

Online Mediation: Prospects and Challenges in India

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Abstract

Online mediation is a relatively new approach to resolving disputes, which has gained popularity in India due to the COVID-19 pandemic. This paper examines the prospects and challenges of online mediation in India. The study highlights the advantages of online mediation, such as convenience, cost-effectiveness, and accessibility, especially in a country as diverse and vast as India. However, the study also identifies several challenges, including technical difficulties, security and confidentiality issues, and the need for parties to have access to technology. Additionally, the study highlights the cultural and social barriers that may make online mediation less effective in certain regions of India. The paper concludes by emphasizing the need for clear guidelines and regulations to ensure the effectiveness of online mediation in India. Overall, online mediation has the potential to be a valuable tool in resolving disputes in India, but it requires careful consideration of its prospects and challenges to achieve success.

Introduction

The discussion of mediation should start with its historical underpinnings and the social setting in which it takes place. The basic concept of mediation has been practiced since time immemorial in various cultures across the world. 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.¹

Our modern institutions have been since trying to resurrect and transform our traditional justice delivery mechanisms into their modern avatar. With the advent of technology and internet the mediation is changing its mode – from physical to online (virtual). virtual mediation, refers to the process of resolving disputes between parties through the use of online communication technologies, such as video conferencing, email, and instant messaging.

Mediation in India

India has tradition of dispensing justice through amicable settlement ensuring blood feuds are out of the way. One of the earliest references to mediation in India can be found in the ancient Hindu texts known as the Vedas, which were composed around 1500 BCE. During Vedic period, two popular assemblies were established, Sabha and Samiti. Although these assemblies featured in early Vedic literature that is Rigveda, they appeared more prominently

¹ Prof. Ved Kumari, Dr. Aman Hingorani and Dr. Ashish Kumar, *Alternative Dispute Resolution Case Material*, Faculty of Law, University of Delhi

in the later Vedic texts such as the Veda Samhitas.² It is believed that these exchanges of views and ideas were followed by decisions on several matters that were accepted by the public through consensus. The Vedas also describe a system of resolving disputes known as "Samadhan," which involved the appointment of a neutral third party to help settle conflicts between individuals or groups. The concept of mediation was further developed in ancient India by the Buddha, who taught that disputes could be resolved through peaceful means rather than through violence. The Buddha emphasized the importance of listening to all sides of a dispute and finding a resolution that was fair and just for all parties involved.

India, the world's largest democracy, is facing a significant challenge in its judicial system, with a massive backlog of cases that threatens to render the noble cause of justice delivery ineffective. The country's population is expected to surpass that of China by 2028,³ and this, combined with a lack of tolerance, and a materialistic way of life, has contributed to a rise in both civil and criminal litigation. As a result, the number of pending cases in Indian courts has surged, with a staggering figure of 42,532,381 cases⁴. The problem of delayed justice delivery in India has raised concerns among legal experts, policymakers, and the general public. The pendency of cases in the courts has resulted in a backlog of work for judges and other legal professionals, leading to long wait times and delayed verdicts. Concerning the pending cases and the delayed justice, the judiciary and legislature hold their hands together, and making structural and functional changes to dispose of pending cases.

In our country, arbitration and mediation have been in vogue since long. Arbitration was originally governed by the provisions contained in different enactments, including those in the Code of Civil Procedure. The first Indian Arbitration Act was enacted in 1899, which was replaced by the Arbitration Act, 1940 which in turn was replaced by the Arbitration and Conciliation Act of 1996. The mediation of informal nature was being adopted at the village level to resolve petty disputes from times immemorial. Thanks to the innovative measures taken by the judiciary in some States, resolution of court litigation through Lok Adalats became quite popular during 1970s and '80s. With the advent of Legal Services Authorities Act 1987, Lok Adalats and Legal Aid Schemes have received statutory recognition and become an integral and important part of the justice delivery system.⁵

The colonial laws have sidelined these practices and disrupted our traditional modes of dispensing justice much to their advantage, that we came across the adversarial justice system and has been moored with it since. This adversarial system has ensured that justice is at best lop-sided in favor of the rich. As the litigation cost and the extensive years needed to see through a dispute is what an indigent can never afford, justice for him is neither done nor can ever be seen to be done.

Mediation: A need of hour in India

Now India has grown into a country of 130 crore people and with liberalization and globalization, there is tremendous economic growth. All this has led to explosion of litigation in India. According to the data provided by the National Judicial Grid Data, currently, over 10,853,509 civil cases and 31,722,049 criminal cases are pending in India out of which approximately 70.08% of civil cases and 71.74% of criminal cases are more

² Rigveda Samihitā, Ed. R.C Majumdar, Calcutta.

³ India Population, Worldometers, <https://www.worldometers.info/world-population/india-population> (last visited Feb. 13, 2023).

⁴ NJDG, http://njdg.ecourts.gov.in/njdg_public/main.php (last visited Feb. 13, 2023).

⁵ Law Commission of India, Government of India, Amendment of Section 89 of Civil procedure Code, 1908 and Allied Provisions, Report No. 238 (December 2011).

than a year old. This means that out of the staggering figure of 42,575,558 pending cases, approximately 71.31% of cases are more than a year old. Considering the socio-political, economic and language barriers the access to justice to the poor and marginalized people is still a herculean task. The Government and Courts have popularized Alternate Dispute Resolution Mechanisms ("ADR") in India because of the backlog of cases and the need to unburden the judicial system. Mediation is a method which stands out among other ADR techniques due to the active participation of both parties and non-adversarial nature of the process.

Dispute resolution has a significant impact not only on the economy and business methods, but also on citizens' ease of living, access to justice, and rule of law. Being one of the first prominent signatories to the Singapore Convention on Mediation ("SCM"), India has promulgated the draft Mediation Bill, 2021, in which the importance of institutional mediation, inter alia, was stressed. Mediation is an ADR mechanism that is mentioned in a variety of existing laws, but there was no comprehensive law governing mediation's various aspects prior to the enactment of this Mediation Bill.

Furthering the goal for finding innovative techniques for effective dispute resolution, Online Dispute Resolution (ODR) has emerged to be online equivalent of Alternative Dispute Resolution mechanism. ODR involves use of Information and Communication Technology (ICT) to facilitate dispute resolution between the disputants. ODR takes almost whole procedure online, from filing of complaint, appointment of the neutral facilitator (Arbitrator, Mediator, Conciliator, etc.), evidentiary procedures, hearings, sittings or negotiations, and rendering of award/binding settlements. The Online Dispute Resolution service may make use of services like email, text-messaging software, audio/video conferencing software for communication or other automated systems like blind bidding between the arbitrator/mediator and the disputants. The mediation bill has also mentioned about the significance of online mediation.

Definition and Meaning of Online Mediation

Online mediation, also known as virtual mediation, refers to the process of resolving disputes between parties through the use of online communication technologies, such as video conferencing, email, and instant messaging. Online mediation is a process in which a neutral third-party mediator helps two or more parties resolve a dispute or conflict through the use of internet-based technology. The mediator guides the parties through a structured process of communication and negotiation, helping them to identify and address the underlying issues, interests, and concerns that are driving the conflict. The goal of online mediation is to reach a mutually acceptable agreement that satisfies the needs and interests of all parties involved. Online mediation is increasingly used in a variety of contexts, including business, family, community, and legal disputes.

The definition of online mediation is as varied as the cases it attempts to solve. Usually in mediation, skilled third-party mediators are able to lower emotional temperature, provide a medium for effective communication, uncover lesser and unobvious interests, offer face-saving possibilities and finally break the impasse. But what if the other party is located in a different geographical area? Or the dispute was related to an online transaction? Or the other party is intimidating and hence one feels uncomfortable in being seated in front of him in person? The answer to all the above problems is online mediation.

Online mediation has a two-pronged strategy, one to cater to the existing pendency of court cases and second is to settle e-commerce disputes⁶. That is to say, mediation is not only essential in preserving amity between parties by addressing concerns, but also has great a great ability to sustain business relationships. Sustainability an important factor in all business practices, e.g., Business-to-Consumer (B2C) relations. In B2C transactions, disputes usually arise from consumer's side, him being at the receiving end of the goods and/or services in personal capacity⁷. In most of the cases, businesses are keen to resolve the dispute as soon as possible to maintain their reputation in market and similarly the consumer wants to dispute to settle as soon as possible due to hard-earned money and discomfort involved. Online mediation can prove to be highly effective in such cases because of Online Mediation Service providers like Online Consumer Mediation Centre, which strive to solve dispute within twenty-one days from appointment of mediator⁸.

Preamble of the Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters provides one of the most accurate description of the process of mediation:

“(6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements”⁹

Why Online Mediation is important?

With the ever-growing statistics and developments of Information Communication Technologies at the lowest level of Social Administration, it will be soon possible for a common consumer to access online dispute resolution and especially online mediation from anywhere in the country. This will in turn benefit farmers, tribals and other distant human settlers to resolve their disputes from their hometowns and villages and the need to travel to nearest urban settlement for dispute resolution will be eliminated.

In the modern era of globalisation, a consumer sitting in one corner of the world does trade with a business sitting on the other edge of the globe. Although it is convenient as all the things are a click away, but this has actually led to plethora of legal issues in this internet driven market. And to resolve these issues to actually even thinking of going via traditional methods and tangling oneself in the spider-web of jurisdictions, litigation costs, travelling costs etc. is far from an intelligent step. This is the perfect situation where importance of Online Mediation kicks in.

Benefits of Online Mediation

Accessibility

Online mediation makes it easier for people to access mediation services from

⁶ Quote by Hon'ble Mr. Justice Mohammad Mushtaq, Judge, Kerala High Court while speaking in International Conference on Mediation held on 6th and 7th April 2019 at Conference Centre, University of Delhi. Summary of speech available at <http://www.lc2.du.ac.in/DATA/ICM%20REPORT%20-%20finished-1.pdf>

⁷ Pablo Cortés, -Online Dispute Resolution Methods for Settling Business to Consumer Conflicts, pp.151-173, available at <http://www.mediate.com/pdf/cortes.pdf>.

⁸ Online Consumer Mediation Centre Mediation Rules, 2016: Rule 9 (7), available at :[https://onlinemediationcenter.ac.in/mediation-rules/\(last visited on May 28, 2020\)](https://onlinemediationcenter.ac.in/mediation-rules/(last%20visited%20on%20May%2028,%202020)).

⁹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN\(last visited on May 28, 2020\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN(last%20visited%20on%20May%2028,%202020)).

anywhere in the world without having to travel long distances or take time off work. This is particularly important for individuals who live in rural or remote areas or those with mobility issues.

Convenience

Online mediation allows participants to schedule mediation sessions at a time that is convenient for them. It eliminates the need for participants to take time off work or travel to a specific location, which can be time-consuming and expensive. The most popular form of online mediation is asynchronous online mediation for it provides flexibility of schedules and faster resolution of the matter as compared to the traditional mediation process.¹⁰

Cost-effective

Online mediation is generally less expensive than traditional in-person mediation. Participants do not have to pay for travel, accommodation, or other expenses associated with attending an in-person mediation session.

Efficiency

Online mediation can be conducted more efficiently than in-person mediation. Mediators can share documents and communicate with participants in real-time, reducing the time needed to resolve disputes.

Safety

Online mediation provides a safe and secure environment for participants to resolve their disputes. It eliminates the need for participants to meet in-person, which can be especially important in cases where there is a history of conflict or abuse.

Freedom from Inferences and Candor

Body language and posturing play a big role in negotiations. A person can be a dominant or a submissive negotiator and these traits often decide the result of negotiation as the posturing puts one to advantage while other at a disadvantage. Online mediation helps in overcoming this hurdle of traditional mediation as major communication here is via electronic means. No one can be intimidated by other's posturing or from inference of his or her body language. Even during the video conference proceedings, the negative effect of posturing remains minimum and helps the parties to remain candid.

Anonymous Parties

In situations where mediators are unknown of the participants or in the situations where the parties to a mediation proceeding are unknown of their identity, online mediation preserves anonymity. Although unprejudiced behaviors are expected from a mediator, yet he/she is merely human and might be affected by certain aspects of party's identity.

Challenge of Online Mediation

Technical difficulties

Online mediation relies on technology such as video conferencing, which can lead to technical issues such as poor internet connection, audio or video problems, and difficulty in sharing documents.

¹⁰ Derric Yeoh, Is Online Dispute Resolution The Future of Alternative Dispute Resolution, available at: <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/> (last visited on May 28, 2020).

Lack of face-to-face interaction

Online mediation lacks the personal touch of face-to-face communication. It can be difficult to read nonverbal cues or body language and build rapport with the parties. Electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation.¹¹

Security and confidentiality

Confidentiality is crucial in mediation, and online mediation may pose a risk to the confidentiality of the parties involved. Online platforms may be vulnerable to hacking or other security breaches.

Limited access to technology

Not all parties may have access to the required technology or be familiar with using online platforms, which can make it difficult to conduct mediation online.

Time zone differences

Online mediation may involve parties from different time zones, which can make scheduling difficult and may require mediation to take place at inconvenient times for some parties.

Difficulty in managing emotions

Mediation can be an emotional process, and the lack of face-to-face interaction can make it difficult for mediators to manage emotions effectively.

Online Mediation: Prospects and Promises

Despite the disadvantages posed, the advantages outweigh the disadvantages. ODR portals like Smart Settle have proved to be very successful in the past and are resolving disputes as this report is being typed. Although family disputes like divorce and custody might not find the process of online mediation and would still require the traditional mediation process, convenient but majority of the other disputes that do not need the emotional investment that the family disputes need might find online mediation a more accessible format for dispute resolution. Furthermore, most of the disadvantages that Online Mediation may not have much weight when seen in light of the disputes that arise online.

As William Ewart Gladstone said –Justice delayed is justice denied online mediation seems committed to the cause; OCMC even claims that it strives to complete the online mediation proceedings within twenty-one days⁴⁹ from the appointment of mediator as far as possible. Although the impersonal nature of the online medium is a major demerit, the gap between the offline and online mode is gradually on the decline as the technology is evolving and the internet penetration rate is increasing day by day. With the use of video conferencing in the process, the process has already started to show signs of replacing the traditional medium. Yet not so much as discussed earlier that it would handle delicate issues of matrimony.

The best advantage that online mediation has over the offline is the doing away with the common issue of jurisdiction. By paving the way for more popularity of Online Mediation, the government and the citizens will invite more businesses to invest in the country as ease of resolution of disputes and less complexity of dispute resolution system is what a business seeks before investing in a geographical area.

¹¹ Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. Rev. 1305 (1998), available at: <https://digitalcommons.law.byu.edu/lawreview/vol1998/iss4/1> (last visited on May 28, 2020).

NITI Aayog suggested that to develop the online mediation, India has to provide greater access to technology to its people. The access is both in term of Physical access to infrastructure as well as digital literacy. Apart from the technological infrastructure, human resources such as the neutral mediators, paralegal volunteers, Court registry officers, and judicial officers are other areas which needs to be focused and trained. Aayog further says it is crucial to provide extensive, customised education to each of the aforementioned actors. Finally, it is crucial to support the private sector's expansion and innovation in the coming years so that the government and the dispute resolution ecosystem can both gain in the long run. Targeted actions, such as the creation of legal tech centres and tax incentives, can be used to this goal.¹²

¹² NITI Aayog. (2021). Designing the future of dispute resolution: The ODR policy plan for India. available at (<https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>)