

MEDIATION IN FAMILY DISPUTES: EXAMINING ITS IMPACT ON CHILDREN'S WELL-BEING

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Family disputes exert significant influence on the mental well-being of children who are entangled in the midst of their parental conflicts. Often, the focus during these disputes revolves around the victimised parents, which overshadows the rights and experiences of the children caught in this crossfire. This paper delves into the impact of mediation on children's welfare, considering both Indian and international perspectives in comparison to traditional litigation. In the evolving legal landscape, alternative dispute resolution, especially mediation, is gaining prominence, and we can connect Alternative Dispute Resolution methods with children and child rights stakeholders on the ground, such as CWCs, SCPCRs, NGOs and child rights advocates to support children who are caught in the midst of family conflicts between their parents. Here, mediation will act as a bridge between the courts and ground-based child rights stakeholders who are directly connected with the children's issues on a day-to-day basis. By fostering the importance of healthy childhood relationships in an adult's life, this approach prioritises the best interests of the children involved in child-centric mediation. The present paper will be analysed using the existing literature available on the theme of the paper via using thematic analysis which is a mode of qualitative data analysis. There will be comparisons made using quantitative data as well. This paper aims to contribute to the growing body of knowledge aimed at creating a more child-sensitive approach to family dispute resolution, ensuring a protective cushion for children amidst parental conflicts.

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I. INTRODUCTION

A child is a person below 18 years of age as per United Nation Convention on the Rights of Child ('**UNCRC**'), which was ratified by India on 11 December 1992.¹ A child does not have any autonomy of its own and is dependent upon the adults, mainly parents, teachers in school, legal guardian, etc. for his/her day-to-day activities, in the growing up stage. Therefore, when a dispute occurs in the family of a child either due to property, parental separation or death of one parent etc., it results in huge trauma for the child. Dissolution of marriage or judicial separation of the parents is devastating for a child. A child's distress is heightened when the parents are residing in different states/countries, independently disputing custody before the courts of their respective states/nations, leading to conflicting judicial orders. Often during such instances, the child is used as a weapon by the spouses in marriage.

Mediation stands as an alternative method for resolving disputes, where involved parties willingly reach a settlement with the aid of a third-party, possessing negotiation and communication skills. The process involves the mediator facilitating discussions and guiding the parties to a mutual agreement, which is then formalised into a written contract. The success of mediation hinges on two closely connected

¹ UN Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, art 1 (ratified by India 11 December 1992).

elements, i.e., both the party's readiness to address their dispute amicably and the mediator's adeptness in navigating the process to reach a point of consensus.

II. WHAT KIND OF MATTERS CAN BE RESOLVED THROUGH MEDIATION

The Supreme Court ('SC') of India has provided a concise classification of cases appropriate for mediation and those that are not appropriate for mediation in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*² The types of cases considered suitable for mediation as per the aforementioned case law are outlined as follows:



Section 5(1) of Mediation Act, 2023 stipulates, regardless of any mediation agreement, participants may willingly & mutually opt to resolve a civil or commercial dispute through mediation before initiating legal proceedings in any court.³ Section 6 of the Mediation Act, 2023, in conjunction with the first schedule, provides an illustrative list of disputes or matters deemed unsuitable for mediation.⁴ This includes, among other things:

- Contentions involving minors or individuals with intellectual disabilities

² *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24.

³ Mediation Act 2023, s 5(1).

⁴ Mediation Act 2023, s 6.

- Legal proceedings of criminal offenses
- Any contention relating to levy, collection, penalties, direct/indirect tax refunds,
- Any investigation, inquiry, or proceeding before entities such as the Telecom Regulatory Authority of India, Telecom Disputes Settlement & Appellate Tribunal, and under the Competition Act, 2002, etc.

III. INDIAN PERSPECTIVE ON MEDIATION & CHILDREN IN MEDIATION

In India, where familial ties hold considerable cultural and societal importance, the legal system is increasingly endorsing the practice of mediation. The Mediation and Conciliation Project Committee, set up by SC, has played a pivotal role in advancing the cause of mediation. This committee was formed by the Chief Justice of India at that time, Hon'ble Mr. Justice R.C. Lahoti vide an order dated April 9, 2005 that aims to ensure the successful execution of Mediation and Conciliation throughout the country.⁵ Currently, the Chairman of this committee is Hon'ble Mr. Justice Sanjiv Khanna.⁶ The committee comprises distinct judges from both the SC and HC, Senior Advocates, and the Member Secretary of National Legal Services Authority ('NALSA').

Mediation and conciliation in the resolution of family disputes are referenced in various legal frameworks, including under Section 9 of the Family Courts Act, 1984,⁷ Section 89 of the Code of Civil Procedure, 1908 ('CPC'),⁸ Section 23 of The Hindu Marriage Act of 1955,⁹ and Section 22C of the Legal Services Authorities Act, 1987.¹⁰ These statutes accord a unique position to Lok Adalats, recognising their effectiveness in mediating family conflicts. Section 34(3) of the Special Marriage Act, 1954,¹¹ as well as sub clauses (2) & (3) of Section 23 of the Hindu Marriage Act, 1955,¹² mandate courts to actively attempt mediation in cases where parties are seeking divorce, taking into account the specific details of each situation. Additionally,

⁵ Assam State Legal Services Authority, 'Scheme for Training under Mediation and Conciliation Project Committee' p 16.

⁶ Mediation and Conciliation Project Committee, 'Composition & Governing Body' <<https://mcpn.nic.in/?100004>> last accessed 28 June 2024.

⁷ Family Courts Act 1984, s 9.

⁸ Code of Civil Procedure 1908, s 89.

⁹ Hindu Marriage Act 1955, s 23.

¹⁰ Legal Services Authorities Act 1987, s 22C.

¹¹ Special Marriage Act 1954, s 34(3).

¹² Hindu Marriage Act 1955, s 23(2)-(3).

Section 89 of the CPC¹³ outlines the procedure for court-ordered mediation. The primary goal of Section 89 of CPC is to facilitate a harmonious and mutually agreeable resolution amidst the parties outside the formal court proceedings. The Mediation Act, 2023 outlines the provision for mediation before litigation in Section 5.¹⁴ As per Section 30 of the A&C Act,¹⁵ an arbitral tribunal is authorised to employ mediation as a means to facilitate the resolution of disputes.

While mediation is applicable on civil matters, questions arise when considering cases of domestic violence covered under Section 498A of Indian Penal Code ('IPC'),¹⁶ where rights of children are also involved. Domestic violence cases are non-compoundable under Section 320 of Code of Criminal Procedure ('CrPC'), 1973,¹⁷ raising the issue of how such cases can it be referred to mediation.

The Karnataka High Court ('HC') addressed this issue in the matter of *Mohd. Mushtaq Ahmed v. State*,¹⁸

"In this instance, marital discord arose consequently the birth of a daughter, leading the wife to initiate divorce proceedings & file an FIR under Section 498A of the IPC against her husband. The Karnataka High Court, exercising its inherent authority to promote justice, recommended mediation, resulting in a mutually agreeable resolution. Recognising the unique circumstances, the court allowed the wife to withdraw the initially filed FIR".

In the matter of *K. Srinivas Rao v. D.A. Deepa*,¹⁹ the SC held:

"44. ... though offence punishable under Section 498-A IPC are not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation.... The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law.... If there is settlement, the parties will be saved from

¹³ Code of Civil Procedure 1908, s 89.

¹⁴ Mediation Act 2023, s 5.

¹⁵ Arbitration and Conciliation Act 1996, s 30.

¹⁶ Indian Penal Code 1860, s 498A.

¹⁷ Code of Criminal Procedure 1973, s 320.

¹⁸ *Mohd. Mushtaq Ahmed v State* (2015) 3 AIR Kant R 363.

¹⁹ *K. Srinivas Rao v D.A. Deepa* (2013) 5 SCC 226.

the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest”.

In an effort to promote the adoption of mediation for family disputes in India, several significant initiatives have been introduced in recent times. The Delhi HC has established a mediation and conciliation centre known as “*Samadhan*” on 26 May 2006 specifically focused on family disputes, child custody and visitation rights providing free mediation services to the litigants.²⁰ The Centre’s services are accessible for both pre-litigation disputes and those currently under the Court’s consideration.

The mediation process at this centre has garnered positive feedback from participants, and a considerable number of cases have been successfully resolved through its services. In India, all state HCs have established a set of guidelines and regulations governing the Mediation and Conciliation procedure.

A. STAGES INVOLVED IN THE MEDIATION JOURNEY IN FAMILY LAW DISPUTES

Preparation phase	Prior to commencing the mediation process, the mediator has the option to engage with parties, providing guidance on the mediation steps, addressing doubts, and responding to any queries. This discussion is not limited to in-person meetings and can take place via phone or video mode, in accordance with the new The Mediation Act, 2023.
Introduction phase	Initially, the mediator provides opening statements, clarifying their role. The mediator then seeks agreement from both parties to proceed with the mediation process. If both parties consent, the mediation follows the outlined steps. However, if the parties decline mediation, the Court may impose cost

²⁰ SAMADHAN, ‘Delhi High Court Mediation and Conciliation Centre’
<<https://dhcmediation.nic.in/about-us>> last accessed 28 June 2024.

	sanctions as a consequence of disregarding the process in case of court-referred mediation.
Problem Statement	The mediator lays a room for the parties to articulate their concerns in their opening statements. This is done with the aim that by the conclusion of these remarks, both the parties and the mediator will have gained a deeper comprehension of the scenario.
Collective Dialogue	The Mediator engages both parties in discussions, posing pertinent questions to gather additional information. Through this dialogue, the mediator will discern the priority of issues that need resolution.
Private Conversation	Subsequent to the collective deliberation of matters, each party is provided an opportunity to privately communicate their concerns with the mediator, and if desired, with their advocates. This vital stage supports in preparing the parties for negotiations.
Negotiation	The involved parties engage in negotiations until a mutually acceptable settlement is reached. The mediator facilitates a resolution that safeguards the interests of both sides. In the event of unsuccessful negotiations, the case is subsequently referred to the Court.
Resolution Process	Once agreement terms are determined, the parties reconvene. The mediator verbally affirms the settlement terms, which are subsequently documented and signed by the parties. This legally binding settlement is enforceable in Court. Concluding the

	proceedings, the mediator demonstrates thankfulness to the participants for their engagement & cooperation throughout the entire procedure.
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IV. INTERNATIONAL PERSPECTIVE ON CHILDREN IN MEDIATION

Globally, countries like the United States, Canada, and various European countries have embraced the use of mediation to alleviate congestion in family court systems. The UNCRC affirms a child's entitlement to be involved in family dispute proceedings. According to the Art. 12 of UNCRC, a child should be granted the opportunity to express their views, particularly in legal and administrative proceedings that directly or indirectly impact them.²¹ The UNCRC emphasises the applicability of this provision to all pertinent judicial proceedings involving the child, without restrictions, covering aspects such as parental separation, custody and care, juvenile justice, and social security.

The UNCRC additionally stipulates in Art. 3 that, in all actions related to children, regardless of being executed by public or private social welfare institutions, courts, administrative bodies, or legislative entities, the foremost focus should be the best interests of the child.²² The individuals involved in a court mediation represent those directly affected by the dispute, thus, making children's rights a crucial consideration in mediation.

V. MEDIATION & FAMILY LAW ACROSS CANADA, CHILD CUSTODY DISPUTES

According to the Art. 12 of UNCRC, children possess a legal entitlement to express their opinions and have them considered. They express a desire to be acquainted and retrieve facts concerning the disunion or divorce proceedings. Additionally, children seek for their necessities and desires to be acknowledged amidst parental judicial separation or divorce.²³ Children themselves deem their participation rights crucial,²⁴

²¹ UN Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, art 12 (ratified by India 11 December 1992).

²² *ibid* art 3.

²³ Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review*, (June 2009), highlighted in studies by Birnbaum (2007), Marchant, and Kirby (2004), and Neale (2002) at p 10 < <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vcsdm-pvem/pdf/vcsdm-pvem.pdf>>.

²⁴ *ibid*.

especially concerning family matters and issues related to legal and social welfare systems.²⁵

VI. LONG-TERM IMPACT OF MEDIATION ON PARENT-CHILD RELATIONSHIP & CHILD'S RELATIONSHIP WITH THE WORLD

In New Zealand, a qualitative study was conducted by Jill Goldson (2006), a social worker & chief researcher on child centric mediation, involving 26 children within 17 families (age 6-18 years).²⁶ The mediator met individually with both parents and children, discussing parenting plan arrangements. Children had the option to decline sharing certain information. A joint session with parents and children, followed by another session two weeks later, addressed parenting plan implementation and any remaining concerns.

Results showed that children consistently appreciated having their voices heard, which led to higher satisfaction with adhering to the parenting plan. They expressed a yearning to engage in reshaping family relationships. Parents noted reduced conflict and increased satisfaction, crediting this to a mediator who communicated with both of the parents concurrently.

Broadly, the study revealed decreased parental strife, enhanced conciliation and cooperation, and increased parental awareness of the impact on children. Children, having their voices acknowledged, conveyed restored and enhanced adoption of their parental split.

VII. COMPARATIVE ANALYSIS OF MEDIATION WITH TRADITIONAL LITIGATION

There are 775 Family Courts functional across the Country, in various states of India as per October 2023, National Judicial Data Grid ('**NJDG**'), Department of Justice, Government of India. Number of Family Court cases pending across all states of India as per NJDG sums up to 11,50,094.²⁷ The case count that have been adjudicated/disposed during the month as per NJDG sums to 66,150.²⁸ This means

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Department of Justice, 'Family Courts & Cases – No. of Cases Pending' <https://dashboard.doj.gov.in/family-court-cases/fc_pending> last accessed January 2024.

²⁸ *ibid.*

that there were a total of ‘12,16,244’ family court cases in India that came to the court. If we look into the data deeply and analyse it, 775 Family Courts in India were left to deal with/are dealing with approximately 12 lakhs cases pendency²⁹ i.e., each court is supposed to deal with approximately 1569 cases, while in reality each family court was actually able to dispose of 85 cases.

The Central Government has not yet established the ‘Mediation Council of India’, as laid down in the Section 3(c) and Section 31(4) of the Mediation Act, 2023.³⁰ With the setup of the Mediation Council of India, domestic and international mediation in India will be regulated, which will significantly reduce the burden of cases on courts.

The overall figure of family court cases that were scheduled for resolution in Delhi were 2884, and the total case count that were adjudicated by Mediation through the drive week from 02-17.12.2019 in the family courts of Delhi were 2171, as per data taken from the official website of District Court in India.³¹ This data shows that family court cases are resolved speedily through mediation.

Based on the data on referrals and resolutions from March 2006 to February 2023, as provided on Samadhan³² (Delhi HC Mediation & Conciliation Centre), a total of 31,691 cases were addressed. Among these, 10,690 cases were successfully settled, while 16,099 cases were not resolved. Additionally, 7,797 cases were also disposed of due to mediation settlement cases, suggesting a reduction in real-time pendency through the mediation process. This data underscores the significant impact of mediation in achieving resolutions and alleviating the backlog of cases, as demonstrated by the notable number of cases that were successfully settled and promptly disposed of.

VIII. BEST INTEREST OF CHILD & CHILD-CENTRIC APPROACH IN MEDIATION

The key concept of the best interest of the child, outlined in Section 3(iv) of the Juvenile Justice (Care and Protection of Children) Act, 2015,³³ can be effectively addressed through child-centric mediation or pre-litigation mediation. Child-centric

²⁹ *ibid.*

³⁰ Mediation Act 2023, s 3.

³¹ E-Courts Mission Mode Project, ‘Official Website of District Court’ <<https://districts.ecourts.gov.in/sites/default/files/Dataofthemediationdrive.pdf>>.

³² SAMADHAN, Delhi High Court Mediation and Conciliation Centre, ‘Real Time Pendency’ <<https://dhcmediation.nic.in/realtimependency>> last accessed 28 June 2024.

³³ Juvenile Justice (Care and Protection of Children) Act 2015, s 3.

mediation not only saves considerable time for all parties involved but also facilitates the amicable creation of Child Maintenance Cost Agreements between parents until a divorce is granted by the court. This approach ensures that the child's academic performance remains unaffected, as mediation eliminates the need for prolonged court procedures, sparing children from undue harassment. Recognising the non-child-friendly nature of family courts, the option of mediation provides a comfortable, out-of-court environment for both children and parents. Child-friendly mediation not only shields children from the distress of being entangled in their parents' divorce but also allows them to have their voices heard. Moreover, by deciding maintenance agreements and visitation rights amicably, child-centric mediation significantly reduces the case load burden on Family Courts, contributing to a more efficient legal system.

IX. JUDICIAL PRONOUNCEMENTS

In the case of *B.S. Krishna Murthy v. B.S. Nagaraj*³⁴, the SC emphasised the necessity of recommending mediation in disputes arising within family and business relationships. The Court further asserted that legal practitioners should advise their clients to opt for mediation, especially in cases involving family matters, considering that litigation processes often extend over prolonged and exhaustive periods, simultaneously detrimentally affecting both disputing parties without yielding appreciable results. Some studies indicate that a well-functioning family environment fosters growth, confidence, openness, and the ability to confront reality, while inadequacies in family functioning are linked to delinquent behaviour in children.

“Para 1. Heard the learned counsel for the appearing parties. This is a dispute between brothers. In our opinion, an effort should be made to resolve the dispute between the parties by mediation”.

“Para 3. In our opinion, the lawyers should advise their clients to try for mediation for resolving the disputes, especially where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and decades often ruining both the parties. Hence, the lawyers as well as litigants should

³⁴ *B.S. Krishna Murthy v B.S. Nagaraj* (2011) 15 SCC 464.

follow Mahatma Gandhi's advice in the matter and try for arbitration/mediation. This is also the purpose of Section 89 of the Code of Civil Procedure”.

In the *B. S. Joshi & Ors v. State of Haryana & Anr*³⁵ case, the Apex Court determined that utilising the authority vested in the court by Section 482 CrPC,³⁶ the HC has the discretion to suspend criminal proceedings. The SC addressed an appeal petition in this matter, involving a scenario where the wife registered an FIR against her husband but later recanted, asserting that the complaint was hastily and thoughtlessly filed, and there was no actual issue in their relationship. Consequently, the SC has emphasised the need for courts to genuine settlements in matrimonial disputes. The Court advocates for the promotion of genuine settlements through mediation at the Court’s mediation and conciliation centre, aiming to uphold the sanctity of marriage and family as fundamental institutions.

“12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes”.

In the matter of *Manas Acharya v. State & Anr*,³⁷ the Delhi HC adopted an even more favourable stance towards mediation. It underscored that any agreement or determination, arising from mediation, as well as decisions made by the mediator, are deemed valid and lawful. The court further affirmed that resolutions reached in the course of the mediation process are contractually obligatory for parties involved.

“3. On 18th April, 2011, both parties resolved all their disputes and differences by way an agreement before the Mediation Centre, Tis Hazari Courts, Delhi.....”

“13. Keeping in view the aforesaid, this Court is of the view that the settlement agreement executed between the parties is a comprehensive legal, valid and binding document and respondent No. 2 cannot be allowed to wriggle out of it”.

In the case of *Selvaraj v. Revathi*,³⁸ the SC addressed a custody dispute involving a 12 years 9 months old child. The father challenged a Madras HC order via an appeal, which directed handing over the child’s custody to the mother. The Apex Court allowed the child to remain with the father but granted the mother visitation and

³⁵ *B.S. Joshi v State of Haryana & Anr.* (2003) 4 SCC 675.

³⁶ Code of Criminal Procedure 1973, s 482.

³⁷ *Manas Acharya v State & Anr.* (2012) SCC OnLine Del 4462.

³⁸ *Selvaraj v Revathi* (2023) SCC OnLine SC 1644.

calling rights. Despite the mother's reluctance and the child's initial unwillingness to engage with her, mediation played a pivotal role in improving their relationship. The mediation process, facilitated by Senior Counsel Ms. V. Mohana, helped the child slowly accept interaction with the mother, illustrating the significance of mediation in resolving family disputes and promoting the child's best interests.

Mediation also helped the court understand the child's feelings and the dynamics between the parents. Despite the initial unwillingness, mediation efforts led to a partial improvement in the child's relationship with the mother. The Apex Court's decision to have the child meet a counsellor outside the court premises highlights the flexibility and importance of mediation in creating a comfortable environment for the child in cases of familial discord.

In the *Dr. Jaya Sagade v. The State of Maharashtra*³⁹ case, the state government's circulated directive that prohibited mediation & counselling in domestic violence matters lacking in the court's authorisation was invalidated. In paragraph 23(b)(d)(e) of judgment, the Court further decreed that a victim has to be informed about the legal alternatives, and must be guided about the rights. She should not face coercion to settle her complaint. The Court explicitly stated that there should be no imposition of pressure or force on her to resolve her claim or grievance, and joint counselling/mediation should only commence with the voluntary and informed consent of the aggrieved woman.

X. CONCLUSION

Mediation in family disputes emerges as a significant asset for a country like India, grappling with a vast population and an overwhelming backlog of cases within its judicial system. The timeline for completion of mediation process is 4 months (120 days) as stipulated in Section 18 of The Mediation Act, 2023, which is far less than what family disputes litigation goes through for 5 years or more. Particularly noteworthy is the child-friendly nature of mediation, giving an extrajudicial setting to expeditiously address familial conflicts. To optimise its efficacy concerning children, the Mediation Council of India ought to equip mediators with specialised training in

³⁹ *Dr. Jaya Sagade v The State of Maharashtra*, (2016) (1) Mh. L.J.

child-centric mediation, aligning with the provisions outlined in the Mediation Act, 2023.

As elucidated in research and literature cited above in the paper, recognising the right of children to actively take part in the proceedings which impact them is of critical significance. In this context, the child's involvement not only ensures a holistic mediation process, but also nurtures their ability to comprehend and cope with the repercussions of familial discord. Thus, the active engagement of children becomes an integral facet of the mediation procedure, contingent upon their cognitive capacity to communicate effectively, thereby enhancing the overall outcome.

The measure of child assessment in divorce mediation can be adopted in India. It is a recommended practice by family mediators and therapists in Canada who deal with divorce mediation. Since, it is a general practice, similar methods can be potentially adopted in India.

Considering the socio-economic landscape of India, it becomes imperative to establish a robust connection between mediation and key stakeholders advocating for child rights. This interconnected legal collaboration will ensure that when cases involving children come under the purview of aforesaid key stakeholders, they can promptly refer them for mediation and pre-litigation mediation. Mediation thus, assumes as a bridge between Family Courts and on-the-ground child rights stakeholders contributing to the expedited dispensation of justice, in the best interest of the child