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# ROLE OF MEDIATORS IN RESOLVING CHILD CUSTODY DISPUTES

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## ABSTRACT

This research paper examines the role of a mediator in resolving child custody disputes with reference to the family court in Delhi. Child custody cases are often emotionally sensitive and time-consuming, making it difficult for courts to provide quick and satisfactory solutions. Mediation, as an alternative dispute resolution method, offers a more cooperative and less adversarial approach to resolving such conflicts.

The study aims to analyse how mediation assists parents in reaching mutual agreements and whether mediation outcomes serve the best interest of the child. It also explores the effectiveness of mediation in reducing conflict, saving time and improving communication between disputing parties.

The research is based on both primary and Secondary data. Primary data has been collected through questionnaires from the parents and mediation trust, while secondary data includes books, journal articles, and legal provisions related to mediation. Findings suggest that mediation plays a significant role in resolving child custody disputes by promoting understanding and reducing hostility between parties. However, challenges, such as lack of cooperation, emotional stress, and power imbalance, can affect the success of the process.

The paper concludes that mediation is an effective and beneficial method for resolving child custody disputes, but improvements in awareness, mediator training, and structured procedures are necessary to enhance its efficiency in family courts.

**Keywords:** Child custody, Parenting Conflicts, Family disputes, Family Mediation, Mediators, ADR, Alternative dispute resolution, Divorce Mediation.

## **129<sup>TH</sup> LAW COMMISSION REPORT**

The 129<sup>th</sup> report of the Law Commission of India, titled *Urban Litigation – Mediation and Conciliation*, is one of the most important reports in the development of alternative dispute resolution in India. This report strongly emphasises the need to reduce the burden of courts by introducing structure methods like mediation and conciliation. It observes that the Indian judicial system was facing heavy caseloads, backlogs, and many disputes; special, civil, and family-related matters could be resolved through peaceful settlement outside the traditional court process.

The report recommended the establishment of conciliation courts and mediation centres to encourage amicable settlement of disputes. It highlighted that litigation increases hostility between parties, especially in emotionally sensitive cases like family disputes, whereas mediation helps in promoting cooperation and mutual understanding. The commission also stressed that mediation should be voluntary, flexible, and conducted by drained neutral persons to ensure fairness.

This report laid the foundation for the inclusion of section 89 of the Code of Civil Procedure, 1908, which formally introduced ADR mechanisms in India. In relation to child custody and family disputes, the report is highly significant because it supports the idea that such disputes should be resolved in a manner that preserves relationships and prioritises emotional well-being over adversarial legal battles.

## **245<sup>TH</sup> LAW COMMISSION REPORT 2014**

This report of the Law Commission titled “arrears and backlog: creating additional judicial (wo)man power”, focuses on the current problem of pending cases in Indian courts and suggest practical solutions to improve the justice Delivery system. One of its recommendations is a stronger use of alternative dispute resolution ADR mechanism, Especially mediation and conciliation, to reduce the burden on courts.

The report highlights that the number of cases pending in Indian courts are civil and family matters, many of which can be resolved through mutual settlement rather than prolonged litigation. It emphasises that mediation<sup>1</sup> is cost-effective, time-saving, and a less adversarial

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<sup>1</sup> Law Commission of India, *129th Report on Urban Litigation – Mediation as an Alternative to Adjudication*

method of dispute resolution. In emotionally sensitive disputes, such as family conflicts and child custody cases, mediation is particularly useful because it helps parties communicate better and focus on practical solutions, instead of legal confrontation.

The commission also recommended improving mediation infrastructure, increasing the number of trained mediators, and encouraging courts to refer suitable cases to mediation at early stage. Strengthening ADR mechanisms is essential for ensuring speedy justice and reducing judicial backlog overall; this report supports the idea that mediation should become a central part of the Indian Justice system, especially in family-related disputes where relationships and emotional well-being are at stake.

## **LEGISLATIVE AND JUDICIAL FRAMEWORK IN INDIA**

### **FAMILY COURT ACT 1984**

Section 7 of this Act, grant the family court, the same power and jurisdiction as the district court or subordinate civil court in their suit and proceeding

Section 7(2) gives the family courts authority to exercise the same jurisdiction as a magistrate of the first class under Chapter 9. If the CCode of criminal Procedure, 1973, as well as any other jurisdiction provided by law.

Types of cases that are heard in family course

1. Dissolution of marriage
2. Custody of child.
3. Domestic violence
4. Maintenance
5. Property disputes

Child custody explanation in section 7(1) provides that the family court has jurisdiction to grant

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(1988). Commission of India, *245th Report on Amendments to the Arbitration and Conciliation Act, 1996* (2014).

the custody of the child to a proper person and make their right person, the guardian of a minor.<sup>2</sup>

### **CODE OF CIVIL PROCEDURE, SECTION 89 – ADR**

There are various modes for the settlement of disputes in India. One such mode is the alternative dispute resolution mediation, which is summarised and formulated in terms of section 89 of the Civil Procedure Code. Alternative dispute resolution in itself involves the Arbitration, Conciliation and Mediation Act, 1996, which would apply, and thus it would imply that the proceedings of such a matter for arbitration and conciliation took place under the provisions of the 1996 Act. The power of the court to refer the parties to mediation is provided by section 8 of the 1996 Act; however, it is subject to the presence of an arbitration agreement between the parties involved.<sup>3</sup>

### **ARBITRATION AND CONCILIATION ACT 1996**

ADR is a popular method for resolving disputes outside traditional court settings. The ADR method offers a flexible and peaceful solution to high-emotion family disputes, encompassing divorce, child custody battles, and property division matters. This article examines the application of ADR within family disagreements, while explaining its legal framework, benefits, and primary approach. Knowledge of ADR enables parties in the family to achieve a mutually beneficial resolution with respect for all involved, particularly children, throughout the process.

### **Conceptual Framework: Mediation And Child Custody**

1. The nature of mediation is a structured, voluntary, and confidential process in which a neutral third party called a mediator facilitates communication between disputing parties with the objective of assisting them in negotiating a mutually acceptable agreement. Unlike arbitration or adjudication, the mediator does not impose a decision; the parties themselves retain decision-making authority. This self-determination is the hallmark of mediation and distinguishes it from all other forms of dispute resolution.

In the context of family law, mediation is particularly suited to disputes involving ongoing relationships, such as those between separated parents, because the process encourages

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<sup>2</sup> <https://www.drishtijudiciary.com/to-the-point/tp-hindu-law/concept-of-family-courts>

<sup>3</sup> <https://www.legalserviceindia.com/legal/article-385-section-89-of-cpc-a-critical-analysis.html>

dialogue, builds empathy, and creates durable solutions that the parties themselves have crafted and are therefore more likely to honour.

## **2. CHILD CUSTODY-LEGAL MEANING AND TYPES**

Child custody encompasses both physical custody – the right to have the child reside with a parent – and legal custody right to make decisions regarding the child education, health, religion, and general welfare, Indian courts recognise several forms of custody arrangements

1. Sole custody: one parent is granted both physical and legal custody, while the other is accorded visitation rights.
2. Joint custody: both parents share either physical residence of the child or legal custody, making authority or both.
3. Third-party custody: custody is granted to a third relative or other fit person when neither parent is deemed suitable.
4. Split custody: in cases involving multiple children, each parent is granted custody of one or more children in Indian courts have shown a growing preference for joint custody arrangements that the child's relationship with both parties, particularly wear, parental conflict can be merged constructively through mediation.

## **ROLE OF MEDIATOR IN CHILD CUSTODY PROCEEDINGS**

### **FUNCTIONS OF THE MEDIATOR.**

The mediator in a child custody dispute perform multiple, often simultaneously demanding, functions. these include creating and maintaining a safe and structured environment for dialogue and facilitating communication between parties whose relationship has often broke down irreparably and identifying underlying interest and concerns – including those of the child – that may differ materially from the parties stated legal positions and generating and evaluating options for resolution and assisting parties in drafting a comprehensive parenting plan.

Mediator does not act as a judge, counsellor or legal advisor. The mediator role is facilitative, to hold the space for productive conversation, guiding parties towards their own consensual

resolution. This neutrality is the source of the mediator's authority and effectiveness.

## **STAGES OF MEDIATION PROCESS**

A typical mediation session in a family court custody matter, proceed through the following stages:

Opening statement: the mediator explains the process, ground rules, and confidentiality obligations, establishing the collaborative tone of the session.

Joint session – party narratives, each party is given an uninterrupted opportunity to narrate their perspective, concerns, and aspirations regarding custody and the child's welfare.

Caucus or Private Session: the mediator meets privately with each party to explore underlying interests, concerns about safety or conduct and potential flexibility in positions

Interest identification and option generation: through guided discussion, the mediator helps parties identify their core interest – usually the child welfare, and their own relationship with the child and generates creative options for parenting arrangements

Negotiation and agreement drafting: parties, negotiate terms of a parenting plan, covering physical residence, visitation schedules, holiday arrangements, educational decisions, medical authority, and communication protocols.

Settlement recording: the mediator's record the agree terms in a memorandum of understanding MOU, which the parties sign, and which may be submitted to the court for incorporation into a consent order.

## **CHILD-INCLUSIVE MEDIATION**

A significant development in family mediation, practice is a concept of child-inclusive mediation, where in the child's voice is incorporated into the mediation process through age-appropriate consultations conducted by a child specialist, working in conjunction with the mediator. this approach acknowledge that while the child is not a party to the mediation, the child's interest and expressed preferences are Central to the validity and sustainability of any parenting arrangement.

## **EFFECTIVENESS OF MEDIATION, EMPIRICAL FINDINGS**

### **A. Settlement rates and time efficiency.**

Delhi High Court mediation and conciliation centre has reported consistently high settlement rates in family matters referred to mediation, with custody cases showing significant resolution within 3 to 5 sessions on average. The centre's annual report 2024-2025 documented that family disputes, including custody matters, constituted one of the highest categories of successfully mediated cases, with settlement rates exceeding 60%.

This stands in contrast to contested custody litigation, which may spend several years across trial and appellate courts, during which period the child is subjected to a prolonged state of uncertainty and inter-parental conflict.

The empirical findings of this research reveal that the Delhi High Court Mediation and Conciliation Centre (Samadhan) has played an effective role in promoting amicable dispute resolution through mediation. According to the Delhi high court annual Report 2024-25, a total of 3579 cases were referred to the centre, out of which 1968 cases were successfully settled through mediation and conciliation. Further 736 prelitigation matters were instituted before the centre, and 239 matters were resolved without formal litigation. Institutional records also confirm that family and matrimonial disputes, including child custody and visitation rights matter, form a significant category of mediation referrals. A study on the functioning of Samadhan observed that 13,646 disputes were referred over a 5-year period, of which 7644 cases were successfully settled. These statistics demonstrate that mediation has emerged as a practical, time-efficient, and less adversarial mechanism for resolving sensitive family and child custody disputes while preserving relationships and protecting child welfare.

### **B. High emotional intensity.**

Custody disputes are by their very nature emotionally charged. Parties who are grieving the breakdown of their marriage, or who harbour deep resentment towards one, may be psychologically ill-equipped to engage in a calm, looking dialogue that mediation requires. An mediator must possess advanced skill in emotional management and deescalation, often functioning in a quasi-therapeutic capacity while scrupulously maintaining neutrality.

### **C. Absence of legal representation and awareness.**

A structural deficit in the Indian mediation ecosystem is the low level of public awareness regarding the availability of benefits of mediation. Many parties approach family courts with little knowledge of mediation as an option, and legal practitioners-whose cooperation is essential for the effective functioning of court-referred mediation- sometimes actively describe ADR in favour of contentious proceedings.

### **D. Institutional and infrastructural gaps.**

Despite the legislative mandate of section 89 CPC, mediation infrastructure across India remains uneven. While Delhi, Mumbai, Bangalore, and other Metropolitan centres have functional mediation centres with trained mediators, many district and subordinate courts lack adequate facilities, trained personnel, and administrative support to operationalise court-referred mediation effectively.

### **E. Non-Cooperation by parties**

Since mediation is fundamentally a voluntary process, its success depends upon the genuine willingness of both parties to participate constructively; in cases where one party is determined to use legal proceedings as a tool of harassment or delay, or where deeply entrenched animosity renders dialogue impossible, mediation may fail at the threshold stage. Coerced or reluctant participation produces no genuine engagement, nor durable settlement.

## **SEVERAL AUTHORS REFERRED TO THE ROLE OF DISSOLVING CHILD CUSTODY DISPUTES IN INDIA.**

### **AVTAR SINGH- “LAW OF ARBITRATION AND CONCILIATION”**

Avtar Singh explains the legal framework of alternative dispute resolution. ADR in India. According to him, mediation and conciliation are effective methods for resolving disputes quickly without the need for lengthy court trials. He highlights that these processes reduce the burden on courts and promote mutual settlement between parties.

### **M.P JAIN - “INDIAN CONSTITUTIONAL LAW”**

M.P. Jain explains the importance of legal principles such as the welfare of the child in custody

disputes. His work highlights that courts prioritise the best interest of the child over strict legal rights of parents, making mediation a suitable tool for peaceful settlement.

According to M.P. Jain in Indian Constitutional Law, the Indian judicial system aims to ensure access to Justice through speedy and effective mechanisms. This principle supports the growth of alternative dispute resolution methods such as mediation and conciliation, which help reduce the burden on courts in the context of child custody disputes; these methods are especially important as they promote settlement, reduce conflict, and protect the welfare of the child.

### **GAURAV NAGPAL VERSUS SUMEDHA NAGPAL 2009**

This case concerns custody dispute, where the Supreme Court emphasised that the welfare of the child must remain the decisive factor. The court clarified that while parents may have legal assets, such claims cannot override the child's overall well-being. It highlighted that welfare must be understood broadly, including emotional stability, moral upbringing, education, and security. The judgment rejected a narrow or technical approach and instead endorsed a holistic evaluation of circumstances. The court ultimately reaffirmed that custody decisions are not about the rights of parents, but about ensuring the child grows up in a supportive and healthy environment.

### **NITIN KUNDU VERSUS ABHIJEET KUNDU 2008**

In this case, the Supreme Court dealt with competing custody claims and reiterated that the child's welfare overrides all other considerations. The court examined not only the parents' financial capacity but also their character, conduct, and overall suitability. It observed that a stable and secure environment is essential for a child's development. The judgment also recognises that courts are not bound by state rules of evidence in such matters and may adopt a more flexible approach to the child's best interest. Decisions reinforce the principle that custody must be determined by practical realities rather than informal legal entitlement.

### **SALIM ADVOCATE BAR ASSOCIATION VERSUS UNION OF INDIA, 2005**

This case addressed challenges to amendments to the Code of Civil Procedure, aimed at improving the deficiency of the judicial process. The Supreme Court upheld the validity of these reforms, emphasising the need to reduce delays and streamline litigation. A key aspect of judgement was its support for alternative dispute resolution mechanism such as mediation,

arbitration and conciliation. The court encouraged their use as a means to ease the burden on the Court and promote quicker settlements, and also clarified the procedure expected to ensure that the amended provisions would be implemented effectively in practice.

### **AFCONS INFRASTRUCTURE LIMITED VERSUS CHERIAN VARKEY CONSTRUCTION CO. LTD**

In this decision, the Supreme Court elaborated on the application of section 89 of the Code of Civil Procedure, which deals with referral of disputes to alternative dispute resolution. The court provided detailed guidance on how and when such referral should be by mediation. It categorises disputes that are suitable for ADR, such as commercial and contractual matters, and those that are not, including cases involving serious allegations of fraud or criminal conduct. The judgment aimed to remove confusion surrounding section 89 and to encourage its practical use, thereby promoting efficient dispute resolution outside traditional court processes.

### **RECOMMENDATIONS**

1. An awareness Program should be conducted to educate people about the benefits of Mediation.
2. Mediators should receive advanced training in handling emotional and sensitive custody cases.
3. Courts should encourage early referral of custody disputes to mediation centres.
4. More structured mediation guidelines should be developed for family disputes.
5. Psychological counselling Support should be included in mediation centres for better outcomes.
6. Efforts should be made to reduce power imbalance between parties during mediation.
7. Legislative reform: Parliament should amend the Family Courts Act 1984 to introduce an obligation requiring parties in custody proceedings to attend at least one mediation session before adversarial proceedings may be commenced, subject to exceptions for cases involving domestic violence or child abuse.

8. Mandatory mediator accreditation: A national mediator accreditation system, administered by an Authority, should be established to ensure standardised training, ethical courses, and quality assurance for mediators working in family courts.

9. Infrastructure development: dedicated family mediation centres, equipped with child-friendly facilities, multilingual mediators, and located counselling and psychological support services, should be established in all District family courts, not mainly in Metropolitan centres.

10. Research and data collection: A centralised database of mediated outcomes in family courts should be established to enable evidence-based development, impact, assessment, and identification of best practices.

## **CONCLUSION**

Child custody disputes represent one of the most profound challenges in family law-not merely because of their legal complexity, but because of the reversible psychological impact they can have upon children who are entirely blameless for the circumstances that have brought them before the court. The adverse serial model of litigation, while an indispensable feature of the rule of law, is structurally ill-suited to the resolution of disputes, rooted in fractured human relationships. Mediation, as an alternative dispute resolution mechanism, offers a fundamentally different philosophy-one premised upon dialogue, empathy, self-determination, and the centrality of child welfare. When conducted by skilled, trained and ethically grounded mediators, it has demonstrated the capacity to produce durable, child-focused parenting agreements that litigation really achieves. legislative framework in India-enquired in section 89 CPC, the Family Courts Act 1984, and the rich judicial tradition articulated by the Supreme Court- provides a sound foundation for the institutionalisation of mediation in custody proceedings.

Which challenges are real and must not be minimised- power imbalances, emotional volatility, infrastructural deficits, and inadequate public awareness, all impaired the full realisation of mediation's promise. But these are challenges of implementation and resource allocation, not of principle. The principle that children's welfare is best served by parents who communicate and cooperate rather than litigate and align is beyond reasonable dispute. This paper concludes that mediation should be recognised, resourced, and institutionalised as a primary-rather than residual-mechanism for resolving child custody disputes in India with appropriate legislative

reform, redress, mediator training, adequate infrastructure, and sustained public awareness, mediation can transform the family Justice system into one that truly places the child at its centre.

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