

# FORMULATING A MODEL LEGISLATIVE FRAMEWORK FOR MEDIATION IN INDIA

*Rashika Narain & Abhinav Sankaranarayanan\**

*The Indian judicial system has often been criticised for high rates of pendency, inefficient functioning, and adoption of an archaic approach to dispute resolution. The need to establish alternate pathways of dispute resolution has been emphasised on numerous occasions by the Law Commission of India as well as acclaimed scholars. Mediation has been identified by legal practitioners as a suitable technique for resolving a variety of disputes. However, such an alternate form of dispute resolution is yet to gain popularity in India, with the lack of legislative sanction being cited as a key reason for its underdevelopment. This paper seeks to understand mediation as an alternate dispute resolution technique and explores reasons regarding why mediation will prove to be a suitable pathway for litigants in India to resolve disputes in an amicable and inexpensive manner. Additionally, this paper discusses the different forms of mediation regulation across jurisdictions and argues that the creation of a national legislative framework would be the ideal next step in India.*

## Table of Contents

I.	INTRODUCTION.....	2
II.	REQUIRMENT OF ADR IN INDIA.....	4
III.	MEDIATION IN THE INDIAN CONTEXT.....	8
A.	COURT REFERRED MEDIATION (POST-LITIGATION MEDIATION): §89 CPC.....	8
B.	MEDIATION WITHIN STATUTES.....	9
C.	PRIVATE MEDIATION (PRE-LITIGATION MEDIATION).....	11
1.	Confidentiality.....	13
2.	Enforcement of Settlement Agreements.....	14
IV.	REGULATORY FRAMEWORKS FOR MEDIATION.....	17
A.	MARKET-CONTRACT REGULATION.....	18
B.	SELF-REGULATORY APPROACH.....	20
C.	FORMAL REGULATORY FRAMEWORK.....	22
D.	FORMAL LEGISLATIVE REGULATION.....	25
V.	FINDINGS OF THE SURVEY AND MODEL CLAUSES.....	26
A.	METHODOLOGY.....	27
B.	MEDIATOR QUALIFICATIONS.....	27
C.	CONFIDENTIALITY.....	28
D.	ENFORCEMENT OF SETTLEMENTS.....	30
VI.	CONCLUSION.....	32
VII.	ANNEXURE: MODEL QUESTIONNAIRE.....	32
A.	GENERAL.....	32
B.	REFERENCE MADE TO MEDIATION.....	33
C.	COMPLAINT MECHANISMS.....	34

**January – March, 2018**

D. RIGHTS OF PARTIES ..... 34  
 E. INFRASTRUCTURE REQUIREMENTS..... 35  
 F. SELECTION OF MEDIATORS ..... 36  
 G. AWARENESS ..... 37

I. INTRODUCTION

The judiciary acts as the backbone of the Indian democracy, by ensuring social order while furthering the ends of justice. The existence of an independent and unbiased judiciary is necessary for the preservation of citizen’s rights and maintenance of the rule of law. Further, studies indicate that the effectiveness of the civil justice system, in particular, has a profound impact on the efficiency of the economy,<sup>1</sup> thus maintaining economic stability.<sup>2</sup> Authoritative judicial determination, wherein the coercive power of the State compels unwilling litigants to come to the negotiating table, is crucial to ensure that weaker parties are able to enforce their legal and contractual rights.<sup>3</sup> Thus, the existence of a civil justice system, which functions efficiently and adjudicates expeditiously, is indispensable for the continued survival of any democracy.

However, the Indian justice system is infamous for its inability to dispose cases in a timely manner.<sup>4</sup> As of December 8, 2017, there are over 2.6 crore cases pending in High Courts across the country.<sup>5</sup> In fact, at the current pace of functioning, the Delhi High Court alone would take 466 years to clear its backlog.<sup>6</sup> As of December, 2016, there exist seventy-five lakh civil suits pending, out of which more than forty lakh have been pending for over two years.<sup>7</sup>

The Supreme Court has on several occasions recognised the need for a less formal, alternative forum that may help in securing speedy justice as the Court stated judicial processes in India are time-consuming, complex and expensive.<sup>8</sup> Protracted litigation is not in the interest of either party, not only due to the time and high economic costs involved but also

---

\* 3<sup>rd</sup> and 1<sup>st</sup> year BA. LL.B students at the W.B. National University of Juridical Sciences, Kolkata. We would like to thank Ms. Gauri Pillai for her invaluable comments and vital inputs on earlier versions of this paper, as well as for her help and guidance at every stage. We would also like to thank Mr. Pranjal Sinha (ODRways) for helping us conceive the paper in its initial stages. All errors, however, remain solely ours.

<sup>1</sup> RM Sherwood, *Judicial Systems and Economic Performance*, 34 QUARTERLY REVIEW OF ECONOMICS & FINANCE 101, 116 (1994).

<sup>2</sup> CYNDI BANKS, CRIMINAL JUSTICE SYSTEM, ETHICS, AND PRACTICE, 11-15 (2012); SHIV KUMAR DOGRA, CRIMINAL JUSTICE ADMINISTRATION IN INDIA 4-5 (2003); Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE L. REV. 18 (2013).

<sup>3</sup> *Id.*; ALAN UZELAC, GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN THE CONTEMPORARY JUDICIAL SYSTEMS, 29-37 (2013).

<sup>4</sup> Mayur Suresh & Siddharth Narrain, *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India*, 17, 20 (2014); THE WORLD BANK, *Ease of Doing Business in India*, available at <http://www.doingbusiness.org/data/exploreeconomies/india/#enforcing-contracts> (Last visited on January 7, 2018).

<sup>5</sup> NATIONAL JUDICIAL DATA GRID, *Summary Report of India*, available at [http://njdg.ecourts.gov.in/njdg\\_public/main.php#](http://njdg.ecourts.gov.in/njdg_public/main.php#) (Last visited on December 8, 2017).

<sup>6</sup> *It would take Delhi HC 466 yrs to clear backlog: CJ*, THE INDIAN EXPRESS, February 13, 2009, available at <http://indianexpress.com/article/india/india-others/it-would-take-delhi-hc-466-yrs-to-clear-backlog-cj/> (Last visited on February 3, 2018).

<sup>7</sup> NATIONAL JUDICIAL DATA GRID, *supra* note 5.

<sup>8</sup> *Guru Nanak Foundation v. Rattan Singh & Sons*, AIR 1981 SC 2073; *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531; *Shyamalika Das v. Gen. Manager, Gridco*, (2010) INSC 802.

because of the emotional cost associated with the public forum.<sup>9</sup> Negotiation is one such method that involves parties endeavouring to settle the dispute amicably, aiming to arrive at a solution and not a ‘decision’ as negotiations do not involve a judge passing a judgment, but parties arriving at a compromise.<sup>10</sup> Mediation, conciliation and Lok Adalats are modes of Alternative Dispute Resolution (‘ADR’) mechanism through negotiation.<sup>11</sup>

Mediation provides an alternative, that not only saves time and is cost effective, but it also enables parties to work together and solve disputes amicably.<sup>12</sup> The current adversarial form of litigation does not allow for open dialogue or conversation, parties fight against each other while the problem still persists. In contrast, in mediation, both parties play an active role in resolving the dispute to reach a settlement.<sup>13</sup> Additionally, there exist several indirect costs of litigation such as time, the relationship, and loss of faith between parties.<sup>14</sup> Internationally, mediation has made justice more accessible as it has made adjudication more accommodating.<sup>15</sup> Studies indicate that parties are more likely to comply with a mediation settlement than a court decree.<sup>16</sup>

Empirical data indicates that mediation is cheaper, faster and more satisfying as a dispute resolution mechanism than traditional litigation.<sup>17</sup> Despite the successful track record mediation enjoys, Indian citizens have placed a significantly disproportionate reliance upon the traditional judicial system to resolve disputes, as opposed to alternate modes of resolution. Through our paper, we attempt to analyse this trend.<sup>18</sup> After analysing responses from major Indian mediation centres and numerous mediation practitioners to the queries posed by us, we found that the reason mediation is not widely used as a dispute resolution mechanism in India is because of the lack of State support. We argue that individuals do not trust the existing mediation setup, and in order to encourage mediation, we believe that there exists a dire need for a regulatory framework for mediation as there exists for arbitration.

In our analysis, for the purpose of understanding the grey areas in the existing legal framework for mediation in India, we framed a questionnaire for practicing mediators in India. Our survey questionnaire was modelled to contain thirty-two questions and was designed to focus on seven facets of mediation. The first aspect in this regard focused on the challenges faced by parties during a mediation proceeding. Next, we examined the

---

<sup>9</sup> Harry T Edwards, *Alternative dispute resolution: Panacea or anathema?*, 99 Harvard Law Review 669, 670 (1986).

<sup>10</sup> Mary P. Rowe, *People who feel harassed need a complaint system with both formal and informal options*, 6 NEGOTIATION JOURNAL 166 (1990).

<sup>11</sup> Global Pound Conference Series 2016-17, *Lok Adalat: India's Alternative Dispute Resolution Mechanism*, available at <http://globalpound.org/2017/05/04/lok-adalat-indias-alternative-dispute-resolution-mechanism/> (Last visited on February 3, 2018); *Different Modes of Alternative Dispute Resolution (ADR)*, available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09_chapter%203.pdf) (Last visited on February 3, 2018).

<sup>12</sup> *Different Modes of Alternative Dispute Resolution (ADR)*, *supra* note 11.

<sup>13</sup> TJ Costello, *Pre-litigation Mediation as a Privacy Policy: Exploring the Interaction of Economics and Privacy*, available at <https://www.mediate.com/articles/costelloTJ1.cfm> (Last visited on February 3, 2018).

<sup>14</sup> *Id.*

<sup>15</sup> Tony Biller, *Good Faith Mediation: Improving Efficiency, Costs, and Satisfaction in North Carolina's Pre-Trial Process*, 18 CAMPBELL LAW REVIEW 284 (1996).

<sup>16</sup> James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 182 (2002); Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L.J. 241 (2000).

<sup>17</sup> Alfani & McCabe, *supra* note 16.

<sup>18</sup> To answer this question and to understand the practice of mediation in India, we undertook a survey of professional mediators in India, see Part VII of this paper.

parameters used in different states for making a reference to mediation. The third section sought to understand the rights available to parties that opt for mediation. This section contained questions pertaining to confidentiality as well as enforcement options for parties. The fourth section considered the infrastructural requirements for the existing centres and the challenges the centres face. In the fifth section, the complaint mechanisms that exist for consumers of the service were sought to be looked into. The sixth section covered the criteria for mediator qualification in each centre while the final section of the survey was directed towards understanding the manner in which lack of awareness poses a challenge to mediation and impact of a regulatory regime on the same. We approached mediators from centres located in Delhi, Mumbai, Bangalore, Shimla, Chennai, Golghot-Assam, Alapuzha- Kerala, Pune, Kochi, Coimbatore, Srinagar, Hyderabad and Nagercoil-Tamil Nadu. In total, forty-four respondents answered our survey questionnaire.

Based on our findings, we shall be arguing for formal regulation for mediation in the form of a principle-based legislation. In Part II of the paper, we identify the different types of ADR mechanisms and highlight the benefits arising out of mediation as opposed to other dispute resolution processes, including litigation in courts. Part III identifies the present legal set-up for mediation in India. We also identify and discuss certain important areas that are currently unregulated and the manner in which regulation in these areas would help in developing a robust culture supporting mediation. Part IV identifies the types of regulatory frameworks that exist for mediation across the world. We discuss Market Contract Regulations practiced in the UK, the self-regulatory approach in Australia and formal regulatory frameworks and legislations in the EU. While examining the harms and benefits arising out of these systems, we argue that the regulatory approach in the form of legislation, as followed by the EU, is best suited for India. In Part V, we discuss the findings from our survey and identify certain core principles that should be part of the legislation setting up a framework for mediation.

## II. REQUIRMENT OF ADR IN INDIA

The ineffectiveness of the justice system in India is a result of the fact that litigation in Indian courts has proven to be a time consuming, laborious, and expensive process.<sup>19</sup> Further, an acute lack of competent institutions capable of training adequate numbers of accomplished lawyers has resulted in a dearth of quality legal professionals.<sup>20</sup> Moreover, the inherent inadequacies in the legal aid system in India have compelled prospective litigants to seek out a small clique of established lawyers. This in turn has increased the workload of these lawyers, and has resulted in incessant delays and substantial increase in charges.<sup>21</sup> A combination of these factors has compelled a vast majority of the public to forego certain grievances and choose to resolve their disputes only as a 'last resort'.

---

<sup>19</sup> Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 53 HASTINGS LAW JOURNAL 789.

<sup>20</sup> THE INDIAN EXPRESS, *supra* note 6; The Bar Council of India, *Reform of Legal Education in India: Note on Proposed Directions for Reform*, available at <http://www.barcouncilofindia.org/wp-content/uploads/2010/07/LegalEducationReformRecommendations.pdf> (Last visited on January 25, 2018); *Improving legal education in India*, THE HINDU, September 29, 2016, available at <http://www.thehindu.com/todays-paper/tp-opinion/Improving-legal-education-in-India/article14783272.ece> (Last visited on January 25, 2018); Bar and Bench, *Clinical Legal Education: A Way towards Up-scaling Access to Justice in India*, available at <http://barandbench.com/clinical-legal-education-a-way-towards-up-scaling-access-to-justice-in-india/> (Last visited on February 2, 2018).

<sup>21</sup> Robert L. Kidder, *Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India*, 24(1) LAW AND SOCIETY REVIEW 182; Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37(3) THE AMERICAN JOURNAL OF COMPARATIVE LAW 503.

Consequently, presently while a dispute persists, parties choose not to approach the formal dispute resolution mechanism, as the only option they perceive is litigation. Thus, there currently exists a demand for speedy and inexpensive dispute resolution that is not being met by the conventionally available legal services.

Additionally, there exist numerous structural barriers such as income, caste, gender, age, and religion that have rendered the Indian courts inaccessible to large segments of the general populace.<sup>22</sup> These barriers disproportionately impact the marginalised sections of Indian society.<sup>23</sup> For instance, in certain parts of the country, women and Dalits are actively discouraged from enforcing their rights.<sup>24</sup><sup>25</sup> The convergence of these factors has resulted in a large proportion of the Indian population becoming disenchanted with the functioning of the Indian judiciary.<sup>26</sup>

Furthermore, the adversarial nature of litigation, which is often regarded as the sole mode of dispute resolution, coupled with the alienating behaviour of the lawyers that focuses more on procedure has been identified as one of the several causes of disconnect among the masses.<sup>27</sup> Further, the prohibitively high costs for the procurement of civil justice and the complexity of the inner workings of the justice system, natural consequences of an adversarial mechanism,<sup>28</sup> discourage people from approaching the courts.

As a result, while there exists a pressing need to reform the judiciary, for a complete transformation in the justice system in India, it is also necessary to complement the existing court system with robust alternative mechanisms. This has been highlighted by a number of distinguished jurists.<sup>29</sup> The idea of a ‘Multi-door Courthouse’ was first conceptualised by Frank Sander, who emphasised the need to provide alternative avenues for citizens to amicably resolve their disputes in an informal manner.<sup>30</sup> He proposed the ‘Multi-door Courthouse’ as a single establishment that provided multiple informal avenues to resolve disputes. This establishment would provide prospective litigants a choice to identify

---

<sup>22</sup> GALANTER & KRISHNAN, *supra* note 19; C. Raj Kumar, *Legal Education, Globalization, and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India*, 20 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 221, 252.

<sup>23</sup> Kumar, *supra* note 22.

<sup>24</sup> See National Campaign on Dalit Human Rights, *Access to Justice for Dalits in India*, December 18, 2015, available at <http://idsn.org/20448-2/> (Last visited on February 2, 2018); Navsarjan Trust, *Gender-Violence and Access to Justice for the Dalit Woman*, 13, 14 (2011).

<sup>25</sup> Government of India and United Nations Development Programme, *Removing Barriers through the Bench: A Training Manual for Judges on Laws and Issues Related to Marginalised Communities*, available at <http://www.in.undp.org/content/dam/india/docs/DG/Removing%20Barriers%20through%20the%20Bench.pdf?download> (Last visited on February 2, 2018).

<sup>26</sup> DAKSH INDIA, *Access to Justice Survey 2015-16*, available at <http://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf> (Last visited on December 15, 2017).

<sup>27</sup> LORD WOOLF, HER MAJESTY'S STATIONARY OFFICE, *ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* (1995).

<sup>28</sup> *Id.*; HELEN STACY & MICHAEL LAVARCH, *BEYOND THE ADVERSARIAL SYSTEM* 75-84 (1999).

<sup>29</sup> Harry T Edwards, *Alternative Dispute Resolution: Panacea or anathema?*, 99 HARVARD LAW REVIEW 678, 679 (1986); Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOTIATION JOURNAL 169,170 (1990); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 225, 226 (1994).

<sup>30</sup> Address by Frank E.A. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), reprinted in FRANK E.A. SANDER, *VARIETIES OF DISPUTE PROCESSING* (1978).

the dispute resolution technique most suited to their particular grievance.<sup>31</sup> This theory has been further endorsed and emphasised extensively in a number of other jurisdictions.<sup>32</sup>

The High Court of Kerala in *T. Vineed v. Manju S. Nair*<sup>33</sup> held that making an attempt for alternative redressal of disputes is not only a statutory obligation of courts under §89 of the Code of Civil Procedure but also forms part of a duty that courts owe to the public.<sup>34</sup> Widespread adoption of ADR mechanisms would provide the aggrieved with multiple avenues to enforce their rights and would consequently improve access to justice in India.<sup>35</sup> Consequently, it would substantially lower the burden upon the subordinate and high courts. This need for the adoption of such techniques has been emphasised and reiterated by the Law Commission of India on numerous occasions.<sup>36</sup>

ADR mechanisms typically include arbitration, neutral evaluation, conciliation, and mediation.<sup>37</sup> Both arbitration and neutral evaluation are adjudicatory forms of dispute resolution that involve an independent third party who evaluates the dispute. While neutral evaluation involves a seasoned and neutral third party who evaluates the merits of the dispute and delivers a non-binding judgement, arbitration involves the rapid adjudication of disputes by an independent and private third party who then passes a binding award.<sup>38</sup> Conciliation and mediation, on the other hand, are both mechanisms that involve an independent third party who helps parties reach ‘a settlement’, rather than the adjudicator passing a unilateral award. While, certain legislations have failed to adequately distinguish the two concepts and have used them in an interchangeable manner,<sup>39</sup> it has been recognised by the Supreme Court,<sup>40</sup> as well as the Law Commission, that conciliation and mediation are both fundamentally different techniques.<sup>41</sup> Conciliation as a form of dispute resolution involves a conciliator who assumes an active role, meets the concerned parties, and proposes the terms of settlement.<sup>42</sup> Mediation as an ADR mechanism is largely informal in nature, and does not focus heavily on procedural aspects. The mediator, in contrast with the conciliator, plays a passive role, and merely sets the tone of negotiation between the parties.<sup>43</sup> Such an environment encourages citizens to readily approach the mediation centres to adjudicate their

---

<sup>31</sup> *Id.*

<sup>32</sup> Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATHOLIC UNIVERSITY LAW REVIEW 578, 579 (1988); SANDER, *supra* note 30.

<sup>33</sup> *T. Vineed v. Manju S. Nair*, 2008(1) KLJ 525.

<sup>34</sup> *Id.*

<sup>35</sup> Law Commission of India, *Delay and Arrears in Trial Courts*, Report No. 77 (November 1978); Law Commission of India, *Delay and Arrears in High Court and other Appellate Courts*, Report No. 79 (May 1979); Law Commission of India, *The High Court Arrears- A Fresh Look*, Report No. 124 (1988).

<sup>36</sup> *Id.*

<sup>37</sup> MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE, 3-7 (2010); Edwards, *supra* note 29, 669-670; Frank EA Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37(1) U. FLA. L. REV. 2 (1985).

<sup>38</sup> JAMES S. KAKALIK, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT, 17-23 (1996).

<sup>39</sup> The Companies Act, 2013, §442(2).

<sup>40</sup> Salem Advocate Bar Association, T.N. v. Union of India, (2005) 6 SCC 344 (‘Salem II’) ¶61.

<sup>41</sup> Justice M. Jagannadha Rao, *Concepts of Conciliation and Mediation and their Differences*, available at [http://lawcommissionofindia.nic.in/adr\\_conf/concepts%20med%20rao%201.pdf](http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20rao%201.pdf) (Last visited on January 31, 2018).

<sup>42</sup> Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is re-Shaping Our Legal System*, 108(1) PENN ST. L. REV. 165 (2003).

<sup>43</sup> Laura Fishwick, *Mediating with Non-Practicing Entities*, 27(1) HARVARD JOURNAL OF L. AND TECH. 331, 349 (2013).

disputes, aiding in altering the perception of systems of justice as a last resort.<sup>44</sup> This informal and party-oriented nature of mediation could also potentially provide assistance in transgressing structural barriers that render justice inaccessible to sections of the population.<sup>45</sup>

Further, ADR techniques in India, such as mediation and arbitration, have proved to be quick and efficient, with two-thirds of mediated disputes being resolved at an average rate of 173 minutes per case in 2015.<sup>46</sup> This is in stark contrast to the existing justice system, wherein high courts take an average of 523 days to dispose of a civil writ petition.<sup>47</sup> This is in line with the concerns voiced by an overwhelming majority of Indian civil litigants, who outline a fair, speedy, and inexpensive trial as their top priority.<sup>48</sup>

Globally, arbitration and mediation are widely employed ADR mechanisms and have been acknowledged to be the most effective.<sup>49</sup> However, the two techniques are distinct and apply to different kinds of disputes.<sup>50</sup> While arbitration is ideal primarily for disputes of a commercial nature, mediation has a broader reach, and has been used successfully to resolve disputes of multiple kinds, ranging from criminal trials to commercial transactions.<sup>51</sup> Most importantly, arbitration focuses on adjudicating disputes expediently, while mediation is a party centred process which focuses primarily upon the needs, rights, and interests of the individual parties.<sup>52</sup>

The core value and benefit of mediation is that it provides an opportunity for the parties to converse, negotiate, and arrive at an amicable compromise that is acceptable for all the concerned parties.<sup>53</sup> Adversarial litigation does not provide any scope for the litigants to compromise and enter a legally binding settlement even if the concerned parties are willing to do so. In contrast, all parties – consumers, companies, employers, employees, husband and wife – play an active role in solving the problem while reaching a compromise through mediation.<sup>54</sup> In addition to this, there exist several indirect costs of adjudication such as employee's time, loss of an employee, loss of a customer, loss of a business relationship, or just a loss of faith between parties, which are not incurred if parties adopt mediation.<sup>55</sup> There also exist several advantages for society related to the action of coming to an amicable solution. For instance, the potential of lawsuits being filed against teachers in America is a

<sup>44</sup> DAKSH INDIA, *supra* note 26; John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOTIATION L. REV. 1 (1998).

<sup>45</sup> Bingham Centre for the Rule of Law, *International Access to Justice: Barriers and Solutions*, 22 (October 2014) at [https://www.biicl.org/documents/485\\_iba\\_report\\_060215.pdf?showdocument=1](https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1) (Last visited on March 3, 2018).

<sup>46</sup> VIDHI CENTRE FOR LEGAL POLICY, *Strengthening Mediation in India: Interim Report on Court Annexed Mediations*, 42, (July 29, 2016), available at <https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/579ee7be5016e10ca2ae65f0/1470031920694/Interim+Report+Strengthening+Mediation+in+India.pdf> (Last visited on February 3, 2017).

<sup>47</sup> DAKSH INDIA, *supra* note 26.

<sup>48</sup> *Id.*

<sup>49</sup> Fishwick, *supra* note 43; SCOTT BROWN & CHRISTINE CERVENAK, *ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE*, 15-18 (2000).

<sup>50</sup> *Id.*

<sup>51</sup> Judge Joe Harman (of the Federal Circuit Court of Australia), *From Alternate to Primary Dispute Resolution: The pivotal role of mediation in (and in avoiding) litigation*, National Mediation Conference Melbourne (2014).

<sup>52</sup> FRANK ELKOURI, EDNA ASPER ELKOURI & ALAN MILES RUBEN, *HOW ARBITRATION WORKS* (18th ed., 1985); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 32-35 (1986); MARK D. BENNET & MICHELE G. HERMANN, *THE ART OF MEDIATION* 43-48 (1996).

<sup>53</sup> DAVID SPENCER & MICHAEL BROGAN, *MEDIATION LAW AND PRACTICE* 68 (2006); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 3 (1994).

<sup>54</sup> Costello, *supra* note 13.

<sup>55</sup> Kenneth R. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. 5 (1989).

factor that is known to cause stress that has shown to be a cause behind teachers leaving the profession. However, the informal nature of mediator proceedings helps reduce such emotional costs and therefore, has an impact on the burn out rate of teachers.<sup>56</sup> Mediation can also be used as a form of dispute settlement when the employer wants to retain an employee, when both parties want to gain a deeper understanding of the problem to resolve the issue at hand, at a minimal cost.<sup>57</sup> With costs associated with hiring employees, namely, opportunity costs, training costs, lost time being so high, employment mediation can be a viable option to resolve internal disputes. Additionally, in a settlement agreement, parties can agree to reach any compromise, which can include remedies that a court may not be able to grant but will be acceptable to both parties.<sup>58</sup> For instance, on several occasions a sincere apology is the only demand made a party,<sup>59</sup> courts cannot force a party to apologise since this is not a right any party has in statute, but a settlement along these terms can be drafted.

Crucially, the mediator assumes a largely passive role, her primary objective being to facilitate the parties in reaching an amicable settlement.<sup>60</sup> This trait is unique to mediation as it is the only ADR mechanism wherein the third party merely guides the parties and helps them resolve their differences, instead of proposing the future plan of action.<sup>61</sup>

### III. MEDIATION IN THE INDIAN CONTEXT

The Code of Civil Procedure ('CPC') was amended in 2002 to incorporate §89 which includes mediation as an ADR mechanism.<sup>62</sup> As per §89, if the court deems that the matter may be settled amicably or through alternative mechanisms, it can refer the case to arbitration, conciliation or judicial settlement through Lok Adalats or mediation.<sup>63</sup> Mediation at this stage is known as, court-referred mediation.<sup>64</sup> In case court-referred mediation fails, litigation for this matter shall continue; however, in the event efforts at mediation succeed, a report is given to the Court by the mediator and the case is disposed off. The power of the Courts to refer parties for mediation when it deems fit is enshrined in §89(d) of the Civil Procedure Code. However, mediation may take place at two stages, pre-litigation mediation and court-referred mediation.<sup>65</sup> When the parties undertake mediation individually, independent of Court proceedings, it is then termed pre-litigation mediation or private mediation.<sup>66</sup> There also exist several statutes in India that refer to mediation. In this part, we will discuss the regulations surrounding all phases in which mediation takes place.

#### A. COURT REFERRED MEDIATION (POST-LITIGATION MEDIATION): §89 CPC

§89(2) provides the procedure that is to be followed when ADR mechanisms are employed. §89 envisions only post-litigation mediation; therefore, the rules of procedure

<sup>56</sup> Bradley, Allison, TJ Costello, Robin McMillin & Bob Popinsky, *Redefining the Texas Teacher Shortage: Key Issues in Retention and Recruitment of Quality Educators*, (December 2001).

<sup>57</sup> Costello, *supra* note 13.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> DAVID SPENCER & MICHAEL BROGAN, *MEDIATION LAW AND PRACTICE* 8 (2006).

<sup>61</sup> Hensler, *supra* note 42.

<sup>62</sup> Civil Procedure Code (Amendment) Act, 2002.

<sup>63</sup> The Code of Civil Procedure, 1908, §89(1)(d).

<sup>64</sup> Niranjana Bhatt, *Court Annexed Mediation*, LAW COMMISSION OF INDIA, [http://lawcommissionofindia.nic.in/adr\\_conf/niranjana%20court%20annx%20med13.pdf](http://lawcommissionofindia.nic.in/adr_conf/niranjana%20court%20annx%20med13.pdf) (Last visited on March 3, 2018).

<sup>65</sup> Mediation and Project Committee, *Mediation and Training Manual of India*, 16, available at <http://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> (last visited on March 3, 2018)

<sup>66</sup> *Id.*



prescribed under §89 are applicable only to such court referred mediation. In the absence of a central legislation governing mediation, proceedings take place as per rules prescribed by each Court.<sup>67</sup> However, in *Salem Advocate Bar Association v. Union of India* ('Salem I')<sup>68</sup> the Supreme Court recognised the need for regulating mediation proceedings on account of the absence of a framework rendering §89 ineffective. The Court was of the opinion that for ADR to be successful under §89, "the modalities" for the manner in which proceedings will take place need to be formulated. Pursuant to this judgment, the Mediation and Conciliation Project Committee ('MCPC') was formed under Justice Jagannadha Rao, which submitted a report, formulating the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003.<sup>69</sup> These Rules laid down non-binding procedural guidelines for court referred mediation. The Supreme Court opined that these rules could be adopted by each High Court with modifications that the Court deemed fit.<sup>70</sup> As a result, the development of mediation system in each state has been dependent largely on the inclination of each court. For instance, only five disputes have been resolved at the Tripura Mediation Centre from 2008 to 2015,<sup>71</sup> while 31,441 disputes have been resolved by Bangalore Mediation Centre from 2011 to 2015.<sup>72</sup>

Based on our survey we found that 61.8% of the respondents to our questionnaire said that less than 100 cases are annually referred to them, only 5.9% of the participants receive more than 1000 cases annually. Incidentally, all respondents that indicated they receive more than 1000 cases are practicing mediators in Bangalore. 64.7% of the data set responded that judges refer cases on the basis of no prescribed standard. 34.3% of the respondents stated that the High Courts that they practice under have not taken any concrete steps to implement the MCPC recommendations.

### **B. MEDIATION WITHIN STATUTES**

Apart from §89, the only other statutes that provide for dispute resolution mechanisms that resemble mediation are the Industrial Disputes Act, 1947, Companies Act, 2013 and arguably the Arbitration and Conciliation Act, 1996 ('1996 Act').<sup>73</sup> Before delving into the specific provisions of these legislations, it must be noted that the provisions for ADR within these statutes resemble conciliation rather than mediation, with some statutes collapsing the distinction between the two (Companies Act, 2013), while other statutes only providing for conciliation (Industrial Disputes Act, 1996 Act), thereby, rendering mediation outside of §89, unregulated.

The Industrial Dispute Act sets up a conciliation framework for workmen and employers to resolve disputes.<sup>74</sup> A Conciliation Officer and a Board of Conciliators are appointed by the government. The duties of these officers as codified in the statute include investigating the dispute and helping the parties arrive at an amicable solution. The officer's role is akin to that of a civil court. He is vested with the power to adduce evidence and pass judgment.<sup>75</sup> In case the Officer is of the opinion that the dispute cannot be resolved, a failure

<sup>67</sup> Code of Civil Procedure, 1908, Order 20, Rules 1A, 1B & 1C.

<sup>68</sup> *Salem Advocate Bar Association v. Union of India*, (2003) 1 SCC 49 ('Salem I').

<sup>69</sup> Rao, *supra* note 41.

<sup>70</sup> *Id.*

<sup>71</sup> NORTHEASTNEWS, *Mediation yet to start visibly in India: Judges*, October 4, 2015, available at [http://northeastnews.in/news\\_details.php?c=30&n=12546#.WFKvudV97IV](http://northeastnews.in/news_details.php?c=30&n=12546#.WFKvudV97IV) (Last visited on March 3, 2018).

<sup>72</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 46.

<sup>73</sup> ANUROOP OMKAR & KRITIKA KRISHNAMURTHY, *THE ART OF NEGOTIATION AND MEDIATION*, 57 (2015).

<sup>74</sup> The Industrial Disputes Act, 1947, §§4,5,12.

<sup>75</sup> OMKAR & KRISHNAMURTHY, *supra* note 73; The Industrial Disputes Act, 1947, §§4, 5.

report is submitted to the Government. While the statute seems to incorporate conciliation as a dispute mechanism akin to mediation, in reality the parties do not have a say in the terms of the settlement or in the final outcome.<sup>76</sup> In fact, the pleadings submitted by each party are drafted by professionals and there is no scope to explore the issues underlying the dispute.<sup>77</sup> The proceedings envisioned under the Industrial Disputes Act similarly do not resemble either mediation or conciliation.<sup>78</sup>

Companies (Mediation and Conciliation) Rules, 2016 ('Companies Rules') and §442 of the Companies Act 2013 set up a Mediation and Conciliation Panel "for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal."<sup>79</sup> While, the panel is referred to as the Mediation and Conciliation Panel, the Act states that it is set up only for the purpose of 'mediation'.<sup>80</sup> On a reading of the Companies Rules with §442, it is evident that the statute does not maintain a clear distinction between mediation and conciliation, as laid down by the Jagannadha Rao Committee report in 2003 post the Salem I judgment. For instance, Rule 17 of the Companies Rules describes the role of the mediator and conciliator to be the identical while the 2003 Report acknowledged that the two do not and cannot perform the same function, as a conciliator has a more active role.<sup>81</sup> The 2003 report cited several international authors and UK Reports and referred to mediation as a means of settling disputes by a third party who helps both sides to come to an agreement, which each considers to be acceptable. The Committee was of the opinion that mediation can be 'evaluative' or 'facilitative'. 'Conciliation', on the other hand required the conciliator to play an interventionist role in bringing the two parties together and arriving at a settlement.<sup>82</sup> In fact, this distinction is recognised even within the 1996 Act, wherein §30 refers to mediation and conciliation

<sup>76</sup> The Industrial Disputes Act, 1947, §§4.5.

<sup>77</sup> OMKAR & KRISHNAMURTHY, *supra* note 73.

<sup>78</sup> *Id.*

<sup>79</sup> The Companies Act, 2013, §442. It states:

"442. (1) The Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

(2) Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in such form along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).

(3) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit.

(4) The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

(5) The Mediation and Conciliation Panel shall follow such procedure as may be prescribed and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

(6) Any party aggrieved by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be".

<sup>80</sup> Companies Act, 2013, §442(1).

<sup>81</sup> Companies (Mediation and Conciliation) Rules, 2016, Rule 17.

<sup>82</sup> Lord Chancellor's Department, *Discussion Paper on Alternative Dispute Resolution*, available at <http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm> (Last visited on March 3, 2018); HENRY J. BROWN & ARTHUR L. MARIOTT, *ADR PRINCIPLES AND PRACTICE* 127 (1st ed., 1997).

separately as alternative dispute resolution during the pendency of an arbitration proceeding.<sup>83</sup> Blurring of the lines between mediation and conciliation is especially troubling because it is unclear whether the Companies Act, 2013 intends to create a separate framework for conciliation outside the 1996 Act, or whether the legislature intended to create a framework for mediation of commercial disputes separate from conciliation.<sup>84</sup>

The 1996 Act does not define mediation or conciliation, however §73 of the 1996 Act lays down what a settlement agreement is and the role of a conciliator when a settlement agreement is being framed. His role under the Act is that of an interventionist, pro-active individual, as he can formulate terms of the settlement. Even when the parties want to make a suggestion for settlement, they must make such a suggestion to the conciliator first, thus making the conciliation proceeding under the 1996 Act rigid.<sup>85</sup> Hence, it cannot be argued that mediation in India is regulated or can be clubbed with conciliation under the 1996 Act.

Therefore, even though these statutes make references to Mediation, in practice only the non-binding MCPC rules pursuant to §89 govern post litigation mediation while pre-litigation mediation is entirely unregulated.

### C. PRIVATE MEDIATION (PRE-LITIGATION MEDIATION)

In *K. Srinivas Rao v. D.A. Deepa*,<sup>86</sup> the Supreme Court discussed the idea of pre-litigation mediation in the context of family disputes.<sup>87</sup> In this case, the husband prayed for a divorce decree on grounds of mental cruelty as the wife had filed a false criminal complaint against him and his family. The Court, while granting the husband relief, placed great importance on the benefits of pre-litigation mediation as a form of dispute settlement, observing that in the present case there would be no requirement for a divorce had the parties approached a mediation centre prior to pursuing the suit. The Court acknowledged that often disputes such as these arise as a result of trivial reasons that are exacerbated by pursuing litigation. The oppositional ‘winner takes all’ set-up is not beneficial for the relationship between parties, particularly in the context of matrimonial disputes.

Subsequently, the judge observed that data from the Delhi district courts indicate that chances of a successful resolution are higher when parties approach mediation centres at the earliest instance.<sup>88</sup> The Court went to the extent of holding that if parties are willing, even non-compoundable offences (offences that cannot be settled out of Court)<sup>89</sup> under 498A of the Indian Penal Code should be referred to mediation by courts.<sup>90</sup> The judgement discussed that this method of resolution will help solve matrimonial disputes in an amicable manner such that all parties will be satisfied.<sup>91</sup> The Court identified that the benefits

<sup>83</sup> The Arbitration and Conciliation Act, 1996, §30.

<sup>84</sup> Arjun Natarajan, *Companies (Mediation And Conciliation) Rules, 2016 – “Giant Leap” Or “Achilles Heel” For Mediation In India?*, LIVE LAW, September 20, 2016, available at <http://www.livelaw.in/companies-mediation-conciliation-rules-2016-giant-leap-achilles-heel-mediation-india/> (Last visited on March 3, 2018) (“This confusion arises as the Companies Rules provides for conciliation of disputes without making any reference to the 1996 Act. Further as this procedure is also referred to as ‘mediation’ within the Companies Act, there exists a possible intention of the legislature to create mediation framework for commercial disputes.”).

<sup>85</sup> Arbitration and Conciliation Act, 1996, §69.

<sup>86</sup> *K. Srinivas Rao v. D.A. Deepa*, (2013) 5 SCC 226.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Code of Criminal Procedure, 1973, §320.

<sup>90</sup> *Id.*

<sup>91</sup> *K. Srinivas Rao v. D.A. Deepa*, (2013) 5 SCC 226.

of pre-litigation mediation include the possibility of settlement at the first instance, in addition to the fact that families and relationships are saved if parties resolve their dispute through mediation and reach a mutually agreeable settlement. In an effort to settle matrimonial disputes at the pre-litigation stage itself, the Supreme Court directed all family courts in India to set up and publicise pre-litigation clinics at all mediation centres.<sup>92</sup>

In jurisdictions across the world, the growth in court-referred mediation has nurtured a culture of mediation and has subsequently resulted in the rise of pre-litigation mediation.<sup>93</sup> However, in India the number of civil cases referred by courts for mediation itself remains abysmally low.<sup>94</sup> For instance, only 5.49% of newly instituted civil cases were referred to mediation by the Karnataka High Court in the year 2015.<sup>95</sup> Studies indicate that not only does a low rate of court referral impact post litigation mediation but the rate of court referral also plays a role in the development of a culture of private mediation in the country.<sup>96</sup> 54.5% of the respondents of the survey felt that parties are more inclined to reaching a settlement prior to the court framing issues.<sup>97</sup>

The primary benefits that arise as a result of dispute settlement through mediation are saving of cost and time, and maintenance of confidentiality,<sup>98</sup> all of which are further exaggerated in the case of pre-litigation mediation. With respect to costs, private mediation incurs less cost than court referred mediation, as by the time parties have been referred by the court they have already incurred the direct costs of litigation such as court fees, lawyer's fees, and stamp paper duty. However, the only costs that may be associated as a result of private mediation would be mediator fees and other administrative fees associated with institutionalised mediation, in addition to any settlement amount agreed upon by the parties.<sup>99</sup> Court-referred mediation requires parties to first file their dispute in Court, thereby making the dispute a matter of public record, as no such requirement exists for private mediation, confidentiality is ensured. With respect to the amount of time involved, private mediation does not require the heavy procedure involved in filing a dispute and then obtaining a reference under §89 CPC, therefore, time take is naturally shorter. For instance, the average time taken by Bangalore Mediation Centre to resolve a dispute pre-litigation is 150 minutes.<sup>100</sup>

Despite the several advantages that pre-litigation mediation possesses over court-referred mediation, it is currently unregulated in India. In this part, I shall discuss two aspects of private mediation – confidentiality and enforcement, which suffer as a result of this regulatory over-sight. Further, we shall argue how this lacuna within Indian regulation is also responsible for the lack of popularity of mediation (both private as well as court-referred) as a dispute resolution mechanism in India.

---

<sup>92</sup> *Id.*, ¶35.

<sup>93</sup> Mark Kleiman, *A Perspective on the Growth and Evolution of the Field of Mediation*, available at <http://www.mediate.com/articles/kleimanM1.cfm> (Last visited on February 3, 2018).

<sup>94</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 46.

<sup>95</sup> *Id.*

<sup>96</sup> See Greg Rooney, *The Australian Experience Of Legislated Pre-Action ADR Requirements: Specificities, Acceptation, And Keys To Success*, available at <http://www.odreurope.com/assets/site/content/PREMEDICATION-adr.pdf> (Last visited on March 3, 2018)

<sup>97</sup> Results of the Survey conducted using the Questionnaire, *see* Part VII: Annexure of this paper.

<sup>98</sup> Law Reform Commission, *Report Alternative Dispute Resolution: Mediation and Conciliation* (November 2010), available at [http://www.lawreform.ie/\\_fileupload/reports/r98adr.pdf](http://www.lawreform.ie/_fileupload/reports/r98adr.pdf) (last visited on March 3, 2018) ('Law Reform Report').

<sup>99</sup> Results of the Survey conducted using the Questionnaire, *see* Part VII: Annexure of this paper.

<sup>100</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 46, 42.

## 1. Confidentiality

Confidentiality is essential for any mediation proceeding to be successful.<sup>101</sup> The fact that parties can engage in open, honest and informal discussions with one another helps them arrive at a compromise. Confidentiality is particularly crucial for parties to discuss all forms and avenues of settlement. Without free-flowing discussion, parties would not be able to resolve dispute in a non-adversarial manner. In addition to this, on occasions where parties refrain from filing a suit in court as the subject matter of the suit is painful or scandalous, private mediation offers a remedy. Parties need not fear public scrutiny as a result of the confidential nature of mediation proceedings.<sup>102</sup>

The Supreme Court when discussing mediation as a process held in *Moti Ram v. Ashok Kumar*,<sup>103</sup> that mediation proceedings ought to be strictly confidential, and in case of court referred settlements the mediator must simply place the agreement before the court without conveying to the court what transpired during the proceedings. A similar principle was upheld by the Central Information Commission in *Rama Aggarwal v. PIO, Delhi State Legal Service Authority*<sup>104</sup> wherein it was stated that proceedings during mediation are protected under the exceptions in the Right to Information Act, 2005 and are not subject to be disclosed as no public interest is served on disclosure and there exists larger public interest protecting the information.<sup>105</sup>

In India, confidentiality is usually ensured through confidentiality agreements that are signed by lawyers, parties and the mediator.<sup>106</sup> However, there exist centres for mediation in India wherein mediation proceedings are kept confidential solely on the basis of trust.<sup>107</sup> The question that arises then is whether the Court will uphold this principle of absolute confidentiality in cases where one party alleges fraud on part of the mediator. It is also worth considering if courts will pierce the veil of confidentiality in order to determine whether consent of the parties was obtained freely for the settlement agreement. For instance, a court may not be in a position to adjudicate whether the mediation settlement was reached under coercion, or determine as to what are the terms of the settlement, if all facts of the proceeding are kept confidential, and thereby outside the court's purview.<sup>108</sup>

Although the Court has not answered these questions directly, in *Vennangot Anuradha Samir v. Vennangot Mohandas Samir*,<sup>109</sup> the Court set aside a settlement for divorce as it was of the opinion that consent of the wife was given under duress and was not free consent. However, the reason the Court could take such a stand was because §23(1)(bb) of the Hindu Marriage Act, 1955 provides for the court to be satisfied that the consent obtained for a mutual consent divorce has “not been obtained by force, fraud or undue influence.”<sup>110</sup> In absence of a specific statute or policy for all mediation settlements, it is unclear as to whether courts will adopt a similar position for all cases when the validity of a settlement is questioned. While confidentiality is an essential component of mediation, some

<sup>101</sup> See Charlie Irvine, *The Three Pillars of Mediation*, KLUWER MEDIATION BLOG, January 12 2012, available at <http://kluwermiationblog.com/2012/01/12/the-three-pillars-of-mediation/> (Last visited on March 3, 2018) (“Irvine”).

<sup>102</sup> *Id.*

<sup>103</sup> *Moti Ram v. Ashok Kumar*, (2011) 1 SCC 466.

<sup>104</sup> *Rama Aggarwal v. PIO, Delhi State Legal Service Authority*, CIC/SA/A//2015/900305.

<sup>105</sup> *Id.*

<sup>106</sup> Results of the Survey conducted using the Questionnaire, *see* Part VII: Annexure of this paper.

<sup>107</sup> *Id.*

<sup>108</sup> Alfani & McCabe, *supra* note 16.

<sup>109</sup> *Vennangot Anuradha Samir v. Vennangot Mohandas Samir*, (2015) 16 SCC 596.

<sup>110</sup> The Hindu Marriage Act, 1955, §23.

exceptions may need to be carved, in larger public interest. For instance in California, the Supreme Court held that if a statement made during a mediation would be one that would exculpate a criminal defendant in a subsequent proceeding, the person making the statement can be compelled to repeat it, thereby the Court pierced the veil of confidentiality on grounds of larger public interest.<sup>111</sup> We shall examine the exceptions that may be required in this regard in Part V of this paper.

## 2. Enforcement of Settlement Agreements

Another issue that arises in the absence of a framework regulating mediation is in relation to the enforceability of a settlement agreement. Although, there exist data in other jurisdictions to show that parties are more likely to comply with mediation settlements than court orders,<sup>112</sup> situations do arise where one party does not comply with the terms of the settlement and the other party approaches the judiciary for enforcement of the same.<sup>113</sup> There exist separate mechanisms for enforcement of settlements based on whether they were a result of pre-litigation or court referred mediation proceedings.

For court-referred mediation, the Supreme Court in *Afcons Infrastructure v. Cherian Verkey Construction*<sup>114</sup> held that settlement agreements that arise out of court-referred mediation are enforceable only if they are placed before the court for recording the settlement and disposal.<sup>115</sup> However, for court referred mediation, rules formulated by each state vary, with some states remaining silent in their rules regarding enforcement and others like Punjab and Haryana incorporating provisions for enforcement in their Mediation Rules, 2003.<sup>116</sup> In *Ravi Aggarwal v. Anil Jagota*,<sup>117</sup> the Delhi High Court held that a mediation settlement cannot be binding on parties if the settlement has not been placed on record before the court. In this case, the trial court had referred a compoundable offence to a mediation centre and subsequently the parties arrived at a settlement. One party had complied with the terms of the settlement, while the other party enjoyed the benefits and did not comply with his end of the agreement. The issue before the court was whether such an agreement is

<sup>111</sup> *Rinaker v. Superior Court*, (1998) 62 Cal. App. 4th 155.

<sup>112</sup> Craig A. McEwen & Richard S. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOCIETY REV. 11 (1984).

<sup>113</sup> *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032; *Susan Jacob v. State of Karnataka*, Cri. Petition No. 5524/2013 (Karnataka High Court) (Unreported).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Mediation and Conciliation Rules, Punjab and Haryana High Court, Rules 23, 24.

“23. Settlement agreement:

(1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced into writing and signed by the parties or their power of attorney holders. If any counsel have represented the parties, they shall attest the signatures of their respective clients. (2) The agreement of the parties so signed and attested shall be submitted to the mediator/conciliator who shall, with a covering letter signed by him, forward the same to the Court in which the suit is pending. (3) Where no agreement is arrived at between the parties, before the time limit specified in rule 17 or where, the mediator/conciliator is of the view that no settlement is possible, he shall report the same to the Court in writing.

24. Court to fix a date for recording settlement and passing decree;

(1) Within seven days of the receipt of a settlement, the Court shall issue notice to the parties fixing a date for their appearance which date shall not be beyond 14 days from the date of receipt of the settlement and the Court shall then take the settlement on record. (2) Thereafter, the Court shall pass a decree in accordance with the settlement, so taken on record, if the same disposes of all the issues in the suit. (3) If the settlement disposes of only certain issues arising in the suit, the Court shall take on record the settlement on the date fixed and shall include the terms of the said settlement in the judgment, while deciding the other issues.”.

<sup>117</sup> *Ravi Aggarwal v. Anil Jagota*, 2009 SCC OnLine Del 1475.

binding without the settlement being placed before the trial court to be recorded. The High Court held that such a settlement is not binding.<sup>118</sup>

Pre-litigation mediation settlement agreements may be enforceable in three different ways. First, to give effect to a private settlement agreement, after parties have reached a settlement they may choose to file suit and subsequently make an application to the court under Order XXIII Rule 3<sup>119</sup> to effect a compromise; however this has been recognised as an highly irregular method to enforce a settlement, as parties would have to bear the primary costs of litigation even with no intention to pursue litigation.<sup>120</sup> Second, private mediation settlement agreements, in the absence of any other legislation, are enforceable on the basis of contract law.<sup>121</sup> Enforceability of settlement agreements by relying on the Indian Contract Act implies that principles of duress, free consent and fraud will apply to settlement agreements.<sup>122</sup> This takes us back to the confidentiality aspect of the proceedings and the question of what evidence of mediation proceeding can remain outside judicial purview. Furthermore, as no enforcement mechanism similar to other ADR techniques<sup>123</sup> exists for mediation settlements, parties need to approach courts to enforce the settlement, which brings with it a host of problems associated with litigation that the parties sought to avoid when they agreed to resort to mediation in the first place.

Third, parties have sought to enforce mediation settlements as arbitral awards or conciliator settlements. A mediation settlement can be enforced as an arbitral award if the proceeding takes on recommendation of the arbitral tribunal and the tribunal records the terms of settlement as an award.<sup>124</sup> However, in case of a conciliation settlement the Delhi High Court in *Shri Ravi Aggarwal v. Shri Anil Jagota*<sup>125</sup> held that a settlement agreement that is an outcome of private mediation is not a conciliation settlement agreement as defined under §73 and §74 of the Arbitration and Conciliation Act, 1996 unless procedure laid down

<sup>118</sup> Rakesh Kumar v. State, Criminal Writ No.1018/2010, (Del. H. C.), (Unreported).

<sup>119</sup> The Code of Civil Procedure, 1908, Order 23, Rule 3.

“Compromise of suit.- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -

Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation : An agreement or compromise which is void or avoidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.”

<sup>120</sup> Afcons Infrastructure v. Cherian Verkay Construction, 2010 (8) SCC 24, ¶10; Gerald Manoharan & Tanvi Kishore, *Enforceability of a Mediated man Settlement*, available at <http://www.campmediation.in/enforceability> (last visited on February 3, 2017).

<sup>121</sup> Mediation and Project Committee, *supra* note 65; *Shri Ravi Aggarwal v. Shri Anil Jagota*, 2009 SCC OnLine Del 1475.

<sup>122</sup> Alfini & McCabe, *supra* note 16.

<sup>123</sup> A settlement that takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under §21 of the Legal Services Authorities Act, 1987. Conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to §74 read with §30 of the 1996 Act. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to §36 of the 1996 Act.

<sup>124</sup> The Arbitration and Conciliation Act, 1996, §30, 73.

<sup>125</sup> *Shri Ravi Aggarwal v. Shri Anil Jagota*, 2009 SCC OnLine Del 1475.

in the Arbitration and Conciliation Act, 1996 is followed.<sup>126</sup> Thus, in the present case it was not enforceable through this Act, as no procedure under the 1996 Act was followed.<sup>127</sup> In the context of mediation settlements under the Negotiable Instruments Act, 1883, the Delhi District Court in 2016 identified a lacuna in the existing legal framework and recognised the need for the High Court to formulate guidelines laying down the procedure for the enforcement of a mediation settlement and consequences of breach by a party.<sup>128</sup>

The requirement for regulating mediation is founded on four primary reasons: First, to protect consumers from fraudulent mediators, second, to increase public awareness about mediation as an ADR process, third, so that a regulatory framework can be used to improve mediator ability and fourth, to enhance the credibility of the profession itself.<sup>129</sup> Without a binding regulation or an Act, any individual, with or without a law degree or other training, can call themselves a mediator. As mediation is a relatively new professional service and many consumers – both individuals and lawyers – do not possess adequate information about service providers to evaluate a mediator’s qualifications and practice.<sup>130</sup> While presently the MCPC rules lay down procedure for mediator accreditation, these rules are neither binding nor followed religiously in India.<sup>131</sup>

Under the existing framework, consumer protection is largely ignored, leaving several users of this service without any recourse against unskilled mediators.<sup>132</sup> A regulation would prevent the entry of unskilled or unscrupulous mediators into the fraternity as it would lay down qualifications that mediators must possess.<sup>133</sup> A mediation regulation could lay down binding standards that would establish standards with respect to education, apprenticeship experience, performance testing and mediation skill training that new mediators would be required to adhere to. This would also provide mediation with the much required state certification that would encourage people to trust the process.<sup>134</sup> The government must recognise that consumer protection is a necessity especially when there exist gaping loopholes with respect to confidentiality and enforcement in the current system.

Practitioners across the country believe that to promote the use of mediation as an ADR mechanism, a framework to govern aspects such as confidentiality and enforcement

<sup>126</sup> The Arbitration and Conciliation Act, 1996, §73.

“73. Settlement agreement. - (1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement.

- The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under § 30.”

<sup>127</sup> *Shri Ravi Aggarwal v. Shri Anil Jagota*, 2009 SCC OnLine Del 1475.

<sup>128</sup> *Dayawati v. Yogesh Kumar Gosain*, 2017 SCC OnLine Del 11032.

<sup>129</sup> Art Hinshaw, *Regulating Mediators*, 21 HARVARD NEGOTIATION L. REV. 163 (2016).

<sup>130</sup> *Id.*; see NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 76 (2009).

<sup>131</sup> Results of the Survey conducted using the Questionnaire, see Part VII: Annexure of this paper.

<sup>132</sup> Hinshaw, *supra* note 129.

<sup>133</sup> Kleiner, *Occupational Regulation* 189, 192, 14 J. ECON. PERSP. (2000).

<sup>134</sup> Hinshaw, *supra* note 129.



are necessary, as the ambiguities pointed are the primary reasons identified by our survey for inherent lack of trust in mediation by the public.<sup>135</sup> 57% of the respondents of the survey felt that lack of trust is the reason that parties do not opt for mediation in the first place.<sup>136</sup>

Furthermore, despite the existence of several legal disputes that are subject to mediation under contractual, statutory, or judicial auspices, most consumers of the service do not possess a basic understanding of what mediation is and have an even more vague understanding of their rights.<sup>137</sup> To make educated choices, consumers need trustworthy information about mediation and mediator quality, all of which is possible only through regulation.<sup>138</sup>

In the next part of the paper, we shall discuss the features of different kinds of regulatory framework that exist for mediation across jurisdictions, and seek to identify a suitable framework to regulate both private and court-referred mediation in India.

#### IV. REGULATORY FRAMEWORKS FOR MEDIATION

Mediation is an extremely flexible and adaptable form of dispute resolution. Confidentiality and an informal process are the two cardinal precepts of mediation practice worldwide.<sup>139</sup> Formulating regulations for an essentially informal process has challenged and intrigued regulators and policy makers across jurisdictions.<sup>140</sup> Despite extensive policy debates and parleys, the question of regulation has persisted in being one of the most controversial and inconclusive topics concerning mediation as an alternative dispute resolution technique.

While considering approaches to regulating mediation, it is necessary to take into account the theme that has continued to define and dominate discussions, debates, and developments regarding ADR mechanisms: the diversity-consistency dilemma.<sup>141</sup> The diversity-consistency dilemma refers to the dilemma faced by regulators as a result of the persistent tension between the two opposing forces of consistency and diversity.<sup>142</sup> There is, on one hand, the predilection towards ensuring diversity in practice through flexibility and innovation, and, on the other hand, the inclination to establish consistency and reliability in mediation practice through regulation. Diversity-consistency tensions represent a multiplicity of interests relating to consumers, practitioners, service providers, and governments.<sup>143</sup> For example, consumers often prioritise flexibility and responsiveness in mediation while

---

<sup>135</sup> Results of the Survey conducted using the Questionnaire, *see* Part VII: Annexure of this paper.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; *see* DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL*, 261 (2011).

<sup>138</sup> *Id.*

<sup>139</sup> Alfani & McCabe, *supra* note 16.

<sup>140</sup> The United Nations Commission on International Trade Law [UNCITRAL], *Working Group on Conciliation, Report of the Working Group on Arbitration on the Work of its Thirty-Fifth Session*, U.N. Doc. A/CN.9/506 (November 19-30, 2001); International Arbitration Conference: Mediation, Arbitration and Recent Developments, November 21, 2008, *Liberalisation or Legalisation?* (Nov. 21, 2008).

<sup>141</sup> NADJA ALEXANDER, *INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES*, Vol.4 75(1<sup>st</sup> ed., 2009); T. Altobelli, *New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination* 8 *AUSTRALIAN DISPUTE RESOLUTION J.* 20.

<sup>142</sup> NADJA, *supra* note 141, 76.

<sup>143</sup> Institutionalization (co-option of mediation into court programs, government agencies and business and community organizations), legalization (case law on aspects of mediation), and innovation (experimentation with a number of different mediation models) have all been identified as major trends that have influenced mediation practice across the world.

maintaining quality and accountability.<sup>144</sup> On the other hand, policy makers often attempt to ensure that consumers are protected from unscrupulous practitioners by introducing approval standards which are to be necessarily met by mediators and mandating a certain degree of transparency.<sup>145</sup> While excessive regulation and insistence on rule consistency might stifle innovation, a completely unregulated system might adversely impact uninformed consumers due to the absence of adequate safeguards. In order to protect consumers from unconscionable and possibly prejudicial practices, it is therefore essential to establish a certain degree of transparency and disclosure along with appropriate approval standards. However, it is feared that the establishment of rigid transparency standards would dilute the confidentiality of the mediating process and undermine the efficacy of the technique in itself. Consequently, it is essential that regulatory models perform a balancing act and help inculcate the dual ideals of diversity and consistency.

In order to create an ideal environment for mediation, it is necessary for regulators to standardise certain aspects of mediation whilst preserving its flexible and innovative nature.<sup>146</sup> There are many potential forms of mediation regulation and policy makers throughout the world have promulgated several laws, codes, and standards with the objective of regulating the mediating process.<sup>147</sup> Given the adjustable and flexible nature of mediation, it has been opined that there is no 'one size fits all' approach regarding its regulation, and that any form of regulation is to be made in light of the prevailing socio-economic milieu in the country of implementation.<sup>148</sup> Accordingly, different countries have adopted different approaches towards the regulation of mediation. From a global perspective, the various forms of mediation regulation can be categorised into four primary approaches: market-contract regulation, self-regulation, formal regulatory framework, and formal legislative regulation.<sup>149</sup> In this part, we examine all four approaches and discuss why it would be ideal to establish a formal legislative framework, the third approach, to regulate the mediation process in India.

#### A. MARKET-CONTRACT REGULATION

As its name suggests, the market-contract approach is based on the concepts of *laissez faire* and party autonomy.<sup>150</sup> In accordance with the principles of *laissez faire*, individual parties are given maximum freedom to engage in any kind of arrangement for the provision of mediation services.<sup>151</sup> The terms of the private contract entered into by the parties are given paramount importance under this approach.

However, market principles assume that consumers would be in a position to gather information regarding the mediation process in order to make an informed choice. This would require the parties to be educated about the inner workings of the mediation process in order to make such informed choices. In addition, the market-contract regulation approach allows the economic laws of supply and demand to determine the price and quality of

---

<sup>144</sup> Nadja Alexander, *Mediation and the Art of Regulation*, 2 QUT. L. J. 8(2008).

<sup>145</sup> *Id.*, 2-3.

<sup>146</sup> T Altobelli, *New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination* 6 AUSTRALIAN DISPUTE RESOLUTION JOURNAL 20 (1997).

<sup>147</sup> NADJA, *supra* note 141.

<sup>148</sup> Nadja, *supra* note 144.

<sup>149</sup> *Id.*, 3-4.

<sup>150</sup> NADJA, *supra* note 141.

<sup>151</sup> *Id.*

mediation services.<sup>152</sup> Accordingly, the costs of mediation services could potentially be lower in comparison to other forms of regulation.

Further, the approach relies on legal infrastructure for the enforcement of mutually agreed contractual provisions.<sup>153</sup> Therefore, while the mediating process is driven by concepts of individual freedom and economic liberty, this approach is dependent upon Courts in order to effectively enforce awards and ensure compliance. As a result, this approach helps give legal form to the ideals of party autonomy and individual responsibilities while relying upon minimalist legal infrastructure for enforcement and contract interpretation. Consequently, proponents of this approach have argued that it would provide the parties with an opportunity to mutually self-regulate their transactions and enter into innovative arrangements that are backed by legal sanction.

Nevertheless, there also exist extraneous factors regulating proceedings in the market-contract approach. For instance, in Australia, where the market-contract approach is being adopted increasingly to mediate high-end disputes, courts are empowered to remove mediators on account of wrongdoing or misconduct.<sup>154</sup> This in turn influences mediator behaviour, making them more likely to act in accordance with the law. More importantly, the potential of repeat deals, reputation power, and individualised arrangements available through private contracting are likely to act as powerful regulatory instruments, which encourage quality and consistency in mediation practice.<sup>155</sup> For instance, mediators who acquire a reputation for impartiality and speedy resolution would be preferred over other mediators. Similarly, repeat deals occur when the parties to mediation are pleased with the conduct of their mediator and it is likely that the same mediator will be engaged by the clients to resolve future disputes.<sup>156</sup> It has been suggested by mediation experts such as Deckert that the choice of mediators, in a market-contract model, would be largely influenced by their reputation, with mediators having poor or substandard track records being gradually eliminated from the market.<sup>157</sup>

However, the risks of the market-contract approach lie in the multiple imperfections of the free market and the realities concerning access to accurate information.<sup>158</sup> It is improbable for all consumers to have access to accurate and relevant information regarding mediators and the process of mediation.<sup>159</sup> Additionally, structural barriers such as income inequality and illiteracy would render the freedom of choice illusory rather than informed. Studies undertaken in certain jurisdictions have demonstrated that inhabitants of geographically backward regions and individuals hailing from lower socio-economic backgrounds are likely to be adversely affected by such mechanisms.<sup>160</sup> Furthermore, the use of standard form contracts, which are often utilised extensively by large

---

<sup>152</sup> Nadja, *supra* note 144.

<sup>153</sup> *Id.*

<sup>154</sup> For example, *see* *Tapoohi v. Lewenberg*, [2003] VSC 410, wherein professional negligence on the part of the mediator was alleged.

<sup>155</sup> Nadja, *supra* note 144.

<sup>156</sup> *Id.*

<sup>157</sup> Katrin Deckert, *Mediation in Frankreich – Rechtlicher Rahmen und praktische Erfahrungen* in *MEDIATION – RECHTSTATSACHEN, RECHTSVERGLEICH, REGELUNGEN* 183 (2008).

<sup>158</sup> NADJA, *supra* note 141.

<sup>159</sup> *Id.*

<sup>160</sup> Tania Sourdin, *An Alternative for Whom? Access to ADR Processes* (2007), 10(2) *ADR BULLETIN* 26 (2007) available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1419&context=adr> (Last visited on April 2, 2018).

corporations, would cause major disparities in bargaining power and render the notion of freedom of contract non-existent.<sup>161</sup>

Consequently, in order for the market-contract approach to be successfully implemented, it is essential for consumers to be well informed and capable of making rational decisions. Therefore, in our opinion the market-contract approach would be unsuitable in the Indian context, as a vast majority of Indian consumers are inadequately equipped to make informed decisions as a result of numerous structural barriers in the form of caste, gender, class, and illiteracy which impede access to information in India.<sup>162</sup> In addition, due to the fact that the judiciary in India is overburdened and has a high pendency rate, it is unlikely for such disputes to be resolved quickly if the parties are compelled to resort to litigation for enforcement of the settlement contract.

In a developing country like India, it is essential to formulate rigid safeguards to prevent abuse by unscrupulous corporations and to secure the financial interests of all consumers. Accordingly, the market-contract approach, which is largely based upon the concepts of *laissez faire* and party autonomy, is inapplicable in a transitional democracy like India.

#### A. SELF-REGULATORY APPROACH

As opposed to the market approach that largely revolves around the individual autonomy of the parties, the self-regulatory approach refers to community and industry-based initiatives that regulate the mediating process by embracing collaboration and innovation.<sup>163</sup> There are many different forms of self-regulation and these approaches embody both reflexive and responsive theories of regulation.<sup>164</sup> The responsive theory aims to inculcate collaboration between the Government and the group that is subjected to regulation.<sup>165</sup> Reflexion refers to the notion of responsiveness and highlights opportunities for involved individuals to identify issues and find their own solutions.<sup>166</sup>

Self-regulation can take the form of codes, standards, benchmarks, and similar instruments established by private or public bodies, or a combination of both.<sup>167</sup> Examples of private bodies include dispute resolution organizations, private training institutions, chambers of commerce, and professional associations of lawyers, counsellors, and other professions. Under this approach, public bodies such as government agencies, legislative bodies, courts, tribunals, publicly sponsored dispute resolution centres and public education and training institutions are regularly involved in the establishment of approval and practice standards for mediators.<sup>168</sup>

The self-regulatory approach has been successfully implemented in a number of jurisdictions and the Australian National Mediator Accreditation System is recognised as a

---

<sup>161</sup> Nadja, *supra* note 144.

<sup>162</sup> Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L. J. 789 (2005); C. Raj Kumar, *Legal Education, Globalization, and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India*, 221 INDIANA J. OF GLOBAL LEGAL STUDIES 20 (2013).

<sup>163</sup> NADJA, *supra* note 141.

<sup>164</sup> *Id.*, 82.

<sup>165</sup> Nadja, *supra* note 144.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> NADJA, *supra* note 141.

prime example of self-regulation on an industry basis.<sup>169</sup> Integral instruments of self-regulation in the Australian mediating process include approval and practice standards, precedents and model clauses.<sup>170</sup> The Australian National Mediator Accreditation System established the National Mediator Standards Body ('NMSB'), which implements the National Mediator Accreditation System ('NMAS') and aids in setting assessment standards, which are to be complied with by mediators desirous of being accredited to the national standard.<sup>171</sup> Civil mediation practice in France is largely regulated by the self-regulatory codes of conduct, accreditation requirements, and other standards of mediation organizations and industry groups. In Netherlands, the mediator standards set by the Netherlands Mediation Institute ('NMI') effectively operate as national benchmarks for mediating processes.<sup>172</sup> The NMI provides an independent quality assurance system through accreditation and personal certification of mediators.<sup>173</sup> Similarly, the Civil Mediation Council ('CMC') has been responsible for the development of a national pilot accreditation scheme for mediators in England.<sup>174</sup> The desirability of such industry-driven self-regulatory approaches to mediator standards has been emphasised in a number of other jurisdictions as well.<sup>175</sup>

Self-regulatory instruments include framing of model mediation clauses by organizations that endorse that industry and also cover practices such as co-mediation, which involves two mediators instead of one, and mediation client surveys.<sup>176</sup> Courts in Australia have relied upon such self-regulatory instruments whilst determining the enforceability of mediation clauses.<sup>177</sup> In addition, corporate and government pledges to resort to alternative dispute resolution techniques such as mediation before initiating litigation constitute a growing form of self-regulation.<sup>178</sup> These pledges typically emphasise the institution's commitment to alternate dispute resolution techniques and provide the procedure that has to be followed whilst resolving disputes involving the signatory entity.<sup>179</sup> Prominent examples of such pledges include the UK Government Pledge 2001,<sup>180</sup> the International Trademark Association (INTA) ADR pledge,<sup>181</sup> the CPR ADR Pledge,<sup>182</sup> and the Individual and Corporate Pledges of the Mediation First Communities in Hong Kong.<sup>183</sup>

---

<sup>169</sup> *Id.*, 83.

<sup>170</sup> Nadja, *supra* note 144.

<sup>171</sup> *Id.*, 6.

<sup>172</sup> NADJA, *supra* note 141; *see also* Netherlands Mediation Institute, available at [www.nmi-mediation.nl](http://www.nmi-mediation.nl) (Last visited on June 16, 2017).

<sup>173</sup> NADJA, *supra* note 141.

<sup>174</sup> *Id.*, 82.

<sup>175</sup> For example, the United States of America, where the Texas Credentialing Association, which is an industry initiative, aims to cover all mediation credentialing in the state and Germany, where the Federal Ministry of Justice has indicated the desirability of such industry-driven regulatory approaches.

<sup>176</sup> Nadja, *supra* note 144.

<sup>177</sup> *See, e.g.*, European Consumer Law Group, *Soft Law and the Consumer Interest* (2001) European Commission, available at [www.ec.europa.eu/consumers/policy/eclg/rep03\\_en.pdf](http://www.ec.europa.eu/consumers/policy/eclg/rep03_en.pdf) (Last visited on 16 June 2017); *see also* H Ballin, *Director-General Administration of Justice and Law Enforcement* (2007) as found in Nadja, *supra* note 144 (the Dutch Minister of Justice in his letter to the House of Representatives expressed his reluctance towards regulating mediation); *see* CEDR, *Proposed Mediation Directive Adopted by European Commission* (2004), available at [www.cedr.com](http://www.cedr.com) (Last visited on 16 June, 2017) (the European Commission has advocated self-regulation of mediation).

<sup>178</sup> Nadja, *supra* note 144.

<sup>179</sup> AMERICAN ARBITRATION ASSOCIATION, *ADR & THE LAW*, 140 (22<sup>nd</sup> ed., 2008).

<sup>180</sup> Department for Constitutional Affairs, Effectiveness of the Pledge available at [www.justice.gov.uk](http://www.justice.gov.uk) (Last visited on 16 June, 2017).

<sup>181</sup> International Trademark Association Alternative Dispute Resolution (ADR) Program Pledge, available at <http://www.inta.org/Mediation/Documents/INTAADRLawFirmPledge.pdf> (Last visited on February 2, 2018).

There are numerous perceived benefits of self-regulation. Participants in the regulatory process are experts who possess an intimate and sensitive knowledge of the specific needs and interests of the mediating community. In addition, the self-regulatory model promotes innovation and has proved to be much more flexible and adaptable than formal regulation. This is because industry members themselves participate in the decision-making process and help further a diverse set of ideals. In addition, self-regulatory models have been associated with lower costs of information collection, supervision, and enforcement as a result of the fact that a substantial portion of the costs incurred are reabsorbed by the industry itself because mediation experts and practitioners play a key role in mediation regulation when self-regulatory models are employed.<sup>184</sup>

The primary risks associated with self-regulation are however with respect to the resource levels, in terms of both expertise and funding.<sup>185</sup> In order to achieve optimum functioning, the self-regulatory approach requires sustained input from key interest groups and experts.<sup>186</sup> Where levels of industry and expert input begin to wane, the self-regulatory model begins to lose efficacy and disintegrate.<sup>187</sup> Furthermore, self-regulatory models are susceptible to excessive and monopolistic domination by specific individuals or groups who are not representative of the interests of the broader economic spectrum.<sup>188</sup> Therefore, sustained industry and expert input is essential for optimum functioning of the self-regulatory model. Notably, there is an acute lack of skilled and experienced individuals who specialise in mediation in India.<sup>189</sup> Moreover, mediation is yet to pick up popularity as an ADR mechanism in India and is still in a nascent stage of development.<sup>190</sup> In the absence of a fully functioning mediation community and requisite industry expertise, self-regulation would be unsuitable. In addition, a vast majority of Indian citizens are not aware of their legal rights and it is essential to protect such individuals from potentially exploitative behaviour by unscrupulous mediation practitioners.<sup>191</sup> As a result, the implementation of a self-regulatory model in such conditions could possibly result in economic dominance being asserted by a select few. Therefore, we believe that, the implementation of a self-regulatory model would be unfeasible in India.

## B. FORMAL REGULATORY FRAMEWORK

Like the self-regulatory approach, the formal regulatory framework approach is based on reflexive and responsive theories of mediation and is relatively similar to the self-

<sup>182</sup> International Institute for Conflict Prevention & Resolution (CPR) pledge to resolve disputes through negotiation, mediation, and other Alternative Dispute Resolution (ADR) processes, available at <https://www.cpradr.org/resource-center/adr-pledges/21st-century-pledge> (Last visited on February 2, 2018).

<sup>183</sup> “Mediate First” Pledge, available at <http://www.doj.gov.hk/mediatefirst/eng/pledge.html> (Last visited on February 2, 2018).

<sup>184</sup> NADJA, *supra* note 141; Tania Sourdin, *Australian National Mediator Accreditation System – Report on Project* (September, 2007), available at <http://archive.nswbar.asn.au/docs/professional/adr/documents/AccreditationReportSept07.pdf> (Last visited on April 2, 2017).

<sup>185</sup> Nadja, *supra* note 144.

<sup>186</sup> *Id.*, 83.

<sup>187</sup> *Id.*

<sup>188</sup> Nadja, *supra* note 144.

<sup>189</sup> Greg Bond, *Talking Mediation in India*, KLUWER ARBITRATION BLOG, January 24, 2017, available at <http://kluwermediationblog.com/2017/01/24/lex-infinitum-talking-mediation-in-india/> (Last visited on 16 June, 2017); Laila Ollapally & G Aparna, *Mediation an omission in the ADR Legislation*, BAR & BENCH, available at <http://barandbench.com/mediation-an-omission-in-the-adr-legislation/> (Last visited on 16 June, 2017).

<sup>190</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 46.

<sup>191</sup> *Id.*

regulatory approach.<sup>192</sup> Under this approach, the Government establishes formal parameters within which the mediation community is allowed to self-regulate the inner workings of the mediating process.<sup>193</sup> The formal parameters established are often rather broad in nature so as to ensure that an adequate degree of flexibility is provided to the practitioners. Consequently, this approach helps foster collaboration between the Government and the mediation community and is responsive towards the demands and suggestions of all actors involved in the mediating process.

The formal regulatory framework, usually takes the form of legislative or executive instruments such as international conventions, directives, and legislations. Under certain circumstances, even model laws, which typically mirror legislative enactments in target jurisdictions, can act as effective guidelines for local regulators and interest groups. For instance, in Australia, it has been suggested that the introduction of a national model law dealing with the rights and obligations of participants in the mediating process would help create effective guidelines and result in desirable regulatory outcomes.<sup>194</sup> The regulatory framework helps establish formal and legally enforceable parameters within which other forms of regulation, such as self-regulation can fill in the minute regulatory details. For instance, the framework could deal with issues such as professional misconduct, whilst allowing the mediation community to self-regulate quality control mechanisms. This form of regulatory framework is used in a number of jurisdictions.<sup>195</sup> The European Directive on Mediation is a prime example of the successful implementation of the formal regulatory framework approach.<sup>196</sup> The directive defines mediation, establishes its scope, and identifies the different aspects of the mediating process that require regulation by the individual EU-member states.<sup>197</sup> By doing so, it helps identify the exact scope for self-regulation by the individual States. In addition, it recognises self-regulation as one of the different forms of regulating mediation,<sup>198</sup> and encourages member states to establish requisite quality control mechanisms for providing mediation services.<sup>199</sup> The Directive also places an obligation upon member states to encourage mediators and mediating organizations to comply with such quality control mechanisms.<sup>200</sup>

Similarly, the establishment of the National Consultative Council on Family Mediation in France and the passage of The Act on Promotion of Use of Alternative Dispute Resolution in Japan are cited as illustrations of the regulatory framework approach.<sup>201</sup> The National Consultative Council on Family Mediation, which was created by means of a formal decree, helped establish a State Diploma and a code of practice for family mediators. The Council establishes the code of practice for mediators, lays down the content of training programmes, certifies training centres, and provides the necessary compliance standards for

---

<sup>192</sup> NADJA, *supra* note 141.

<sup>193</sup> *Id.*, 84.

<sup>194</sup> R. Carroll, *Trends in Mediation Legislation: 'All for One and One for All' or 'One at All'?*, 207 UNIVERSITY OF WESTERN AUSTRALIA L. REV. 30 (2002).

<sup>195</sup> NADJA, *supra* note 141.

<sup>196</sup> *Id.*; *see*, Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, proposal as adopted by the European Parliament and the Council of the European Union on 21 May 2008, L 136/3, 24.05.2008 ('EU Mediation Directive').

<sup>197</sup> EU Mediation Directive, Art. 3(a).

<sup>198</sup> EU Mediation Directive, Recital 14.

<sup>199</sup> EU Mediation Directive, Recital 16.

<sup>200</sup> NADJA, *supra* note 141.

<sup>201</sup> *Id.*, 85.

obtaining public funding.<sup>202</sup> While the Council helps provide a regulatory framework, it allows individual institutions to operate within these boundaries.<sup>203</sup>

The foremost advantage of the formal regulatory framework approach is its ability to accommodate a number of diverse interest groups whilst pursuing common objectives.<sup>204</sup> The formal regulatory framework is well equipped to accommodate divergent interests because it provides for a common standard, while allowing interest groups to customise the finer details, thereby striking a delicate balance between consistency and diversity. However, formal regulatory frameworks are effective only in jurisdictions where a single juristic body, such as the European Court of Justice, has the power to interpret and enforce regulatory wrangles as and when they arise.<sup>205</sup> Uniform interpretation of provisions of the regulatory framework increases the robustness of the framework as a whole. On the other hand, if the provisions are not interpreted harmoniously, the efficacy of the framework is undermined.<sup>206</sup> This is because of the fact that the formal regulatory framework only helps establish certain parameters that guide mediation practice and a subjective interpretation of these parameters would cause discrepancies in the application of the framework and dilute the strength of the framework. In addition, in the absence of a fully functioning mediation community, it is difficult to ensure continued innovation. Moreover, unlike comprehensive ADR legislations, regulatory frameworks do not regulate specific details of mediating process and hence, it is of utmost importance that the guidelines established by the framework are interpreted harmoniously.

Consequently, the formal regulatory framework approach is not suitable for all jurisdictions; the implementation of a national framework that deals with all aspects of the mediating process is often unattainable in large and federal countries which are divided into provincial and federal Governments and have numerous pieces of local and state legislations.<sup>207</sup> It is difficult to ensure that the provisions of the framework are interpreted in a uniform manner across such countries because the judicial system is often bifurcated between the federal and provincial governments. As a result, this approach cannot be adopted in jurisdictions like the United States of America, which have a significantly large population, a number of sub-national jurisdictions, and numerous pieces of local and state legislation.<sup>208</sup> For the same reason the regulatory framework approach is unsuitable for implementation in India. India has a massive population of over one billion, and has a quasi-federal constitutional scheme. Moreover, it is impractical for the Supreme Court, which is the final appellate court, to individually interpret and enforce all regulatory wrangles related to mediation. If the role of interpretation of such regulatory disputes is taken by the subordinate High Courts, it could cause discrepancies in interpretation, which would decrease the efficacy of the framework as a whole. Furthermore, given the absence of a well-developed mediation scheme in India, the disadvantages associated with self-regulation will also be applicable to formal regulatory frameworks, as they rely extensively upon self-regulation to fill in the finer details.

---

<sup>202</sup> Miquel Martin Casals, *Divorce Mediation in Europe: An Introductory Outline*, 9.2 ELECTRONIC J. OF COMPARATIVE L. 17 (2005).

<sup>203</sup> *Id.*

<sup>204</sup> Nadja, *supra* note 144.

<sup>205</sup> NADJA, *supra* note 141.

<sup>206</sup> *Id.*

<sup>207</sup> NADJA, *supra* note 141.

<sup>208</sup> *Id.*



Therefore, the implementation of a formal regulatory framework in India would be impractical and possibly counterproductive. In fact, the ‘Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003’ could be interpreted to be a regulatory framework modelled along this approach. However over the last fourteen years it has not proved to be successful in creating a robust framework for mediation.<sup>209</sup>

### C. *FORMAL LEGISLATIVE REGULATION*

The formal legislative approach forms part of a formal regulatory approach discussed in Part C; however, this relies primarily upon formal legislative enactments which are supported by legal institutions, such as the executive and the judiciary, to regulate the mediating process.<sup>210</sup> The formal legislative approach focuses upon the positive notions of law and is consonance with the concept of an active state. The presence of a formal legislative enactment with regard to mediation would represent a strong endorsement of the mediating process by the state and result in the recognition of mediation as a legitimate alternative dispute resolution mechanism.<sup>211</sup> The State helps incorporate well-defined legal norms and policies into the regulatory process. The involvement of the State in most aspects of the mediation process is identified as a defining characteristic of the formal legislative approach in certain jurisdictions, such as France.<sup>212</sup>

Formal legislative enactments also help set goals of practice consistency, establish certainty on legal issues regarding the mediating process, and provide consumer protection.<sup>213</sup> For instance, prior to the introduction of the Uniform Mediation Act (‘UMA’) in the United States of America, the mediating process was regulated in an inconsistent manner which led to considerable uncertainty and confusion.<sup>214</sup> The UMA helped provide a uniform process and ensured that the integral tenets of mediation, such as evidentiary privilege and confidentiality, were accorded the same degree of protection nationwide.

In recent times, a number of developing countries have preferred a centralised and formal legislative enactment, over other forms of regulation, in order to govern mediation.<sup>215</sup> This is because transitional democracies, which are eager to attract investment and enter into multilateral economic agreements, are compelled to demonstrate that their legal systems are democratic and friendly towards alternate techniques of dispute resolution. International institutions and corporations are more likely to recognise formal legislative enactments as a clear indication of the Government’s will over other informal methods of regulation.<sup>216</sup> Moreover, formal legislative enactments help institutions and individuals, unfamiliar with the localised legal scheme of a particular country, clearly identify the dispute resolution process. Accordingly, a number of developing countries, including Austria,

---

<sup>209</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 46.

<sup>210</sup> Stanley B. Lulman, *Dispute resolution in China after Deng Xiaoping: Mao and Mediation Revisited*, 11 COLUM. J. ASIAN L. 229 (1997).

<sup>211</sup> Nadja, *supra* note 144.

<sup>212</sup> J-P Bonafé-Schmitt, *Global Trends in Mediation: Training and Accreditation in France*, 11 ADR Bulletin 47 (2009) (translation by D Macfarlane).

<sup>213</sup> Nadja, *supra* note 144.

<sup>214</sup> *Id.*, 8.

<sup>215</sup> *Id.*, 10.

<sup>216</sup> NADJA, *supra* note 141.

Croatia, Montenegro, Serbia, Slovakia, Bosnia and Herzegovina, and Malta have adopted the formal legislative regulatory approach.<sup>217</sup>

Sector-specific legislations, which are tailor-made for a particular sector or industry, have been utilised extensively in other common law countries such as Australia, the United States, and England.<sup>218</sup> For instance, in England and Wales, mediation accreditation is done on a sector-specific basis to cater to the requirements of the individual sectors. India can explore the prospects of having similar sector-specific mediation legislations. Currently, while certain legislations such as, the Industrial Disputes Act and Companies Act make a passing reference to mediation, there exist no statutes which attempt to regulate mediation proceedings.

However, on the other hand, the implementation of excessively rigid legislative mechanisms may be counterproductive, and result in stifling growth and innovation in mediation.<sup>219</sup> Furthermore, the implementation of statutory regulations may, under certain circumstances, dilute the core ideals of the mediating process, such as party autonomy and confidentiality. It is therefore essential that legislators make sure that the legislation is not antithetical in any way to the core values of mediation, which includes party autonomy, confidentiality, and innovation.<sup>220</sup> Accordingly, it is necessary that the legislative mechanism balances innovation with consistency and ensures that the central tenets of mediation practice are not undermined for the sake of uniformity.

Nevertheless, the formal legislative approach remains the most ideal and suitable regulatory approach for India. The introduction of a uniform national legislation regulating the mediating process would help establish consistency by resolving the disparities in the interpretation and phraseologies of the multiple Mediation Rules framed by different High Courts. Additionally, the introduction of a formal legislative enactment in India would legitimise the mediating process and in addition would help demonstrate the country's continued commitment towards nurturing alternative forms of dispute resolution. Accordingly, the formal legislative approach is ideal for India and is suitable for implementation in Indian conditions.

## V. FINDINGS OF THE SURVEY AND MODEL CLAUSES

The primary challenge before legislators while drafting legislation for mediation is drafting a regulation that protects consumers without taking away from the informal and voluntary nature of the process itself.<sup>221</sup> The legislation itself must therefore be broad enough to provide guidance that can be applied to the infinite variations in circumstances that arise in practice.<sup>222</sup> Further, the aim of this legislation must be to lay down regulations that codify over-arching guidelines that are essential for mediation proceedings without prescribing the manner in which a mediation proceeding will be conducted to ensure that flexibility is not compromised.

As discussed in Part III, the primary justification for regulating mediation in India is to ensure mediator qualification as well as improve the process itself and since

---

<sup>217</sup> Ales Zalar, *Towards Primary Dispute Resolution Systems: Global Trends in Civil and Family Mediation: An Overview of Best Practice in Europe* (2006).

<sup>218</sup> LAURENCE BOULLE, *MEDIATION: PRINCIPLES PROCESS PRACTICE* 284-285 (2005).

<sup>219</sup> NADJA, *supra* note 141.

<sup>220</sup> *Id.*

<sup>221</sup> Fishwick, *supra* note 43.

<sup>222</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 46.

mediation relies on the pillars of confidentiality and the finality of settlements, they form part of the crucial principles that need to be codified.<sup>223</sup> The aspects of the mediation legislation we shall discuss in this part are *first*, mediator qualifications, *second*, determining the manner in which confidentiality shall be ensured during mediation proceedings, *third*, and most importantly the finality of outcomes of mediation.

The present section undertakes an empirical review of the working of mediation centres in Delhi, Mumbai, Bangalore, Shimla, Chennai, Golghot-Assam, Alapuzha-Kerala, Pune, Kochi, Coimbatore, Srinagar, Hyderabad and Nagercoil-Tamil Nadu. After analysing responses from mediation centres across the country we discuss specific clauses relating to confidentiality and enforcement from different jurisdictions and then propose model clauses for the Indian law.

#### A. METHODOLOGY

We conducted a survey in order to identify the existing legal as well as practical intricacies that exist in the manner in which mediation is practiced in India. The sample for the survey comprised of mediators that practice across India. These included independent practitioners as well as mediators appointed by the state that were working within court-annexed mediation centres. The determinative criterion to choose participants was that they must have completed at least one mediation session in India. These questionnaires were emailed to 150 Indian mediators. This survey was quantitative in nature; participants were given a questionnaire with 32 questions each containing multiple choice answers. 44 individuals responded to our survey. These responses form the basis for the discussion and findings in this paper.

#### A. MEDIATOR QUALIFICATIONS

Across the world, there exists several mechanisms to assess mediator eligibility; they include educational qualifications, mediation training, and performance based assessments as well as written exams.<sup>224</sup> In India there exists no binding regulation that lays down a standard for mediator qualification. The guidelines for mediator qualification that resemble a regulatory framework are given by the Supreme Court MCPC. These non-binding guidelines lay down a minimum forty hour course that needs to be completed by mediators.<sup>225</sup> This course covers the theory of mediation, role-playing/demonstrations of mediation proceedings as well as shadow mediations that one must complete under a trained mediator.<sup>226</sup> The curriculum for the course includes the history of mediation, ethics of a mediator, role of judges, parties and advocates, types of mediation and conflict resolution among other things.<sup>227</sup> The format of the course as well as the curriculum includes topics that are covered by most internationally recognised mediation training programs.<sup>228</sup> An overwhelming majority of the mediators that responded to our questionnaire believe that

<sup>223</sup> Hinshaw, *supra* note 129.

<sup>224</sup> Roselle L. Wissler & Robert W. Rack, Jr., *Mediator Performance: The Usefulness of Participant Questionnaires*, 2004(1) J. OF DISP. RESOL. 229 (2004).

<sup>225</sup> Mediation and Project Committee, *supra* note 65, 42.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*, 43.

<sup>228</sup> See Indian Institute of Arbitration and Mediation, *IIAM Training*, available at <http://www.arbitrationindia.org/training.html> (last visited on March 3, 2018); The International Centre for Alternative Dispute Resolution, Training Modules, available at <http://icadr.nic.in/index.php?page=training-programmes-on-mediation&p=104> (Last visited on June 3, 2017).

these guidelines are sufficient. A total of 65.7% of the respondents believe that these guidelines must be made mandatory.<sup>229</sup>

As per *Salem Advocate Bar Association v. Union of India*,<sup>230</sup> judges and lawyers are not required to undergo a mediation course. However, the adversarial atmosphere in which judges and lawyers are conditioned to resolve disputes affects the success of the mediation itself.<sup>231</sup> Thus, the government must consider adopting a law providing legislative sanction to the MCPC training guidelines, thereby ensuring that all mediators that practice in India have undertaken a formal training in mediation.

### B. CONFIDENTIALITY

As discussed earlier, confidentiality is an integral part of any mediation proceeding.<sup>232</sup> The openness and honesty that stem from informal conversations during a mediation is guaranteed through confidentiality and is essential for the success of any mediation.<sup>233</sup> In our survey we asked mediators several questions on how they guarantee confidentiality in India and how much importance is placed on confidentiality by consumers.<sup>234</sup> Majority of the mediation centres in India ensure confidentiality through agreements signed by the mediator and/or the lawyers and the parties, however, close to 34.1% of the respondents secure confidentiality solely on the basis of trust or verbal commitments.<sup>235</sup> In fact, 25% of the respondents viewed lack of enforcement confidentiality to be a reason parties opted out of mediation.<sup>236</sup>

Countries across the world regulate mediation in different ways. The EC Directive on Mediation, 2008, stipulates that a mediator considers all information relating to the mediation confidential unless it is opposed to public policy or is necessary to enforce the settlement.<sup>237</sup> While Italy pursues a stricter standard for confidentiality where all mediators are required to keep confidential any information in connection with the mediation, including the fact that the mediation exists and has been conducted between the parties.<sup>238</sup> In addition, mediators may not be called as witnesses and the parties may not rely on any communications made or any information collected during mediation in the subsequent judicial proceedings.<sup>239</sup> Article 9 of the Italian legislation provides for all accredited mediators to be bound by an obligation of confidentiality with respect to statements made and

<sup>229</sup> Results of the Survey conducted using the Questionnaire, *see* Part VII: Annexure of this paper.

<sup>230</sup> *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344.

<sup>231</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 46.

<sup>232</sup> *See* Part IIIC(1) of this paper.

<sup>233</sup> Law Reform Report, *supra* note 98; Irvine, *supra* note 101.

<sup>234</sup> Results of the Survey conducted using the Questionnaire, *see* Part VII: Annexure of this paper.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, 2008 OJ (L 136), Art. 7. It states:

“1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement”.

<sup>238</sup> Legislative Decree No. 28, 2010 (Italy).

<sup>239</sup> *Id.*

the information acquired during the mediation process,<sup>240</sup> while Article 10, titled ‘*Usability and professional-secrecy*’, states that the statements made or the information acquired in the course of a mediation process cannot be used in a trial having the same object, even in part, that has begun, been summarised, or continued after the failure of mediation, except with the consent of the registrant or the party from whom the information originated.<sup>241</sup> The Article further elaborates that the duty of a mediator in reference to testifying about the content of the proceedings is protected, and hence, the mediator is not required to testify.<sup>242</sup>

The UMA adopted in the United States of America is an example of a legislation that is striving to strike a balance between protecting mediation communications and preventing parties from using mediation to cloak otherwise discoverable or admissible evidence in privilege. The UMA protects ‘mediation communications’ as defined in the statute.<sup>243</sup> It provides that mediation communications are privileged unless the information is otherwise admissible.<sup>244</sup> Therefore, under the UMA while all briefs, letters, forms of communication between the parties prepared specifically for the mediation are protected; however, any exhibits or briefs used during the mediation but that can be admissible otherwise such as documents prepared for an investigation are not protected by the UMA. Such an example can be considered suitable in the Indian scenario as the law does not alter the flexible nature of mediation by itself, but still manages to protect information that parties chose to share exclusively during the mediation proceedings. The clause must be drafted in the following manner:

#### Confidentiality:

- (1) Notwithstanding anything contained in any other law for the time being in force, the mediator and the parties shall keep confidential all matters relating to the mediation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.
- (2) There is no privilege under this section for a mediation communication that is:
  - (a) in an agreement evidenced by a record signed by all parties to the agreement;
  - (b) made during a session of a mediation which is open, or is required by law to be open, to the public;
  - (c) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
  - (d) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
  - (e) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.

<sup>240</sup> *Id.*, Art. 9.

<sup>241</sup> *Id.*, Art. 10.

<sup>242</sup> *Id.*

<sup>243</sup> Uniform Mediation Act, 2005 (U.S.A.), §2 (2) (Section 2(2): “Mediation communication” a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator).

<sup>244</sup> *Id.*, § 4 (Privilege against disclosure; admissibility; discovery).

The above clause is largely borrowed from the UMA, as this Act recognises the need to lift the veil of confidentiality in certain circumstances and has been largely viewed as a successful legislation in terms of identifying exceptions to the confidential nature of proceedings.<sup>245</sup> Even though, confidentiality is integral to the process of mediation, exceptions in light of public interest need to be recognised, or else consumers will have no recourse against unscrupulous mediators.<sup>246</sup> Such confidentiality is referred to as enumerated confidentiality. Enumerated confidentiality is similar to absolute confidentiality with one main difference; there are exceptions to the rule.<sup>247</sup> These exceptions are created merely to prevent abuse of absolute confidentiality.<sup>248</sup>

### C. ENFORCEMENT OF SETTLEMENTS

Although there is evidence from other jurisdictions which indicates that parties are more likely to comply with mediation settlements than court orders, the necessity for recognising settlements as enforceable without court intervention stems from the fact that the entire process of ADR is rendered redundant if parties need to go to court to obtain relief.<sup>249</sup> In fact the need to recognise arbitration awards in India is also based on the same premise.<sup>250</sup> In Australia, a mediated settlement agreement is a legally binding agreement and is enforceable under the normal rules of contract law.<sup>251</sup> Although there is no requirement under common law that the settlement agreement be written, this is advisable to aid enforcement. Conventionally a deed of agreement will be used as a settlement agreement.<sup>252</sup> Some Australian states require formalisation of certain types of mediated settlement agreements. For example, in Victoria, mediated settlement agreements in civil matters must be formalised.<sup>253</sup> Courts may also embody settlement agreements in consent orders. This option can provide an effective enforcement tool, since a failure to comply with such an order may result in contempt of court.<sup>254</sup>

In USA, any settlement agreement reached through the mediation process must be reduced to writing and executed by the parties. Neither the mediator nor any organisation such as JAMS or AAA has the authority to enforce a settlement. Settlement agreements may be enforced in the same way as any other contractual agreement – either through arbitration (if the agreement contains an arbitration clause) or in court.<sup>255</sup> Japan considers a settlement achieved at Administrative Mediation or Non-governmental Mediation

<sup>245</sup> *Id.*

<sup>246</sup> *Foxgate Homeowners' Association v. Bramalea California Inc.*, 78 Cal.App.4th 653 (2000).

<sup>247</sup> *Id.*

<sup>248</sup> Andrea Wykoff, *Mediation and Confidentiality*, 4 BOND UNIV. STUDENT L. REV. 1 (2016).

<sup>249</sup> Thomas J. Smith, *The Enforceability of Mediated Settlement Agreements*, available at <http://www.nadn.org/articles/Tommy-Smith-Enforceability.pdf> (last visited on March 3, 2018) (for further discussion on enforcement, see Part III of this paper).

<sup>250</sup> The Arbitration and Conciliation Act, 1996, §35.

(“Section 35: Finality of arbitral awards. -Subject to this Part an arbitral award shall be final and binding on the parties and persons, claiming under them respectively. 36. Enforcement. - Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court”).

<sup>251</sup> Nadjia, *supra* note 144.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

as a mere agreement between the parties. If a party breaches the settlement, the other party needs to obtain a court order before it can enforce the agreement.<sup>256</sup>

In India, arbitration awards and conciliation settlements are binding in the same manner as that of a decree of a Court.<sup>257</sup> This ensures that parties do not need to go to court again to enforce the settlement.<sup>258</sup> While conciliation and mediation are inherently distinct processes as discussed in Part II and III, the fact remains that both processes place importance on the principles of free consent of parties as well as finality of the outcome. This allows us to draw a comparison when framing a provision. Following the framework laid down for the finality of conciliation settlement agreements in the 1996 Act, the mediation legislation must contain a similar provision, making a settlement final and binding. Such a provision could be framed in the following manner:

**Settlement Agreement- Final and Binding:**

- (1) The settlement agreement entered by the parties during the mediation proceedings shall be final and binding and shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.
- (2) Recourse to a court against a settlement may be made only by an application for setting aside such a settlement in accordance with sub-section (4) and subsection (4)
- (3) A settlement agreement may be set aside by the court only if-
  - (a) The party making the application furnishes proof that-
    - i. A party was under some incapacity, or
    - ii. The settlement agreement is not valid under the law for the time being in force; or
    - iii. The mediator acted in a fraudulent or corrupt manner and consent obtained by parties was vitiated by the actions of the mediator
  - (b) The court finds that the settlement agreement is in conflict with the public policy of India.

Explanation. -Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the settlement was induced or affected by fraud or corruption in any manner.

- (4) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had signed the settlement agreement: Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

This provision would prevent Courts from examining the contractual basis on which the agreement was entered into and the settlement would be binding, while the option of setting aside the agreement would still be possible to set aside.

---

<sup>256</sup> *Id.*

<sup>257</sup> The Arbitration and Conciliation Act, 1996, §§35, 73.

<sup>258</sup> *Id.*

## VI. CONCLUSION

Through the course of this paper, we have argued in favour of the implementation of a legislation to regulate mediation in India. In doing so, we have identified the numerous flaws present in the Indian justice system as it exists, and the drawbacks of adversarial litigation. While doing so, we have identified mediation in particular, among other forms of alternate dispute resolution, to be suitable given the Indian socio-economic milieu. Having identified the need to regulate mediation in such a way as to ensure consistency and foster innovation, we have provided an overview of other major forms of regulations in order to identify the perfect fit in Indian conditions.

We conducted a survey to understand the manner in which mediation centres work, given the lacuna in regulation that exists. Our data indicates that the condition of mediation centres in India is far from perfect. In fact, several high courts have made little or no attempt to incorporate the Mediation Project Committee report recommendations within their jurisdiction. Moreover, essential aspect of mediation such as protection of confidentiality is maintained in several centres only through trust without the backing of any legal document.

Most centres do not have a complaint mechanism to report mediators, and those that do have no guidelines on the manner to deal with such complaints. While a majority of respondents practice a mixture of evaluative as well as facilitative method of mediation, nearly all respondents were of the opinion that the current post-litigation mediation system that provides for judges or lawyers to conduct sessions are impeded by their existing work load. The data also indicates that most mediators believe there exists a palpable mistrust of the process of mediation from within the litigants as well as the legal fraternity. While a wide variety of reasons are considered responsible for the same, lack of awareness is the primary concern. Nearly all respondents held the opinion that passing a law would resolve the existing systemic as well as perception problems in the current set-up. In this paper we have argued for the implementation of a principle-based legislation for mediation in India based on empirical data collected from these practitioners and institutions across the country, along with taking examples from legal practices in other countries.

## VII. ANNEXURE: MODEL QUESTIONNAIRE

### A. GENERAL

1. Which city do you practise in? \*

\_\_\_\_\_

2. Have the following been perceived as problems by the parties during mediation? (Tick as many as applicable) \*

*Check all that apply*

- Confidentiality
- Qualifications of mediators
- Parties did not have sufficient authority to settle the case
- Perception Barriers (fear regarding neutrality of the mediator, mistrust in the informal set up etc)
- Time taken for dispute resolution
- Other: \_\_\_\_\_

**January – March, 2018**



3. Are parties more inclined towards reaching a settlement when mediation takes place prior to the framing of issues? (pre-litigation mediation)

*Mark only one oval.*

- Yes
- No

4. Is there a palpable mistrust in the process of mediation among the legal fraternity?

*Mark only one oval.*

- Yes, it is evident from the attitude of the judges.
- No, the judiciary along with lawyers is taking an active step towards promoting mediation
- Other: \_\_\_\_\_

**A. REFERENCE MADE TO MEDIATION**

If you are a private mediator, kindly ignore this section.

5. How many disputes are referred to your centre annually under Section 89 of the CPC?

*Mark only one oval.*

- Less than 100
- More than 100
- More than 500
- More than 1000
- More than 1500

6. Based on what parameter do judges refer cases under Section 89? (Tick as many as applicable)

*Check all that apply.*

- Number of Parties involved
- Pre-existing relationship between parties
- Small Amount of claim
- Time taken to reach a settlement
- No prescribed parameter

7. If there exists no specific parameter, in your experience are there any particular type of disputes that are best resolved through mediation? (Tick as many as applicable)

- Check all that apply.
- Family Disputes
- Consumer Disputes
- Labour Disputes
- Other: \_\_\_\_\_

8. Has the High Court in your state made any attempt to incorporate the Mediation and Conciliation Project Committee (MCPC) guidelines within the rules related to Section 89, CPC?

*Mark only one oval.*

- Yes
- No

**January – March, 2018**

9. If no, have the courts made any other attempts to codify mediation guidelines?

*Mark only one oval.*

- Yes
- No

10. If yes, what other attempts have been made by the Court to codify mediation guidelines?

**B. COMPLAINT MECHANISMS**

11. In case parties are unhappy with the mediation process, are there any complaint mechanisms in place for the aggrieved party to lodge a complaint?

*Mark only one oval.*

- Yes
- No

12. If there exists such a complaint mechanism, what is the nature of complaints that you receive? (Tick as many as applicable)

*Check all that apply.*

- Quality of the mediator
- Other party not attending sessions
- Lack of trust in the process itself
- Other: \_\_\_\_\_

**C. RIGHTS OF PARTIES**

13. In what manner are parties guaranteed confidentiality?\*

*Mark only one oval.*

- Mediator signs a confidentiality agreement.
- Parties and lawyers sign confidentiality agreements
- All of the above
- None of the above
- Other: \_\_\_\_\_

14. How many instances of non compliance with mediation settlement agreements have been reported at your centre in the last year? (Approximately)

*Kindly ignore if you are an individual mediator.*

\_\_\_\_\_

15. What kind of approach do you prefer to adopt in your mediation proceedings?

*Mark only one oval.*

- Facilitative
- Evaluative
- Mixture of Both

**January – March, 2018**

(Note: *Evaluative Mediation* refers to making recommendations to the parties in dispute. *Facilitative style of mediation* requires the mediator to act like a mere facilitator for the entire discussion without actively making any suggestions or recommendations.)

*D. INFRASTRUCTURE REQUIREMENTS*

16. Is there a requirement for space for Mediation Centres (rooms for mediation, space for accommodating mediators and for separate as well as joint meetings of the parties) within the Court premise?

*Mark only one oval.*

- Yes
- No, the existing setup is satisfactory considering the number of cases handled

17. According to you, are the Mediation and Conciliation Project Committee (MCPC) guidelines laid down by the Supreme Court sufficient to provide a framework for mediation in India?

*Please specify yes or no in 'other reasons'.*

*Mark only one oval.*

- Yes
- No, they require legislative sanction
- Other:

18. Do the sitting Judges of the High Court determine which mediator will mediate a particular dispute?

*Mark only one oval.*

- Yes
- No

19. If no, then please specify who does.

\_\_\_\_\_

20. If yes, does their duty to perform judicial work disallow them from devoting enough time?

*Mark only one oval.*

- Yes
- No

21. Is there a requirement to set up a separate management committee (such a committee would make a roster for mediators within each centre, set up an approval process for mediators) in each High Court?

*Mark only one oval.*

- Yes
- No

22. At your mediation centre, who pays bears the cost of a mediation proceeding?

**January – March, 2018**

*Mark only one oval.*

- The parties
- The State
- Other: \_\_\_\_\_

*In case of other cost bearing entities, kindly specify in the space given above.*

**E. SELECTION OF MEDIATORS**

*Kindly ignore these questions if you are a lawyer not practicing mediation at a centre.*

23. What is the total number of mediators at your centre?

*Mark only one oval.*

- Less than 10
- Less than 20
- More than 20
- More than 50
- More than 100

24. What are the criteria for an individual to practice at your centre as a mediator?

*Check all that apply.*

- Must be a judge
- Must be a retired judge
- Must be a lawyer
- Must be a certified mediator
- Other: \_\_\_\_\_

25. Considering sometimes mediators are from within the legal community, especially judges, has neutrality of mediators ever been a concern while selecting a mediator?

*Mark only one oval.*

- Yes
- No

26. Do you think the MCPC guidelines that refer to training for mediators should be made mandatory in India?

*Mark only one oval.*

- Yes
- No
- Other: \_\_\_\_\_

27. Is there any requirement for institutional support that the state should provide for mediators?

*Mark only one oval.*

- Yes

**January – March, 2018**

- No

28. If yes, please specify

\_\_\_\_\_

*F. AWARENESS*

29. Is awareness amongst litigants a major reason for the lack of popularity of mediation in India?

*Mark only one oval.*

- Yes
- No

30. Are there any concrete steps that the Government can take to spread awareness amongst the Indian masses?

*Check all that apply.*

- Nationwide campaigns
- Media campaigning
- Allocation of more funds to promotion of mediation in State budgets
- Making it mandatory for all law students to become trained mediators
- Other: \_\_\_\_\_

31. In your opinion will the passage of a specific law for mediation help in promoting mediation in India?

*Mark only one oval.*

- Yes
- No
- Other:

32. Respondent's Name : \_\_\_\_\_

Respondent's Email Address: \_\_\_\_\_

**\*Required**

**January – March, 2018**