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ROLE OF MEDIATION IN FACILITATING ACCESS TO JUSTICE IN ITS TRUE ESSENCE: A CRITICAL ANALYSIS

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ABSTRACT

The concept of justice is not novel, and so is Mediation. Since the inception of human interactions, disagreements and disputes have been a part of living. When Indian legal System was being formed, it was designed following the adversarial system that seem to favour the strong party and follow the already written law points with little or no room for creative solutions. Also, there are several provisions and arrangements made to extend the access of legal corridors to the underprivileged and left out segments of the society; but this does not ensure that justice has been realised in its true essence. Mere access to legal means, is not access to justice too. This is where Mediation as a means of alternative dispute resolution steps in and creates a comfortable, private, inexpensive and self- determined environment for both the parties at dispute. This paper examines what is true justice and what our constitution makers had in mind in relation to notion of justice when they attempted to give us the related rights. Justifying the stance with real life scenarios and cases, the paper also elucidates how Mediation can help parties achieve justice in its real sense and not just literal or technical.

Keywords: Mediation, Justice Delivery System, Alternative Dispute Resolution, Access to Justice, Equity and Equality

1. INTRODUCTION

Over the ages, time and again the concept of justice has been discussed by various philosophers and school of thoughts. From Aristotle, Kant, Locke, Rawls to Humes and Amartya Sen; all of them have their own notion of justice. The definitions given by them also varies as per the predominance of a particular characteristic from the whole idea of justice, using which they advocate their thoughts. Justice owes its origin to the Latin word 'jus' which mean right or law. Thus, justice can be presumed to be a state that is 'lawfully right'. At least this happens to be the presumption and belief over which the entire legal system and legal institutions of India function. An act might not be just to one person but if it is rightful according to the law or in other words 'legally right', then indeed it is justice in the eyes of law. Thus, justice is more of a theoretical concept that might change with the changing theory of the person who makes the theory.

Proceeding further, 'Access to Justice' is another such concept that may be defined differently as per the person defining it. If we go by the literal sense then access to justice can be understood by the access to the tools and machinery that provide justice, i.e., 'access to court.' This is the belief and first thought when we at once hear the phrase 'access to justice'. People might feel that if someone is privileged enough to visit the court, pay the lawyers fee, file a suit then he has all the access to justice. This is somewhat true if we follow or go by the literal sense of this phrase. But even this access also often fails to provide justice in true sense. People are unable to seek justice even after this access is available to them. Thus, access to courts might not actually be access to justice. This concept would be further discussed and build upon by various illustrations.

2. THE CONSTITUTIONAL ASPECT OF ACCESS TO JUSTICE:

The gravity of access to justice can be very well felt from that fact that it is predominantly included in the Preamble itself. The Preamble is believed to define who we are as a nation and what are our aspirations for ourselves.[3] The Preamble very clearly aims for "Justice – Social, Economic and Political". Thus, it is evident from here that are constitution drafters acknowledged the fact that pre-independence, justice in this form was not existing and post-independence when we ourselves would govern the nation then this goal would slowly and gradually be achieved. They did believe that we as a nation would take all the possible efforts in ensuring the delivery of social, economic and political justice to all the people of the nation.

The first step in this direction was taken in year 1976, when by the 42nd amendment of the constitution, Article 39-A was inserted that talked about Equal Justice and Free Legal Aid. The article stated that "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"[4]. This article is believed to be the pioneer of free legal aid in the nation and which imposed a moral duty over the government to facilitate the access of justice to its people.

The 42nd Amendment also amended the 7th schedule[5] and transferred the duty of administration of justice from the union list to the concurrent list which imposed a duty over the states also to administer justice and take relevant secure the enforcement of the same. This gave a clear message to the states that they can no longer shift the burden to the central government each time the relevant steps towards access to justice needs to be taken. This was also done to ensure that the justice delivery system is strengthen at the very grassroot level. One can easily find the mention of access to justice in several other parts of the constitution. This speaks of the aspirations that the constitution makers had for the nation at the time of framing the constitution.

Another duty over the state is imposed by Article 46[6] which says that "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation". This article acknowledged that the weaker section of the society are in a more vulnerable position that others and the state, being a guardian of their rights should extend all possible efforts to prevent them from being subjected to any form of injustice. The term social injustice that is used here depicts that complete justice can never be achieved until all the sections of the society are at par and away from any sort of discrimination. It depicts that we can uplift as a society only when together and never alone.

Article 142 is a special article that allows the supreme court to do complete justice as per its discretion. It says that, "The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe". This article is popularly known to empower the supreme court with unprecedent level of authority and permission to take whatever steps are required to ensure that justice prevails. The inclusion of this article even after the existence of a proper democratic governmental structure signifies that the constitution framers could imagine of a situation where when all the organs of government would fail, the citizens can still expect the Supreme Court of India to secure their rights and deliver Justice to them. This is the importance of Justice in our Constitution.

In year 1987, the government brought the Legal Services Authorities Act that constituted the National[7], State[8] and District[9] level authorities that would work towards providing legal services at the grassroot level. This also introduced 'Lok Adalats' with an aim to extent dispute resolution services even to the last person. The judiciary, as a guardian to the

rights of the citizens have upheld the concept of justice several times. Cases like M.H. Haskot Vs. State of Maharashtra[10], Menka Gandhi Case[11], Hussainara Khatoon case[12] and even the Kasab case of year 2012 upholds the value of justice over all other needs for the people. The govt. also has time to time been coming up with various schemes in interest of justice.

3. WHY AND WHERE 'ACCESS TO JUSTICE' IS FALLING SHORT?

There are different reasons that leads to failure in access to justice.

The time that is involved in litigation upholds the saying that 'justice delayed is justice denied'. Suppose in a matter of rape, the case is instituted and after the series of hearings and appeals of 30 odd years, the accused who at the time of the incident was of 40 years is finally found guilty. Over these years the victim and her family has been continuously harassed and pressurised to backout and owing to this pressure she commits suicide. Now the victim is dead and the offender has lived all his life in the manner he wanted to. This pronouncement of judgement might be 'just' and fulfilment of 'access to justice', in literal sense but not a single soul could find justice in this delivery. We really need to find a way that could substantially reduce the amount of time that the cases in judicial system consume.

The cost involved in litigation also fails justice delivery. In a property matter of 2 Lack Rs. the petitioner would gain nothing if he had to bear a cost of 6 Lack in course of litigation. That property might be the world to someone, but not a day could he enjoy and cherish it because it was under stay orders for years. Many a times the formal structure of the law and legal institutions hinder in the delivery of true justice. A judge might be wanting to give a little extra or that ideal judgement that would be in the best interest of both the parties but he cannot because he is bound by the procedural aspect of the law. Thus, there are many reasons that restricts access to justice merely to access to courts and does not achieve the real objective of establishing social order and delivering greater good to the greater numbers.

4. THE CURRENT JUSTICE DELIVERY REGIME: [13]

The Indian legal system is based upon the 'Adversarial Legalism'. This is a system in which each party at dispute present their case in the best possible manner and then on the basis of the facts presented in court, a neutral decision is made by applying the provisions of a pre-constituted law. This system operates on the past events. This system has generally been followed by the common law countries in which in matters other that criminal in nature, the parties affected have to themselves bring the wrong in the notice of the court. It is believed that this system was designed keeping the power holder in mind and not the people over whom it is to be applied. Thus, this justice delivery is time consuming, costly and mentally a traumatizing process.

When India got Independence and our constitution took shape, various provisions were framed with an intention to redesign this adversarial system that was being followed by the Britishers to rule over Indian masses and to redesign the justice delivery system. This is evident from the inclusion of Article 14[14], i.e., 'Equality before Law' that ensures equality of all sorts in the eyes of law and in the application of law over all. Also, Article 256[15] imposes a duty on the state government to implement the laws framed by the Union and State Legislatures and the Union government can issue directions to the state government in case the state government fails to do so. Thus, the state has the duty to initiate proceedings even in the private wrongs committed to the individuals. This depicts the "Inquisitorial System"[16] of justice delivery in which the court play an active role and determine how to proceed. This mandate of constitution remained in the books and we in practice are still using the adversarial system that is both, biased towards power and unconstitutional. Looking at these aspects, it can be said that the current justice delivery system of India is not opening the gates for access to justice to prevail and thus, some alternate means of justice delivery system other than litigation that addresses at least some of these issues must be looked up to.

5. MEDIATION AND ACCESS TO JUSTICE:

One of the aims of our constitution is to provide justice at the door step and that too, within a permissible time-frame. When the traditional Justice delivery system fall short of its objective of dispute resolution, willingly or unwillingly we looked towards the alternate dispute resolution arrangements to cope up with the demands of the society. These methods are also called the 'Informal Access to Justice methods'. Informal because they structurally differ from the trustworthy 'court system of dispute redressal' and is conceived as a separate institution. These methods include Arbitration, Mediation, Negotiation and Conciliation. Different methods, different uses but same objective – to settle disputes. Mediation, being the subject matter of this research paper would be in detail discussed.

Mediation, according to the Black's Law Dictionary[17], "is a method of non- binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution". Mediation is the use of

negotiation techniques by a neutral third party to resolve the dispute between the individuals and entities, out of court[18]. The mediators can be advocates, former judges or even other people trained in mediation. The mediator is just a facilitator and performs only for the negotiation of the settlement of disputes between the parties. Initially, arbitration was picked up as the most looked up to alternate dispute redressal mechanism but over the time people realised several disadvantages and limitations of undergoing arbitration. This has led them to slowly and gradually proceed towards Mediation, as it offers several benefits when compared to litigation or arbitration.

6. LAWS GOVERNING MEDIATION IN INDIA:

Mediation got legislative recognition via the Industrial Dispute Act, 1947[19]. Later, the possibilities of mediation as an ADR were mentioned by the Law commission[20] in year 1988 and by the Malimath Committee21 in year 1990 when it advocated for amending the law and including ADR mechanisms[22]. Later in year 1999, "the Code of Civil Procedure Amendment Act"[23] was passed by the Parliament which introduced the "Section 89 in CPC"[24] that facilitated the courts to refer any matter that they feel appropriate and in which they feel exist a scope of settlement to Alternative Dispute Resolution mechanisms. Till here, to gain the consent of parties was mandatory for the court to proceed towards ADR.

A mediation session is required by law under the Civil Procedure Mediation Rules, 2003 r.5(f)(iii). These rules empowered the court to refer a matter having possibility of settlement to mediation, even beyond the consent of the parties[25]. Thus, in this manner mandatory mediation came into picture. In case Salem Advocate Bar Association v Union of India[26] ("Salem I") the Supreme Court of India observed that even after the recommendation of the Law commission and post inclusion of provisions of ADR into CPC via section 89, the instances of the cases being referred to ADR by the courts was very less. Later, when in year 2005 when in case Salem Advocate Bar Association v Union of India[27] ("Salem II") the Supreme Court set the framework for mediation. As a result, the High Courts implemented the model rules and guidelines and mediation centres were instituted within courts. Mediation further gained momentum with the Afcons case[28] in which the court discussed the limitations and purpose of section 89 CPC and also in detail mentioned about how mediation should be used and accepted more widely.

Another positive development towards mediation was the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 introduced Section 12A of the Commercial Courts Act of 2015 to require pre-institution mediation and settlement in all cases involving commercial disputes that do not require urgent relief.[29] The Legal Services Authority Act of 1987 establishes the authorities that can mediate. You have three months to finish it, with the option for an additional two months.

The Arbitration and Conciliation Act, 1996 states that a signed agreement between the parties shall have the same force and effect as an arbitral award. Furthermore, in order to standardize such mediation processes, the Central Government published the Rules, 2018 for Commercial Courts (Pre-Institution Mediation and Settlement) on July 3, 2018. The original intent of the Act was to reduce case delays, so this Amendment and the subsequent notification of the Rules are positive developments in that direction. In addition to facilitating the use of mediation cells to swiftly resolve business disputes, these measures will encourage parties to forego the use of external agencies like courts.

7. THE MEDIATION ACT, 2023[30]:

A proper codified Act for Mediation was the long pending demand of the legal fraternity and related stakeholders. Last year, on 15th of September 2023, this bill was finally enacted and saw the light of day. Now, with its enactment, it has become the first proper legislation on Mediation. The act has several features like promotion of Institutional Mediation, Community and Online mediation. While the long-term effects of this Act are yet to be witnessed but people serving in the Indian justice delivery system believe that this Act has the potential to make the system more efficient and equitable.

CATEGORIES OF MEDIATION: Primarily mediation can be categorised into two broad categories depending upon the manner by which they approach mediation.

1. **COURT REFERRED MEDIATION:** This was initiated after inclusion of Section 89 C.P.C. that made it mandatory to courts to look towards possibilities of mediation in civil disputes. The court often use this method for family and matrimonial matters where parties are at a relationship amongst each other. The court issue direction under Order X Rule 1A C.P.C. to the parties offering them to choose amongst the different methods of ADR and also fixes the appearance date[31]. Still, it is up to the discretion of the court to refer or not a matter into mediation. The court may simply record its reasons and refrain from referring a matter to mediation.

2. **PRIVATE MEDIATION**[32]: In this method, the parties at a dispute choose to settle through mediation voluntarily and the role of court if not involved. This is also known as pre-litigation mediation where the parties give a fair chance to settling their disputes out of court. this method is also used when a matter is long pending in the court and the parties want to end it by settling out of court. If such Mediation is successful then the settlement terms are executed as a contract under Section 74 of the Arbitration and Conciliation Act, 1996[33] and has the same validity as an arbitral award. In case the settlement is reached in a dispute that is still pending in the court, the parties here have the option to file the settlement in court for a decree and in case of pre-litigation disputes that were referred to mediation, parties have the option to name the mediation process and a 'conciliation'[34].

8. UNIQUE FEATURES OF MEDIATION AND HOW IT IS A FACILITATOR OF "ACCESS TO JUSTICE":

MEDIATION RESPECTS THE PRIVACY OF PARTIES: Mediation is a 100 percent confidential process that keeps the inputs, views, proposals and fears of the parties within themselves and the mediator and only that amount of information is share with the other party that is allowed by the parties and also which is factual in nature. In course of litigation, it often happens that the confidential aspects, private documents, trade secrets or personal biases becomes public that not only is harmful for the reputation of the parties but is also disruptive to their personal relationships. In cases where companies are involved, disclosure of their trade secrets or confidential documents brings in financial losses to them and is harmful to their further business prospects. In such cases, mediation becomes the first choice as the parties gain control over the procedures, control over what and how much information is to be shared and even if settlement is not reached then also their secrets are safe.

MEDIATION IS CHEAPER: We have all the stories about how litigation and arbitration is becoming more and more costly with time and beyond the reach of a large section of people. In a nation like India where access to food, clothing and shelter is still a dream for many; spending money over justice is beyond imagination. The Supreme Court Judge Justice N V Ramana[35] lately said in his address at NALSA that "we are still a country with millions of people living without access to basic fundamental amenities of life, including access to justice". In such a scenario, a cheaper and more effective method of dispute resolution is always a better choice for all.[36]

MEDIATION GIVES CONTROL TO THE PARTIES OVER THE PROCEEDINGS: ANOTHER characteristic of adversarial system is that it takes the control over the proceedings from the parties at dispute and transfers it to the lawyers and courts. These lawyers present the case as per their discretion and most of the time the parties are not much involved thinking that what the lawyer is saying is in their best interest. Mediation changes this scenario by giving the control back into the hands of the parties. The parties can decide how to proceed, where to conduct the proceedings and what to include in the process. The parties have more say and get to speak out their terms. They enter into mediation with a preconceived notion that we can settle to what is best to us. Also, as the process is completely voluntary in nature, the parties if do not want to continue further can at any point of time leave the process and exit. The parties do not feel that anything is at risk in trying a hand at mediation when they can gain immensely from it. also, as there is no further appeal from mediation the dispute can end soon and there is no uncertainty of the order turning over the settlement. This gives a sense of satisfaction to the parties as nobody wants to unnecessarily drag a dispute considering the amount of time and energy its resolution demands. The non- binding nature of disputes is like the cherry on the cake. If mediation fails and no settlement is reached then also there is nothing to lose. Nobody can bind a party to accept the terms and conditions if they don't want to accept. Thus, Mediation offers so much to benefit from and very little to lose.

MEDIATION IS INFORMAL: This I believe is the most outstanding feature of Mediation which makes it different from litigation and arbitration and suitable for a large spectrum of disputes. The informality of procedures allows the mediator to use their skills in finding 'out of the box' and creative solutions to which the parties might agree and settle. This feature allows mediation to find solutions that are practical and acceptable. This not only creates a win-win situation for both the parties at disputes but also improves their mutual relationships. Hon'ble Justice A.K. Sikri in his address at NLSIU, mentions about how he has witnessed mediation successfully solving several disputes that if had been solved by the courts would have delivered justice only in literal sense but would lead to larger issues that might remain unaddressed later[37]. He gave illustrations from four different cases that he witnessed over the years that beautifully explains the difference in the nature of justice granted by mediation than litigation in the same case.

He first mentions about the Levi's counterfeiting case in which Levi's filed for an injunction against a factory owner of Punjab that had been producing counterfeits of Levi's jeans. This factory had around 200 employees who had the only

source of income working in the factory. Had the injunction been granted the factory would be closed, all the workers would have become unemployed, the factory owner would not be able to pay back his loan to the bank but justice for sure would have been delivered. This justice would have been merely literal justice causing greater harm to several people. Alternatively, when the case went to mediation; a team from Levi's visited the factory, got assured of the quality of counterfeits produced and made an agreement with the factory owner for accepting them as one of their vendors. It was decided that they will now onwards make clothing only for Levi's, with the required quality assurance. This saved the employment of all the workers and also the owner of factory from becoming a loan defaulter. This is 'access to justice" in real sense.

Another example he cites is that of a family dispute. This dispute arose when the famous Author and Writer Mr. O.V. Vijayan died. His son and wife could not reach on time and the last rites were performed by his brother with whom he had several differences. Later when it was the time to immerse his ashes in the holy river, both his brother and son claimed their right over the same and wanted to complete the rituals themselves. When the case came to the court of Justice Sikri, he read different scriptures and laws and finally came to the conclusion that as the brother performed the last rites, he had the right to immerse the ashes also.

But as he did not want to deprive the son of his right, he suggested that both of them can jointly perform the ceremony. None of them willingly agreed to it. the brother was happy but not the son and the widow. They filed an appeal and the matter went to the division bench. The chief justice referred the matter into mediation.

Following this, the case went to mediation and the parties did come for the mediation. The mediator was skilled enough and used her emotional quotient to settle the dispute. She took the family through past memories and the times they had spent together and made them realised that all they had amongst each other was misunderstanding and wrong perception of each other deeds. They ended up hugging each other and had tears in their eyes and also agreed to perform the ceremony together. The final outcome of the mediation was same that was decided by the court. But, had they not been given an opportunity to reconcile, the performance of ceremony together had been merely symbolism of togetherness and not unity at heart. This is the power of mediation and the informal approach it follows. Sometimes all that is needed in a dispute is a push to the parties to simply sit and talk, which they otherwise don't want to do due to their personal egos.

The third example he cites is that of an industrial dispute of employment between the employer and the employee. The employee is a manager in a factory who was not required anymore and his services were terminated. He files a case against his termination. Now the management takes the plea that he is not a workman under the industrial dispute act and thus, holds no ground to file the case. The court here could not direct beyond judging the fact that whether the manager is a workman or not. If case he is a workman, he has to be reinstated and then the factory was at loss as they didn't need that post anymore. Had he been laid off, he became unemployed. Both the ways it was a win-lose situation that got converted to a win-win situation when the case was referred to mediation. What came out of the
mediation was that sadly, the employee had lately lost his entire family and the only emotional connect he had was with his colleagues at the factory. All he wanted was not to be separated from these friends of his who were now his family. The administration on the other hand was ready to retain him but on another post with a little lower pay. Both the parties agreed to this and ended in a win-win situation. This was not possible through litigation as the judge could not go beyond the formal law even if he wanted to.

The last case he shares is about a matrimonial dispute where the parties had taken divorce and the dispute was over maintenance and permanent alimony for which they were unable to reach an agreement. It would be surprising to know that after attending the sessions of mediation for deciding the alimony amount, both the husband and wife resolved their differences and married each other again. This is the extreme example of what mediation can do. Mediation helps in restoring the order of the society and solving disputes not merely in literal sense, but offers solutions that are more practical and amicable to the parties. Lesser disputes mean a more ordered and satisfied society. Thus, Justice Sikri very well says that, "Justice is achieved in mediation by exercise of parties self-determination". "The parties get a chance to self-determine themselves. It takes you from a position of I vs. You to We, where both the parties sit together with the objective of finding solutions[38]."

Sometimes, the outcome or resolution might not be legally just or fair. This outcome when judged over the scales of law is defected. But it might be the most satisfying solution for the parties involved in the dispute. Professor Stulburg, of Ohio State University, who had also drafted the uniform model arbitration act has in his paper 'Justice as Fairness' says that "The meaning of fairness is not exhausted by the concept of legal justice. If the primary objective for using mediation was to ensure that litigants have their legal claims heard and results

established in a more expeditious, informal, nonadversarial atmosphere than would otherwise be obtained by using a traditional litigation process, all that one could say with confidence about such a use of mediation is that the parties secured at least what they were legally entitled to, whether that outcome was fair or not"[39] this mean that sometimes what is needed might not be legally fair, but there could not have been a resolution that would have been more fulfilling for the parties at dispute.

9. WHICH CASES ARE AMENABLE TO MEDIATION AND WHICH SHOULD NEVER BE REFERRED?

The traditional legal system has its own sanctity but is not absolutely impeccable.[40] Thus, there are a category of cases that ger resolved in a better manner when referred to mediation than when tried in court. The Supreme Court while discussing the Afcons Case[41] in year 2010 listed several cases that can be amenable to mediation. But talking in general, Mediation is best suited to disputes that involve mutual relationships among the parties either personal or commercial in nature. In personal relationships the parties often land into disputes due to misunderstanding due to lack of communication or ego clashes. Also, mediation preserves their relationships and they do not have to face defamation in front of open court. These types of disputes have the highest probability of settlement and thus, courts often refer them to mediation. Commercial matters on the other hand involve business prospects amongst the parties which can be negotiated and settled. For example, majority of patent infringement suits often settle with grant of license and creation of a licensor licensee relationship amongst the parties. Grant of franchisee is also a common settlement option in trademark disputes. Disputes of such nature that involves mutual relationships of the parties not only are more suited for mediation but often end up preserving and improving their mutual relationships. Mediation is also beneficial in Intellectual Property matters where TIME is a crucial parameter and the right holder cannot spend the years in which he has to exploit his rights in the court. Partnership matters also have high settlement rate when referred to mediation.
Irrespective of all these benefits, there is a category of cases which can and should never be referred to mediation. These are matters in which any interim or immediate relief is desired. Such cases are of urgent nature and need immediate attention of the courts. Also, criminal cases also should not be referred to mediation as it is a big threat to justice and the equilibrium of the society. Other than these to solve some critical tax matters that need a new ruling or constitutional matters that question the law itself are best judged by the court itself. These cases should never be referred in to mediation. We should also keep in mind that a primary goal of our constitution is to deliver social justice to all. Thus, if cases of less importance and private disputes are solved through mediation, the courts can spend their valuable time solving the cases that involve social justice and criminal matters in which the victim cry for justice and is necessary to secure a social order.

10. MEDIATION AS A HINDERANCE TO ACCESS TO JUSTICE AND WHY MEDIATION IS STILL NOT VERY POPULAR IN INDIA?

As each coin has two sides and each situation has two aspects to look at, similarly mediation also has several limitations. Professor Jacqueline Nolan-Haley, the Director of ADR and Conflict Resolution Program at Fordham University School of Law mentions in his paper[42] devoted to mediation in case of self-represented parties and talk about how mediation fall short in providing access to justice in case of self-represented parties. The plight of these parties is that they do not have enough means to afford the lawyer who could guide them properly about how to proceed and fight the case. He mentions how the courts and legislatures in U.S.A. had pushed hard enough to sell mediation without keeping in regard the consensual nature of this process.[43] Mediation has several limitations and negative aspects which if not taken care of, takes us away from access to justice.

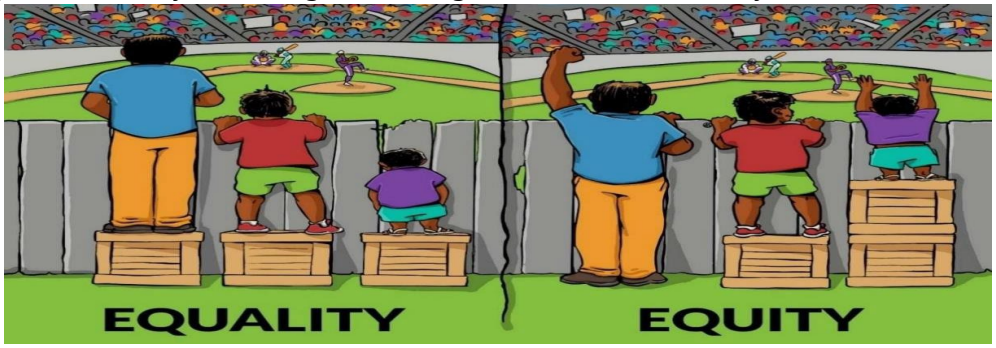
1. Mandatory mediation is an additional burden on the parties which they might not want to pursue and this increases their overall cost spend over seeking justice. Thus, the access to justice is not voluntary but through withered consent.
2. Lack of information: It is very important that the parties are properly explained about the mediation process so that they can actually take charge and actively participate in the mediation process, the characteristic for which mediation is often praised. In case of self-represented parties this becomes even more important because they are already suffering with either no information or misinformation and should not further face discrimination in mediation process.
3. The coercive nature of some mediators also is against the access to justice in true means. It is evident that the mediator has to be an impartial person who is simply facilitating the negotiation process and helping the parties to

reach practical solutions. At no point of time his personality should overshadow the mediation process and create problems for the parties. The mediator can always suggest but never force his view over the parties at the dispute.

4. Rushed mediation sessions is another disadvantage of mediation. A dispute resolution process needs to be speedy to actually be fruitful, but anyhow the parties should get enough time to soak the previous session and ponder over what solutions and future prospects can be. The quality of mediation degrades if the sessions are organised very quickly. This should always be taken care of by the mediator.
5. Mediators getting biased is another issue that hinders access to justice. As we say, judges are also humans and not God; so are mediators. Ethics is a theoretical concept that changes from the eye that perceives it. Thus, if a mediator gets biased or get involved in monetary benefits; it would be unjust and can never lead to just outcome. The better part is that the result of mediation is non-binding in nature but anyways, a biased mediation would result is loss of time, money and energy of all.
6. Enactment might limit the scope and informality of mediation: The Supreme Court in case M.R. Krishna Murthi v The New India Assurance Co. Ltd.[44] noted that "the way the mediation movement is catching up in this country, there is a dire need to enact an Indian Mediation Act as well." The apex court emphasised over it's the necessity of this act. Contrary to this, scholars often question that whether the mediation process would function equally effectively enough after such act is enacted. Because it being the informal nature of mediation that offers so many creative and out of the box solutions that make mediation a popular choice over litigation.
7. Absence of Mediation Culture: India suffers with the absence of mediation culture and the public at large are still unaware that such resolution even exists. To those who know, show reluctance in accepting the same. This has been seen in the popular Ajodhya case when the court asked the parties to mediate, this view was severely criticised.
8. Less referral from Judiciary: It has also been seen that irrespective of all the amendments and recommendations, the judiciary is still not referring cases frequently to mediation. The courts should spend more of their time in delivering social justice, but have to deal with private matters which can better be handled by mediation. This decreases the rate at which these disputes can be solved and increases the burden over the courts.
9. Lack of mediation management: This is another reason why mediation is failing and not often looked up to by litigants. In India, the Mediation and Conciliation Project Committee, Supreme Court of India manages all the mediation activities. The burden of executing mediation in high courts and lower courts are on the respective judges who are already overburdened and are unable to give enough time to mediation. This degrades the rate of mediation and is a hinderance in access to justice.

11. MEDIATION - FACILITATING ACCESS TO JUSTICE OR A HINDERANCE IN IT? "CONCLUSION"

When the Constitution of India asserted Social, Economic and Political Justice for all the citizens and laid down several provisions for the same, all of us believed that now we would be witnessing a just society where all the people would be treated equally. What we did not realised that we did not actually needed equality but equity. This equity would further take us to equalit y automatically. Referring to the image below would make my above made statement clear.



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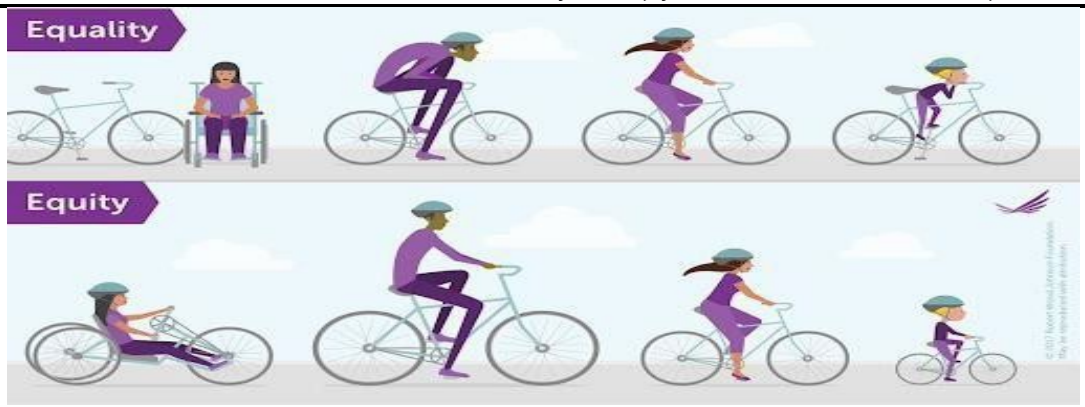

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Thus, the justice would be delivered in true sense not when all of us are treated equally, but when we get what is actually needed. What works for one person might not work for another. It would be appropriate to say that "Justice is not readymade, but needs to be custom tailored". Mediation offers this custom tailoring. The straight jacket structure of our formal judicial system might not bring satisfactory results for all, but the same could be achieved through mediation. We all have seen the mention of Latin quote "Fiat Justitia ruat caelum" mentioned everywhere in our legal systems that means, Let Justice be done, though the heaven may fall. But what would all of us achieve if justice comes at this cost? Our Constitution and Courts uphold Dharma that is the virtue of rightness nous and legal justice. But Actual Justice (practical justice) can be far away from Legal Justice (justice as per law). Law can be very confusing and can be just and unjust at the same time for two different persons. Had this not been true, we would not have evolved from the concept of rule of man…to rule by law…to rule of law….to law for the people. We would not have shifted from locus standi to public interest litigation. Thus, law to needs refinement and so do the justice delivery system. Amartya Sen in his classic work "The idea of Justice" mentioned about the concept of Nyaya and Neeti and how Lord Krishna focussed on Neeti whereas Arjuna was emphasising on whether following Neeti would actually lead us to Nyaya? Amartya Sen, says that "Justice is ultimately connected with the way people's lives go and not merely with the nature of the institution surrounding them". This leads us to several questions in regard with the access to justice that "are we really delivering justice by simply applying the law to all cases?", "are we not overburdening the court with private matters and deflecting it from delivering social justice?", "is it sufficient to just have fully functioning legal institution without accessing its impact in the life of people?" and the biggest question, "are we actually providing access to justice?".

It is up to us that whether we follow the deontological approach or look into what actually works for the people. India does critically and urgently need to pace up mediation as not just an alternative dispute resolution method but in a manner by which it complements the existing structure of legislation i.e., courts. Mediation is an arrangement that not only looks at the law but also the other facets such as emotional and psychological aspects of a case because justice is not merely application of law, but reinstating the affected person to such a state that is closest to his original position. We have already discussed with the help of several examples that how mediation is suitable in many cases and actually helps in resolution of disputes. The settlement reached by mediation often happens to be more effective than the judgement pronounced by the court. Mediation is a cheaper, confidential, speedy and more flexible approach that opens itself as per the needs of the parties. It also empowers the parties to determine the outcome of their dispute. In U.S.A. 95 percent of disputes are being settled by mediation and the judiciary is getting time to focus over the hard-fought rights of people and concepts of social justice. The process of mediation in western society has reached to the grassroot level and is included in communities and a variety of institutions. We do not need to blindly follow the western society but can import a system and customise it as per the conditions in our country. Mediation is for sure the much-needed gateway for "Access to Justice" and deserves a fair chance of practice. It is expected that over the time we would see unprecedent development in this field that would strengthen the Indian justice delivery system and the citizens would obtain the long pending access to the justice that they truly deserve.

To conclude, quoting the lines of Sir Frances Hodgson Bernett from his book "The Secret Garden" would be well justified here.

"At first people refuse to believe that strange new things can be done; Then they begin hope it can be done;
Then they see it can be done;
Then it is done and all the world wonders why it was not done centuries ago".

The same holds true in the case of Mediation also.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

REFERENCES

Mediation from the Perspective of The Constitutional Promise of Access to Justice by Mr. A.J. Jawad, Legal Eagles Elites, Feb. 13, 2021,
INDIA CONST. art. 39, cl. a.
Insertion of Section 11A. "Administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts".
INDIA CONST. art. 46.
NALSA is the abbreviation for the National Legal Services Authority.
State legal services authority was established at state level in several states.
District legal services authority was established at district level with the vision to spread access to justice at grassroot level.
1978 AIR 1548,1979 SCR (1)192.
1978 AIR 597, 1978 SCR (2) 621.
1979 AIR 1369, 1979 SCR (3) 532.
13Amit Pratap Shaunak, India: Access to Justice in India, rights/369048/ =access-to-justice-in-india, accessed on 05th of July 2021, 18:30 pm.
INDIA CONST. art. 14.
INDIA CONST. art. 256.
Supra at 11.
Black's Law Dictionary, 8th Ed., p. 1003.
SUKUMAR RAY, Alternative Dispute Resolution, 72 (Eastern Law House 2007).
The Industrial Dispute Act, 1947, No. 14, Acts of Parliament, 1947 (India).
Law Commission of India, 129th Report, Urban Litigation: Mediation as an alternative to Litigation (1988).
The Malimath Committee submitted its report in August, 1990.
Sudipto Sarkar & V.R. Manohar (Eds.), Sarkar's Code of Civil Procedure (Wadhwa and Company, Nagpur, 11th Edn., 2006).
The Civil Procedure Code (Amendment) Act, 1999, No. 46, Acts of Parliament, 1999 (India) with effect from 1/7/2002.
Section 89, The Civil Procedure Code, 1908.
This was the introduction of mandatory mediation in India.
Salem Advocate Bar Association v Union of India, (2003) 1 SCC 49, (2003).
Salem Advocate Bar Association v Union of India, 6 SCC 344, (2005).
Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. (P) Ltd., 8 SCC 24 (2010).
Under Section 2(c) of the Commercial Courts Act 2015, "commercial disputes" include disputes arising out of intellectual property rights.
30 The Mediation Act, 2023. No. 32 of 2023
Nishikant Bhibu, Strengthening the Justice Delivery System in India Through Mediation, Mediation, 95 (V.K.Ahuja, Ashutosh Mishra, Ashutosh Acharya et. al. Satyam Law International 2020).
Ibid. The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
ibid
"Speaking at the inauguration of the front offices and legal aid defense counsel office under the auspices of the National Legal Services Authority (NALSA) in New Delhi, Justice Ramana" — the second most senior judge of the top court — said: "Ever since we declared ourselves to be an independent nation, we found ourselves caught between the twin problems of 'poverty' and 'access to justice'. The architects of modern India had debated this issue on several national and international platforms. Sadly, even after 74 years of independence, we are still discussing the same issue. One would have expected that, in this fast-paced world, topics such as these would have become outdated,

however, they have not." He further said that, "Being the second most populous country in the world, we are now a force to be reckoned with. Indians, with their grit, determination, intelligence and expertise are now highly sought after in the work-force. On the other side of this success story, we are still a country with millions of people living without access to basic fundamental amenities of life, including access to justice. Although the reality is sad, the same should not demotivate us," Justice Ramana said, adding that, "As long as we are a nation which continues to face such dual realities, such discussions must continue."

Express News Service, "Access to Justice still a challenge for millions: Justice Ramana, Indian Express (March 23, 2021, 7:33:46 am)", 'https://indianexpress.com/article/india/access-to-justice-still-a-challenge-for- millions- justice-ramana-7240561/'.

https://dx.doi.org/10.29121/shodhkosh.v4.i2.2023.2311

Joseph B. Stulberg, Fairness and Mediation, 13:3 Ohio State Journal on Dispute Resolution, 909, 910-11 (1998).

Supra at 34.

Supra at 26.

Jacqueline Nolan-Haley, Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here, 87 Fordham Law Review Online 15 (2018).

Id.

Civil Appeal No. 2476-2477 of 2019, order dated 5 March 2019.

Image Reference : https://dx.doi.org/10.29121/shodhkosh.v4.i2.2023.2311

SUKUMAR RAY, Alternative Dispute Resolution, 72 (Eastern Law House 2007).

SUDIPTO SARKAR & V.R. MANOHAR (Eds.), Sarkar's Code of Civil Procedure (Wadhwa and Company, Nagpur, 11th Edn., 2006).

NISHIKANT BHIBU, Strengthening the Justice Delivery System in India Through Mediation, Mediation, 95 (V.K.Ahuja, Ashutosh Mishra, Ashutosh Acharya et. al. Satyam Law International 2020).

Joseph B. Stulberg, Fairness and Mediation, 13:3 Ohio State Journal on Dispute Resolution, 909, 910-11 (1998).

Jacqueline Nolan-Haley, Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here, 87 Fordham Law Review Online 15 (2018)

Omer Shapira, Conceptions and Preceptions of Fairness in Mediation, 54 South Texas Law Review (2012)

Craig A. McEwen and Laura Williams, Legal Policy and Access to Justice through Courts and Mediation, 13:3 Ohio State Journal on Dispute Resolution. 865 (1998).

Mediation from the Perspective of The Constitutional Promise of Access to Justice by Mr. A.J. Jawad, Legal Eagles Elites, February 13, 2021, https://www.youtube.com/watch?v=HxteN8qR0XI&t=43s

Amit Pratap Shaunak, India: Access to Justice in India, https://www.mondaq.com/india/human-rights/369048/access-to-justice-
in-india, accessed on 05th of July 2021, 18:30 pm.

Express News Service, Access to Justice still a challenge for millions: Justice Ramana, Indian Express (March 23, 2021, 7:33:46 am), https://indianexpress.com/article/india/access-to-justice-still-a-challenge- for-millions-justice-ramana-7240561/.

Justice A.K. Sikri : Mediation and Access to Justice in India, NLSIU Banglore, Student Bar Association, NLSIU, https://www.youtube.com/watch?v=fW7fHzUO4i

The Industrial Dispute Act, 1947, No. 14, Acts of Parliament, 1947 (India)

The Civil Procedure Code (Amendment) Act, 1999, No. 46, Acts of Parliament, 1999 (India) with effect from 1/7/2002.

Commercial Courts Act 2015

The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India)

The Constitution of India

The Mediation Act, 2023. Act 32 of 2023

Law commission report:

Law Commission of India, 129th Report, Urban Litigation: Mediation as an alternative to Litigation (1988)