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EVALUATING THE EFFECTIVENESS OF MEDIATION IN RESOLVING FAMILY DISPUTES IN INDIA: A CRITICAL ANALYSIS OF LEGAL FRAMEWORKS, CHALLENGES, AND FUTURE REFORMS

- Devang R
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ABSTRACT

This research paper critically appraises the swelling dependence of Indian family law disputes into the mediation as a proceeding to solve such disputes related to matrimonial discord, divorce, child custody, and maintenance. The study recognizes that the conventional litigation is inherently adversarial and procedural rigid, but also posits that mediation is a non-confrontational and temporal efficient, cost effective, and preserves the familial relations and encourages amicable settlement.

The first part of the paper considers the existing legal framework dealing with mediation in India. *Section 9 of the Family Courts Act, 1984*¹ lays down a mandate in a family court that it should make efforts for settlement prior to going into the trial, thus institutionalizing mediation as a primary remedy. Also, *Section 89 of Code of Civil Procedure, 1908*² as amended allows courts to refer dispute to alternate dispute resolution, most of which include mediation. It also probes the role of the Supreme Court's *Mediation and Conciliation Project Committee (MCPC)* which works towards systematic standardisation and streamlining of mediation practices in the judiciary.

The paper addresses the success rate of mediation through an evaluation of empirical data as well as select case studies. There are reports of how family disputes are resolved at court annexed mediation centers like the *Delhi High Court Mediation Centre (Samadhan)* and the *Bangalore Mediation Centre* and how a promising rate of dispute resolution from these centers relay the success rates in family matters. Landmark judgments including *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010)³, and *K. Srinivas Rao v. D.A. Deepa*, (2013)⁴, reaffirm the judiciary's endorsement of mediation in matrimonial disputes.

Nonetheless, despite that, the paper is not averse to discuss the systemic barriers to effective mediation. Inadequate public awareness, no trained standards for mediators, social or cultural bias (especially gender) and not everyone a user's mediator is discussed critically. Relying on a survey of the mediation literature and studies conducted by the UNDP in Uganda, the study concludes by proposing legal and institutional reforms such as mandatory pre-litigation mediation and the creation of a national accrediting body for mediators as well as targeted public sensitisation programmes that facilitate the efficacy and scope of mediation in family law.

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¹ *Sec.9 of the Family Courts Act, 1984*

² *Sec.89 of Code of Civil Procedure, 1908*

³ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

⁴ *K. Srinivas Rao v. D.A. Deepa*, (2013) 5 SCC 226

INTRODUCTION

Thrust is the central question: Can mediation appropriately handle the rush of family disputes (especially parties of divorce, disparity of custody and maintenance) against the Indian advocacy litigation framework which has always been adversarial. Under *Section 9 of the Family Courts Act, 1984*⁵, family courts have to endeavor to settle the matters before taking up the trial; *Section 89 of the Code of Civil Procedure*⁶, 19 August 1908, authorizing the courts to send civil matters to alternative dispute resolution (ADR) including mediation. The Mediation Act, 2023 was enacted by Parliament and was assented to by president on September 14, 2023. To institutionalize mediation, the Act proposes to create a Mediation Council of India, demands for mediator's accreditation, introduces pre litigation/online mediation, and provides that the settlement will be enforceable as statutory agreement.

However, applied these statutory norms, one should see a mixed picture. Court annexed centres like Samadhan of the Delhi High Court and Bangalore Mediation Centre show that such family law referrals have been resolved above 50 percent in more than a month. What has been commended by judicial pronouncements is mediation's ability to salvage relationships through the mediation of communication in an confidential and non-adversarial setting. These cases illustrate the courts' purpose to handle these cases as mediation friendly because of the relational dynamics that are sensitive, ongoing.

However, the full potential of the *Mediation Act 2023*⁷ is still unfulfilled. Although the legislation was to take effect soon, it has been hamstrung by a dearth of final rules and regulations for mediators setting out standards of procedural and conduct rules. Now, in January 2024, a working committee under former Law Secretary P K Malhotra is yet to pass the necessary regulations; which renders mediators and dispute resolution institutions unsure and deprived litigants of the Act's comprehensive framework. Without these rules, mediators are un-certified, process is not uniform, and there are no enforceability provisions, all of which undercut public confidence and impede mediation's entrance into family law practice. The article concludes that although the legal structure that supports mediation in family disputes in India is strong on paper, missing or too little rule making and implementation inhibit its transformational potential. Therefore, the Mediation Rules have to be immediately promulgated, mediators have to be properly accredited, and initiatives to promote mediation need to be sustained. It is only then that mediation can become the preferred first recourse for India's burgeoning family law litigants.

⁵ *Supra* note 1.

⁶ *Supra* note 2.

⁷ *Mediation Act 2023*

LEGAL FRAMEWORK GOVERNING MEDIATION IN FAMILY LAW

As family disputes in India grow into more of a sensitive and sometimes taboo transaction, the statutory and institutional framework pertaining to mediation in family disputes tends to fall under the growing trend of alternative dispute resolution (ADR) mechanisms. Institutional developments and key legal provisions highlight the crucial significance of mediation as an approved approach to deal with disputes.

SECTION 9, FAMILY COURTS ACT, 1984

A legislative mandate to assist and persuade parties to meet and resolve their family problems is embodied in *Section 9 of the Family Courts Act, 1984*⁸. This provision is consistent with the legislative intent to encourage reconciliation and avoidance of adversarial litigation rather than adversarial litigation. The statute also provides that the Family Court shall adjourn the proceeding at any stage to the end that it may settle the matter, and for that purpose it can adjourn such proceedings for so long period that it may think fit. As this statutory obligation effectively posits mediation as a preferred and necessary precursor to adjudication in the areas of matrimonial and related disputes, mediation then becomes almost an engagement of right and a statutory duty of a couple intending to proceed to court. Section 9 of the language does not simply grant family courts a discretion but a duty to investigate whether a settlement is possible, which corroborates the therapeutic and reconciliatory ethos of the family jurisprudence in India.

SECTION 89, CODE OF CIVIL PROCEDURE, 1908

In fact, *Section 89 of the Code of Civil Procedure, 1908*, as amended by the CPC (Amendment) Act, 1999, authorizes the civil court to provide such disputes to be settled by ADR methods, comprising arbitration, conciliation, judicial settlement, Lok Adalats and mediation. This is a major legislative change in favor of decongesting courts and encouraging alternative dispute resolution. Where, however, the section appears to have something something of a settlement, courts are required to formulate terms of any possible settlement and to refer the matter to one of the specified ADR forums. Section 89 has been operationalized in the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003, which are procedural rules spelled out for mediation referrals. Section 89 is applicable generally to civil disputes though and is also applicable to family disputes, reinforcing the direction of the Family Courts Act through the process of procedural alignment.

SUPREME COURT MEDIATION AND CONCILIATION PROJECT COMMITTEE (MCPC)

Created by the Supreme Court of India in 2005, the *Mediation and Conciliation Project Committee (MCPC)* is an institutional initiative worth noting in order to mainstream mediation within the Indian legal system. The MCPC has provided very important

⁸ Supra Note 1

leadership in establishing the mediation infrastructure, training of mediators and stimulation of court annexed mediation centres throughout the country. The MCPC has helped to integrate mediation into family court proceedings as an option for resolving sensitive issues with confidentiality, flexibility, with a limited impact on the adversarial process. This work of the committee standardizes and also institutionalizes mediation practices and thereby enhances the judiciary's commitment to ADR in family law matters.

JUDICIAL ENDORSEMENT AND KEY CASE LAW

Mediation has time and again been reiterated as an effective mechanism for resolution of family disputes by the Indian judiciary – enabling the maintenance of family relationships, avoidance of adversarial confrontation and quid pro quo resolution. The Supreme Court as well as the High Courts have institutionalized the practice of referring matrimonial disputes for mediation as an expert policy of judicial practice, through a series of landmark decisions.

AFCONS INFRASTRUCTURE LTD. V. CHERIAN VARKEY CONSTRUCTION CO. (P) LTD., (2010)⁹

The subsequent judgment in Afcons Infrastructure is primarily a commercial dispute, but its obiter dicta is of broader interests, and in particular that which is relevant to family law. Interpreting Section 89 of Code of Civil Procedure, 1908, Supreme Court has classified different type of disputes as amenable for the ADR process. The matters of matrimonial and family disputes were expressly identified as particularly suited for mediation. Such disputes, even by their nature, involve persons and emotions in personal relationship, which are much better resolved by conciliatory methods, as opposed to adversarial litigation. It was accordingly recommended by the Court that any matrimonial disputes should be referred to mediation as a routine unless there were exceptional circumstances to that effect. It established a pattern that other courts across jurisdictions would follow by looking into the systemization of the use of mediation in family cases.

K. SRINIVAS RAO V. D.A. DEEPA, (2013)¹⁰

In this respect, the Supreme Court reasserted the need of mediation in matrimonial disputes specially under s. 13 of the Hindu Marriage Act, 1955. The Court noted that many such cases arise from transient misunderstanding, emotional impetus or external pressure. Timely intervention was attempted through mediation and it was observed that a number of these disputes could be resolved on a more amiable basis, thereby preserving or, at least, enabling an amicable sounding piece and less acrimonious separation. The Court demanded the setting up of counseling and mediation centres in all family court premises and urged for having trained counselors to assist the parties in finding their ways of reconciliation.

SHIKHA BHATNAGAR V. GAURAV BHATNAGAR, 2014¹¹

In the Delhi High Court, which is the vehicle of this decision, the question as to whether parties could be referred to mediation by a family court before proceeding with trial posed itself. The highlighting of the importance of pre litigated mediation in matrimonial dispute further in upheld the referral by the Court. It held that the family courts Act of 1984 was not only an adjudicatory but also a reconciliatory purpose of that Act. The judgment followed that family courts are statutorily under a duty to consider if settlement is possible and that they should proactively refer cases to mediation at the first possible opportunity.

Each of these decisions cumulatively expresses the judiciary's general tendency to perpetuate mediation as the first and most auspicious mechanism of dispute resolution within the family domain.

⁹ Supra note 3

¹⁰ Supra note 4

¹¹ *Shikha Bhatnagar v. Gaurav Bhatnagar*, 2014 SCC OnLine Del 6396

EMPIRICAL EVIDENCE SUPPORTING THE EFFICACY OF MEDIATION IN FAMILY DISPUTES.

Data from the leading mediation centres and legal services authorities of India confirms the fact that mediation is very effective in resolving the family disputes. These statistics are not only about the developing capacity to handle the sensitive family affairs through alternative dispute resolution (ADR) but also indicate that mediation can lead to amicable settlements, reduce judicial backlog, and to a very limited extent reduce post litigation adversities.

DELHI HIGH COURT MEDIATION AND CONCILIATION CENTRE (SAMADHAN)

Samadhan (also known as Delhi High Court Mediation and Conciliation Centre) is a pioneering institution working for court annexed mediation, more specifically in the field of family matters, primarily in the Delhi High Court. According to its Annual Report for the Year 2022, around 6,500 matrimonial and family disputes were brought before mediation, and more than 60 % of which were settled amicably. Most importantly, most of these cases have been brought to an end within number of mediation sittings, clearly demonstrating the efficiency and expeditiousness of the process. What these figures remind us is that mediation is capable of providing timely relief in the emotional family disputes by preserving the dignity of the parties. The data also reveal that trafficking parties are more inclined to settle a dispute in structured dialogue than they are to take the dispute to an ‘unstructured’ mechanism for resolution.

BANGALORE MEDIATION CENTRE (BMC)

It is an institution of mediation under the Karnataka State Legal Services Authority and working under the control of High Court of Karnataka, Bangalore Mediation Centre (BMC) has become India’s model of institutionalized mediation. Similarly in 2021, the resolution success rate of 51.4% for family disputes referred to mediation as reported by the BMC. Notably, these cases were settled within a 60 days period indicating that the mediation process was time bound. The combined factors of a structured yet flexible framework formed by the BMC and the mediators involved have worked miracles in resolving issues as complex as divorce, maintenance and child custody, without having to cope with a prolonged litigation.

MAHARASHTRA STATE LEGAL SERVICES AUTHORITY (MSLSA)

The Maharashtra State Legal Services Authority (MSLSA) study is done in 2020 and is a study which gave us critical insights on how family law cases can stand to benefit from mediation over long term. According to the study, cases mediated showed a significant decrease in the number of cases filed after a divorce, namely ones concerning custody over children, visitation, and maintenance. This data shows both that mediation does this: It enables initial resolution of the dispute, but also that it has done that: It engenders sustainable agreement that mitigates against future legal conflict, too. According to the MSLSA’s findings, mediation has the potential to significantly change toward more cooperative co-parenting and less adversarial post separation dynamics.

Substantially, institutional experiences and outcomes make a very compelling case for mainstreaming mediation as default mechanism for family law disputes as mandated by statute and upheld by the courts.

FINDINGS

The research demonstrates that mediation is becoming increasingly utilized in alleviating family disputes in India. As an informal, non-adversarial and structured process, mediation is one which prioritizes over adversarial litigation the mutual understanding and reconciliation through communication. Family law confronts also emotional stress, social stigma, and long duration consequences, but mediation offers in this context parties a possibility to accomplish more humane and sustainable settlement without undermining familial relationship and safeguard children's interests.

The three together give weight to the fact that mediation is now an institutional imperative of family dispute resolution. The *Family Courts Act, 1984* has been mainly section 9 of which continues to remain the base mandate for pre litigative settlement efforts by family courts. This is supplemented by *Section 89 of the Code of Civil Procedure, 1908* which empowers the courts to refer the matter to mediation as well as other ADR systems. The Civil Procedure Mediation Rules, 2003 are also supportive of these provisions as they give guidelines on how to conduct court referred mediation.

There is increasing institutional and governmental pressure to mainstream mediation. The fact that Parliament brought *Mediation Bill, 2023* into force with approval is seen as a key legislative achievement. The Bill now makes provision of a comprehensive statutory framework for mediation of civil and commercial matters in particular allows for mediation of family disputes. Other key features are the recognition of mediation before the filing of a suit, confidentiality safeguards, legal enforceability of mediated settlements and set up of a Mediation Council of India for accreditation and management. Given that the legislation is in the process of being operationalized its implementation is anticipated to greatly improve institutional support for family mediation and public trust in the process.

As the empirical data demonstrates, the mediation in family matters remains efficient and successful. For example, Delhi High Court Mediation and Conciliation Centre (Samadhan) also note that in 2022, nearly 60% of family disputes referred to it were settled amicably, sometimes within three sessions. In 2021, family mediation in Bangalore Mediation Centre was successful in 51.4 percent of cases, four out of the nine mediated, with nine already settled within two months. Again, as per the Maharashtra State Legal Service Authority (MSLSA), family settlements mediated had a tremendous reduction in post-divorce litigation, particularly in the custody and maintenance cases.

Overall, the findings here exhibit that mediation not only is supported by the legal mandates, but also to some extent mediates this in terms of speed of dispute resolution, how cheaply they are, and the degree of post resolution stability. Coming up with legislation and institutional reforms, the integration of mediation in the formal framework of dispute resolution in India signals a process of progressive movement toward a human, easily accessible and effective family justice system.

CONCLUSION

The mediation of disputes by consent has developed itself into a paradigm of resolving disputes of family nature in India, paying off being an alternative to an emotionally and financially draining adversarial litigation process. Mediation rests on statutory mandates that require focusing on mediation as the preferred mode to settle family law issues as provided under *Section 9 of the Family Courts Act, 1984* and *Section 89 of the Code of Civil Procedure, 1908*, that emphasizes reconciliation, empathy, and voluntary participation, distinct characteristics of family law issues. On the first front, the research shows that even today by institutionalizing the process of mediation, the benefits have been highly promised with empirical evidence from court annexed centers such as Samadhan of Delhi and the Bangalore Mediation Centre showing satisfaction rates of high resolution within short duration.

Recent legislative initiatives, particularly the *Mediation Act, 2023*, mark a significant evolution in India's dispute resolution landscape. These comprise of Act's provisions for pre-litigation mediation, accreditation of mediators, enforceability of settlements and establishment of the Mediation Council of India, which together indicate a commitment to mainstreaming mediation as a viable and a trustworthy legal process. But because the promised law has not been fulfilled in its entirety, as finalization of operational rules, standards and certification mechanisms has been delayed, the promise of this legislation too remains partly unfulfilled. The regulatory frameworks being missing would make the mediation process cannot be wholly capable and leave public trust in the process would suffer.

But to move forward, the successful implementation of the Mediation Act must be topped on the agenda. This involves speedy issuance of rules and guidelines, thorough and comprehensive training of mediators, improved infrastructure of family courts and spreading awareness across the country. Such attempts will lead to a sense of consistency, accessibility and professionalism that will prevail in the mediation practice, more specifically, in unserved rural areas.

In conclusion, mediation has albig more than a procedural alteration: it is a cultural and systemic movement in the mindset of India pertaining to family justice. This if something that promises a legally responsive system, but in addition, that delivers emotionally responsive one as well, a much more humane, a much more efficient, a much more responsive family law system.

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