

# MEDIATION - THE NEED OF THE HOUR

*“I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby not even money; certainly not my soul.”*

MAHATMA GANDHI

## FOREWORD

Mediation has been brought to the spotlight and watchful eye of many, for its ability to resolve disputes for different kinds of proceedings. Many countries already have statutes in place that give their courts the leeway to order disputing parties to mediate, when deemed appropriate, and many of those have now turned to enacting additional legislation to order the parties to go for mediation before the conflict is allowed before the court.

Out-of-court settlements have been considered as the way out ever since society’s reliance on courts has increased. As one of the mechanisms of Alternative Dispute Resolution, mediation involves a structured negotiation process in which an independent person, known as a mediator, assists the parties to identify and assess options and negotiate an agreement to resolve their dispute amicably, without having to go to court. It is widely accepted and known that having less litigation and more out-of-court settlements improves business and commercial developments.



Even though mediation operates largely through negotiation and psychology, it is subject in several respects to the law. The law remains in the foreground, and emerges. One would be right in saying that mediation strives and facilitates to reach a settlement, especially by maintaining the balance between law and equity, and for the same reason, would be effective in resolution of disputes before they are sent to courts.<sup>1</sup> The purpose of this article is to highlight the obvious advantages of mediation and why mediation might be the answer to many of the short and long term problems for the Indian judicial system.

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<sup>1</sup> Mauro Rubino-Sammartano, “*Domestic, transnational, foreign and international mediations: legal issues*”, *Arbitration* 2015, 81(4), 381-388, at [3].

## INTRODUCTION TO MEDIATION

“Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures, and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants.”<sup>2</sup>

That is to say, mediation is a process by which a third neutral party acts as a facilitator between the disputing parties to bring them to a congenial agreement that will accommodate their needs and rights.<sup>3</sup> Mediation has also shown to address the causes of disputes, reduce the alienation of litigants, and inspire consensual agreements that are complied with and are durable over time and help disputants resume workable relationships.<sup>4</sup> Instead, the parties, with the assistance of the mediator, can reach a solution which is tailored to their real needs and interests.<sup>5</sup>

## HOW IT DIFFERS FROM ARBITRATION

Mediation involves third party assistance in getting the disputants to achieve a voluntary settlement, whereas arbitration is a procedure where a third party holds a hearing. In arbitration the disputants present their stands on the dispute and bring forth evidence for their respective positions. After evaluating the evidence and taking note of other relevant factors, the third party (arbitrator) issues a binding award.<sup>6</sup>

**“An ounce of mediation is worth a pound of arbitration and a ton of litigation!” — Joseph Grynbaum**

Arbitration is being used widely, both at the domestic and international levels and inserting an arbitration clause within contracts and while concluding agreements has become the norm these days. What parties entering into an arbitration agreement do not realize is that in the event of any dispute, while they may not be going to a court of law, appearing before an arbitrator is not very different from litigating before a judge. While a mediator does not have any advisory role as to the content and outcome of the negotiation, an arbitrator, similar to a judge, gives a binding decision.<sup>7</sup>

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<sup>2</sup> Christopher W. Moore, *“The Mediation Process: Practical Strategies for Resolving Conflict”*, at pg. 67.

<sup>3</sup> Justice M.M. Kumar, Judge, Punjab and Haryana High Court, Chandigarh, in the National Conference on Mediation, organised by the Mediation & Conciliation Project Committee, Supreme Court of India, held on July 10, 2010 at New Delhi.

<sup>4</sup> Pearson, Jessica. "An Evaluation of Alternatives to Court Adjudication." *The Justice System Journal* 7.3 (1982): 420-44. Web.

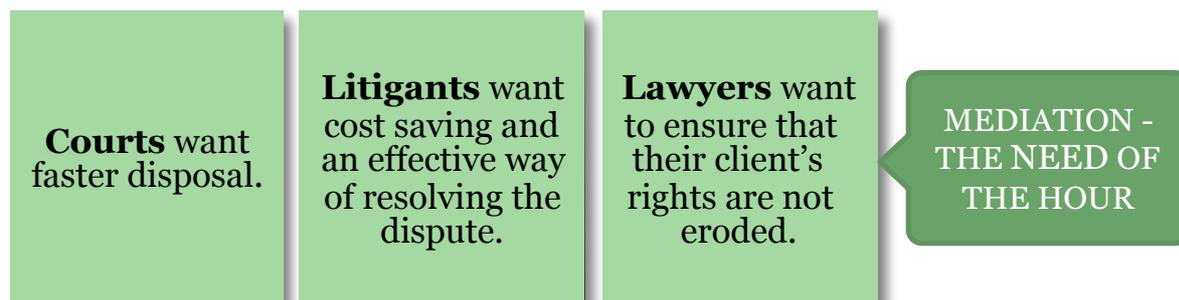
<sup>5</sup> *Aird v. Prime Meridian Ltd*, Aird [2006] EWCA Civ 1866; [2007] C.P. Rep. 18; [2007] B.L.R. 105 at [5].

<sup>6</sup> Elkouri, Elkouri, Goggin, & Volz, 1997

<sup>7</sup> Shah, Sayed Sikander. *“Mediation in Marital Discord in Islamic Law: Legislative Foundation and Contemporary Application.” Arab Law Quarterly* 23.3 (2009): 329-46. Web.

## HOW IS MEDIATION USEFUL?

Parties to a dispute often endorse mediation because of the opportunities to participate in the process, to tell their side of the story and to contribute in determining the outcome of the dispute.<sup>8</sup> Many lawyers also see that mediation has improved communication between the parties and the attorneys. Not only this, lawyers who are trained mediators have been recognized as being capable of bringing about more number of settlements. Furthermore on cases that eventually reached settlement, 90% of the mediated cases had a higher rate of settlement than cases that did not undergo mediation.<sup>9</sup> The apparent benefits of mediation also include party control over the dispute, reduced court dockets<sup>10</sup>, reduced legal fees<sup>11</sup> and most importantly, time saving.



In commercial disputes, an impasse most often arises from either a lack of trust in the integrity of the other party or a genuine good faith difference of opinion on the facts underlying the dispute or on the probable outcome of the case were it to go to court. The mediator would help bring the parties together, highlight the main issues in dispute, and may act as a shuttle diplomat and a channel for communication, by filtering out the emotional elements and allowing the parties to focus on the underlying objectives. The mediator will encourage the parties to reach an agreement themselves as opposed to having it imposed upon them.<sup>12</sup>

There is strong support from judicial and legislative of using mediation since it offers a more efficient and cost effective system for the parties (and the courts are not clogged up with cases that could have been resolved otherwise).<sup>13</sup>

<sup>8</sup> See Roselle L. Wissler, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research", 17 Ohio St. J. on Disp. Resol. , 690 (2002).

<sup>9</sup> Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining The Feasibility Of Implementing A Court-Mandated Mediation Program", available at <https://www.statecourts.gov.sg/Lawyer/Documents/The%20ADR%20Form.pdf#search=dorcas%20quek>.

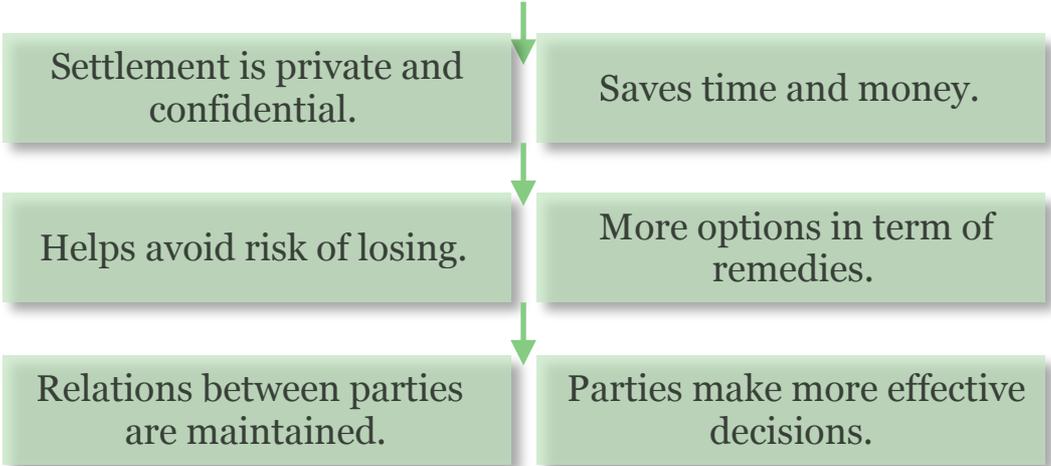
<sup>10</sup> "Alternative Dispute Resolution: The Benefits of Arbitration and Mediation", <http://www.bodie-law.com/news/2016/04/19/alternative-dispute-resolution-the-benefits-of-arbitration-and-mediation/>.

<sup>11</sup> Jeff Rifleman, "Mandatory Mediation: Implications and Challenges", <http://www.mediate.com/articles/riflemanj1.cfm>.

<sup>12</sup> See "Hong Kong Dispute Solutions", Hong Kong International Arbitration Centre, <http://ebook.lib.hku.hk/HKG/B35844024.pdf>.

<sup>13</sup> Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (TSO, 2011), para.4.11.

## Merits Of Mediation



“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.”  
*Abraham Lincoln*

**MANDATORY MEDIATION**

Despite its documented advantages, mediation may well be under-utilized in certain jurisdictions. Parties and their attorneys are still accustomed to treating litigation as the default mode of dispute resolution; initiating mediation may also be perceived as a sign of weakness.<sup>14</sup> In many jurisdictions, the rates of voluntary usage of mediation have been low.<sup>15</sup> For instance, in England’s Central London County Court system in which mediation occurred only with the parties’ consent, only 160 mediations took place out of the 4,500 cases in which mediation was offered. In contrast, after England introduced changes within the Civil Procedure Rules, which empowered the courts to encourage the use of ADR (with cost sanctions), the number of commercial disputes referred for mediation increased by 141 percent.<sup>16</sup> Hence, the full benefits of mediation are not reaped when parties are left to participate in it voluntarily.

<sup>14</sup> Soc’y Of Prof. In Disp. Resol., “Mandated Participation And Settlement Coercion: Dispute Resolution As It Relates To The Courts” (1991).

<sup>15</sup> Morrill, Calvin, and Mckee Cindy, “Institutional Isomorphism and Informal Social Control: Evidence from a Community Mediation Center.” *Social Problems* 40.4 (1993): 445-63. Web.

<sup>16</sup> The Lord Chancellor Dep’t, “Emerging Findings: An Early Evaluation Of Civil Justice Reforms”, para. 4.12 (Mar. 2001), available at <http://www.dca.gov.uk/civil/emerger/emerger.htm>.

Where the parties' reticence towards mediation is due to unfamiliarity with or ignorance of the process, court-mandated mediation may be instrumental in helping them overcome their prejudices or lack of understanding. The need to increase awareness and the usage of mediation services is probably the most compelling reason for introducing mandatory mediation.<sup>17</sup> Mediation has also been a way of getting people to appeal to their "good"<sup>18</sup> side, negotiate disputes with a clear head and to consider and search for creative, forward-looking solutions to problems and develop understanding through possible collaborations.

## COURT MANDATED MEDIATION OUTSIDE INDIA

1. **Mandatory Mediation in Ontario:** In 1999, Ontario introduced mandatory mediation for civil, non-family actions, with a provision for the parties to opt-out of filing a motion. The parties in all these cases have to undergo mediation within ninety days after the filing of the first defense. The parties in standard cases may consent to an extension of sixty days, but all other extensions have to be obtained through formal court orders.<sup>19</sup>
2. **The U.K. Approach to Court Referral for Mediation:** In the United Kingdom, mediation is theoretically a process that is entered into voluntarily. However, the courts have encouraged the use of mediation or ADR for suitable cases under the U.K. Civil Procedure Rules.
3. **Florida:** Florida is leading the way among U.S. states with its comprehensive court-connected ADR program. It has been estimated that more than 100,000 cases are diverted from court process to mediation each year.<sup>20</sup>
4. **Italy:** Italy's mediation law is an example of compulsory mediation. Italy's March 4, 2010, Legislative Decree No. 28, required that by March 2011 all civil disputes arising in the following areas proceed to mediation prior to gaining access to the courts: neighbor disputes, property rights, division of goods, trusts and estates, family-owned businesses, landlord/tenant disputes, loans, leasing of companies, disputes arising out of car and boat accidents, medical malpractice, libel, insurance, banking, and financial contracts.<sup>21</sup>

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<sup>17</sup> Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining The Feasibility Of Implementing A Court-Mandated Mediation Program", available at <https://www.statecourts.gov.sg/Lawyer/Documents/The%20ADR%20Form.pdf#search=dorcas%20quek>.

<sup>18</sup> Carrie Menkel-Meadow, "The Case For Mediation: The Things That Mediators Should Be Learning And Doing", Chartered Institute of Arbitrators 8th Symposium on Mediation, October 2015, Arbitration 2016, 82(1), 22-33.

<sup>19</sup> Tsormpatzoglou Stavros, "Compulsory mediation: A contradiction?" Pg. 20, available at [https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/289/Stavros%20Tsormpatzoglou\\_3724\\_assignsubmission\\_file\\_Dissertation%20Tsormpatzoglou%20Stavros.pdf?sequence=1](https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/289/Stavros%20Tsormpatzoglou_3724_assignsubmission_file_Dissertation%20Tsormpatzoglou%20Stavros.pdf?sequence=1)

<sup>20</sup> Supra.

<sup>21</sup> Herbert, William A., De Palo Giuseppe, Baker Ava V., Anthimos Apostolos, Tereshchenko Natalia, and Judin Michael. "International Commercial Mediation." *The International Lawyer* 45.1 (2011): 111-23. Pg 112. Web.

5. **California:** California's mandatory mediation law, which first became effective in 1981, requires that all custody and visitation disputes be mediated prior to being considered by the county Superior Court. In 1978, the Los Angeles Conciliation Court, the largest jurisdiction offering public sector mediation services, handled 747 cases with an estimated net savings to the County of Los Angeles of \$175,004. The procedure was found to be so satisfactory and cost effective that it was made mandatory in 1981 with the enactment of S.B. 961.<sup>22</sup>

## MEDIATION IN INDIA

Mediation has been an age-old practice in India, with people approaching Panchayats in villages for resolution of their disputes. A village panchayat, meaning a group of five wise men, used to be recognized and accepted as a conciliatory and/or decision-making body, who took up grievances of the people of the village and got them to amicably come to a settlement, while continuing to maintain peace and harmony in the society.

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes." Later, the Code of Civil Procedure was amended in the year 1999 to include Section 89, which explicitly established mediation as a separate ADR method. Section 89 along-with rules 1A, 1B and 1C of Order X of First schedule have been implemented by Section 7 and Section 20 of the CPC Amendment Act and cover the ambit of law related to Alternate Dispute resolution. Section 89 of the Code of Civil Procedure States that:

*"Sub Section (1)*

*Where it appears to the court that there exist elements of a settlement 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-*

*(a) arbitration;*

*(b) conciliation*

*(c) judicial settlement including settlement through Lok Adalat; or*

*(d) mediation.*

*Sub Section (2)*

*Where a dispute had been referred-*

*(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.*

*(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*

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<sup>22</sup> Pearson, Jessica. "An Evaluation of Alternatives to Court Adjudication." *The Justice System Journal* 7.3 (1982): 420-44. At pg. 437. Web.

*(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*

*(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.”*

In India, Mediation is slowly gaining credence. Even though predominantly India uses court-annexed mediation, but in time the practice and acceptance of private and court referred/assigned mediation and online mediation are in the offing. The Supreme Court, in ***Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Construction***<sup>23</sup>, explained that mediation is a synonym of the term ‘conciliation’. The Law Commission has also supported this viewpoint. Mediation, as a tool of the larger ADR jurisprudence, has got judicial recognition in India, as was pointed out by Justice Ranjana Prakash in para 39 of ***K. Srinivas Rao vs. D.A. Deepa***<sup>24</sup>, which dealt with resolution of a matrimonial dispute. Prakash, J., had also expressed his views as under:

*“The idea of pre-litigation mediation is also catching up. Some mediation centres have, after giving wide publicity, set up “Help Desks” at prominent places including facilitation centres at court complexes to conduct pre-litigation mediation. We are informed that in Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre, several matrimonial disputes are settled. These centres have a good success rate in pre-litigation mediation. If all mediation centres set up pre-litigation desks/clinics by giving sufficient publicity and matrimonial disputes are taken up for pre-litigation settlement, many families will be saved of hardship if, at least, some of them are settled.”*

In November 2015, The Indian Express published a newspaper report, narrating the details of the Bangalore Mediation Centre in successfully mediating matrimonial and property disputes. The report said that of the total 25,028 cases received for mediation 24,097 cases settled. Of the 24,097 cases settled, 67% were matrimonial and 8,882 pertained to property disputes. The remaining were taken back by the parties as they patched up, or the 60-day period and the 30-day grace period expired.<sup>25</sup>

The Delhi Government entered into a joint venture with the Delhi High Court and set up mediation centers in all the Districts to take up all kinds of civil and petty criminal cases, whether or not pending in the courts. The mediation centers are managed and supervised by trained mediators and officials. Similarly, the Delhi High Court has a Mediation and Conciliation Center, where thousands of cases are resolved by way of mediation and conciliation, thus resulting in faster disposal of the case and reduction in civil litigation in courts.

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<sup>23</sup> (2010) 8 SCC 24

<sup>24</sup> (2013) 5 SCC 226

<sup>25</sup> “3,642 City Couples Sought Mediation”, The Indian Express, 15.11.2015, available at <http://www.newindianexpress.com/cities/bengaluru/3642-City-Couples-Sought-Mediation/2015/11/15/article3128999.ece>

Manmohan Singh, J., Delhi High Court, in an interview taken by Dilip K. Das for his book *'Trends in the Judiciary: Interviews with Judges Across the Globe'*, expressed his views as follows:

*“There are several systems that have worked extremely well besides litigation in the courts. Our Delhi High Court Mediation Cell has been very successful. Within the span of a year or say a year and a half, about 100,000 cases were disposed of by mediation. Attorneys acting as mediators work for the best interests of their clients. As a mediator handles the proceedings like a Judge would, the client feels confident that his or her grievances will be resolved in the best possible way. Such a system of mediation has worked very effectively in the Delhi High Court and I have personally witnessed several cases... Also, the procedures for giving speedy justice like the mediation centers have proved to be effective in relieving the case load.”*

After 32 years of litigation, a matter was resolved by three sittings of mediation between the parties. BR Gavai, J., Mumbai High Court, said mediation has tasted success despite initial resistance. "It's a win-win situation where settlement is not

## **ANALYZING SECTION 89 OF THE CODE OF CIVIL PROCEDURE, 1908**

Section 89 came into its current form on account of the enforcement of the CPC (Amendment) Act, 1999 with effect from 01.07.2002. The rules under Order X provide for when court may direct to take recourse to alternate means to resolve disputes, the duty of parties to appear before such forums and the responsibility of the presiding officer to act in interest of justice and return the suit if better suited for the court.

The Law Commission, in its 129th Report<sup>26</sup> advocated the need for amicable settlement of disputes between parties and the Malimath Committee<sup>27</sup> recommended to make it mandatory for courts to refer disputes, after their issues having been framed by courts, for resolution through alternate means rather than litigation/trials.

Malimath committee called for a *“legal sanction to a machinery for resolution of disputes and resort thereto is compulsory”*<sup>28</sup> which the sole objective of reducing the large influx of commercial litigation in courts of civil nature, number of appeals to higher courts lessened and the efficiency of courts revitalized by such implementation.

The provision under Section 89 is for the sole objective of blending judicial and non-judicial dispute resolution mechanisms and bringing about an alternative dispute mechanism to the center of the Indian Judicial System.<sup>29</sup> Section 89 was introduced with a purpose of amicable, peaceful and mutual settlement between parties without

“Interpretation of Section 89 – a Trial Judge’s nightmare!”

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<sup>26</sup> 129th Report of the Law Commission of India, available at <http://lawcommissionofindia.nic.in/101-169/report129.pdf>

<sup>27</sup> Malimath Committee Report, Chapter VIII, pg 112.

<sup>28</sup> *Ibid*, Chapter IX, pages 168, 170 , 171.

<sup>29</sup> Gupta, Vinay. *Mulla: The Code of Civil Procedure*. 14th ed. New Delhi: LexisNexis, 2005. 420.

intervention of the court. The case/ dispute between parties shall go to trial only when there is a failure to reach a resolution.

While Section 89 seems promising, there are several irregularities in the provision. Some such irregularities include:

1. In the *Afcons'* case, the Hon'ble Supreme Court had observed that the Section 89 had been drafted in a haphazard manner and the interpretation of the Section was observed to be "A trial judge's nightmare."
2. The terms "shall formulate the terms of settlement" impose a heavy and unnecessary burden on the courts. The formulation and reformulation of the issues to be dealt with by the courts and specifying the method to be adopted may leave the provision meaningless and out of place at the pre-ADR stage.<sup>30</sup>
3. A mediator's intervention leads to a settlement and such settlement is also authenticated by the mediator, but it is still not regarded as a decree. Notwithstanding, when the same mediator is referred to as a conciliator, the settlement reached through him is regarded as a decree.
4. Converting mandatory requirement into a directory provision also leads to an anomaly. Section 89(1) states that "where it appears to the court that there exists elements of a settlement which may be acceptable to parties". This necessarily means that the Court will refer the matter to ADR only when it finds elements of settlement in the dispute and not otherwise. Such words convert what was expected to be an obligatory provision into a discretionary provision.

## WHY IT IS TIME TO BRING MEDIATION INTO PROMINENCE

Sir Anthony Clarke MR once said, "The more horses approach the trough the more will drink from it"<sup>31</sup>. This statement is more than true for the present times when the numbers of disputes are on the rise and courts are overflowing with cases which may just as easily be resolved by way of mediation.

Swatanter Kumar, J., Supreme Court of India, had once written:

*"The benefits of such processes as mediation are further fortified from the fact that imminent legal personalities, such as Mahatma Gandhi, Abraham Lincoln and Nani Palkhiwala, have taken pleasure and pride in continually settling cases out of court, in uniting the parties driven asunder by conflict and discouraging litigation. In the words of Guatam Budhha, "Better than a thousand hollow words is one word that gives peace", which even is reflected in the famous Sanskrit quote "santosham paramam sukham". Mediation is one of the modes for attainment of 'Peace'."*<sup>32</sup>

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<sup>30</sup> Justice R. V. Raveendran, "Section 89 CPC: Need for an Urgent Relook", (2007) 4 SCC J23.

<sup>31</sup> Sir Anthony Clarke MR, "The Future Of Civil Mediation" (2008) 74 Arbitration 419 para. 22.

<sup>32</sup> Swatanter Kumar, "Mediation Training Manual of India", Page i, available at <http://supremecourtfindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>.

India has come a long way as far as ADR is concerned and it is about time mediation is made a prerequisite to litigation. The intrinsic function of mediation emphasizes the value of mediation as an end in itself. Following reasons can be considered while debating making mediation mandatory:

- A. Pitfalls in litigation include delay, rigidity of procedure and excessive costs. Mediation provides a solution to all of the above problems by being faster, more flexible and reducing drastically the expense involved. Mediation is easy to implement and less formal compared to court procedure, yet structured. Parties feel at ease and are more likely to make an informed decision when their minds are not occupied with the rigors of litigation.
- B. In today's times, when courts are flooded with cases ranging from petty property disputes to high stake matters involving massive costs, mediation can save the day. It is quite evident that most cases which are taking up the valuable time of the judiciary these days do not deserve to be taken up in courts at all. If all these cases are first sent to mediation, it will significantly reduce the burden on courts and even on the Judges, who are faced with less time to dedicate to each matter that comes up before them. Chief Justice of India, TS Thakur, addressing a Joint Conference of Chief Ministers and Chief Justices of High Courts in April, 2016, expressed his serious concern regarding the large number of pending cases in India and the shortage of Judges to reduce the pendency.<sup>33</sup> Looking at this from an objective perspective, such an outcry for increasing the number of judges would be heard, if specific kinds of cases, if not all, are referred to mediation first. Since the inception of the economic liberalization policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts.<sup>34</sup>

**“Litigation is not the way to good governance.”**

**Justice T.S. Thakur  
Chief Justice of India**

- C. Many are taught that winning is everything. It is the lust for this win that makes a person seek solace in litigation. Little do people know that mediation can give them reliefs which are not even a part of the judicial remedies. They can find far more solutions to their problems than the court has to offer.
- D. Stepping aside from the conventional solutions mediation has to offer, an important aspect of mediation involves maintaining the relationship between the parties. While litigation, due to its iron fist, may force parties to part ways, mediation can provide a way out for the parties while making sure there is no love lost between them. D.Y. Chandrachud, J., Supreme Court of India, in his paper, had written:

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<sup>33</sup> <http://indiatoday.intoday.in/story/teary-cji-laments-over-governments-inaction-to-increase-the-number-of-judges/1/650301.html>, India Today, 24.04.2016.

<sup>34</sup> Legal Recognition of Mediation in India, Mediation Training Manual of India, at Page 6.

*“Litigative remedies which parties apply for in a conventional judicial set up may often result in the rupturing of a relationship. Declarative or injunctive remedies, and remedies by way of damages that Courts provide for in a judicial setting may in certain cases lead to a cessation of relationships. Mediation has the potential to obviate this by enabling the mediator to allow parties to perceive the immediate dispute between them in the wider context of an overall business, professional or personal relationship and to resolve their problems by fashioning solutions that would protect their long term interests.”<sup>35</sup>*

- E. Considering the increased inflow of international companies investing in India, commercial disputes have also been on the rise. Parties are making it a point to include an arbitration clause in their agreements. However, what they fail to realize is that it leaves them with as little choice, if not the least, as courts, because they give the adjudicatory powers in the hands of the arbitrator. If agreements were to include a mediation clause preceding arbitration, many commercial disputes may get settled by way of mediation in first instance with negotiations between the parties.
- F. By mandating mediation, the focus of lawyers will also shift from simply litigating matters in courts, to being a part of mediations and to promoting better business environment structure and policies, thus creating employment for more people. Legal practitioners would move away from being seen to be litigants in time of crisis and dispute to providing and supplying means for people to do more and better business and increased commerce.

## **CONCLUSION**

As demonstrated above, many jurisdictions are adopting a range of measures in relation to mediation, and the majority are encouraging voluntary mediation as an alternative to the litigation process. Establishment of more Mediation Centers outside the purview of courts would lead to bigger and easier participation in the mediation process. Such Mediation Centers may be monitored by Courts, but must not leave parties waiting to be directed by courts to have their disputes settled by mediation. This would reduce the pendency of cases in Courts, and also give mediators a chance to give something back to the society. All this adds to the fact that the judiciary in India as well as overseas is giving a positive feedback to mediation.

While Section 89 of CPC seems promising, there are several irregularities in the provision. It would be most beneficial if this provision is resolved. It must also be remembered that most of the people are not aware of the process of mediation, and thus, find it difficult to consent to going for the same. If the process of mediation is made clearer and even compulsory, despite initial resistance, people will understand its value and will start approaching mediation centers in large numbers. India has seen huge success when it comes to mediation so far. Lawyers as well as judges have advocated bringing mediation into the mainstream. It would, therefore, be in the interest of the society if mediation is made clearer under Section 89 of CPC and even mandated and made more essential by way of legislation, so as to provide an effective dispute redressal mechanism which has been proven already to be extremely successful so far.

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<sup>35</sup> D.Y. Chandruchud, J., Bombay High Court, “Mediation – realizing the potential and designing implementation strategies”, 2010.

Going through litigation in India is not for the faint hearted. It is a tedious process that consumes not only a person's time and money, it drains them of their energy, too. Finally after generations have fought over one matter spanning over decades, there take place settlements outside court. There have been several instances of the same, which leads parties to wonder why they did not go for ADR in the first place. Mediation will cure India of the terrible affliction called pending litigation and most importantly, will preserve harmony and peace in the society. Having a more productive legal environment and dispute resolution process in place would also increase and develop the business environment and ease of doing business in India and link well with the Governments plans and mission going ahead of making India a developed country. It would be apt to conclude in the words of Right Honorable Lord Phillips C.J.:

*“In this field, as in others, India is ahead of us. I was aware before this visit of the amendment made to your Procedural Code by the famous S. 89 and of Sabharwal C.J.'s support of mediation in Salem Advocate Bar Association, Tamil Nadu v. Union of India. On this visit I have been learning with admiration of the progress made in instilling a culture of ADR in this jurisdiction. I hope very much that we shall follow where India is leading.”*

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*