

## ***Development of ADR / Mediation in India***

*[Material Extracted from Chapter I, Mediation Training Manual of India, designed by  
Mediation and Conciliation Project Committee, Supreme Court of India]*

### **INTRODUCTION**

Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government-sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence. Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

### **HISTORICAL PERSPECTIVE**

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries.

The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business,

dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitration by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.

Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues. Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbourhood disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that

mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States.

A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

## **MEDIATION IN INDIA**

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The

East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts.

The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation.

Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies.

Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

### **LEGAL RECOGNITION OF MEDIATION IN INDIA**

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes."

Detailed procedures were prescribed for conciliation proceedings under the Act.

Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with duties to perform, inter alia, the following functions: -

- To encourage the settlement of disputes by way of negotiations, arbitration and conciliation.
- To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.
- To frame most effective and economical schemes for the purpose.
- To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.
- To undertake research in the field of legal services.
- To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.
- To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in universities, Law Colleges and other institutions.
- To act in co-ordination with governmental and non-governmental agencies engaged in the work of promoting legal services.

The Indian parliament enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.

In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Since the inception of the economic liberalization policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts. In 1995-96 the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M.

Ahmadi, undertook an Indo-U.S. joint study for finding solutions to the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of The Institute for Study and Development of Legal Systems [ISDLS], a San Francisco based institution. After gathering information from every State, a central study team analyzed the information gathered and made some further concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code with special reference to the Indian scenario.

### **EVOLUTION OF MEDIATION IN INDIA**

The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad. On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India. The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code. Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate Course for "Intensive training in Theory and Practice of Mediation". The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003. The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India. The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation centre in the Academy's campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon'ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Banglore, Ranchi, Indore and Chandigarh.

MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52

Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.

The Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a committee chaired by Justice Mr. Jagannadha Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management and framed and circulated model Rules. The Supreme Court approved the model rules and directed every High Court to frame them. The Law Commission of India organized an International conference on Case Management, Conciliation and Mediation at New Delhi on 3rd and 4th May 2003, which was a great success. Delhi District Courts invited ISDLS to train their Judges as mediators and help in establishing court annexed mediation centre. Delhi High Court started its own lawyers managed mediation and conciliation centre. Karnataka High Court also started a court-annexed mediation and conciliation centre and trained their mediators with the help of ISDLS. Now court-annexed mediation centres have been started in trial courts at Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat and many more Districts in India.

Mandatory mediation through courts has now a legal sanction. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centres. In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the

movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

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