OPTIMISING AND POPULARISING THE COURT-ANNEXED MEDIATION IN INDIA[1]

ABSTRACT

Mediation has been in vogue in India since time immemorial. Even the epic Mahaabhaarat reveals that Krishna attempted the mediation alternative to avert a war between the Kauravas and Pandavas. Yet, mediation has not evolved into a major dispute resolution mechanism or tool till date, in our country's formal dispute resolution space. It still finds a place in the informal dispute resolution space in the country, though. If the mechanism satisfies the litigants concerned, one wonders why our country is yet to exploit it to the hilt. Such exploitation will have helped bring down the litigation numbers swiftly for the judiciary. An interaction with two stakeholder groups, namely litigants and mediators, reveals that a few flaws obtain in the mechanism. Identifying and addressing the flaws would help in defining the way forward for optimising the effectiveness of the mechanism. However, the exercise would involve putting in place a light-touch regulatory regime. An umbrella legislation is the need of the hour. The legislation as well as the measures initiated under the legislation should lead to mediation being assigned the same status as formal litigation. In other words, it should not be viewed by the litigants as an alternative to the public court system. In fact, it should convince the litigants that it is the equivalent of the public court system. This can be accomplished by ensuring that judges are trained thoroughly in the mediation space. It will help the judges decide effectively on matters that deserve to be referred to mediation. Practising lawyers should be exposed to mediation too. Last but not least, mediators should be accredited, based on their educational and professional background.

Key words: flaw; hilt; immemorial; interaction; light-touch; litigant; mediation; stakeholder

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1.1 Theoretical background of the topic

Mediation has been in vogue in India since time immemorial. Even the epic Mahaabhaarat reveals that Krishna attempted the mediation alternative to avert a war between the Kauravas and Pandavas. Yet, mediation has not evolved into a major dispute resolution mechanism or tool till date, in our country's formal dispute resolution space. It still finds a place in the informal dispute resolution space in the country, though. Presently, the long-drawn process of litigation and the costs incurred by the litigants for the purpose have rendered it difficult to deliver justice swiftly and effectively in the country. The limited number of adjudicators available for the purpose has rendered it imperative to exploit the alternative dispute resolution mechanism, namely mediation, for delivery of justice swiftly and effectively. The alternative dispute resolution (ADR) mechanism is the most conspicuous mechanism in the dispute resolution space today. The credit for this outcome should go to mediation. This is truer of disputes involving individuals. A wide range of civil disputes like those arising out of contractual relationships and family or matrimonial relationships, can be resolved through mediation. Mediation is based on the principle of self-determination on the part of the parties to the dispute to reach a resolution. They are assisted by the mediator in the exercise. The general concern for ethical standards is nowhere more prominent than in mediation.

1.2 Statement of the problem

According to the National Judicial Data Grid, the number of pending cases (civil and criminal) across all courts in the country as of November 12, 2020, stood at 3,59,08,679 (Deepika & Apoorva, Mandatory Mediation in India - Resolving to Resolve, 2020). Out of these, civil cases numbered 98,01,986, accounting for a little over 27 percent of all pending cases. It is unfortunate that mediation has not achieved the level of success it should have, considering its potential in a huge geography like India and the number of disputes pending with the judiciary. The absence of an umbrella legislation (governing mediation) is primarily blamed for this sad situation. Judges of the district courts (the courts designated by the law, for the purpose) have not been trained adequately in the nitty-gritty of mediation. Even the available data proves that judges are not exploited Section 89 to the hilt. Accustomed as they are to the adjudicatory processes, it is rightly feared in informed circles, that they cannot make objective referral judges. Lack of clarity on the enforceability of the settlement of mediation only adds to the confusion. Consequently, in cases referred by courts to mediation, a settlement reached by the parties cannot be enforced automatically.

1.3 Review of literature

The following paragraphs briefly review the previous studies on the problem and significant writings on the topic being researched. The intention of the researcher is "to locate the present research in the existing body of research on the subject and to point out what it contributes to the subject". (Krishnaswami, Ranganatham, & Harikumar, Research Methodology, 2019)

1. *Sanjeev Sirohi* cites a development which has far-reaching implications for disposal of cases before the Family Court in Kerala. The development concerns some commendable guidelines that the Kerala High Court issued on March 23, 2021, (Sanjeev, 2021) . It issued the guidelines while delivering its judgement in the case of *Shiju Joy A vs Nisha* {in OP (FC) No. 352 of 2020} and cases connected thereto. The guidelines seek to streamline the existing procedure and prescribe a uniform procedure for disposal of cases before the family courts in the State. A Division Bench of the Kerala High Court comprising of Justice A Muhamed Mustaque and Justice CS Dias issued the judgement in response to a batch of petitions submitted to the Hon'ble Court. The petitions highlighted the hurdles the litigants faced while seeking resolution of their matrimonial disputes. The petitioners, citing supervisory jurisdiction of the High Court under Article 227 of the Constitution, had sought the issue of directions to the family courts to expeditiously dispose of the pending proceedings. In the circumstances, the Hon'ble High Court mandated compliance with some directions by the family courts.

2. *Ayush Verma* , citing *Bheeni Goyal* explains the scope of Section 125 of the Code of Criminal Procedure and the revision applications passed against the orders under Section 125 (Ayush & Bheeni, 2021).The code provides that any person who has sufficient means to maintain himself cannot deny maintenance to his wife, children, and parents if they are not able to maintain themselves. In a few cases, the husbands, against whom the order of maintenance is passed, may not be satisfied with the judgment passed by the lower court. They should be afforded a platform from where they can express their grievances against the order. They have a right to file the revision application in the court of law as provided under Section 397 of the Code. The scope of revision applications has widened lately owing to rising awareness and broadened outlook on the part of the judiciary to provide justice to such parties as well. For providing maintenance to the wife, the husband must have sufficient means to support his wife after the separation. At the same time, the wife must not be living in adultery.

She should not be living separately even if it is by mutual consent. Nor should she refuse to live with the husband without sufficient reasons.

3. According to *Kamakshi Puri,* it is generally perceived that communication between stakeholders is always the first and most important step in familial disputes (Kamakshi, 2020). Much of the responsibility is vested with the adjudicator. Hence a mediator who can invest time in understanding the nuances of the dispute and thus trigger communication and collaboration between the parties is indispensable. The confidentiality element inherent in every mediation proceeding makes it the most ideal dispute settlement forum for family matters. This need for confidentiality in mediation has been stressed in many cases including the case of *Moti Ram (D) Tr. Lrs. v. Ashok Kumar & Anr*. While emphasising the need for confidentiality, the courts also stated that the mediators, during submission of mediation report to the court, must not disclose transcripts of the proceedings. They should only reveal whether the mediation was successful or not and the settlement / compromise arrived at, if any. Many laws in India, including sections of the family courts statute and the Hindu Marriage Act emphasise the need for out-of-court settlement of disputes. Courts derive the requisite legislative backing for reference to mediation from three provisions. The provisions are, Section 89 of Code of Civil Procedure (CPC), 1908, Section 9 of Family Courts Act, 1984 and Section 23 of Hindu Marriage Act, 1955. These provisions do not mandate reference to mediation. The reference discretionally accrues to the court and on its part, the statute encourages it. A court-referred mediation may compel participation in the mediation process, although the statutes do not state whether the outcome of the mediation is binding.

4. *Radhika* and *Shatrajit* claim that if the alternative dispute resolution (ADR) mechanism has become the front runner in the dispute resolution space, the credit goes to mediation. The latter has gained a great deal of traction in the last couple of decades (Radhika & Shatrajit, 2020). This is true of disputes involving individuals and companies as well. A wide range of civil disputes like disputes arising out of contractual relationships, family or matrimonial relationships, employment, partnerships, tortious disputes and consumer disputes can be resolved through mediation. Mediation is based on the principle of self-determination on the part of the parties to the disputes to reach a resolution. They are abetted by the mediator in the exercise. The general concern for

ethical standards is nowhere more prominent than in mediation. This is understandable, given that rigid procedures or substantive rules are absent in mediation. The corollary is that mediation being an informal process, requires the mediator to adhere to the globally recognised principles of impartiality, neutrality, self-governance and confidentiality in mind. The mediator is not bound by provisions of the Code of Civil Procedure, 1908, or the Evidence Act, 1872 for that matter. The mediator is guided by the principles of fairness and justness.

5. *Thiruvengadam* asserts that there is not enough awareness about structured mediation (Thiruvengadam, 2020). The latter is different from what people perceive as mediation, involving an intervener who may be a friend, relative, spiritual guru or even a politician who tries to resolve a dispute. They wrongly compare it to a *Panchayat*. Even judges make this mistake. Panchayat is the earliest adversarial and adjudicative form of dispute resolution. A *Panchayat* is an adversarial adjudicative practice as old as the *Rig Veda*. It involves five respected members of a village / community or trade group, called *Panchayatdars* They adjudicated on disputes and passed an award. The award reflected the decision of a majority of the *Panchayatdars*. It was binding on the parties to the dispute and the society that had appointed them. Similar practices prevailed in various parts of the world. For example, guilds operated in Europe to resolve trade disputes. Structured mediation is a non-adversarial Alternative Dispute Resolution (ADR) mechanism. It is voluntary. In this mechanism, the mediator undergoes rigorous training. He / she functions as an independent and neutral facilitator. He / she is not interested in any of the litigants or the litigation itself, either directly or indirectly. The mediator does not evaluate the merits of the dispute or the parties to the dispute. The mediator deploys special communication and negotiation skills to help the litigants arrive at a mutually acceptable resolution. Unlike a conciliator, the mediator does not provide options or proposals for settlement.

1.4 Research gap

Well, the researchers have come up with valuable insights into the issues that the courts are confronted with. As one researcher points out, issues arise while considering provision of relief to the husband in deserving cases. Courts have not been following any set rule in allowing or rejecting the revision application. Courts depend on the facts and circumstances of the case concerned. Sometimes the wife, post separation, has the means to sustain herself. All the same,

some High Courts have rejected the revision application filed by the husbands in such cases. Yet some High Courts have approved the revision application of the husbands for the same reason! Such precedents have widened the scope of the revision application filed against the order passed under Section 125 of CrPC. As another researcher points out , the issue with the mediation mechanism in India is the absence of a statutory control over the mechanism. There is no statute that governs the role of the mediator and the mediator's limits or lays down accreditation standards for mediators or drills down into the process of mediation and its elements and their conduct thereof . Mediation warrants adherence by the mediator to the globally recognised principles of impartiality, neutrality, self-governance and confidentiality in mind although it is a component of the alternative dispute resolution mechanism. Litigants never had it so good since they get to enjoy the best of both worlds, as another researcher rightly points out. As yet another researcher rightly points out, most people do not know the difference between mediation and structured mediation. Essentially, structured mediation is a non-adversarial Alternative Dispute Resolution (ADR) mechanism. In this mechanism, the mediator is imparted rigorous training to function as an independent and neutral facilitator. The mediator's sole intention is to help the litigants arrive at a mutually acceptable resolution. It is time the finer nuances of structured mediation were disseminated to the litigants so more of them would embrace this ADR mechanism rather than move the court. In view of these healthy outcomes, it is time the flaws in the court-annexed mediation mechanism were unravelled fully. It is time the stakeholders concerned set out way forward for optimising the effectiveness of the said mechanism . It is this gap the present study proposed to bridge.

1.5 Scope of the present study

The study covers the court-annexed mediation practices followed in India. It focuses on family, matrimonial, guardianship, custody and maintenance matters and their disposal before the Bangalore Mediation Centre (BMC), Bangalore, Karnataka state. 100 litigants seeking resolution of their disputes from BMC and 100 mediators associated with BMC are the respondent categories considered for the study.

1.6 Objectives of the study

The objectives of the study are to ascertain the flaws that obtain in the court-annexed mediation mechanism.

1.7 Hypothesis proposed to be tested

The study proposes to test the following hypotheses:

1. "The views of the litigants and the mediators on the absence of some clarity in terms of the enforceability of the outcomes of mediation are independent"

2. "The views of the litigants and the mediators that, apart from training, mediators should be accredited based on their educational and professional background, are independent"

1.8 Research design

The following paragraphs furnish the research methodology followed:

1.8.1 Research methodology

The study is descriptive in nature and has used the 'fact-finding' survey method

1.8.2 Sources of data

Primary data has been collected from the respondents, viz., 100 litigant respondents and 100 mediator respondents based out of Bangalore (Urban) and Bangalore (Rural) districts.

Secondary data has been collected from the websites of the government of India, the government of Karnataka, the National Judicial Data Grid , the Bangalore Mediation Centre and the financial press, among others.

1.8.3 Sampling plan

Litigants: Given the time constraint and the limited number of litigants based out of the area covered by the study, the researcher settled for purposive or judgement sampling under the non-probability method. The researcher selected 100 such respondents. This criterion, according to the researcher, is the most appropriate one for the present study. What is important is the typicality and the relevance of the sampling units to the study and not their overall representativeness to the population. Thus, it guarantees inclusion of the relevant elements in the sample. Probability sampling plans cannot give such a guarantee.

Mediators: Given the limited number of mediators operating in the area covered by the study and the constraint of time, the researcher settled for purposive or judgement sampling under the non-probability method. The researcher selected 100 mediators. This criterion, according to the researcher, is the most appropriate one for the present study. What is important is the

typicality and the relevance of the sampling units to the study and not their overall representativeness to the population. Thus, it guarantees inclusion of the relevant elements in the sample. Probability sampling plans cannot give such a guarantee.

1.8.4 Data collection instruments

Interview schedules were administered to the respondents for collection of primary data.

1.8.5 Data processing and analysis plan

As for data processing and data analysis, the researcher used the spreadsheet software Microsoft Excel 365. The researcher applied the statistical tools / measures, percentage and chi-square test. Since the variables being analysed are categorical and non-ordinal in nature, the chi-square test has been applied. To analyse primary data, the researcher used a 4-point Likert scale to represent the respondents' replies to the queries raised in the Interview Schedule. The Likert scale ranges from "strongly agree" to "strongly disagree". Likert scale is relevant to this research since it can be used to measure the respondents' attitude by gauging the extent to which they agree or disagree with a question or statement. Today, Likert scales are widely used in social and educational research. On the whole, a Likert item is simply a statement that the respondent is asked to evaluate by assigning to it a quantitative value on any kind of objective dimension, with a level of agreement and / or disagreement being the most commonly used dimension. Respondents find it relatively easy to understand a 4-point Likert scale. The scale is ideal for a larger study. It tends to produce better distributions of data. There are several types of chi square tests depending on the way the data has been collected, and the hypothesis is being tested. The researcher has applied the chi square test of independence to the Likert scale data collected in view of its relevance to the objectives of the study. The researcher has consolidated "strongly agree" and "agree" into one, namely "agree" and "strongly disagree" and "disagree" into one, namely "disagree" for testing the hypothesis.

1.8.6 Limitations of the study

Primary data has sometimes been deduced through constant topic-oriented discussions with the respondents. It is possible that a certain degree of subjectivity has influenced their views.

1.9 Litigants

In the following paragraphs, the primary data collected from the 100 litigant respondents is analysed.

1.9.1 Flaws obtaining in the court-annexed mediation mechanism

One view going the rounds has it that flaws obtain in the court-annexed mediation mechanism. Hence the researcher requested the respondents to cite the flaws that obtain in the court-annexed mediation mechanism. Their replies to the query appear in the following Table.

Table-1

Flaws obtaining in the court-annexed mediation mechanism

Flaws	Agree	Disagree
There obtains a certain degree of lack of clarity in terms of the enforceability of the outcomes of mediation	59	41
In India, for whatever reason, the mediation option is associated with a litigant that does not have a strong case	64	36
In India, the litigant that chooses mitigation is mistaken for one that blinks first.	56	44

59 respondents agree that there obtains a certain degree of lack of clarity in terms of the enforceability of the outcomes of mediation. 41 beg to differ. 64 respondents agree that in India, for whatever reason, the mediation option is associated with a litigant that does not have a strong case. 36 beg to differ. 56 respondents agree that in India, the litigant that chooses mitigation is mistaken for one that blinks first. 44 beg to differ.

1.9.2 The way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime

Another view going the rounds has it that the associated stakeholders should set the way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime. Hence the researcher sought to know from them the way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime. Their replies to the query appear in the following Table.

Table-2

The way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime

The way forward	Agree	Disagree
Upskill the dispute resolution professionals	61	39
Government should create an ecosystem where the ADR mechanism is not viewed as an alternative but as the equivalent of the public court system	77	23
In some categories, ADRs should be mandated as the first choice of dispute resolution	61	39
Practising lawyers should be exposed to mediation	66	34
Apart from training, mediators should be accredited based on their educational and professional background	78	22

61 respondents agree that the dispute resolution professionals should be upskilled. 39 beg to differ. 77 respondents agree that the government should create an ecosystem where the ADR mechanism is not viewed as an alternative but as the equivalent of the public court system. 23 beg to differ. 61 respondents agree that in some categories, ADRs should be mandated as the first choice of dispute resolution. 39 beg to differ. 66 respondents agree that practising lawyers should be exposed to mediation. 34 beg to differ. 78 respondents agree that apart from training, mediators should be accredited based on their educational and professional background. 22 beg to differ.

1.10 Mediators

In the following paragraphs, the primary data collected from the 100 mediator respondents is analysed.

1.10.1 Flaws obtaining in the court-annexed mediation mechanism

One view going the rounds has it that flaws obtain in the court-annexed mediation mechanism. Hence the researcher requested the respondents to cite the flaws that obtain in the court-annexed mediation mechanism. Their replies to the query appear in the following Table.

Table-3

Flaws obtaining in the court-annexed mediation mechanism

Flaws	Agree	Disagree
There is no umbrella legislation governing mediation in the country	86	14
Judges in the district judiciary who are empowered under Section 89 of the CPC to refer matters to mediation have not been trained adequately	70	30
Referral judges, more accustomed to the adjudicatory processes, may find it relatively difficult to maintain objectivity, while negotiating a settlement between litigants	63	37
There obtains a certain degree of lack of clarity in terms of the enforceability of the outcomes of mediation	69	31
In India, for whatever reason, the mediation option is associated with a litigant that does not have a strong case	54	46
In India, the litigant that chooses mitigation is mistaken for one that blinks first.	65	35

86 respondents agree that there is no umbrella legislation governing mediation in the country. 14 beg to differ. 70 respondents agree that judges in the district judiciary who are empowered under Section 89 of the CPC to refer matters to mediation have not been trained adequately. 30 beg to differ. 63 respondents agree that referral judges, more accustomed to the adjudicatory processes, may find it relatively difficult to maintain objectivity, while negotiating a settlement between litigants. 37 beg to differ. 69 respondents agree that there obtains a certain degree of lack of clarity in terms of the enforceability of the outcomes of mediation. 31 beg to differ. 54

respondents agree that in India, for whatever reason, the mediation option is associated with a litigant that does not have a strong case. 46 beg to differ. 65 respondents agree that in India, the litigant that chooses mitigation is mistaken for one that blinks first. 35 beg to differ.

1.10.2 The way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime

Another view going the rounds has it that the associated stakeholders should set the way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime. Hence the researcher sought to know from them the way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime. Their replies to the query appear in the following Table.

Table-4

The way forward for optimising the effectiveness of the court-annexed mediation mechanism through a light touch regulatory regime

The way forward	Agree	Disagree
Upskill the dispute resolution professionals	64	36
Litigants should be mandated to attempt mediation first, followed by arbitration or litigation if the mediation option fails	77	23
Government should create an ecosystem where the ADR mechanism is not viewed as an alternative but as the equivalent of the public court system	79	21
In some categories, ADRs should be mandated as the first choice of dispute resolution	71	29
Practising lawyers should be exposed to mediation	41	59
Apart from training, mediators should be accredited based on their educational and professional background	72	28

64 respondents agree that the dispute resolution professionals should be upskilled. 36 beg to differ. 77 respondents agree that the litigants should be mandated to attempt mediation first, followed by arbitration or litigation if the mediation option fails. 23 beg to differ. 79

respondents agree that the government should create an ecosystem where the ADR mechanism is not viewed as an alternative but as the equivalent of the public court system. 21 beg to differ. 71 respondents agree that in some categories, ADRs should be mandated as the first choice of dispute resolution. 29 beg to differ. 41 respondents agree that practising lawyers should be exposed to mediation. 59 beg to differ. 72 respondents agree that apart from training, mediators should be accredited based on their educational and professional background. 28 beg to differ.

1.11 Conclusions

Conclusions are inferences / generalisations drawn from the findings and relate to hypotheses. They are answers to the research questions or the statements of acceptance or rejection of hypotheses. As explained in a previous paragraph, this study proposes to test the following hypothesis:

1.11.1 Testing of hypotheses

In the following paragraphs, the hypotheses proposed by the study are tested.

1.11.1.1 First hypothesis

The first hypothesis reads as follows.

"The views of the litigants and the mediators on the absence of some clarity in terms of the enforceability of the outcomes of mediation are independent"

Hence H_0 and H_1 are as follows:

H_0: "The views of the litigants and the mediators on the absence of some clarity in terms of the enforceability of the outcomes of mediation are independent"

H_1: "The views of the litigants and the mediators on the absence of some clarity in terms of the enforceability of the outcomes of mediation are dependent"

Based on the primary data collected from the respondents, vide Tables: 1 and 3, a chi-square test was applied to ascertain the association, if any, between the two variables. The following Table reveals the computation made using MS-Excel:

	Category	**Observed Values**		
		Agree	*Disagree*	*Total*
	Litigants	59	41	100
	Mediators	69	31	100
	Total	*128*	*72*	*200*
		Expected Values		
	Category	*Agree*	*Disagree*	*Total*
	Litigants	64	36	100
	Mediators	64	36	100
	Total	*128*	*72*	*200*
		Agree	*Disagree*	
	o-e	-5.0000	5.0000	
2		5.0000	-5.0000	
	(o-e)^2	25.0000	25.0000	
		25.0000	25.0000	
	((o-e)^2)/e	0.3906	0.6944	
		0.3906	0.6944	
	CV	*0.7813*	*1.3889*	*2.1701*
	TV			*3.8415*
	p			*0.1407*

The calculated value of χ^2 is 2.1701, lower than the Table value of 3.8415 for an alpha of 0.05 at one degree of freedom. Hence the null hypothesis is not rejected. p=0.1407 is the inverse of the one-tailed probability of the chi-squared distribution.

1.11.1.2 Second hypothesis

The second hypothesis reads as follows.

"The views of the litigants and the mediators that, apart from training, mediators should be accredited based on their educational and professional background, are independent"

Hence H_0 and H_1 are as follows:

H_0: "The views of the litigants and the mediators that, apart from training, mediators should be accredited, based on their educational and professional background, are independent"

H_1: "The views of the litigants and the mediators that apart from training, mediators should be accredited based on their educational and professional background, are dependent"

Based on the primary data collected from the respondents, vide Tables: 1 and 3, a chi-square test was applied to ascertain the association, if any, between the two variables. The following Table reveals the computation made using MS-Excel:

	Category	**Observed Values**		
		Agree	*Disagree*	*Total*
	Litigants	78	22	100
	Mediators	72	28	100
	Total	*150*	*50*	*200*
		Expected Values		
	Category	*Agree*	*Disagree*	*Total*
	Litigants	75	25	100
	Mediators	75	25	100
	Total	*150*	*50*	*200*
		Agree	*Disagree*	
	o-e	3.0000	-3.0000	
2		-3.0000	3.0000	
	(o-e)^2	9.0000	9.0000	
		9.0000	9.0000	
	((o-e)^2)/e	0.1200	0.3600	
		0.1200	0.3600	
	CV	*0.2400*	*0.7200*	*0.9600*
	TV			*3.8415*
	p			*0.3272*

The calculated value of χ^2 is 0.9600, lower than the Table value of 3.8415 for an alpha of 0.05 at one degree of freedom. Hence the null hypothesis is not rejected. p=0.3272 is the inverse of the one-tailed probability of the chi-squared distribution.

1.12 Researcher's recommendations

The following are researcher's recommendations:

1. To state that there is no umbrella legislation governing mediation in the country is to state the obvious. The legislation will materialise soon and once it materialises, many loopholes will be plugged.

2. The consensus among all stakeholders groups is that there obtains a certain degree of lack of clarity in terms of the enforceability of the outcomes of mediation. Once the

legislation in the making on the subject or the umbrella legislation eventually comes into force, this loophole will be plugged.

3. Mediation being viewed as secondary to litigation or the mediation-inclined litigant being viewed as one without a strong case or the mediation-inclined litigant being mistaken for one that blinks first is something one has to put up with in the short to medium term in our country. Once mediation is assigned the same status as litigation, this will cease. If this has to come about, the government should create an ecosystem where the ADR mechanism is not viewed as an alternative but as the equivalent of the public court system. The umbrella legislation would be the tool to bring about the much needed parity in status between litigation and mediation

4. Judges in the district judiciary who are empowered under Section 89 of the CPC to refer matters to mediation are short on exposure to this space. They have to be trained thoroughly in the mediation space . It will help them decide effectively on matters that deserve to be referred to mediation.

5. Further, referral judges, more accustomed to the adjudicatory processes, may find it relatively difficult to be objective, while negotiating a settlement between litigants. This vacuum should be filled by ensuring that the referral judges are trained appropriately so that they do not subconsciously carry the “adjudicatory” baggage, so to speak, while negotiating the settlement between litigants.

6. Litigants should be mandated to attempt mediation first, followed by arbitration or litigation if the mediation option fails. This should not deter the litigants since they can have recourse to arbitration or litigation if the mediation option fails. In fact, in some categories, ADRs should be mandated as the first choice of dispute resolution.

7. Practising lawyers should be exposed to mediation . Additionally, mediators should be accredited based on their educational and professional background. These measures will go a long way in convincing the litigants that mediation is in no way superior to the traditional legal remedy.

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