

Pragmatic Role of Mediation Techniques in Alternative Dispute Resolution System

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The goal of mediation Is not to get rid of thoughts of emotions. The goal is to become more aware of your thoughts and emotions and learn how to move through them without getting stuck.

Dr. P. Goldin.¹

INTRODUCTION

Alternative Dispute Resolution (ADR) is an attempt to devise machinery which should be capable of providing an alternative to conventional methods of resolving disputes. An alternative means the privilege of choosing one of two things or course offered at one's choice. It does not mean the choice of an alternative court but something which is an alternative to court procedures or something which can operate as court annexed procedure. Non-binding procedure in which an impartial third party, the conciliator or mediator, assists the parties to dispute in reaching a mutually satisfactory and agreed settlement of the dispute. Mediation is a process by which disputing parties engage the assistance of a neutral third party to act as a mediator. He is a facilitating intermediary who has no authority to make any binding decisions, but who uses various procedures, techniques and skills to help the parties to resolve their dispute by negotiated agreement without adjudication. The mediator is a facilitator who may in some models of mediation also provide a non-binding evaluation of the merits of the dispute. If required, but who cannot make any binding adjudicatory decisions.² The main objectives of the arbitration and conciliation are to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes.³ Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the arbitration Act 1940.⁴

Alternative Dispute Resolution System

The Movement Towards Alternative Dispute Resolution ADR was endorsed by a resolution at a meeting of chief ministers and chief justices, The meeting noted that the courts were not in a position to undertake the entire burden of administration of justice and that a number of disputes were capable of being disposed of by alternative methods such as arbitration, conciliation, mediation and negotiation. The meeting emphasised that litigants should be encouraged to adopt other methods because they provided procedural flexibility saved valuable time and involvement less expenditure and strain as compared with conventional trials in civil court.⁵ Further, it is to be noted that Alternative Dispute Resolution (ADR) has several methods. However, the principle of natural justice is required to be followed while adopting any method under Alternative Dispute Resolution (ADR).online dispute resolution, which is called as ODR, uses information and computer technology and it is capable of assisting all kinds of dispute resolution, which includes negotiation, mediation and arbitration.⁶ A negotiator may follow than one method depending upon nature of dispute and strategies.⁷ Although, the methods of Alternative Dispute Resolution (ADR) are as under:

1. Arbitration: Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties.⁸

¹ Quotes on Mediation,

<<https://www.google.co.in/search?q=quotes+on+mediation&dcrl=0&tbm=isch&tbo=u&source=univ&sa=X&ved=0ahUKEwixwKD94YXWAhUDSo8KHSRwCTkQsAQIJw&biw=1366&bih=662> > accessed on 4rth Februrary, 2022).

² Avtar Singh, *Law of Arbitration And Conciliation*, Eastern Book Company,lucknow, 2005, pp. 391, 414.

³ Har Dev Kohli, *New Case Law References on arbitration and conciliation Act*, Universal Law Publishing Co., Delhi, 2008, P.205.

⁴ *Guru Nanak FoundationV. Rattan Singh And sons* (1981) 4 SCC 634, AIR 1981 SC 2076.

⁵ *Rustees Of The Port Of Madras vs Engineering Constructions*, (1995) 5 SCC 531.

⁶ Sophia Furtando And Farisa Tasneem, *The Suitability and legal challenges of online Dispute Resolution, advantages and disadvantages of the use of technology in Alternative Dispute Resolution*, Indian Bar Review, Vol (xxxvii) (3&4), 2010, p.166.

⁷ Dr S.C.Tripathi, *Arbitration And Conciliation Act 1996*, Central Law Publications, Allahabad, 2010, p.337.

⁸ Justice Y V Chandrachud, *Concise Law dictionary*, Wadhwa, Nagpur, 2005, p.77.

2. Negotiation: It is method of settlement of dispute with or without assistance of a third person.⁹
3. Mediation: A form of alternative dispute resolution in which a third party, usually professionally trained, helps the parties to resolve their differences.¹⁰
4. Conciliation: Bringing of opposing parties or individuals into harmony to settle the dispute.¹¹
5. Mini trial: It is a method when conflicting parties approach the senior executives to adjudicate the dispute.¹²
6. Expert Appraisal: under this method an expert of relevant field is appointed to investigate and furnish non-binding opinion.
7. Neutral evaluation: it is a non-binding evaluation carried out in reasoned manner mediation.¹³

Law on Mediation

- (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement....¹⁴
- (2) The process may be used by the arbitrator and leads to an award by the arbitrator on agreed terms as provided in sub sections(3) & (4). It is an arbitrator driven process rather than a mechanism separate from arbitration.¹⁵
- (3) On the other hand, the entire part III (Section 61 to 81) is devolved to conciliation. The concepts of mediation and conciliations are used interchangeably in the Indian context and only conciliation has sanction as a separate dispute resolution Mechanism in the 1996 Act and leads to a legally enforceable agreement/award. The status of such a settlement agreement defined in section 74 of the Act.
- (4) Status and effect of settlement agreement: the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.¹⁶

MEDIATION TECHNIQUES

Mediation Techniques are combination of facilitative, transformative and narrative mediation models throughout the mediation process. These different mediation models each have slightly different goals and methodology.

• Facilitative mediation

This is about facilitating communication between the parties so that they can gain an understanding of how each party perceives the issues. Once they have a clearer understanding of each others' perspective the parties can move on jointly as problem solvers to look at the options for resolving the issues. When the parties have exhausted all the options they can begin to narrow them down to those that are workable and that both parties can live with. This model of mediation is best used for resolving simple transactional and workplace disputes.¹⁷

All mediators use some facilitative techniques and he identifies four key characteristics common to facilitative mediation.

- (1) Facilitative mediation is *process oriented* not focused on outcomes, mediators serve as process guides to assist the parties in their own deliberation.
- (2) Facilitative mediation is *client oriented*. The job of the mediator is to help the clients communicate and problem solve effectively.
- (3) Facilitative mediation is *communication focused*. The mediator facilitates or in some instances restricts communication between the parties.
- (4) Facilitative mediation is *interest based*. Mediator help parties understand the interests and concerns that they each have and work together to look for solutions that address those areas.¹⁸

9. Avtar Singh, *Law of Arbitration and Conciliation*, Seventh Edition, Eastern Book Company, Lucknow, 2005, p.411.

¹⁰ Supra note 2, p. 414.

¹¹ Supra note 2, p.359.

¹² Supra note 2, p.415.

¹³ Supra note 7, Pp. 337-338.

¹⁴ Section 30, The Arbitration and Conciliation Act, 1996.

¹⁵ P.K. Basu Majumdar, *Law of Arbitration*, Universal Law Publishing CO. new Delhi, 2011, pp. 19-20.

¹⁶ Section 74, The Arbitration and Conciliation Act, 1996.

¹⁷ Mediation Model And techniques, < http://www.mindfulmediation.com.au/wp-content/uploads/2010/08/Mediation_Techniques.pdf > accessed on 210th February, 2022.

¹⁸ Jay Folberg, Ann Milne, Peter Salem, *Divorce and Family Mediation: Models, Techniques and Applications*, Guilford Press, New York, 2004, pp. 14-15, available at:

<[https://books.google.co.in/books?hl=en&lr=&id=NS3xyU0Bv-](https://books.google.co.in/books?hl=en&lr=&id=NS3xyU0Bv-4C&oi=fnd&pg=PA3&dq=article+on+mediation+techniques&ots=ia7Q5TK3X4&sig=9cGyvHNfCr_goNvuWzF5tkN)

[4C&oi=fnd&pg=PA3&dq=article+on+mediation+techniques&ots=ia7Q5TK3X4&sig=9cGyvHNfCr_goNvuWzF5tkN](https://books.google.co.in/books?hl=en&lr=&id=NS3xyU0Bv-4C&oi=fnd&pg=PA3&dq=article+on+mediation+techniques&ots=ia7Q5TK3X4&sig=9cGyvHNfCr_goNvuWzF5tkN) GRIg#v=onepage&q=article%20on%20mediation%20techniques&f=false >accessed on 14th February, 2022.

- **Transformative mediation**

This is about encouraging the parties to recognise each others' perspectives and accept responsibility for the issues. The parties are empowered to move on to resolve the issues in the way they see best and to learn and grown from their experience. This approach is best used for disputes involving ongoing relationships, where the parties need to consider future ways of relating to each other. The purpose of transformative mediation is to effect a changed and more pacific relationship between the parties. The focus is on the parties that will lead them to moral growth. Settlement of the dispute is a welcome by product. The focus on the relationship requires that a transformative mediator meet conjointly with the parties.¹⁹

Narrative mediation

This approach is about story telling. The parties are encouraged to tell their story and to hear the other party's story. Through the story telling and an incisive style of questioning, parties can gain insight into each other's perspectives and values. We particularly encourage a rich dialogue at the initial one-on-one session to get to the heart of each individual's story. This approach is useful for assisting people to understand their perception of the issues, as well as others' perceptions. It assists people to develop alternative views and they begin to see the conflict in a new light. It is also helpful for getting to the heart of what the parties value.²⁰

OTHER TECHNIQUES

We base our practice on positive psychology, strength-based and solution-focused techniques. These approaches and techniques are based on a new movement and focus in psychology towards individual's strengths and virtues rather than attempting to "fix" what is "wrong" with them. We focus on leveraging people's strengths to overcome challenges.

- **Positive psychology**

Using positive psychology we assist people to foster positive emotions in their lives. There are a number of well-researched evidenced-based ways of creating positive emotions. We assist people to resolve the issues and to feel more positive about the future. Positive psychology techniques are also used to promote self-care to counter the effects of stress associated with conflict. ²¹Mindfulness opens a door of awareness to who we are and character strengths are what is behind the door since character strengths are who we are at core".²²

- **Strengths-based approach**

The basis of our strength-based approach is to help clients identify their strengths and how they wish to apply them. The goal is to motivate clients to build and draw upon these strengths when facing challenges. This approach is particularly useful when clients are feeling de-motivated and filled with self-doubt. ²³In our culture we all have a default impulse to fix problems as soon as we learn of problems, and this can apply all the same to fixing problems for other people. In a humanistic approach, mediators truly pull back from this normative role. Instead, they create a safe, if not sacred space for parties to converse as deeply as they choose to converse, and out of this conversation parties do their own fixing and mending. This can be a humbling process for mediators for a couple reasons. On one level the mediator has to consciously pull back into a non-directive posture with the parties and assure them that this is truly their process. On another level, it is humbling to bear witness to the depth that parties can go when they have the right opportunity to do so. Here we see how this approach is the ultimate strength-based approach to mediation and how it honours the principle of party self-determination to the highest degree.²⁴

- **Solution-focused approach**

Our solution-focused approach means that we focus on future solutions rather than past problems. We reflect upon the past only for lessons learnt and to determine the focus of future strategy and skill building. This approach is particularly useful when clients are feeling stuck and unable to move forward.²⁵ The assessment stage includes the miracle question, assessing the family member's vision of what the "solution" would look like allowing the therapist to better understand his or her motivation to change, discuss problem clarification, and identify the potential strengths possessed by the patient. SFT focuses on the past only to determine the patient's strengths as illustrated in exceptions. The therapeutic

¹⁹ Jay Folberg, Ann Milne, Peter Salem, 2004, p.16.

²⁰ Supra note 17.

²¹ Ibid.

²² 7 Great Benefits of Mindfulness in Positive Psychology, <<https://positivepsychologyprogram.com/mindfulness-positive-psychology-3-great-insights/>> accessed on 14th February, 2022.

²³ Supra note 22.

²⁴ Ted Lewis, Mark S. Umbreit, What Is A Humanistic Approach to Mediation? An Overview, <<http://www.cehd.umn.edu/ssw/rjp/>> accessed on 14th February, 2022.

²⁵ Supra note 22.

techniques implemented are brief and fall into two categories: Development of well-focused goals and generating solutions based upon exceptions. Developing well-focused goals include identification of a problem description that can lead to setting measurable goals using the patient's language and exploring what the patient has previously tried. Once the problem is defined and realistic, measurable goals for solutions are established and exceptions to the problem are used as strengths. The remaining sessions of SFT focus upon identification, amplification, and measurement of progress of solutions developed through the previously mentioned processes.²⁶

a. The Mediation Process

Although every conflict and every mediation process will be slightly different, there are a number of steps which you will need to consider in every case and points to take into account.

b. Preparation

You will need to lay out the 'ground rules' for the mediation process. Usually some basic rules of communication and confidentiality will be essential, but there may also be others pertinent to that situation. For example, you might want to set out that only one person talks at a time, and while someone is talking, the others listen in silence, that there is to be no verbal abuse at any time, and that all that happens remains confidential unless both parties agree to speak about it outside mediation. You may also wish to set out the mediator's role: to be impartial and help the parties to reach their solution, but also to protect the parties from each other if necessary. You should also consider whether you should have separate meetings with each party to develop a better understanding of the issues before mediating a joint meeting.²⁷

c. Reconstructing and Understanding the Conflict

Threats to personal or group identity (racial, ethnic, national, and cultural) are extremely common causes of intractable conflicts today. Even if a conflict does not seem to involve identity issues, it often does. Peace builders should understand the nature of identity, why it is so important, and what can be done when identity is at the core of the conflict.²⁸ Your task at this stage is to listen to the participants' stories, whether together or separately, and clarify what they want to achieve from the process. If you are meeting both participants together, it is helpful if you can summarise the main points of conflict in a neutral way that both can agree upon, and propose an agenda for the discussion: an order in which issues should be discussed. It can also be helpful at this stage to name the emotions that participants are feeling, to show that they have been recognised and understood.²⁹

d. Defining Points of Agreement and Dispute

During this stage, your role is to help the participants to move towards a position where they start to understand each other's point of view, and can then begin to resolve a shared problem. One way to do this is to think of it as moving from a focus on the past to one on the future. It can also be helpful to use paraphrasing and summary in neutral terms to help the participants identify areas of agreement, and to check understanding. It's extremely powerful to reflect feelings back to the participants, as it shows both that they have been heard. Don't be afraid to suggest a break for coffee or a walk outside, or even an adjournment to another day if you think things are getting a bit heated. 'Time out' is a valuable reflection opportunity for everyone.³⁰

e. Creating Options for Agreement

When the mediator brings both parties back into the room, it is good to go over the confidential nature of the process. The mediator will then either open the process up for general discussion or if a party has indicated that they are prepared to present their option package to the other party. As in the exploration, the negotiation stage should be facilitated by the mediator and the negotiations should flow between the parties. The mediator should facilitate the negotiations as well as noting down any of the options that are forming into possible resolutions. This can be done by either noting them on the whiteboard or on a notepad so that the summary of possible resolutions can be shared with the parties.³¹ A useful starting point for this stage is to identify the simplest area, or the one on which there is most agreement, and suggest resolving that first, to give a 'quick win'. Useful techniques for developing options include brainstorming. At this stage, 'anything goes'! You then need to help the participants to develop evaluation criteria, which should ideally be objective and in order of importance. Your role here is chiefly to make sure that all participants are equally involved in generating options and developing evaluation criteria, and that they cover all parts of the problem. Make sure that you are reflecting their opinions and not your own, but you can point out linkages between

²⁶ Gage Stermensky and Kristina S. Brown, *The Perfect Marriage: Solution-Focused Therapy and Motivational Interviewing in Medical Family Therapy*, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311347>> accessed on 15th February, 2022.

²⁷ Mediation Skills, <<https://www.skillsyouneed.com/ips/mediation-skills.html>> Accessed on 15th February, 2022.

²⁸ Peacebuilding and Post-Conflict Reconstruction in Difficult and Intractable Conflicts, <<http://www.beyondintractability.org/userguide/peacebuilders>> accessed on 15th February, 2022.

²⁹ Id.

³⁰ Supra note 27.

³¹ Module 2: Facilitative Mediation: Process and stages, <<http://www.ama.asn.au/wp-content/uploads/2012/05/MODULE-2.pdf>> accessed 16th February, 2022.

options and/or problems. Once the options have been evaluated, you'll need to guide them to a single solution that suits all parties, and help them to fine-tune it if necessary.³²

f. Developing an Agreement

During the course of mediation, various ideas and solutions come up. These may reflect agreement among the parties themselves, or, the parties may express the ways in which they want the dispute to be resolved. All such suggestions and declarations should be agreed to in writing. They are vital. Using them, it is possible to configure a provisional agreement. They are stepping stones to progress. They become the concrete material that the parties discuss as potential resolutions and are a powerful tool in furthering the termination of the dispute.³³

- Like objectives, an agreement should be smart, that is Specific, Measurable, Attainable, Realistic and Time-bound. You can help the participants to achieve this by:
- Writing down the proposal in neutral language, and reading it back to them.
- Writing down individual points so they are clear and understood.
- Clarifying any general or vague points, for example, by asking the participants to agree concrete behavioural changes with deadlines for achievement.
- Avoid legalistic language, and keep everything simple.
- Summarise progress and next steps, including setting a deadline for any future meetings, and identifying any remaining areas of difficulty, and options for their resolution.
- Being positive about progress and the fact that everyone has remained engaged.
- Offering your continued support as a mediator if required.
- Ensuring both parties sign the agreement then and there, and close the meeting once agreement is reached.³⁴

CONCLUSION

Mediators range in training from practicing attorneys, retired judges or other professionals to highly trained mediators who work full or part time in the specialized field of mediation. The right mediator for your case is one who demonstrates overriding neutrality in evaluating and resolving your case. The effective mediator will help the parties recognize the strengths and weaknesses of both sides' case, so that at the end of mediation both parties are reasonably satisfied with the outcome. The effective mediator will also help parties consider the risks and costs of resolving a dispute before a judge or jury, without necessarily meeting the expectations of either party. The mediation process is as successful as the willingness of the parties to participate in good faith to reach a settlement. A good mediator will work with the parties until he or she determines that a settlement cannot be reached at the time. Parties who consider what they have learned during the mediation process often reach a settlement after the hearing in order to avoid spending precious time and additional funds which may never be recovered at trial.³⁵ Mediation Process is an alternative dispute resolution system, which provide various techniques and procedure to apply these techniques in an efficient manner that mediator would be a successful person in attempting in out of court settlement with less time consumption and avoiding expensive trials of courts. At present, courts are overburdened with cases, in such circumstances it is need of time to provided alternative dispute resolution system, which could give appropriate solution of present problem. It would not be wrong to say that alternative dispute resolution system is an informal method to resolve the disputes. Complexities of matrimonial disputes can be resolve through ADRS. It can save both the parties and judicial administration from undue long process of litigation.

³² Id.

³³ Michael Tsur, The Art Of Writing A Mediation Agreement, < <http://www.mediate.com/articles/tsur.cfm> > accessed on 15th February, 2022.

³⁴ Supra note 27.

³⁵ Adrienne Krikorian, Litigate Or Mediate?: Mediation As An Alternative To Lawsuits, < <https://www.mediate.com/articles/krikorian.cfm#bio> > accessed on 16th February, 2022.