

# KRISHNA AND MEDIATION



**V. K. Ahuja**



**National Law University and  
Judicial Academy, Assam**

**2023**

# KRISHNA AND MEDIATION

**Professor (Dr.) V. K. Ahuja**

Vice – Chancellor

National Law University and  
Judicial Academy, Assam

Senior Professor

Faculty of Law, University of Delhi

National Law University  
and Judicial Academy

Hajo Road, Amingaon, Kamrup

Guwahati – 781031

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Dedicated  
to  
Lord Krishna  
The Supreme Godhead





*Ram Nath Kovind*

FORMER PRESIDENT OF INDIA

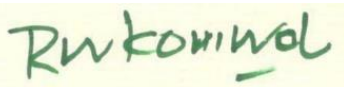
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## MESSAGE

With the passage of time pendency across all courts have grown manifold, which has introduced the pertinence of Mediation as an important tool for timely dispensation of justice. The endeavour of Prof. V.K. Ahuja in infusing this tool with primeval wisdom in his book titled **'Krishna and Mediation'** is praise worthy. Lord Krishna, a personification of ancient Indian wisdom, has always explained us various aspects of life including polity, warfare, emancipation of soul and also **mediation**. The book endeavours to invoke the pragmatic wisdom of Lord Krishna in order to inform and reestablish **mediation** as a mechanism for effective and non-adversarial delivery of justice.

The book by Prof. Ahuja takes us back to the ancient Indian values and vouches for the pertinence of the same in the modern context, thereby, dwelling upon the organic connect between the antiquity and the posterity. The book's attempt to conjugate a post-modern legal concept, such as Mediation, with archival tenets, such as the philosophy of Lord Krishna, reinforces its appeal. In many ways this book is a recountal of the values of the old times, whose relevance in the modern context has been echoed by many thinkers. I am sure the book will be a useful addition to the literature on mediation theory of law.

I congratulate Prof. V.K Ahuja for bringing out such an enriching publication and wish him success for all his scholarly endeavours.



Ram Nath Kovind

**Hrishikesh Roy**  
Judge  
Supreme Court of India



6, Tughlak Road,  
New Delhi-110 011  
Tel. :011-23793479

## Message

The way Prof. (Dr.) V.K. Ahuja has integrated Lord Krishna's teachings and wisdom into the Mediation process is fairly innovative. Use of verses from Bhagavad Gita, poems and parables from sacred scriptures keep the readers engaged and seamlessly convey the importance of compassion, self-awareness, and detachment in Mediation. I congratulate him for bringing forth a cultural and spiritual approach while dealing with Mediation and noticing the significance of judicial pronouncements to create a continuous dialogue between jurisprudence and spirituality. Anyone interested in the practice of Mediation or the teachings of Lord Krishna would benefit from this book not merely for its pearls of wisdom but also in the journey towards greater peace and self understanding.



(Hrishikesh Roy)

1<sup>st</sup> March 2023  
New Delhi





**SANDEEP MEHTA**  
CHIEF JUSTICE



**GAUHATI HIGH COURT**  
(High Court of Assam, Nagaland,  
Mizoram and Arunachal Pradesh)  
GUWAHATI - 781001 ASSAM  
0361-2735866 / 2735877 (O)  
2735955 (FAX)  
e-mail : hcjsecretariat@yahoo.in

15<sup>th</sup> March, 2023

## Message

I am delighted to pen down for the book 'Krishna and Mediation' by Prof. (Dr.) V.K. Ahuja. I want to congratulate the author for this brilliant piece of writing where he has laid greater emphasis on the role of mediation in settling disputes or conflict from time immemorial to the present day.

Conflict or dispute is an ever present social process in human society. The concept of mediation as a tool for dispute resolution is deeply rooted in the Indian ethos, and it has been used for much longer than one can imagine. In the monumental pieces of Hindu literature such as the Shrimad Bhagavad Gita and the Mahabharata, one can find many accounts of Lord Krishna playing the role of a mediator to resolve the conflict between the Pandavas and the Kauravas. According to the epic Mahabharata, Lord Krishna used all the mediation skills like Sama, Dama, Danda, and

Bheda in his attempt to maintain peace between the parties. Though not directly, the concept of mediation in the legal or judicial system has found its roots in history. With the increasing numbers and pendency of cases, increasing burden on courts, mediation is gaining popularity in the Indian judicial system. In recent years, mediation as an alternative dispute resolution mechanism has received much impetus, and for its effective implementation. Several discussions, conferences and training programmes have been organized to provide training to the mediators throughout the country from time to time.

I extend my heartiest congratulations to the author for his commendable effort to present such a significant topic by revisiting its historical genesis in a lucid manner for the benefit of all the readers. I am confident that this book will receive wide attention from different sections of readers.

I wish the book a great success.



(Sandeep Mehta)

*Justice Ujjal Bhuyan*  
CHIEF JUSTICE



HIGH COURT FOR THE STATE OF TELANGANA  
Madina Circle, Ghansi Bazar, Hyderabad – 500 066  
Phone : Off : 040 – 2344 6333

## Foreword

Professor (Dr.) V. K. Ahuja, a soft spoken and genteel academic, is presently the Vice Chancellor of National Law University and Judicial Academy, Assam, besides being a Senior Professor in the Faculty of Law, University of Delhi.

He has written the book titled *Krishna and Mediation*. On going through the manuscript, I find that he has written the book with a great deal of devotion and conviction.

Mediation is one of the modes of alternative dispute resolution. It is not that alternative dispute resolution or mediation had entered into the judicial landscape of the country only recently with the insertion of Section 89 in the Code of Civil Procedure, 1908 by way of the Civil Procedure (Amendment) Act, 1999. Section 89 of the Code of Civil Procedure has only given statutory recognition to this traditional method of dispute resolution. Settlement of dispute at the intervention of

family elders or village elders or community elders is ingrained in our Indian tradition and culture. The *bhakti movement* in Assam is basically showing unquestioning reverence to Lord Krishna or to the incarnations of Lord Vishnu. As an adjunct to such devotion an important institution called *namghar* has come up literally in every village of the Brahmaputra valley where the impact of the *bhakti* movement led by Mahapurush Srimanta Sankardev is mostly felt. *Namghars* are centres of not only prayers or religious discourse but also a place to perform dramatic presentations centering around the theme of devotion called *bhaona*. Besides, those have also emerged as places where the village elders or the community elders sit together to discuss and resolve personal as well as community disputes.

Mediation has emerged as an effective mode of dispute resolution. It is a voluntary, cooperative process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement. It is a settlement process which is informal whereby disputing parties can settle their disputes and reach a mutually acceptable agreement. It allows flexibility, control and

participation of the disputing parties. Though the mediator plays an important role, his role is that of a facilitator. He must be an impartial and neutral third person. While he facilitates resolution of the dispute, he would not suggest what should be the resolution. A mediator does not impose a solution but creates a conducive environment in which the disputing parties can resolve their disputes. Thus mediation is a flexible process and does not interfere with party autonomy; rather it is a process which respects party autonomy.

Mediation is a far more satisfactory way of resolving disputes as compared to litigation or even arbitration.

However, there is a general misconception that mediation is only suitable for resolution of matrimonial or family disputes. As explained by the Supreme Court in *Afcons Infrastructure v. Cherian Varkey Construction*<sup>1</sup>, all disputes of civil nature be it related to trade, commerce and contracts are suitable for dispute

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<sup>1</sup> (2010) 8 SCC 24.

resolution through mediation; not necessarily confined to inter-personal or family disputes.

Statistics would reveal that application of mediation as a tool for dispute resolution is quite uneven in the country. While in some centres, it has taken firm roots with reasonable success, it is yet to be fully endorsed and adopted in other parts of the country.

As the dockets of our courts are overflowing with litigation and also arbitration becoming more and more expensive, it is necessary that all the stakeholders adopt and apply the mediation method of dispute resolution.

Though Abraham Lincoln had long ago said: discourage litigation; persuade your neighbours to compromise wherever you can; however, the reality is that disputes are inevitable, more so when the society is becoming more and more complex.

Steeped as we are in the adversarial system of litigation, it is difficult to shift gear midstream to adopt a settlement culture including by way of mediation. It is therefore essential that a settlement culture is inculcated

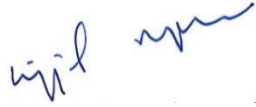
amongst the law students and young lawyers and this should start from the law schools itself. Profession of law has undergone a tremendous change and going by the trend, it is posed for further transformation. A lawyer is not only the paid spokesperson of his client. The role of the lawyer has to be seen as a peacemaker, thus truly becoming an officer of the court. As Abraham Lincoln used to say, as a peacemaker the lawyer has a superior opportunity of being a good man; there will still be business enough; a moral tone ought to be infused into the profession.

About lawyers as peacemakers, Mahatma Gandhi had said that the true function of a lawyer is to unite parties riven asunder. He had said that a large part of twenty years of his practice as a lawyer was occupied in bringing about private compromises of hundreds of cases thereby losing nothing, not even money and *certainly not my soul*, as he had said.

I am sure *Krishna and Mediation* will, be a useful addition to the literature on mediation jurisprudence.



I congratulate Professor Ahuja for his painstaking efforts and I extend my best wishes to him.



(Justice Ujjal Bhuyan)

March 10, 2023

Hyderabad

**Suman Shyam**  
Judge, Gauhati High Court



GAUHATI HIGH COURT  
Guwahati – 781001 Assam  
sumanshyam.2000@gmail.com  
Mobile : 94353-75158

## Foreword

My acquaintance with Prof. (Dr.) V. K. Ahuja dates back almost to the day when he took over as the Vice Chancellor of the National Law University and Judicial Academy, Assam. As a member of the Executive Council of the Law University, I have had the good fortune of interacting with Prof. (Dr.) V. K. Ahuja on a number of occasions and I found that he is not only a very learned person but is also extremely focused on his work. Prof. (Dr.) Ahuja has had a brilliant academic career having remarkable scholarly qualities. He has a number of important publications to his credit, which include books on the "Intellectual Property Rights" and "International Law". I have found that all his books were published by Publishing Companies of International repute, such as Lexis Nexis and have been very well received by the students of law.

While functioning as the Chairperson of the Gauhati High Court Mediation Committee, I had the occasion to be a part of a number of training programmes organised for the mediators and the referral Judges. I was extremely

impressed by the keen interest shown by the prospective mediators to take up mediation as a career option. It was during that time, I realised the potential of mediation as a very effective tool of Alternative Dispute Resolution and the promise it holds for the future.

The book "Krishna and Mediation" lays down a thoughtful account of the genesis of mediation, which can be traced back to the Great Indian Epics, *Ramayana* and *Mahabharata* and even before that. In *DwarpurYuga*, Lord Krishna, the Supreme God head had himself mediated between the *Kauravas* and *Panda vas* to avert the Kurukshetra war but the process ended in failure due to the obstinacy of Duryodhana, the son of king Dhritrashtra. The role of Lord Krishna as a Mediator has been eruditely depicted in the book. I find that the extracts of the verses from the Gita as well as the elucidation of the stories, poems and the principles of "Dharma" in the book are relevant even in the present day context and have greatly enriched the book.

With the rise in the number of conflicts and disputes in the modern society and the growing number of litigations, Alternative Dispute Resolution(ADR) mechanisms such

as mediation is gaining popularity across the globe. The Indian Courts are today overflowing with litigations. The other alternative modes of dispute Redressal such as, arbitration is proving to be ineffective due to the rigmaroles of the legal process involved therein. Under the circumstances, mediation is increasingly becoming the preferred alternative mode of dispute redressal. Due to its multifarious advantages, mediation is gaining acceptability amongst the public at a rapid pace and it is believed that mediation would have a stellar role in resolution of dispute in the coming days. In the words of Joseph Grynbaum, the founder of Mediation Resolution International, LLC "an ounce of mediation is worth a pound of arbitration and a ton of litigation".

It is in the above context, I feel that the endeavour of the author is truly commendable. This book will be of immense help not only to the experts in the field of mediation but also to the public in general in helping them understand the nuances of the mediation process and also the manner in which the same affords an opportunity to resolve dispute while promoting peace in the society. I recommend the book "Krishna and Mediation" to the

Judges, Lawyers, Mediators and the Public in general, as the same, in my opinion, makes excellent reading.

A handwritten signature in blue ink, consisting of a stylized 'S' followed by 'Shyam' and a horizontal line.

Sri Suman Shyam

Judge, Gauhati High Court

**Prof.(Dr.) Upendra Baxi**  
Emeritus Professor of Law

University of Warwick  
University of Delhi

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## Foreword

Professor (Dr.) Virendra Ahuja has written a wise and thought-provoking monograph on mediation, which he traces back to classical ancient Hindu law and jurisprudence and Lord Krishna. The monograph is about Lord Krishna and mediation not about the law and policy regarding mediation which the learned author also knows well. Indian mediators often say that the theory and practice of mediation have divine origins and function. But this is the first book to systemically study the celestial origins of the theory and practice of mediation in India. What makes Dr. Ahuja's work interesting is the effort to show that while democratic constitutionalism in the West and India, began with the total repudiation of the divine rights of kings to rule, the best way to study mediation is to explore the divine origin of mediation in India.

This is accordingly aimed not as a legal treatise but a sustained meditation on mediation. It is not about the

four recognized forms of contemporary alternate dispute resolution mechanisms: namely, Arbitration, Conciliation, Judicial settlement including settlement through Lok Adalat and Mediation. These remain essentially court decongestion measures, now celebrated in an elaborate judicial discourse of the Supreme Court in *Salem Advocate Bar v. Union of India* (as late as 2 August 2005).

Tantalizingly, Professor Ahuja reminds us about epochal mediation done “by Angada between Rama and Ravana in *Treta Yuga*; by Lord Krishna between *Kauravas* and *Pandavas* in *Dwapar Yuga*; and by Supreme Court in *Rama Janam Bhoomi* case”. He laments that “all the three mediations failed” but reminds us that these were grand failures which convey to us about its “potential as ... dispute settlement mode”, and now stand invoked in an “endless number of cases in the informal manner”. However, the learned author says finally that “law and justice also emanate from Lord Krishna as ... stated ... in the *Mahabharata*: “यतः कृष्णस्ततो धर्मो यतो धर्मस्ततो जयः”.

Dr. Ahuja rightly maintains that “Mahabharata shows how Krishna was an ideal mediator, who did his best to avert war between *Kauravas* and *Pandavas*. Krishna, being Lord of the Universe, knew it well that mediation would be a failed attempt”, he still gave “mediation a chance to teach humanity that every possible effort should be made till the last minute to resolve disputes”. Giving ‘mediation a chance’ is a crucial turn of phrase because common law /colonial heritage presents a legal fate winner –take– it –all approach. In the context of people’s dispute settlement at Rangpur, Gujarat, I have tried to show how and why disputes and even conflicts move from *takrar* to *karar*<sup>1</sup> and truly participative democratic results are achieved by mediation.

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<sup>1</sup> See Upendra Baxi, “From Takrar to Karar: The Lok Adalat at Rangpur: A Preliminary Study, *J. of Const. & Parliamentary Studies* 53 (1916); see further Epilogue of Upendra Baxi in *The Crisis of Indian Legal System* (Delhi: Vikas, 1982). It is interesting to note that neo–Gandhian leader of Lok Adalat recourses to forms of mediation through customs of the Indigenous peoples and from Mahatma Gandhi rather than Lord Krishna.



Dr. Ahuja stresses, rightly, that the great epic narrative of how Lord Krishna offered to mediate among *Kaurava* and *Pandavas* was a way to make the war and bloodshed less and less inevitable. But this was, what we will call today, a good faith effort; Lord Krishna's acts of mediation and conciliation were in good faith, but one side maintained bad faith all along making all efforts futile. One must appreciate that Dr. Ahuja couches the entire narrative in terms of protean conceptions of *Dharma Yuddha*, which extends to the domain both of conflicts and disputes (which the learned author elucidates at the outset).

This is a deep work, and I invite empathetic readers to soulfully engage with it, to understand more fully some central contributions and perplexities surrounding the celestial origins of mediation.

Upendra Baxi

Delhi

21 March 2023

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# Preface

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The Book Krishna and Mediation is a humble attempt by the author to go back into the history and look at the institution of mediation in India. The Book is not written as a legal treatise. It is written from the point of view of layman and to understand how mediation prevailed in India from ancient time to settle disputes and bring peace and harmony to the society.

Though the institution of mediation could be traced back to Vedic period; and *Treta Yuga*, where it was invoked to avert war between Rama and Ravana, the focus however, has been made on Krishna doing mediation in *Dwapar Yuga*. The reason for doing so is that Krishna has been considered as Lord of the Universe; and when the Lord of Universe himself adopts a particular mode of dispute resolution, it motivates the entire society and encourages people to resolve their disputes and differences through that mode.

The indigenous justice delivery system included *Kulani, Sreni, Puga, Mahajan, Mediation and Panchayats*. Mediation had always been one of the most important methods of resolving disputes and conflicts. Mediation was done by Angada between Rama and Ravana in *Treta Yuga*; by Lord Krishna between Kauravas and Pandavas in *Dwapar Yuga*; and by Supreme Court in *Ram Janambhoomi* case. Unfortunately, all the three mediations failed. Nevertheless, the community learnt its potential as a dispute settlement mode and invoked it in endless number of cases in the informal manner.

The Book discusses conflict and dispute in detail. It also discusses many facets of Lord Krishna. Emphasis has been made on Lord Krishna as Mediator. The Book also discusses Mediation in India and at the international level in contemporary times. It also discusses about the pendency of cases which is going to touch the figure of 5 crores, which is more than the population of several countries taken together. The Book discusses how mediation may become game changer and bring down the pendency of cases.

The references have been made to *dharma*, verses of Gita, stories, poem, etc. to exemplify certain facts.

I sincerely hope that the Book will come to the expectations of the readers.

Prof. (Dr.) V.K. Ahuja

Guwahati

21 March 2023



# Acknowledgment

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My source of inspiration to write the Book *Krishna and Meditation* is none other than Lord Krishna, himself. The more I read about Krishna, the more I was inspired. I express my sincere gratitude to Lord Krishna for being my inspiration for writing this book.

Parents are always a source of inspiration for doing any good thing. My parents and the parents of my wife Shalini (all of whom had left for heavenly abode) were very religious in nature and were always a source of motivation for my professional journey. I was always encouraged by them whenever I started any academic project. I fall short of words to express my gratitude to them. Though their physical existence is not there, I can always feel their blessings.

I am thankful to my wife Shalini Ahuja who had been assisting me in the writing of this book. I am extremely thankful to my daughter Parthvi Ahuja, Advocate for sparing her valuable time to design the cover page for



the book. I am also thankful to Prapti Singh, Advocate and my son Lakshya Ahuja for assisting me in the research.

I am also thankful to Hon'ble Mr. Justice Mir Alfaz Ali, Director, Judicial Academy, Assam and former judge, Gauhati High Court; Prof. R.N. Sharma, former Vice Chancellor, IASE University and former Head and Dean, Faculty of Law, Jai Narain Vyas University, Jodhpur; and Dr. G. R. Raghvendra, former Joint Secretary, Department of Justice, Ministry of Law and Justice, Government of India for reviewing the manuscript of the book and providing their invaluable inputs.

I am also thankful to Hon'ble Mr. Justice Hrishikesh Roy, Judge, Supreme Court of India, Hon'ble Mr. Justice Sandeep Mehta, Chief Justice, Gauhati High Court, Hon'ble Mr. Justice Ujjal Bhuyan, Chief Justice, Telangana High Court, and Hon'ble Mr. Justice Suman Shyam, Judge, Gauhati High Court for sending their valuable messages and Forewords for the Book.

I am also thankful to Professor (Dr.) Upendra Baxi, Guru of Gurus, for taking the pain of writing Foreword for the Book.

My special thanks are due to Mr. Satyajit, System Analyst for providing all technical support. The template of the Book has been designed by him. Further, he has done all the type setting and converted the Book in Flip Book for uploading on the website of National Law University and Judicial Academy, Assam.

I am also thankful to Dr. Kankana Baishya, Assistant Librarian to get ISBN for the Book. I am also thankful to Dr. Indranoshee Das, Registrar and Dr. Nandrani Choudhury for providing institutional support to publish this Book.

Prof.(Dr.) V.K. Ahuja



# Chapter 1

## Introduction

“To mediate is a divine function.”

Justice T.S. Thakur  
Former Chief Justice of India

# 1. Introduction

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“The culture of settlement by an informal agency is in the roots of our society, where matters are resolved at the very local level by elderly or reputed persons”.<sup>1</sup>

Justice Sharad A. Bobde  
Former Chief Justice of India

Conflicts and disputes, being part of human behaviour, have always been found in human civilization. It is, therefore, said that conflicts are as old as human civilization. No society in the world can be free from conflicts and disputes.

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<sup>1</sup> Justice Sharad A. Bobde, “Foreword” in V.K. Ahuja, Ashutosh Mishra, and Ashutosh Acharaya, *Mediation* (2020).

Justice N V Ramana, the then Chief Justice of India once said, “conflicts are unavoidable in any society for a variety of reasons – political, economic, social, cultural and religious. And with conflicts, there is also the need to develop mechanisms for conflict resolution”.<sup>2</sup>

African community traditionally adopted a positive mindset on conflict and did not find anything wrong with that. Professor Isaac Olawale Albert, who was Director of the Institute for Peace and Strategic Studies at the University of Ibadan, Nigeria made important observation on conflict in the following words:

“There is nothing wrong with conflict; it is a critical mechanism by which goals and aspirations of

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<sup>2</sup> Speech of Justice N. V. Ramana on “Mediation for Everyone: Realizing Mediation’s Potential in India” at India-Singapore Mediation Summit – 2021, available at <https://www.deccanherald.com/national/mahabharata-early-attempt-at-mediation-a-tool-of-social-justice-chief-justice-n-v-ramana-1009719.html>

individuals and groups are articulated; it is a channel for a definition of creative solutions to human problems and means to creative solution to human problems and a means to the development of a collective identity.”<sup>3</sup>

Justice A.K. Sikri states that “a conflict emerges whenever two or more persons seek to possess the same object, occupy the same space or same exclusive position, play incompatible roles or undertake mutually incompatible means for achieving their purposes.”<sup>4</sup> Conflicts may be referred as views of two persons who look at a situation in different manner from their own perspectives by putting their interest above one another.

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<sup>3</sup> K.S. Sarma, “Traditional Mediation Practices in India and other Cultures” in E-Mediation Writings, *Mediation Compendium* (2021), pp. 46–52, at p. 50.

<sup>4</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation in Sudhanshu Batra”, et.al. (eds.), *The Power of Mediation* (2020), p. 10.



According to Amarjit Singh Chandhiok, “conflicts and disputes are perhaps the creative ailments of human existence”.<sup>5</sup>

Generally, the terms “conflict” and “dispute” are used interchangeably. However, these terms are different from each other. The term “conflict refers to a broad area of issues and within this broad area, specific disputes can arise”. In other words, disputes stem from conflicts.<sup>6</sup> Further, the nature of conflicts is more serious and sensitive in comparison to disputes. Conflicts are very volatile in terms of resolution, whereas “disputes can be easily resolved by dealing with the specific issue at hand and coming to a final

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<sup>5</sup> Amarjit Singh Chandhiok quoted in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 8.

<sup>6</sup> Anuja Saxena, “Conflict and Dispute: Understanding the Misunderstanding” in E-Mediation Writings, *Mediation Compendium* (2021), pp. 9–21, at p. 11.

determination”.<sup>7</sup> In other words, conflict is genera, whereas dispute is its specie.

Since it is next to impossible to have a conflict and dispute free society, the important thing, therefore, is how to address those conflicts and disputes in the most effective, faster and affordable manner, because unattended conflicts and disputes may result in unwarranted situations leading to commission of crimes sometimes. Such a situation may pose law and order problem and disturb the peace and harmony in the society. Sometimes, unresolved differences between two countries, when escalated, take the shape of war. Between differences and war, there comes various stages, viz. disagreement, problem, dispute, conflict, and violence.<sup>8</sup> Every society faces this challenge; therefore, a robust justice

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<sup>7</sup> See also “Difference between Conflict and Dispute” available at <https://www.differencebetween.com/difference-between-conflict-and-vs-dispute/>

<sup>8</sup> See MCPC, Supreme Court, *Mediation Training Manual of India*, p. 10.

delivery system is *sine qua non* for the orderly development of any society.<sup>9</sup>

The indigenous justice delivery system in India was based on the principle “यतो धर्मस्ततो जयः” which means that where there is righteousness (*dharma*), there is victory (*jayah*). This principle has been originated from a verse in the epic *Mahabharata* – यतः कृष्णस्ततो धर्मो यतो धर्मस्ततो जयः । This means that victory always remains on the side of *dharma* (righteousness), and where there is Krishna, there is *dharma* (righteousness).<sup>10</sup> In other words, where there is Krishna, there is *dharma*, and where there is *dharma*, there is victory. Law and justice emanates from Lord Krishna. “यतो धर्मस्ततो जयः” also finds a place in the logo of Supreme Court of India.

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<sup>9</sup> V. K. Ahuja and Parthvi Ahuja, “Mediation in Intellectual Property Disputes” in V.K. Ahuja, Ashutosh Mishra, and Ashutosh Acharya, *Mediation* (2020), p. 127.

<sup>10</sup> <https://www.aajtak.in/india/story/supreme-court-motto-or-tagline-and-meaning-tstp-971577-2019-11-09>

It is interesting to note that in the epic *Mahabharata*, *Kauravas* had chosen the path of *adharma* and enjoyed better life. However, they lost the ultimate war. On the other hand, *Pandavas* never left the path of *dharma* and struggled throughout their life. At the end they won the War of Kurukshetra, which was also called as *Dharma Yudha*. Lord Krishna himself was on the side of *Pandavas*, as they were fighting for *dharma*. In other words, the path of *dharma*, howsoever difficult and challenging it may be, it ultimately takes us to victory.

On the basis of above, it can easily be concluded that indigenous justice delivery system as well as the modern justice delivery system of India is inspired by none other than Lord Krishna, the Supreme Godhead.

One can very well argue that Krishna was born in *Dwapar Yuga*, more than 5000 years back only. How can one say that law and justice emanated from him for the period before his birth? Arjuna asked Krishna

a similar question in a different context. Krishna replied<sup>11</sup>:

बहूनि मे व्यतीतानि जन्मानि तव चार्जुन ।  
तान्यहं वेद सर्वाणि न त्वं वेत्थ परन्तप ॥5॥

(Krishna told Arjuna that both you and I have passed many births. I can remember all of them, but you cannot.)

Earlier also Krishna told Arjuna<sup>12</sup>:

न त्वेवाहं जातु नासं न त्वं नेमे जनाधिपाः ।  
न चैव न भविष्यामः सर्वे वयमतः परम् ॥ 12॥

(“Never was there a time when I did not exist, nor you, nor all these kings; nor in the future shall any of us cease to be”.)

Further, in verse 10.8 of Gita, Krishna says:

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<sup>11</sup> *Bhagvad Gita*, Chapter 4, verse 5.

<sup>12</sup> *Bhagvad Gita*, Chapter 2, verse 12.

अहं सर्वस्य प्रभवो मत्तः सर्वं प्रवर्तते ।  
इति मत्वा भजन्ते मां बुधा भावसमन्विताः

(I am the source of all spiritual and material worlds. Everything emanates from Me. The wise who perfectly know this engage in My devotional service and worship Me with all their hearts).

These verses make it clear that Krishna existed in all times in the past, he exists in the present and will continue to exist in the future also. Everything emanates from Krishna. One can therefore, safely draw a conclusion that law and justice also emanates from Lord Krishna as also stated through the verse:

यतः कृष्णस्ततो धर्मो यतो धर्मस्ततो जयः ।

It is not out of place to mention here that Chapter III (Fundamental Rights) and Chapter IV (Directive Principles of State Policy) in the original handwritten Constitution, carry the pictures of Lord Rama and Lord Krishna respectively, the protectors of human rights (civil and political rights as well as economic, social and cultural rights). Rama and Krishna always

advocated *dharma* (righteousness) and a peaceful life. Both of them taught that war must be avoided to the extent possible. However, if war is to be waged to protect *dharma*, such war is justifiable and should be waged.

“*Dharma*” is not to be confused with religion. It refers to righteousness. According to Rosane Rocher, “*dharma* is best translated as “righteousness” or “duty” in an encompassing religious and social spectrum”.<sup>13</sup>

A verse from Mahabharata defines *dharma* as under:

धारणाद्धर्ममित्याहुः धर्मो धारयते प्रजाः |  
यस्याद्धारणसंयुक्तं स धर्म इति निश्चयः ॥<sup>14</sup>

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<sup>13</sup> Rosane Rocher, “The Creation of Anglo-Hindu Law” in Timothy Lubin, Donald R. Davis, Jr., and Jayanth K. Krishnan, eds., *Hinduism and Law: An Introduction* (2010), p. 87.

<sup>14</sup> Mahabharata, 69.58 (*Karna Parva*).

"*Dharma*" is derived from "धारणा" (to hold). "It is "*dharma*" which holds society together". Therefore, if something is there which is capable of holding people together, it is *dharma* only. It is noteworthy that "*Manusmriti*, The Law of Manu" also lays down *dharma* for all.<sup>15</sup>

The term "*dharma*" is "closely associated with sacred law, both as an abstract notion of righteousness or justice, and in more concrete terms as the collective name for specific rules of social conduct and ritual action laid down in (or considered to be implicit in) revealed scripture ("the *Veda*")".<sup>16</sup> "The *Mimamsakas* take the *Vedas* to be the prototypical, and indeed ultimately the only, source for our knowledge of *dharma*, which they define as a

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<sup>15</sup> *Manusmriti*, The Law of Manu, available on <https://advocatetanmoy.com/2018/07/10/manusmriti-the-laws-of-manu-english/>

<sup>16</sup> Timothy Lubin, Donald R. Davis, Jr., and Jayanth K. Krishnan, "Introduction" in Timothy Lubin, Donald R. Davis, Jr., and Jayanth K. Krishnan, eds., *Hinduism and Law: An Introduction* (2010), p. 5.



*good indicated by Vedic command*". About *dharma*, Bankimchandra Chattopadhyay stated:

“[*D*]harma proclaimed by the Gita is for all men. It is the best *dharma* for him who believes in reincarnation just as well as for him who does not. It is the best *dharma* for him who is devoted to Krishna as well as for him who is not. It is the best *dharma* for him who believes in God, and also for him who does not.”<sup>17</sup>

He further states that *dharma* (ethical obligation, rule of action) in the very essence of humanity “is eternal, and so is its connection with society. It can never be the intention of God that the *dharma* proclaimed by him is *dharma* only for some specific

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<sup>17</sup> Hans Harder, ed., *Bankimchandra Chattopadhyay's Srimadbhagavadgita: Translation and Analysis* (2001), p. 60 quoted in Andrew Sartori, “The Transfiguration of Duty in Aurobindo's Essays on the Gita” in Shruti Kapila and Faisal Devji, eds., *Political Thought in Action: The Bhagavad Gita and Modern India* (2013), p. 54.

society or condition of society”.<sup>18</sup> He further writes that “it is one’s *dharma* to protect to the best of one’s abilities one’s right sanctioned by *dharma*. ... If people self-interestedly depriving others of their rights, are allowed to freely rob and thereafter enjoy others’ property, then society cannot last for even one day. In such a case all humans would suffer infinitely”.<sup>19</sup>

According to Mahatma Gandhi, “a *dharma* which does not serve practical needs is no *dharma*, it is *adharma*.”<sup>20</sup> He emphasised on the requirement of sticking to one’s true *dharma* as the Gita recommended: If we “lose our *dharma*, we lose our capacity for good works, lose both this world and the other”.<sup>21</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.*, p. 55.

<sup>20</sup> Mahatma Gandhi quoted in Dipesh Chakrabarty and Rochona Majumdar, “Gandhi’s Gita and Politics as Such” in Shruti Kapila and Faisal Devji, eds., *Political Thought in Action: The Bhagavad Gita and Modern India* (2013), p. 81.

<sup>21</sup> *Ibid.*

After failure of mediation by Krishna between *Kauravas* and *Pandavas*, Arjuna has to fight the War of Kurukshetra because of his *dharma*, which was above all his emotions, love, respect towards his kinsmen in *Kauravas*. The War of Kurukshetra is an outcome of the denial of justice to *Pandavas* by *Kauravas*. The principle of *dharma* is equally applicable for King, Ruler and Government, as the case may be. To protect territorial integrity is the *dharma* of every State. At the same time, it is also *dharma* of the State to ensure a robust justice delivery system within its territory. Therefore, it is the *dharma* of three organs of the State, most particularly, the judiciary to ensure timely delivery of justice to the people, as justice delayed is justice denied. The mounting pendency shows that State as a whole and judiciary in particular, has failed to perform this *dharma*.

Many people ask a question whether *dharma* was also meant for Krishna? If yes, then why did he allow the War of Kurukshetra to happen? The war, which was a complete devastation, has brought untold

sorrow to humankind by killing and wounding thousands of people. The war made married women widows, children orphans, and parents childless. It was well within the hands of Krishna who is the Supreme Godhead to prevent the war and save thousands of lives.

The answer to these questions can be found in Gita in verses 3.15 and 3.22 to 3.24. In verse 3.15, Krishna says to Arjuna:

कर्म ब्रह्मोद्भवं विद्धि ब्रह्माक्षरसमुद्भवम् |  
तस्मात्सर्वगतं ब्रह्म नित्यं यज्ञे प्रतिष्ठितम् ||

(The duties for human beings are described in the Vedas, and the Vedas are manifested by God Himself. Therefore, the all-pervading Lord is eternally present in acts of sacrifice).

Verse 3.15 makes it clear that it is *dharma* of every human being to perform his/her duties which have been described in Vedas, which have emanated from God Himself.

In verse 3.22, Krishna says to Arjuna:

न मे पार्थास्ति कर्तव्यं त्रिषु लोकेषु किञ्चन ।  
नानवाप्तमवाप्तव्यं वर्त एव च कर्मणि ॥

(There is no duty for Me to do in all the three worlds, O Parth, nor do I have anything to gain or attain. Yet, I am engaged in prescribed duties).

Krishna continues in verse 3.23:

यदि ह्यहं न वर्तेयं जातु कर्मण्यतन्द्रितः ।  
मम वर्त्मानुवर्तन्ते मनुष्याः पार्थ सर्वशः ॥

(For if I did not carefully perform the prescribed duties, O Parth, all men would follow My path in all respects).

Krishna further says to Arjuna in verse 3.24:

उत्सीदेयुरिमे लोका न कुर्यां कर्म चेदहम् ।  
सङ्करस्य च कर्ता स्यामुपहन्यामिमाः प्रजाः ॥

(If I ceased to perform prescribed actions, all these worlds would perish. I would be responsible for the pandemonium that would prevail, and would thereby destroy the peace of the human race).

The aforesaid verses make it clear that even though there was no duty for Krishna and He had nothing to gain or attain, He was still engaged in the prescribed duties. Further, had He failed to perform his duties carefully, all people could have followed his path in every respect; as a consequence of which the world could have faced the severe consequences. The people would have held Krishna responsible for the pandemonium which could have destroyed the peace in the society.

It is, therefore, crystal clear that Krishna also had *dharma* to perform His prescribed duties. It is also true that it was His duty to make efforts to prevent war, which He ultimately did. Krishna tried his level best by mediating between *Kauravas* and *Pandavas* in order to avert war and establish peace. When *Kauravas* did not come forward to resolve the conflict because of the stubbornness of Duryodhana, the war became imminent. At that point of time the *dharma* of Krishna was to re-establish *dharma* in the society, which he ultimately did.

Krishna has also said in verses 4.7 and 4.8 of Gita that to protect the righteous, to annihilate the wicked, and to re-establish the principles of *dharma*, I appear on this earth, millennium after millennium.

यदा यदा हि धर्मस्य ग्लानिर्भवति भारत।  
अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम् ॥

परित्राणाय साधूनां विनाशाय च दुष्कृताम् ।  
धर्मसंस्थापनार्थाय सम्भवामि युगे युगे ॥

Krishna performed his *dharma* by reminding Arjuna about his *dharma* and motivating him to wage the War of Kurukshetra, which was also known as *Dharma Yudha* (war of *dharma*). Had the war not happened, a wrong message would have gone to the people that mighty were entitled to rule and humiliate the weaker with impunity. Imagine the situation, if Draupadi, the daughter in law of King's brother could be humiliated in the open court in front of all by wicked Duryodhana and his brother, what would have been the fate of ordinary women there? *Adharma* could have prevailed over *dharma* and the

entire system made by God for the betterment of humankind could have collapsed.

Krishna has rightly motivated Arjuna to fight as it was *Dharma Yudha* (war of *dharma*), as already stated. By defeating *Kauravas* and killing all *adharmis* (people involved in sinful activities), *dharma* was re-established in the Hastinapur and *Pandavas* took over the charge.

It is noteworthy that Indian scriptures did not talk about rights. These texts provided duties for all. In other words, our scriptures advocated a duty based society and not a right based society, in which we live today .<sup>22</sup> In Gita also, Krishna said:

कर्मण्येवाधिकारस्ते मा फलेषु कदाचन |  
मा कर्मफलहेतुर्भूर्मा ते सङ्गोऽस्त्वकर्मणि ||<sup>23</sup>

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<sup>22</sup> See also “Legal Systems – Vedic Concept of Law and Jurisprudence”, available at

<https://vedicheritage.gov.in/legal-systems/>

<sup>23</sup> Shrimad Bhagwat Gita, Chapter 2, verse 47.



(You have a right to perform your prescribed duties, but you are not entitled to the fruits of your actions. Never consider yourself to be the cause of the results of your activities, nor be attached to inaction).<sup>24</sup>

It is also important to mention that Rama and Krishna should not be seen as Hindu deities only. They symbolise the Indian culture. It is also noteworthy that “*Hindutva*” and “*Hinduism*” should be seen beyond Hindus. In 1966, in *Sastri Yagnapurushadji and others v. Muldas Brudardas Vaishya and Another*,<sup>25</sup> the Supreme Court quoted Monier Williams who wrote that “it must be borne in mind that *Hinduism* is far more than a mere form of theism resting on *Brahmanism*.. The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at

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<sup>24</sup> See <https://www.holy-bhagavad-gita.org/chapter/2/verse/47>

<sup>25</sup> 1966 SCR (3) 242.

accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds.”<sup>26</sup>

In *M. Ismail Faruqi and Ors. v. Union of India & Ors. (Ayodhya case)*<sup>27</sup>, Justice Bharucha in the separate opinion for himself and Justice Ahmadi, made the following observations:

“Hinduism is a tolerant faith. It is that tolerance that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land...”.<sup>28</sup>

In *Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*<sup>29</sup>, the Supreme Court stated:

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<sup>26</sup> Monier Williams, *Religious Thought & Life In India* (1883), p. 57.

<sup>27</sup> 1994 (6) SCC 360.

<sup>28</sup> *Id.*, at p. 442.

<sup>29</sup> 1996 SCC (1) 130.

“Ordinarily, *Hindutva* is understood as a way of life or a state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism”.

Referring to earlier judgements, the Court also stated that “‘*Hinduism*’ or ‘*Hindutva*’ are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. ... in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practising the Hindu religion as a faith”. It is noteworthy that India is also known as Hindustan, though it is not an official name of the country. Hindustan is a home for people of all faiths and religions.

As already stated *Hindutva* and *Hinduism* are not confined to Hindus alone and are to be seen beyond them that is why the pictures of Lord Rama and Lord Krishna have been depicted in the Constitution as already stated.



*Lord Rama, Mata Sita and Laxman depicted in Chapter III of the original handwritten Constitution of India*



*Lord Krishna and Arjuna depicted in Chapter IV of the original handwritten Constitution of India*

Rama is considered as true guardian of the peoples' rights. He protected everyone who approached him. Be it Sugariv or Vibhishan, He gave everyone full protection and assisted them to get their rights. He was humble to eat tribeswoman Mata Shabari's *ber*/berries which she first tasted herself and then gave Rama to eat. For Rama, everyone was equal and He blessed all his devotees. Rama always performed his *rajdharma* and never crossed the limits which were prescribed by his *dharma*. Everybody was happy during Rama's time as a King.

Today, we think of making India as *Rama Rajya*. *Rama Rajya* does not mean Hindu nation. It means a nation which is governed by rule of *dharma*, and has protected boundaries, prosperity, progressive development, happiness and harmony among people. *Rama Rajya* works for the welfare of people and adopts a people-centric approach.<sup>30</sup> Justice

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<sup>30</sup> See also Tejasvi Surya and Suyash Pande, "Why Painting of Ram in India's Constitution Matters", available

used to be done to everyone within no time during *Rama Rajya*.

The characters of Rama, Sita, Lakshmana, Hanuman, and Ravana have been defined beautifully in the following words:

“Ram is your soul. Sita is your heart. Ravana is your mind that steals your heart from your soul. Lakshmana is your conscience, always with you and active on your behalf. Hanuman is your intuition and courage that help retrieve your heart to re-animate your soul”.<sup>31</sup>

Similarly, the picture of Krishna and Arjuna gives us a message that each one of us is duty bound to perform our *dharma* without fail.

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at <https://theprint.in/opinion/why-painting-of-ram-in-indian-constitution-matters/592160/>

<sup>31</sup> See also

<https://www.hindustantimes.com/india/stories-woven-into-a-kashmiri-shawl/story-kpR0f1edReRdNTJ5nU5uuJ.html>

It is within the four corners of the thing to mention that culture of India is one of the oldest in the world. The western scholars have also accepted it as the most impactful culture. Muller once wrote that “he wished to direct the other’s interest to the “real India”, in which lay the primitive origins of European culture”. He further stated that “... the older literature in India, the Vedic and the Buddhistic ... is where ... we can watch a real growth from the simplest beginnings to the highest concepts which the human mind is capable of ...”.<sup>32</sup>

The concepts of “*dharma*” and “justice” are integral parts of the Indian culture. *Dharma* is defined for everyone whether King or the ordinary people. It was *dharma* of the King to ensure that timely justice was done to its people. The indigenous justice delivery system, therefore, was developed

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<sup>32</sup> Muller quoted in Mishka Sinha, “The Transnational Gita” in Shruti Kapila and Faisal Devji, eds., *Political Thought in Action: The Bhagavad Gita and Modern India* (2013), p. 33.



accordingly. The justice delivery system was very fast where conflicts and disputes between persons were decided in no time. Mediation was a popular and one of the most important modes of the conflict and dispute resolution in the early times in India.

Mediation as a mode of dispute settlement has deep roots in India since Vedic era.<sup>33</sup> Justice Sharad A. Bobde, the then Chief Justice of India stated that “out of court settlement in India dates back to ancient times. Ancient Indian literature talks about mechanisms like arbitration and mediation to resolve various community issues”.<sup>34</sup> Justice Swatanter Kumar also stated that settling disputes amicably is the “hall-mark of civilization”. He further stated that in ancient India, mediation system was prevalent in one form or the other. Mediation continued in the villages

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<sup>33</sup> Jaya Goyal, “Mediation Laws in India and Important Judgements on Mediation” in E-Mediation Writings, *Mediation Compendium* (2021), p. 55.

<sup>34</sup> Justice Sharad A. Bobde, “Foreword” in V.K. Ahuja, Ashutosh Mishra, and Ashutosh Acharaya, *Mediation* (2020).

and has also been “preserved in its customary form in our tribal areas”.<sup>35</sup>

It is appropriate here to mention a verse from Gita, in which Lord Krishna said:

सुहृन्मित्रार्युदासीनमध्यस्थद्वेष्यबन्धुषु |  
साधुष्वपि च पापेषु समबुद्धिर्विशिष्यते ॥<sup>36</sup>

(One who looks upon well-wishers, friends, enemies, the neutral, *madhyasth* (*mediator*), envious, relatives, saintly persons and sinners with equal mind is the most exalted).

The term “mediator” used in the aforesaid verse refers to the person who tries “to act as mediator to bring conflict resolution by trying to act as a discussion channel for two opposing warring factions”.<sup>37</sup>

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<sup>35</sup> MCPC, Supreme Court, Mediation Training Manual of India, p.i.

<sup>36</sup> Chapter 6, verse 9, Shrimad Bhagavad Gita.

<sup>37</sup> See <https://gitadaily.com/gita-06-09-explained/>

Lord Krishna, himself made a reference to *madhyasth* (mediator) in this verse. What can be a better evidence to prove that mediation was an inseparable part and parcel not only of indigenous justice delivery system but also of Indian culture? It is also noteworthy that Gita came into existence more than 5,000 years back, much before the dawn of Christianity.

Interestingly, conciliation also finds a place in “*Manusmriti*, The Laws of Manu”. It says that a King should try to conquer his foes by several means; and one of those means is conciliation.<sup>38</sup>

Appreciating the judicial system of ancient India, John W. Spellman, a British writer stated that "in some

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<sup>38</sup> “*Manusmriti*, The Laws of Manu”, available at <https://advocatetanmoy.com/2018/07/10/manusmriti-the-laws-of-manu-english/>

respects the judicial system of ancient India was theoretically in advance of our own today."<sup>39</sup>

In ancient India, apart from mediation, other modes of resolving or deciding disputes included the systems of village councils (*Kulani*)<sup>40</sup>, corporations (*sreni*)<sup>41</sup>, and assemblies (*puga*)<sup>42</sup>, according to *Yajnavalkya* and *Narada*.<sup>43</sup> The aforesaid mechanism was in a way similar to arbitral tribunals like the modern panchayats. Appeals could be made against the decisions of these so called arbitral tribunals to

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<sup>39</sup> John W. Spellman, *Political Theory of Ancient India: A Study of Kingship from the Earliest Times to Circa A.D. 300* (Oxford, 1964), p.128.

<sup>40</sup> *Kulani* or *Kula* dealt with "the disputes between members of the family, community, tribes, castes or races".

<sup>41</sup> *Sreni* was a "corporation of artisans following the same business, dealt with their internal disputes".

<sup>42</sup> *Puga* was also an "association of traders in any branch of commerce".

<sup>43</sup> See MCPC, Supreme Court, *Mediation Training Manual of India*, p. 2.

the courts of judges appointed by the King and finally to the King himself.<sup>44</sup>

Thus, according to indigenous justice delivery system, in addition to mediation, two more methods existed for deciding cases between people, viz arbitral tribunals and the courts established by the King.

Further, in order to resolve their business disputes, the merchants used to approach *Mahajans*, who were considered respected, impartial and prudent persons. These *Mahajans* used to mediate between the merchants who were members of a business association to resolve their disputes. It was mandatory

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<sup>44</sup> See also Kane, *History of Dharamsastra* (1946), Vol. 3, p. 280, 230 available at <https://www.advocatekhaj.com/library/lawreports/arbitrationact/11.php?Title=Arbitration%20Act,%201940&STitle=Yajnavalkya%20and%20Narada>; see also Shivaraj S. Huchhanavar, "The Legal System in Ancient India" available at <https://www.legalservicesindia.com/article/1391/The-Legal-system-in-ancient-India.html>

for the merchants to refer their disputes to *Mahajans* before resorting to the court. If any merchant violated this rule, he used to be removed from the membership of that association.<sup>45</sup>

It is noteworthy that in contemporary times in tribal areas, particularly in the north east region of India, traditional methods of resolving disputes are still in use with wide acceptability. In Arunachal Pradesh, the *Adi Kebang* has judicial power to try civil and criminal cases. *Adi Kebang* is basically a non-adversarial traditional village council system providing for an Alternative Dispute Resolution (ADR) forum. The parties to dispute approach *Kebang* in order to have an amicable settlement of their disputes, rather than going to the formal courts. The *Kebang* has been following the practice of mediation and conciliation since ages. It continues to provide this ADR forum to

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<sup>45</sup> See MCPC, Supreme Court, *Mediation Training Manual of India*, p. 4.

the tribesmen to resolve their disputes amicably.<sup>46</sup> People of Arunachal Pradesh have faith in *Kebang* as it provides justice faster, economically, and effectively.

The practice of resolving or deciding disputes through mediation or Panchayats was so prominent in the rural parts of the country that both the parties would accept it as an obligation. The panchayat system followed mediation, conciliation and arbitration for the disposal of a dispute as per the situation. Where dispute could not be settled through mediation or conciliation, the panchayats used to hear both the parties and decide the disputes.

Munshi Premchand, the great Hindi writer wrote a small story on the practice of deciding disputes through Panchayats in which he emphasised the pious duties of the *Panches* (arbiters).

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<sup>46</sup> Jumri Koyu and Pradeep Singh, "The KEBANG: A Self-Governing Indigenous Institution of the Adi Tribe of Arunachal Pradesh", 11(2) *Indian Journal of Law and Justice* (September 2020), pp. 267–85 at p. 270.

The story *Panch Parmeshwar* goes like this – there were two good friends Algu Chowdhury and Jumman Sheikh in a village. Their friendship was an ideal friendship for all the people living in that village. The old aunty of Jumman transferred her land to Jumman on the condition that he will take care of her basic needs till her death. After sometimes, Jumman and his wife started ignoring her needs and also mistreating her. She called a Panchayat and made Algu as one of the Panches. Algu told her that he was a close friend of Jumman, so she should choose some other person. The aunty replied that being a *Panch*, he was not supposed to ignore his duties just because the other party was his friend. Algu reluctantly accepted her offer to become a *Panch*. Everybody including Jumman was confident that the matter would be decided in favour of Jumman only, because Algu was his best friend.

Algu first asked both of them to settle their dispute themselves. When it did not happen, he listened to both of them carefully and decided the dispute in favour of Aunty by directing Jumman to pay monthly



allowances to his aunty. Everybody was surprised that Algu decided against his best friend Jumman, but they appreciated the decision. Jumman became the worst enemy of Algu. He was so upset that he decided to settle his score with Algu.

The life moved on. Algu once sold his ox to one businessman. The ox was of good breed and healthy. The businessman promised to pay the price of the ox after sometime. Businessman was very greedy and he used to put lot of stuff on the ox and did not give it enough food. One day he overloaded the hungry ox so much that it could not walk and fell down after some steps and died. When Algu asked the price of ox, the businessman replied that the ox was sick, weak and useless and therefore died. There was no question of paying price of the ox. Algu called Panchayat and businessman appointed Jumman as *Panch* to which Algu also agreed.

Everyone was confident that Jumman would never let the opportunity go out of his hands to settle his personal vendetta. Jumman was also prepared to take revenge. However, when he assumed the

charge of *Panch*, there was a sea change in his behaviour. After listening to both the parties, he decided the matter in favour of Algu. Everyone hailed the decision and appreciated the *Panches*. Jumman had also realised that *Panch* could not think of anything other than justice. The moral of the story is that *Panches* are not ordinary persons and God exists in them. While doing justice *Panches* become impartial, honest and dutybound and they think that delivering justice is their only *dharma*.

The story *Panch Parmeshwar* depicts how important and effective our Panchayat system was in the earlier times.

After referring to Panchayat system which used to prevail in earlier times and which still prevails in some parts of the country, it is now appropriate to discuss about mediation as a prominent mode of alternative dispute resolution.

The importance and relevance of mediation has been recognised in all ages and throughout the history of human civilization in all societies of the

world. Mediation existed in Africa, China, Greece, and Middle East long back and had also been “a part of the Arabic and Islamic tradition”.<sup>47</sup>

Mediation as a mode of dispute resolution was applicable in India since time immemorial. Examples of mediation can be found in our society on day to day basis. The same has been explained in detail in the next chapter.

Two great epics of the country of *Treta Yuga* and *Dwapar Yuga* - *Ramayana* and *Mahabharata* respectively also referred to mediation. Mediation is even older than *Treta Yuga* and can also be found in *Sat Yuga*.

Mediation was exercised in *Treta Yuga* to avert war between Rama and Ravana. Rama sent Angada to Ravana’s palace to mediate between Rama and

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<sup>47</sup> For further details see, K.S. Sarma, “Traditional Mediation Practices in India and other Cultures” in E-Mediation Writings, *Mediation Compendium* (2021), pp. 46-52.

Ravana so that the war between them could be averted. Ravana did not receive Angada properly. He did not even offer him a seat. Not only that, Ravana also spoke ill of Rama. Angada stated that as per rule, he should have returned back to Rama because being an ambassador he deserved minimum courtesy of good behaviour from Ravana, which was not extended to him. He nevertheless, preferred to stay there even after humiliation because being an ambassador of peace lover Rama, he wanted to avert war by mediating between Rama and Ravana. Angada, as he was a monkey, enlarged his tail and made a seat by coiling it. Now his seat was at the level of Ravana's seat as per the prevailing rules. Angada said to Ravana that his Lanka has been surrounded by the army of Rama and it was just waiting for a signal from Rama to attack his territory.

He further stated that Rama had given him a final opportunity to avert the war. Angada, using his communication skills, tried to persuade Ravana to accept the path of peace. Angada further stated that if war would take place, many innocent persons

would also die along with him and his family members. He therefore, advised Ravana to return Mata Sita to Rama and apologise for his sin; and by doing so, he would be forgiven by Rama for all his misdeeds he had committed and the war would be averted. Since Ravana was so arrogant, stubborn and over confident that not only did he not return Mata Sita, but also made fun of Angada as well as of Rama in his court. He called Rama a coward, who was interested in maintaining peace.

When Angada reminded him how he was humiliated at times in the past on several occasions, Ravana got furious and asked his security to throw Angada out of court. Angada at that point of time showed his power and challenged Ravana and his security to even remove his foot. He promised in the court of Ravana that if anybody could remove his foot, Rama would concede his defeat and go back without waging war on Ravana's Lanka. No one in Ravana's court, including his own son Meghnad, one of the most powerful warriors of Lanka could remove Angada's foot from his place. Finally, Ravana himself

got up from his throne and reached near Angada to remove his foot. Angada immediately moved and told Ravana that instead of touching his feet, he should touch the feet of Rama and apologise.

Due to stubbornness of Ravana, the mediation failed and the war took place between Rama and Ravana. As a consequence, the Ravana was defeated badly and he along with all his warriors got killed.

There was a similar incident in the *Dwapar Yuga*, where Lord Krishna himself mediated. Detailed discussion about that mediation between *Kauravas* and *Pandavas* to avert the War of Kurukshetra has been made in Chapter 4.

Thus, one can safely come to the conclusion that the institution of mediation was applicable in India much before the dawn of Christianity. In fact, Indian civilization is much older than the other civilizations and examples of mediation can easily be found in whatever ancient India literature is available.

In contemporary times also, mediation was invoked by Supreme Court in one of the oldest and complex matter. In *Ram Janambhoomi–Babri Masjid* dispute, a five judge Bench of the Supreme Court of India referred the matter to court-appointed and court-monitored mediation in the hope of finding a “permanent solution”. The Court constituted a panel consisting of 3 members which was headed by former Justice F.M.I. Khalifullah. The other two members were Sri Sri Ravi Shankar and Senior Advocate Sri Ram Panchu.<sup>48</sup>

Despite the fact that renowned and respectable persons of the society were mediating, the mediation was not successful in this case also and finally the matter was decided by the Supreme Court. Notwithstanding the fact that mediation was not successful in this case, the mediation process was brought to limelight as a potential method of dispute

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<sup>48</sup> <https://www.livelaw.in/top-stories/ayodhya-babri-land-dispute-mediation-supreme-court-143401?infinitescroll=1>

resolution by the Supreme Court by referring this highly sensitive dispute to mediators.

To sum up, it is appropriate to quote William James:

“Whenever you're in conflict with someone, there is one factor that can make the difference between damaging your relationship and deepening it. That factor is attitude.”<sup>49</sup>

Mediator is that person who assists parties to show that attitude to resolve their dispute.

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<sup>49</sup> See <https://www.goodreads.com/quotes/54022-when-ever-you-re-in-conflict-with-someone-there-is-one-factor>





## Chapter 2

### Mediation

“In the Gita, we hear the distant sound of the conflict of sects, and Lord Krishna comes in the middle to harmonize them all; he is the great teacher of harmony.”

Swami Vivekananda

## 2. Mediation

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“I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men’s heart. I realized that the true function of a lawyer is to unite the parties involved in a dispute. The lesson was so indelibly burnt into me that the large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby, not even money and certainly not my soul.”

Mahatma Gandhi

Mediation has been a part of the Indian culture. As a peace loving nation, it always believed in reducing tension between disputing parties and bringing peace

in the society. Mediation is embedded in our traditions and customs. Practically, mediation is to be seen as an integral part of our behaviour. It may not be wrong to say that mediation is as old as human civilization.

Mediation is not about eliminating conflicts from the society. Conflicts are part of human behaviour and therefore will always remain in all the societies of the world for all times. Mediation is about transforming conflict in to cooperation “on the basis of mutual interests and collaborative efforts of the parties”.<sup>1</sup>

One can find endless examples of mediation in the Indian society. For example, when children fight, parents or elderly in the family mediate between them and resolve the issue. The same is the case with the students, where teachers mediate among disputing students. Similarly, when there is a dispute between

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<sup>1</sup> See also Niranjana J. Bhatt, “Role of ‘Third Party’ in Mediation” in in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 51.

two neighbours, the other neighbours mediate and resolve the issue. The disputes between the spouses, partners, friends, family members, employer and employees, sellers and purchasers, etc. are normally resolved through mediation to the extent possible. Sometimes, there is collective mediation by a group of people. Therefore, mediation is not a new concept for India. The same may also be true for many other countries.

The system of mediation was evolved by village elders, community activists and other prominent personalities of the society, etc. who did not have a law background. These so called “non-lawyer” mediators played an important role in the indigenous justice dispensing system of the country.<sup>2</sup>

The old day mediation to resolve a conflict/dispute has been described as “three people sitting down

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<sup>2</sup> See also Anil Xavier, “Lawyer Mediator, Non-lawyer Mediator – Who is better?” available at [https://www.arbitrationindia.com/lawyer\\_non\\_lawyer.html](https://www.arbitrationindia.com/lawyer_non_lawyer.html)

under a tree”.<sup>3</sup> The mediation process was fully service oriented on an urgent basis with an objective to maintain peace and harmony in the society.

According to Justice Sikri, mediation has the “overtones of spirituality”, and it brings prosperity in addition to peace and harmony in the society.<sup>4</sup> It is the only process which addresses the “emotional needs of the parties”.<sup>5</sup>

Amarjit Singh Chandhiok also defines “mediation” as “a peace-making process, a service oriented duty with a vision of creating harmony in society.” He

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<sup>3</sup> Gregg F. Relyea, “Mediation: A Powerful Tool for Risk Reduction and Reward Expansion in the Commercial Sector” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 33–34.

<sup>4</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 31.

<sup>5</sup> J.P. Sengh, “Empowering Sustainable Negotiations in the New World of Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 93.

further states that mediation is “a forum to resolve all differences and disputes, commercial or personal.”<sup>6</sup>

Mediation is basically a voluntary process, in which there is no element of force or coercion. Any party may walk out of the mediation proceedings at any time if it feels uncomfortable due to any factor. Further, how much information is to be revealed in the proceedings will depend upon the parties, as it is their matter. So confidentiality is maintained.

In *Moti Ram (D) Tr. Lrs. & Anr. v. Ashok Kumar & Anr.*<sup>7</sup>, the Supreme Court emphasised on the confidentiality of mediation proceedings. The Court stated that unlike “proceedings in Court which are conducted openly in the public gaze”, the mediation proceedings are totally confidential. The Court made following important observations:

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<sup>6</sup> Amarjit Singh Chandhiok quoted in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 8.

<sup>7</sup> Decided on 7 December, 2010 available at <https://indiankanoon.org/doc/79225691/>



“If the mediation succeeds, then the mediator should send the agreement signed by both the parties to the Court without mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the ‘Mediation has been unsuccessful’. Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process”.

According to Lord Gill, “mediation could provide parties with more potential outcomes and more

importantly, the desired outcome.”<sup>8</sup> This results in a win-win situation for both the parties.

Mediation can be described as an art by which the mediator encourages both the parties to divide a cake in such a manner that each party celebrates in the belief that it has got the biggest piece.<sup>9</sup>

According to Laila Ollapally, mediation has four pillars – (i) party autonomy, (ii) confidentiality, (iii) neutrality, and (iv) voluntariness, which makes it a unique brand of dispute resolution.<sup>10</sup> Veena Ralli, however, states that “mediation is a flexible, yet structured process guided by five distinct elements

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<sup>8</sup> Lord Gill quoted in Anita Sahani, “Domestic Violence: Is Mediation a Panacea or an Illusion?” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 172.

<sup>9</sup> See also Gauguin quoted in Timothy D. Keator, “Conflict vs. Dispute?” (2011) available at <http://www.uop.edu.pk/ocontents/ConflictvsDisputeKeator2.pdf>

<sup>10</sup> Laila Ollapally, “Private Mediation: Peacemaking as a Profession” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 101.

e.g. confidentiality, voluntariness, empowerment, neutrality and creative solutions”.<sup>11</sup>

Being an informal proceeding, mediation is not based on the procedural laws or law of evidence. Parties are not required to have legal expertise as such to participate in the mediation proceedings. Parties enjoy lot of flexibilities as mediation is participatory proceeding and the parties decide at their own. Further mediation proceedings remain transparent. Everything happens in front of the parties. There is nothing like sudden or surprises in the mediation.

In *Salem Advocate Bar Association, Tamil Nadu v. Union of India* (2005),<sup>12</sup> in the context of section 89 of Civil Procedure Code, the Supreme Court referred

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<sup>11</sup> Veena Ralli, “Balancing Parties in resolving Family Disputes” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 158–59.

<sup>12</sup> (2005) 6 SCC 344.

the following definition of mediation from Draft Mediation Rules, 2003:

“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 ... , 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 which affect them”.

According to Warren Burger, mediation “resolves the dispute in a way that is private, fast and economical. It is a process in which a neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. It

embraces the philosophy of democratic decision-making”.<sup>13</sup>

Mediation totally rejects the approach of parties “my way or the highway”. It is based on the approach “our way”. The major objective of mediation is “collaborative solution to disputes”, as Justice Sikri has rightly put it. He takes his point further to elaborate the concept of mediation by stating that “discussions are always better than arguments, because an argument is to find out who is right, and a discussion is to find what is right.”<sup>14</sup>

Mediation is also found to have a transformative approach. It not only resolves dispute between the parties but also transform their relationship for betterment at times. “Transformation is the goal of the

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<sup>13</sup> Alfin, et al., *Mediation Theory & Practice*, (2006) quoted in *Vikram Bakshi & Ors v. Sonia Khosla[Dead] By Lrs*, (2014) 15 SCC 80.

<sup>14</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 12-13.

mediation process. Without the emotional healing process there can be no transformative solutions”.<sup>15</sup>

Justice Sundaresh Menon, Chief Justice of Singapore also stated that “Mediation holds the potential to transform society’s ideas of ‘justice’ from adversarial zero sum outcomes to more effective relational outcomes, since mechanisms such as mediation, arbitration and conciliation prevent future deterioration and fractures in relationship”.<sup>16</sup>

Robert A. Baruch Bush and Joseph Folger state that “mediation can effect much deeper changes in people and their interpersonal relationships, beyond just remedying a short-term problem”. They further stated that, “mediation’s greatest value lies in its potential not only to find solutions to people’s

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<sup>15</sup> Veena Ralli, “Balancing Parties in resolving Family Disputes” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 158.

<sup>16</sup> See <https://www.indiatoday.in/india/story/amicable-dispute-settlement-is-part-of-indian-cultural-ethos-says-cji-nv-ramana-1829436-2021-07-17>

problems but to change people themselves for the better, in the very midst of conflict.”<sup>17</sup>

While referring to fundamental advantages of mediation, the Supreme Court in *Vikram Bakshi & Ors v. Sonia Khosla [Dead] by Lrs*,<sup>18</sup> made the following important observations:

“To preserve, develop and improve communication, build bridges of understanding, find out options for settlement for mutual gains, search unobvious from obvious, dive underneath a problem and dig out underlying interests of the disputing parties, preserve and maintain relationships and collaborative problem solving are some of the fundamental advantages of mediation. Even in those cases where relationships have

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<sup>17</sup> Robert A. Baruch Bush and Joseph Folger, *The Promise of Mediation* (1994) quoted in Anil Xavier, “Mediation is here to stay”, *Indian Yearbook of International Law and Policy* (2009), pp. 363–78 at p. 371 available at

[http://arbitrationindia.com/pdf/mediation\\_tostay.pdf](http://arbitrationindia.com/pdf/mediation_tostay.pdf)

<sup>18</sup> (2014) 15 SCC 80.

turned bitter, mediation has been able to produce positive outcomes, restoring the peace and amity between the parties”.<sup>19</sup>

Mediation process is said to be opposite to litigation. In litigation, parties maintain distance between them and do not talk with each other at all. Litigation is said to have focussed on “fault-finding”. On the other hand, mediation prompts the parties to talk to each other and sort out their issues with the help of mediator. Therefore mediation is said to have focussed on “problem-solving”.<sup>20</sup>

Mediation provides emotional healing touch which sometimes help parties to work more closely in future. According to Anil Xavier, “litigation is said to be cold, hard, and uncaring. Both parties are instructed not to talk to each other and neither side gets to voice their

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<sup>19</sup> *Id.*, para 16.

<sup>20</sup> A.J. Jawad, “Interplay between Domain Knowledge and Process Knowledge in Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 148.



concerns. Mediation uses the psychological power of empathy to create mutual understanding between parties to address concerns, promote emotional healing, and preserve ongoing relationships”.<sup>21</sup> Lord Krishna also tried to heal the bleeding relationship between *Kauravas* and *Pandavas* by way of mediation, but failed to do so because one of the parties, i.e. Duryodhana on behalf of *Kauravas* was adamant not to accept any solution as discussed in detail in Chapter 4.

Comparing mediation with arbitration and litigation, Jawad has rightly said that “unlike litigation and arbitration, mediation focuses on the real, underlying interests of the disputing parties, their fears and concerns, their feelings and emotions and their future

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<sup>21</sup> Robert A. Baruch Bush and Joseph Folger, *The Promise of Mediation* (1994) quoted in Anil Xavier, “Mediation is Here to Stay”, *Indian Yearbook of International Law and Policy* (2009), pp. 363–78 at p. 373 available at [http://arbitrationindia.com/pdf/mediation\\_tostay.pdf](http://arbitrationindia.com/pdf/mediation_tostay.pdf)

needs”.<sup>22</sup> He also quotes Archie Zariski – “the ability of mediators to respond creatively to unique situations is an essential difference between mediation and legal processes which provide standard solutions to narrowly categorized problems”.<sup>23</sup>

Unlike arbitration, which once upon a time was considered as time and cost effective method of dispute resolution, but turned out to be an expensive affair and in some of the cases very time consuming to get finality, mediation is time and cost effective method. In all those cases, where parties show their willingness to resolve dispute between them by mediation, the same may be resolved effectively and within no time.

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<sup>22</sup> A.J. Jawad, “Interplay between Domain Knowledge and Process Knowledge in Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 148.

<sup>23</sup> Archie Zariski, “Standing on the Shoulders of Giants: Artistry, Expertise and Professionalism in Mediation and the Role of Higher Education” quoted in A.J. Jawad, *id.*, p. 149.

A mediator in layman's language facilitates between the disputing parties to assist them to reach a solution. The mediator is said to play the role of a "dispute doctor", who initiates the healing process between the parties to the dispute.<sup>24</sup> The parties to the dispute remains in control of proceedings. As already stated mediation proceedings are also called as participatory proceedings, as both the parties participate in the proceedings to arrive at a solution. Mediation is not possible if one of the parties becomes dominant or dormant during the proceedings. Therefore, both the parties are expected to take active participatory role to make mediation successful.

Strictly speaking, mediators are not expected to judge or compel the parties to resolve the dispute. They are expected to empower the parties to decide for themselves. Sudhanshu Batra defines

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<sup>24</sup> See Anuroop Omkar and Kritika Krishnamurthy, "Role and Ethics of a Mediator" in *E-Mediation Writings, Mediation Compendium* (2021), p. 137.

“empowerment” as “the process of becoming stronger and more confident, especially in controlling one’s life. It is acceptance of responsibility and the refusal to perceive oneself as a victim”.<sup>25</sup>

In order to have successful outcome in the mediation proceedings, a mediator is required to have good communication skills, analytical skills, interpersonal skills, compassion, empathy and more such skills.<sup>26</sup> Further, “the skill of the mediator also lies in giving adequate attention to the power imbalance, and to strategize how to eliminate or at least minimize power imbalance between the parties,

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<sup>25</sup> Sudhanshu Batra, “Editorial Afterword” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 216.

<sup>26</sup> Laila Ollapally, “Private Mediation: Peacemaking as a Profession” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 101.

so as to make mediation more effective, neutral and acceptable”.<sup>27</sup>

Stephen Covey writes that “most people do not listen with the intent to understand; they listen with the intent to reply”.<sup>28</sup> The same thing happens in mediation also. Each party to the dispute forms its opinion without properly understanding the other party. The role of mediator becomes extremely important in such a case. It is the duty of mediator to prepare both the parties to listen to each other carefully and know their point of view. Once that is done, the problem is over and issue may be resolved without much of difficulties.

Sometimes, the mediator becomes more active in the proceedings and suggest solution to the problem to the parties. Such kind of proceedings are normally

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<sup>27</sup> See Veena Ralli, “Balancing Parties in resolving Family Disputes” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 160.

<sup>28</sup> See <https://conversational-leadership.net/listen-to-understand/>

called as conciliation and the person suggesting solution is known as conciliator.

Though there is a difference between the terms 'Mediation' and 'Conciliation', the same have been used interchangeably in several jurisdictions.

Justice N. V. Ramana, the then Chief Justice of India while delivering speech on "Mediation for Everyone: Realizing Mediation's Potential in India" at India-Singapore Mediation Summit – 2021 stated:

"Mediation, as a concept, is deeply embedded into the Indian ethos. Long before the arrival of the British adversarial system in India, various forms of mediation were being practiced as a method of dispute resolution. Disputes were often resolved by the chieftains or elders of the community. Similarly, disputes relating to business were resolved by merchants, either by direct negotiations or through merchant bodies. However, the establishment of the British courts system, in 1775, marked the erosion of

community-based indigenous dispute resolution mechanisms in India”.<sup>29</sup>

Justice Ramana also stated that “designed around a participatory model, mediation and conciliation enable parties to become insiders to a process that traditionally treated them as outsiders.”<sup>30</sup>

In case of mediation, the parties to the dispute feel easy and comfortable in putting forward their case in an informal manner as no technicality is involved and no legal representation is required, and also by maintaining confidentiality and having a positive mindset.<sup>31</sup> Since outcome of the mediation is based on the settlement, both the parties come out as

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<sup>29</sup> Full text of the speech is available at <https://www.deccanherald.com/national/mahabharata-early-attempt-at-mediation-a-tool-of-social-justice-chief-justice-n-v-ramana-1009719.html>

<sup>30</sup> *Ibid.*

<sup>31</sup> V.K. Ahuja, “Law of Mediation: National and International Perspectives” in Souvenir of the Bar Council of Assam, Nagaland, Mizoram, Arunachal Pradesh and Sikkim, 2022, p. 47.

winners. Their relationship may be strengthened post mediation which may ultimately be helpful to them in the future.

The flexibilities in the mediation proceedings may enable the parties to dispute to take a break in between or defer the proceedings for some time to have a re-look into the facts and issues from a different perspective and come back again to end the impasse with the assistance of mediator.<sup>32</sup>

Another benefit of mediation is that both the parties may put forward their views in a frank manner, as there is no issue of contempt of court. It is, however expected from both the parties that they will not cross the *Laxman Rekha* of decency. Nevertheless, if the pitch of any party is high, the mediator may immediately intervene to calm down that party and

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<sup>32</sup> See also Sudhir Kumar Jain, “Understanding Impasse and Problem Solving Techniques” in E-Mediation Writings, *Mediation Compendium* (2021), pp. 127–34, at pp. 132–33.



request him to behave in a dignified manner to win the trust of the other party.

It is noteworthy that mediated cases are final. There is no appeal or revision of those cases. This shows that in adversarial system, if a case is decided by a lower court, it may go up to Supreme Court for the final decision and may take decades for its finality. One party will win and the other will lose. Relationship between the parties may get spoiled. Both parties end up spending enormous time and money in the case. On the other hand, in case of mediation, the case may be resolved expeditiously without much expenditure in full and final manner, leaving smiles on the faces of the parties.

The discussion on the advantages of mediation may be summed up by the following detailed observation of Supreme Court in *Vikram Bakshi & Ors v. Sonia Khosla [Dead] by Lrs*<sup>33</sup>:

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<sup>33</sup> (2014) 15 SCC 80.

“Mediation ensures a just solution acceptable to all the parties to dispute thereby achieving ‘win-win’ situation. It is only mediation that puts the parties in control of both their disputes and its resolution. It is mediation through which the parties can communicate in a real sense with each other, which they have not been able to do since the dispute started. It is mediation which makes the process voluntary and does not bind the parties against their wish. It is mediation that saves precious time, energy as well as cost which can result in lesser burden on exchequer when poor litigants are to be provided legal aid. It is mediation which focuses on long term interest and helps the parties in creating numerous options for settlement. It is mediation that restores broken relationship and focuses on improving the future not of dissecting past. It is based on an alternative set of values in which formalism is replaced by informality of procedure, fair trial procedures by direct participation of parties, consistent norm enforcement by norm creation, judicial

independence by the involvement of trusted peers, and so on".<sup>34</sup>

The Court further stated that mediation presents "an alternative conceptualization of justice".<sup>35</sup>

It is noteworthy that norms in the society changes with the passage of time. Change is law of nature. Law keeps on evolving as per the needs of the society. What was relevant in the past, may not be relevant today.

It is also in the fitness of the things to refer to the conversation between Krishna and Bhishma when the War of Kurukshetra got over and Bhishma was lying wounded on the bed of arrows. Nobody could kill Bhishma, he had the boon to die as per his own wish. Before leaving the world, he asked Krishna as to whether all that happened in the war was right and ethical? He was referring to the law and practices of war. As is known that law of war was violated from

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<sup>34</sup> *Id.*, para 18.

<sup>35</sup> *Ibid.*

both the sides. Abhimanyu was killed in violation of law of war by *Kauravas*. *Pandavas* also killed Karan, Duryodhana, Dronacharaya, and Jayadharat in a deceitful manner against the law of war. Since *Kauravas* were defeated and eliminated, the question was based on the acts of *Pandavas*.

Krishna replied to the question of Bishma by saying that nothing wrong had happened from *Pandavas'* side. He further stated that we should learn from the past but take decision as per the present situations. The decisions are taken as per the needs and logics of that time only. He further stated that when I was born in *Treta Yuga* as Rama, the enemies were Ravana and Bali who knew religion, but deviated from it. Religious persons, like Vibhishan was born as brother of Ravana, and Angad was born as son of Bali. But in this *Dwapar Yuga*, the enemies such as Kansa, Jarasandh, Duryodhana, Dushsasana, Shakuni, and Jayadharath were gross sinners. Unlike *Treta Yuga* they had to be dealt with in a different manner. Sin has to be eliminated at all cost to preserve *dharma*. Ethics and morality become

meaningless when these sinners are involved in sinful activities. Therefore, traditions, rules and laws should be time and situation specific.

Taking a clue from the aforesaid conversation between Krishna and Bhishma, one can easily say that the practice of mediation is not an exception. Similar to other things, the practice of mediation has also undergone transformation in the contemporary times.

Mediation, today is not something as “three people sitting down under a tree” and resolving a dispute. Though the core element of mediation is the same, there has now been law to deal with court annexed mediation. Not everyone is authorised to do mediation today. The law on mediation is extremely important to lay down rules on ethics for mediator to prevent corruption and bias by the mediators. The Mediation Bill, 2021 is a welcome step in streamlining the law on mediation. The same is likely to be passed very soon.

## Chapter 3

### Many Facets of Krishna's Personality

“Krishna is *Solah Kala Sampurna*” and  
“*Poorna Purushottam*”

## 3. Many Facets of Krishna's Personality

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Krishna is an irrepressible child, a terrible prankster, an enchanting flute player, a graceful dancer, an irresistible lover, a truly valiant warrior, a ruthless vanquisher of his foes, a man who left a broken heart in every home, an astute statesman and kingmaker, a thorough gentleman, a yogi of the highest order, and the most colorful incarnation of the Divine.<sup>1</sup>

Sadhguru

In order to establish rule of *dharma* on earth, Lord Krishna took birth as the eighth incarnation of Lord

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<sup>1</sup> See <https://isha.sadhguru.org/us/en/wisdom/article/krishna-quotes>



Vishnu. Rule of *dharma* means rule of righteousness.<sup>2</sup> Lord Krishna was biologically born and brought up as a normal human being. Like all human beings, he also died. We, however, need to remember that God never dies, he simply left his human body. He remains in all the times. Wise people could find God in him, stupid like Duryodhana called him a mysterious person.

Krishna is omnipresent, omniscient and omnipotent. He is present everywhere. He knows everything. There is nothing in the world which he is not aware of, whether it belongs to present, past or future. He is the maintainer of everything, He is the controller, He is beyond all material conception, He is inconceivable, He is luminous like the Sun, He is transcendental and beyond this material nature. He is

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<sup>2</sup> Renu, "The Qualities of Krishna that You must Admire" available at <https://www.boldsky.com/yoga-spirituality/faith-mysticism/2018/the-qualities-of-krishna-that-you-must-admire-123443.html>

the source of all spiritual and material worlds. Everything emanates from Him.

He is the most powerful personality in the world. He is the Supreme Lord. As already stated He is regarded as “*Solah Kala Sampurna*” and “*Poorna Purushottam*”. The *Solah Kala* which Krishna had, are – (1) *Daya* – Compassion; (2) *Dhairya* – Patience; (3) *Kshama* – Forgiveness; (4) *Nyaya* – Justice; (5) *Nirapeksha* – Impartiality; (6) *Niraskata/ Anasakti* – Detachment; (7) *Tapasya* – Meditation and *Dhyana*; (8) *Aparchitta* – Invincibility; (9) *Danasheel* – Bestower of all wealth in the world; (10) *Saundariyamaya* – Beauty Incarnate; (11) *Nrityajna* – Best of Dancers; (12) *Sangitajna* – Best of Singers; (13) *Neetiwadi* – Embodiment of Honesty; (14) *Satyawadi* – Truth Itself; (15) *Sarvagnata* – Perfect master of all arts, such as poetry, drama, painting etc.; and (16) *Sarvaniyanta* – Controller of All.<sup>3</sup>

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<sup>3</sup> See <https://www.quora.com/What-are-the-16-kala-qualities-of-Bhagwan-Shri-Krishna-according-to-spirituality-Is-it-possible-in-a-normal-person>

Krishna, being Supreme personality of Godhead, was *Solah Kala Sampoorna*; whereas it is next to impossible for a normal human being to have all the *Solah Kala*, howsoever, divine he/she may be.

There are many facets of the Krishna's personality. There is no quality, characteristic or skill which was not there in Lord Krishna. The life of Krishna is a subject matter of study from the point of view of different disciplines, be it law; conflict management; human rights; women's rights; philosophy; theology; music; diplomacy; political science; management; strategic studies; counselling; motivational studies; inter-personal skills; personality development; and many more.

One can find a great friend, a saviour, a philosopher, a king, an accomplished charioteer, cow protector, a musician, *Jagat Guru*, diplomat, a mediator, a great lover, an excellent communicator, and a great motivational speaker in him. As it is next to impossible for any human being to give a complete description of all facets of Lord Krishna, a brief

description is given of some of the facets of his personality in this chapter.

Krishna had many friends in the childhood. He along with his friends used to do lot of mischiefs. Everyone knew that the mischief was done by Krishna but nobody would mind that in the real sense, though they would make complaints to Yashodha, Krishna's foster mother.

The friendship of Krishna and Sudama is unmatched. The friendship shown by Krishna towards Sudama was selfless and exemplary. It is said that Sudama who was very poor and did not have enough food to feed his family, travelled to Dwarka on the insistence of his wife to meet Krishna. He carried some rice packed in cloth for Krishna. When Krishna got to know about his arrival, he came running at the gate to receive him in front of everyone. He treated him very well. Sudama after getting royal treatment was hesitant to give those rice to Krishna. Krishna snatched the rice from Sudama and started eating them with lot of enjoyment. Sudama was very happy with the treatment. When he reached home,

he was surprised to see a complete transformation in his house. His house was full with all amenities. This was the friendship which Krishna had with his poor friend Sudama. Their friendship gives a message to the entire humanity.

Krishna is considered as *Jagat Guru*, i.e. Guru of the World. By giving Gita to the world, he taught the world how to live in the society observing *dharma*.

There is an interesting reason as to why Gita was gifted by Lord Krishna to the world. Before the start of the War of Kurukshetra, Lord Krishna who became *Saarathi* (charioteer) of Arjuna on his request, took his chariot in between the forces of *Kauravas* and *Pandavas*. He then asked Arjuna to see the force of *Kauravas* which was full of his family members, relatives, and Gurus. By looking at the persons who were his family members as well as members of his extended family, relatives, Guru, etc. on enemy side, he became very sad and decided not to wage war, as he would be killing his own people. This attachment of Arjuna towards his family was the main reason which prompted Krishna to give him sermons

which is ultimately known as Gita. People considered it as a trick of Krishna to teach Arjuna about his *dharma* and motivate him to wage war against *Kauravas* to end *adharma* and establish the rule of *dharma*.

Had Arjuna agreed in the first instance to wage the war against *Kauravas*, the world would never have got Gita. Gita is not a religious text of Hindus as most of the people feel, it is a great instrument which tells people of all faiths and all religions of the world, the way of living. It tells us the distinction between the right and the wrong and *dharma* and *adharma*. Mishka Sinha writes that “the Gita was no longer a sacred or religious text from a specific non-Western tradition, but something more universal”.<sup>4</sup>

Gita in true sense is considered as “Life Manual” for all human beings, which responds to all their queries, dispel their fears and brings enlightenment.

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<sup>4</sup> Mishka Sinha, “The Transnational Gita” in Shruti Kapila and Faisal Devji, eds., *Political Thought in Action: The Bhagavad Gita and Modern India* (2013), p. 38.

To put Gita in legal terms, it can be described as “Constitution of Life”. Unlike Constitution of India, it is applicable to all human beings of the world irrespective of caste, creed, religion, nationality, etc. The principles laid down in Gita are applicable to all without any discrimination. Gita tells us what is right and what is wrong. It tells us about our duties and the *dharma* (righteousness). When puzzled by complex situations in life, we should have a look at the Gita to find solutions to all our problems and miseries. Gita helps everyone to get spiritual enlightenment.

Mahatma Gandhi called Gita as his “Eternal Mother” and said:

“I confess to you that, when doubts haunt me, when disappointments stare me in the face, and when I see not one ray of light on the horizon, I run to the Bhagavad Gita and find a verse to

comfort me, and I immediately begin to smile in the midst of overwhelming sorrow."<sup>5</sup>

Krishna was a great musician. The musical power of his flute used to attract not only *gopis* but also animals, particularly cows. Everyone including Goddess Radha, his lover, used to get immersed in the melodious music coming from the flute of Krishna. Flute remained essentially with Krishna and even Radha used to complain at times that he was giving more importance to flute than to her.

Krishna being a cowherd, is also considered as protector of cows. One of his names is Gopala, which is made of two words – “Go” and “Pala”. “Go” means “cow” and “Pala” means “one who tends to it”.<sup>6</sup> The relation between Krishna and cows is so strong that

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<sup>5</sup> Uma Majmudar, “Mahatma Gandhi and the Bhagavad Gita” available at

<https://www.mkgandhi.org/articles/Mahatma-Gandhi-and-the-Bhagavad-Gita.html>

<sup>6</sup> <https://isha.sadhguru.org/us/en/wisdom/article/gopala-understanding-essence-krishna-cowherd>



it has always been put into an inseparable divine entity in Bharatiya Puranas and Itihasa.<sup>7</sup> Following has been said in the praise and salutation to Gita:

सर्वोपनिषदो गावो देग्धा गोपालनन्दनः पार्थ वत्स सुधीर्भोक्ता दुग्धं  
गीतामृतं महत्

(The Upanishads are cows, Lord Gopalanandana is the cow milkers, Partha-Arjuna is the calf, the wise scholars are the drinkers of that milk and Gita is that milk, the nectar of life).<sup>8</sup>

In Chapter 18, verse 44 of the Bhagwat Gita, Krishna says that it is the duty of Vaishyas to take care of cows:

कृषिगौरक्ष्यवाणिज्यं वैश्यकर्म स्वभावजम्।

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<sup>7</sup> See also <https://hinduexistence.org/2016/08/25/remembering-the-cow-krishna-divine-relationship-in-janmashtami/>

<sup>8</sup> <https://hinduexistence.org/2016/08/25/remembering-the-cow-krishna-divine-relationship-in-janmashtami/>

(Agriculture, taking care of cows, and commerce are the natural works for those with the qualities of Vaishyas).<sup>9</sup>

It is noteworthy that in *Mohd. Abdul Khaliq v. State of U.P. and Another*,<sup>10</sup> Justice Shamim Ahmed of Allahabad High Court (Lucknow Bench) made pertinent observations about cow protection:

[I]n Hinduism, the belief and faith is that cow is representative of divine and natural beneficence and should therefore be protected and venerated. The cow has also been associated with various deities, notably Lord Shiva (whose steed is Nandi, a bull) Lord Indra (closely associated with Kamadhenu, the wise-granting cow), Lord Krishna (a cowherd in his youth), and goddesses in general (because of the maternal attributes of many of them). ... Her legs symbolise four Vedas;

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<sup>9</sup> See also <https://www.holy-bhagavad-gita.org/chapter/18/verse/44>

<sup>10</sup> Application u/s 482 no. - 1743 of 2021, order dated 14 February 2023.

her source of milk is four *Purushartha* (objectives, i.e. *dharma* or righteousness, *artha* or material wealth, *kama* or desire and *moksha* or salvation); her horns symbolise the gods, her face the sun and moon, and her shoulders *agni* or the god of fire. She has also been described in other forms: Nanda, Sunanda, Surabhi, Susheela and Sumana.<sup>11</sup>

Krishna was also a great lover. His pious love for Radha is well known. Both of them did not marry, but their love was so great that Radha's name was added with the name of Krishna. Though he has 108 names, he was also known as Radhekrishna and Radheshyam. The love shared by Krishna and Radha is considered as eternal and immortal.<sup>12</sup> Once Radha asked Krishna as to why they couldn't marry? Krishna

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<sup>11</sup> *Id.*, p. 6, available at <https://www.livelaw.in/news-updates/cow-killers-rot-hell-centre-ban-cow-slaughter-declare-protected-national-animal-allahabad-hc-223050?infinitescroll=1>.

<sup>12</sup> See also <https://vedicfeed.com/things-about-love-you-can-learn-from-bhagavad-gita/>

responded that two persons are required for marriage, whereas we are one only. In certain places, people worship Radha more than Krishna, because the belief is that if you worship Radha, your prayers will automatically reach Krishna.

Krishna was a great protector of human rights. Krishna said to Arjuna:

यदा यदा हि धर्मस्य ग्लानिर्भवति भारत।  
अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम् ॥<sup>13</sup>

(O Arjuna, whenever there is a decline in righteousness (*dharma*) and a predominant rise of sinfulness, at that time I manifest Myself on the earth).

परित्राणाय साधूनां विनाशाय च दुष्कृताम् ।  
धर्मसंस्थापनार्थाय सम्भवामि युगे युगे ॥<sup>14</sup>

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<sup>13</sup> *Shrimad Bhagavad Gita*, Chapter 4, verses 7

<sup>14</sup> *Id.*, verse 8.

(To protect the righteous, to annihilate the wicked, and to re-establish the principles of *dharma* I appear on this earth, millennium after millennium.)

The aforesaid verses mean that whenever there is a decline in *dharma* (righteousness), particularly on the part of King, Government or those in power (which may result in mass violation of peoples' human rights as well as other rights), and also sinful activities are on rise, Krishna manifest on the earth for the protection of righteousness. Krishna says that He eliminates the sinners and establish *dharma* again, viz. also protect human rights of the people. For this purpose, He comes on this earth millennium after millennium, whenever the need arises.

The aforesaid human rights violation could be in terms of punishing people for telling the truth, starving them, depriving them of their livelihood, torturing them unnecessarily, humiliating them, killing them for no reason, prohibiting them to worship as per their choice, extorting their hard earned money, etc.

As far as women's rights are concerned, Krishna always supported the right of woman to select her life partner. Krishna was always of the opinion that no family member should impose his/her decision on any woman of the family with respect to her marriage. The woman should always be consulted about her marriage. Krishna always supported woman to get married to the man of her choice, if the family does not agree to her decision.

Interestingly, Krishna himself abducted Rukmani to marry her. Rukmani's marriage was fixed by her brother to Shishupal, who was Krishna's cousin. Rukmani did not want to marry Shishupal. She was attracted towards Krishna and wanted to marry him. When her marriage was fixed with Shishupal, she sent a message to Krishna requesting him to abduct her from the temple where she would go for worship and marry her. Krishna accepted her request, abducted her, defeated her brother and married her.

Krishna also helped his younger sister Subhadra to elope with Arjuna, when her marriage was fixed with Duryodhana by her elder brother Balrama.

Subhadra loved Arjuna and wanted to marry him. When she got to know that her brother Balrama had fixed her marriage to Duryodhana, she got very upset. Krishna advised her to elope with Arjuna while going to temple. He also advised her to take charge of chariot so that Balrama would think that she eloped Arjuna, and he would not chase Arjuna to punish him. This is how Krishna helped Subhadra to exercise her right to marry a person of her choice.

It is noteworthy that a woman had the right to select her life partner in the *Treta Yuga* also. The best examples are Mata Sita selecting Rama as her life partner through *Swayamvar* in *Treta Yuga*. Similarly, *Swayamvar* was also organised for Draupadi in *Dwapar Yuga* to make her select her life partner. Many more examples can be found in *Dwapar Yuga* where *Swayamvars* were organised for women to select their life partners. Krishna had reaffirmed this right of the women.

As far as communication is concerned, who else can be a better communicator than Krishna himself. Krishna enlightened Arjuna by way of communication

of his sermons at the battlefield of Kurukshetra at a time when war was going to start and there was lot of noise, fear, aggression, and tension. It is also said that if Krishna was a good communicator, Arjuna was a good listener who understood what Krishna said and also got convinced with his teachings on the battlefield.

Krishna used to get his views supported by all even though opposite views were expressed by his family including his elder brother Balrama.

The way Krishna used to conduct himself, his “presentation style, non-verbal as well as verbal communication, interpersonal skills, and mass communication” were unparalleled.<sup>15</sup> His skills have relevance in the modern society and may be

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<sup>15</sup> See Aayush, “10 Qualities of Lord Krishna that Makes Him a Fully Blossomed One” available at <https://vedicfeed.com/10-qualities-of-lord-krishna/>



extremely important for the modern Management and Communication practitioners.<sup>16</sup>

It must be remembered that good communication is extremely important to become a good mediator; and Krishna was one such great communicator.

Krishna is considered as the first motivational speaker of the world. Apart from being the first, he is also the best source of motivation. This is reflected from the fact that he gave a motivational speech to Arjuna at a time when the War of Kurukshetra was about to begin. Arjuna got so much attachment to his relatives, clan members, gurus and friends after seeing them in the enemy army that he decided not to take part in the war and kill them. His attachment to the aforesaid persons made him so much confused that he thought that it was better to die at the hands of them rather than killing them. It was at that point of time that Krishna gave him motivational speech, which became Gita and which is being

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<sup>16</sup> *Ibid.*

followed by millions of people throughout the world. Finally, Krishna was successful in motivating Arjuna through his speech to take part in the war and kill all those who were part of the enemy army.

Motivational speeches are given to motivate people to do certain positive things. Through his motivational speech, Krishna also motivated Arjuna to do the positive thing by killing the enemy army including all those whom Arjuna thought as his own people. In normal circumstances, waging war and killing people is not to be considered a positive act, that however, was a situation where the war was essentially to be waged for righteousness, to establish the rule of *dharma*; and Krishna succeeded in getting it done by Arjuna through his motivational speech. He is, therefore, considered as the first and the best motivational speaker.

Krishna can also be said to be an excellent counsellor. He counselled all *Pandavas* that war should never be resorted to in the first place. All efforts should be made to avert it and peace should be maintained. He also counselled Draupadi who

wanted revenge against *Kauravas*, who humiliated her in the open court in Hastinapur. By making an unsuccessful effort of mediation between *Kauravas* and *Pandavas*, Krishna in true sense tried to counsel Dhritrashtra and Duryodhana and strongly advised them to act as per *dharma* and return the Kingdom of *Pandavas* back to them.

Krishna counselled Arjuna by listening to him patiently at the war field. He finally succeeded in counselling Arjuna by replying to all his questions and motivating him to move on the path of *dharma* (righteousness). After achieving enlightenment from Krishna, Arjuna finally got up and waged the war against *Kauravas* to win it.

Krishna is also considered as a great strategist. Once, he had to run away from Mathura (which was Kingdom of Krishna's grandfather Maharaja Ugrasen) because of his enemy Jarasandh, the mighty King of Magadh, who was hell bent to kill Krishna, his brother Balrama and the people living there. Jarasandh earlier attacked 17 times at Mathura and caused severe destruction there.

The reason of Krishna's running from there was that Jarasand formed an alliance with King Kalayavan of Yavana nation who got a boon from Lord Shiva because of which it was not possible for Lord Krishna to kill him.

Krishna with his family and people of Mathura got shifted to Dwarka where a city was made by Vishwakarma for them. When Jarasandh came to know about it, he called Krishna *Ranchhod*. *Ranchhod* is made of two words, *Ran* and *Chhod*. *Ran* means "war" and *Chod* means "to leave". Therefore, *Ranchhod* means a person running away from the war. In normal parlance, *Ranchhod* is considered a person who could not face the war and ran away as a coward. Krishna did not bother for the term "*Ranchhod*" being used for him, because security of his people was of paramount concern for him at that point of time.

Krishna got King Kalayavan killed in a tactful manner. Thereafter, he went back to Mathura and defeated the joint army of Jarasandh and Kalayavan.

This incident of his life shows that he was a great strategist. Leaving the war field for some time when one feels that it is not the appropriate time for him to fight, is not cowardness but a strategy. What is most important is the security of people and sometimes it is prudent to retract from war field and attack at the right time. One should not be perturbed by the fact that he would be addressed by some name, not matching his status.

There is another example of his being the best strategist. Krishna was the one who planned the strategy for *Pandavas* in such a manner that victory for them could be ensured. In the War of Kurukshetra, the army of *Kauravas* and friendly countries was much bigger than that of *Pandavas*. The ratio between the army of *Kauravas* and *Pandavas* was 11:7. *Kauravas* had great warriors such as Bhishma, Guru Dronacharya, Karan, etc. who could not be defeated so easily. Nobody could kill Bhishma as he could die only at his own wish. He was blessed with that boon. It was next to impossible to defeat such a mighty army of *Kauravas*. Before the war, when

Duryodhana and Arjuna approached Krishna to fight in their favour, Krishna told them that they can choose between Him and his *Narayani Sena* (army) which was considered to be very strong. Krishna also made it clear that he will not fight in the war. He will not even touch the arms. Still Arjuna chose him and Duryodhana went with his *Narayani Sena* and felt proud on his decision.

When Duryodhana had chosen *Narayani Sena*, Krishna tried to make fun of Arjuna and spoke to him sarcastically:

“हार निश्चित हैं तेरी, हर दम रहेगा उदास ।  
माखन दुर्योधन ले गया, केवल छाछ बची तेरे पास”

(Krishna sarcastically told Arjuna that you are bound to be defeated in the war and you would always remain disappointed, because Duryodhana has taken away the butter and you are left with butter milk only).

Arjuna replied to Krishna:

“जीत निश्चित हूँ मेरी, दास हो नहीं सकता उदास ।  
माखन लेकर क्या करूँ, जब माखन चोर हूँ मेरे पास”

(Arjuna replied that I am bound to win the war and I can't be disappointed; what would I do of butter when butter thief is with me.)

Arjuna knew that the company of Krishna was more than sufficient for him to defeat *Kauravas*. In the war, Arjuna requested Krishna to become his charioteer and plan the strategy for war. He requested Krishna to guide him about the targets to be hit on the priority basis. Krishna planned the entire strategy and *Pandavas* fought as per his strategy only and won the war. As per promise, Krishna did not kill even a single person, nor did he touch the arms in the entire war.

By being on the side of *Pandavas* in the War of Kurukshetra as they were fighting for *dharma*, Krishna gave a strong message to the world that wars are won not on the basis of bigger armies, but on the basis of a great strategy. The way, Krishna planned the strategy for *Pandavas* to fight the war, the huge

## Many Facets of Krishna's Personality

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army of *Kauravas*, which was otherwise not defeatable, was defeated by *Pandavas* and the rule of *dharma* (righteousness) was established.





## Chapter 4

### Krishna as a Mediator

“I envy no one nor am I partial to anyone;  
I am equal to all.”

Lord Krishna

## 4. Krishna as a Mediator

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Mediation, as already stated in previous chapters, was tried by none other than Lord of Universe, Lord Krishna himself to avert the War of Kurukshetra between *Kauravas* and *Pandavas* during *Dwapar Yuga*. The question arises why Krishna mediated between them? Why not some other person? The reason is that both sides were extra ordinary powerful. There were great warriors on both the sides. No one other than Krishna was competent enough to act as a Mediator between *Kauravas* and *Pandavas*.

The other relevant question arises for consideration is whether Krishna was biased in favour of *Pandavas*? This question may come to the minds of many people because Krishna spent lot of time with *Pandavas*. A mediator is not supposed to be

biased in favour of one party. Biased mediation is no mediation and should never be given effect to. The role of Krishna can never be considered as biased for two important reasons. Firstly, when, *Kauravas* defeated *Pandavas* in the game of dice in a deceitful manner, Krishna did not intervene. Had Krishna intervened, *Kauravas* could have been defeated and the situation could have been different. As an outcome of defeat, they had to go in exile as discussed later in this chapter, and which also became the root cause of war, as their territory was not returned on the completion of term of exile. Secondly, Krishna offered the solution which was completely in favour of *Kauravas*, because both Krishna and *Pandavas* wanted peace not war. Krishna said, as already written in the beginning of this chapter, "I envy no one nor am I partial to anyone; I am equal to all".

It is therefore proved beyond doubt that Krishna was the most competent mediator who mediated in the most impartial manner to make peace happen;

which unfortunately did not happen as the mediation was not successful.

It is in the fitness of the things to mention the situations which led Krishna to mediate between *Kauravas* and *Pandavas* in order to prevent war between them.

In the Kuru dynasty which descended from King Bharata, Dhirtrashtra and Pandu were born. Dhirtrashtra, being the elder one was entitled to rule, however, as he was blind by birth, the younger brother Pandu was made the King. Unfortunately, Pandu died at an early stage leaving behind his wives Kunti and Madhavi and five sons – Yudhishtra, Bhima, Arjuna, Nakul and Sahdeva. The first three sons were born from Kunti and the last two from Madhavi.

After the death of Pandu, Dhirtrashtra was made the King for the time being as there was no other option. One hundred sons of Dhirtrashtra and five sons of Pandu grew together. They got education and army training under the same Guru Dronacharya. Duryodhana, the eldest son of

Dhitrashtra did not like his five cousins known as *Pandavas* right from the beginning and hated them like enemies.

Yudhistra, eldest of *Pandavas* was also eldest of his cousins, sons of Dhitrashtra. Dhitrashtra, however, wanted his son Duryodhana to inherit the Kingdom. In order to clear the impediments out of his way, Duryodhana plotted to kill all the five *Pandavas*, but failed as the destiny was on the sides of *Pandavas* who always believed in *dharma* (righteousness).

Mischievous Duryodhana tried to trap *Pandavas* by inviting them to the game of dice, a gambling match. Ignored of his deceitful plot, *Pandavas* accepted the invitation and were defeated badly in that game which was rigged by Shakuni, maternal uncle of Duryodhana, who was playing for him. As a consequence, they lost everything including their wife Draupadi, a pious and divine soul. Stupid Duryodhana stooped so low that he ordered his younger brother Dushsasana to strip her naked in the open court. Draupadi remembered Lord Krishna at that difficult

moment who came to her rescue without being visible and the saree which she was wearing became endless and with the grace of Krishna she could maintain her dignity in the Assembly.

After getting defeated, as a pre-decided rule, *Pandavas* had to go in exile (*vanvas*) for a period of 12 years and to live in *agyatvas* (incognito) for another period of one year. There was another condition that if they were located in *agyatvas*, they will have to undergo a new term of *vanvas* and *agyatvas*. The *Pandavas* successfully completed their term of *vanvas* and *agyatvas* as per the rule of game.

After completion of their term as per the rules of the game, they returned to Hastinapur and requested Dhritrashtra, the King of Hastinapur, to return Kingdom of Indraprastha to them as agreed. The egoist Duryodhana, the eldest son of King Dhritrashtra who in fact was behaving like the *de facto* King refused to return Indraprastha. This is how the dispute arose between the *Kauravas* and *Pandavas*.



To resolve this issue amicably, Krishna thought of mediating between them. He made his intention clear to *Pandavas* that he would go to Hastinapur to mediate between *Kauravas* and *Pandavas* to avoid war. *Pandavas* agreed to his proposal as they were also interested in peace. They just wanted their Kingdom of Indraprastha to be returned to them.

However, when Draupadi got to know about Krishna's plan of going to Hastinapur, she got disappointed and tried to convince Krishna not to go to Hastinapur, where she was humiliated in the open court. However, Krishna somehow made her to understand that peace was the better option and the war should be avoided at any cost.

When the news of Krishna coming to Hastinapur reached Bhishma and Vidur, they met Dhritrashtra and Duryodhana to discuss the strategy. They were of the opinion that that could be a golden opportunity for them to avert war, as Krishna, himself was coming to mediate between *Kauravas* and *Pandavas*. They advised Dhritrashtra not to miss that opportunity at any cost, as it was in the interest of everyone.

Dhritrashtra planned to give lot of gifts to Krishna on his arrival to Hastinapur to impress him. He was advised by Vidur, the Prime Minister not to do so as Krishna was beyond all those material things. He was further advised to impress Krishna by listening to him with all sincerity and act accordingly as Krishna was messenger of peace.

*Kauravas* knew the might of *Pandavas* as they were already defeated by *Pandavas* in the war of Virat. Duryodhana, however, was egoist and over-confident to win the war against *Pandavas*.

When Krishna reached Hastinapur, he was received by all elderly from *Kauravas* side in a dignified manner. Duryodhana wanted Krishna to have food with him, which he refused straightaway. He preferred to have food at the residence of Vidur, who was the Prime Minister but not from the Kuru clan as such. This made Duryodhana very annoyed and unhappy.

By not agreeing to have food with Duryodhana, Krishna gave a message to the mankind that while

going for mediation, it is unethical to accept hospitality from one of the parties. A mediator should not only be honest, but his honesty should also be reflected in his actions.

He was brought to the court with all due respect. Krishna, in all humility and with all protocols advised King Dhritrashtra to return Indraprastha to *Pandavas* to avert war and buy peace. Krishna told the King that *Pandavas* were the sons of his younger brother Pandu only and therefore, they also deserved his love and affection; and that he should not do any injustice to them.

To this, in place of King Dhritrashtra, his arrogant son Duryodhana reacted that there was no question of returning Indraprastha to them. He then asked Krishna whether he had any other proposal?

Here Krishna turned from mediator to conciliator. He then said he had another proposal. He proposed to King Dhritrashtra that if he was not interested to return Indraprastha to them, he could give at least five villages to *Pandavas*, viz, Avishthala, Vrikasthala,

Makandi, Varanavata, and one more village of their choice. Pandavas would be satisfied with these five villages as they were peace lovers and the war will be averted. Once again, the arrogant Duryodhana sharply reacted and turned down the proposal. He said he would not even give land equal to the tip of a needle to *Pandavas*. He was adamant that *Pandavas* should go again to *vanvas* (exile) for another term of 12 years as they did not complete the term as per the condition of game of dice. Duryodhana disputed the completion of the term of exile and incognito.

King Dhritrashtra who was blind in love for his son Duryodhana did not go against his wishes. Krishna told Dhritrashtra that war had become inevitable. He warned *Kauravas* about the severe consequences of the war, which would bring untold sorrow to both the sides as many people would be killed from each side. Duryodhana felt offended by the words of Krishna who was blunt to tell the truth on the face of *Kauravas* about the consequences of war and the sufferings of his mother which would happen after the

war. Not only that the appeal for peace of Krishna went unheard, the stupid Duryodhana went to the extent of asking his security to arrest Krishna and put him in the jail. It is rightly said:

सर्वस्यौषधमस्ति शास्त्रविहितं मूर्खस्य नास्त्यौषधम् ।

(There is a cure for everything but not for foolishness).<sup>1</sup>

Finally, Krishna felt that the time had come to show his power to Duryodhana to dispel his myth that he was the only powerful person on the earth and capable of winning the war. Krishna, then showed his *virat roopa* (divine form) to all present in the court. Krishna kept on growing in size and leaving cosmic light which frightened Duryodhana and all his well-wishers. Krishna, then left the court of Dhritrashtra

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<sup>1</sup> Mukul Asher, "Introduction to Public Policy" (2023), p. 6, available at <https://clppg.nluassam.ac.in/index.php/2023/03/04/introduction-to-public-policy-by-prof-mukul-asher/>

indicating them about the dire consequences of war which would result in bloodshed of many people.

Everyone in the Dhritrashtra court, except the only arrogant and stubborn Duryodhana, could realize that *Pandavas* could win the war with the help of Krishna alone as he had the divine powers. The elderly including Dhritrashtra himself could easily make out what that *virat roopa* of Krishna meant. They knew so long Krishna was with *Pandavas*, it would not be possible for them to win the war. But Dhritrashtra instead of accepting the mediation kept quiet and could not go against the decision of Duryodhana, his spoiled son, knowing the fact that they would go for an unjust war against *Pandavas* and the consequences would be severe.

The great Hindi poet Shri Ramdhari Singh Dinkar described the entire incident in a Hindi poem “*Krishna ki Chetawani*” (Warning of Krishna) from Rashmirathi 3<sup>rd</sup> Sarg. The relevant excerpts of the poem are reproduced below:

मैत्री की राह बताने को,  
सबको सुमार्ग पर लाने को,  
दुर्योधन को समझाने को,  
भीषण विध्वंस बचाने को,  
भगवान हस्तिनापुर आये,  
पांडव का संदेशा लाये।

दो न्याय अगर तो आधा दो,  
पर, इसमें भी यदि बाधा हो,  
तो दे दो केवल पाँच ग्राम,  
रक्खो अपनी धरती तमाम।

...

दुर्योधन वह भी दे ना सका,  
आशीष समाज की ले न सका,  
उलटे, हरि को बाँधने चला,  
जो था असाध्य, साधने चला।  
जब नाश मनुज पर छाता है,  
पहले विवेक मर जाता है।

हरि ने भीषण हुंकार किया,  
अपना स्वरूप-विस्तार किया,  
डगमग-डगमग दिग्गज डोले,  
भगवान क्रुपित होकर बोले-

‘जंजीर बढ़ा कर साध मुझे,  
हाँ, हाँ दुर्योधन! बाँध मुझे।

यह देख, गगन मुझमें लय है,  
यह देख, पवन मुझमें लय है,  
मुझमें विलीन झंकार सकल,  
मुझमें लय है संसार सकल।  
अमरत्व फूलता है मुझमें,  
संहार झूलता है मुझमें।

...

भूलोक, अतल, पाताल देख,  
गत और अनागत काल देख,  
यह देख जगत का आदि-सृजन,  
यह देख, महाभारत का रण,  
मृतकों से पटी हुई भू है,  
पहचान, इसमें कहाँ तू है।

...

बाँधने मुझे तू आया है,  
जंजीर बड़ी क्या लाया है?  
यदि मुझे बाँधना चाहे मन,  
पहले तो बाँध अनन्त गगन।  
सूने को साध न सकता है,  
वह मुझे बाँध कब सकता है?



हित-वचन नहीं तूने माना,  
मैत्री का मूल्य न पहचाना,  
तो ले, मैं भी अब जाता हूँ,  
अन्तिम संकल्प सुनाता हूँ।  
याचना नहीं, अब रण होगा,  
जीवन-जय या कि मरण होगा।

टकरायेंगे नक्षत्र-निकर,  
बरसेगी भू पर वह्नि प्रखर,  
फण शेषनाग का डोलेगा,  
विकराल काल मुँह खोलेगा।  
दुर्योधन! रण ऐसा होगा।  
फिर कभी नहीं जैसा होगा।

भाई पर भाई टूटेंगे,  
विष-बाण बूँद-से छूटेंगे,  
वायस-शृगाल सुख लूटेंगे,  
सौभाग्य मनुज के फूटेंगे।  
आखिर तू भूशायी होगा,  
हिंसा का पर, दायी होगा।'...<sup>2</sup>.

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<sup>2</sup> Full text of the poem is available at <https://hindionlinejankari.com/ramdhari-singh-dinkar-poems/>

This is how the author Ramdhari Singh Dinkar has narrated the entire incident beautifully in the aforesaid poem right from the beginning of mediation till warning of Krishna to Duryodhana of the consequences of the war when he ordered his security people to arrest Krishna.

Despite the best efforts made by Krishna to mediate with excellent proposal, the mediation did not succeed. The one and only reason for mediation not succeeding was the stubbornness of Duryodhana who was not in control of anyone. The consequences are very well known – the War at Kurukshetra took place resulting into huge loss of lives.

The army of *Kauravas* and *Pandavas* was 11 *akshauhini* and 7 *akshauhini* respectively. As per one estimate, the number of two armies, including chariots, elephants, horses and foot soldiers come to 24,05,700 and 15,30,900 warriors respectively. Most of them were killed in the war. Looking at the magnitude of the War of Kurukshetra, it is most appropriate to call it as First World War.

Mahabharata shows how, Krishna was an ideal mediator, who did his best to avert war between *Kauravas* and *Pandavas*. Krishna, being Lord of the Universe, knew it well that mediation would be a failed attempt, he still gave mediation a chance to teach humanity that every possible effort should be made till the last minute to resolve disputes.

It is appropriate to mention a verse from Gita. Krishna, while motivating Arjuna to do his duty for the good of world, stated<sup>3</sup>:

यद्यदाचरति श्रेष्ठस्तत्तदेवेतरो जनः ।  
स यत्प्रमाणं कुरुते लोकस्तदनुवर्तते ॥

(Whatever actions great persons perform, common people follow. Whatever standards they set, all the world pursues.)

Though Krishna spoke the aforesaid verse with respect to the great persons, the same is also applicable on him, who himself is the Supreme

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<sup>3</sup> Chapter 3, verse 21.

Godhead. Krishna mediated between *Kauravas* and *Pandavas* to resolve the conflict, avert war, and maintain peace and harmony between them. The common people are also expected to follow the same method to resolve their disputes. One should not care for success or failure, because as per Gita one can only perform his duty, the outcome lies in the hands of Supreme Godhead. Krishna himself tried mediation to set an example for the mankind, though He failed in making the mediation successful. Performing our duties without expecting the outcome, is our *dharma*.

Justice NV Ramana, the former Chief Justice of India while referring to Mahabharata, highlighted the importance of mediation and stated:

“I always quote this mythological story. It is of Lord Krishna’s efforts to mediate before the Kurukshetra war. Imagine how these kingdoms

would have prospered if the mediation had succeeded.”<sup>4</sup>

Justice T.S. Thakur, the then CJI also referred to Mahabharata while discussing about mediation as a better option for the dispute resolution and stated:

“If you fail, it does not make a difference as even Lord Krishna had failed in his attempt”.<sup>5</sup>

It is interesting to note that this failed mediation by Krishna brought many positive results for the mankind.

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<sup>4</sup> Thyagarajan Narendran, “Imagine How Kingdoms Would Have Prospered Had Lord Krishna ‘Succeeded’ In Mediating Kurukshetra War: CJI NV Ramana” available at <https://lawbeat.in/top-stories/imagine-how-kingdoms-would-have-prospered-had-lord-krishna-succeeded-mediating>

<sup>5</sup> “Lack of professionalism by arbitrators bringing bad name to the country: CJI Thakur” available at <https://www.dnaindia.com/india/report-lack-of-professionalism-by-arbitrators-bringing-bad-name-to-the-country-cji-thakur-2154716>

First of all, evil was defeated and *dharma* prevailed. In other words, *Kauravas* who were not ready to go as per *dharma* were defeated badly and almost all of them including those who fought for them got killed. The regime of *dharma* (righteousness) was established with the victory of *Pandavas*.

Secondly, Gita was gifted to mankind, which is considered as “Life Manual” for all human beings on this earth irrespective of their caste, creed, faith, religion and nationality.

Thirdly, war of Kurukshetra taught the mankind a lesson that people who do not resolve their disputes through peaceful means (mediation or conciliation) due to their over confidence of winning probability, ego, arrogance, undermining the opposite party or simply because they do not want to resolve conflict meet the same fate as *Kauravas* met.

Last but not the least, Krishna taught the qualities a person should have to become a good mediator, such as being impartial, good communicator, good listener, a great thinker (thinking out of the box), being

patient in all situations, dignified, having respect for the parties, trustworthy, having positive mindset, and confidence, etc.

In the modern day mediation also, a good mediator should have all the aforesaid qualities. Anil Xavier, an advocate and Certified Mediator writes that certain qualities should be there in a good mediator such as “overall “people” skills, good verbal and listening skills, ability to think “out of the box”, helping people work together as a team, impartial, respect for the parties, the ability to gain the parties’ confidence, knowledge of the mediation process, bringing about a balanced approach to control the process, initiative and the confidence to use it, reflective, trustworthy, dependable, keeping information confidential and the ability to remain calm under pressure”.<sup>6</sup>

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<sup>6</sup> Anil Xavier, “Mediation is Here to Stay”, *Indian Yearbook of International Law and Policy* (2009), pp. 363–78 at p. 368 available at [http://arbitrationindia.com/pdf/mediation\\_tostay.pdf](http://arbitrationindia.com/pdf/mediation_tostay.pdf)

## Chapter 5

### Mediation at International Level



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“The emergence of fast paced global culture, the complexities of modern society along with the changing demographical landscape of business and commerce demand efficient and time-bound dispute redressal mechanisms. In the last two decades, Mediation has come to be recognized as the most effective method of alternative dispute resolution globally”.

Justice Sharad A. Bobde  
Former Chief Justice of India

## 5. Mediation at International Level

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“As we look ahead to the future of mediation, we should remind ourselves that legal services – as with all other services – must ultimately be designed with the user at the heart. And for international mediation to come into its own, it must meet the evolving needs of cross-border businesses”.

Justice Sundaresh Menon  
Chief Justice of Singapore

Mediation as a time-tested method of dispute resolution has also been adopted by the international community to resolve disputes between two parties. Mediation, and in some of the cases collective

mediation has been invoked to avert wars between two nations and also to stop them. Max Lucado rightly said that “conflict is inevitable – combat is optional.”<sup>1</sup> The history is full of such cases, where mediation played an excellent role to end violence and maintain international peace in the global community.

It is noteworthy that United Nations Charter also obligates Member nations to settle their disputes by peaceful means including mediation and conciliation. Many other international conventions and treaties also provide mediation as a mode to settle international disputes.<sup>2</sup>

What was invoked by Lord Krishna in *Dwapar Yuga*, was adopted by the international community to resolve international disputes in the modern world.

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<sup>1</sup> See

<https://www.overallmotivation.com/quotes/mediation-quotes/>

<sup>2</sup> Article 2(3) and 33, United Nations Charter. See also Article 279, United Nations Convention on Law of the Sea, 1982.

This also shows the leadership of India in the settlement of international disputes.

Realising the potential of mediation as a method of dispute resolution, the international community also adopted it for the resolution of commercial disputes. The UNCITRAL Model Law on International Commercial Mediation, 2018 deals with procedural aspects of mediation in details. It encourages the nations to resolve commercial disputes through mediation. As it is only Model Law, it is not applicable on nations as a treaty obligation.

The UNCITRAL Model Law was initially adopted in 2002 as the “Model Law on International Commercial Conciliation”. Originally, it covered only conciliation procedure. It was amended in 2018 and was renamed as “Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation”. It is also to be noted that the terms “conciliation” and “mediation” were used interchangeably in the Model Law of 2002.

To make mediation a treaty obligation, the United Nations Convention on International Settlement Agreements Resulting from Mediation (popularly known as Singapore Convention) was adopted on 20 December 2018. The Singapore Convention establishes an effective “framework for international settlement agreements” which may result from mediation and which are also acceptable to the State Parties having “different legal, social and economic systems”. A framework like this is likely to contribute to the “development of international economic relations” among member nations. The settlement agreement resulting from mediation is enforceable by State Parties.

“Mediation” is defined by Singapore Convention as a process “whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute”. The “third person” referred to in the definition of mediation is known as Mediator.

State Parties under the Singapore Convention are obligated to “enforce a settlement agreement in accordance with their own rules of procedure” as applicable in their territory and as per the Convention.

It is noteworthy that similar to “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (the “New York Convention”), the Singapore Convention also “facilitates the recognition and enforcement of settlement agreements”. Thus, “a settlement agreement will be enforced directly by a court instead of it being treated only as a contract, with a civil suit having to be filed for its enforcement”.<sup>3</sup>

Therefore, “the value of the Convention lies in providing certainty to parties that settlement agreements effected through mediation will ultimately

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<sup>3</sup> See also Shaneen Parikh and Ifrah Shaikh, “India: The Singapore Convention on Mediation – India’s Pro-Enforcement Run Continues” available at <https://www.mondaq.com/india/arbitration-dispute-resolution/838414/the-singapore-convention-on-mediation-india39s-pro-enforcement-run-continues>

be enforceable in an efficient manner and that they will not be relegated back to a full-blown arbitration or litigation, should the other party default”.<sup>4</sup> In case of non-compliance, the Singapore Convention gives teeth to the mediated settlement agreements.

The grounds for refusal of relief are provided in Article 5 of the Convention which enables the competent authority of a State Party to refuse to grant relief. These grounds are:

(i) A party to the settlement agreement was under some incapacity;

(ii) The settlement agreement in question – (1) “is null and void, inoperative or incapable of being performed” under the applicable law; (2) “is not binding, or is not final, according to its terms”; or (3) “has been subsequently modified”;

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<sup>4</sup> *Ibid.*

(iii) “The obligations in the settlement agreement – (1) have been performed; or (2) are not clear or comprehensible”;

(iv) It “would be contrary to the terms of the settlement agreement” to grant relief;

(v) There was a serious breach by the mediator of standards applicable to the mediator or the mediation which formed the very basis for that party to enter into the settlement agreement; or

(vi) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

Apart from that, the relief sought on the basis of settlement agreement is also to be denied by the “competent authority” of the State Party if it is found that – (i) “granting relief would be contrary to the public policy” of that State Party; or (ii) “the subject



matter of the dispute is not capable of settlement by mediation under the law of that Party”.

According to Gregg F. Relyea, mediated settlement agreements are more complied with in comparison to court judgements. The reason is that in case of mediation, there is direct party involvement in arriving at settlement agreement.<sup>5</sup>

The cultural predisposition always existed towards adjudicative means of dispute resolution particularly in the West. The Singapore Convention seeks to promote the use of mediation bridging some of the cultural gaps in legal systems.<sup>6</sup> Further, it is expected that Singapore Convention will bring “certainty and stability to the international framework on mediation,

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<sup>5</sup> Gregg F. Relyea, “Mediation: A Powerful Tool for Risk Reduction and Reward Expansion in the Commercial Sector” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 41.

<sup>6</sup> Kennedy Gaston, “The Singapore Convention on Mediation and Disputes Involving Multinational Corporations” in V. K. Ahuja, et. al., *Mediation* (2020), p. 30.

thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16”,<sup>7</sup> which is to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.<sup>8</sup>

Since the Singapore Convention is consistent with the “UNCITRAL Model Law” of 2018, the States have been provided with the “flexibility to adopt either the Convention, the Model Law as a standalone text or both the Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation”.<sup>9</sup>

India is a signatory to the Singapore Convention and is yet to become a party. The adoption of Singapore Convention on Mediation has proved

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<sup>7</sup> See [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements)

<sup>8</sup> See <https://sustainabledevelopment.un.org/?menu=1300>

<sup>9</sup> [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements)

beyond doubt that mediation, a time tested mode of dispute settlement, where both parties remain in the control of mediation proceedings and come out in a win-win position must be given a chance to dispose of commercial disputes where time remains an important element. The biggest benefit of mediation in the commercial disputes is that the commercial relationship between the parties remain intact or sometimes even strengthened after mediation and the parties do more business than before.

Michael McIlwrath, Chairman of the International Mediation Institute, The Hague observed that mediation is needed to be globally accepted, then only it will emerge as a profession. According to him, “to emerge as a profession, mediation must be globally understood and accepted; where competent mediators apply transparent high standards, and are instinctively regarded as professionals regardless of their background; where users see mediation as an opportunity and are more inclined to accept than reject a proposal to engage a mediator; where there are enough competent mediators from all cultures

and technical fields that the most suitable mediator can easily be identified".<sup>10</sup>

As this study had already explained that mediation is possible in all types of disputes, be it political, commercial, family, service or any other, it is in the fitness of the things to make a reference to the ongoing war between Russia and Ukraine and the role which mediation can play to stop it.

At the outset, I would like to state that the war between Russia and Ukraine should not have been waged. The entire international community has failed in averting this war. There were no serious or whole hearted efforts by the United Nations or group of nations or a single nation to mediate between the two nations who are at war since 24 February 2022. It is now more than a year and no solution has been found till date. This war is practically not between two

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<sup>10</sup> Anil Xavier, "Mediation is here to stay", *Indian Yearbook of International Law and Policy* (2009), pp. 363-78 at p. 370 available at [http://arbitrationindia.com/pdf/mediation\\_tostay.pdf](http://arbitrationindia.com/pdf/mediation_tostay.pdf)

nations but between two groups of nations. As normally happens, one of the two nations, i.e. Russia, was adamant and hell-bent to wage war.

Being a strong military power, the Russia was overconfident to win this war within no time. However, the things did not go its way. Russia has understood by now that it would not be a cake walk for him as anticipated. Somewhere the Ukraine's assessment of the West assistance also went severely wrong. Enormous damage has been caused to Ukraine and it will take years to normalise everything. According to a study, the estimated loss to physical infrastructure of Ukraine by this war is \$127 billion till December 2022.<sup>11</sup>

Ukraine will continue to fight so long it is getting military assistance from the West. If military assistance is stopped to Ukraine, it will land in a very difficult situation and will not be able to defend itself, though,

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<sup>11</sup> For detailed information, see <https://www.statista.com/statistics/1303344/ukraine-infrastructure-war-damage/>

it may not surrender. On both the sides, there have been huge casualties. It is not possible to have a fair estimate as to how many people have died in this war so far. The figure of casualties quoted by unofficial sources varies drastically. Apart from casualties, Russia also had incurred huge economic losses, but Putin's stubbornness is preventing him to stop the war.

The impact of this war can be seen on the entire world. Martin Luther once said "Injustice anywhere is a threat to justice everywhere".<sup>12</sup> The prices of crude oil in many countries had soared like anything, putting enormous economic burden on masses. Russia stopped oil and gas supply to various European countries because they were supporting Ukraine. The oil and gas supply cut had badly affected the people of these countries during the winter.

Now the question is what next? Russia had threatened many a times that it will not hesitate in

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<sup>12</sup> <https://tssw.tulane.edu/news/injustice-anywhere-threat-justice-everywhere>

using nuclear weapons, if required. In fact, it is also a face saving situation for Russia, as it had already realized that winning this war is not that easy. If the war continues, Russia will also bleed, though it may not bleed in the same proportion as Ukraine.

As I have already stated that the war in the first place should not have been waged, but since it happened, it must stop now. The world cannot be a moot spectator of this unjust war. The time is ripe when India should come forward and assume the character of Krishna to stop this war by way of mediation.

India enjoys a credible image at the international level. The entire world also expects India to mediate and stop this war, which had turned out to be the worst war of the 21<sup>st</sup> century. The sooner mediation takes place and the war is stopped, the better it would be for both the nations and international community as a whole. The longer this war goes, the difficult it would be for the mediator(s) to stop it. Let us not think about the consequences and move forward for mediation, the divine function, as Justice T.S. Thakur,

the then Chief Justice of India termed it.<sup>13</sup> Dr. A.P.J. Abdul Kalam, former President of India, rightly said that when “a stone is broken by the last stroke of hammer, that doesn’t mean that the first stroke is useless. Success is the result of continuous efforts”.<sup>14</sup> The dispute may not get resolved in the first attempt of mediation, but the continuous efforts will definitely bring positive results because war has to end one day. The message given by Lord Krishna that mediation can bring peace in the world by averting or stopping war is to be applied whole heartedly and with all sincerity.

If India dreams of becoming *Vishwa Guru*, it is the best opportunity for her in this worst situation to prove her mettle and impress the world. It is worth mentioning that India got the Presidency of G 20 (Group of Twenty) for one year starting from 1

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<sup>13</sup> See also <https://www.dnaindia.com/india/report-lack-of-professionalism-by-arbitrators-bringing-bad-name-to-the-country-cji-thakur-2154716>

<sup>14</sup> <https://www.goodreads.com/quotes/9739013-a-stone-is-broken-by-the-last-stroke-of-hammer>



December 2022 till 30 November 2023. G 20 comprises 19 countries and the European Union. All the five permanent members of the United Nations Security Council, viz. United States, Russia, France, United Kingdom and China are its members. G 20, which is the “premier forum for international economic cooperation”, expanded its agenda to include “trade, sustainable development, health, agriculture, energy, environment, climate change, and anti-corruption”. G 20 represents around two-third population of the world, 75% of the global trade, and 85% of the global GDP. Security as such is not the agenda of G 20, it is however, not possible to have economic collaboration at international level in absence of international peace and security.

As already explained, the war between Russia and Ukraine is affecting the economic health of many countries of the world. It is the right time for India to prove her leadership and make all possible efforts to stop this war and establish peace in the world. India, being President of G 20 is in a much better position to take up the role of Mediator and break the ice between the warring countries. The entire world is

looking at us. The step taken by India will get lot of world's appreciation. It is noteworthy that Prime Minister Sh. Narendra Modi while talking to Russian President Vladimir Putin on 16 September 2022, said that "...today's era is not an era of war". He advocated peace and the importance of "democracy, diplomacy and dialogue". The *dharma* for India is to assume the role of Krishna and prepare both the countries for mediation. Howsoever complex it may be, there is no problem in the world, which cannot be resolved through mediation.

We should keep in mind the following couplet:

“कौन कहता है कि आसमाँ में छेद नहीं हो सकता  
एक पत्थर तो तबीयत से उछालो यारों!”

(Who says there cannot be a hole in the sky  
Just toss a stone with determination)

It is important to note one more point here that western scholars have serious reservations that India contributed anything to the modern international law. The fact is that many concepts of modern international law were already there in ancient India

much before the dawn of Christianity. For example, one can find subjects like treaties, pacific settlement of disputes including mediation, maintenance of peace, law of war, most particularly law on prisoners of war, diplomatic immunity, human rights, women empowerment, etc. in ancient India. The basic core elements of law on these subjects as applicable in ancient India remain the same even today. This simply shows the ignorance of western scholars about rich ancient Indian culture, law and practices.

To sum up what Lord Rama and Lord Krishna taught us in *Treta Yuga* and *Dwapar Yuga* respectively has been adopted by the international community. We need to feel proud of our ancient texts, epics and practices. Whatever has been laid down in those texts and practices are still relevant. Interestingly, Britishers who imposed their adversarial system on us in 1775 by criticising our ancient justice delivery system, have also adopted mediation.

Let us hope that the institution of mediation becomes successful at international level for all types of disputes.

Chapter 6  
Mediation in India

“Mediation and reconciliation work is about a profound quest for justice and social transformation. But at the same time, they are about service, solidarity, about exploring and rediscovering the human spirit that has been lost or shattered through human conflict, cruelty, ignorance and greed.”

Hizkias Assefa

## 6. Mediation in India

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“An ounce of Mediation is worth a pound of Arbitration and ton of Litigation”.

Joseph Gymbaum

Lord Krishna’s invoked, time tested, highly reliable, efficient, cheap and faster mode of dispute resolution, i.e. mediation, was kept in cold storage for several decades even after the independence as we heavily relied on the adversarial system and considered it to be the most suitable justice delivery system.<sup>1</sup> In fact, the Constitution makers also did not pay due attention to

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<sup>1</sup> See also Anoop Kumar Srivastava, “Modes of Dispute Resolution and Mediation as a Preferred ADR” in E-Mediation Writings, *Mediation Compendium* (2021), pp. 26-27.

alternative dispute resolution methods, most particularly the mediation. Justice A.K. Sikri stated that it was the judiciary which was recognised as the “justice delivery institution under the Constitution of India”<sup>2</sup>; and the judiciary did not focus much on mediation, as is evident.

By Constitution (Forty-second Amendment) Act, 1976, section 39A was inserted in Part IV of the Constitution, i.e. Directive Principles of State Policy, regarding “equal justice and free legal aid”.<sup>3</sup> Section 39A also did not speak of mediation as such. The non-consideration of indigenous methods of dispute resolution, including mediation proved to be a blunder for the judiciary and the end result was that number of

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<sup>2</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 11.

<sup>3</sup> 39A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

cases kept on increasing every year. Unfortunately, cases filed by people were much more than the cases decided by the courts per day, which led to monstrous pendency of cases. There is a famous saying that “justice delayed is justice denied” or that “delay defeats justice” as Justice A.K. Sikri rightly puts it. He further stated that this delay in justice created “frustration amongst the litigants” and also led to “loss of faith” in the justice delivery system. Emphasising upon the relevance and significance of mediation, he states that “mediation has proved, in varied circumstances, as the best mode of access to justice”.<sup>4</sup> This is what exactly Lord Krishna taught the world more than 5000 years back.

Interestingly, Justice Sikri states that the concept of “Social Context Judging” has been adopted in India. He further observed that “Social Context Judging” is mainly “a shift from the adversarial system so that the faith of

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<sup>4</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 11.



the society in the justice delivery system can be maintained whereby bridging the gap between law and life, law and justice". The ADR methods including mediation were brought in due to this shift to "Social Context Judging".<sup>5</sup> It is rightly said better late than never.

In 1996, a major step was taken by the legislature when it passed the Arbitration and Conciliation Act, 1996 repealing the Arbitration Act, 1940, which had become outdated. It was thought that cases will be decided much faster and cheaper by arbitration and conciliation. The arbitration was invoked mainly by the corporate sector. Conciliation did not get the response which was expected of it. Conciliation, as a method of dispute resolution remained underused.

The Law Commission of India had made some studies on the backlog of cases and also made several recommendations. The Code of Civil Procedure (Amendment) Bill, 1997 which was introduced on 14<sup>th</sup> August 1997 in Rajya Sabha was impacted by Law

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<sup>5</sup> *Id.* at 12.

Commission's 129<sup>th</sup> Report, the Committee on Subordinate Legislations (11<sup>th</sup> Lok Sabha) Report and Malimath Committee Report on "Alternative Modes and Forums for Dispute Resolution" along with their recommendations.

The objectives of the Bill *inter alia* was "that every effort should be made to expedite the disposal of civil suits and proceedings".<sup>6</sup> The Bill proposed to insert a new provision section 89 in the CPC for "Settlement of Disputes outside the Court". In 1999, section 89 was finally inserted in Civil Procedure Code, 1908 which came into force on 1 July 2002.

Section 89(1) of the CPC provides that "where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may

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<sup>6</sup> V. K. Ahuja, "Making ADR Techniques Mandatory in India: Proposed CPC Amendment", II *National Capital Law Journal* (1997), pp. 27-42 at 38-39.

reformulate the terms of a possible settlement and refer the same for ... mediation.” Section 89(2) provides that “where a dispute has been referred ... for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed”.

In *Salem Advocate Bar Association, Tamil Nadu v. Union of India*,<sup>7</sup> the CPC amendments were challenged before Supreme Court. The amendments were upheld by the Court. The Court made an important observation with respect to ADR modes:

“In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but

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<sup>7</sup> (2003) 1 SCC 49.

resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not *ipso facto* take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial”.<sup>8</sup>

In the aforesaid observation, Supreme Court has acknowledged the fact that ADR had been very successful in certain countries where there were out of court settlement for more than 90% cases. This shows that ADR including mediation has the potential to ease the burden of courts.

In compliance with Supreme Court directions in *Salem Advocate Bar Association, Tamil Nadu v. Union of India* (2003),<sup>9</sup> and *Salem Advocate Bar Association, Tamil Nadu v. Union of India* (2005),<sup>10</sup> and in order to

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<sup>8</sup> *Id.*, para 10.

<sup>9</sup> (2003) 1 SCC 49.

<sup>10</sup> (2005) 6 SCC 344.

give impetus to the effective implementation of section 89 of CPC, Alternative Dispute Resolution Rules 2009 and Civil Procedure Mediation Rules 2009 were framed.

The legal position with respect to section 89 of the CPC was further clarified by Supreme Court in *M/S Afcon Infra Limited & Another v. M/S Cherian Varkey Construction Co. Limited*.<sup>11</sup> The Court gave comprehensive guidelines with respect to implementation of section 89.

The initiative of legislature of introducing section 89 in CPC was a good step in the direction of expeditious disposal of civil cases. The judiciary also played its role in explaining the procedure and clarifying the doubts of legal fraternity with respect to the implementation of section 89. The cumulative effect of the efforts of legislature and judiciary did not bring the desired results as the cases kept on mounting and the effect of having mediation as a method of dispute resolution was not very much visible.

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<sup>11</sup> (2010) 8 SCC 24.

The legislature took another significant step towards the speedy disposal of commercial cases by enacting “The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act” in 2015. “Commercial dispute” is defined in a comprehensive manner in the Act. By an amendment Act of 2018, mediation was added in the 2015 Act as a mode of settlement of commercial disputes. The 2018 amendment inserted *inter alia* section 12A which provided for the mandatory “pre-institution mediation and settlement” in commercial disputes. The “Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018” were adopted to give effect to the provisions of the Commercial Courts Act, 2015 as amended in 2018.

The inclusion of mediation in Commercial Courts Act, 2015 as a method of dispute resolution is a welcome step. Since 2018 Rules *inter alia* take care of confidentiality of the mediation proceedings and also provide for the ethics for mediator, mediation is likely to have a promising future provided the parties join the

proceedings with positive mindset leaving behind vested interest, if any.<sup>12</sup>

It is noteworthy that the first Court Annexed Mediation Centre was started in Chennai. It was organized by court administration. Thereafter, Delhi High Court Mediation and Conciliation Centre was established which was managed by the advocates of Bar Association of Delhi High Court. Apart from this, in the territory of Delhi, in Court Annexed Mediation Centres, the services of judges were extended as mediators by District courts. This step of district courts in Delhi is commendable.

With the excellent efforts made by the Supreme Court Mediation and Conciliation Project Committee (MCPC), High Courts and District Courts of all states have established Court Annexed Mediation Centres. Further, High Courts have also framed their Mediation and

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<sup>12</sup> For more information, see V. K. Ahuja and Parthvi Ahuja, “Mediation in Intellectual Property Rights” in V.K. Ahuja et.al., *Mediation* (2020), pp. 127–39.

Conciliation Rules which are applicable to their Court Annexed Mediation Centres.<sup>13</sup>

It is noteworthy that mediation/ conciliation was also introduced in some of the legislations including the Industrial Disputes Act, 1947, Special Marriage Act, 1954, Hindu Marriage Act, 1955, Family Courts Act, 1984, Legal Services Authority Act 1987, Companies Act, 2013, Commercial Courts Act, 2015, Real Estate Regulation and Development Act 2016, and Consumer Protection Act, 2019.

One of the main reasons why mediation did not pick up in India was lack of rules or guidelines on mediation, as already stated. The then CJI Justice N.V. Ramana stated that “in a constitutional challenge to Section 89 CPC, the Supreme Court of India appointed a Committee to draft Mediation Rules, which were subsequently approved. All the High Courts were

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<sup>13</sup> See also Niranjana J. Bhatt, “Role of ‘Third Party’ in Mediation” in in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 52–53.



directed to frame the rules. This led to the development of Court-Annexed Mediation in India”.<sup>14</sup>

Justice Ramana further stated that “mediation referrals often happen even in the Supreme Court of India, and I have personally seen disputes that have subsisted for decades get resolved through the process of mediation, within a short time.”<sup>15</sup>

Referring to private mediations, Justice Ramana further stated that “private mediations, which take place at the pre-litigation stage, are also becoming more prevalent in the country. Most arbitration clauses in commercial contracts have a multi-tiered approach, where the first attempt to resolve the dispute between parties is through mediation or negotiation”.<sup>16</sup>

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<sup>14</sup> See full text of the speech at <https://www.deccanherald.com/national/mahabharata-early-attempt-at-mediation-a-tool-of-social-justice-chief-justice-n-v-ramana-1009719.html>

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

This is an excellent development in the area of alternative dispute resolution where different modes of ADR including mediation will be invoked before finally invoking arbitration in a commercial contract. The multi-tiered approach will always be useful in commercial contracts, irrespective of the fact whether both parties to the contract are Indians or one of the parties is a foreigner. It proves the fact that mediation/ conciliation must be invoked in all probabilities. It is only when the dispute is not resolved through mediation/ conciliation then only arbitration should be invoked or parties should move to the court. This means that we have once again recognised the importance of mediation after ages and the then CJI has also stated the same.

In 2005, the Supreme Court of India set up the Mediation and Conciliation Project Committee (MCPC). The MCPC *inter alia* trains Mediators and Referral Judges throughout the country. This may also be referred to as an important step towards institutionalising mediation procedure in India.

In order to train mediators as professional mediators, the mediation related skills have been isolated, identified

and taught to them. Such trained professional mediators are expected to assist parties in resolving their disputes using their “core negotiation and communication skills rather than authority-based or arbitrary decision-making”.<sup>17</sup>

Justice F. M. Ibrahim Kalifulla, Judge, Supreme Court stated that out of 38,592 cases which were referred to mediation and conciliation centre in Tamil Nadu during 2005 to 2015, only 6,359 were settled. This figure constituted only 18%. He further stated that “it is miniscule feat if compared to millions of disposals by traditional civil courts”.<sup>18</sup>

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<sup>17</sup> Gregg F. Relyea, “Mediation: A Powerful Tool for Risk Reduction and Reward Expansion in the Commercial Sector” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 33–34.

<sup>18</sup> “Judges invoke Veda, Lord Krishna, Prophet to lay stress on mediation” available on <https://timesofindia.indiatimes.com/city/chennai/judges-invoke-veda-lord-krishna-prophet-to-lay-stress-on-mediation/articleshow/50510850.cms>

Expressing disappointment on such a sorry state of affairs, Justice Kalifulla drew immediate attention on five aspects – (i) reference for mediation; (ii) lack of skills; (iii) disinclination shown by litigants; (iv) poor infrastructure; and (v) decent honorarium.<sup>19</sup>

No exclusive enactment was passed on mediation as a dispute resolution method, as was done for arbitration and conciliation. On 20 December 2021, Mediation Bill was introduced in the Rajya Sabha “to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost effective process”.

The Bill purports to define mediation as “a process ... whereby party or parties, request a third person referred to as mediator or mediation service provider to

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<sup>19</sup> *Ibid.*

assist them in their attempt to reach an amicable settlement of a dispute”.<sup>20</sup>

Disputes or matters listed in First Schedule of the Bill are not to be resolved through mediation. The court may, however, refer any dispute relating to compoundable offences or matrimonial offences connected with or arising out of civil proceedings to mediation.<sup>21</sup>

The Bill proposes that the mediator is to “assist the parties in an independent, neutral and impartial manner in their attempt to reach an amicable settlement of their dispute”. Further, the mediator is to be “guided by the principles of objectivity and fairness”. Apart from that, “voluntariness, confidentiality, and self-determination of the parties” are to be protected by the mediator. The mediator is to assist the parties “in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute expeditiously”. The

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<sup>20</sup> Clause 4, Mediation Bill, 2021.

<sup>21</sup> *Id.*, clause 7.

mediator shall be under an obligation to inform the parties in clear terms that he will only facilitate them “in arriving at a decision to resolve a dispute”.<sup>22</sup>

Confidentiality is to be maintained by all the stakeholders in the mediation proceeding.<sup>23</sup> A mediated settlement agreement may be challenged on the ground of (1) fraud; (2) corruption; (3) impersonation; or (4) dispute not fit for mediation.<sup>24</sup> Online mediation is to be approved under the proposed law.

The Bill also proposes to establish Mediation Council of India. The duties and functions of the Council ranges from promoting mediation to laying down the guidelines for the continuous education, certification and assessment of mediators; manner of registration, renewal, withdrawal, suspension or cancellation of registration of mediators; laying down standards for professional and ethical conduct of mediators; holding trainings, workshops and courses in the area of

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<sup>22</sup> *Id.*, clauses 17 and 18.

<sup>23</sup> *Id.*, clause 23.

<sup>24</sup> *Id.*, clause 29.

mediation; recognising mediation institutes and mediation service providers; and laying down standards for professional and ethical conduct of the mediation institutes and mediation service providers.<sup>25</sup>

The Bill also proposes to provide for community mediation.<sup>26</sup> The time limit for completion of mediation is proposed as 180 days which can be extended by another 180 days.<sup>27</sup>

The Bill was referred to Standing Committee on 20 December 2021 and the report of the Standing Committee was submitted on 13 July 2022. The Bill is a welcome step. The Parliament should pass it at the earliest after considering the Standing Committee report and addressing the concerns raised.

It is heartening to note that as per the statistics published by National Legal Services Authority, between April 2022 to December 2022, there were 479 ADR

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<sup>25</sup> *Id.*, clauses 33 and 40.

<sup>26</sup> *Id.*, clause 44.

<sup>27</sup> *Id.*, clause 21.

Centres out of which 412 were functional. Other than ADR Centres, there were 613 Mediation centres and 16,577 Mediators which included Judicial Officer Mediators, Lawyer Mediators and other Mediators. During this period, 67,099 cases were settled through mediation.<sup>28</sup>

This shows that by using mediation in an institutionalised manner and to the full capacity, a good number of cases may be disposed of in a comparatively short span of time.

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<sup>28</sup> For more information and to have access to period wise data on mediation, see <https://nalsa.gov.in/statistics/settlement-through-mediation-report/settlement-through-mediation-april-2022-to-december2022>





## Chapter 7

# Pendency of Cases in India: Can Mediation be a Game Changer?

“The pressure on our judicial system due to high pendency of cases not only delays justice delivery but also affects the public faith in it. The role mediation is playing in today's world is not just that of reducing the number of litigations in courts but it is also at the same time proving to be a cost-effective method of resolving conflicts.”

Justice Sharad A. Bobde  
Former Chief Justice of India

## 7. Pendency of Cases in India: Can Mediation be a Game Changer?

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“If every case has to be tried till the end, if every first appeal has to be heard by the courts, if every matter transcends itself into coming to the Supreme Court, 200 years, 500 years will also not see the end of this litigation.”<sup>1</sup>

Justice Sanjay Kishan Kaul  
Judge, Supreme Court of India

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<sup>1</sup> For more details, see <https://legal.economictimes.indiatimes.com/news/industry/it-may-take-500-years-to-dispose-off-all-pending-cases/93338563>

The pendency of cases in all courts taken together has reached around 50 million. Surprisingly, this number is much more than the population of several countries taken together.

In *Hussainara Khatoon v. Home Secretary, State of Bihar*,<sup>2</sup> the Supreme Court held that “right to speedy trial is a fundamental right”, which is covered under Article 21 of the Constitution of India. Right to speedy justice is *sine qua non* for any robust justice delivery system, as justice delayed is justice denied.

Now the question arises is as to who is to be blamed for the mounting pendency of cases? Is this the judiciary alone which is to be blamed for? The answer is no. In fact, all the three organs of the State, viz. Executive, Legislature and the Judiciary are responsible for the present state of affairs.

The blame game must stop now and an effective solution must be found to bring down the pendency

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<sup>2</sup>1979 SCR (3) 532.

of the cases. The case filed today adds to the pendency of cases tomorrow. With the increasing population which has crossed 140 crores, the number of cases are also rising. There is no magic stick to bring down pendency of cases on immediate basis.

One of the several factors adding to the pendency of cases is so called “luxurious litigation” as stated by Justice NV Ramana. “Luxurious litigation” is defined by him as a “specific type of litigation wherein parties with resources attempt to frustrate the judicial process and delay it by filing numerous proceedings across the judicial system”. These insensitive parties do not have any regard to the pressure on judicial system in terms of pendency of cases. They may be settling their personal vendetta or satisfying their ego by filing unnecessary and avoidable cases.

The “increased access to justice” was cited by Justice Ramana as another factor contributing to pendency of cases in India. The legal aid programs in India after the enactment of Legal Services

Authorities Act, 1987 has provided easy access to justice to nearly 70% of the Indian population.

Justice Ramana may be right in stating that “increased access to justice” is a factor for mounting arrears. At the same time, it is not wrong to say that general perception of public about judicial system has not changed much. Many people still do not go to court to enforce their rights, as they feel that it will be sheer waste of time and money. They prefer to tolerate injustice rather than going to court. On the other hand, some people with criminal mindset settle their score then and there as they feel that there is no use in going to the court.

In addition to above, inadequate infrastructure both physical and technical, lesser number of judges in comparison to rising population, non-use or grossly inadequate use of artificial intelligence in the justice delivery system,<sup>3</sup> inadequate use of ADR mechanism

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<sup>3</sup> It must be noted that artificial intelligence is being utilized in justice dispensing system in several countries.

including mediation process,<sup>4</sup> lack of funds, lack of desire on the parts of advocates to settle cases out of court, are some other factors responsible for the mounting pendency of cases.

Albert Einstein once said that “in the middle of every difficulty lies opportunity”. Today, difficulty is to deal with mounting pendency of cases, and the opportunity is to popularise our own indigenous dispute settlement method, i.e. mediation. In other words, out of several measures to reduce pendency of cases which are being thought about today, mediation may be proved to be a game changer.

There is not an iota of doubt that mediation is the best method of resolving dispute, be it political dispute, family dispute, commercial dispute or dispute of any other nature. This is Lord Krishna invoked, the

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Cases with petty matters are being filed with Judge AI in some of the countries, with a provision to make an appeal to a human judge.

<sup>4</sup> The lack of law on private mediation so far has proved detrimental to the justice delivery system.



most trusted method for dispute resolution in the country.

Justice Ramana has also stated:

“[M]ediation and conciliation, can reduce pendency, save resources and time, and allow litigants a degree of control over the process and outcome of their dispute resolution process.”<sup>5</sup>

Justice Sikri is also of the opinion that mediation in the form of pre-litigation mediation has the potential to tackle the problem of arrears at the threshold itself. Mediation may bring in a situation of “dispute avoidance” to ease the pressure on judiciary.

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<sup>5</sup> Speech of Justice N. V. Ramana on “Mediation for Everyone: Realizing Mediation’s Potential in India” at India-Singapore Mediation Summit – 2021, available at <https://www.deccanherald.com/national/mahabharata-early-attempt-at-mediation-a-tool-of-social-justice-chief-justice-n-v-ramana-1009719.html>

Justice Sikri further states that “court-referred mediation” results in settlement and also avoids the possibilities of appeal against such settlement which ultimately reduces the pendency of cases and also eases the pressure on appellate courts.<sup>6</sup>

It is worth mentioning here that mediation is the best suited method of dispute resolution for some of the cases. For example, family matters are more suitable for being resolved by mediation. This can be exemplified with the story of 17 Camels and 3 Sons.

The story goes like this – once upon a time, there was an old man who used to live with his 3 sons in a deserted area. He had 17 camels, which were the main source of his income. He wrote a will and died. After his funeral, the sons opened the will, so that they could divide the camels among themselves. As per the will,  $\frac{1}{2}$  of the 17 camels were to go to the

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<sup>6</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 18.

eldest son;  $\frac{1}{3}$  to the middle son; and  $\frac{1}{9}$  to the youngest son.

This was a strange case as 17 is not divisible into  $\frac{1}{2}$ ,  $\frac{1}{3}$  and  $\frac{1}{9}$ . The three sons had a fight on the division of camels in the given ratio. Finally, they thought of going to a wise man and to request him to mediate and solve the issue amicably.

The wise man asked them to bring all the camels to him so that he could solve their issue. As per his advice, the three sons of the deceased took those 17 camels to him. The wise man gave them one camel from his own side and then asked them to read the will and divide. Now, the total number of camels was 18. The eldest son got 9 camels ( $\frac{1}{2}$  of 18); the middle son got 6 camels ( $\frac{1}{3}$  of 18); and the youngest son got 2 camels ( $\frac{1}{9}$  of 18). When the three added the total number of camels they got, it became 17 ( $9 + 6 + 2$ ). The wise man asked them to return his camel. This is how the problem was resolved amicably.

The aforesaid story tells us that there is a solution to every problem. But every problem cannot be decided by the court. Had the three sons gone to the court, the court could not have added a camel of its own as done by the mediator. By going to mediation, not only their problem was resolved amicably, but also the bond between them was strengthened as all the three emerged as winners and there was no loser. This story shows the potential of mediation as a method of dispute resolution.

Emphasising the importance of mediation, Professor Madhava Menon also stated:

“Mediation is ... in fact the handling of human relations in a responsive and positive manner for the good of the people and betterment of the community. ... In mediation there is no victor nor is there a vanquished.”<sup>7</sup>

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<sup>7</sup> Justice A K Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al.

Unfortunately, the political circumstances forced us to leave mediation and go for adversarial system. The British after colonizing our motherland totally disrupted our indigenous justice delivery system much to their advantage. They imposed their adversarial system on us which was not suited to our conditions. The justice under adversarial system tilted towards the rich, as the litigation cost was high, procedure became complex and time consuming. The poor in India could not afford justice under the adversarial system. Justice for poor is neither done nor can ever be seen to be done effectively in the adversarial system.

Lamenting upon the adversarial system, the then Chief Justice of Chhattisgarh High Court, Justice Navin Sinha stated:

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(eds.), *The Power of Mediation* (2020), pp. 10–32 at p. 13.

“our basic problem is our perception that justice could flow only from the gentleman sitting four feet above the ground level”.<sup>8</sup>

Even after becoming independent, we continued with adversarial system only. There is a saying that history repeats itself. It is a matter of great satisfaction that this indigenous system of dispute resolution which was left long back as formal system of dispute resolution is now gaining significance and being preferred by the courts.

Mediation is now being institutionalised and the new law on Mediation is likely to be a game changer. The pendency of cases may reduce if the mediation is taken in the right spirit. Except for few cases, particularly the criminal and constitutional cases, most of the cases may be resolved by mediation and

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<sup>8</sup> “Judges invoke Veda, Lord Krishna, Prophet to lay stress on mediation” available on ”<https://timesofindia.indiatimes.com/city/chennai/judges-invoke-veda-lord-krishna-prophet-to-lay-stress-on-mediation/articleshow/50510850.cms>

relationship between the parties may remain intact. Even petty offence matters may also be resolved by mediation. Some guidelines however, may be made in this regard.

To reduce the mounting arrears of cases, we need to find out the 18<sup>th</sup> Camel; and that only mediator can bring and not the courts. Only Krishna could make the offer of giving just five villages to the *Pandavas* to resolve the disputes. The courts cannot make such offers and will go with laws of the land, whatever may be the consequences.

Justice NV Ramana, the Chief Justice of India shared an anecdote while delivering his speech on “Mediation for Everyone: Realizing Mediation’s Potential in India” at India-Singapore Mediation Summit – 2021. The anecdote shows the attitude of judges in the present adversarial system which is primarily responsible for huge pendency of cases.

The anecdote goes like this – one fine morning a judge was sipping his coffee and flipping through the newspaper. His granddaughter came to him and said,

“Grandpa, my elder sister has taken away my toy”. The immediate response of the judge was – “Do you have any evidence?”

The sad reality is that this formal, complex, time consuming and expensive adversarial system had frustrated the dreams of many.

Had we continued with our indigenous system of dispute resolution, particularly mediation along with adversarial system, the pendency of cases would not have gone to that extent. Unfortunately, after attaining independence, we preferred to stick to the alien system which was imposed on us, rather than taking ahead our own indigenous system.

We have miserably failed in providing timely justice to the people and also denied justice to many as they did not come forward, looking at the sorry state of affairs and also because of lack of resources. Again we see ray of hope in mediation, a time-tested, trusted, time saving, and affordable method of resolving disputes between parties. As already stated, except for criminal and constitutional matters mainly,



mediation may be tried in all other cases to bring down the pendency of cases.

Mediation may also be given a chance in some criminal cases particularly petty offences. In the matrimonial cases, defamation cases, family cases, neighbourhood cases and other similar cases in which there is some criminal element, mediation may be given a try. The reason is that many criminal matters happen just in the heat of arguments. So criminal issues within the family and neighbourhood may better be disposed of by mediation rather by courts. Sometimes, it is an ego issue which may be dealt with sensitivity by the mediator to get the case closed. In such cases, an apology by a person who committed wrong works as magic. It is mediator only who brings the parties together and transforms a tense situation into a pleasant one where both the parties end up shaking hands as if nothing has happened. Anil Xavier writes that mediation is quite helpful in “restorative justice through its variety approaches and restoring the offender in community by giving correctional practice thereby giving

everyone a second chance. Sometimes victims of crime need answers and apologies more than they need to know perpetrators are being punished.”<sup>9</sup>

Mediation should compulsorily be invoked in new matters, as is being done in commercial dispute cases. In addition, mediation should also be invoked in pending cases. The courts should come out heavily on the party which tries to fail mediation proceedings deliberately.

As is known that Gita has solution to all the problems, let us go back to Krishna and invoke the method of dispute resolution which he adopted, i.e. mediation. We will also find a solution to the pending cases. The need is to adopt mediation with positive mindset and whole heartedly.

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<sup>9</sup> Anil Xavier, “Mediation is here to stay”, *Indian Yearbook of International Law and Policy* (2009), pp. 363–78 at p. 374 available at [http://arbitrationindia.com/pdf/mediation\\_tostay.pdf](http://arbitrationindia.com/pdf/mediation_tostay.pdf)



Chapter 8  
Conclusion

“Discourage litigation. Persuade your neighbour to compromise whenever you can ... As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough”.

Abraham Lincoln

## 8. Conclusion

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Mediation has been evolved for all human conflict which not only rejects revenge, aggression and retaliation, but also strengthen the relationship, based on mutual trust and understanding.

Change is rule of the nature. No society of the world can afford to remain static. The legal system in any nation must also adapt itself to the changing needs of the society from time to time. The concept of justice in mediation, i.e. “fairness beyond legal justice”<sup>1</sup> as Justice A.K. Sikri rightly puts it, is also being institutionalised in India. It is good that mediation is going to get a respectable place in the

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<sup>1</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 20.

Indian legal system; and once again we have realised the importance of indigenous legal system of this great nation; the system, which was left by us for the sake of adversarial system.

We should not be disheartened if the mediation fails. Where both the parties have a bona fide intention to resolve dispute, it is going to be successful in all probabilities. Mediation normally fails where one of the parties is not interested in resolving dispute, due to one reason or the other. Sometimes, one of the parties is ill informed, or is over confident about the sure success of the case in court, or has enormous ego, or is interested in delaying the case. In all these situations, the mediation is likely to fail due to the fact that sincere effort is not going to be made by one of the parties.

We have the example of Krishna before us who made the sincerest effort to resolve the dispute between the *Kauravas* and *Pandavas* to avert the war. He, however failed due to Duryodhana's stubborn nature. Frankly speaking, Krishna knew the outcome of his efforts well in advance as he was the God, he

still gave it a chance. Had he recommended war to *Pandavas* straightaway, people might have raised question on his decision and had thought hundreds of times that war could have been averted had a sincere effort made by a third party.

The reason why Krishna went for mediation knowing the fact very well that Duryodhana would not agree, is that he wanted to give a strong message to people that never give up your efforts to resolve disputes till the last moment.

Mediation by Angada between Rama and Ravana also failed and war took place. In the modern times also, the mediation failed in the *Ram Janambhoomi* case. Despite these failures, it is clear that our indigenous method of resolving dispute, i.e. mediation should be the first choice as it is a time tested method and does not spoil the relationship between the parties, whatever the nature of dispute may be. The success of mediation is based on the willingness of parties.



Mediation is based on the principle of “heal the past, live the present, dream the future”.<sup>2</sup> There must be honest attempt to resolve all disputes through mediation because of its inherent characteristics of putting both the parties on equal pedestal with a strong relationship between them. All disputes, whether simple, complex, technical or others deserve solution by mediation in the first instance.

It is noteworthy that online mediation has completely transformed the ecosystem. The pandemic Covid-19 has taught us many lessons but at the same time it has also provided us many opportunities. One of such opportunities was putting the life back in gear with the help of technology during pandemic time. When entire world came to a halt, online mediation happened in different parts of the world. Today, parties from the different places or

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<sup>2</sup> Justice A.K. Sikri, “The Singapore Convention: A Paradigm Shift for Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 13.

different nations need not travel and meet at one place for resolving their disputes through mediation. Now online mediation takes place where mediator and the parties to the dispute join online from their places. The ease with which online mediation takes place, it is no doubt, going to be a preferred choice over other modes of dispute resolution in future.

There are, however, some concerns also with respect to online mediation. These are lack of body language which is extremely important for conducting mediation, technical glitches leading to improper communication, privacy, etc. Joel Eisen states that “the practice of mediation cannot easily be reproduced in the online environment because cyberspace is not a mirror image of physical world.”<sup>3</sup> It is also advocated that the most important “human touch” remains missing in the online mediation which

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<sup>3</sup> Joel Eisen quoted in J.P. Sengh, “Empowering Sustainable Negotiations in the New World of Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 92.

is extremely important for pushing parties towards settlement. Further, eye fatigue is another matter of concern.<sup>4</sup>

It is true that online mediation has its own limitations, nevertheless, it can be very useful particularly in those cases where the parties and mediator are from different nations. What is important is to have good infrastructure with seamless internet connectivity. Despite some flaws, online mediation is going to stay in future. Aloysius Goh also suggests how the mediation should be conducted in online mode without making it cumbersome for the parties and taking them into full confidence with respect to privacy and other issues.<sup>5</sup> The Mediation Bill, 2021 also proposes online mediation in India.

Mediation will definitely be proved to be a game changer if invoked by parties with positive mindset to

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<sup>4</sup> Aloysius Goh, “New Considerations for Effective Virtual Mediation” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), pp. 128–35.

<sup>5</sup> *Ibid.*

resolve disputes. The advocates are also expected to co-operate and encourage people to go for mediation rather than ill informing them.

Laila Ollapally states that mediation is doing well in some of the jurisdictions such as United Kingdom, United States of America and Singapore. She further states that California in particular is doing extremely well in mediation. It has a thriving private mediation practice due to “pro-active judges and the availability of good mediation services, both in the courts and in the private domain”.<sup>6</sup>

If indigenous justice system of India can do extremely well in other jurisdictions why can't it be successful in the country where Lord Krishna himself invoked it to teach a lesson to the humanity.

It is noteworthy that to make mediation successful, it should start from the law schools. Mediation should

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<sup>6</sup> Laila Ollapally, “Private Mediation: Peacemaking as a Profession” in Sudhanshu Batra, et.al. (eds.), *The Power of Mediation* (2020), p. 99.

not only be taught in law schools but also be practised there by opening “Mediation Clinics”. Mediation Clinic may be independent or made part of the Legal Aid Clinic. Certified Mediators should attend these Clinics and resolve the real cases brought to them by the community people. The students and faculty members may be part of the mediation proceedings with the prior consent of the parties. There should be awareness programs on mediation and simulated mediation proceedings in the law schools. A positive approach towards mediation should be developed in the minds of budding advocates so that they could motivate parties to go for mediation even if mediation is not mandatory in their cases. It is essential to sensitize law students about the problem of pending cases in India. As per present situation, it may take several hundred years to get the backlog cleared, as the case filed today becomes a pendency tomorrow. The future seems to be in mediation.

Taking a cue from the story of 17 Camels and 3 Sons as already discussed in Chapter 7, one can

easily conclude that a mediator may have 18<sup>th</sup> camel to resolve any dispute, howsoever complex it may be. The same is not possible in a dispute which has been referred to the court, since neither the judge nor the court has a camel. Therefore, the 18<sup>th</sup> camel which can only be found with a mediator may play an important role to give a new life to justice delivery system of the country.

The private mediation has great future in the country where around 5 crore cases are lying pending. The need is to have awareness programs, trained mediators, good ecosystem, and positive mindset among other things. Once, mediation picks up as a dispute resolution method, the approach of justice delivery system will change from decision about who is right and who is wrong to solution about what is right. As already stated, mediation proceedings will be based on the participatory process in which both the parties will try to reach at a solution with the assistance of mediator.

In addition to various efforts which may be made by the executive and judiciary, mediation may be

proved very helpful to reduce the number of filing of cases in the court as well as in reducing the number of pending cases in the country. If the number of cases decided and resolved per day would be more than the cases filed per day, it will put a break on the increasing number of pending cases.

Mediation, therefore, will work in two ways to reduce the pendency of cases. Firstly, it will resolve cases before the same could be filed in the court or at the pre-litigation stage. Secondly, it will resolve the old pending cases or the cases at post-litigation stage. What is most important is to restore the credibility of mediation by creating an ecosystem in which parties to disputes prefer mediation at their own rather than going to the courts in the first place itself. We, however, need to ensure that mediation proceedings do not become expensive as arbitral proceedings and the mediators follow the ethics to maintain credibility of mediation in all respects.

In the valedictory speech at National Initiative towards Strengthening Arbitration and Enforcement in

India on 23 October 2016, Sh. Narendra Modi, Hon'ble Prime Minister of India stated that:

“We need to simultaneously facilitate a vibrant ecosystem for alternate dispute resolution, including arbitration, mediation and conciliation. This will provide additional comfort to investors and businesses. More importantly, it will also ease the case-load on Indian courts”.<sup>7</sup>

Emphasising upon mediation as a potential ADR method, he further stated that “we must deliberate on ways and means to supplement the efforts of the judiciary and arbitration mechanisms. Mediation is one such mechanism, the potential of which has not been utilized much in the country”.<sup>8</sup>

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<sup>7</sup> Speech of Prime Minister is available at <https://www.narendramodi.in/valedictory-speech-by-prime-minister-at-national-initiative-towards-strengthening-arbitration-and-enforcement-in-india-532838>

<sup>8</sup> *Ibid.*



The role of lawyers is very important in making the mediation successful. Lawyers must advise their parties to go for mediation, rather than encouraging them for litigation. Aman Hingorani writes that during a mediation proceeding, lawyer must take a back seat unless a need is felt to intervene because of power imbalance or to pre-empt or handle impasse or to give legal inputs in direct negotiations between the parties. If the mediation proceedings fail in a dispute, the lawyer is expected to guide his client about other alternative methods of resolving dispute. However, where mediation proceeding is successful, the lawyer is expected to be “proactive in formulating and drafting the terms of the settlement agreement. The lawyer should ensure that the settlement agreement is reduced in writing in a non-evaluative, balanced and positive language, free of blame assessment”.

Settlement agreement should be drafted in the simplest possible manner avoiding legal jargons, so

that parties could understand it properly.<sup>9</sup>

To sum up, let us give mediation a chance whole heartedly by making people aware of it and by winning their trusts. It is *sine qua non* to ensure the creditability of mediation to make it successful. This is the real *dharma* of all the three organs, viz. Executive, Legislature and Judiciary at this point of time.

Lord Krishna also says in Gita:

कर्मण्येवाधिकारस्ते मा फलेषु कदाचन |<sup>10</sup>

(Your right is to do prescribed duties only; not to its fruits).

When we work with all honesty, sincerity and conviction for a noble cause, we are bound to

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<sup>9</sup> See Aman Hingorani, “Mediation Advocacy – Responsibilities of a Lawyer in Mediation” in E-Mediation Writings, *Mediation Compendium* (2021), pp. 187–91, at pp. 190–91.

<sup>10</sup> Chapter 2, verse 47, Bhagwad Gita.

succeed. This is what the divine law is. To make mediation successful in order to do effective justice to the people is that noble cause, which we have to achieve.



**National Law University and Judicial Academy, Assam**  
**Hajo Road, Amingaon, Guwahati – 781031**  
**Assam**



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