



Law of mediation in India -Regulations and challenges

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Abstract

The Constitution of India promises social justice and equality. The fundamental right guarantee equality before law and equal protection of law. The Parliament and State legislatures have enacted a plethora of legislation to implement the fundamental rights and directive principle of state policy. The high cost of legal proceedings and ignorance of law adversely affect the right to access to justice. Right to legal aid and access to justice are integral part of right to life which is protected under article 21 of the Constitution of India. It is noticed that thousands of cases are pending before different courts in India including the apex court. There is a famous maxim which says "Justice delayed is justice denied." One of the solutions to reduce the pendency of litigations is the recourse to alternate dispute resolution techniques (ADR). The ADR techniques are accepted globally to reduce the workload of courts and to provide speedy justice to people. Another objective of A DR technique is to provide free legal aid to the deserving litigants. Section 89 of Civil Procedure Code 1908 mandates settlement of dispute through arbitration, conciliation, lok adalat and mediation. The Legal Services Authority Act 1987 constituted Legal Service Authorities at the national and regional level to provide free legal aid and to organise lokadalat. The Arbitration and Conciliation Act deals with the techniques of arbitration and conciliation. Parliament enacted the Mediation Act 2023 to give statutory recognition to mediation. The Act provides for court-annexed mediation, court referred mediation, institutional mediation, pre-litigation mediation, online mediation and community mediation. This paper makes a comprehensive analysis of the Mediation Act 2023 and examines the extent to which it realises the right of access to justice.

Keywords: Access to justice, legal aid, alternative dispute resolution, mediation

Introduction

According V. Krishna Iyer J., "Access to justice is basic to human rights and directive principles of State Policy become ropes of sand, teasing illusion and promise of unreality, unless there is effective means for the common people to reach the Court, seek remedy and enjoy the fruits of law and justice."

The preamble of the Constitution of India promises justice economic, political and social. Social justice requires access to justice. There shall not be any discrimination in access to justice and right to legal aid. Article 14 of the Constitution guarantees equality before law and equal protection of law as an inalienable right. There is famous maxim that says "Justice delayed is justice denied" which means that timely access to justice is essential. Rights are meaningless unless there is an effective system for implementation. The significant section of population which is below the poverty line do not have the capacity to afford the cost of legal proceeding in India. The movement for free legal aid started before independence. Informal settlement of dispute or alternate dispute resolution (ADR) was prevalent in Indian society in various forms. Section 89 of the Code of Civil Procedure, 1908 introduced by the Code of Civil Procedure (Amendment) Act, 1999 gave statutory status to A DR technique in India. The Mediation Act 2023 is the progressive legislation that gives legal recognition to mediation which is a popular technique of informal settlement of dispute or alternate dispute resolution (ADR). It provides for the constitution of a central body called Mediation Council of India to regulate the process of mediation.

Access to justice

Access to justice is a cherished human right. Article 8 of the Universal Declaration of Rights (UDHR) 1948 states that

everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law. Article 10 of UDHR states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him. Article 2 of the International Covenant on Civil and Political Rights (ICCPR) 1966 provides that government shall ensure that every person whose rights or freedom is violated, shall have an effective remedy. Article 14 of ICCPR guarantees fair trial and affirms the right to speedy trial and legal representation.

There are judicial pronouncements that declares access to justice is an integral part of right to equality (article 14) and right to life (article 21) under the Constitution. In *Anita Kushwaha V Pushap Sudan* ^[1], the honourable supreme Court, while recognizing the fundamental right of access to justice under articles 14 and 21 of Constitution. it was observed that "The Citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in article 14 both in relation to equality before law as well as equal protection of laws."

Speedy Trial

Prolonged trial procedure is a violation of rule of law and access to justice. Arrears of cases in the court, lack of sufficient infrastructure and lack of legal aid result in undue prolongation of trial.

In the landmark judgement of *Hussainara Khatoon & Ors V Home Secretary, State of Bihar*, ^[2] P, N Bhagavati J., held that "though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and

content of article 21 of the Constitution. No procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of article 21." In *Imtiyaz Ahmad V State of U.P* Supreme Court held unduly long delay undermines public confidence in the justice delivery system^[3].

In *Brij Mohan Lal Dev Constable V Union of India* the apex court emphasised that it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial. The plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government^[4].

Right to Legal Aid.

The directive principles of State policy give guidelines for a welfare State. Right to legal aid was not expressly mentioned in the original Constitution. It was incorporated as article 39A by the Forty-Second Amendment Act, 1976. "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities^[5]."

Right to legal aid stems from the concept of fair trial under article 21 and the right to equal protection of law under article 14 of the Constitution. In *Akhil Bandhu Saha V the State of West Bengal* the Calcutta High Court observed that "Providing assistance to a litigant in distress either due to economic or other disabilities is the State's duty viewed in the light of not only article 39A read with article 21 of the Constitution but also article 14 of the Constitution^[6]."

In *Hussainara Khatoon & Ors V Home Secretary, State of Bihar*^[7], court held that a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". The right to free legal services is, therefore, clearly an essential ingredient of reasonable, fair and just, procedure for a person accused of an offence and it must be held implicit in the guarantee of article 21.

Concept of Alternative Dispute Resolution (A DR)

In 1980, a Committee was constituted at the national level known as "Committee for Implementing Legal Aid Schemes" (CILAS) to supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati. CILAS evolved a model scheme for legal aid programme applicable throughout the country by which several legal aid and advice boards have been set up in the States and Union territories^[8].

Section 89 of Code of Civil Procedure 1908 (CPC) gives statutory recognition of for informal settlement of dispute. It was inserted by the 1999 amendment on recommendation of Law Commission of India and Justice Malimath Committee^[9]. Section 89 of CPC states that where it appears to the Court that there exist elements which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the Court may reformulate the terms of a possible settlement and refer the

same for arbitration, conciliation judicial settlement including settlement through lok adalat or mediation.

In *Salem Advocate Bar Association, Tamil Nadu V Union of India* the Supreme Court of India upheld the constitutional validity of the new law reforms and appointed a committee chaired by Justice Mr. Jagannadha Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts^[10].

The Arbitration and Conciliation Act 1996 explains the procedure for arbitration and conciliation. Legal Services Authority Act 1987 describes the modalities of lok adalat. At the time of enactment of section 89 of CPC, there was no legislation governing mediation. The Mediation Act 2023 provides for amendment of Code of Civil Procedure 1908 also.

The Legal Services Authorities Act, 1987 was enacted to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organise lok adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity^[11].

Section 2(1)(c) of the The Legal Services Authorities Act, defines legal service. It says that legal service includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter. The Act constituted National Legal Services Authority, State Legal Services Authority, District Legal Services Authority and Taluk Legal Services Committee to provide free legal aid to the society^[12].

According to section 4 of the Act, National Legal Services Authority (NALSA) shall lay down policies and principles for making legal services available under the provisions of this Act, frame the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act and utilise the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities.

The official newsletter of NALSA namely 'Nyaya Deep' promote a healthy working relationship between legal services functionaries throughout the country. Legal Aid Counsel have been provided in most of the courts of the Magistrates in the country to provide immediate legal assistance to those prisoners who are not in a position to engage their own counsel^[13]. Supreme court has formulated different schemes like Middle Income Group Legal Aid Scheme to provide legal services for cases intended to be filed in Supreme Court. The benefit is available to the people based on their income^[14]. The Supreme Court Legal Services Committee, constituted under Section 3A of the Act, provide free and competent Legal Services to the weaker sections of the Society in the cases which fall under the jurisdiction of Supreme Court of India^[15].

Every person who has to file or defend a case shall be entitled to free legal services if that person, is

- a. a member of a Scheduled Caste or Scheduled Tribe
- b. a victim of trafficking in human beings or beggar as referred to in article 23 of the Constitution
- c. a women or a child
- d. a person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal

Opportunities, Protection of Rights and Full Participation) Act, 1995

- e. a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster
- f. an industrial workman
- g. in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act 1956 or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act 1987
- h. in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court^[16].

Mediation Act 2023

Mediation is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement^[17].

Section 3 of the Mediation Act 2023 defines mediation as follows "It includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute.

Mediation and Conciliation Project Committee (MCPC) was constituted by Supreme Court of India. Its co-ordinates with different Mediation Centers/State Legal Services Authorities/Judicial Academies, collates statistics received from States, maintains accounts and also data of each trainer in the database software. Functions of the MCPC includes conducting research, coordinating with International Organizations, accrediting mediators and holding of seminars/conferences^[18] According to Mediation and Conciliation Project Committee, a successful mediation is dependent upon two inter-related factors namely, the willingness of the parties to resolve their dispute and the skill of the mediator in guiding the parties to the point where agreement is possible^[19].

There are different legislations that provide for alternate dispute resolution by means of mediation. Section 12A of the Commercial Courts Act, 2015 read with Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018, section 442 of the Companies Act 2013, section 4 of the Legal Services Authority Act 1987, section 18 of the Micro, Small and Medium Enterprises (MSME) Development Act 2006, section 61 of the Arbitration and Conciliation Act, 1996 and sections 37 and 37 A of the

Consumer Protection Act, 2019 makes a reference to mediation^[20].

a. Court-Annexed Mediation

Section 3 (e) of the Mediation Act 2023 states that court-annexed mediation includes pre-litigation mediation conducted at the mediation centres established by any court or tribunal. In court-annexed mediation the mediation services are provided by the court itself. In court-referred mediation the court merely refers the matter to a mediator. One of the advantages of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. "When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The court is the central institution for resolution of disputes."

In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation^[21].

b. Pre-Litigation Mediation

According to section 3(u), pre-litigation mediation is a process of undertaking mediation for settlement of disputes prior to the filing of a suit or proceeding of civil or commercial nature in before a court or tribunal. Section 5 explains the procedure for pre-litigation mediation. It is not necessary that there shall be a mediation agreement. Parties are free to adopt pre-litigation before filing a suit provided that their consent is mutual and free. Pre-litigation mediation can be conducted by a mediator registered with the Mediation Council, or empanelled by a court-annexed mediation centre or empanelled by an Authority constituted under the Legal Services Authorities empanelled by a mediation service provider. Mediation is not suitable for every kinds of disputes. Section 6 of the Act states that disputes mentioned in the First Schedule can not be referred to mediation.

c. Appointment of Mediators

According to section 8 of the Act, person of any nationality may be appointed as a mediator. The parties shall be free to decide the procedure for appointment of mediator or they can make an application to a mediation service provider for the appointment of a mediator. There will be panel of mediators registered with mediation service providers.

The mediator shall be impartial and independent. Their words, manner, attitude, body language and process management must reflect an impartial and even-handed approach^[22]. Great care must be taken when the third parties are likely to be affected by a mediated settlement. Mediator should ensure that there is no domination by any party or person. Settlement of dispute must be based on informed consent^[23].

Effective communication between all the participants in mediation is necessary for the success of mediation. Active listening is the quality of a mediator. Mediator shall have the ability to understand and appreciate the feelings and

needs of the parties, and to convey to them such understanding and appreciation without expressing agreement or disagreement with them. Body language of the mediator shall be appropriate. Questions of the mediator should not indicate bias, partiality, judgment or criticism^[24].

d. Conflict of Interest

Section 10 imposes an obligation on the mediator that he shall disclose any circumstance or potential circumstance, personal, professional, financial, or otherwise, that may constitute any conflict of interest or that is likely to give rise to justifiable doubts as to his independence or impartiality as a mediator prior to or during the conduct of mediation.

Mediation Training Manual of India explains the ethical code of mediators which is essential to keep the fairness of the process^[25]. The mediator must ensure that pre-existing relationships, if any, between the parties, do not affect the negotiation. He must avoid cases where he has any direct personal, professional or financial interest in the outcome of the dispute. Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated. Where the mediator is a judicial officer he shall not mediate any dispute involved in or connected with a case pending in his Court.

e. Mediated Settlement Agreement

The outcome of the mediation is the mediated settlement agreement. Section 19 states that it shall be in writing signed by the parties and authenticated by the mediator. Agreement may settle all the disputes between the parties or some of them or may extend beyond the disputes referred to mediation. Section 18 requires that proceedings shall be completed within a period of 120 days from the date fixed for the first appearance before the mediator.

Section 27 declares that mediated settlement agreement shall be final and binding on the parties and persons claiming under them respectively. The mediated settlement agreement shall be

enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a judgment or decree passed by a court, and may, accordingly, be relied

on by any of the parties or persons claiming through them, by way of defence, set off or otherwise in any legal proceeding.

Section 28 of the Act lays down the conditions under which a mediated settlement agreement may be challenged. The available grounds are fraud, corruption, impersonation and the mediation were conducted in disputes or matters not fit for mediation under section 6 read with first schedule. The agreement shall be challenged within a period of 90 days from the date of receipt of the copy of mediated settlement agreement unless it is condoned.

f. Confidentiality of Proceedings

Section 22 states that the mediator, mediation service provider, the parties and participants in the mediation shall keep confidential all the following matters relating to the mediation proceedings, namely:

1. acknowledgements, opinions, suggestions, promises, proposals, apologies and admissions made during the mediation;

2. acceptance of, or willingness to, accept proposals made or exchanged in the mediation;
3. documents prepared solely for the conduct of mediation or in relation thereto;
4. any other mediation communication.

The audio or video recording of the mediation proceedings shall not be made or maintained by the parties or the participants including the mediator and mediation service provider.

Section 30 requires that the mediation communications in the case of online mediation shall, ensure confidentiality.

Section 23 states that the mediator or any participant in the mediation, including experts and advisers engaged for the purpose of the mediation and persons involved in the administration of the mediation, shall not be permitted, or compelled to disclose to any court or tribunal, or in any adjudicatory proceedings any communication in mediation, or to state the contents or conditions of any document or nature or conduct of parties during mediation including the content of negotiations or offers or counter offers with which they have become acquainted during the mediation.

The prohibition is not applicable where the disclosure of information is sought to prove or disprove a complaint of professional misconduct of mediator or malpractice based on conduct occurring during the mediation.

There shall be no confidentiality of communications, where there is a threat or statement of a plan to commit an offence punishable under any law for the time being in force or information relating to domestic violence or child abuse or statements made during a mediation showing a significant imminent threat to public health or safety.

Supreme Court (Mediation) Rules 2010 made by the Chief Justice under sections 17A and 198 of the Courts Act states that the mediation process shall take place in private and shall be confidential. Every document produced or communication done, or other form of information disclosed, or any proposal made by any party specifically for the purpose of the mediation process, shall be treated as having been produced, done, disclosed or made on a privileged and without prejudice basis and no privilege or confidentiality shall be deemed to have been waived by such disclosure. All notes and records taken by or before the mediation Judge in connection with the mediation process shall be confidential^[26].

g. Online Mediation

Section 30 states that there shall be written consent of the parties for online processes. Online mediation including pre-litigation mediation may be conducted at any stage of mediation by the use of electronic form or computer networks, encrypted electronic mail service, secure chat rooms or conferencing by video or audio mode or both.

h. Mediation Council of India

The council promotes domestic and international mediation in India, enters into memoranda of understanding or agreements with domestic and international bodies or organisations or institutions and endeavours to develop India to be a robust centre for domestic and international mediation. It lays down guidelines for the continuous education, certification and assessment of mediators by the recognised mediation institutes and manner of conduct of mediation. The council specifies the conditions for registration

of mediators, mediation institutes and mediation service providers and its renewal, withdrawal, suspension and cancellation. It lay down standards for professional and ethical conduct of mediators, mediation institutes and mediation service providers.

The council conduct trainings, workshops and courses in the area of mediation in collaboration with mediation service providers, law firms and universities and other stakeholders, both Indian and international, and any other mediation institutes. The council has the power to recognise mediation institutes and mediation service providers and renew, withdraw, suspend or cancel such recognition^[27].

Section 45 of the Act constitute a Mediation Fund for the purposes of promotion, facilitation and encouragement of mediation which shall be administered by the Council.

i. Institutional Mediation and Mediation Service Providers

Section 3(f) of the Act defines institutional mediation as the mediation conducted under the aegis of a mediation service provider. According to section 40 of the Act, mediation service providers require the recognition of the Mediation Council of India. The centre is entrusted with the function to promote professional and ethical conduct among mediators. The mediation service providers shall accredit and maintain panel of mediators. The centre will provide the services of mediators and ensure all facilities, secretarial assistance and infrastructure for the efficient conduct of mediation. It will facilitate registration of mediated settlement agreements^[28].

j. Community Mediation

Community mediation is an innovative concept that consider the role of communities or residence associations to settle the dispute amicably. It provides for the settlement of dispute at the grass root level itself. According to section 43 any dispute that likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality may be settled through community mediation with prior mutual consent of the parties to the dispute. The Act provide for the constitution of a permanent panel of community mediators with the following members,

- a. person of standing and integrity who are respectable in the community;
- b. any local person whose contribution to the society has been recognised;
- c. representative of area or resident welfare associations;
- d. person having experience in the field of mediation; and
- e. any other person deemed appropriate.

Any of the parties shall make an application before the Legal Services Authorities Act 1987 or District Magistrate or Sub-Divisional Magistrate for referring the dispute to mediation.

There are various advantages for mediation. Procedure for mediation is speedy, simple, flexible, informal, economic, confidential and efficient. Parties can accept creative and non-conventional remedies even ignoring their legal rights or liabilities^[29]. According to Mediation and Conciliation Project Committee mediation saves time and money. In mediation, both the parties sit together and resolve their disputes amicably and peacefully. Confidentiality of the procedure is another advantage of mediation. Parties get considerable freedom to decide time, location and duration of proceedings also^[30].

Conclusion

Alternative dispute resolution techniques like mediation are aimed at speedy justice and free legal aid. Free legal aid to the poor and marginalized members of the society is a method to empower them. Mediation is one of the popular methods of alternative dispute resolution due to its informal nature unlike arbitration. There are various advantages for the process of mediation. The mediator only facilitates the resolution of a dispute without suggesting the solution. Mediators must be neutral and they cannot force or compel any party to make a particular decision. Parties have control over the scope of mediation and its result. They are free to withdraw from the process if they feel any discomfort. Mediation helps to restore the good relationship between the parties. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and to facilitate mutually acceptable agreements to resolve the dispute. The success of mediation depends on the mediator to a great extent. The mediator shall not do any thing prejudicial to the interest of the parties. He should consider whether the proposed settlement may cause difficulties to third parties who are not participating in the mediation. The provisions for online mediation help to break the barriers of communication when the parties are unable to present physically for the settlement of disputes. The mediation council and service providers have the duty to maintain the standards of mediation and code of ethics of the process. The legal services authorities under the guidance of NALSA are doing a commendable work in organising legal aid programmes, lok adalat, legal awareness classes etc. There is no doubt that mediation is an efficient tool to realise the constitutional goal of access to justice and equality before law.

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