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BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **MODERN MEDIATION: INTEGRATING ETHICS WITH TECHNOLOGY**

AUTHORED BY - ARYAN MITTAL

## **ABSTRACT**

Mediation is one of the oldest forms of resolving disputes, which has progressed with the incorporation of modern technologies for greater efficacy. The practice of mediation is known to have started in ancient civilizations like India, but over the years it has developed into ADR. Increasingly the need for ODR has enabled the practice of mediation to be offered via the internet at reasonable prices. Yet, this change has a number of ethical implications. In traditional mediation the Moscow principles are essential for conducting the process, but implementation of the principles in digital practice is highly compromised due to various factors; cyber risks, lack of emotional understanding and the digital gap. On the other hand, The Indian Mediation act 2023 recognizes ODR however it is not clear how to balance the ethical challenges present in ODR. Overall ethics and training need to be incorporated into the mediation process to protect the innovative nature of the process. In addition, even though training overlays of online ethics, communication interlayers, and technical aspects is important, it should be remembered that sometimes a face-to-face meeting combined with an online or phone conversation will help to speed up and improve the development of the trust. Ethics should be continuously monitored in ODR.

**Keywords:** - Online Dispute Resolution (ODR), Mediation Act, 2023, Technological Advancement, Ethical Principles

## **INTRODUCTION**

Mediation has its roots in the Latin word 'Medius', which means middle. Mediation, subsequently, concerning its Latin meaning, is the process of a middleman resolving disputes between two other parties. It is a neutral middleman with no personal connection to the parties and does not form a bias towards anyone. This middleman is thereto referred to as a 'mediator'. In India, mediation was first defined under Rule 4 of the Civil Procedure—Alternate Dispute Resolution Rules, 2003 (ADR Rules): -



*“Settlement by ‘Mediation’ means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute, and emphasizing that it is the parties own responsibility for making decisions that affect them”.<sup>1</sup>*

In the modern era, mediation has emerged significantly as a method of alternate dispute resolution as compared to litigation. With the advancement in the technological world, mediation has established a place in the digital sphere as well. In the past few years, this digital sphere has transformed the alternate dispute resolution mechanism into online dispute resolution (ODR), wherein it has presented a wide range of opportunities and challenges to these outside court settlement techniques.

ODR has allowed people to have easy access to mediation, where the process becomes cost-efficient. In this online mediation, the role of the mediator remains the same. Still, the challenge this technological advancement has, concerns the ethical principles from which mediation has its roots.

Mediation has a few ethics that have to be followed so that the process becomes smooth and efficient. These ethical principles are:

1. Neutrality: The mediator or middleman shall be neutral towards both parties and shall provide equal opportunities to put forward their case. The mediator shall sign an NOC with the parties wherein he specifies that he has neither met the parties before nor has any personal connection to any of the parties in the dispute.
2. Confidentiality: One of the most essential principles of mediation is the confidentiality of the information that the mediator receives from both parties. The mediator cannot disclose any facts to either of the parties until and unless he has obtained the consent of

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<sup>1</sup> Code of Civil Procedure, ADR Rules, § 4, No.5, Act of Parliament, 1908 (India)



the concerned party, nor can he disclose the dispute to any third party not connected to the dispute.

3. Voluntary: This is an essential ingredient of mediation, wherein both parties have to provide their consent to mediate rather than fight in a court case. No party shall be forced or coerced into mediation by the other party. It is according to the free will of the party that they sit for mediation.

### **HISTORY OF MEDIATION IN INDIA**

The practice of mediation, a method of resolving disputes amicably without litigation, has deep roots in various ancient civilizations, including post-Vedic India, ancient Rome, and tribal communities globally. In India, the origins of mediation can be traced back to the Vedic period (around 4000 to 1000 B.C.), where unwritten laws based on divine wisdom, reason, and prudence were used to resolve disputes. This principle of mediation, focusing on wisdom and prudence, is still respected today. Ancient Indian texts reveal that informal dispute resolution mechanisms, like the Kula, Shreni, and Puga, were widely practiced. These early forms of mediation facilitated the resolution of disputes within families, communities, and trade guilds. The Mahajans, respected businessmen, played a crucial role in mediating business disputes, a practice that continued until British colonization. The British, however, imposed their adversarial legal system, which marginalized traditional Indian mediation practices.

Mediation saw a significant resurgence in the United States during the 1970s. Two schools of thought emerged: one advocating for mediation as an extension of the legal system, and the other promoting mediation as an independent process. The 1976 Pound Conference was a milestone, highlighting the need for alternatives to litigation due to rising costs and delays in the judicial system. This conference led to the development of concepts such as the multi-door courthouse and neighborhood justice center, aimed at providing various dispute resolution processes under one roof. These concepts emphasized the importance of negotiation and communication in resolving disputes, with a neutral party facilitating the process. In India, mediation received legislative recognition with the Industrial Disputes Act of 1947<sup>2</sup>, which mandated mediators to settle industrial disputes. The Arbitration Act of 1940<sup>3</sup> and the Civil Procedure Code of 1908<sup>4</sup> also acknowledged arbitration and conciliation. The establishment

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<sup>2</sup> Industrial Dispute Act, No. 14, Act of Parliament, 1947 (India)

<sup>3</sup> The Arbitration act, No. 10, Act of Parliament, 1940 (India)

<sup>4</sup> Code of Civil Procedure, No.5, Act of Parliament, 1908 (India)

of the National Legal Services Authority under the Legal Services Authorities Act of 1987<sup>5</sup> further promoted mediation. All these acts led to the introduction of the Mediation Act of 2023<sup>6</sup>, which gave proper recognition to the process of mediation in India.

### **ONLINE MEDIATION IN THE MEDIATION ACT OF 2023**

The Mediation Act, of 2023<sup>7</sup>, was one of the most long-awaited pieces of legislation to promote and facilitate mediation as an effective and successful dispute resolution approach in our country. This comprehensive piece of information recognizes the scope of online mediation as one of the salient features of the said legislation. Section 30<sup>8</sup> of the Act gives parties the autonomy to choose between online and virtual mediation, which is considered to take place within a competent court of justice having jurisdiction over the matter. Therefore, this provision renders online mediation as an acceptable and a cost-effective method, as compared to conventional mediation. The Act also prescribes that communication mechanisms used for online mediation ensure the confidentiality and integrity of the proceedings. The drawback to this provision is that it lacks various aspects that have to be considered before engaging in online procedures which then lead to challenges faced by both the parties and the mediator. There is a need for specific guidelines or rules that provide for a procedure for online mediation similar to what international organizations are enacting. JAMS, a US-based organization that deals in ADR, released new rules related to ADR in April 2024 concerning AI and technology. The rules are designed to handle the growing complexities and legal challenges in AI-related matters, focusing on the protection of proprietary information.<sup>9</sup> India also needs similar rules or guidelines that are related to Online Dispute Resolution.

### **CHALLENGES**

#### **1. Confidentiality Concerns**

With the advancement of technology, the rates of cybercrime have increased. This results in many data being leaked and hacked. In the online mode of mediation, it is evident that such criminal activities can take place where confidential information and data shared by the parties may get leaked. Hence, it is essential to protect this crucial

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<sup>5</sup> Legal Services Authorities Act, No. 39, Act of Parliament, 1987 (India)

<sup>6</sup> The Mediation Act, No. 32, Act of Parliament, 2023 (India)

<sup>7</sup> Id

<sup>8</sup> Supra Note 6 § 30

<sup>9</sup> Surya Gopalan, Preeti Bhagnani, 'JAMS unveils new arbitration rules for artificial intelligence disputes', 2024, <https://www.whitecase.com/insight-our-thinking/jams-unveils-new-arbitration-rules-artificial-intelligence-disputes> Accessed October 15, 2024

information to maintain and follow the principle of confidentiality. The mediator shall be responsible for taking precautionary steps to safeguard against any leak, breach, or cybercrime.

## 2. Impartiality and neutrality

It is essential in a mediation setup to understand the parties from all angles, including the emotional angle. Digital communication may lead to a lack of proper understanding of the emotional dynamics of parties since the online presence does not depict the party's body language or any other emotional feelings. Difficulties are also encountered, from poor video quality, possible lags, or even a poor understanding of text communication. Reading all nonverbal cues and managing emotions are much-needed mediation skills in contrast to traditional mediation. Mediations need to use different methods to assess the emotional states of the parties and evolve various means to understand non-verbal communication through online channels.

## 3. Technology Dependence

The evolution of technology and the introduction of online mediation can lead to an over-reliance on technology, which comes with many unforeseen problems. The online platform is an evolving space where technical glitches and malfunctions can easily disturb mediation. This may lead to gaps in understanding and relating to the situation. The mediation needs different plans in case of a glitch or malfunction of the online platform.

## 4. Ethical Decision-Making

The sense of mediation is a joint discussion medium for the parties and transparency from both parties to the mediator. The mediator will have both parties' arguments and contentions for an unbiased decision-making process. The mediator quickly judges people within a closed environment through body language. In the online world, the mediator requires support to know whether parties provide honest information or hide a vital fact. This will result in complications associated with transparency and the mediator's decision-making.

## 5. Informed Consent in the Digital Age

In the virtual world, informed consent requires that people be fully aware of what data



is being collected and its storage and use. The users should be informed of any risks that may be entailed while using the platform so that they can opt out of certain features. The mediator should also explain how information transmitted during the online caucuses or confidential communication of the mediator with one of the parties will be handled. The rules shall be communicated to the parties before the mediation process, and any malpractice that the parties may indulge in on the online platform shall lead to the dismissal of the mediation process. In order to ensure the non-disclosure of private caucus information, the mediator shall plan and opt for safe platforms in digital technology.

6. Power Imbalances and the Digital Divide:

The transition to online mediation should be equitable and bridge the digital divide. Some parties require access to reliable technology, which may give them an unfair edge over the other party. Mediators must, therefore, be ready to offer alternative means of participation with a guarantee that justice will be served equally to those who lack proper access to technology or cannot boast of these skills of technological advancement.

**STRATEGIES FOR BALANCING INNOVATION AND INTEGRITY**

1. Ethical Guidelines

The stages of mediation are full of ethical principles that have to be followed for a smooth conduct of the process. The mediator has to develop comprehensive and strict ethical guidelines concerning the digital mediator to benefit from a straightforward mediation process. The mediator must educate the parties about the challenges the online mediation can pose and provide prior information about the platform, ethical principles, security guidelines and measures, confidential policies, and other limitations that may arise due to technical glitches or issues. Thus, some ground rules must be communicated so there is no scope for bias or other data breaches of information.

2. Training

This evolution of mediation in digital platforms requires a proper training course for professional mediators. This will help them find solutions to the challenges that arise in online mediation and even help them provide information and education to the parties about the guidelines and ethics in the online mediation process. Training in safety

measures against cyber-crimes and data breaches, understanding the emotional situation of the parties through online modes, understanding and tackling glitches or malfunctions, etc., shall help mediators conduct a smooth mediation process. Such training will ensure that the parties are in private, distraction-free environments, and maintaining appropriate online etiquette helps maintain a professional and respectful atmosphere.

### 3. Technological Integration

Incorporating secure, user-friendly digital platforms designed with mediation ethics in mind promotes integrity while leveraging innovation. It is vital to have a flexible approach that allows for a combination of online and in-person sessions that may be beneficial in some instances, catering to individual participants. It is equally essential for the parties to meet the mediator offline so that it becomes easy for the mediator to understand the parties' state of mind and he can be fairer in decision making.

### 4. Continuous Evaluation and Improvement

This means the mediator requires recurrent audits and feedback from the parties to check the ethical compliance level or emerging challenges in online mediation practices. This will help assess the performance of the mediators in mediating through the internet and improve how they use moral principles in online platforms.

## CONCLUSION

The evolution of mediation from ancient times to date has marked the fact that through various changes in systems or processes, mediation remains a strong and viable alternative for litigation. Mediation has been present in many cultures in historical times due to the basis of wisdom, prudence, and community orientation in handling and solving disputes and colonial periods imposed adversarial legal systems on many colonies. India is no exception, but mediation continued to rise and evolve to meet the need for quick and inexpensive dispute resolution methods.

Online dispute resolution, or ODR, has revolutionized mediation by utilizing digital platforms for communication and negotiation between two parties. Here are some benefits that ODR offers. They are accessible, cost-effective, and convenient; these can make mediation much more appealing and accessible in the fast world where everything has been made accessible

through technology. Switching to online mediation, though, is a difficult step. Confidentiality, neutrality, dependence on technology, and the digital divide are essential barriers that must be transcended to retain mediation's integrity and effectiveness.

Ethical norms must ensure mediation is a just process with no inequalities. Neutrality, confidentiality, and even digital conduct- voluntary participation of parties is a must. Training and educating mediators about digital tools and techniques would be necessary for online mediation. Secure and user-friendly technological solutions and flexible approaches permit, in some cases, doing online sessions, and some sort of offline also complements the mediation experience.

The evolution of mediation balance innovation with principles such as ethics will be addressed and solved through periodic assessment and feedback systems so that mediation will remain trusted and reliable for conflict resolution. Mediation, embracing the advancing technologies while keeping its core ethical principles, will continue to provide an appropriate alternative to the traditional litigation process and to ensure its delivery toward more collaborative and harmonious conflict resolution.



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