INTRODUCTION

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.

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 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras 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 SHREN, 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 arbitrage 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 INDIA

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 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.

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 liberalisation 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 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.

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.
Comparison Between Judicial Process and Various ADR Processes
(Material Extracted from Chapter IV, *Mediation Training Manual of India*, designed by Mediation and Conciliation Project Committee, Supreme Court of India)

<table>
<thead>
<tr>
<th>JUDICIAL PROCESS</th>
<th>ARBITRATION</th>
<th>MEDIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome.</td>
<td>Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.</td>
<td>Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.</td>
</tr>
<tr>
<td>Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.</td>
<td>Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration &amp; Conciliation Act, 1996.</td>
<td>Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.</td>
</tr>
<tr>
<td>The decision is binding on the parties.</td>
<td>The award in an arbitration is binding on the parties.</td>
<td>A binding settlement is reached only if parties arrive at a mutually acceptable agreement.</td>
</tr>
<tr>
<td>Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.</td>
<td>Adversarial in nature as focus is on determination of rights and liabilities of parties.</td>
<td>Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.</td>
</tr>
<tr>
<td>Personal appearance or active participation of parties is not always required.</td>
<td>Personal appearance or active participation of parties is not always required.</td>
<td>Personal appearance and active participation of the parties are required.</td>
</tr>
<tr>
<td>A formal proceeding held in public and follows strict procedural stages.</td>
<td>A formal proceeding held in private following strict procedural stages.</td>
<td>A non-judicial and informal proceeding held in private with flexible procedural stages.</td>
</tr>
<tr>
<td>Decision is appealable.</td>
<td>Award is subject to challenge on specified grounds.</td>
<td>Decree/Order in terms of the settlement is final and is not appealable.</td>
</tr>
<tr>
<td>No opportunity for parties to communicate directly with each other.</td>
<td>No opportunity for parties to communicate directly with each other.</td>
<td>Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.</td>
</tr>
<tr>
<td>Involves payment of court fees.</td>
<td>Does not involve payment of court fees.</td>
<td>In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.</td>
</tr>
</tbody>
</table>
### Comparison Between Judicial Process and Various ADR Processes

<table>
<thead>
<tr>
<th>MEDIATION</th>
<th>CONCILIATION</th>
<th>LOK-ADALAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation is a non-adjudicatory process.</td>
<td>Conciliation is a non-adjudicatory process.</td>
<td>Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.</td>
</tr>
<tr>
<td>Mediator is a neutral third party.</td>
<td>Conciliator is a neutral third party.</td>
<td>Presiding officer is a neutral third party.</td>
</tr>
<tr>
<td>Service of lawyer is available.</td>
<td>Service of lawyer is available.</td>
<td>Service of lawyer is available.</td>
</tr>
<tr>
<td>Mediation is party centred negotiation.</td>
<td>Conciliation is party centred negotiation.</td>
<td>In Lok Adalat, the scope of negotiation is limited.</td>
</tr>
<tr>
<td>The function of the Mediator is mainly facilitative.</td>
<td>The function of the conciliator is more active than the facilitative function of the mediator.</td>
<td>The Function of the Presiding Officer is persuasive.</td>
</tr>
<tr>
<td>The consent of the parties is not mandatory for referring a case to mediation.</td>
<td>The consent of the parties is mandatory for referring a case to conciliation.</td>
<td>The consent of the parties is not mandatory for referring a case to Lok Adalat.</td>
</tr>
<tr>
<td>The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.</td>
<td>In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.</td>
<td>The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.</td>
</tr>
<tr>
<td>Not appealable.</td>
<td>Decree/order not appealable.</td>
<td>Award not appealable.</td>
</tr>
<tr>
<td>The focus in mediation is on the present and the future.</td>
<td>The focus in conciliation is on the present and the future.</td>
<td>The focus in Lok Adalat is on the past and the present.</td>
</tr>
<tr>
<td>Mediation is a structured process having different stages.</td>
<td>Conciliation also is a structured process having different stages.</td>
<td>The process of Lok Adalat involves only discussion and persuasion.</td>
</tr>
<tr>
<td>In mediation, parties are actively and directly involved.</td>
<td>In conciliation, parties are actively and directly involved.</td>
<td>In Lok Adalat, parties are not actively and directly involved so much.</td>
</tr>
<tr>
<td>Confidentiality is the essence of mediation.</td>
<td>Confidentiality is the essence of conciliation.</td>
<td>Confidentiality is not observed in Lok Adalat.</td>
</tr>
</tbody>
</table>
THE PROCESS OF MEDIATION

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Junior sessions (iii) separate Session and Closing. These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.

- **Introduction**

- **Understanding the problem**

- **Deeper understanding of the interests and needs of parties**

- **Defining the problem**

- **Creating options**

- **Evaluating Options**

- **Settlement/Nonsettlement**

Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished moving to the next phase.

This is my humble submission of the topic “Comparison between Judicial Process and Various ADR Processes & Process of Mediation” designated to me.

I thank one and all.
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(1) *Michael McIlwraith – the host of the CPR International Dispute Negotiation (IDN).
(2) Mediation Training Manual of India, designed by Mediation and Conciliation Project Committee, Supreme Court of India.

(SMT. K.SUDHAMANI),
JUDGE,
FAMILY COURT – CUM- III ADDL. DISTRICT COURT,
SRIKAKULAM