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# **THE ROLE OF LEGAL EXPERTISE IN MEDIATION: A CRITICAL ANALYSIS OF MINIMUM QUALIFICATIONS FOR MEDIATORS**

AUTHORED BY - DR. DEEPIKA SAINI

## **Abstract**

Mediation, as a form of alternative dispute resolution, has gained significant traction in contemporary legal practice due to its efficiency, flexibility, and potential for amicable resolution. Central to the effectiveness of mediation is the role of the mediator, who acts as a neutral third party facilitating communication and negotiation between disputing parties. However, the question of whether mediators should possess a minimum legal background, such as a law degree, remains a subject of debate within the legal community.

This research paper aims to critically analyse the necessity and implications of requiring mediators to have a legal background. Through a comprehensive review of existing literature, case studies, and relevant legal frameworks, the paper will explore the arguments both in favour of and against mandating legal expertise for mediators. Additionally, it will examine the potential benefits and drawbacks of such requirements from various perspectives, including legal, ethical, and practical considerations.

Furthermore, this paper will assess the current regulatory landscape concerning mediator qualifications across different jurisdictions, highlighting variations in requirements and their underlying rationales. By synthesizing theoretical insights and empirical evidence, the research will offer insights into the impact of legal expertise on the mediation process's fairness, effectiveness, and overall outcomes.

Ultimately, this research aims to contribute to the ongoing discourse surrounding the professionalization of mediation and inform policymakers, legal practitioners, and stakeholders about the potential implications of setting minimum qualifications for mediators, particularly in terms of legal background.

### **Keywords**

Dispute resolution, Behaviours mediation, Community initiative, Impartiality, Mediator skills, Mediator duties, Neutrality.

## 1. Introduction

The traditional adversarial adjudicatory system has long dominated our society as the primary means of solving disputes among parties.<sup>1</sup> Recently, however, many state and federal courts, local governments, businesses, and private individuals are turning to alternative dispute resolution (ADR) as a potential option to traditional court litigation.<sup>2</sup> A fair and efficient process for resolving dispute is crucial in any civilized society for the purpose of securing and defending rights of its citizens. As it is written that the "Court brings dispute to an end and ensures that people can enforce their rights. But in most parts of the world, ever mounting expenses of litigation, congested court schedule, delay in disposal of cases have put question on the efficiency of the system<sup>3</sup>

This has been reflected in judgment of the Supreme Court of India, where the court observes that, "interminable, time-consuming complex and expensive court procedures impelled jurist to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to..."<sup>4</sup> In fact, the philosophical basis of alternative forum that means alternative dispute resolution (ADR) is drawn from Confucianism. The philosophy of Confucianism was, in essence, one of harmony, of peace and compromise resulting in a win-win combination"<sup>5</sup>

Among the alternatives to litigation are arbitration, mediation, mini-trial, summary jury trial, private judging, and expert fact-finding negotiation.<sup>6</sup> The time demands that our legal

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<sup>1</sup> Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Meditative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 888 (1997).

<sup>2</sup> John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 456 (1997). The National Institute for Dispute Resolution released a recent survey that revealed the following: (1) twenty-eight states have mandatory, non-binding arbitration programs; (2) more than half the states, through state legislation or court rules, have comprised other arbitration methods into their system; and (3) most states supply mediation for domestic matters such as divorce, custody, and visitation. Additionally, federal courts have ventured into the dispute resolution arena. Due to the Civil Justice Reform Act of 1990, 80 out of 94 district courts have experimented with ADR programs. *Id.* Also, the cost of court litigation is high, adversarial in nature, and time-consuming. *Id.*

<sup>3</sup> Mahbub, SK Golam *Alternative Dispute Resolution (ADR) in Commercial Dispute. The UK and Bangladesh Perspectives*. 1<sup>st</sup> edition. Dhaka, 2005, p. 29

<sup>4</sup> *Guru Nanak Foundation v. M/s Rattan Singh & Sons*, AIR 1981 SC 2075, 2076-2077

<sup>5</sup> Rahman, Dr. Mizanur "Alternative Dispute Resolution". *Human Rights Summer School Manual*. 2007, p. 148

<sup>6</sup> See Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 593 (1988). Arbitration is a process where a third party makes a binding decision for the parties. It differs from litigation in that the parties are able to select the third party and are permitted to select their own procedural rules, which generally loosens up the rules of evidence. Mediation requires a neutral third party that acts as a facilitator and allows the parties to develop a solution that is voluntarily accepted. A mini-trial involves a presentation and arguments by attorneys, usually without witnesses, in order to obtain a realistic view of the outcome to aid the settlement process. A summary jury trial involves a panel of jurors who render a verdict after participating in limited trial. The non-binding verdict then forms the basis of the parties' discussion for settlement. Private

system should be developed to ensure greater social justice in the context of modern social science. Alternative dispute resolution (ADR) promising road toward improvement in it combines both old and new dispute resolution processes. Amidst the ancient traditions (notably aboriginal) of a surprisingly large number of cultures, there is a way of thinking about conflict and dispute that has been recaptured in the modern age. This article focuses specifically on the mediation process.

## 2. Importance of Legal Expertise in Mediation

Mediation in civil matters is becoming increasingly popular and has been made mandatory in both family and commercial matters in countries like the United States, Australia, and New Zealand. There is a consensus in both common law as well as civil law countries that mediators should be neutral, unbiased, and have no interest in the outcome of mediation. The mediators, however, need not be neutral to the process itself. Thus, they can play more active roles in some cases. They can be asked to help parties to identify legal issues, provide a reality check about the expected outcome, ensure that the agreement is based on a sound legal foundation, and help parties to articulate their interests in legal terms.

In cases where parties appreciate the contribution to the process by a legal expert, it would be to their disadvantage to opt for a non-lawyer mediator based purely on strict adherence to the principle of party autonomy. There is no question that neutrality is an important qualification, but there is no justification for absolutism. Nonetheless, many countries, following the 2002 Ethical Principles for Mediators of the Union Europeenne de Mediators, insist on mediator neutrality and would not persuade the parties to use a non-neutral legal expert to provide "settlement proposal(s) or advice".<sup>7</sup> This raises an important question: Can the legal system in a country play a more active role in shaping mediation? This question needs to be answered in the Indian context, where 1) there is stiff opposition from the Bar Council and some retired judges, due to a fear that a mandatory pre-litigation mediation would displace lawyers as dispute resolution professionals, and 2) the Supreme

judging involves the referral of the parties' dispute to a private judge and the decision becomes the official decision of the court. Expert fact-finding allows an expert to examine the facts, and to use the findings as a basis for settlement discussions. *Id.* at 592-98.

<sup>7</sup> Singh, A. (2022). Analysis: Mediation vs. Arbitration vs. Litigation. Part 1 Indian J. Integrated Rsch. L.

Court mediation model rules require mediators to be either judicial officers or lawyers of at least ten years standing.

## 2.1. Understanding the Legal Framework

The Mediation and Conciliation, 1996 (*hereinafter 'MC Act'*) provides guidelines about the respective qualifications of mediators. The law stipulates through rules that both lawyer mediators and non-lawyer mediators should have 40 hours of training and 20 hours of observation. However, no international scholarly writings are suggesting exactly 40 hours of training. There is also provision for the Certified International Professional Mediators' Arrangement, 2019, which is apparently referred to as "Certification" in 7.1. But there is no effective recognition of "Certification" in Indian legislation, implying intermittent importance to a globally known public dispute institution. Discussing the decision, the article explores how ultimately the required qualifications for mediators can affect the process of mediation.<sup>8</sup>

In India, alternate dispute resolution (ADR) is often mentioned as a credible remedy after civil and criminal litigation. However, claims of inadequate knowledge about ADR techniques are being increasingly reported in case law. The Indian legislature has enacted different legislations for ADR methods, which include MC Act for mediation. The judiciary has also been extremely supportive in terms of promoting ADR.<sup>9</sup> At the same juncture, adopting the terminology "alternative" is insufficient because of different conflicting characteristics across the ADRs. Therefore, it can also be regarded as a set of complementary dispute resolution mechanisms, a new term used here instead of ADR.

## 2.2. Applying Legal Knowledge in Mediation

In mediation, the decision-making authority shifts from one of the parties to the mediator. At least in part, the greater power and influence wielded by mediators is meant to be counterbalanced by the fact that mediators are generally expected to be neutral and have limited subject-matter expertise. But party empowerment as a justification for particular

<sup>8</sup> Rice, D. F. (2022). What are the barriers experienced by self-represented litigants in civil court?

<sup>9</sup> Pandya, D. H. & Dave, R. (2023). Investigating the Jurisprudential Aspects of ADR. Journal of Pharmaceutical Negative Results.

aspects of mediation practice is questionable. In a purportedly party-driven process, the knowledge, background, and practices of mediators should not be justified by reference to any influence that this might have on the process itself.<sup>10</sup> In this light, the assertion that mediators are much like GP doctors becomes perhaps easier to place in the context of mediation.

A rather outdated conceptualization of mediation proffers the idea that party empowerment is the defining feature of mediation and that this empowerment confers upon the mediation process various commendable qualities, some of which are missing from other modes of dispute resolution. A more contemporary and inclusive view of mediation acknowledges that various actors, including mediators, help to shape the mediation process. In such a model, the mediation process is an inherently social construct, produced by the actions or inactions of the parties, their legal representatives, and the mediator.

### **2.3. Ensuring Fairness and Impartiality**

According to Professor Sonja M. Starr, when adversaries seek the help of an intermediary, both "the officer concerned should act in good faith, believe in the impartiality of the procedures and be guided only by the best interests of the parties... the goal of this neutrality is to ensure decision and confidence in the quality of the decisions and decisions of the officer or the court". The mediator should ensure that the parties maintain a balanced playing field. They should guide the conversation and probe the data that cuts critical in a way that the parties do not perceive vectors to the conversation. It is said that evenly balanced negotiation boards serve as mediators. One of the most important aspects is to guarantee that mediation helps "the mediation process provides participants with meaningful work, satisfaction with the process of winning, and satisfaction with the result of the negotiation".

The revised Code of Ethics for Mediators, convening, opening an office, office, excellence and security in one of the Supreme Court's recommendations, and the Preamble begins with an explanation of the purpose of the Mediation Standards 2005. According to the 2003 amendment to the Federal Law on Dispute Resolution and Another (ARB-Med-Arb), Rule

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<sup>10</sup> Alam, M. (2022). Inseparable but not interchangeable: Inclusion and Gender Sensitivity for Effective Peace Mediation.

B, and Article 2 of the Civil Procedure Code, 1908, the goal of this endeavour is to provide a professional framework that guides parties to mediation and arbitration, to help them express their interests, develop options, make decisions, and enjoy the meaning enterprise. According to the first mediator intentions, 2003 arbitration law, this ethical conflict of interest can also be confirmed by the parties' consent.

### 3. Minimum Qualifications for Mediators in India

The present system of non-regulation and accreditation of private trainers and institutions in India, similar to the one that was in vogue in the United States during the initial stages of its program, has multiple limitations like compromised trainers, faulty unscientific materials, evaluation by institutions interested in profits instead of the public's interest, the general public interest, and the final result of the public being at the mercy of arbitrating, add-on full-time practicing advocates when mediation proves in vain either due to lack of mediator ethics, preparation, and professional excellence or due to the inventive sins of the mediating advocates-mediators. For these reasons, it becomes the duty of the government to prescribe minimum educational qualification and training standards to ensure that mediators are capacitated to bring about long-lasting benefits to the disputing community, in the true spirit of the Indian Arbitration and Conciliation Act 1996.

A perusal of the amendments to the Singapore Mediation Act, the Appointment of Mediators Act 2016 of Singapore (AMA), the Emirates Mediation Registry of the DIFC- LCIA (Rules of Arbitration 2016) and the UNCITRAL Working Group II discussion has highlighted the growing prominence amongst the states in formulating concrete standards for the qualification requirements for the practice of mediation.<sup>11</sup> Although India was the torchbearer of the age-old idea of using the mediation process for settling disputes, the silence of the Government of India on the need for prescribing minimal qualification standards for mediators has given a free hand to the deposit-seeking private ADR institutions to draw up any criteria that seek to ward off adversarial advocates who bring with them their corrupting membership of the Bar Council of the State, in addition to offering them a lucrative career at the institution.

<sup>11</sup> Mandal, S. (2022). Is Mandatory Mediation the Future of Dispute Resolution in India? Available at SSRN 4119810.

### 3.1. Current Requirements

Under Section 89 of the Code of Civil Procedure, 1908, courts are empowered to attempt a settlement of certain disputes that are pending before them through ADR processes. Specifically, under Section 89(2) (a), it is provided that efforts should be made to persuade parties to opt for arbitration where the dispute involves valuable commercial assets. Paragraph (g) provides for conciliation, either by the court itself or, if the parties so desire, by the use of conciliators chosen by the court. Under Section 89(2) (d), mediation is also provided for. It states that mediation should be tried "where it appears that elements of a settlement exist".<sup>12</sup> As per Order X Rule 1A of the Code, any court before whom a suit is pending may refer the parties to ADR processes under Section 89 of the Code. The Mediation Rules have been enacted by the central government, probably in exercise of its rule-making powers under Section 89(2) (d), although the connection with ADR in this context is indirect.

The Mediation Rules provide that a small or simple dispute is a matter that can be referred to mediation by the court under Section 89 of the Code. Such a dispute cannot involve complex or substantial questions of law. The manner of conducting mediation by a newly trained mediator is specified in the Annexure to the Rules.<sup>13</sup> An attempt to introduce the qualifications of a mediator first appears almost in the High Court at Delhi Mediation Centre (Selection and Training of Mediators) Regulations enacted in 2006, hereinafter referred to as the Delhi Mediation Centre Regulations. Regulation 5 prescribes that a person is to be appointed as a mediator if he is accredited by an accredited institution or an accredited mediator or has conducted mediation for such time as specified by the Mediation Officer of the Delhi High Court.

### 3.2. Evaluation of Existing Standards

Mediation as a formal process is relatively undeveloped in India. It is, however, not an entirely new concept. Traditional mediation systems in diverse socio-legal systems have existed in the Indian subcontinent. Dispute resolution<sup>14</sup> in tribal societies and the Panchayat

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<sup>12</sup> GN, P. (2023). An Analytical Study on Effectiveness of Section 89 of Code of Civil Procedure. Available at SSRN 4468327.

<sup>13</sup> Kumar, R. & Deka, G. (2022). Mediation: A Method of Alternative Dispute Resolution. *Supremo Amicus*.

<sup>14</sup> Mani, R. (2020). Mediation in Insolvency Matters.

Raj systems are only a few examples of such informal dispute resolution mechanisms. The modern form of mediation, the one introduced by the Courts and the Government of India with all good intentions in a formal regime of dispute resolution, suffers from multiple predicaments. One of those multiple predicaments which I intend to address in this paper is the 'lack of standards' for mediators in the Indian Judiciary, specifically, the low starting point on the qualifications of mediators in terms of their legal capability, which I refer to as the Minimum Standards for Mediators (minimum qualifications).

None of those categories of mediators require any legal education in India as the first criteria, or having done the law as the first necessity for selection as a mediator in any mediation rosters of High Courts or Supreme Court of India. Though the generally referred page in Supreme Court of India says "the qualifications are not prescriptive anymore" in the Mediation Rules, 2008, a candidate applying for the IICA<sup>15</sup>, and also persons with none of the academic qualifications in law, representing as a mediator, Data Vorst is price conscious, health-conscious, personality-conscious, and time-conscious. Became the pillars of formal mediation, these improvements among mediators after those mediations, though valuable, are not legal skills and consequently could not resemble the standards as 'minimum standards for selection' aiming public areas of dispute resolution. The same is true with most of the High Courts in India. It is also observed silence beyond listing a roster in the rules of High Courts either at the relevant statute or as a part of Court Rules.

### 3.3. Proposed Changes and Recommendations

Each of the proposed changes to the 2015 regulation fails to instil a coherent benchmark against which to assess a mediator's ability to perform their duties. In the place of such individual scrutiny, the proposed changes emphasize the importance of a mediator's legal expertise. As a standalone argument, there are several who argue in favour of overcoming the disadvantages of minimum qualification schemes to regulate mediators. However, the complexity of mediation can, by the very same logic, rest upon any other professional or academic background that the mediator may possess. This crucial point also cleanly aligns with the concerns expressed by Professor Jayadevan of the NLU, Kochi, who has pointed

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<sup>15</sup> Nkobogo, J. J. (2022). Legal and Institutional Challenges on Mediation of Labour Disputes in Tanzania. *The Eastern African Law Review*.

out that the 2015 regulation neither clarifies the purpose of such a minimum qualification requirement nor does it incorporate these into the functions of the statutory council in the legislative scheme. History also bears witness to the fact that a focus on legal expertise seldom deals in isolation from any opportunity to raise the bar for mediators who are not similarly qualified advocates. To maintain that advocates are the only category whose expertise is relevant to the mediating process is to ignore the strict prerequisites of the Advocates Act, 1961, without which perhaps any practitioner of dispute resolution would hold the same legal expertise in the first place.

On the second proposed change, it is difficult to disregard that promoting advocates and retired judicial officers to the ranks of minimum qualification mediators wards off the ill-effects of the second and third changes stated above and even furthers compatibility with Section 89 of the CPC. A search for negligible or comparative private sector data for mediation-related education and introduction results in a selective emphasis on advocates and retired judicial officers who co-exist in the mediating regime of the United States and Europe. In the United States and Europe, many court-embedded mediation services provide court-settled remunerations and arbitrations.<sup>16</sup> It is therefore not surprising that any study which examines these services would often focus on attorneys or legal officers who wield an advantage in extending their practices to these alternative dispute resolution settings more than their non-legal colleagues. Further support for such a notion is tucked away in the pages of proposed amendments to minimum qualification mechanisms across the globe, which is upheld with evidence from law students who tutor less-expert claims and which requires years of study at law schools before the proponent is able to occupy an advanced legal practice belonging exclusively to non-lawyers who seek to excel in dispute resolution mechanisms.

#### 4. Conclusion

Mediation is generally viewed as one of the best dispute resolution methods that is consistent with public policy. However, the direct effect of unsatisfactory mediation is often that the case will eventually be resolved by courts. Listening to both sides and

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<sup>16</sup> Nkobogo, J. J. (2022). Legal and Institutional Challenges on Mediation of Labour Disputes in Tanzania. *The Eastern African Law Review*.

providing the correct advice can be the important function of mediators, especially for non- legal professionals or professionals in fields other than law and technical terminology. Hence, the mediator in the contemporary world needs to have some familiarity with legal issues. It is also said that the greatest help is needed where it is not expected. Thus, there are sufficient reasons to suggest that mediators at least have some familiarity with the legal framework of the dispute in question. Unlike in the US, the certification program for the mediators in India emphasizes more on neutrality and the facilitative aspects of mediation. The focus is less on "high-level knowledge of legal matters." However, the growing trend of introducing a minimum cut-off of a law degree to practice mediation, as evident from various High Court Rules, cannot be disregarded. Some of the family mediation programs imparted abroad specifically focus on legal aspects of family disputes. Using Australian standards come next to a "law degree," skills of dispute resolution. Active legal practitioners should be recognized for their active understanding of cases. The following modifications could be incorporated into the CCH Rules to be more in line with the international trend: Law shall be a minimum qualification, but "active legal practice" may also be a condition to ensure the required high level of familiarity with the specific issues involved.

