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# POWER IMBALANCES IN MEDIATION: A CHALLENGE TO FOUNDATIONAL NEUTRALITY AND FAIRNESS

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## ABSTRACT

This paper examines how imbalances of power affects the ethical basis of mediation, in particular, the ethics of neutrality and fairness that provide it with moral foundation. Although most people rejoice that mediation is a timesaving, relationship preserving, affordable etc. based manner of solving conflict, it does not exist in a vacuumal environment outside the broader social realities that inform it. In India, where the practice of mediation is quickly taking formal shape through the Mediation Act of 2023, the issues of economic, gender-based, and institutional inequality continue to lie within the practice. When one side enters into mediation with a greater financial pull, superior education or greater social status, the one that appears to be voluntary may actually be merely a slight coercive action. Neutrality cannot therefore simply imply remaining silent or unconcerned, it must entail an ethical sense of environments and insensitivity to unequalness.

I explained the influences of philosophical, legal and comparative views to study how various jurisdictions like Singapore, the United Kingdom or Australia have been shifting towards a more participatory concept of neutrality what they would term as contextual or active neutrality. These strategies enable the mediators to ensure all the participants have their even share without losing objectivity. Based on doctrinally and comparatively supported analysis supported by available empirical evidence, the study reveals that the practice of Indian mediation usually confuses neutrality with non-interference which in fact may be contributing to the same kind of inequalities that mediation is meant to remedy.

I claim redefining neutrality, as an active practice of ethics, but not a strict guideline. It appears that mediators ought to be trained to identify and address power disparities by using systematic protection, screening during pre-mediation, and continuous ethical monitoring. Finally, it is concluded in the study that, to mediate legitimacy in India does not simply lie in obtaining settlements but also in making sure that all the agreements are based on actual consent, informed involvement, and material fairness which is the mechanism that makes mediation comparable to the larger constitutional commitment of justice and equality.

**Keywords:** Mediation, Power Imbalance, Neutrality, Fairness, Party Autonomy, Procedural Justice.

## Introduction

The use of mediation has emerged as an important component of the contemporary way of settling disputes. Mediation is a more human and practical approach in the current scenario of overloaded courts everywhere. It saves time and resources and also benefits in mending broken relationships since emphasis is laid on a dialogue, understanding and mutual respect. In India, the upliftment of mediation has been done by both judges and lawmakers, especially after *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (2010)*, where the Hon'ble Supreme Court of India highlighted how mediation can ease the pressure on the judiciary.<sup>1</sup> However, behind this bright picture, there remains another issue, which is the problem of power balance that may pervert the principles of neutrality and fairness which in turn are the moral support of mediation.

The ethics of mediation imply neutrality, which presupposes that the mediator must maintain neutrality between the parties and in the mediation process. Fairness, in turn, refers to the fact of providing both parties with an equivalent opportunity and that the process and the results are equitable. Although mediation is premised on free will of the parties involved, the asymmetry of their power relationship may cause such free will to be perceived as more of coercion than of voluntariness. According to Shalini Seetharam, the very practice of voluntariness is usually illusionary once the reality is distorted by economic, gender-related or even institutional disparities in favor of the more powerful side of the equation.<sup>2</sup>

## Understanding Power Imbalances in Mediation

The imbalance of power in mediation is simply a lack of balance in the extent to which either party is able to influence it or to actually impact the process or final deal. It may occur due to discrepancy in money, social standing, education, amount of information one possesses, or amount of emotional contact that one has. At least on paper, mediation is all neutral and self-determining process, though differences exist in reality.<sup>3</sup>

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<sup>1</sup> *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24

<sup>2</sup> Shalini Seetharam, *Power Imbalances and the Illusion of Voluntariness in Mediation*, (2016) 5 Indian J. Arb. L. 87.

<sup>3</sup> Laurence Boulle, *Mediation: Principles, Process and Practice* 143–45 (2d ed. 2005)

These power inequalities are further expanded in India with the presence of strong social hierarchies, the economical dependence, caste systems, and gendering tend to influence the way negotiations are conducted. An example is given of matrimonial mediation where women often believe they have a nearly palpable force compelling them to receive an offer of peace, rather than go through the process of separation since the culture enforces the importance of maintaining a family over personal autonomy. The same tendency can be traced in the commercial disputes when small vendors / contractors coerced into settlement by a larger firm which has more cash and legal knowledge.<sup>4</sup> The concept of neutrality in the eyes of a mediation must not always be about treating all the people in the same manner but a "neutral" approach that ignores social context risks legitimizing inequality. Some scholars such as Sriram Panchu believe that in India, neutrality must be "contextually ethical" i.e. it must be sensitive on the historical and cultural factors that influences the bargaining power.<sup>5</sup>

### **Sources and forms of power imbalance.**

Power imbalance in mediation is caused by a cluster of inter-relationships. Although they might appear different at the surface, but in the end all of them combines resulting into discouragement of the fairness and voluntary essence of the process itself.<sup>6</sup>

#### **A. Economic Disparity**

The most obvious manifestation is likely to be economic inequality. Big parties are able to afford bigger lawyers, roll out the heavy artillery or even drag out the negotiations in order to deteriorate the weaker party.<sup>7</sup> The situation is made worse in India where there is lack of a solid legal aid system in mediation. The weaker parties do receive support and representation at the Legal Services Authority Act of 1987 at the regular courts, and that is not the case with mediation. This makes poor or small parties go into a negotiation on their own, whereas the financially stronger party come to the negotiation table with trained lawyers, and experienced mediators.<sup>8</sup> An Indian Institute of Arbitration and Mediation study, concluded that in most instances where one side was more economically endowed, the poor side either compromised or yielded to the terms of the other. This demonstrates the immediate influence of money

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<sup>4</sup> Flavia Agnes, *Family Law and Constitutional Claims* 201–04 (Oxford Univ. Press 2011)

<sup>5</sup> Sriram Panchu, *Mediation Practice in India: Ethics, Neutrality and Context*, (2014) 6 Indian J. Arb. L. 21

<sup>6</sup> Carrie Menkel-Meadow, *Power and Ethics in Mediation*, (1995) 84 Geo. L.J. 1235

<sup>7</sup> Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 89–92 (4th ed. 2014)

<sup>8</sup> Legal Services Authorities Act, No. 39 of 1987, India

disparity on the outcome that transforms consent into a ritual instead of a free will.<sup>9</sup>

### **B. Gender and Social Hierarchies.**

Imbalanced gender is a mammoth problem in family or marriage-related mediations. Although mediation is meant to be voluntary, women are in many cases indirectly coerced into peace or reconciliation against their rights. The Indian society is oblivious to it, which makes the point sturdier in instructing women to keep the family intact even where abuse or financial exploitation has taken place against her only.<sup>10</sup> According to feminist scholars, such practices transform mediation as a place of empowerment into a place of social pressure and ethical domination. In the case study by Delhi Mediation Centre demonstrates a real life picture of the wife withdrawing her domestic violence complaint because of hearing many times that she needs to save the marriage. Although that could be defined as a voluntary choice, it was evident that decision was forcibly supported by cultural pressure which believes in perseverance instead of justice.<sup>11</sup>

The gender problem is compounded by the caste and community differences. Mediations in smaller towns may also be facilitated by local elders or caste heads who are not concerned with individual rights, but with protecting the reputation of the community. This is an indication that mediation in India usually follows a mixed or a hybrid model where formal legislation and social traditions co-exist to offer different systems at the expense of actual fairness.<sup>12</sup>

### **C. Informational and Psychological Imbalances.**

The other imbalance that is not evident but equally dangerous is the absence of equal information. The side which possesses more papers, information or legal knowledge can comfortably distort the discussion or conceal the fact. As an example, in business conflicts the large companies might hold back papers on contracts or even details on their financial situation and the small firms will not be able to professionally defend themselves.<sup>13</sup> A significant role is also played by psychological pressure. Emotions of fear, stress, or dependency may influence the involvement of an individual during the mediation. Most mediators have not been trained regarding these emotional effects. Studies have revealed how individuals who lack in

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<sup>9</sup> Indian Institute of Arbitration and Mediation, *Empirical Study on Commercial Mediation Outcomes in India* (2018)

<sup>10</sup> Bina Agarwal, *Gender and Law in India* 176–80 (Oxford Univ. Press 2015)

<sup>11</sup> Delhi Mediation Centre, *Annual Report on Family Mediation Cases* (2017)

<sup>12</sup> Werner Menski, *Hindu Law: Beyond Tradition and Modernity* 412–15 (Oxford Univ. Press 2003)

<sup>13</sup> Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* 56–59 (3d ed. 2011).

confidence or are less skilled in communication, are usually overwhelmed even when the mediator tries to present familiarity of being neutral.<sup>14</sup> In India, pre-mediation screening does not have any rule, which is applied in some countries such as Australia that is to screen the vulnerable parties prior to initiating the process. Due to this omitted point, these imbalances usually remain unacknowledged and still remain biased to influence the outcome.<sup>15</sup>

### **Neutrality and the Ethical Dilemma of Intervention**

The aspect of neutrality by the mediator is an asset as well as a limitation to his or her ethical duty. Even though the idea of neutrality is claimed to enhance the legitimacy of the process, its strict observance may prevent the efforts of mediators to alleviate the observable unequal distribution of power. Such tension of the neutrality and fairness is the centre of the modern discussion of mediation ethics.<sup>16</sup>

Philosophically, neutrality has been outlined in three different modalities namely; substantive neutrality whereby the mediator does not interfere with the results; procedural neutrality whereby the mediator must participate in ensuring that a fair process is achieved without compromising impartiality and contextual neutrality whereby the mediator is allowed to interfere with the process in order to protect fairness and yet maintain impartiality. Even though the practice of Indian mediation is mainly varied into the first two models, modern academic evidence proves that scholars are shifted toward the contextual approach because it permits minimal intervention in case the autonomy of a party is at risk. Acceptance of such subtle non-partisanship has not yet developed into a legal form. In the case of *Afcons Infrastructure LTD. v. Cherian Varkey Construction Co. and Salem Advocate Bar Association (II)*, the Supreme Court emphasized the aspect of voluntariness as well as impartiality, but did not specify the ethical limits of neutrality. However, comparative jurisdictions have gone ahead. This is expressly permitted by the UK Civil Mediation Council Code, which encourages measures to promote informed participation of a mediator; the Singapore Mediation Act, 2017 also allows the mediator to take further actions when it appears that a party has been coerced to consent. Such frames depict how neutrality should not conflict with fairness, but on the contrary, it may be rationalized.<sup>17</sup>

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<sup>14</sup> Nadja Alexander, *Global Trends in Mediation* 231–34 (Kluwer Law Intl. 2006)

<sup>15</sup> Australian Law Reform Commission, *Family Violence and ADR Screening Mechanisms*, Report No. 114 (2010)

<sup>16</sup> Carrie Menkel-Meadow, Ethics in Mediation: Neutrality, Impartiality and Fairness, (2001) 10 Mediation Q. 25

<sup>17</sup> *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24; *Salem Advocate Bar Association v. Union of India (II)*, (2005) 6 SCC 344; Civil Mediation Council, *Code of Conduct* (UK); Singapore Mediation Act, 2017

## Mediation Practice in India: Institutional and Cultural Challenges

Although the growth has been significant, Indian mediation is institutionally broken. Centres of court-annexed mediation have unequal rules, and often they rely upon retired lawyers or judges who have minuscule ethical education. Mediation against a single national system of accreditation results in a lack of uniformity in applying the standards of neutrality and confidentiality by mediators.<sup>18</sup> The Mediation Act, 2023 also attempts to fill this gap but is unclear. Section 9 requires neutrality and independence and does not describe how neutrality should react in the event of social or economic inequality. Additionally, the Act does not contain any continuous ethical training or disciplinary measures of a disciplinary board of the mediators. Bringing about the idea of neutrality is further complicated due to cultural attitudes towards compromise. Conciliation and adjustment are considered more honorable than arguments in most Indian cultures and success in conciliation discussions is actually equated to success by most family and marriage mediators and not justice. Such an orientation towards agreement may coerce weaker parties to endorse terms that sustain inequality.<sup>19</sup>

The other major problem is the language of mediation. A lot of sessions use formal legal English especially during the metropolitan centres and thus, this sidelines the rural counterparts who may not really understand their rights. This informational asymmetry is exacerbated by the lack of translators or simple-language summaries which disfavors uneducated parties at a disproportionate rate. Such observations indicate that neutrality, fairness, cultural understanding cannot be seen as discrete concepts, challenge is a structural one and not just an ethical one.<sup>20</sup>

### Comparative Interludes: Neutrality through the Global Lenses.

A review of the other jurisdictions provides practical examples of striking a balance between being a neutral and being fair.<sup>21</sup>

#### A. United Kingdom

The ethics of mediation in the UK are focused on active neutrality ethic, where the mediator can interfere with the negotiation process in order to make both sides more informed and

<sup>18</sup> Sriram Panchu, *Institutional Mediation in India: Gaps and Possibilities*, (2019) 11 Indian J. Arb. L. 67

<sup>19</sup> Mediation Act, No. 32 of 2023, § 9, India; Flavia Agnes, *Law and Gender Inequality* 233–36 (Oxford Univ. Press 2018).

<sup>20</sup> Marc Galanter, Why the Haves Come Out Ahead, (1974) 9 Law & Soc'y Rev. 95.

<sup>21</sup> Nadja Alexander, *Global Trends in Mediation* 41–44 (Kluwer Law Intl. 2006)

assured. During a renewal of certification, the Civil Mediation Council expects the mediator to prove that his/her process is fair. The *Halsey v. A court decision made by Milton Keynes NHS Trust (2004)* determined that mediation consent had to be real, informed and uncoerced. Such actions demonstrate a mature attitude that a neutral position does not stand in the place of fairness but can be used to gain it.<sup>22</sup>

### **B. Singapore**

The model of Singapore is a combination of procedural neutrality and the facilitative style of more proactive. The Singapore International Mediation Centre (SIMC) requires the mediators to undergo social-sensitisation and ethics training every one year. In *Chua Siew Ying v. The court* ruled that mediators should make certain that settlements are in true sense indicative of free consent (Lim Choon Seng, 2019). The neutrality model, which is guided, has helped to strengthen the trust among people by showing that it is possible to be indifferent and proactive at the same time.<sup>23</sup>

### **C. Australia**

Australia based the principles of mediation neutrality standards in National Mediator Accreditation (NMAS) that embraces protective neutrality. Vulnerability checks are conducted before mediation, and it allows one to adjust the process, e.g. hold separate meetings with the weaker sides. The new mediation law being adopted in India would be advantageous in adding such similar flexibility and ethical flexibility as to have a less mechanical view of impartiality.<sup>24</sup>

### **Toward a Context-Sensitive Model of Neutrality**

The above discussion has proven that it is not enough to be neutral but a primitive moral notion should be transformed into an effective way of exercising ethics. The main role of the mediator is not to be a passive observer, but to establish even-handedness in the engagement of the two parties.<sup>25</sup> The context-sensitive model of neutrality ought to include such elements as-

- (i) evaluation of power disparity before the mediation process itself begins;
- (ii) ensuring that the parties have understood the procedural framework and the associated rights fully;

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<sup>22</sup> *Halsey v. Milton Keynes General NHS Trust*, [2004] EWCA Civ 576

<sup>23</sup> Lim Choon Seng, *Judicial Perspectives on Mediation Ethics in Singapore*, (2019) 31 SAcLJ 102.

<sup>24</sup> Australian Mediator and Dispute Resolution Accreditation Standards (NMAS), Practice Standards (2021).

<sup>25</sup> Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* 148–52 (UBC Press 2008).

- (iii) ensuring the mediator should have limited and transparent interventions to enable balanced representations; and
- (iv) establishment of the ethical oversight mechanisms to ensure accountability.

It is a practice, that is very much consistent with the egalitarianism found in Articles 14 and 39A of the Indian Constitution. When mediation is supported by sound ethical principles, it might pass well as a continuation of constitutional morality as opposed to circumventing the same.<sup>26</sup>

## FINDINGS & SUGGESTIONS

### Findings:

Based on the current analysis, it appears that even though the mediation process is supposed to encourage the discussion, empowerment and voluntary resolution, most of the time it is not implemented in India as desired because of the deeprooted power dynamics. The results can be outlined in four domains which are interrelated<sup>27</sup>:

#### A. System Disadvantage and Structural Inequality.

The Indian mediation has been a field that functions on a society which have a rigid social and economic divide. Poor people who can be distinguished by gender, social classes, or even caste, often enter the world of negotiation in an unequal state. Due to the assumption of equal opportunity the legal structure, social stratification often defines who will be listened to and believed. To exemplify this, statistics provided by Delhi Mediation Centre (2022) show that women who were involved in different marital conflicts typically provided consent to unfair deals to avoid the destruction of family reputation or to withstand stigma in the society. In its turn, this means that the colorblind obedience to the principle of neutrality may only increase inequality, and make the so-called voluntarism of mediation illusionary when the choice is subject to fear, addiction, or ignorance.<sup>28</sup>

#### B. Neutrality and Fairness Conceptual ambiguity.

The concept of being neutral is yet to be generally agreed upon in the practice of Indian mediation. Neutrality is often equated with detached posture by many practitioners thus confusing impartiality with detachment of emotion. However, according to comparative

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<sup>26</sup> INDIA CONST. arts. 14, 39A.

<sup>27</sup> Carrie Menkel-Meadow, *Mediation, Power, and Justice*, (1993) 11 Ohio St. J. Disp. Resol. 105.

<sup>28</sup> Delhi Mediation Centre, *Annual Statistical Report on Matrimonial Mediation* (2022).

studies, neutrality implies having mutual understanding and equal involvement, but not emotional apathy. Although, the Mediation Act, 2023 does not define the concept of neutrality ethically, nor does it stipulate the behavior of a mediator in a situation characterized by the presence of power imbalance. This omission leaves the mediators caught between taking an action to protect an disadvantaged party or staying quiet to create an impression of indifference and objectivity. Without a clear guideline, the consequences will depend on the moral judgment of individual mediators, and hence the continuation of systemic inequities.<sup>29</sup>

### **C. Institutional Fissures in Training: When Training is not Enough.**

The ecosystem of mediation in India is still immature, and much is lacking in terms of preparation of mediators and their constant development. Court-annexed centres often include groups of well-meaning volunteers such as retired judges, lawyers and social workers but the competencies of these members are heterogeneous. On the one hand, some fundamental competencies like communication and negotiation level are taught, but on the other hand, more specialized training in trauma-informed practice, unconscious bias, and power-dynamic analysis are mostly not provided. In stark contrast, other jurisdictions like Australia, Singapore or the United Kingdom have strong national systems that compel regular training towards ethics and bias. The absence of a systemic control in India leads to significantly unequal qualities of mediation whereby some mediation is an act of oppression instead of reducing inequality. This inconsistency explains the necessity of structural changes and not on personal motive.<sup>30</sup>

### **D. Feminist and Intersectional Intuitions: The Fairness of What?**

In certain cases, mediation can be as replicatory of the power structures as it attempts to even out the situation. This tendency to compromise silently in order to keep peace has long been recognized by feminist scholarship as the so-called culture of compromise, which puts a strain on women to give in so as to preserve peace, and until recently, this process has been active in the family and in marriage conflicts. Furthermore, intersectionality makes the concept of fairness to be complicated because the gender is intersected with the caste, class, education, and language and generates stratified inequities. When a Dalit woman of rural origin is confronted with a conflict with an employer of upper caste, she is faced with an absolutely

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<sup>29</sup> Mediation Act, No. 32 of 2023, §§ 9–11, India; Nadja Alexander, *Mediation and the Art of Regulation* 92–95 (2019).

<sup>30</sup> Australian Mediator and Dispute Resolution Accreditation Standards (NMAS), Practice Standards (2021); Civil Mediation Council (UK), *Training and Ethics Framework* (2020)

uneven level of playing field. Therefore, authentic non-partisanism involves work with concrete realities and accommodative justice that will depend on room make-up. In cases where neutrality is the simple masking of an inherent inequality, it is complicit.<sup>31</sup>

### **Building Fairness That Feels Real: Suggestions and Policy Shifts**

We need a change that will base neutrality on morality, compassion, and fair treatment. It is not to burden mediators with bureaucracy but to provide them with the support, training and moral guidance which they do indeed deserve.<sup>32</sup>

#### **A. Establishing a National Accreditation and Ethical Oversight Body.**

It would greatly help the establishment of a National Mediation Accreditation Council (NMAC) in India which is more than a certification issuing organization. It must develop and institute codes of ethics, outline the practical aspects of neutrality and place clear limits regarding interests of conflict. This apparatus can radically change the dynamics of operation when it is modeled based on the reports in the United Kingdom or Singapore International Mediation Institute (and other entities of that type) by checking complaints, maintaining transparency, and maintaining accountability. This would not be just a symbolic act, but the creation of trust in a compulsory registration system. People are likely to seek a mediation process with the comfort of being supervised by an unbiased watch-dog.<sup>33</sup>

#### **B. Teaching Power, Not Bargaining, Teaching Bias.**

There is a dire need to note that good mediators do not emerge but are trained. The training curriculum should be more than focusing on standard methods of persuasion to include learning how to be aware of manipulation, intimidation, and coercion through subtle means. Gender sensitivity, social stratification, and emotional sensitivity modules should be essential and core part of teaching as opposed to additions. In the event that all the mediators had to renew certification by attending workshops on the influence of changing ethical principles, trauma-informed mediation, and modern studies of human behavior, the profession would be honest and up-to-date. The law schools can also play a role in this by incorporating them into their Alternative Dispute Resolution programs instead of assigning them a peripheral role.<sup>34</sup>

<sup>31</sup> Martha Albertson Fineman, *The Illusion of Equality*, (1991) 25 Univ. of Chi. Legal F. 9; Kimberlé Crenshaw, *Mapping the Margins*, (1991) 43 Stan. L. Rev. 1241.

<sup>32</sup> Julie Macfarlane, *Rethinking Neutrality in Mediation*, (2002) 9 Mediation Q. 189

<sup>33</sup> Singapore International Mediation Institute, *Professional Standards and Accreditation Scheme* (2021); Civil Mediation Council (UK), *Registration and Disciplinary Regulations* (2019)

<sup>34</sup> Leonard Riskin, *Mindfulness and the Ethics of Mediation*, (2015) 36 Cardozo J. Conflict Resol. 1

### C. Protecting the Weaker Side

When equality is in mediation, practical actions are necessary. The first step that mediators should take is the pre-screening to determine whether both parties can express themselves without any kind of coercion. Mediators should be allowed to bring out support individuals or legal counselors in adjudicating on sensitive issues like cases of victims of domestic violence or low-paid workers. In commercial disputes, as is the case with the conflicts between small vendors and big companies, it is fair to have all the conducive information about the contract and the financial issues disclosed in advance. These procedural changes would make a great difference in terms of fairness without undermining that mediation is voluntary.<sup>35</sup>

### D. Neutrality under a pulse: Redefining Fairness.

Passivity as understood as neutrality could prove effective as counterproductive. It is advisable to view it as a dynamic responsive construct. The concept of the boundaries of neutrality as articulated by Julie Macfarlane implies that a mediator can step in and correct an undue imbalance, on the condition that his or her actions are transparent. The fairness of such policies would be enshrined in statutory terms - e.g. some decisive provision in the Mediation Act which required that mediators should take reasonable steps to provide a balance in participation. Singapore and Australia have already put in place such mechanisms without compromising legitimacy, in fact they have strengthened the faith among the people.<sup>36</sup>

### E. Institutional Research and Data Collection.

India currently has no reliable enough data on the outcome of mediation. A lack of information about the rates of the case completion, failure rates or even the reinforcement of the bias in a subtle way is a problem to objective evaluation. The NMAC ought to maintain a national document of the settlement trends, withdrawal causes and the user comments. Such data would not only reveal positive findings that the statistics are merely summaries: e.g., whether women are heard, whether caste still does its job, or whether indifference in Warsaw and Melbourne have a comparable effect. This empirical grounding, combined with academic partnership, would allow evidence-driven reforms, as opposed to gut-instead reforms.<sup>37</sup>

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<sup>35</sup> Australian Law Reform Commission, *Family Violence and ADR: Screening and Safeguards*, Report No. 114 (2010)

<sup>36</sup> Julie Macfarlane, *The Limits of Neutrality*, (2005) 14 J. Disp. Resol. 215

<sup>37</sup> Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and ADR Outcomes*, (1994) 46 Stan. L. Rev. 1339.

## CONCLUSION

The principles of mediation have a theoretical basis in the elements of neutrality and equity, but in reality the concepts often come in conflict. The truth of the matter is multifaceted due to the presence of the mediation process within the society that is even today laced with inequality on one hand and the overt hierarchies of gender, caste, and classes, on the other hand. The beautiful picture of the parties coming to the table as equals is usually erased either with asymmetries of fear, dependency or ignorance. An interpretation of neutrality that in itself amounts to only the detachment can, therefore, reinforce inadvertently the very inequities he is intending to prevent. Other countries like Singapore, United Kingdom and Australia show this alternative: mediators undergo training to play a proactive role of bringing impartiality without being passive. Such approach does not amount to prejudice or disproportion but a controlled imbalance. Similar strategies can be taken by India.

Despite the fact that the Mediation Act, 2023 is an improvement, it is unfortunately sparse in the area of ethics. It does not recommend how mediators must address power disparities, whom to treat and whom not to treat and how to keep accountable by engaging in continual education. Without these types of protection, mediation can reflect pre-existing social privileges instead of a balanced well-rounded arena. Thus, mediators need to go beyond facilitation to see that every one of the participants is ready to understand the peculiarities of the procedures, is empowered to speak, and finally makes a final agreement, not a forced one. Articles 14 and 39A of the Indian Constitution offer the ethical basis of such an initiative. The end measure of the mediation success must not be the number of cases settled but the sense of justice and free volition of such settlements. A solution obtained without speaking is the same as giving up and not agreeing. The three core values that India needs should be to; ethical neutrality, informed participation, and structural fairness, in order to achieve the potential of mediation. These factors play off and, when combined, mediation is a process beyond formal procedural barricading, rather, a transformational discourse that both restores dignity and establishes trust, and, in the first instance, makes justice accessible to everyone at the table.

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