

Understanding Indian Mediation: Comparison of Indian and Korean Mediation Programs

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“Discourage litigation; persuade your neighbors to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time”

-Abraham Lincoln¹⁾

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1) ‘Abraham Lincoln’s Notes for a Law Lecture’ (Abrahamlincolnonline.org).

(available at <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm> (Last visited on May 05, 2021).

I . Introduction

Mediation is a voluntary non-adjudicative process where a neutral third party assists parties to reach resolution to their conflict.²⁾ It is a method of resolution of disputes wherein an independent and impartial third party uses different skills and technique in order to resolve the conflict and mediate the parties to reach an amicable solution.

The purpose of this paper is to understand the Indian court-led (centered) mediation programs, especially court-connected mediation center in comparison with Korean court-connected mediation programs. The research is focusing upon the mediation centers operating in India and Korea, which are categorized in the court-referred mediation program in order to provide better way of access to justice and to encourage lawyers to participate the mediation program.

Even though both Indian and Korean mediation programs are highly affected by U.S. mediation system, these programs are still highly connected to the court system. It also can be categorized in the court-connected mediation programs because the mediation centers usually get mediation cases by court's referral.³⁾ Because of strongly connected with the judiciary, the mediation programs in both countries are not popular and there is a need to enhance by encouraging the participation of parties and lawyers.

1. Necessity of Mediation in India and Korea

The floodgate of vexatious cases filed in Indian courts are the reflection that India is one among the most 'Litigious Society' and the delay and backlog of cases are the outcome of Litigious Explosion.⁴⁾ People and government are less tolerant towards each other and to a surprise; Indian governments are biggest litigants in the country.⁵⁾ However, Korea has

2) 'MEDIATION TRAINING MANUAL', Mediation and Conciliation Project Committee, Supreme Court of India, (available at <https://sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> (Last visited on May 15, 2021)).

3) It can also be called as court-led or court-centered mediation.

4) Asian Survey, University of California Press, 33 No. 12 at 1136-1150 (Dec., 1993) (available at <https://www.jstor.org/stable/2645174> (Last visited on April 11, 2021)).

been non-litigious society because Koreans are more tolerant than reactive. They often suppress their feelings which mean they also suppress disputes and conflicts. There is a huge influence of Confucianism, which discourage people towards disputes.⁶⁾ However, the Korean judiciary has been under pressure of high number of filing into the courts. The number of filing cases has been increased about 16 times more from 1979 to 2008.⁷⁾ While the number of filing cases has gradually increased for several decades, judges in Korean judiciary are under pressure to handle cases within limited times.⁸⁾ Furthermore, the Indian judiciary has been suffering from both explosion of filing cases and extreme case pendency in the courts since 1980's.⁹⁾ Then, the mediation programs could be efficient and effective methods to reduce judges' workloads and enhance to expedite the process without increase cost, delay and congestion in legal procedures in both countries.

2. Adoption of Mediation Programs in India and Korea

After the Pound conference in 1976,¹⁰⁾ the alternative dispute resolution (“ADR”) movement hit U.S. judiciary and ADR programs were introduced and adopted by each court. Both Indian and Korean judiciaries adopted mediation programs similar to U.S., mutating it into its judicial system.¹¹⁾ Because a title and operation of ‘mediation’ in India and Korea could be different,

5) <https://www.deccanherald.com/content/406073/litigious-indians.html> (Last visited on June 03, 2021).

6) Michael Pryles, *The Cultures of Dispute Resolution in Asia*, in *Dispute Resolution In Asia*, 4 (2002); Professor Sooyoung Kwon explained that the positive meaning for Korean is a social solidarity and the negative meaning for Korean is to be excluded from the solidarity of community or group, available at <https://www.youtube.com/watch?v=FGsZT7t6heY> (Last visited on May 3, 2021).

7) Chul-Gyoo Park, *Alternative Dispute Resolution*, 404 (2016).

8) Yonghwan Choung, *SJD Dissertation, Achieving Justice through ADR*, 9-10, Indiana University, Law School (2016): Korean judge mentioned that majority of civil cases are resolved within 1 year from the filing date. It means that they are under pressure to handle with overloaded works on their shoulder.

9) Yonghwan Choung, *Study of Legal Corruption in Indian Courts and Reforming Civil Court System to reduce Pendency*, 26-1 *The Kor. Asso. for Corruption Stu.*, 201, 204-206 (2021).

10) Named in honor of Roscoe Pound, the Dean of Harvard Law School. The seminal event that led to the birth of modern dispute resolution systems was the 1976 Pound Conference.

11) Siyoon Lee, *Experience and Improvement of ADR in Korea*, 19-1 *CIVIL PROCEDURES* 479 (2015); Anil Xavier, *President of the Indian Institute of Arbitration & Mediation, Mediation: Its Origin & Growth In India*, 27 *Hamline J. of Pub. L. & Pol'y.*, 1, 05 (available at https://www.arbitrationindia.com/pdf/mediation_india.pdf (last visited

the mediation programs have developed in different multiform, such as court-connected or hybrid with private mediation.¹²⁾

In India, ADR programs were recognized by enacting Arbitration (Protocol and Convention) Act of 1937 and Arbitration Act 1940. After the Independence, the Indian Arbitration and Conciliation Act of 1996.¹³⁾ In July 2002, Chief Justice of India formally inaugurated the Ahmadabad Mediation Center. The center was reportedly the first ever entirely run and managed by Lawyers. Thereafter, first court-annexed mediation center came into existence at Chennai High Court on April 1, 2005.¹⁴⁾ Following this, several other high courts also establishes their Mediation centers. Delhi District Courts made a request to ISDLS to provide a formal training to their judges to act as mediators in order to establish court-annexed mediation centers in Trial Courts.¹⁵⁾

The Korean Supreme Court has recognized necessity of adopting ADR programs since 1987 and the court-annexed mediation programs were launched due to the Judicial Conciliation of Civil Disputes Act of 1990 was enacted.¹⁶⁾ Furthermore, the Court-annexed mediation center was launched in Seoul and Pusan in 2009 as a pilot program. Then, this center program was expanded to other large cities in 2011, expecting that it can reduce overloaded cases.

In Korea, there are five (5) different types of mediation programs: 1) court mediation by judge, 2) court mediation by a mediation judge 3) court-annexed mediation center 4) inner council mediation and 5) outer-council mediation based on the article 7 and 8 of the Judicial Conciliation of Civil Dispute Act.¹⁷⁾ All types of Korean mediation are led by the court and majority of programs can be categorized into a court-annexed mediation except

on June 1, 2021)).

12) Sunbok Seo, ADR for Managing Conflicts under Governance, 79-80 (2016).

13) Anil Xavier, *supra note* 11, at 5.

14) *Id.*, at 8.

15) Justice R.V. Raveendran, *Mediation-Its Importance and Relevance*, PL (Oct 10 2010).

16) In this paper, a term of 'mediation' is mainly used to describe a method of resolving dispute by a third neutral who does not have an authority to make a binding decision. However, there is no exact definition of mediation and conciliation. The Korean judiciary uses a term of conciliation in the 'Judicial Conciliation of Civil Dispute Act.' It just uses the same in this paper. In my opinion, it needs to correct the term to correctly describe it in the court-annexed and connected programs.

17) Yonghwan Choung & Agnieszka Gora Blaszczykowska, *Criticizing Judge's Participation in Mediation and Conciliation in Poland and Korea*, Dong-A L. Rev. 405, 409 (2019).

outer-council mediation which is court-connected mediation.¹⁸⁾

II. Mediation in India

1. Introduction

According to the data provided by the National Judicial Data Grid as of June 19, 2021¹⁹⁾ 10,373,297²⁰⁾ civil cases is pending across Indian courts. The issue of pendency and backlog of cases in India is not new but it has been escalated by the ongoing COVID-19 pandemic. There are two approaches to deal with this issue; 1) to reform the current structure in order to adjudicate faster and 2) to prevent cases from reaching the courts. Mediation as a mode of dispute resolution falls under the second approach. Thus, adoption and promotion of Mediation Culture in India can be one of the most efficient solutions to the issue of pendency and backlog in India.

2. Role of Judiciary in Mediation

Even though judges require certain objectivity while engaging in the process of determination element of settlement for cases to be referred to the mediation, the Indian judiciary is accustomed to the traditional adjudicatory process and to shift their attention to an alternate mode, requires certain efforts.²⁰⁾ With efforts of reducing a huge number

18) Yonghwan Choung, *supra note 8*, at 48.

19) The e-Committee of the Supreme Court had launched the National Judicial Data Grid to provide data on cases pending in the district courts across the country. It works as a monitoring tool to identify manage and reduce pendency of cases. <https://njdg.ecourts.gov.in/njdgnew/index.php>; Generally see, Yonghwan Choung, *supra note 9*, at 201 (the India judiciary has suffered from the explosion of filing cases and huge pendency in court system); According to the news report, there were 22,833 judges in India in 2018 and, based on a rough calculation, the judge and population ratio would be about 20 judges per million population (available at <https://www.news18.com/news/india/there-are-20-judges-per-10-lakh-people-in-india-says-government-2027585.html> (last visited on Aug 18, 2021)).

20) Murlidhar, S., *Alternate Dispute Resolution and Problems of Access to Justice*, Judicial Exchange on Access to Justice Conference, Mumbai, CHRI/INTERRIGHTS (November 14-16, 2003).

of pending cases in the courts, it requires for the Indian judiciary to change an attitude of operating mediation programs in different regions of India and get confidence in the process of mediation. Further, it strongly needs to recognize a lack of judicial understanding and training about the process of mediation due to no unified mediation act in India. Thus, an elaborate training process must be carried out along with massive awareness program in order to enhance the rate of referral cases.²¹⁾

In order to provide incentives to the Judges for referring the cases to mediation, they are being given points for referring the cases to mediation and if the cases are disposed off via mediation, it is an added advantage. These points are used as an evaluative method and counted for their promotion.²²⁾ But referrals under section 89 of Civil Procedures Code (“CPC”)²³⁾ is not tracked for the National Judicial Data Grid²⁴⁾ which means cases do not form part of the records of disposal, which creates a lot of confusion.²⁵⁾ There is a need of tracking cases disposed out of mediation under the data of National Judicial Data Grid in order to encourage and popularize mediation in India.

3. Types of mediation programs

Mediation is a voluntary non-adjudicative process where a neutral third party assists parties to reach resolution to their conflict.²⁶⁾ It is one of alternative dispute resolution methods to amicably resolve the conflict and mediate matter with the parties to reach a mutual solution

21) Nathan Rehn, *Justice Without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts*, O.P. Jindal Global University, Research Paper No. 4 (2011).

22) Interviewed on June 13, 2021.

23) Indian Civil Procedures Code, sec. 89 (1) (“...the Court may reformulate the terms of a possible settlement and refer the same for (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through LokAdalat; or (d) mediation).

24) The e-Committee of the Supreme Court had launched the National Judicial Data Grid to provide data on cases pending in the district courts across the country. It works as a monitoring tool to identify manage and reduce pendency of cases <https://njdg.ecourts.gov.in/njdgnew/index.php> (Last visited on June 23, 2021).

25) Rajiv Dutta, *Mediation in India -Building on Progress*, International Bar Association. (Available at <https://www.ibanet.org/Document/Default.aspx?DocumentUId=B705AE33-0AF0-4DA2-9C93-7421D28D2767> (Last visited on April 25, 2021)).

26) ‘Mediation Training Manual’, *supra* note 2, at 16.

by an independent, impartial and neutral third party who gently obtains skills in negotiation and mediation.²⁷⁾

In general, there are three different types of mediation programs in India as below. The first two can be categorized as court-led mediation programs because the mediation programs strongly connected with the court, regulated these programs by the court system and reviewed by the judge in order to have a same effect as court order or judgment.

3.1 Court–annexed Mediation²⁸⁾

It is when the mediation services are provided by the court as a part and parcel of the same judicial system. It is applicable in cases which are pending or have recently filed before the court. Here the parties to mediation are same as filed in the suit. Judges, Counsel of both the parties and the litigants all of them participate in the said mediation. The parties are represented by the same lawyers and continue to put forth the best interest of the parties before the panel. Here the litigants are given an opportunity to participate themselves in the resolution process, thus this method has gained larger public acceptance.²⁹⁾

3.2 Court–connected (Referred) Mediation:

Section 89 of CPC empowers the court to refer the cases pending before it to ADR programs that also include Mediation.³⁰⁾ Where the court refers the parties for mediation as mandated

27) SriramPanchu, *Mediation Practice & Law: The Path to Successful Dispute Resolution*, 212-213 (2015); James Melamed, 'So, You Want To Be A Mediator' (available at <http://www.mediate.com/articles/melamed10.cfm> (last visited on May 15, 2021)).

28) The meaning of 'court-annexed' is that the court-annexed organization is sometimes located within the court buildings, or officers in this organization and financial supports are coming from the court. In short, the annexed organization could not survive after separating from the court.

29) Niranjan J. Bhatt, *Court Annexed Mediation* (available at https://lawcommissionofindia.nic.in/adr_conf/niranjan%20court%20annx%20med13.pdf (Last visited on June 03, 2021)).

30) Indian Civil Procedure Code of 1908, sec. 89- Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations

under Section 89 of CPC said as court referred mediation. Courts are more tend to refer the parties to mediation in cases of Matrimonial disputes, particularly divorce cases.

3.3 Private Mediation

This is a form of mediation privately held, without any interference from the court. Where the parties instead of going to court for a dispute, directly go to a trained and qualified mediator for resolving the dispute is said as private mediation. There are no laws applicable in private mediation in India and the mediator is appointed voluntarily by the parties. The matters could include high commercial value to family dispute.³¹⁾ This is mainly preferred when there are issues of confidentiality and parties are not willing to reveal their private information in a public forum i.e. courts.

4. Basic Attributes of Mediation Program in India:

There is no uniform working structure of mediation in India.³²⁾ Every mediation center has adopted their own specific set of rules and regulations for their functioning. The lack of authority and regulation often creates uncertainty among the parties and the mediators. Thus, the information collected through the interview with the mediators working in different mediation center across India has helped us to narrow down the few important characteristics

of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:-
 (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation. This provision was inserted under the code in 1999 with the aim to reduce the burden of the court and facilitate the resolution of disputes out of court. The court must consider the nature of the dispute and refer to the most suitable forum listed under the section. The provision clearly lists down 4 different modes of Alternative Dispute Resolution and all the forums of ADR mechanism are treated equally in the section. Arbitration and Conciliation can only be with the consent of the parties. Lok Adalat derives its power to adjudicate from the Legal Services Authority Act. In addition, mediation is a voluntary process undertaken by the parties.

31) Alok Prasanna Kumar, Ameen Jauhar, Kritika Vohra, and Ishana Tripathi. *Strengthening Mediation in India: Interim Report on Court Annexed Mediations*, Vidhi Centre for Legal Policy (2016) (available at <https://vidhilegalpolicy.in/reports-1/2016/7/25/strengthening-mediation-in-india-an-interim-report-on-court-annexed-mediations> (last visited on April 10, 2021)).

32) Due to a lack of uniform code of mediation in India, this research recruits the empirical methods of interviewing mediators in areas of Delhi and Bombay, two largest cities in India.

of the working of mediation program in India.

4.1 Appointment of Mediators

Judge refers the matter to mediation as per section 89 of CPC, when there exists an element of resolution and thereafter that particular mediation center appoints a mediator for the said case.³³⁾ The name of the mediator can be suggested by the Judge or by the Advocate of the party or the cases in the mediation centers are allotted on a rolling basis. While, in the private mediation it is completely dependent upon the discretion of the parties.³⁴⁾

The issue with this process is that, it is not systematic. With discretion comes biasness. There can be cases of favoritism by the judges, while allocating mediation cases to the advocates. With respect to mediation center's approach, Delhi High Court mediation center provides a list of trained Mediators available to undertake the cases are made available to the parties, who come to the center.³⁵⁾ It also maintains list of professionals, who are experts in their respective fields. In addition, parties can make their choice accordingly. Similar approach can be adopted in all the mediation centers across the country, in order to ensure better functioning and maintain transparency.

4.2 Place and Time

The Place of conducting the mediation proceeding is flexible and can be anywhere decided mutually by the parties and the mediator. It is not restricted within the mediation centers but it is conducted within the premises of the mediation center. The rooms in the center are to be pre- booked in advance.³⁶⁾ Most mediation centers generally have deadline of 2

33) Interview with Indian Mediator on June 8, 2021.

34) Delhi High Court Mediation and Conciliation Rules, 2004, Rule 3, Appointment of mediator: It provides that the High Court shall, for the purpose of appointing the mediator between the parties in suits or proceedings, prepare a panel of the mediators and put the same on the Notice Board and the mediation center allot cases to those empanelled mediators on a rolling basis or depending upon their experience.

35) Samadhan, *Refection* 2 (2010-2012) (available at <http://dhcmediation.nic.in/uploads/report/Reflection-2013-Apdf-805ee401033036f25e17279bbc303283.pdf> (Last visited on June 15, 2021)).

36) Interviewed with Indian Mediator on June 13, 2021.

months to reach settlement agreement, which can be extended to 3 months.³⁷⁾ Sometimes the cases are resolved within 2-3 weeks also as the proceedings are consecutively held on daily basis. The resolution is more dependent on number of sessions rather than number of days. 12-15 sessions are the average time to reach an agreement.

Despite all the flexibility and convenience attached to the mediation as a mode of dispute resolution, Mediation in India has not seen much growth. It has failed to gain popularity among the public and the advocates. Low Incentives and remuneration are the reasons that discourage advocates towards the field.

4.3 Facilities at the Center

Court- annexed mediation centers are not well equipped across India. Only a small premise out of the court complex is allocated for mediation center. Supreme Court does not have any physical space for mediation center. Madras HC mediation center have around 10 rooms consisting of waiting hall and a lobby.³⁸⁾ One mediator is given one room for the entire proceeding. No specific rooms are allotted for carrying out private mediation.³⁹⁾

4.4 Qualification and Training Program

Mediation centers have their own set of post qualification experience mandate. Some mediation centers have unreasonable post qualification experience mandate e.g. Mandatory Bar license along with 10 or 5 years of practice which discourage the young professionals towards mediation.⁴⁰⁾ There is a need to encourage people from non- law background to practice as mediators.

37) Rule 18, Delhi High Court Mediation and Conciliation Rules, 2004, the proceeding of the mediation shall be completed within ninety (90) days from the date the parties first appeared before the mediator.

38) Interviewed with Indian Mediator on June 8, 2021.

39) Interviewed with Indian Mediator on June 13, 2021.

40) Interviewed with Indian Mediator on June 8, 2021; Delhi High Court Mediation and Conciliation Rules of 2004, rule 4 provides for Qualification of mediators which includes, Retired Judges of the Supreme Court, High Court of India, District & Sessions Judge/ Officers of Delhi Higher Judicial Service, Experienced Legal practitioners with at least ten years standing at the Bar, Experts of the field etc..

The training is only mandated for mediators working in court annexed mediation centers. They must undergo 40 hours of training to be appointed as a mediator. There is no such mandate in case of private mediation.⁴¹⁾ For further evaluation, the center have forms to be filled up by the mediators regarding number of cases settled, lectures attended etc. and depending upon which the cases are allotted to them.⁴²⁾

4.5 Remuneration of the Mediator

It is one of the major discouragements for the mediators practicing in Court annexed mediation centers in India. The mediators are paid very meager and are not remunerated enough and this is also the reason why the advocates never treat mediation as a full time job/profession.⁴³⁾ But, in private mediation the advocates acting as mediators are free to charge according to their reputation and goodwill in the market. The mediators charge either per case or per proceeding, depending upon the agreement with parties.⁴⁴⁾

4.6 Enforcement of Settlement Agreement

Absence of regulation upon enforcement of settlement agreement raises serious concerns about the whole mediation process.⁴⁵⁾ There was no binding effect upon the parties who settled in mediation. Thus, in the Salem Bar Association case⁴⁶⁾ court recognized this issue

41) Interview with Indian Mediator on June 8, 2021; Samadhan- Training Program(available at <http://dmcmediation.nic.in/training-program>(last visited on June 1, 2021)).

42) *MEDIATION TRAINING MANUAL*, supra note 2, at 16; According to the officer of Delhi High Court Mediation Center, the meditation training program consists of a lecture type and a role-playing type and one of writer is currently providing an elective course of “Negation and Mediation” in one of Indian Law School and this course also similarly provides a lecture type and a hypothetical role-playing.

43) Interview with Indian Mediator on June 8, 2021; Dr. Marisport, *Resolving Pending Cases Through Alternative Dispute Resolution Under Section 89 Of Civil Procedure Code: A Case Study*, Department of Justice, Ministry of Law and Justice, Government of India.

44) Interviewed with Indian Mediator on June 13, 2021.

45) Rashika Narain & Abhinav Sankaranarayanan, *Formulating a Model Legislative Framework for Mediation in India*, 11 NUJS L. REV. 75 (2018).

46) Salem Advocate v. Union of India Writ Petition (civil) 496 (2002).

and provided mechanism to consider the settlement agreement as a decree upon following the conditions/requirements laid down under Section 73 and Section 74 of the Arbitration and Conciliation Act, 1996.⁴⁷⁾ This principle was later affirmed in the *M/S Afcons Infra*⁴⁸⁾ case wherein the Court observed, “Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding.”⁴⁹⁾

4.7 Confidentiality

As confidentiality is an indispensable to mediation proceeding, it creates trust and honesty among the parties. It ensures openness and encourages parties to resolve dispute without any external fear or pressure. Then, the success of mediation is largely dependent upon confidentiality.⁵⁰⁾ Majority of mediation centers ensure confidentiality via agreement among the parties and mediators. However, very few of the parties actually enter into separate agreement on confidentiality. Delhi mediation center⁵¹⁾ provides for confidentiality and prohibit mediators from disclosing information to other party or upon any other platform. However, this rule being non- mandatory in nature does not guarantees any confidentiality of the information disclosed. This rule did not generally protect mediator’s privilege to keep in confidence and

47) Prateek Kumar Singh and Shambhavi Shekhar, *Settlement of Commercial Disputes by Mediation in India: Need for Formalized Enforcement Mechanism*, CADR- Center of Alternative Dispute Resolution, RGNUL(available at <https://rgnucadr.wordpress.com/2020/11/08/settlement-of-commercial-disputes-by-mediation-in-india-need-for-formalized-enforcement-mechanism/> (last visited on May 04, 2021)).

48) Para 28, *M/S Afcons Infra. Ltd. & Anr v. M/S Cherian Varkey Constn*, Civil Appeal No.6000(2010).

49) Rule 24 and 25 of Delhi High Court Rules, 2004 requires the settlement agreement to be produced before the court within 7 days and if the court is satisfied that the parties have amicably and voluntarily reached a settlement, it shall pass a decree in accordance with terms of the agreement.

50) Goldberg, Sander, Rogers & Cole, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 460-62 (2007); Menkel-Meadow, Love, Schneider & Sternlight, *Dispute Resolution: Beyond the Adversarial Model*, 327-30 (2011)

51) Delhi High Court Mediation and Conciliation Rules of 2004, rule 20: Confidentiality, disclosure and inadmissibility of information; Because of the confidentiality and protection of personal information in mediation, and a current COVID-19 circumstance, we could not observe actual mediation case in the center or could not introduce the mediation case in this article. During the telephonic interviews with Indian mediators, they notified that all of civil matters could be subject of mediation.

party's personal information that was released during the mediation.

III. Comparison of Indian and Korean Mediation Programs

1. Process and Filing Fee of Mediation in Mediation Centers

When judge believe that there exists an element of resolution with both parties' consent, the judge can refer the matter to mediation. In this referral, the judge needs both parties' voluntary participation in the mediation process and the judge cannot push either party to participate into it. Unlike Indian referral, Korean judge can refer a case to mediation without parties' consent.⁵²⁾

Here, we found that the parties in India cannot directly file a matter into the mediation center and they should file a case into the court with paying the filing fee. Unlike Indian mediation center, in Korean, parties can directly file a matter into the mediation center with paying only 10% of normal filing fee.⁵³⁾ The less filing fee can encourage the parties to voluntarily take part in the mediation program in the mediation center. It might lower the financial barrier for parties to easily access to court system.

However, there was a problem for double charge for the Indian mediation because party should pay for a filing to the court and pay for a fee for mediator.⁵⁴⁾ Because the parties also have to pay a certain amount of money for mediation, it might be discourage them to use the mediation program by raising a financial barrier. Then, Indian Supreme Court

52) Judicial Policy Research Institute, *Research on the Development Direction of Korean Alternative Dispute Resolution*, 384 (2016); It is possible to argue that a judge can freely refer a case to the mediation program regardless of parties' consent because it enhances the efficiency of process. However, we do not agree this point because the party, who does not agree to move to the mediation process, will not voluntarily participate in the process and the party will immediately request a mediator to return his or her case to the litigation again on the first day of mediation. In addition, because the voluntary participation is a core concept of ADR, a judge only can guide or introduce parties to use the mediation programs.

53) Joo In, *A Study on the Private Autonomies of the Disputes in the Process of Conciliation*, 13-2 *Arbitration* 613, 613(2004).

54) Interviewed on June 27, 2021.

held that parties who privately agree to settle their dispute or they are referred by the court for settlement of dispute outside court shall be entitled to refund of court fees under section 89 of Civil Procedures of Code,1908 read with section 16A of Court Fees Act, 1890.⁵⁵⁾

2. Appointment and Training of Mediator

Even though both the Indian and Korean judiciary declared that their court-connected mediation programs are properly working, there are some concerns to enhance the mediation process. Because the Korean mediators in both court-annexed and court-connected were not officially trained by the expert and the center did not provide the continuous education program for the remaining mediators.⁵⁶⁾ Then, some criticized that the Korean mediation is not facilitative but evaluative, like a judge.

However, the Indian mediation centers currently provide their own mediation training courses.⁵⁷⁾ Like U.S. mediation program,⁵⁸⁾ the Indian mediation center provides a pool of mediators who obtained a certificate of trained mediator, completed generally 40 hour-training course. It can provide a bigger legal market to the practicing lawyers and provide an option to choose a mediator based on competing environment.

We believe that the lawyer could be a good mediator after the training course because the majority of cases are related with legal matters and it could be required for mediator to obtain the legal knowledge. Furthermore, the mediators also need communication skills in the facilitative mediation.⁵⁹⁾ The Indian mediators who completed the training and continuous educations apply facilitative method for the mediation in order to assist parties to participate negotiation with a good will.

55) Rep by its Registrar General v. MC Subramaniam & Ors. SLP (civil) Nos. 3063-3064 of 2021 decided on February 17, 2021(The High Court of Judicature at Madras).

56) Yonghwan Choung, *supra note* 8, at 133-34.

57) Each High Court mediation center provides its own training program. It needs to develop a unified training course based on the Unified Mediation Act.

58) Judicial Policy Research Institute, Research on the Development Direction of Korean Alternative Dispute Resolution, 428-30 (2016).

59) Youngwook Kim, Alternative Dispute Resolution: Negotiation, Mediation and Arbitration, 154 (2015).

3. Character of Mediation (Med-Arb)⁶⁰ based on Court's Intervention

Unlike Indian mediation, the Korean judiciary's attitude is focusing on the efficiency of the court process, instead of parties' voluntary participation or self-determination. In this regards, mediation could neither be popular, nor be disregarded by parties. For example, the judge can refer a case into the mediation process without parties' consent⁶¹ and the mediator can forcefully complete the mediation program, by making a binding decision, which is similar "med-arb."⁶²

Arbitration in India has been criticized for severe intervention by the Indian courts in the process of recognition and enforcement.⁶³ However, in Indian mediation, the court mediation centers mainly regulate mediation and the Indian judiciary tries not to intervene the mediation process by referring its cases into the center.⁶⁴

4. Resistance or Unawareness by Lawyers

The relationship between lawyers and their clients are fiduciary in nature. They are in a position to influence and advise their client/parties for an appropriate remedy for resolving their dispute. They have an opportunity to prioritize mediation at an initial stage even before the court. It is the lawyer to whom an individual would come first to evaluate his legal options. If the lawyers recommend mediation for dispute resolution in cases where there are chances of settlement, it could bring popularize mediation within the territory.⁶⁵

60) Folberg, Golann, Stipanowich & Kloppenberg, *Resolving Disputes: Theory, Practice, and Law*, 605 (2010) (Definition of "Med-Arb" a neutral initially serves as mediator and changes a main role to arbitrate the dispute by switching a hat as an arbitrator when parties could not make an amicable agreement by themselves).

61) Judicial Policy Research Institute, *The Development Direction of Korean Alternative Dispute Resolution*, 384 (2016).

62) *Id.* at 414-15.

63) Yonghwan Choung & Siddharth Shukla, *Interpretation and Application of Public Policy in Enforcement of Foreign Arbitral Awards in India: Comparison with the Interpretation of Public Policy under the Civil Procedure Act*, 30 *Dong-A J. of Int'l Business Trans. L.* 263, 263-64 (2020); Yonghwan Choung, *Reviewing Current India Backlog of Pending Cases and Excessive Judicial Intervention in Arbitration: Focusing on Setting Aside and Enforcement with Ssangyong Case*, 24-4 *The Kor..Asso. For Corruption Stu.*29, 30-31 (2019).

64) Interviewed on June 13, 2021.

65) Laila Ollapally, *Lawyers Can Win In Mediation* (available at <https://www.livelaw.in/law-firms/articles/lawyers-win>

Instead of promoting, there exists a sense of resistance from the members of Bar. They are reluctant to advise their clients to opt for mediation because they fear losing their client base and litigation practice.⁶⁶⁾ They are more concerned about their legal fees than the much bigger issue of pendency in the courtrooms. According to the survey conducted by ‘The Global Pound Conference’⁶⁷⁾ 67% of lawyers who participated in the survey admitted to have strong impact upon their clients and to be reluctant to use/refer parties to mediation. Majorly because they are unaware about the processes and working of the mediation and some are fearful about their diminishing revenue.

We found Korea lawyers’ similar attitudes toward court-led mediation programs because they were not fully aware of the existence of program in existence or operation of the programs. Furthermore, some lawyers complained that there is no financial benefit to using a mediation for a lawyer under a current circumstance.⁶⁸⁾

5. Recognition of Private Mediation

The practice and recognition of private Mediation is another point of difference between the mediation programs in these two countries. One of the most preferred and growing method of mediation in India is ‘Private Mediation’ especially in cases of Commercial disputes.⁶⁹⁾

mediation-172112?infinitemscroll=1 (Last visited on April 05, 2021)).

66) Cf. Marisport A, Resolving Pending Cases Through Alternative Dispute Resolution Under Section 89 Of Civil Procedure Code: A Case Study, Department of Justice, Ministry of Law and Justice, Government of India.

67) Named in honor of Roscoe Pound, the Dean of Harvard Law School. The seminal event that led to the birth of modern dispute resolution systems was the 1976 Pound Conference in St Paul, MN, USA. On October 29, 2014, IMI organized an interactive convention entitled *Shaping the Future of International Dispute Resolution* in London. Over 150 delegates from many stakeholder groups and from more than 20 countries used individual voting and interactive technology to explore and express their views on a number of key issues. The resulting data suggested that significant gaps may exist between what disputants expect and need versus what is currently provided by advisors, provider bodies, practitioners, educators and policy makers. (available at <https://imimmediation.org/research/gpc/gpc-about/> (last visited on April 05, 2021)).

68) Interviewed on June 28, 2021.

69) Looking at the success rate of mediation and the fact that the courts are loaded with such cases, the Central Government last month issued an ordinance to amend the Commercial Courts’ Act, 2015, which makes pre-institution mediation mandatory prior to instituting a commercial suit for matters that do not require urgent interim relief. The settlement arrived at under this provision shall have the same status and effect as an arbitral award on agreed terms. K Giriprakash, *How private mediation helps corporate solve disputes faster* (June 11, 2018), available at

This is a form of mediation privately held, without any interference from the court. Where the parties instead of going to court for a dispute, directly go to a trained and qualified mediator for resolving the dispute is said as private mediation. The private mediation in India remains unregulated, which grants a larger horizon to the parties to choose any style of mediation according to their needs. The parties can mutually appoint a mediator and initiate the proceeding; there is little/ less interference of the court in a private mediation.

However, the Korean judiciary does not recognize a private mediation program yet. Mediation programs in Korea are mostly annexed or connected to the court. It held within the court premises or referred to the court-annexed or connected programs. The court at Korea can refer cases to mediation without the consent of the parties. That is not the case in India. In India, court gives an option to the parties to opt for mediation. It can suggest parties or the pleader to opt for mediation but cannot impose. This can be one of the reason that mediation in India has not grown exponentially and a very few cases are actually referred to mediation.

6. Approach of Mediators

The approach followed by Indian mediators is facilitative in nature instead of evaluative attitude by a mediator.⁷⁰⁾ Wherein, the mediators enable them to explore their interests and consider all the available options.⁷¹⁾ There is no pressure or push exerted towards reaching a settlement agreement.⁷²⁾

However, as mentioned above, among the Korean mediation programs in the court-connected mediation, the judges and standing commissioner can make a binding settlement when two parties fail to reach an amicable agreement by themselves.⁷³⁾ In many

<https://www.thehindubusinessline.com/news/how-private-mediation-helps-corporates-solve-disputes-faster/article24138432.ece> (Last visited on April 25, 2021)).

70) Interview with Indian Mediator on June 13, 2021.

71) Justice Dhananjaya Y. Chandrachud, *Mediation: Realizing the Potential and Designing Implementation Strategies* (available at http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdfhttps://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf (Last visited on June 1, 2021)).

72) Interview with Indian Mediator on June 13, 2021; Rule 16, Mediation and Conciliation Rules, 2004.

73) Yonghwan Choung & Gora Blaszczykowska, *supra note 17*, at 405-07 (In Korea, court-annexed civil mediation

cases, the judges themselves act as mediators and if the parties fail to mutually reach an agreement the judge, acting as mediator would prepare an agreement.

IV. Suggestions for Enhancing Mediation Programs

1. Promoting of Mediation Culture

A mediation culture needs to be promoted in both the jurisdictions.⁷⁴⁾ Raising awareness and educating different stakeholders involved in the process is of utmost importance. Parties need proper counseling for resting their faith on mediation as a mode of efficient dispute resolution. Conference and workshops must be regularly organized for educating the lawyers and the same could be made mandatory to attend as a bar council obligation. It is essential for a lawyer to acquire both the skills to argue and to reconcile for an effective dispute resolution system.

In both India and Korea, the facilities of mediation center are well prepared and fancy. In addition, the mediators in India also can operate mediation program outside the mediation center's facilities and invite the parties into their sites, such as their law firms. However, both mediator in India and Korea are currently using only one mediation room, not using two mediation rooms. In this circumstance, the mediator would occupy his or her seat and each party should continuously move in or out the mediation room during the separate session. It might cause uncomfortable environments for parties because each party has to meet the other who is unfavorable to face each other based on the dispute. Therefore, in our opinions, the mediator needs to use at least two different mediation rooms without sharing the wall.

programs are strongly tied to the court. E.g., programs are operated within court-buildings and share human resources with the court).

74) Chul-kyoo Park, A Study on the Current Status of ADR law System of Korea and the Measures for Its Establishment-Focused on a Proposal for the Alternative Dispute Resolution Act (Plan), 10, Korea Development Institute (2012).

2. Need of Unified Mediation Act

Although the practice of mediation in dates back to ancient times, the Mediation in India remains unregulated. There is no uniformity in the functioning of the different mediation centers, every center works on their own set of rules. There is a need to systematize the entire process of Court annexed/ Court Connected mediation in India. A regulatory body needs to be set up under the aegis of Supreme Court of India. There can be hierarchy created among the mediation centers as India have in case of Consumer forum under Consumer Protection Act, 2019. The Act provides for three tier of consumer forum i.e. District Consumer Dispute Redressal Forum, State Consumer Dispute Redressal Forum and National Consumer Dispute Redressal Forum.⁷⁵⁾ Similarly, we can systematize the Mediation centers at District, State and National level. Supreme Court can act as model mediation center for both the state and district centers.

3. Incentives for Lawyer

The advocates working as mediators are not incentivized enough to keep them committed to mediation. They perceive mediation as a part- time job/profession. There is a need to enhance the remunerations/incentives paid to the mediators. A minimum and maximum bar can be created by each mediation centers and the mediators must be paid within the said benchmark. In India, there is no specific regulation for payment to a mediator and remuneration of the mediator was not stable. In addition, the payment was minimal and not enough to survive in India. Therefore, the attitude toward the Indian mediation program should be changed and amount of payment to mediator should be reasonable.

After the Korean judiciary adopted the U.S. type of law school program in 2009, it usually stated that young lawyers and law school students would struggle to survive in the tough legal market. It could expand a current Korean legal market for all lawyers by aggressively involving into the mediation program.

75) The District Consumer Dispute Redressal Forum operate at the district level similarly State Consumer Dispute Redressal Forum operates at state level and the National Forum is the apex body acting in a supervisory role.

4. Training Courses of Mediation in Center and Law School

A compulsory course on Mediation must be introduced in all the Law Schools. Bar Council should mandate the same for an effective implementation. This will educate the young minds regarding the benefits and efficiency of the process. This will also help in popularizing the concept at the ground level.

The court-connected mediation center could be a main control tower of the entire mediation programs, like the U.S. mediation program. The mediation center could provide the training program and continuous training course for young lawyers and the lawyers could obtain the certificate after completing the course and could be listed on the pool of mediators' list. Furthermore, the center could regulate the mediation programs, including training members and regulating processes.

5. Private Mediation

Mediation as a mode of dispute resolution tends to flourish in disarranged and informal set-up. The parties often get nervous and become hesitant to discuss freely in a formal and serious environment. Court connected and Court annexed mediation functions within their specific sets of rules and regulations, which gives very little space for parties' discretion. However, Private mediation entails sufficient amount of flexibility. There are no rules for Private mediation and thus, parties can choose any style of mediation, which suits their needs and comfort. Thus, Mediation must move from court connected/ annexed mediation to Private mediation in future.

V. Conclusion

Despite being one of the most efficient, speedier, cost-effective means of amicable dispute resolution mechanism, the present Mediation framework in both the jurisdiction has not been able to achieve its full potential. There is a lack of awareness and acceptance of the mediation

processes among the practicing lawyers, which directly influences the legal advice received by the litigants. Parties tend to have doubts regarding the feasibility of the process. Thus, it is very important to adopt mandate in some form for the lawyers who could influence them for recommending clients to mediation as the first recourse to dispute resolution especially in cases having highest rate of amicable resolution such as, Domestic and Matrimonial disputes. Secondly, the remuneration paid to the practicing mediators is not enough for their survival in the market and thus, it discourages them towards mediation. All these issues are the outcome of one significant problem, lack of awareness. There is no mediation culture in India and in Korea. We need to work on ground level to educate people and enlighten them about the functioning of the process and its efficiency.

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[Abstract]

Understanding Indian Mediation: Comparison of Indian and Korean Mediation Programs

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Our societies are in constant state of dispute. We need a mechanism of dispute resolution, which is less formal, fast, flexible, cheaper, voluntary, and devoid of lengthy procedures. Mediation is one such method, which is operational in India as well as in Korea. Although the process of dispute resolution through mediation has existed since ages, it has not been able to gain the popularity that it needs. There are several issues responsible for the same and through this research we aim to identify all such problems and try to reach desirable outcome.

The purpose and objective of the research is to draw a comparative analysis of contemporary mediation program in India and Korea. The focus is upon the working techniques of court-connected/court- led mediation. The comparative approach of India and Korea would help in understanding the basic concept of mediation, functioning in both the jurisdiction.

In the midst of Pandemic, when countries were under lockdown we managed to use empirical method of data collection by conducting interviews with several experts/professionals (mostly working mediators at India and Korea). We found that, although, the rationale behind adoption of mediation in India and in Korea varies but, there exist a common need of enhancement and regularizing the status of mediation program. Both the countries lack mediation culture and awareness among the lawyers, judges and the parties. We found, Indian mediation program is similar to US mediation program. Both have similar way of appointment of mediators

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and enforcement of settlement agreement. Whilst, the mediation program in Korea is a hybrid/ combination of both India and US, with its distinct features.

[Key Words] India, Mediation, Mediator, Mediation Center, ADR