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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **ROLE OF JUDICIARY IN PROMOTING MEDIATION**

AUTHORED BY - HRISHIKESH B.M

## **Abstract**

Mediation has become an important form of alternative dispute resolution (ADR) because it allows parties to work together in resolving a conflict without the combative nature of litigation as is the case in the courts. Mediation is encouraged by the courts, especially in countries where the court system is overwhelmed by backlogs and in countries where the traditional court system is ineffective - meaning there is little or no requirement for the court. This paper seeks to analyze the role of the courts in encouraging mediation through various mechanisms such as legislation, the judicial system, and the creation of relevant structures.

The context proves that, over the years, there has been a tendency towards normalizing mediation and accepting it as an alternative means of conflict resolution in India – most notably after the Mediation Act, 2015 came into existence. Important cases before the courts, like *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*<sup>1</sup> and *K.K. Verma v. State of U.P.*<sup>2</sup>, served to illustrate the positive impact of mediation on the courts and the public, making such alternative means of dispute resolution comprehensible and useful to the population.

However, despite this good news, many issues stand in the way of promoting mediation that include but are not limited to, opposition from the lawyers or the litigants themselves, the illiteracy of the litigants, and the inadequacy of the institutions. This paper presents successful experiences of mediation implementation and carries out an analysis of the necessary updates which can be made to reinforce the position of the courts in re-establishing mediation as a main tool for achieving resolution of disputes. In summary, the judicial system must continue to support and work towards the mediation culture actively, if judicial normalization is to improve and all citizens access justice with equitability.

## **Introduction**

Mediation is fast becoming an appealing method of alternative dispute resolution (ADR) due to its efficacy in conflict resolution. Unlike litigation, which is often prolonged and conflict ridden, mediation persuades parties to find a solution which is satisfactory to both of them. The court system is one of the institutions that encourage mediation especially in countries like India where the case volumes are quite high making the courts less effective. The mediation process has also been embraced in the law practice and even the judicial practice in India over the years.

Also, The enactment of the Mediation Act, 2015 was a transformative step in India that gave weight to the practice of mediation. It was also noted that: there has been an increased appreciation of the advantages offered by mediation, as seen in the attitudes towards mediation over the years. This paper looks into the various dimensions of the judicial system towards the practice of mediation including, Important cases, legislative measures providing assistance, obstacles to the effective mediation practices and how to make it better.

## **Judicial Attitude Toward Mediation**

Judiciary being the main driver in which mediation has gained acceptability in the legal system has shaped the perception of mediation among the judiciary. Some of the noteworthy cases have illustrated how these mechanisms have been approved by the judiciary to be used in settling disputes. For example, in the case of Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. the Indian Supreme court recognized the very essence of mediation in the determination of disputes and stated that referring the parties to mediation was necessary in order to prevent potential escalation of the conflict. The Court's instruction which called for a consideration of mediation prior to embarking on any litigation activities, is an example of an advocacy that is aimed at creating favorable and positive attitudes towards mediation within the public sphere<sup>3</sup>.

On top of that, judges have always been encouraging mediation by giving rules on how to do mediation. The K.K. Verma v. State of U.P.<sup>4</sup> the case further solidified the judicial approach towards mediation in that the court insisted that the parties should attempt mediation prior to the commencement of court action. This has not only helped create awareness on the need for mediation but has also created a space for mediation practice as a credible way of

solving issues. Judicial performance is particularly significant in this case as it relates to mediation as well. The interesting thing is how the judiciary has addressed the issue and how the public attitude has changed thanks to the so called mediation oriented landmark decisions. This has been extended by the courts in that court-connected mediation and the systematic appointment of mediators has now been put into practice. The judiciary's advocacy of mediation has not only provided a surrogate feel of mediation to the legal professionals, however one of the very first audiences that the mediation became popular.

In addition, the endorsement of mediation by the higher judiciary creates a trend that further compels the lower courts to embrace mediation. Mediation is an approach whose greatness is made evident to judges of all ranks, especially when adorned by the higher courts who go ahead to assure the judges of its usefulness. This snowballing effect helps considerably in entrenching mediation in the legal order<sup>5</sup>.

Judicial strategies to encourage mediation include more than just the law. In this regard, several High Courts in India, set up mediation cells in the courts to avail of mediation services with ease. For example, the Delhi High Court has taken the lead in a number of initiatives aimed at promoting mediation in the courts by providing training opportunities for both judges and mediators so that standards of mediation practice are improved.

In addition, the Supreme Court's initiation of the Mediation and Conciliation Project Committee (MCPC) clearly indicates an interventionist stance by the judiciary towards mediation. Some of the initiatives of the MCPC are such as formulating the mediation practice directions and sensitizing the litigants on mediation thus creating conditions fair for the practice of mediation<sup>6</sup>.

### **Initiatives for Promoting Mediation**

An effective set of laws is imperative in ensuring that mediation is a key aspect of the mechanisms put in place for the resolution of disputes. To this end, the Mediation Act, 2015, is a major milestone in legislation, providing an in-depth legal architecture for arbitration and mediation in the country. The Act recognizes mediation and provides for it, as an important prerequisite to the disputes resolution process, thus reinforcing its use<sup>7</sup>.

The mediation initiative of the Kerala High Court is a classic example of how mediation can be embedded in the justice delivery system. The program has, since the beginning, solved thousands of cases which has helped in clearing the court of a lot of pending cases. One key aspect of this program is that it trains mediators because this has set high benchmarks for mediation in the state. The court has also supported further training of the mediators to ensure that they can manage productive conversations and handle conflicts effectively. This well-established system of training advocates in mediation has also been adopted by other states that desire to improve their mediation systems<sup>8</sup>.

Further to this, the Kerala High Court has undertaken vigorous campaigns to promote and market mediation to the litigants which has made this mode of dispute resolution widely accepted amongst the public. The Court has interacted with the public through outreach programs, establishing the practice of mediation among the people and encouraging them to mediate before going to court<sup>9</sup>.

In the same vein, the Delhi High Court has designed a mediation programme which has facilitated the overcoming of the obstacles that have come with the burden of high volume of cases. The High Court has also embraced mediation, viewing it as one of the verticals in the resolution of disputes and urged the parties to seek it very early during the course of their disputes<sup>10</sup>. There have been many benefits to the court systems that have implemented mediation programs such as the one above which have cut down case resolution time significantly, many cases being resolved in a session or two of mediation.

The monitoring and evaluation of mediation results has also been included in the structure of the Delhi High Court, which assists in the progressive development of the mediation system.<sup>11</sup> This approach assists the court in determining the success of mediation programs and locating the weaknesses in them so as to improve the outcome of litigants through changes in the operating protocols or processes.

The effectiveness of the mediation policy of the Delhi High Court exemplifies the necessity of the judicial system within the framework of mediation as a serious form of constructive dispute resolution practice<sup>12</sup>. The judiciary has not only advocated the promotion of mediation but has also shown support for its active implementation in order to increase the efficiency of the judicial system.

## **Judiciary's Role in Institutionalizing Mediation**

The role of the judiciary in the process of institutionalisation of mediation is very important for the sustainability of mediation as an ADR tool. There have been attempts to enhance court-connected mediation, which includes, for example, providing judges with instructions on how to promote mediation in suitable cases. These guidelines provide that it is better to address the conflict before filing the case, rather than after it has gone to court<sup>13</sup>.

Another necessary component of institutionalising mediation involves setting Bar for standards of mediators and their practices. The establishment of standards on training and accreditation of mediators will help the judiciary of the country in boosting the acceptability of mediation as a legitimate forum for resolution of disputes<sup>14</sup>. This standardization will also enhance the public's perception of mediation and encourage parties in conflict to consider it more as a viable alternative.

Apart from this, the judicial system may work with NGOs and the economy and promote mediation by public-private approaches<sup>15</sup>. This way, more mediation centres will be opened, more awareness will be created, mediation training will be better and the mediation system as a whole will be enhanced.

The judiciary may also engage with law schools in an effort to incorporate mediation in law training so that the lawyers of the future will have a deep appreciation of ADR processes. This will help the judicial system in that new lawyers will carry the spirit of mediation rather than only prognosis and resolution of problems within court settings.

Mediations programme's implementation will also be subject to continuous evaluation and monitoring in order to be able to improve the quality of mediation services and keep mediation from becoming ineffective dispute resolution channels<sup>16</sup>.

By taking the initiative in assessing mediation initiatives, the judiciary will be able to enhance its mediation promotion policies more effectively and in a timely manner with reference to the demands of the society.

In order to outline more ways in which the judiciary can be of assistance in enhancing the

practice of mediation, the following recommendations can be put forth<sup>17</sup>. The initial step would be to implement public education campaigns focused on the advantages of mediation. These campaigns would be directed to some or all of the social groups, which include but not limited to parties to the conflict, lawyers and the society at large in order to make them appreciate mediation<sup>18</sup>.

In the second place, critically, some amendments to the existing legislation may be required to ensure that the mediation process is more effective and integral<sup>19</sup>. That includes updating the current laws to enable more incorporation of mediation in the court processes and filling up the existing laws that do not support its effective application.

More so, focusing on building capacity of mediation services through developing practitioner training schemes for mediators and setting mediation practice standards will avail high quality mediation services. The judiciary is more likely to promote the respectability of mediation as an ADR process if it ensures that qualified mediators who can dispense justice are available<sup>20</sup>.

In addition, the judiciary has to stress the role of mediation in the practice of law. If the judiciary wants to ensure that mediation as a means of conflict resolution is more widely adopted, it has to encourage lawyers to mediate more<sup>21</sup>. This is possible via continuous legal education which appreciates the advantages of mediation as well as addresses issues of training in the practice of mediation.

There is also the attainable enhancement of the mediation process, which utilizes technology in the practice. The two or more parties engaging in mediation can do so thanks to online mediation systems, which auger well for accessibility<sup>22</sup>. The courts of law can also encourage the adoption of technology in mediation considering that in some instances, like parties being in different places or when they find difficulty in attending physical meetings, technology is imperative.

### **Conclusion**

Judiciary also has a very critical role in encouraging the use of mediation as a means of resolving disputes. In fact, the acceptance and practice of mediation in the country has been possible because of the judiciary's intervention through defining the concept in supreme court pronouncements, enacting laws enabling it and creating structures geared towards its design.

However, there are barriers which include unwillingness to accept a new role by the lawyers and issues of more public education and amenities.

The ongoing encouragement of the judiciary is important in instilling mediation as part of the practice and in promoting judicial efficiency. The justice system can take further steps to promote mediation by the implementation of the suggested actions in the justice system. There are many advantages associated with mediation in the contemporary scenario in India and therefore the prospects for its growth in future are very bright. In other words, it has the capability of reducing the load on the court system and delivering justice to people in all corners of the country with relatively low expense.

<sup>1</sup> Afcons Infrastructure Ltd. v. Cherian Varkey Constructions Co. (P) Ltd., (2010) 8 S.C.C. 24 (India).

<sup>2</sup> K.K. Verma v. State of U.P., A.I.R. 1954 All. 231 (India)

<sup>3</sup> Supra Note 1

<sup>4</sup> Supra Note 2

<sup>5</sup> Justice A.K. Sikri, *The Role of Judiciary in Promoting Mediation in India*, 18 SCC (J) 1, 3 (2018).

<sup>6</sup> Sriram Panchu, *Mediation in India: A Reflection on Its Journey and Challenges Ahead*, 14 Ind. Arb. Q. 73, 75 (2017).

<sup>7</sup> Anirudh Krishnan, *Mediation as a Tool for Access to Justice in Rural India*, 22 Legal Servs. India J. 156, 159 (2022).

<sup>8</sup> Centre for Mediation and Conciliation, *Best Practices in Mediation: The Indian Context*, Policy Paper No. 7 (2021).

<sup>9</sup> Justice R.V. Raveendran, *Mediation and Its Effectiveness in Settling Civil Disputes in India*, 18 Ind. L. Times 47, 50 (2019).

<sup>10</sup> Mohan Singh v. Karan Singh, (2020) 4 SCC 223.

<sup>11</sup> Nandini Mehta, *The Impact of Mediation on the Indian Justice System*, 12 S. Asian L. Rev. 71, 74 (2020).

<sup>12</sup> National Legal Services Authority, *Promotion of ADR Mechanisms*, Circular No. 12/2018.

<sup>13</sup> Supreme Court Mediation and Conciliation Project Committee (MCPC), *Guidelines on Mediation*, 2021.

<sup>14</sup> Draft National Mediation Bill, 2021, Ministry of Law and Justice, India.

<sup>15</sup> Sriram Panchu, *Mediation in India: A Reflection on Its Journey and Challenges Ahead*, 14 Ind. Arb. Q. 73, 75 (2017).

<sup>16</sup> Harish Salve, *The Impact of ADR Mechanisms in the Indian Legal System*, 7 Ind. J. Disp. Resol. 98, 100 (2021).

<sup>17</sup> Afzal Wani, *Mediation in India: Legal Perspective and Future Prospects*, 25 NALSAR L. Rev. 130, 132 (2019).

<sup>18</sup> *Id.*

<sup>19</sup> Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, Rep. No. 246 (2014).

<sup>20</sup> Sriram Panchu, *Mediation in India: A Reflection on Its Journey and Challenges Ahead*, 14 Ind. Arb. Q. 73, 75 (2017).

<sup>21</sup> Tarun Krishnan, *Commercial Mediation in India: Opportunities and Challenges*, 19 Ind. Comm. Arb. Rev. 87, 89 (2021).

<sup>22</sup> Delhi Mediation Centre, *Annual Report 2020-2021*, at 15