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A Comparative Study On The Best Mediation Practices Around The World & India

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Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong.

-Justice Patanjali

1. Introduction

Alternate dispute resolution (ADR) refers to a means through which disputes are settled outside the traditional court system. A backlog of cases and the urgent need to relieve the court system of its burdens are the main reasons behind the Government and Courts promoting Alternative Dispute Resolution Mechanisms in India. In India, the

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different modes of ADR include arbitration, negotiation, mediation, conciliation, and Lok Adalats. Mediation is one of the ADR techniques that stands out from the rest in terms of the parties' active involvement against a neutral background.

Mediation is truly a party-centric process. It is a voluntary process in which parties try to settle their disputes with the aid of an independent third person (the mediator). In mediation, two or more parties work together to reach a solution with the help of an impartial third party. A mediator is merely a facilitator, and not a judge, who aids parties to come to an amicable agreement. Mediators do not impose their views on the parties but create a conducive terrain in which the parties can resolve their disputes. The mediation process is a party-centric process, and thus there are no strict rules of procedure. The benefits of mediation are its voluntary and non-adversarial nature, the flexibility and confidentiality of the process, its speed and cost-effectiveness, and the finality of consensual settlements. As a mode of ADR, mediation also helps reduce the burden on the courts by disposing of several of them without the court's intervention.

2. Traditional mediation practices

Mediation has a long history and its existence for long years has led to

many different types of mediation today. For instance, informal conflict resolution techniques involving mediators or third parties have a long history in the Asia-Pacific area. Mediation has been used in a generalized form of dispute resolution for at least two millennia in Eastern countries like China, Japan, Korea, and Sri Lanka. It also had origins in Judaism, early Quakerism, and the African courts.[3] It has consistently been a part of the Holy Quran's teachings. Some traditional processes of dispute resolution are more like mediation, where the parties decide for themselves, while others are more like arbitration, where the decision is made by a third party (such as a Chief or Elder) after carefully considering the opinions of all parties.[4]

Many factors, such as the limited resources (for instance legal aid), the rising costs of litigation, the uncertainty of outcomes when the dispute is not based on a clear legal principle, and the inability of the civil justice system to handle the growing load of cases (resulting in protracted delays), have contributed to the increased interest in Western models of mediation in various Asian and Pacific countries today. Too many legal problems are being produced by democratic and market-

[3]Hurlbert, E.R., Folberg, J. and Taylor, A. (2005) "Mediation: A comprehenive guide to resolving conflicts without litigation," Family Court Review, 22(2), pp. 95–96. Available at: https://doi.org/10.1111/j.174-1617.1984.tb00106.x.
[4]Bagshaw, Dale (2007) "Transforming mediation in the Asia–Pacific region," ADR Bulletin: Vol. 10: No. 2, Article 10. Available at: http://epublications.bond.edu.au/adr/vol10/iss2/[10]

based trends for courts to handle, and many judicial systems in the region have not kept up with the issue. Many suffer from insufficient institutional resources and antiquated procedures, and litigants and lawyers complain of excessively contentious, protracted, and costly trials, unenforceable decisions, and court backlogs.

The rising interest in Western modes of education is fueled by several factors, including the increased interest in mediation in non-Western legal systems including the need to preserve ongoing relationships, people choosing to stay in control of their conflicts or disputes and their resolution, and/or the need for privacy to avoid public humiliation or to save face. In addition, in some countries throughout the world, judicial systems are either non-existent or corrupt. Considering this tendency to follow Western methods, it is necessary to create more inclusive mediation models in non-Western nations that build on the advantages of regional, customary traditions and situate them within a broader framework of social justice and human rights.

The inclusion of mediation can be first observed in Section 4 of The Industrial Disputes Act, 1947 which provides for conciliators who are charged with the duty of mediating in and promoting the settlement of

industrial disputes.[5] Later, mediation through The Civil Procedure Code (Amendment) Act, 1999 was inserted in The Civil Procedure Code, 1908, and found its presence under Section 89[6] of the same. Mediation then further found its relevance under The Commercial Courts Act, 2015 which has made exhaustion of mediation before litigation mandatory.[7]

3. Mediation in India

3.1 The Mediation Bill, 2021

Many nations, including Australia, Singapore, and Italy, have laws that solely deal with mediation.[8] Although there are several legislations in India such as The Code of Civil Procedure, 1908, The Arbitration and Conciliation Act, 1996, The Companies Act, 2013, The Commercial Courts Act, 2015, and The Consumer Protection Act, 2019 that suggest mediation as a dispute resolution method, however, India lacks legislation that solely deals with mediation and its nitty-gritty.

In order to ensure that a loophole in the Indian Legislation system is done away with, the Supreme Court and a High-Level Committee

[5] The Industrial Disputes Act,1947, § 4. No.14, Acts of Parliament, 1947 (India).
[6] Code Of Civil Procedure, 1908, § 89, No. 5, Acts of Parliament,1908 (India).
[7] The Commercial Courts Act, 2015, § 12, No. 4, Acts of Parliament,2015 (India).
[8] Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India (Chair: Retd. Justice B.N. Srikrishna), July 30, 2017.

reviewed the implementation of arbitration mechanisms in India; both suggested that a separate law governing mediation should be enacted in India (2017).[9] In addition, a committee was then established by the Supreme Court in 2020 that made recommendations and developed a draft piece of law to sanctify mediation as a means of resolving disputes.[10]

This draft called The Mediation Bill, 2021 aims to support mediation, especially institutional mediation, and offer a way to enforce settlement agreements reached through mediation. The bill was reviewed by the Union Law Minister in December 2021 and was then passed on to The Standing Committee on Personnel, Public Grievances, Law, and Justice for further deliberations.

3.1.1 Overview of the Bill

The bill consists of 11 chapters, 10 schedules, and over 57 provisions. As mentioned in the bill, its objective is to promote mediation and enforce the agreements that are it's resultant, provide a body for the registration of the mediators, and also bring forth the concept of online

[9] M.R. Krishna Murthi vs. New India Assurance Co. Ltd., Supreme Court of India, Civil Appeal Nos. 2476-2477 of 2019, March 5, 2019.
[10] *Niti.gov.in.* Available at: https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-NITI-Aayog-Committee.pdf (Accessed: April 26, 2023).

mediation.[11]

As per Section 2 of the Bill, it permits or assigns application of the Bill in situations where mediation is conducted in Indian territory and where (a) all or both parties habitually reside in India, are incorporated there, or have their place of business; (b) the mediation agreement stipulates that any disputes shall be resolved in accordance with the clauses of the Bill; or (c) there is international mediation; that is where at least one party is an individual who is a nation. However, unless the subject relates to a business dispute, the provisions of the Bill shall not apply where one of the parties to the dispute is the Central or State Government (or any of its functionaries) as defined under the Commercial Courts Act, 2015.[12]

The Bill mandates pre-litigation mediation, forcing parties to first try to resolve their differences through mediation before going to court or a tribunal. Before leaving the mediation process, the Bill requires that parties attend a minimum of two pre-litigation mediation sessions. However, Section 8 of the Bill also stipulates that in exceptional circumstances, a party may file appropriate proceedings before a court or tribunal of competent jurisdiction seeking urgent interim measures, and the court or tribunal shall refer the parties to engage in mediation to resolve the dispute, if deemed appropriate, after granting or rejecting

[11] The Mediation Bill, 2021, Bill No. XLIII, 2021 (India).
[12] *Supra* note 5.

urgent interim relief, as the case may be.

The Bill also states that the agreement arrived at is final, binding on the parties, and enforceable in the same way as if it were a judgement or decree issued by a court. It is subject to challenge for fraud, corruption, impersonation, or when mediation was conducted in relation to disputes or matters that were not best suited for mediation. Furthermore, a challenge to the agreement cannot be filed ninety days after the day the applicant receives a copy of the agreement in accordance with Section 22(3) of the bill. Moreover, Section 50 of the Bill stipulates that the settlement agreement reached in cases of disputes involving the Central Government or the State Government shall only be executed after getting the prior written authorization of the competent authority of such governing body.

With respect to community mediation, disputes that affect the peace, harmony, and tranquility among residents or families of any area or locality may be resolved through community mediation with the prior consent of all parties, and the concerned Authority, District Magistrate, or Sub-Divisional Magistrate is given the authority to assemble a panel of three mediators to carry out the community mediation. However, any settlement agreement reached through a community mediation, will not

have the same legal effect as a civil court judgment or decree.

Further, the Central Government of India is authorized to create the Mediation Council of India under Section 33 of the Bill. In addition, Section 40 states that the Council shall work to advance both domestic and international mediation in India through appropriate guidelines. It also establishes the framework and protocol for the ongoing training, accreditation, and evaluation of mediators by recognized institutions for mediation.

3.1.2 Gaps in the Bill

Although the introduction of The Mediation Bill, 2021 ("the bill") was long overdue in India, it has still not been implemented as mentioned above. Moreover, before it gets implemented it is also necessary to ensure that the loopholes or the cons of the bill are done away with. For instance, as per Section 4 of the bill mediation could also be referred to as "pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import."[13] The term "conciliation" which has been used interchangeably with the term "mediation" could be misleading as both the processes, although a form of ADR, are different in nature. In the former, the involvement of the

[13]*Supra* note 9, Sec 4.

conciliator is more prominent than that of the mediator in the latter. Mediation as mentioned above is a party-centric process wherein the mediator is merely a facilitator, hence the involvement of the mediator when it comes to the resolution of the dispute is not significant unlike in the conciliation process.

Furthermore, as per Section 6(1) of the bill[14] requires the parties to be referred to mediation before approaching the courts irrespective of there being a mediation agreement. A provision such as this could result in an increase in the amount of litigation, thereby reversing the objective of the act as parties who are not comfortable with the mediation process would also be required to take that course of settlement. Although a provision of similar nature is adopted in several enactments and by the courts especially in matrimonial and commercial cases, they have been adopted in cases of such nature only due to the nature of the dispute being familial in nature, and the parties have the option to withdraw from the proceedings if pleased. In light of this, the Parliamentary Committee has referred to both houses to reconsider the same.

Although Section 8 of the bill[15] permits the parties to either withdraw before or during the mediation proceedings, the same can only be done in "exceptional circumstances". However, the bill has no mention whatsoever of what those circumstances amount to, which opens the

[14] Supra note 9, Sec 6(1).
[15] *Supra* note 9, Sec 8.

door to multiple interpretations, thereby burdening the courts with excessive cases.

Lastly, one of the major drawbacks of the bill, which was pointed out even by the Parliamentary Committee was that the definition of international mediation under Section 3(f) includes only those proceedings wherein one of the parties is Indian, and the proceedings have been conducted in India. As per this definition, mediation that involves an Indian party but has occurred outside India, will not be enforceable as a judgment or a decree. This provision is not in line with the Singapore Convention mediation which enforces cross-border mediation. Thus, the Parliamentary Committee has recommended the houses to relook at this definition considering India's signatory status to the Singapore Convention on Mediation.[16]

4. Mediation Practices Around the World

The process of mediation has been widely adopted across the world. Several countries such as Singapore, Hong Kong, the USA, the UK, Australia, Canada, and Norway are considered to be pioneers in mediation. This section will delve briefly into some of the key features of mediation proceedings across a few countries.

[16] United Nations Convention on International Settlement Agreements Resulting from Mediation, 2019, United Nations,Treaty Series,vol. 3369C.N.154.2019.

4.1 Singapore

Singapore's Parliament enacted its Singapore Mediation Act, 2017 in the year 2017 in order to boost its international dispute resolution process by ensuring its legal framework has been strengthened for international commercial mediation. One of the key features of this Act is that after the settlement agreement is drawn, any of the parties, with the consent of all the other parties, can apply to the court to record the agreement as an order of the court.[17] This agreement can be enforced within 8 weeks from the agreement was drawn or any time as prescribed by the court.

Further, as per Section 9 of the Act, although the information disclosed during the mediation process is to be kept confidential, however, this section elaborates on several grounds based on which the information shared can be disclosed. For instance, when it has already been made available to the public at the time of its disclosure, there are reasonable grounds to believe that there can be an injury to any person or there is any form of neglect or abuse towards children, for the purpose of seeking legal advice, for research, evaluation or educational purposes without revealing the mediator and parties when required by an order of the court, disclosure is in compliance with a request or requirement imposed by a regulatory authority or when it discloses any information

[17] Singapore Mediation Act, 2017, § 12. No.1, The Statutes of the Republic of Singapore, 2017 (Singapore).

with regards to the commission of an offense and other purposes.[18] Moreover, mediation communication in accordance with Section 9(3) which provides further grounds of disclosure, can be admitted as evidence by a court or a tribunal under Section 10 of the Act for reasons such as when it is in the public interest or administration of justice, or based on any other circumstance that the court finds relevant.[19]

4.2 United States of America

Another one of the countries that is a leading pioneer in mediation is the United States of America which is non-federal in nature. This means that the laws in the USA vary based on the state, however, a few of the common practices include, mediation being a confidential process wherein mediation communication cannot be used as a piece of evidence in the court and neither can a mediator be called upon as a witness in the court. Moreover, similar to the law in Singapore, a mediation agreement can be enforced in court, and it can further be enforced as a legally binding contract. Furthermore, in some instances, the courts may ask the parties to undergo mediation just before the initiation of the trial.

Similar to the Indian mediation practice, even in the USA, mediation is

[18] *Supra* note 15, Sec 9.
[19] *Supra* note 15, Sec 11.

a party-centric process, which means it is voluntary in nature, furthermore, mediators are merely facilitators during the process and are hence required to remain neutral and impartial.

4.3 Australia

When it comes to another one of the commonwealth countries, Australia, the mediation practice is quite similar. However, one of the key features of the Australian Mediation System is that Australia has a national accreditation system for mediators known as the National Mediator Accreditation System (NMAS), which is administered by the Mediator Standards Board (MSB). The NMAS sets the standards for mediator accreditation, including training and experience requirements, ethical guidelines, and ongoing professional development.[20] Furthermore, many courts in Australia have established mediation programs to help parties resolve disputes outside of the court system. These programs often involve court-appointed mediators who work with parties to reach a mutually acceptable outcome.

4.4 Scandinavia

In Norway, unlike India, mediation is offered not only in civil disputes

[20]National mediator accreditation standards practice standards - peel HR (March, 2012). Available at: https://www.peelhr.com.au/PDFs/Mediator%20Standards%20Board%20-%20Practice%20Standards%20(March%202012).pdf (Accessed: April 26, 2023).

but also in criminal disputes. The Scandinavian countries believe in the restorative justice model, based on which they have communal mediation, that has originated from the community mediation model. Further, since the 2000s, Finland has a school mediation system that is used to resolve disputes between students and teachers, and also when children face bullying and name-calling in schools.

Based on the restorative justice model, the Scandinavian countries also have a Victim-Offender Mediation (VOM) system wherein the victims meet their offenders in a safer and more structural setting. A mediation process of this sort, aids in holding the offender directly accountable for their act. It further allows the victim to get closure from their offender in order to cope with their fears, doubts, and inhibitions after the offense. This form of mediation showcases that the Scandinavian countries believe in the restorative model which aids a dialogue-driven mediation instead of settlement-driven mediation. It does not involve the determination of the status of the guilt of the offender, and nor does it encourage the offender to plea before the victim.[21]

5. Suggestions

Mediation in India is at a very nascent stage. The practices and its

[21] Guidelines for victim-sensitive victim-offender mediation: Restorative Justice Through Dialogue. Available at: https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html (Accessed: April 27, 2023).

effectiveness in dispute resolution needs to grow and adapt to Indian social structure. The mediation practices around the world have shown that the practice of mediation can be made more effective. The suggestions that the authors recommend for improving mediation practice in India are:

i. A legislation governing mediation is the need of the hour. Mediation legislation is prevalent in Singapore, Malaysia, Ireland and etc.

ii. India should adopt methods which allow for dispute resolution through multiple ADR mechanisms such as "Arb-Med" or "Arb-Med- Arb" like the protocol and guidelines adopted by Singapore International Mediation Centre.

iii. Make the public at the grass root level about the process of mediation and its effectiveness in dispute resolution and everybody be given easy access to mediation.

iv. Mediation should also be made mandatory for trade, commercial disputes and the legislative framework of mediation in India should be according to the United Nations Convention on International Settlement Agreements

v. A proper universal code of ethics that should be followed during mediation among the stakeholders of the mediation process throughout India based on International guidelines. This will pave

way for adopting mediation as a dispute resolution mechanism in commercial disputes.

vi. A proper mechanism for the setting up and functioning of Mediation Centers which have to be provided with proper infrastructure and a universal pattern that can be adopted throughout India.

vii. The mediation bill currently in waiting should look in provisions and mechanisms for enforcement and quality control by ensuring that part autonomy is always protected.

6. Conclusion

The Mediation System has now been widely adopted by several countries. Over 55 countries are signatories to the Singapore Convention on Mediation, 2018 and 8 have ratified it. The basic nature of mediation is similar across countries although they have developed their own laws based on the practices in their countries. India has signed the convention, however, has failed to ratify the same. The Indian Mediation Bill, 2021 has still not been implemented, hence, it is essential that the loopholes and the recommendations that have been made by the Parliament are looked at by both houses. This further gives an opportunity to the Indian lawmakers to look across the different mediation practices that have been adopted by several other countries

and incorporate them in our laws in order to ensure that India also evolves into a country that becomes the preferred seat of arbitration amongst several countries, has a robust mediation system, and grows into a hub of international dispute resolution.