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RESEARCH ARTICLE

AN ANALYSIS OF MANDATORY MEDIATION

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ABSTRACT

This Mandatory mediation is sometimes referred to as an oxymoron as it is curtailing the voluntary nature of the mediation and also impinges on the rights of self-determination and autonomy of parties which are the hallmarks of mediation process in the conventional sense. However, it is also true that no rights can be absolute. As part of civil justice reforms all over the world, mandatory mediation programs were introduced as part of civil justice systems, either through special laws providing for pre-trial mediation for some categories of causes of actions or through general laws for court-annexed mediation during the continuation of the civil proceedings. There are several policy issues like compulsion for mediation, role of judiciary in promoting mediation programs, which are being debated about these mandatory mediation programs to which different legal systems are dealing with their own ways and in some cases results are encouraging but not so in other cases

Key words: Mandatory Mediation, Imbalance of Power, Settlement Pressure, "Good Faith" participation, Role of Judiciary.

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INTRODUCTION

Mediation can be voluntary or mandatory. In voluntary mediation, the parties agree to hire a mediator to help them resolve their disputes. According to Prof. Frank Sander, under mandatory mediation there can be two types of referrals to mediation: *Categorical* and *discretionary*[1]. The former approach applies when statutes provide that certain classes of disputes must undergo mediation, whereas the latter approach refers to judges who are given the authority to refer any case they deem appropriate to any of a listed number of ADR options.This paper will critically analyze the court-mandated mediation only from *discretionary referral* perspectives. Mandatory mediation is non-binding in most of the situations and its benefits far outweigh the risks.[2] With the non-binding mandatory mediation, the parties are able to enter settlement discussions and still use the court system to resolve their disputes if the parties are not able to reach an agreement.[3] Mandatory mediation allows the parties to consider settlement earlier in the dispute process to potentially save both time and money.[4] There are number of countries that have statutes which mandated mediation in certain types of cases i.e. family disputes, employment and labour disputes, bankruptcy disputes, minor criminal offences etc. However, the issue of whether court-connected ADR should be mandatory is highly controversial. The courts' increasing association with mediation programs begs the question of whether the courts should compel disputing parties to attempt mediation, especially in jurisdictions where mediation is not widely utilized like India. This paper will examine the current debate in various countries concerning court-mandated mediation and make suggestions concerning the most appropriate way to administer a mandatory mediation program.

Growth of Mandatory ADR/ Mediation Programs

Historically voluntary mediation programs have not been well attended.[5] Theories as to why this is so, include: parties do not know about or do not understand the possible benefits of mediation; parties prefer to choose familiar process i.e. litigation; when angry, people tend to choose adversarial rather than cooperative processes; barriers due to many lawyer's negative assumptions about the quality of mediators and doubts about the neutrality of mediators associated with a court programme; and parties and their lawyers do not want to look weak by being the first to suggest mediation – or any other settlement process. Although still controversial, mandatory court referrals have resulted in many citizens engaging in mediation or other ADR processes, which has greatly increased participation in these processes. These mandatory referrals have resulted into:[6] Increased Public

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[1] Frank E. A. Sander, *Another View of Mandatory Mediation*, DISP. RESOL. MAG., Winter 2007, at 16.
[2] David S. Winston, *Note and Comment, Participation Standards in mandatory Mediation Statutes: "You Can Lead a Horse to Water…"*, 11 Ohio St. J. on Disp. Resol. 187, 190-193 (1996)
[3] Id. at 177
[4] Ibid.
[5] Arupa Varma and Lamont Stallworth, *Barriers to Mediation: A Look at the Impediments and Barriers to Voluntary Mediation Programs that Exist Within EEO*, 55 Disp. Resol. J. 32 (2000)
[6] Louise P. Senft and Cynthia A. Savage, *ADR in the Courts: Progress,*

Awareness;[7]Greater sophistication among lawyers and Judges about ADR;attempt to refer cases to Appropriate Dispute Resolution, for example, *Afcon's* judgment[8] in India; Increased choice and expertise of providers: As the need for mediators has grown, so have the numbers and types of service providers; increased research and evaluationas to the effects of such use. Studies of mediation offered both by courts and court-connected programs have consistently shown high satisfaction rates by the participants when measured against the prospects of going to trial.[9] Some studies have shown time and cost savings for parties and the courts through the use of ADR.[10] Research is beginning to look more closely at best practices in implementing ADR programs, including the most beneficial timing of court referral to ADR.[11] Some suggestions in this regard is provided by the Supreme Court of India in *Afcon's* case[12] and lastly, beginning of a Cultural Shift. The growth of Court-connected ADR has contributed to the beginning of a revolutionary change in the court's conception of its role, from that of a passive provider of trials to an active, problem-solving case manager, or, as in some cases, of a catalyst in community change and conflict transformation. Courts are beginning to embrace the concept of litigation as a last resort, rather than a first resort, at least, for some types of cases. Mandatory mediation allows parties that are reluctant to initiate settlement discussions – either may be due to a feeling of weakness related to giving in or due to fear of not being able to use litigation – the opportunity to have the court order the parties into settlement discussions.[13]

Analysis of Mandatory Mediation

Despite occasional complaint that mediation is theoretically incompatible with coercion to participate, compulsion to use mediation has a long history. In U.S.A., informal pressure to use labour mediators accompanied the early state labourprogrammes in the last century, and statutory mandates to accept federal labour mediation have constrained parties to collective bargaining disputes for more than fifty years.[14] Federal Judges have been authorized since 1938 to require participation in pre-trial conferences by Rule 16 of the Federal Rules of Civil Procedure, amended in 1983 explicitly to encourage settlement discussions.[15] In India, sort of mandatory ADR was provided for in the Industrial Disputes Act, 1947 under which industrial disputes have to be first referred to the Board of Conciliation who has to try to achieve settlement and only on failure to settle, the dispute is referred for adjudication[16].There are number of policy issues regarding mandatory mediations. Some of the issues will be dealt in detail in this paper.

Compulsion in Mediation

Many critics have raised the concern that coercion into the mediation process translates into coercion in the mediation outcome, creating undue settlement pressures that produce unfair outcomes."[17] Undue settlement pressure is most readily apparent when a weaker party becomes vulnerable to a forced settlement that may not be in his/her best interest. However, Prof. E. A. Sander totally negates this apprehension and is in favour of mandatory mediation and says, "I think that confuses coercion *into* mediationwith coercion *in* mediation. If you have coercion in mediation, it is not mediation… We have evidence that the process is very powerful, that it works for people who use it, but…, people don't seem to be using the process sufficiently voluntarily (for number of reasons). So my view about mandatory mediation is about the same as affirmative action i.e., it's not the right permanent answer, but it is a useful temporary expedient to make up for inadequate past practices."[18] In India, in order to popularise ADR methods amendment was introduced in the Code of Civil Procedure (CPC) in 1999 and 2002 to make provisions for court-annexed ADR programs under Section 89[19]. The Civil Procedure-Mediation Rules and the Model Mediation Rules contain provision for mandatory mediation under certain situations[20]. The situation of mandatory reference arises as per Rule 5(f) (iii) of the Model Mediation Rules[21]. As per this Rule, when one party applies to the court for mediation or conciliation, the court after hearing all the parties, can refer the matter for mediation without the consent of the parties. However this reference can be made only when the court satisfy that there is a relationship between the parties which has to be preserved and there is an element of settlement exists which may be acceptable to the parties. Later the Supreme Court also held in *Afcons* case[22] that there is no need of consent for referring parties to mediation but said that consent is required for referring parties to arbitration and conciliation.

Imbalance of Power

According to Owen Fiss, imbalance of power between parties very drastically affects any settlement which they may enter into as the weaker party may not have resources to correctly predict the outcome of the litigation; or, may be in need of money immediately; or, may not have resources to finance the litigation. So he is of the view that in such cases it would be

Problems and Possibilities, 108 Penn. St. L. Rev., 329-330 (2003-2004)

[7]Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 Penn. St. L. Rev. 56 (2003)

[8]Afcons Infrastructure Ltd. and Anr.v.Cherian Varkey Construction Co. (P) Ltd. and Ors., (2010) 8 SCC 24

[9] Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why we should care and why we know so little*, 23 Ohio St. J. on Disp. Resol. 549 (2007-2008)

[10] Roselle Wissler, *Court-connected Mediation in General Civil cases: What we know from Empirical Research*, 17 Ohio St. J. on Disp. Resol. 641(2002)

[11] Id.

[12]Supra note 8. For example, in matrimonial cases, the parties may be referred to mediation after filing of plaint.

[13] Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 Loy. L. Rev. 85 (1996)

[14] SARA R. COLE et al., MEDIATION: LAW, POLICY, PRACTICE, 7-11 (2003)

[15] Id., p.7.12-7.12

[16] Section 10, Industrial Disputes Act, 1947

[17] Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts,* 33 Willamette L. Rev. (1997), p. 565

[18] Frank E. A. Sander, *The Future of ADR*, 2000 J. of Disp. Resol. 3, 3-8 (2000)

[19] Section 89, CPC: Settlement of disputes outside the Court- (1)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 mayreformulate the terms of a possible settlement and refer the same for - a) arbitration; b) conciliation; c) judicial settlement including settlement through Lok Adalat; or d) mediation

[20] The Justice M. Jagannadha Rao Committee submitted the Civil Procedure – Alternative Dispute Resolution and Mediation Rules, 2003, to the Supreme Court and the Supreme Court in Salem Advocates Bar Association, T.N. v. Union of IndiaAIR 2005 SC 3353 approved the rules and directed all the High Courts to frame rules according to the Civil Procedure-Mediation Rules.

[21] Rule 5 (f) (iii) - in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be.

[22]Afcons Infrastructure Ltd. and Anr.v.Cherian Varkey Construction Co. (P) Ltd. and Ors., (2010) 8 SCC 24

better for court to try such cases rather than referring these to ADR methods[23]. Some States note the problem of dominant parties mediating against weaker opponents and have enacted statutes to remedy the problem. One example is of a Louisiana Statute allowing courts to waving mediation in cases involving domestic and family abuse.[24]Ontario's mandatory mediation program specifically excludes family law cases from application due to traditional concerns about family dynamics and possible power imbalances that can create unfair advantage of one party over the other. Other critics believe the statutes are not fixing the problem of dominating parties. The power imbalance simply may not be obvious to the courts or the mediator.[25] Critics also believe that the parties, when ordered to participate in mandatory mediation, may not have sufficient information with which to make an appropriate settlement. Some of the benefits of mediation are lost when the parties bring insufficient information to the mediation table. Instead of the process working in the best interests of the parties, the process only works for the best interests of the court by reducing the backlog on its docket.[26]

Role of Judiciary in promoting Court-annexed Mediation

Mandatory mediation is a piece of larger puzzle-whether the courts should more actively steer cases through the judicial process. Another issue is the effect of mandatory mediation on aspects of the quality of justice. Commentators sometimes advocate understanding participation as a type of market check on the quality of mediation - if mediators/mediations performs well, parties will elect to use it.[27] In England, after Lord Woolf's Final Report on Civil Justice System, the Civil Procedure Rules were amended to confer on the court the authority to order parties to attempt to settle their case using ADR and the judge the power to deprive a party of their legal costs if, in the court's view, the party has behaved unreasonably during the course of the litigation.[28] As a result in *Dunnett v Railtrack*[29], Sir Henry Brooke denied the winning party their legal costs because they had unreasonably, in his view, refused properly to consider mediation prior to the appeal. In *Hurst v Leeming*[30], Mr Justice Lightman held that it is for the judge to decide whether a refusal to mediate was justified. The judge argued that *"mediation is not in law compulsory, but alternative dispute resolution is at the heart of today's civil justice system"*. In *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence*[31], the High Court decided that the fact that a case involved a point of law did not make it inherently unsuitable for mediation. By mid-2003, the courts had clearly indicated that refusing an offer of mediation carried with it a significant danger that costs might be denied to the refusing party, even when they had been successful in the litigation. But in the case of *Halsey v Milton Keynes General NHS Trust,*[32]the Court of Appeal held that there was no general presumption in favour of mediation. Most importantly, Lord Justice Dyson significantly held that the courts have no power to order mediation and raised the question of whether a court order to mediate might infringe Article 6 of the Human Rights Act 1998. The court held that compelling parties for mediation violates fair trial. This is a departure from the general rule on costs, the court explained:
"In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown that the successful party acted unreasonably in refusing to agree to ADR".

The court also agreed that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. Later in a speech in India in 2008, the previous Lord Chief Justice, Lord Phillips, sided with Justice Lightman's view that a party who refuses to attempt mediation should have to justify his refusal.[33] Lord Justice Clarke, MR in a mediation conference in Birmingham in 2008, attacked LJ Dyson's assertion that an order for ADR might breach Article 6 of the HRA. He said that in his view compulsory ADR does not violate Article 6 and so there may be grounds for suggesting that Halsey was wrong on the Article 6 point[34]. He concluded that the courts still retain a jurisdiction to require parties to enter into mediation.

In a subsequent case, *Rolf v. Guerin*[35], the defendant won at trial. However, the claimant appealed on a number of grounds including the costs order which the trial judge had made in favour of the defendant. The claimant argued, inter alia, that the defendant's refusal to take part in mediation amounted to unreasonable behaviour for the purposes of Civil Procedure Rule 44 and therefore the defendant should not be awarded his costs. On appeal, when asked by the court why he had been unwilling to mediate, the defendant stated that if he had participated in mediation he would have had to accept 'his guilt' and that he would not have been able to demonstrate to a mediator what the claimant's husband was like, which could only be done at trial. In any event, he wanted his 'day in court'. Rix LJ held that the defendant's refusal to mediate was unreasonable behaviour for the purposes of CPR 44(5) and, as a consequence, the court was entitled to exercise its discretion and make no order as to costs. Rix LJ held: 'As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct

[23] Owen Fiss, *Against Settlement*, 93 Yale Law Journal (1984), p 1073
[24] Maggie Vincent, *Note, Mandatory Mediation of Custody Disputes: Criticism, Legislation, and support*, 20 Vt. L. Rev. (1995), p.271
[25] SARAH R. COLE & et al, MEDIATION: LAW, POLICY AND PRACTICE, 7.19 (2003)
[26] Id.
[27] Eisele, *Mandatory v. Non-Mediatory Court-Annexed ADR,* in GOLDBERG, SANDER & ROGERS, DISPUTE RESOLUTION, 268(1992)
[28]In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties before and during the proceedings.
[29][2002] EWCA Civ 2002
[30] [2001] EWHC 1051 Ch.
[31][2003] All ER (D) 171
[32][2004] 1 WLR 3002
[33] Dame Hazel Genn, *ADR in Civil Justice: What's Justice Got to Do with It?,*Judging Civil Justice, Hamlyn Lectures 2008
[34] Annual Mediation Council Conference, Birmingham, May 2008, available at http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf, visited on 20 August 2010
[35][2011] EWCA Civ 78

in this respect can be taken into account in awarding costs. In *PGF II SA v. OMFS*[36], the Court of Appeal had the opportunity to take an important step in widening the principles in *Halsey*, in relation to awarding costs sanctions against a party on the basis of a refusal to mediate. The matter settled the day before trial; PGF accepting the part 36 offer made by OMFS some 9 months earlier. PGF argued OMFS ought not to have the benefit of the usual costs protection due to the Defendant's lack of response to invitations to mediate. PGF argued the Defendant's silence amounted to an unreasonable refusal to mediate. The Court of Appeal through Lord Justice Briggs held that "the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable…". He went on to say "There are in my view sound practical and policy reasons for this modest extension to the principles and guidelines set out in the Halsey case…." .

It is still not very clear how far the court can use its authority to refer matters for mediation.

Settlement Pressure

Another very sensitive area of concern in mandatory mediation is the settlement pressure on the parties. There can be number of reasons for pressure to settle in a mandatory mediation like:[37]

Financial risk: Some State's Rules permit the court to impose either costs or attorney's fees or both (incurred by the adverse party) on the party who rejects a unanimous recommendation of the hearing panel but fails to improve upon it by at least ten percent at trial.[38] A related pressure to settle prior to mediation is created when the mediation process ordered by the court is expensive or requires out of town participants to appear.

Report to the trier of the facts: In California, the statutes mandating mediation of child custody disputes permit local courts to require a recommendation by the mediator to the child custody referee if the parties do not settle through mediation.

Med-Arb for unrepresented parties: In some courts, parties are asked to agree to mediation by a person who will become a binding arbitrator if the parties do not settle – a process known as med-arb.[39] An example of this med – arb process can be found in the Chapter VI-A of the Legal Services Authorities Act, 1987 in respect of disputes relating to Public Utility Services. According to Prof. Lon Fuller, in med-arb., a third-party tries to persuade the parties to settle, "perhaps reinforcing his persuasive skills with 'the gentle threat' of a decision."[40] The mediator's recommendation seems likely to become the arbitrator's award.[41]

- Judicial pressure: Informal pressures to settle through mediation also raise policy and legal issues, especially when a judge acts in a role similar to that of a mediator.[42] In India too lot of mediator's in the court-annexed mediation are sitting judges who, in their zeal to promote mediation, almost coerce parties to enter into a settlement which in "their view" is in the best interest of parties[43].
- Non-compliance and sanctions: When the litigation is pending, the courts have used both inherent and explicit authority to penalize non-compliance with pre-trial orders or rules by imposing costs and or attorney's fees, excluding evidence, denying a trial de novo, and, in egregious cases, entering a default judgement or dismissal.[44] Contempt sanctions are normally based on willful violation of explicit court orders. Where bad fault is not indicated, the courts are often more lenient in sanctions. The United States Court of Appeals for the Sixth Circuit had noted that dismissal was a severe sanction that should be used only in extreme situations after the court has considered less drastic sanctions.[45]

Thus the problems associated with participation standards in mandatory mediation statutes result in loss of time, money, and diminished efficiency for all parties, including courts and the appointed mediator, and possibly even the loss of mediator's impartiality and confidentiality.[46] Moreover, some studies have found that there is no reduction in expenditures of the parties' time and cost attributable to mediation. Even more importantly, studies also indicate mandatory mediation has "not reduced court delays, caseloads or pre-case costs."[47] Other critics are of the view that mandatory mediation "goes too far and encroaches on the right to use the court system to litigate their dispute, they are being forced to increase their litigation expenses because of mandatory mediation.[48]

Requirement of Participation in "Good Faith"

The special attributes, like assisted dialogue, co-operative, collaborative problem solving, reality-testing, empowerment, flexibility, search for mutually beneficial solutions, of mediation cannot exist in an environment where good faith is absent. Already, the notion of mediation as a novel paradigm for dispute resolution is being eroded due to various reason like: lawyers view the process as merely another tool within the litigation arena to be used combatively; use mediation as a delaying tactics; using mediation for the sole purpose of discovery; or to wear down a litigant where one party is more financially able than the other. More serious reasons are fraud or misrepresentation in mediations that leads one side to make an agreement they likely otherwise would not have, or actual deception during and as part of the mediation. Due to this mostly all statutes providing for mediation, both mandatory

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[36] [2013] EWCA Civ 1288
[37] SARAH R. COLE et. al., MEDIATION: LAW, POLICY, PRACTICE 7.19 (2003)
[38] Id at 7.19-7.24
[39] Fuller, *Collective Bargaining and the Arbitrator*, in GOLDBERG, GREEN & SANDER, DISPUTE RESOLUTION, (1985) at. 247
[40] Supra note 39
[41] S. Goldberg, *The Mediationof Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW UL Rev. 270 (1982)
[42] This indicates that judges use settlement techniques that a substantial number of other judges consider to be improper and calls for reform of judicial practices in settlement conferences
[43] As observed by the author during her field study on working of the Mediation Centres in India.
[44] Ibid, supra note 37
[45] Robinson v. ABB Combustion Engineering Services Inc., 32 F3d 569 (6th Cir. 1994)
[46] Holly A. Streeter-Schaeger, *Note, "A Look at Court Mandated Civil Mediation*", 49 Drake L. Rev. 389 (2000-2001)
[47] Rosselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 Willamette L. Rev. 570, (1997)
[48] Id., p. 571-572

and non-mandatory, provide for requirement of “good-faith” participation. Some of these statutes provide for sanctions regarding violation of “good-faith” requirement. This is one of the tools for effective implementation of court-annexed mediation programs. However, Dr. Ulrich Boettger says that good-faith requirements have helped the efficiency of courts by reducing their dockets, but the increase in court efficiency. Does not necessarily mean that a good-faith mediation has actually satisfied the parties desires, nor necessarily achieves the traditional goal of mediation. So he concludes that many parties treat mandatory mediation as just an extension of traditional procedural litigation, delaying access to litigation, and further entrenching the parties in their conflict posturing in opposition of the intended goals of good-faith mediation[49]. Some commentators are of the view that “good faith” participation or bargaining requirements in a few mandatory mediation statutes place subtle or overt pressures on the parties to settle.[50] In these cases, the mediator may threaten charges of noncompliance to induce unwanted concessions, a threat that cannot be taken lightly by the parties due to the vague nature of the requirement. Most mediation statutes do not state the minimum level of participation required for mandatory mediation. Parties participating in mandatory mediation do not know the limits of participation, which result in a “discretionary decision by the parties and inconsistent results from the process.”[51] The United States Court of Appeals for the Second Circuit rules that the line was crossed when a party was ordered to make a bonafide settlement offer under threat of contempt, noting that the party was forced to guess what was meant by the vague phrase.[52] In *Texas Parks and Wildlife Department V. Davis*[53], the trial court sanctioned The Parks Department for failure to participate in mandated mediation in good faith. The Texas Court of Appeals reversed, stating that the court may order parties to participate in mediation as mandated by the state statutes, but cannot force the parties to mediate in good faith or to settle the dispute.[54] This case is one example of a mandatory mediation statute that fails to provide useful or meaningful participation standards for the parties or the courts. There can be number of obstacles[55]in the path of implementation of a good-faith requirement. Defining good faith has been problematic in a number of situations where it has been imposed[56]. Some fear that implementation of a good faith requirement will necessitate compromise of the mediator’s role, particularly with regard to confidentiality and neutrality.

Confidentiality of mediation process

The assurance of confidentiality in mediation and other ADR processes is critical to their efficacy. Guaranteeing the confidentiality of information disclosed, explanations given and, perhaps, acknowledgments made during mediation enable participants to be open and at the same time protects this openness. Disclosures made in the course of mediation are generally understood to be inadmissible in future legal proceedings. Confidentiality is one of the core elements of mediation and ought to be guarded carefully. As mediation becomes more institutionalized under state and federal control, new rules are required to better define the rules of confidentiality to help avoid potential conflicts arising between participants, mediators and the courts. Currently, mediators commonly disclose that a party has failed to appear for mediation. If the mediator is expected to report the absence of good faith, it can breach the promised confidentiality of the process of mediation. If the parties are aware that the mediator can be called for testifying absence of good faith participation requirement than parties may not be very forthcoming in sharing information during the mediation session and it can result in sub-optimal settlements. In order to mitigate this risk and attempt to preserve confidentiality in mediation meetings, the Uniform Mediation Act was drafted as an attempt to set policy on a uniform mediation standard that includes specific sections to address and preserve confidentiality in mediation sessions, protecting both the conflicting parties and the mediator[57]. Although many states have adopted the UMA in hopes to protect the integrity of the mediation process by setting agreed upon confidentiality rules, opponents still question the enforceability of the confidentiality clauses when one party uses information obtained in mediation to further the current conflict through litigation, instigate new litigation, or place the mediator in a forced position to compromise confidentiality through court orders to disclose information gained in mediation[58].

In India, Rules 13[59] and 23[60] allows the party or the mediator to inform the court about the failure of a party to attend mediation sessions and the Court may issue appropriate directions in this regard. However, in practice the mediator does not inform the court anything regarding the conduct of the parties during the mediation session. This is to ensure complete confidentiality of the process and to not create any bias in the mind of the court against any party to dispute, if the court has to ultimately adjudicate it. This is how the role of a mediator is different from that of a Conciliator under the Industrial Dispute Act who has to submit a detailed failure report to the concerned government as to why the dispute could not be settled.[61]Only the Karnataka Rules[62]expressly provide for imposition of costs on the parties who fail to attend mediation session. However, in India, we have not adopted the concept of

[49]Ulrich Boettger, *Efficiency Versus Party Empowerment -- Against A Good-Faith Requirement In Mandatory Mediation,* 23 Review of Litigation, (2004) Issue 1

[50] Nell, *Making Mediation Mandatory: A Proposed Framework*, 7 Ohio St. J. on Disp. Resol. 287, 204 (1992)

[51] David S. Winston, *Note and Comment, “Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water ...”*, 11 Ohio St. J. on Disp. Resol. 1993-97, (1996)

[52] Hess v. New Jersey Transit Rail Operations Inc., 846 F2d 114 (CA 21988)

[53] 988 S. W. 2d 370 (Tex App. 1999)

[54] Id, p.375

[55]JAMES J. ALFINI, et al, MEDIATION THEORY AND PRACTICE, (2001) at 290

[56] Kimberlee K. Kovach, *Lawyers Ethics in Mediation: Time for A Requirement of Good Faith in Mediation*, Disp. Resol. Mag 1997, American Bar Association at 9

[57] Sections 4-6, Uniform Mediation Act

[58] Jeff Rifleman, *Mandatory Mediation: Implications and Challenges,* December 2005 available at http://mediate.com, visited on August 25, 2017

[59]Rule 13: Consequences of non-attendance of parties at sessions or meetings on due dates - If a party fails to attend a session or a meeting notified by the mediator/conciliator on account of deliberate or willful act, the other party or the mediator/conciliator can apply to the Court in which the suit or proceeding is pending, in that case Court may issue the appropriate directions having regard to the facts and circumstances of the case.

[60]Rule 23: Communication between Mediator/Conciliator and the Court - (a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator/conciliator, there should be no communication between the mediator/conciliator and the Court, except as stated in clauses (b) and (c) of this Rule…….. (c) Communication between the mediator/conciliator and the Court shall be limited to communication by the mediator/conciliator :
(i)with the Court about the failure of the party to attend;……settled the dispute.

[61]Section 13(3), The Industrial Disputes Act, 1947

[62]Rule 13, Karnataka Civil Procedure (Mediation) Rules 2005

sanctions for breach of good-faith participation requirement[63] in ADR process.

Neutrality of mediator

Another policy which favours confidentiality of the mediation process comes within the concept of mediator neutrality. If the mediator is either able or required to convey information to a decision-maker, whether it be an agency or a court, the mediator may need to compromise her neutral role. S/he will be focused on what should be included in her testimony. Further, if the parties are aware that the mediator may make a report to another entity, the mediator is perceived as affiliated with that entity and perhaps not completely impartial. While initially confidentiality was seen as a protection afforded to the parties and their statements, it also serve to protect the third party i.e. the neutral. Most mediators work to facilitate a resolution or agreement, and beyond that do not wish to be further involved in a case. But an opposite perspective is that reporting the absence of good-faith can be seen as an extension of the obligation to inform the court of the parties' compliance with the order to mediate. Apart from the mediator's role as a facilitator, s/he also has a professional duty to set parameters and be in control of the process. Making an assessment or determination of the good faith of the parties' participation falls within this role. Identification of specific guidelines and objective considerations would aid the mediator in deciding if the parties complied with the requirement. Also, there can be a concurrent exception to any rule on confidentiality, since the communication during the mediation is essential evidence to address the claim of bad faith. Another option can be to have the mediator merely "certify" whether good faith was present, or provide a written checklist about the parties' conduct. If some people think that this can confer a decisional role on a mediator which can affect neutrality than alternatively, the mediator may report to the court what specifically happened and allow the court to make the final determination of whether the conduct constituted bad faith.

There is also fear that the establishment of a good faith requirement in mediation will trigger satellite litigation regarding the rule itself. But specific guidelines as well as rational sanctions for non-compliance can reduce satellite litigation. Prior criticism of good faith directives is based on the lack of objective standards. Objective standards that are not based upon the content of the proposals are therefore necessary. Good faith relates to manner of participation rather than its content. A good faith requirement is essentially strong encouragement for the parties and their counsel to use their best efforts during the mediation process. Good faith does not imply that parties are required to resolve their disputes, and certainly should not be used to coerce the parties to settle the matter on any particular economic basis[64].

Suggestions

In acourt-mandated mediation scheme, there is a need to maintain a balance between the need to have the mandatory nature being conveyed to parties in clear terms and the requirement that the program should not be excessively mandatory that it hampers the parties' right of self-determination and autonomy in mediation session. So few suggestions to design a court mandated mediation program is as follows:

- The issue whether reference to mediation is mandatory should be clearly mentioned in the statutes providing for mandatory mediation programs and should not be left for interpretation by courts[65]. The Supreme Court of India resolved the debate whether Section 89 of Code of Civil Procedure talks about mandatory referral to ADR processes due to the use of the word "shall" used in the section. In *Afcons* case,[66] the Supreme Court held that Section 89 starts with the words "*where it appears to the court that there exist elements of a settlement*". This clearly shows that cases which are not suited for ADR process should not be referred under Section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should *invariably* refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under Section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.
- The court mandated mediation programsshould permit the parties to opt out of the scheme in exceptional circumstances. This will help to reduce cases of automatic referrals without application of judicial mind to the facts of the case in the zeal to manage dockets by the courts and consequent waste of time and resources of parties as well as it secures the parties right to have 'their day in the court'.However, the criteria for opting out should not be couched in vague terms or too lenient. For example, the Florida Rules of Civil Procedure[67], parties are able to request that mediation be dispensed with by filing a motion within fifteen days of referral. The grounds for such a motion to be granted include: (i) the issue to be considered has been previously mediated between the same parties pursuant to Florida law; (ii) the issue presents a question of law only; or (iii) any other good cause is shown.
- Instead of pure coercion the mandatory mediation programs should incentives parties to use these programs. For example in India, the court-annexed mediation programs are offered free of cost and even

[63]Nell, *Making Mediation Mandatory: A Proposed Framework*, 7 Ohio St. J. on Disp. Resol. 287, 204 (1992) and David S. Winston, *Note and Comment,* "*Participation Standards in Mandatory Mediation Statutes*: "*You Can Lead a Horse to Water* …", 11 Ohio St. J. on Disp. Resol. 1993-97, (1996)

[64] Id, p.13

[65] The need to amend Section 89, CPC has been time and again raised. Though the Supreme Court has resolved most of the problems in *Afcons* case but there is a need for the legislature to amend the provisions of Section 89 and Order X of CPC on the lines suggested by the Court.

[66]Afcons Infrastructure Ltd. and Anr.v.Cherian Varkey Construction Co. (P) Ltd. and Ors., (2010) 8 SCC 24

[67]Rule 1.700 (b), Florida Rules of Civil Procedure

the court fees can be refunded if the matter is settled in mediation.[68] In order to increase the parties' autonomy, the parties may be given the right to choose the mediator[69]and by providing them an avenue to lodge complaints against any mediator misconduct[70].

- The quality of mandatory mediation program must be closely monitored. This can be done through enacting clear ethical guidelines for court-connection mediation and through Quality Control. There is a need to develop measures for quality control in Indian court-annexed mediation program. Some of the ways can be:
  - Court programs should provide ongoing mediator development programs like Refresher Courses, Lectures, workshop on newer techniques and skills, etc.
  - Courts should also create a mechanism for parties to voice their complaints or grievances when dissatisfied with their mediator or services of the Mediation Centre. These programs should be sufficiently publicized.
- There is a need to have more checks to ensure that people who become mediators are actually competent to be so. Presently, whoever undergoes the training can become a mediator and in the training method there is no way to check whether the trainees have acquired all the skills needed for the mediation services. Even in the requirement of doing ten successfully mediated case for getting the certificate of successful completion of training also does not specify the role of the trainee in these mediations.
  - Some suggestions can be / devising a written as well as practical examination of the trainees after the training is over. Written examination can have questions regarding theory, concept, core values, ethical consideration, etc. in mediation and practical test can be either a simulation exercise or a role-play.
  - During the co-mediation, it may be made necessary that the report of the senior mediator as well as feedback of the parties in those cases should be considered relevant in evaluating the performance of the trainee.
- The participation requirement standards should not be vague so as to prevent unnecessary litigation. The sanctions, if any, to be imposed for non-compliance should be such that it should not rob the informal and voluntary nature of mediation. For example in India, no sanction is attached with the requirement of "good-faith" participation. But it is the duty of the court under Section 89 CPC[71] to educate parties regarding the benefits of mediation and the parties has a duty to try to resolve the dispute amicably by participating in good-faith[72].

Conclusion

One of the main inspirations for the development of the ADR movement and for the thriving of mediation within it is the return to the ideas of control, autonomy and self-determination which were bedrock of the old belief in freedom of contract. However, one of the more passionate debates during the 20th century focused mainly on the critique and revaluation of these notions. There is a need for further research on issues like the impact of mandatory mediation on court's work-load and the long term effect of settlements reached in such mediation. The other legal and ethical issues raised in this article which are very significant in western countries may not be very relevant presently in India due to the fact that court-annexed mediation is not even a decade old. However, need to have a clear policy view on these issues in the Indian context is not irrelevant in present time. The model and structure of the mediation practice of the future in India, the development and professionalization of the various fields of mediation, the linkage between mediation practice and court systems, all of these remain compelling topics of research and analysis. The future is nearly always different from what most of the experts predict, but belief that while the future may be unpredictable, it is certainly negotiable.

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[68] Section 16, Court Fees Act, 1870
[69] Rule 1.720 (j), Florida Rules of Civil Procedure
[70] Rule 10.810, Florida Rules for Certified and Court-Appointed Mediators
[71] Rule 4, Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003
[72] Rule 19, Mediation and Conciliation Rules, 2004