MEDIATION IN FAMILY DISPUTES: A LEGAL–INSTITUTIONAL ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION IN CONTEMPORARY FAMILY LAW

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ABSTRACT

Family conflicts are a very complex issue to a formal adjudicatory process, not only because they are more effective than other disputes, but also due to their relationship and social impacts which might last a long time. Traditional litigation, although providing some legal status, is too time-consuming and vitriolic in nature, which is a threat to the strength of the familial relationship. In this context, mediation has been a significant tool to Alternative Dispute Resolution (ADR) particularly in the family law. This study provides a stringent legal commentary on the mediation with regard to family disputes and lays within the framework of statutory law, judicial law, and global normative law.

It is the question that examines the legal foundations of family mediation, focusing specifically on such constitutional imperatives as access to justice, dignity and equality. It also looks at statutory dictums which encourage settlement such as those contained in family court acts and civil procedure acts. Additionally, the court involvement on the direction of the matrimonial and the custodial conflicts to mediation is assessed and an analysis of the changing jurisprudence that has come to appreciate mediation as a substantive tool of consensual settlement instead of the nominal procedural objection. The development of comparative and international tools, such as the guidelines of the UNCITRAL or the principles, supported by the United Nations, are brought into play to place family mediation in the context of a larger human-rights and access-to-justice decision framework.

In terms of methodology, the article uses the doctrinal research of law, as it uses the authority of the sources like the judicial opinion, governmental documents, law commissions recommendations, and peer-reviewed academic articles and publications. It is also in response to salient issues about mediation in family conflicts, such as power imbalances, gender fairness, voluntary involving history, and enforceability of outcome of mediations. Incorporating the normative legal analysis with the pragmatic arguments, the article claims that when based on institutional support and

steered by ethical principles, mediation is an addition to the procedural efficiency aspect and substantive justice in the family disputes.

Conclusively, the article argues that it would be better that we view mediation not the mediation as an alternative to the adjudicative processes but as a supplementary legal practice that does not contradict the ideals of restorative justice and the goals of the modern family law. It is considered important to empower the mediation structures by involving wholesome training, precision in legislation and judicial review in achieving its full potential in addressing family disputes in effective and human ways.

Keywords: mediation, family disputes, access to justice, statutory framework, judicial decisions

I. Introduction

The cases of family disputes have a special place in the field of jurisprudence, due to their proximity, intimate, and long-term nature. The conflicts that arise as a result of marriage, divorce, spousal maintenance, child custody, guardianship, and inheritance are not just controversial issues of law, but incredibly personal battles, which affect the societal fabric of families and consequently, the society, in broad terms. The conventional adversarial litigation, which is based on the concepts of procedural fairness and expert adjudication, is in many cases inadequate when it comes to the family conflict, which requires consideration of both the relational and psychological aspects inherent in the conflict. The inability to resolve the case promptly may contribute to hostilities and emotional trauma and permanently damage the relationships inside the family, particularly when one of the parties is a minor.[1]

Mediation is another aspect of Alternative Dispute Resolution (ADR) that has cropped up in reaction to these constraints in a family law setting. Foregrounds of mediation include consensual problem-solving, confidentiality and party autonomy, hence allowing conflicting family members to take an active role in devising solutions to the challenges that are geared towards their specific needs.[2] Mediation, in contrast to adjudication, does not aim at distributing winners and losers or imposing solutions but instead, stimulating dialogue, understanding each other better and encouraging sustainable settlements. This is quite affected by contemporary family law goals that are starting to seem more focused on reconciliation,

[1] See Bimal N. Patel & Aparna Chandra, *Family Disputes and the Limits of Adversarial Adjudication*, 52 J. Indian L. Inst. 321, 323–25 (2010).
[2] Law Comm'n of India, *Report No. 129: Urban Litigation—Mediation as an Alternative to Adjudication* 3.1–3.4 (1988)

child welfare, as well as preservation of family relations rather than strict legal results.[3]

Lawwise, the institutionalisation of mediation which has blossomed in terms of family conflict issues, is indicative of a larger scale move towards greater access to justice and access to restorative procedures. The legislatures and courts in a continuum of jurisdictions have realised that family wars require less formalized, adversarial and humane procedures. As a result, the statutory provisions governing family courts and civil procedure are being increasingly mandatory or promotional of mediation and conciliation through out various points in litigation. This trend has also been consolidated by judicial statements that highlight how courts have a responsibility to seek amicable settlement in cases of matrimonial and custody before they advance to the adjudication process.[4]

Family-related mediation is as well connected to constitutional and human-rights matters, such as dignity, equality, equal access to justice, and fairness at the normative level. The process has the capability of empowering the parties, minimizing the economic and emotional expenses, and ensuring the claims whose results are respectful of the realities that family members are living. However, legal acceptance of mediation lacks concerns. The problems of voluntariness, power imbalances, gender justice, and the enforceability of those settlements mediated by them demand the close-up consideration of the legal and institutional framework.[5]

It is on this ground that the current article embarks on a more doctrinal study of mediation through family disputes in legal terms. It attempts to study the conceptual underpinnings, legal underpinning, and case law policy to family mediation but at the same time dwelling upon its issues and future outlook. By placing mediation between the practices of domestic legal systems and international best practices, the article argues that with the right regulation and ethics, mediation serves as an important complement to adjudication, thus helping to settle the family conflict statements in an efficient and humane manner. This approach of resolving disputes is based on the concept of consensual problem-solving and involves a neutral third party (mediation) who helps disputants to reach mutually agreed resolutions.

II. Conceptual and Theoretical Foundations of Family Mediation

In the setting of family conflicts, the mediation takes a different form because of the long term

[3] Werner Menski, *Hindu Law: Beyond Tradition and Modernity* 412–15 (Oxford Univ. Press 2003).
[4] Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 S.C.C. 24, 35–37 (India).
[5] R. K. Bangia, *Law of Marriage and Divorce* 487–90 (11th ed. 2018).

relationships, emotional sensitivities and benefits of welfare that are present.[6] As opposed to the commercial or civil disputes, the disagreements within the family are hardly limited to legal rights, and the conceptual idea of family mediation is rather based on collaboration, communication, and conciliation. In its principle, family mediation is established by the autonomy and voluntariness of the parties. The mediator does not make decisions; instead, the mediator facilitates the relationship, determines underlying interests, and helps parties to explore the settlement options.[7] This is the difference between mediation and adjudication and arbitration, where the outside body makes the decisions. Conciliation, though akin to it, is traditionally more active on the part of the neutral third party, who has the freedom to suggest settlement terms. In comparison, mediation does not take away any decision-making capabilities of the involved parties and thus, it is especially effective in a family conflict where agency and emotional acceptance of the decisions are most important.[8]

The conceptual foundation of family mediation is parallel to the interest-based model of negotiation by Fisher and Ury which focuses on separating individuals and problems, instead of positions, in dealing with issues of security, respect, and parental identity.[9] In the family setting, an inflexible legal stand, such as custody, maintenance, or property claims, often conceals underlying emotional issues with regard to security, respect and parental dissonance. Through mediation, parties can be able to express these underlying interests in an environment that is not confrontational and, thus, more sustaining and situational. Therapeutic jurisprudence is another important theoretical framework that guides family mediation. It appraises the effect of law on emotional life and psychological well-being, embracing recourse to the law attempting to remedy instead of causing strain, trauma, and aggression.[10] Conversely, mediation is considered a therapeutic form of legal representation which reduces the emotional harm and promotes healthy interaction. In this sense, mediation is not a different process since it is a qualitatively different type of administration, adapted to which human relations are personal.

[6] John M. Haynes, *Fundamentals of Family Mediation* 3–7 (State Univ. of N.Y. Press 1994).
[7] Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 15–18 (3d ed. 2003).
[8] P. C. Rao & William Sheffield, *Alternative Dispute Resolution: What It Is and How It Works* 109–11 (Universal Law Publ'g 1997).
[9] Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* 40–45 (2d ed. 1991).
[10] David B. Wexler & Bruce J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* 17–21 (1996).

The conceptual basis of the family mediation is informed by the principles of restorative justice, as well. Even though restorative justice is traditionally related to criminal justice, it focuses on responsibility, dialogue, and relationship restorative, which are aspects that appeal to family conflicts.[11] Mediation offers a platform on which the parties can take responsibility, lament the wrongdoing, and jointly devise solutions that align with the legal and relationship aspects of conflict. This happens to be especially on conflicts that involve children whereby the long-term interests of children require future collaboration between parents despite their separation or divorce. Notably, the rationale of family mediation in concepts can be further supported with the concept of best interests of the child which forms the foundation of family law in most places. Inability to reach an agreement is more likely to instrumentally use children as an object of competing parental claims, as compared to mediation that promotes child-sensitive and cooperative parenting arrangements.

Nevertheless, the limitations of the family mediation process should be weighed against their theoretical beauty. According to the critics, overreliance on consensual models will obfuscate power relationships, especially in patriarchal family set-ups.[12] Content hence, the conceptual platform of family mediation must have safeguards in place, such as informed consent, mediator neutrality, and the possibility of judicial review. In the context of such a controlled legal environment, it follows that mediation may be considered an appropriate and theoretically correct method of solving family conflicts in a way that is both just and humane.

III. Legal Framework Governing Mediation in Family Disputes

The institutionalization of mediation in family disputes through the legal regulation of mediation is an act of purposeful legislative/legal approach to provide conciliatory dispute resolution into the official justice system. Having understood the failure of the adversarial litigation system to resolve the nuanced and dynamic nature of the family relationships, legislature and the judicial system have increasingly integrated the concepts of mediation and conciliation into the family law processes. Such institutionalization makes clear the evolution of rights-based adjudicatory form of scrutiny to a more problem-solving and welfare-focused form.[13]

[11] Howard Zehr, *The Little Book of Restorative Justice* 19–23 (Good Books 2002).
[12] N. R. Madhava Menon, *Clinical Legal Education and Mediation in Family Disputes*, 41 J. Indian L. Inst. 245, 252–54 (1999).
[13] P. C. Rao, *The Indian Law of Alternative Dispute Resolution* 203–06 (2d ed. 2017).

Family courts legislation dominates on the statutory level; it forms the basis of legal mediation of family disputes. Such a law specifically focuses on settlement, reconciliation, and counseling as the major family adjudication goals. The family courts are required to strive amicable settlement prior to trial and are also permitted to refer counselors, welfare professionals and mediators in the mediation process.[14] This legislative model acknowledges the fact that family conflicts usually demand an interdisciplinary intervention than legal arguments. Supplementing the legislation of the family courts, civil procedure laws are also very important to foster the mediation. The language that allows courts to refer disputes to alternative dispute resolution procedures, such as mediation, have been interpreted by judicial bodies to mean that they referral is not made in a discretionary manner, but rather constitutes their duty in instances where the nature of the dispute has made such referral possible. This has resulted in the emergence of court-annexed mediation centres, which are administered by the judicial supervision and comply with mediation policy.[15]

Legal services Act also enhances the mediation system since it empowers the settlement of family disputes before litigation, especially among people who are economically weak. Mediation and conciliation under these statutes are arranged by the authorities using the legal services institutions, thus, promoting access to justice and the minimisation of the susceptibility of courts to costly and emotionally intricate litigation. Along with the general procedural laws, there are personal and matrimonial laws regulating marriage, divorce, maintenance, and custody, which indirectly support mediation also by providing a reconciliation and settlement. It is a policy of proper legislative law that the courts that decide such disputes need to consider options of compromise and reconciliation at different points in the proceedings.[16] This is because family law is seen as restorative rather than solely punitive and declaratory in nature.

Mediation in family conflicts is institutionally based on prescriptive as well as in-house provisions. The valuable aspects of court-affiliated mediation are the judicial control, standardisation and enforceability of settlements as court decrees.[17] The drawbacks of private mediation are that there are no standard guidelines, qualification and responsibility of mediators. To combat these issues, higher court and statutory regulations governing mediation provide various qualifications, training, ethical obligations and informed jurisdiction of all

[14] Family Courts Act, 1984, 9–10 (India).
[15] Salem Advocate Bar Ass'n v. Union of India, (2005) 6 S.C.C. 344, 356–59 (India).
[16] Law Comm'n of India, *Report No. 217: Irretrievable Breakdown of Marriage as a Ground of Divorce* 3.5–3.8 (2009).
[17] Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 S.C.C. 24, 34–37 (India).

mediators.[18]

Mediated settlement agreements: The legal framework has a critical component of the enforceability of a mediated settlement agreement. The cases which have been settled through court-referred mediation and accepted by the court become the ones of the judicial order/decree and can be enforced in accordance with the agreed conditions in terms of maintenance, custody, and property division. On the whole, the legal system on mediation on the issue of family disputes shows an attempt to balance consensual dispute resolution and general adjudication. The law aims at advancing the mediation as a credible, effective, and rights-sensitive process by giving the mediation statutory support, institutional support, and supervision by the courts. The effectiveness of this framework however will be subject to its application, sensitive nature of the judges and availability of trained mediators who can manoeuvre through in the dynamics of family strife.

IV. Judicial Approach to Mediation in Family Disputes

In mediation, the courts have been at the forefront in justifying and reinforcing the use of mediation as a method of solving family disputes. Courts have always recognized that trials involving matrimonial and custody issues require flexibility, discretion, and a non-adversarial form of measured trial proceedings, which conventional litigation lacks easily. It is with this in mind that, not only, but also because of procedural efficiency, the judicial encouragement of mediation is based on the substantive objectives of the family law, that is, reconciliatory, welfare and long-term stability.[19] The initial involvement of the courts with mediation stressed the role of the court in examining settlement prior to the adverse adjudication.[20] The Supreme Court has constantly noted that family disputes ought as much as possible to be handled amicably as litigation exacerbates bitterness and permanently breaks down relationships. Another law-making move that created a massive breakthrough in the judicial strategy of mediation occurred in the expression of systematized rules of court-referred ADR. The Supreme Court made it clear that mediation best suits the case when there is a conflict following marriage, custody, maintenance, among other family relationships with the aim not necessarily focusing on legal decision but making things better.[21]

[18] Supreme Court of India, *Model Rules for Mediation* rr. 3–10 (2005).
[19] Sanghamitra Ghosh v. Kajal Kumar Ghosh, (2007) 2 S.C.C. 220, 224–26 (India).
[20] Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 S.C.C. 42, 51–53 (India).
[21] Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 S.C.C. 24, 35–37 (India).

The voluntary aspect of mediation has also been highlighted by the decisions of the judiciary. The courts have also warned that parties should be motivated to seek mediation but not to coerce or force the process will lead to the continuation of injustice especially to those who are open to be exploited. Based on this, the courts have emphasized the importance of informed consent and the liberty of parties involved in the mediation to back out in case they feel that they are not fairly treated and are being pressured to mediate. Female and child protection have become a major judicial issue in family mediation. It has been acknowledged in the courts that power disparities, and such disparities arise out of economic dependency, social conditioning or even emotional vulnerability, can corrupt the mediation process.[22] It has therefore been established in judicial statements that cases that involve grave allegations of domestic violence, mental cruelty or even abuse may not be appropriate to mediation or at least, increased protection should be had. The courts have therefore taken a subtle route and supported mediation without at the same time overstepping their boundaries. In any custody and guardianship battle, courts have never failed to believe that the best interests of the child should be the dominant factor in mediation as well as adjudication. The presence of judicial oversight is what makes the mediation agreements on custody, visitation, and child support to be evaluated to avoid the welfare of children getting compromised.[23]The role of court has further endorsed the validity of mediation packages and incorporated the concept of child-first into consensual agreements.

The other important area of judicial approach is whether there is enforceability of the mediated settlements. The judiciary has confirmed that, any agreement reached by court-referred mediation after acceptance by the court, acquires the force of order or decree as binding, compelling the populace to place more faith in using mediation as a powerful court procedure. Meanwhile, the courts still have the authority to disperse unconscionable, unlawful or un-social policy settlements. All in all, the court process of mediating the family conflicts portrays a delicate aspect of promoting and restraining collectivity. Being a promoter of mediation and a guardian of voluntariness, equality and good welfare, the judiciary has relegated mediation as a process complementing adjudication and not replacing it. This moderate jurisprudence has played a critical role in including mediation into the nuances of the mainstream of family justice, to the extent of providing a more caring and empathetic court system.

[22] V. Bhagat v. D. Bhagat, (1994) 1 S.C.C. 337, 347–48 (India).
[23] Roxann Sharma v. Arun Sharma, (2015) 8 S.C.C. 318, 326–29 (India)

V. Mediation, Access to Justice, and the Human Rights Perspective

Family mediation is finally being conceived as a tool of promoting access to justice and fulfilment of substantive human rights in the legal system. The availability of justice as a tenet of constitutional democracies does not merely require that one enroll in courts but that it also entails the presence of equitable, expeditious, and intelligent systems to resolve disputes, such as family litigation, with its procedural complexity, time, and expense often rendering justice unattainable to the vulnerable groups in society, especially women, children, and financially dependent spouses. The barriers are overcome through mediation that provides a participatory, economical, and time-sensitive process that is responsive to the realities of family conflict as lived in.[24] Constitutionally speaking, mediation is in line with dignity, equality, and fairness. The right to live with dignity does not merely entail security against arbitrary state action but must also imply to the hostility that legal procedures will cause the unnecessary psychological injury and developments of adversarial family litigation impose hostility entrenched. By contrast, mediation focuses more on respectful dialogue and the empowerment of parties, and thus is more congruent with the concept of justice based on dignity. The judicial acceptance of mediation therefore points to a newly emerging definition of justice as a relationship and experience ideal and not necessarily a formal or accurate end-result.

Mediation also helps in distributive justice which minimizes economic burdens related to the long litigation. The parties in family cases may have different financial means, and the process of forbearing acquittal may be a kind of structural exclusion; mediation allows generating procedural equality and reducing the chances of one of the sides to distort the course of justice in favour of the other. Legal services institutions and court-based mediation centres serve to buttress this aspect by offering subsidised or free mediation services to marginalised litigants.[25]

Human rights wise, however, mediation has to be judged by the need of substantive equality especially, gender justice. The legal feminist literature has warned that informal dispute resolution systems inadvertently tend to legitimise the current power bases within the family, particularly in the patriarchal societies.[26] There is the risk of women being coerced to compromise under social stigmatisation pressures, economical reliance or the threat of retaliation. As such risks have been identified, courts and policy-makers have stressed that

[24] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 111–13 (1974).
[25] Legal Services Authorities Act, 1987, 19–22B (India)
[26] Catherine A. MacKinnon, *Toward a Feminist Theory of the State* 168–72 (1989)

family dispute mediation should be voluntary, informed, and backed by protective measures including legal counsel, domestic violence screening and judicial scrutiny of settlement.[27] Human rights instruments and soft-law norms of international law are starting to recognize the importance of ADR, such as mediation, in improving access to justice. These standards have urged member states to work on mediation that is right, fulfilling, inclusive, and sensitive to the requirements of the vulnerable groups.[28] These principles remind that mediation cannot be an isolated undertaking that exists outside the formal justice system; instead, it is an inclusive process that is overseen and held accountable.

Notably, family mediation also promotes the rights and well-being of children who are usually the stakeholders without a voice during family disputes. Court-monitored child -centred mediation frameworks can ensure results that are in line with the best interests, emotional well-being, and developmental needs of the child, in this regard, mediation can be viewed as a right enabling process that balances expediency with fairness. To conclude, I believe that the access to justice and human rights made by mediation are its ability to humanise the legal procedure and still be grounded in the constitutional and normative protections. As an efficient method to supplement adjudication, mediation as a means of enhancing the meaning and boundaries of justice in family matters is effective when incorporated in a well-developed legal system.

VI. Comparative and International Perspectives on Family Mediation

The results of a comparative and international study of family mediation show that there is an increasing global agreement that consensual year of dispute solving frameworks are specially in an ideal place in family disputes. Mediation has gradually been introduced in jurisdictions with a common law and civil law tradition based on common principles of efficiency and party autonomy and child welfare. The consideration of these models is very helpful in finding best practices and normative standards applicable in informing domestic structures.[29] The UK family mediation has been institutionalised as a core of the family justice system. Law changes have focused on mediation in litigation, as this is a pre-litigation process before children and financial proceedings on post separation grounds. The establishment of compulsory Mediation Information and Assessment Meetings (MIAMs) is a policy decision, which enhances parties to think about mediation before going to courts by compelling them to attend information

[27] K. Srinivas Rao v. D.A. Deepa, (2013) 5 S.C.C. 226, 240–42 (India).
[28] U.N. Office on Drugs & Crime, *Handbook on Restorative Justice Programmes* 43–46 (2d ed. 2020).
[29] Lisa Parkinson, *Family Mediation* 21–25 (2d ed. 2011)

sessions but not mediation. Experimental research indicates that, this early intervention decreases the rate of litigation and enhances some collaborative parenting.[30]

Another possible influential example is found in Australia in the context of which family dispute resolution (FDR) is legally required in most parenting disputes before a court. The legal system focuses on child-oriented mediation and obligates practitioners to become specifically accredited.[31] Courts maintain discretion to withhold such cases in situations of family violence or urgency and thus realize the boundaries of mediation in cases of coercion. Australian experience proves the significance of both mediation and strict screening systems.

The process of family mediation development in the United States has mainly taken the direction of the judiciary approach and state-level policies. Many states either permit or mandate mediation of custody and visitation controversies, usually through court-affiliated programs.[32] American model puts significant importance on party self-determination, mediation confidences and training of the mediator. However, academic observations contain contradictory aspects between states and emphasize the necessity of a more careful focus on power and authority disparities and the issues of domestic violence.46 MED of international level, soft-law instruments and policy frameworks are progressively appreciating the role of mediation as a useful tool that can be used to solve family disputes. Although the United Nations Commission on International Trade Law (UNCITRAL) is mainly dedicated to commercial mediation, it also aided in the establishment of the principles of mediation emphasizing on the voluntariness, impartiality, and enforceability of settlements, which have subsequently found their way into the domestic legislation on mediation that is not commercial. The Hague Conference on Private international law has also touched the issue of mediation in inter-country family disputes especially the child abduction and custody cases. The benefits of incorporating the mediation process in these settings is highlighted by the fact that the method can be particularly useful in family disputes pitting two or more legal systems that require courts to bring cases to resolve without extending the disagreement further.48 The international practice shows that mediation is particularly beneficial in the cross-border family cases where litigations will have to be conducted in a legal system and cultural differences can only worsen the disagreement even further.

[30] Ministry of Justice (U.K.), *Family Mediation Statistics in England and Wales* 8–12 (2019).
[31] Family Law Act 1975 (Cth) pt. VII (Austl.).
[32] Robert E. Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* 98–103 (2d ed. 2012).

In comparison, it is also evident that the main characteristics of family mediation systems which work are to have early referral, trained and accredited mediators, anti-coercion strategies, child-conscious policies and adjudication by courts, which are highly involved and satisfy their users.[33] It is also observed that family mediation models that are effective are those that embrace early referral, trained and accredited mediators, anti-coercion measures, child-conscious policies, and judicial oversight. In conclusion, it can be argued that, as an intervention within family justice, family mediation can be beneficial to improving the efficiency and humanity of family justice systems, provided that it is designed and regulated appropriately. These experiences can teach several lessons on how to enhance domestic mediation frameworks nonetheless taking note of local socio-legal contexts and the human rights requirements.

VII. Challenges and Critiques of Mediation in Family Disputes

Notwithstanding the increasing tolerance and institutionalization of this approach, mediation in family-related conflicts does not lack serious challenges and criticisms. Although the process is commonly praised due to its flexibility, informality, and the ethos of conciliatory, there are cases when scholars and practitioners warn that all these characteristics can, in some instances, have a detrimental effect on substantive justice. These shortcomings must be taken apart to make sure that the mediation process is not turned into an expediency tool that triggers the loss of rights and protections.[34]

Among the most consistent criticisms of family mediation issues is related to power asymmetry among the parties involved in the dispute. Asymmetries in family relationships are often based on gender roles, economic reliance, education-related and emotional vulnerabilities.[35] Women living in a patriarchal society can be disadvantaged and thus it is hard to negotiate on equal terms with their counterparts. The fact that mediation is informal and confidential can contribute to even further blurring of any coercion or implicit pressure thus resulting in settlement which is based on inequality and not a real agreement. The problem of domestic violence and abuse is connected closely with the one of power imbalance. There is a view by critics that mediation would not be suitable or even effective when there has been physical,

[33] Andrew Schepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* 145–49 (2004).
[34] Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1075–78 (1984).
[35] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1556–60 (1991) at 1556–59.,

emotional, or psychological abuse as mediation would assume that they would have the ability to negotiate, freely, and voluntarily.[36] The survivors of domestic violence would find themselves unable to negotiate on unfavorable terms because of fear, intimidation, or pressure. The courts and legislations have reacted to this by and reiterating the importance of some sort of screening setups and exemptions, yet there is still the inconsistency in implementing this.[37]

The other challenge is in terms of the probability of legal entitlement being eroded by informal justice. This compromise aspect of mediation can also diffuse away any statutory rights of maintenance, property distributions, or custody especially where parties do not receive sufficient legal representation, which is problematic in terms of transparency and accountability.54 Scholars warn that the legal standards that have been established to safeguard helpless family members should not be thwarted with the help of mediation.

Quality and competency of mediators is also a critical challenge. Procedural competence is not enough and regulation mandates that require sensitivity to emotional dynamics, cultural situations, and legal requirements, otherwise, family mediation will have ad hoc practices and lack of ethics. Another issue that makes it more difficult to enforce the professionalism and accountability of family mediation is that not all jurisdictions have the same standards of accreditation. Another sphere of criticism is confidentiality, as one of the pillars of mediation. Considering that confidentiality promotes free communication, sometimes the confidentiality can conceal the unfairnesses in a case where settlements would not be fair or in the best interests of children.[38] In family cases, too much confidentiality would ensure that there will be no outside intervention when a settlement would not be fair or against the best interest of children. Striking a balance between confidentiality and judicial checks therefore continues to be a challenging but important undertaking. Lastly, the practical issues of effective use of mediation are resistance by legal professionals and litigants. Lawyers who are used to the adversarial practice might feel that mediation as a means to justice takes away the professional roles whereas parties might distrust informal approaches and see the use of justice as a means to replace formal adjudication. Overall, the family mediation criticisms do not suggest the ineffective bashing, but rather the necessity to design, regulate, and supervise it. The aspects of power imbalance, violence, protection of rights, and professional standards are crucial issues that require addressing to make sure that mediation is a rights-sensitive and credible element

[36] Julie Macfarlane, *Dispute Resolution: Readings and Case Studies* 391–95 (2d ed. 2003).
[37] Family Law Act 1975 (Cth) §§ 60I(9), 60CC (Austl.).
[38] Law Comm'n of India, *Report No. 129*, supra note 2, 4.6–4.8.

of family justice.

VIII. Strengthening the Mediation Framework: The Way Forward

The growing importance of mediation as a practice in family conflicts requires a progressive framework to aggregate its advantages as well as face its limitations as a practice. To make family mediation more robust, there should be legislative, institutional and judicial action to ensure that mediation has become a great part of the policy on family justice. instead of seeing it as a marginal, or even instances intervention, it is important to see family mediation as a central part of the family justice policy.

First, there is a reform necessity of a legislative clarity and coherence. Although nowadays mediation is championed with the help of fragmented statutes and judicial policies, a specialized mediation law, including provisions with respect to family cases, will help in developing unmistakable rules, concerning voluntariness, confidentiality, informed consent and judicial review. Such laws ought to clearly appreciate the unique character of family mediation and encompass a firewall that protects the vulnerable groups.

The other important reform area is capacity building and professionalization of the mediators. In addition to a detailed familiarity with family law, psychology, child development, and trauma-informed practice, family mediation demands specialized abilities like the ability to listen attentively while retaining your own perspective with calmness and clarity.<|human|>60 It takes specific skills, such as the skill to listen and maintain your viewpoint calmly and clearly, making the trauma-informed practices, child development, and profound knowledge of family law essential skills of a family mediator. It can be improved by training, accrediting and further educating family mediators to increase the quality and consistency of mediation services. Ethical standards should also be enforced by the regulatory bodies and they should be in a way that they would provide neutrality, competence and accountability. Mediation should be incorporated in judicial settings more than through referral of cases. Judges are instrumental in the identification of relevant cases, overseeing the mediation proceedings and to examine settlements in order to determine their fairness and legality.[39] Mediation with children, maintenance, and custody should be continually reviewed by the courts, this will provide the right balance between party autonomy and protection of rights. Child-sensitive practices such as use of child specialists where powerfully needed should also be implemented in the family

[39] Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 S.C.C. 24, 36–38 (India).

courts.

The presence of awareness and legal literacy is also crucial towards reinforcing mediation. Litigants do not always view the mediation process in the most favorable way, as they usually have some traumatic or prejudiced views about the informality and the pressure element of the process.[40] The civil society organizations, bar associations and legal aid institutions can play crucial role in informing the masses of the advantages, limitations, and protection of mediation. Ambitious and knowledgeable parties have better chances to take meaningful engagement and stand against unjust compromise. Lastly, mediation systems should be decentralized and location-specific. The policy should be constructed and executed based on socio-cultural realities, gender, and economic inequalities. Introduction of domestic violence screening processes, accessibility of legal advice during the mediation process, and voluntary participation are crucial in preserving the validity of mediation as a process of enhancing justice.

IX. Conclusion

Facilitation of fights within families is a major development of the legal process of covering intimate and relational conflicts. Instead of seeing mediation in the perspective of the adversarial paradigm, it is possible to take an approach that is participatory, humane, and sensitive to the realities of the family life. As this paper has shown, the legal validity of mediation is based on statutory, judicial and support of constitutional values of dignity, equality and the provision of access to justice.[41] Simultaneously, mediation cannot be the panacea. Its efficacy shall rest on strict regulation, professional skills, and sensitive upholding of substantive rights. The issues related to the problems of power imbalance, gender justice, domestic violence, and enforceability should emphasize the necessity of a measured strategy in which mediation is regarded as an addition and not an alternative to adjudication. In this respect, judicial control and the institutional protection are indispensable. Experience at the international level and also comparative experiences support the conclusion that properly developed family mediation systems can lessen litigation, increase compliance, and improve child welfare without harming justice. The trick is to localize these best practices to local socio-legal environments whilst at the same time being attached to the universal human rights principles. To sum up, mediation must be viewed as part of the contemporary concept of justice

[40] Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* 119–22 (2008).
[41] Salem Advocate Bar Ass'n v. Union of India, (2005) 6 S.C.C. 344, 356–59 (India).

in families, that is, as a way of broadening the understanding of justice, going further than court proceedings, case decision forming, and forming sustainable justice. Mediated in a sound legal and ethical context, mediation can revolutionize the mission of resolving family-related conflict into the mission of positive interactions and healing results.