
IMPACT OF MEDIATION ON FAMILY DISPUTES

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ABSTRACT

The interpretation of marriage and its importance in society has changed significantly in recent years. The idea of marriage lasting a lifetime is no longer the norm, as equality is now more important than hierarchy in family law. As a result, more reasons for family conflicts have arisen, leading to the acceptance of ending marriages that are unbearable or unsatisfying, mostly due to the influence of equality and modern trends from the western world. Families play a vital role in all societies and communities. A family is both a group of people and a structured institution. Within the family, emotional needs are prioritized alongside, and possibly even more so than, financial obligations. Disputes related to property inheritance and divorces are increasingly frequent. Potential reasons may include mental health issues, work-related stress, and financial worries. India is the most populous country in the world, home to around 1.41 billion people. The ADR Act of 1996 provides alternate methods of dispute resolution because our legal system finds it challenging to handle all of the little to major issues pertaining to its citizens.

The paper primarily deals with the specific branch of ADR i.e. Process of Mediation in dealing with divorce and other family matters as to when it is beneficial. Today, it is important to use different methods to solve marital issues in order to preserve the integrity of the family, with mediation being a key tool for saving both time and money.

INTRODUCTION ON ADR

Over time, numerous advancements have occurred in the legal sector regarding the resolution of conflicts among varying parties. One development worth mentioning is alternative dispute resolution (ADR), where disputing parties can find a mutually acceptable resolution without going through the conventional court system. The ADR mechanism and its different modes have become extremely popular since their introduction. Currently, it is the favoured method of resolving conflicts in numerous countries across the globe. This is due to how effective and efficient they are in resolving disputes among individuals, organizations, businesses, and other entities in legal conflicts. These legal disputes can be civil, business, and sometimes even criminal.

As we are now fully aware of the large number of pending cases before Indian courts. This delay not only puts strain on the judicial system, but also underscores the fatigue that a litigant can experience from the traditional process of court administration. And this is precisely what led to the necessity of implementing ADR practices in India. The Malimath Committee's report (Malimath, 2003)¹ also suggested that the courts should send disputes for resolution through appropriate ADR methods such as arbitration, mediation, conciliation, and negotiation

A Tale of Indian Courts: What Determines if a Dispute can be Resolved through ADR?

According to Section 89² of the Code of Civil Procedure, 1908, Arbitration, Conciliation, Judicial Settlement, and Mediation are all approved ways to settle disputes without involving the court.

The Supreme Court, while interpreting Section 89 and Order 10 Rule 1A of the Code, in the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd*³, the Supreme Court clarified that even when a case is referred to mediation, the court maintains its control and jurisdiction over the matter. Furthermore, any mediation settlement must be presented to the court for formal recording and disposal. This demonstrates the court's commitment to ensuring that mediation is carried out in a thorough and comprehensive manner in every possible aspect.

¹ https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf

² Civil Procedure Code, 1908, § 89, No. 5, Acts of Parliament, 1908 (India).

³ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd*, (2010) 8 SCC 2014

The court decided that arbitration tribunals are part of private forums, while courts are part of public forums. As such, courts can solely address civil disagreements between individuals who establish personal rights, not property rights, as they belong to private forums. A right in rem can be enforced against the entire world, while a right in personam is only protected against certain individuals. Rights in rem are decided by public courts because they are enforceable against everyone and impact the public in general. In contrast, arbitration involves resolving conflicts privately in front of a private body, with the process and decisions remaining confidential

The Supreme Court expressly forbade the arbitration of criminal matters in the *Booz Allen and Hamilton v. SBI Home Finance Limited and Ors*⁴. decision. The court went one step further and ruled that arbitration is not an option for marriage disputes. Such a decision was justified by the difference between rights in rem. In *Booz Allen*, the court made a note that because marital disagreements lead to entitlements and claims against the entire community, the court ruled that they should be settled in a court.

Hence, while the *Afcons* case acknowledged the arbitrability of matters like child custody and maintenance, the *Booz Allen* case indirectly overturned this view, strengthening the opposition to matrimonial arbitrations and generating a conflict between the two rulings at the same time.

What do you mean by mediation?

Mediation requires conflicting parties to work together with a non-biased mediator to find and resolve conflicts, with the goal of creating a resolution that satisfies both sides. This procedure is private, optional, and involves all parties, enabling them to share their complaints and feelings while creating unique solutions for their situations. The mediator helps instead of forcing solutions, creating a supportive environment for parties to peacefully settle their conflicts. Previously viewed as a different option, Mediation is now a crucial aspect of the conflict resolution process, conserving resources and maintaining social unity. In a time when online communication often takes the place of in-person interactions, Mediation plays a key role in preserving social capital by maintaining interpersonal relationships in a rapidly evolving world. Mediation is a process in which a neutral mediator assists in resolving a dispute between parties without forcing any specific outcomes. It is a casual and collaborative method focused

⁴ (2011) 5 SCC 532.

on assisting conflicting parties in reaching a resolution that is mutually satisfactory. The mediator serves a double purpose, getting both parties ready to find a solution by serving as both a counsellor and mediator, leading them towards a mutually acceptable answer that encourages long-lasting peace. The mediator might need to provide advice to both sides, possibly even convince them to see the potential of a suggested resolution. Suggestions for resolving the issue may come from the mediator or either party involved. The mediator's job is to continuously close the distances in those suggestions to achieve an agreement.

Types of conflicts occurring within families

Family conflicts can take many different forms, and they change for each family size, from large joint families to small nuclear families. The following is a list of the different disagreements that arise:

Divorce and separation issues: Marriage is both a social occasion and a legal responsibility. Divorce-related matters are a significant cause of family disagreements. There could be multiple situations that lead a couple to decide to end their relationship such as work stress, issues with in-laws, problems related to children, financial instability, etc. The primary cause of disagreement in divorce is the disagreement between both partners who participate in two different areas of career, have little time for the other, and have various aspirations for life⁵.

Inheritance: Who will be the property's heir? This question is the root cause of inheritance and property division issues. Siblings fight over money and commodities, or children begin to have issues with their parents. Siblings running a family company face similar circumstances. Their disagreements become a frequent problem.

Eldercare: Often disagreements occur among siblings over who will be responsible for caring for the older family members. If one sibling is tasked with caring for the parents, the others may perceive favouritism towards that sibling, leading to further conflict.

Child custody: Mediation is essential for settling child custody disputes in India through a child-focused, voluntary, and collaborative process. It provides parents with a chance to

⁵ https://www.psychologicalscience.org/journals/cd/12_1/Fincham.cfm visited on 13 April 2021

collaborate with the help of a neutral mediator in creating custody and visitation agreements that prioritize the well-being of their child.

Mediation in matrimonial disputes

Mediation has become the favoured method for resolving marital conflicts. Mediation is highly important in family conflicts as they involve legal, factual, and emotional aspects. Mediating conflicts between spouses is significantly different in approach and content when compared to mediating conflicts in business or property matters. Marital disputes are unique because they involve emotions, motives, societal pressures, individual duties, the couples' outlook on life and marriage, and thoughts about the future. Supporters of mediation stress its capacity to maintain family connections, protect children from trauma linked to conventional divorce processes, and guarantee fast resolution. In addition, mediation has various benefits such as privacy, affordability, informal processes, parties' control, and consensus. Crucially, it is in accordance with the principle of delivering justice promptly, which is crucial in addressing marital disputes. Ultimately, despite the hurdles the Indian Judiciary encounters in managing the increasing number of cases and guaranteeing prompt justice delivery, mediation is one of those alternative dispute resolution methods which present feasible answers. Adopting these techniques can reduce the workload of the official court system and speed up the settling of conflicts, thus maintaining the ideals of fairness and justice.

In *Rao v. L.H.V. Prasad*⁶, the court determined that marriage is traditionally seen as a heterosexual institution centered around children in our society. Nevertheless, when a marriage falls apart, it requires changes in multiple interactions, which can disturb the usual balance and peace within the family. As a result, family laws and courts mostly focus on encouraging marital disputes to be resolved through reconciliation and friendly agreements instead of going to court.

In the case of *Gaurav Nagpal v. Sumedha Nagpal*⁷, the Supreme Court voiced worry about the excessive amount of divorce and judicial separation cases clogging the courts. The Supreme Court declared that the Hindu Marriage Act outlines when a divorce can be pursued. Typically, if a marriage is not beyond repair, the presence of a divorce option should not push individuals

⁶ 2000 INSC 122

⁷ AIR 2009 SCC 557

to end the relationship. The objective should aim to preserve the marriage instead of ruining it. Court proceedings should only be used for severe situations when someone's marriage is permanently damaged.

In Divorce cases

Mediation is necessary during the divorce process because divorcing couples understand that, although ending the legal contract between a husband and wife, divorce also dissolves the household that was built on that marriage. Divorce is the legal process through which marriage is dissolved. It also fails to break the bonds that the pair had before being married. However, compared to other family disputes, where time constraints and torturous/embarrassing arguments are commonplace in the Indian litigation world, mediation settlements can be more beneficial when it comes to divorce proceedings because they require more support and tolerance and deal with a greater number of stakeholders and a lot of emotions. A mediator is a qualified professional who helps the parties negotiate on their own terms without imposing their will on them. A mediator is a therapist of some kind who helps the parties comprehend the circumstances and likely outcomes.

In the case of *K. Srinivas Rao v. D. A. Deepa*⁸, the Supreme Court examined pre-litigation mediation concerning family matters. The husband requested a divorce citing mental cruelty, as the wife had wrongly filed a criminal case against him and his family. The court approved the husband's divorce and highlighted the advantages of pre-litigation mediation for solving disputes. The Court recognized that litigation can be used to resolve disputes that arise over minor matters. The Supreme Court has ordered that pre-litigation clinics be established at all mediation centres within family courts.

In Child custody cases

As the divorces have been on the rise in the last two decades, there is a countrywide effort to promote mediation as a method to address child custody matters in families going through divorce. By using mediation, a neutral third party facilitates communication between disputing parties to help them reach a resolution. The objective of mediation in a child custody case is to enhance the welfare of the child and foster cooperation and dialogue between family members,

⁸ (2013) 5 SCC 226

promoting increased involvement of each parent with the child and helping in developing a custody arrangement tailored to the individual needs of each child. The mediator helps parents create successful co-parenting strategies that decrease conflict and improve parent-child relationships through promoting communication and teamwork. Also in custody disputes, mediation offers parents greater flexibility and control compared to legal proceedings. Instead of relying on a court decision, parents can take an active role in drafting agreements that suit their family's unique dynamics and situations.

According to the legal precedent set in *Smith v. Johnson* (2019)⁹, the mediator played a crucial role in fostering communication and cooperation between the parents in mediation meetings. The mediator helped the parents move past anger and concentrate on creating a custody agreement that they both agreed on by providing a neutral space for discussion and encouraging respectful communication. Mediators help parents in resolving conflicts related to parenting by utilizing methods such as brainstorming, negotiation, and compromise to assist them in reaching agreements that are acceptable to both parties and reducing hostile interactions.

The case law in *Re Marriage of Thompson's* (2017) shows that the mediator in helping parents with custody and visitation problems used conflict resolution methods to find new solutions. The mediator assisted the parents in creating a parenting plan that resolved their issues by promoting a problem-solving method and pursuing compromise. When custody and visitation agreements are being made, factors such as distance to schools, work schedules, transportation plans, and the child's needs are all considered. In conclusion, child custody mediation is a cooperative method for settling conflicts that aims to enhance communication, explore other solutions, address the needs of both parents and children, and create agreements that meet everyone's needs.

If it is suitable to use mediation in instances of Domestic Violence

Section 498A of the Indian Penal Code, 1860, also referred to as the "IPC," deals with domestic violence. According to the CrPC of 1908, domestic violence is a crime that cannot be settled out of court. The gravity of these offenses cannot be reduced by the courts. Instead, the courts have taken a different approach. Courts have not opposed the use of mediation for resolving

⁹ *Johnson v. Smith*, 328 So. 3d 145 (Miss. Ct. App. 2021)

marital conflicts.

In the case of Mohd. Mushtaq Ahmed vs. State¹⁰, the wife lodged a complaint under Section 498A of the Indian Penal Code against her husband along with filing for divorce. The Karnataka High Court ordered the couple to participate in mediation. Once all was resolved, the wife chose to retract the FIR.

In the Gurudath K v. State of Karnataka case¹¹, the High Court ruled that it can dismiss criminal cases, FIRs, or complaints to further the interests of justice, even if the offences are not compoundable, pursuant to its inherent jurisdiction to serve justice. If the parties have reached a friendly agreement, there is no problem. The Indian courts' choice to implement this modification would reduce the probability of the defendants in cases of domestic violence being convicted. Between 2003 and 2013, there was a 134 percent rise in domestic abuse complaints filed, from 50,703 to 118,866.

How Mediation creates emotional and financial benefits?

The parties to the dispute have the opportunity to improve socially and personally through mediation, which is beneficial. The expectation of substantive justice is accompanied by the concept of voluntariness and the parties' own construction of the solution¹². The court ruled in the case of Moti Ram Tr.Lrs. & Anr. vs. Ashok Kumar & Anr.¹³ that the mediation process is private. The mediator does not need to reveal the details of the sessions that were effective when reporting to the court. If it is unsuccessful, he can simply file a report stating, "Mediation was not successful." The mediator's objective is to achieve enduring peace. The parties have agreed to collaborate to find a solution that allows them some control over the outcome and is satisfactory to both. In general, *mediation is less taxing than litigation*.

Confidentiality: Mediation sessions are private, so any conversations had in mediation cannot be brought up in court if an agreement is not reached. This promotes transparent communication and enables parties to consider different options without being judged. Mediation's private setting offers a secure space for individuals to address their issues and talk

¹⁰ Mohd. Mushtaq Ahmed V. State, (2015) 3 AIR Kant R 363

¹¹ Gurudath K. vs. State of Karnataka (20.11.2014 - KARHC) : MANU/KA/2695/2014

¹² https://www.researchgate.net/publication/308134271_Mediation_for_resolving_family

¹³ Moti Ram Tr. LR's and Anr. v. Ashok Kumar and Anr. (2011) 1 SCC 466.

about delicate matters, especially crucial in family conflicts.

Tailored Agreements: Mediation provides the opportunity for innovative and adaptable solutions that may not be possible in a court proceeding. Parties can come to an agreement on arrangements that are most suitable for their specific situations, such as child custody, asset division, or support payments. The mediator can assist the parties in dealing with not just the legal elements of their conflict, but also emotional and practical matters, resulting in a more holistic outcome.

Reduced Emotional Stress: Mediation is typically a less stressful option compared to court proceedings due to its avoidance of the confrontational setting of the courtroom, enabling more relaxed and adaptable conversations. The mediator plays a crucial role in handling emotions, easing tensions, and promoting positive communication, especially in emotionally intense family conflicts.

Empowering Parties: Mediation gives the parties the ability to make their own decisions instead of having a judge impose a solution on them. This frequently results in outcomes that are more satisfactory and long-lasting, since both parties are more prone to stick to an agreement they have made together. Both sides can actively engage in the resolution process, expressing their worries and preferences, resulting in more customized solutions.

In the case of *Manas Acharya v. State & Anr*¹⁴, By highlighting that any settlement achieved through mediation or the mediator's judgement is valid and lawful and that any decision made during the mediation process is binding on both parties, the court adopted a stance that was even more favourable of mediation.

How these mechanisms are different in India as compared to other countries like UK, USA?

UK

Family law arbitrations in the UK were established in 2012 by the Institute of Family Law Arbitrators. In this case, couples can only settle financial disputes through arbitration and are not allowed to go to court for a decree. In other words, they cannot make decisions on child

¹⁴ *Manas Acharya Vs State & Anr*, CRL.M.C. 2090/2012

custody or obtain a divorce decree. Arbitrations are usually employed solely for monetary disagreements arising from a divorce or separation. Property and inheritance issues related to marriage can be resolved through arbitration in a similar manner.

Furthermore, in order to promote the utilization of arbitration in family conflicts, the Institute of Family Law Arbitrators (IFLA) launched the Family Law Arbitration Children Scheme in 2016. This allows families to resolve disputes over parental responsibility and child well-being matters through the process of child arbitration¹⁵.

Disagreements between parents or individuals with parental responsibility may occur regarding where a child should reside, shared living arrangements, visitation schedules, holidays spent with a non-custodial parent, routine disputes, and non-emergency medical care¹⁶.

USA

The idea of mediation was initially introduced in California, which was the first location in the United States and globally to officially acknowledge mediation as a court service. An Atlanta lawyer named O.J Coogler greatly contributed to establishing a framework for the mediation process, making it simple to reproduce and instruct. By the late 1980s, the structure of the process facilitated its expansion throughout America and other countries. The creation of a mediation framework and layout allowed the method to be utilized in various dispute situations beyond just divorce and family matters, and the central aspect of the model is still being utilized.

When it comes to America's extensive knowledge, California required conciliation before divorce trials involving child custody or visitation in the past decade, similar to mediation according to Rau, Sherman, and Peppet, with other states following suit through court rules. Therefore, it is evident that mediation was initially employed in addressing family conflicts as it aligned with the demands and circumstances of that period. And today, as per the author, that just needs to be heightened, and California's example shows the feasibility of solving family conflicts through mediation. In *Sheets v. Sheets*¹⁷, The court praised the use of arbitration while

¹⁵ Children Arbitration, <https://becket-chambers.co.uk/2017/05/17/2186/>

¹⁶ Children Arbitration, <https://www.familylawpartners.co.uk/how-we-work/children-arbitration>

¹⁷ 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1964).

retaining the authority to reverse the arbitrator's decision. Therefore, the arbitrator's ruling is open to court scrutiny, especially in cases involving children.

Suggestions

In India, continuous deliberations and experiments of non-court methods like mediation, conciliation, arbitration, and negotiation, along with easier legal options, aim to offer a tangible ray of hope for justice to the average citizen. The growing number of pending cases in the judicial system may lead to unfair outcomes for the average person. In order to attain the goal of ensuring justice for everyone through alternative dispute resolution (ADR) techniques, the researcher wishes to suggest the following recommendations

- The primary and most crucial step that the government should take is to raise awareness about the ADR process. This can be achieved by creating a website, utilizing various media channels such as local cable TV, radio, pamphlets, brochures, and newspapers, and organizing seminars, workshops, and symposiums.
- Legal professionals need to shift their focus to become practitioners in Alternative Dispute Resolution (ADR). In order to help with this transition, attorneys should be trained properly and participate in role-playing or simulated exercises. Different groups of mediators and conciliators need to be designated to function efficiently in specific fields such as family law or corporate disputes.
- In India, community mediations—particularly through the village or caste panchayat—are a tried-and-true traditional method of resolving disputes. Although the latter has drawbacks and panchayats have been known to inflict more injustice rather than settle conflicts, it would not be wise to completely abandon communal mediation. Private and community mediation can provide individuals in India practical mediation choices if they are appropriately redesigned and addressed within a contemporary, liberal framework.

Conclusion

Mediation shows promise in addressing unfair treatment and fostering a feeling of justice and fairness in Indian society. We will utilize mediation abilities, such as impartial communication and convincing negotiation tactics. We'll use mediation abilities, such as persuasive negotiating

and impartial communication. "Avoid lawsuits; convince those around you to reach a compromise whenever possible," Abraham Lincoln counselled. Ensure they grasp that the average victor often ends up losing when it comes to charges, expenditures, expenses, and time. While it is inevitable, conflict can be managed. All relationships go through ups and downs caused by life's stages like child-rearing, building a career, and navigating the challenges of the current economy. The government needs to pass a law to allow the use of ADR in marital conflicts. It is overdue to accept that there will be no victor, no loser.

In cases of family conflict, mediation is crucial for preserving the privacy of sensitive information. If the issue is resolved via mediation, they simply need to submit a report that does not need detailed information about the conflicts. The mediator will attempt to facilitate discussions and assist the parties in achieving a successful resolution, preventing them from making hasty decisions. The legal system is currently burdened with cases, but they could potentially be resolved using alternative dispute resolution methods. Next, we must take it into account as it will assist in alleviating the workload of the courts.