economic, professional, and psychological elements. Consequently, it becomes crucial to navigate through such disagreements to safeguard the delicate nature of families.

This article aims to explore the effectiveness of mediation as an alternative dispute resolution mechanism, particularly in cases of family disputes. The researcher conducted an extensive investigation into the factors contributing to family disputes. The paper recommends mediation as a superior tool for resolving such conflicts, emphasizing its benefits for individuals and society as a whole. The primary rationale behind this recommendation is that mediation offers greater objectivity, careful consideration of issues, impartiality, and independence. The article further delves into various legal frameworks and case laws where Alternative Dispute Resolution (ADR) has proven successful in resolving family conflicts.

Additionally, the author highlights the shift in the paradigm of the Indian legal system over the last two decades, wherein traditional modes of adjudicating family disputes have been supplanted by more effective measures. The research employs both primary and secondary data, employing a mixed-

method approach to thoroughly investigate the subject matter.

**Keywords:** Mediation, Marital Disputed, ADR, Domestic Violence,

### I. INTRODUCTION

The usual approach to resolving family disputes has been replaced by a more progressive and intricate method, mainly due to the evolving nature of family conflicts, particularly those involving children. In today's society, the perception of marriage no longer means a lifelong commitment. Family disputes largely differ from other conflicts, because family disputes impact not only the involved parties but also others related and connected to them. Managing family disputes is highly challenging due to the intimate, long-standing nature of relationships, which encompasses elements such as love, affection, trust, and bonds.

Mediation, as a form of alternative dispute resolution. It involves engaging a neutral mediator to facilitate the negotiation of a mutually acceptable agreement between the parties involved. Mediation has gained widespread acceptance, particularly in corporate settings and it is not a novice concept in Indian culture. Mediation has had its historical roots since the practice of "*Shantidoot*" during ancient wars, and also as the role of village head in mediating disputes within gram panchayats.

After examining the Indian legal system, it is revealed to us that there are significant changes in family disputes, influenced by amendments and landmark judgments in the past five decades. Notably, grounds for divorce and property matters have undergone considerable transformation. Litigation is often avoided by parties due to its lengthy nature and the reluctance to involve a third party, like a lawyer, in their personal matters.

The Supreme Court of India has consistently emphasized the importance of mediation, particularly in family disputes, and has mandated mediation before



approaching the court in family cases. Consequently, mediation holds the potential to enhance the efficiency of family law cases in India.

Mediation, while is not a solution for all legal challenges, it presents distinct advantages that set it apart from traditional litigation. Beyond simply alleviating court burdens, mediation serves both instrumental and intrinsic functions within the legal system. There are several factors that contribute to mediation's superiority over litigation.

Privacy is one significant advantage of mediation. Unlike court proceedings, mediation is strictly private, keeping disputes and pleadings away from public scrutiny. This is particularly crucial when reputations are at stake, as privacy provides a sense of security, comfort, and facilitates honest conversations, expediting the resolution process.

One of the central themes of mediation is party control. In mediation, the disputing parties retain full control of the process, allowing them to become their own rule-makers for dispute resolution. This self-determination empowers the parties to address their disputes more effectively compared to conventional adjudication, where control is delegated to the courts. Procedural flexibilities are inherent in mediation, allowing parties to design their own procedures based on their unique needs. This flexibility encourages out-of-the-box thinking, convenient scheduling of meetings, and the creation of a comfortable environment conducive to successful mediation.

Time is the next critical factor where mediation excels. In contrast to the prolonged litigation often witnessed in Indian courts, mediation allows parties to control the timeframe of the process. Disputes can be resolved within weeks or months, offering a faster and simpler resolution, enabling parties to move on with their lives.

Mediation's efficiency is underscored by its ability to provide a win-win scenario. It allows parties to be creative in finding novel solutions that serve the best interests of both sides. Unlike adversarial systems that

focus on proving who is right, mediation encourages a balanced, facilitative, and future-oriented process. Settlements reached through mediation are durable, making provisions for future adjustments.

Emotional stability is another benefit of mediation. Courts can be intimidating and emotionally draining. Mediation, conducted in a private setting away from public scrutiny, offers a more emotionally supportive alternative.

Cost considerations further emphasize the advantages of mediation. Divorce litigation involves various expenses, including lawyer fees, court fees, filing fees, and more. Mediation, being flexible and relatively short, provides a less expensive alternative, reducing the financial burden on disputants.

Finally, mediation offers closure to both parties involved. Once the terms of a mediated settlement are agreed upon, signed, and presented to the court, they become binding. Mediated settlements tend to have a high rate of compliance, offering a conclusive resolution. This closure extends beyond individual cases referred for mediation, potentially settling other pending adjudications simultaneously.

## II. RESEARCH METHODOLOGY

The purpose of this study was to examine literature regarding the effectiveness of Mediation in Family Disputes. To gather information, various databases were searched. The search included all relevant articles published since 2004. Due to the type of publications available, a formal systematic review was not possible, and a narrative review was conducted instead. This review prioritized observational studies and briefly summarized key themes from other types of publications. The majority of articles published, as well as all observational studies, were based in India.



## II. EXISTING LEGAL FRAMEWORK

In the year 2002, Section 89 of the Code of Civil Procedure, 1908<sup>1</sup> underwent an amendment to incorporate mediation as a form of Alternative Dispute Resolution. This provision allows the court to consider alternative processes, such as mediation, if it believes that disputes could be peacefully resolved outside of litigation. Consequently, cases may be referred to arbitration, conciliation, or judicial resolution through Lok Adalats. This is commonly known as court-administered mediation. However, there are situations where court-administered mediation may not be effective, leading the court to proceed with the litigation process. Conversely, if mediation is successful, the court issues an order based on the mediator's recommendations, and the case is concluded.

In addition to this, under Indian law, the concept of reconciliation is recognized in the Hindu Marriage Act of 1955<sup>2</sup>, the Special Marriage Act of 1954<sup>3</sup>, and the Family Courts Act<sup>4</sup> under Section 9.

### 2.1 LEGAL PERSPECTIVE ON MEDIATION IN MARITAL CONFLICTS

In a landmark case, the husband sought a divorce on grounds of mental cruelty after the wife filed a false criminal complaint against him. Despite eventually granting the divorce, the court mandated mediation procedures for both parties. This case is known as F K Srinivas Rao v. D. A. Deepa<sup>5</sup>, marking the first time the Supreme Court addressed the importance of pre-litigation mediation. A survey in Delhi revealed that individuals undergoing mediation were more likely to find a form of conciliation compared to those directly approaching the courts. The Supreme Court instructed mediation centres to establish pre-litigation clinics to promote this approach.

The escalating number of divorce cases in India has strained family courts. In the case of Gaurav Nagpal v. Sumedha Nagpal<sup>6</sup>, the court noted the substantial increase in divorce and judicial separation cases in India. The court emphasized that the provisions in the Hindu Marriage Act, offering circumstances for divorce, should not be perceived as an incentive. Divorce is granted only when a marriage is irreversibly broken down. The court urged couples to strive to save their marriage before resorting to litigation as a last resort for irreparable breakdowns.

Another positive aspect of mediation is its cost-effectiveness compared to traditional litigation. Justice Markanday Katju, in B S Krishna Murthy v. B. S Nagaraj<sup>7</sup>, advocated for attorneys to advise clients on seeking mediation, particularly in family-related matters. This recommendation stemmed from the recognition that prolonged court battles could financially burden both parties for decades.

Given the child-centric and heterosexual nature of marriage in Indian culture, the court acknowledged that failed marriages impact not only the involved parties but also others related to them, especially children and parents. Consequently, in G. V Rao v. L.H.V. Prasad<sup>8</sup>, the court asserted that reconciliation and resolution through mutual agreement should take precedence over litigation in marital problems.

#### 2.1.1 Various Approaches to Mediation

In total, there are three mediation models known as facilitative, transformational, and evaluative. The facilitative model involves the mediator asking questions, summarizing responses, and encouraging parties to elaborate, bringing the central issue to the forefront. Both parties are present in the same room, and the mediator seeks a common ground, fostering dialogue. In contrast, transformational mediation is similar to facilitative mediation, but it differs as it

<sup>1</sup> Section 89 of the Code of Civil Procedure. Act No. 05 of 1908. Imperial Legislative Council (India)

<sup>2</sup> The Hindu Marriage Act, 1955 (25 of 1955)

<sup>3</sup> Special Marriage Act of 1954 No.43 of 1954.

<sup>4</sup> Section 9, THE FAMILY COURTS ACT, 1964. (Act XXXV of 1964). [ 18 July 1964 ]

<sup>5</sup> AIR 2013 SC 2176

<sup>6</sup> (With Criminal Appeal NO. 491 of 2006)

<sup>7</sup> (2011) 15 SCC 464

<sup>8</sup> 2000(3) SCC 693



encourages parties to devise their own solutions, making it commonly employed for family matters. The third mediation model is distinct from the former two. Here, the parties do not share the same room; instead, they are placed in separate rooms with the mediator moving between them. Each party expresses their side of the story and concerns. After hearing both sides, the mediator provides feedback on both the positives and flaws. This approach is less common in family disputes and more prevalent in commercial or contractual settings

## 2.2 ADVANTAGES AND DRAWBACKS OF MEDIATION IN MARITAL DISPUTES

One of the most significant advantages of mediation is its ability to save time, money, and maintain confidentiality. For instance, even though a mediator can provide the court with a report, it does not mandate revealing specific details of the proceedings. The report must primarily indicate whether the mediation was successful or unsuccessful, as established in the case of *Moti Ram Tr.Lrs. & Anr. vs. Ashok Kumar & Anr*<sup>9</sup>.

Moreover, mediation is a less stressful process for both parties, fostering attempts to reach an amicable solution rather than engaging in confrontations. This approach enables children to witness their parents working together, even amidst disagreements. A notable 2004 study by Baker McKenzie highlighted the potential for children of divorce to exhibit more aggression and behavioural issues, which mediation can help mitigate.

It's noteworthy that there are no appeals in mediation, providing complete closure to both parties. Additionally, there are instances where mediation has led to couples reconciling rather than pursuing divorce. This outcome is often attributed to the participatory nature of mediation, fostering direct communication between the parties, unlike litigation

where arguments are presented through third parties, such as lawyers.

Facilitating a positive dissolution of marriage through mediation can contribute to changing societal perceptions of divorce, making it more acceptable. However, it's essential to acknowledge the potential drawbacks of mediation. For instance, if the mediator lacks proficiency, the process may not unfold as intended and may favour one spouse over the other. Additionally, clever parties could conceal assets, and if there's a power imbalance between partners, mediation may not proceed equitably.

## III. PROCEDURE OF MEDIATION

In India, mediation lacked dedicated legislation until this year. The absence of a legislative framework for mediation was a drawback as it leaves the method and technicalities of mediation undefined, despite its encouragement. Mediation in India can be initiated in two ways: through voluntary referral by parties (private mediation) or when the court refers parties to mediation under Section 89 of the Civil Procedure Code<sup>10</sup>. The Supreme Court, in the case of *M/S. Afcons Infra Ltd & Anr v. M/S Cherian Varkey Construction*<sup>11</sup>, emphasized the court's authority to choose either approach. In practice, courts access Section 89 once pleadings are complete and formulate issues, utilizing mediation when complexities arise or multiple rounds of dialogue are necessary. Notably, court-ordered mediation settlements are immune to appeal or amendment. In family and marital matters, the opportune time for mediation is typically after the respondent is served but before filing written statements or objections.

The absence of legislation governing mediation had meant that procedures are conducted based on individual court guidelines. Recognizing this gap, the Supreme Court, in *Salem Advocate Bar Association v. Union of India*<sup>12</sup>, highlighted the need for regulation due to the lack of a framework, deeming Section 89

<sup>9</sup> Supra. 1

<sup>10</sup> Section 89 of the Code of Civil Procedure. Act No. 05 of 1908. Imperial Legislative Council (India)

<sup>11</sup> 2010 (8) SCC 24

<sup>12</sup> AIR 2003 SC 189.



ineffective. The recent case of *M.R Krishna Murthi v. New India Assurance Co. Ltd and Others*<sup>13</sup> saw the Supreme Court urging the government to enact an Indian Mediation Act, emphasizing the urgent need for such legislation. The envisioned legislation aims to empower individuals to determine the fate of their marriages, reducing the burden on courts dealing with divorce cases.

Mediation involves functional stages: Introduction and Opening Statement, Joint Session, Separate Session(s), and Closing. In the Introduction stage, the mediator establishes their identity, expertise, and professional experience, emphasizing the goal of achieving a peaceful resolution. This stage aims to create a pleasant environment, inspire trust, and set the tone for impartiality. The Joint Session, the second stage, allows parties to express their perspectives without interruption, enabling them to convey their viewpoints and emotions freely. The mediator may ask questions to clarify doubts and identify areas of agreement and dispute. In the third stage, Separate Sessions provide the mediator with more specific information and allow for a deeper exploration of issues raised during the Joint Session. The mediator addresses emotional considerations and facilitates a true understanding of the matter, being precise, succinct, and sensitive to the parties' concerns and feelings. This structured approach aims to foster effective communication and resolution in the mediation process.

### 3.1 WHETHER MEDIATION IS SUITABLE FOR DOMESTIC VIOLENCE CASES

Domestic violence, addressed under Section 498A of the Indian Penal Code<sup>14</sup>, is deemed a non-compoundable offense under the Criminal Procedure Code (CrPC), reflecting the gravity with which the courts approach such cases. Surprisingly, the judiciary adopts a distinctive stance on this matter by actively

endorsing mediation as a viable approach to address marital issues and rectify instances of domestic violence.

Illustratively, in the case of *Mohd. Mushtaq Ahmed vs. State*<sup>15</sup>, where the wife-initiated divorce proceedings and filed an FIR under Section 498A IPC against her husband. Then the Karnataka High Court intervened by recommending mediation. The outcome was favourable, leading to the withdrawal of the FIR by the wife. The court, in this decision, emphasized that under appropriate circumstances, it holds the authority to utilize inherent powers to terminate criminal proceedings or complaints.

Supporting this perspective, the case of *Gurudath K v State of Karnataka*<sup>16</sup> clarified that Section 329 of the Criminal Procedure Code<sup>17</sup> does not impede the court's right to quash an FIR. This underscores the courts' willingness to utilize alternative dispute resolution mechanisms, such as mediation, even in the context of non-compoundable offenses related to domestic violence.

### IV. SUGGESTIONS

India has been exploring non-judicial avenues like mediation, conciliation, arbitration, and negotiation as cost-effective alternatives to traditional legal proceedings, aiming to make justice more accessible to the common person. The growing backlog of cases in the courts has the potential to result in injustice for the average citizen.

Firstly, the government should take proactive measures to increase awareness about ADR mechanisms. This could be achieved through the creation of a dedicated website, media campaigns on platforms like local cable television, radio, pamphlets, brochures, and newspapers. Additionally, organizing seminars, workshops, and symposiums can play a crucial role in educating the public about the benefits of ADR.

<sup>13</sup> CIVIL APPEAL NOS. 2476-2477 OF 2019

<sup>14</sup> Section 498A of the Indian Penal Code, Act No. 45 of 1860, Imperial Legislative Council

<sup>15</sup> 3 AIR Kant R 363

<sup>16</sup> CRIMINAL PETITION NO.7258/2014

<sup>17</sup> Section 329 of the Criminal Procedure Code 1973. ACT NO. 2 OF 1974 [ 25th January, 1974.]



Furthermore, we must recognize the existing shortage of judicial officials, it is crucial to appoint additional judges. This step is necessary to ensure that they have the time and resources to develop and implement an efficient ADR process alongside their regular judicial duties.

Thirdly, to enhance the effectiveness of ADR, legal professionals should undergo training to become ADR practitioners. This training can include participation in role-plays or simulated practices. Different categories of mediators and conciliators, specializing in areas such as family and business disputes, should be formed to cater to diverse domains.

Lastly the government needs to allocate sufficient funds to meet the essential requirements for the proper implementation of the ADR mechanism. This includes funding for infrastructure, higher-up authority, manpower, and a panel of trained mediators, conciliators, and arbitrators. Adequate financial support is essential for the success of ADR initiatives.

By implementing these recommendations, the government can enhance the effectiveness of ADR mechanisms, making them more accessible and ensuring justice for all.

## V. CONCLUSION

In India, mediation is a helpful way to solve problems and make things fair. It involves good communication and convincing skills. Abraham Lincoln once said it's better to avoid fighting and try to find compromises because legal battles can be costly and time-consuming. Today it is essential that Indian government makes more rules supporting Alternative Dispute Resolution (ADR) methods like mediation to help couples resolve conflicts without winners or losers.

However, many people in India don't know about the benefits of mediation. To fix this, the government should do more to spread the word. It's important to let people know about mediation by putting

information in places like police stations and courthouses. Judges and lawyers should also talk more about mediation and learn from other countries' successful experiences. Even though mediation is recognized worldwide, India still relies heavily on the traditional legal system.

Despite some positive steps taken by the government, the development of mediation centres in India lacks organization and popularity. To make mediation more effective and popular, we need a comprehensive law that supports and organizes mediation. While acknowledging the state's efforts, it's crucial to understand that mediation has untapped potential due to existing issues. The legal system should recognize mediation as an essential part of ensuring true justice, focusing on providing access to mediation as an important responsibility.

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