

# Transformative Constitutionalism and Mediation as a Means of Access to Justice

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**Abstract:** This article examines the intersection of transformative constitutionalism and mediation as complementary mechanisms for advancing access to justice in India. Through an analysis of landmark Supreme Court jurisprudence including the Hussainara Khatoon litigation, the evolution of Public Interest Litigation, and the expansive interpretation of Articles 14, 21, and 39A. The article traces the judiciary's trajectory from formalist adjudication toward a rights-responsive, transformative paradigm.

It explores the theoretical and philosophical foundations of mediation as transformative justice, emphasizing its participatory, restorative character and alignment with constitutional values of equity, dignity, and meaningful access. The article situates mediation within India's constitutional framework for alternative dispute resolution, examining how judicial encouragement of ADR mechanisms operationalizes constitutional commitments amid systemic constraints of delay, backlog, and inaccessibility.

Through critical analysis, it identifies both the promise of mediation as a vehicle for social transformation and the challenges of reconciling consensual processes with non-negotiable constitutional guarantees. The article concludes with forward-looking perspectives on integrating mediation into India's transformative constitutional project.

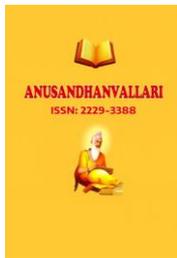
**Keywords:** Mediation, Constitutionalism, Justice, Speedy Trial, ADR

## 1. Introduction

The Constitution of India embeds access to justice not as a procedural ornament but as a substantive constitutional guarantee flowing from Articles 14, 21, and 39A, read harmoniously with the Directive Principles under Part IV. Article 39A, inserted by the Constitution (Forty-Second Amendment) Act, 1976, mandates that the State shall secure "that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."<sup>i</sup> This provision does not exhaust itself in the provision of legal aid; it constitutes a directive to reimagine the legal system itself as an instrument of substantive equality.

The transformative potential of Article 39A was recognised early in *Hussainara Khatoon v. State of Bihar*, where the Supreme Court held that speedy trial is an integral component of the fundamental right to life and personal liberty under Article 21. Justice Bhagwati observed that the constitutional command to provide free legal services is "an essential element of any reasonable, fair and just procedure" and that the State is under a constitutional obligation to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require. The Court extended this logic beyond criminal defence, holding that access to justice cannot be a privilege of the affluent and that the judiciary must evolve procedures that render justice accessible to the poor, illiterate, and marginalised.<sup>ii</sup>

*Maneka Gandhi v. Union of India* fundamentally altered the constitutional architecture of Article 21 by holding that the right to life and personal liberty encompasses all those rights and freedoms that make life meaningful, and that "procedure established by law" must satisfy the twin tests of reasonableness and fairness. The doctrine



of procedural due process requires that any restriction on life or liberty must not only be authorised by law but must also be just, fair, and reasonable. This interpretive expansion created doctrinal space for mediation and alternative dispute resolution as constitutionally mandated procedural innovations that render the legal system more accessible, affordable, and participatory.<sup>iii</sup>

Section 89 of the Code of Civil Procedure, 1908, as inserted by the Code of Civil Procedure (Amendment) Act, 1999, operationalises this constitutional vision by empowering courts to refer disputes to alternative dispute resolution mechanisms, including mediation, where it appears that there exist elements of a settlement. The provision states: "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 of the parties, the court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation." The legislative intent was to decongest courts, reduce delays, and empower parties to resolve disputes through facilitative processes that preserve relationships and reduce adversarial costs.

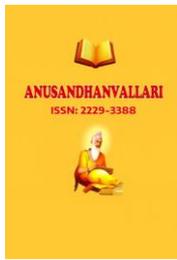
The constitutional legitimacy of court-annexed mediation under Section 89 was affirmed in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, where the Supreme Court held that the power to refer disputes to alternative dispute resolution is not merely discretionary but flows from the constitutional obligation to ensure access to justice. The Court observed that Section 89 must be read in light of Article 39A and that courts are duty-bound to explore settlement possibilities before embarking on protracted litigation. However, the Court also held that referral to mediation must be based on a prima facie assessment that elements of settlement exist and that mechanical or coercive referrals would vitiate the consensual foundation of mediation.<sup>iv</sup>

The Directive Principles under Part IV, particularly Articles 38 and 43, further ground the constitutional imperative for mediation. Article 38 directs the State to strive to promote the welfare of the people by securing a social order in which justiciable, economic, and political shall inform all institutions of national life. Article 43 envisions participation of workers in the management of industries, a principle that resonates with the participatory and empowerment-oriented ethos of mediation. In *Bandhua Mukti Morcha v. Union of India*, the Supreme Court held that the Directive Principles are not mere pious declarations but constitute fundamental in the governance of the country, and courts must interpret fundamental rights in a manner that advances the objectives enshrined in Part IV.<sup>v</sup>

Transformative constitutionalism, a concept originating in post-apartheid South African jurisprudence, refers to a constitutional project aimed at dismantling entrenched hierarchies and enabling substantive social transformation through legal and institutional reform. Justice Albie Sachs of the South African Constitutional Court articulated transformative constitutionalism as a commitment to "healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights." Karl Klare defined it as "a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."<sup>vi</sup>

Indian constitutional jurisprudence, though not explicitly employing the term, has long exhibited transformative aspirations.<sup>vii</sup> In *Kesavananda Bharati v. State of Kerala*, the Supreme Court held that the basic structure of the Constitution includes the supremacy of the Constitution, the rule of law, the principle of separation of powers, the federal character of the Constitution, secularism, and the democratic republican form of government. Implicit in this doctrine is the recognition that the Constitution is not a static document but a living instrument designed to facilitate social transformation within a framework of constitutional continuity.<sup>viii</sup>

The transformative reading of Article 21 and its subsequent elaboration in cases such as *Francis Coralie Mullin*



*v. Administrator, Union Territory of Delhi and Olga Tellis v. Bombay Municipal Corporation* demonstrate the judiciary's commitment to expanding the substantive content of fundamental rights to include socio-economic dimensions.<sup>ix</sup> In *Olga Tellis*, the Court held that the right to livelihood is an integral facet of the right to life, and any deprivation of livelihood except according to just and fair procedure is a violation of Article 21. This interpretive trajectory mirrors the transformative constitutionalist project of embedding substantive equality and social justice within justiciable fundamental rights.

Mediation, understood through the lens of transformative constitutionalism, is not merely a case-management tool or a mechanism for docket control. It is a constitutionally mandated procedural innovation that operationalises the values of dignity, autonomy, participation, and substantive equality. The facilitative and empowerment-oriented structure of mediation enables parties—particularly those marginalised by economic, social, or informational asymmetries—to participate meaningfully in the resolution of disputes affecting their lives. It decentralises adjudicative power, reduces the intimidation and alienation associated with formal court processes, and fosters outcomes that reflect the lived realities and relational contexts of disputants.

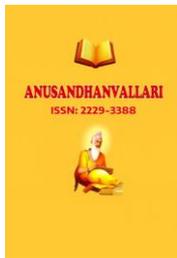
The constitutional status of alternative dispute resolution was further elaborated in *Vidya Drolia v. Durga Trading Corporation*, where the Supreme Court held that arbitration and mediation are not inferior or subordinate modes of dispute resolution but are integral to the constitutional vision of access to justice.<sup>x</sup> The Court observed that the constitutional courts' supervisory jurisdiction under Articles 227 and 136 must be exercised with restraint and deference to alternative dispute resolution mechanisms, recognising their constitutional legitimacy and institutional autonomy. This doctrinal development signals a shift from viewing mediation as an auxiliary to adjudication to recognising it as a co-equal and constitutionally grounded mode of dispute resolution.

## **2. Section 89 of the Code of Civil Procedure: Statutory Architecture and Judicial Interpretation**

The procedural framework under Section 89 requires the court to formulate terms of possible settlement, invite observations from the parties, and reformulate those terms before making a referral. This iterative process ensures that referral is not mechanical but is grounded in a judicial assessment of settlement potential. The provision lists five alternative dispute resolution mechanisms: arbitration, conciliation, judicial settlement including Lok Adalat, mediation, and any other mode agreed upon by the parties. The inclusion of mediation as a distinct category reflects legislative recognition of its unique facilitative and interest-based character, distinguishing it from evaluative processes such as arbitration and conciliation.

The Supreme Court's interpretation of Section 89 has evolved through a series of decisions that have clarified the scope, limits, and constitutional foundations of court-annexed mediation. In *Salem Advocate Bar Association v. Union of India*, the Court struck down certain amendments to the Code of Civil Procedure on the ground that they conferred adjudicatory powers on non-judicial officers in violation of the constitutional scheme of separation of powers. However, the Court upheld Section 89, holding that referral to mediation does not amount to a delegation of judicial power because mediation is a facilitative process in which the mediator does not adjudicate rights but merely assists parties in reaching a voluntary settlement. The Court emphasised that the ultimate authority to record and enforce a settlement remains with the court, preserving judicial oversight and constitutional propriety.

*Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.* provided comprehensive guidance on the exercise of discretion under Section 89. The Court held that referral to alternative dispute resolution is not automatic and must be based on a prima facie assessment that the dispute is amenable to settlement. The Court identified several factors relevant to this assessment, including the nature of the dispute, the relationship between the parties, the stage of proceedings, and the willingness of the parties to engage in settlement discussions. The Court cautioned that coercive or mechanical referrals undermine the consensual foundation of



mediation and may violate the principles of natural justice and procedural fairness enshrined in Article 21.

The Court also addressed the enforceability of settlement agreements reached through mediation. It held that a settlement agreement recorded under Section 89 has the status of a decree under Order XXIII Rule 3 of the Code of Civil Procedure and is executable as such. This doctrinal clarity is critical to the legitimacy and efficacy of court-annexed mediation, as it ensures that parties who invest time and resources in mediation can rely on the enforceability of the outcome. The Court further held that settlement agreements reached in mediation are binding and conclusive, and parties cannot subsequently renege from them except on grounds recognised under the Indian Contract Act, 1872, such as fraud, coercion, or mistake.

In *K. Srinivas Rao v. D.A. Deepa*, the Supreme Court reiterated the constitutional foundations of Section 89 and emphasised the judiciary's duty to facilitate settlement where possible. The Court observed that mediation is particularly suited to family disputes, commercial disputes, and other matters where ongoing relationships require preservation and adversarial litigation may exacerbate conflict. The Court held that judges must be proactive in identifying cases suitable for mediation and must explain the benefits and process of mediation to parties in a manner that empowers them to make informed choices.<sup>xi</sup>

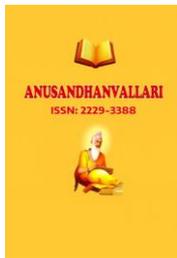
However, the Court also recognised limits to the scope of mediation. Certain categories of disputes are not amenable to mediation, including disputes involving non-arbitrable subject matter such as criminal offences, matrimonial status, guardianship, insolvency, testamentary matters, and disputes affecting third-party rights or public interest. This doctrinal boundary ensures that mediation does not encroach upon areas where the State has a legitimate interest in adjudication or where public policy considerations require judicial determination.

The question of voluntariness in court-annexed mediation has generated doctrinal tension. While mediation is premised on party autonomy and voluntary participation, the reality of court referrals may create subtle coercion, particularly where parties fear judicial displeasure if they decline to participate. The Court acknowledged this tension and held that while courts may encourage mediation, they cannot compel parties to settle or penalise parties for declining referral or for the failure of mediation. The Court emphasised that the success of mediation depends on the genuine willingness of parties to engage in good faith and that coercive referrals undermine the legitimacy and efficacy of the process.

The institutional infrastructure for court-annexed mediation has developed unevenly across Indian states. The Supreme Court and several High Courts have established mediation centres staffed by trained mediators, often drawn from the ranks of retired judges and senior advocates. The quality and accessibility of these centres vary significantly, and resource constraints, lack of training, and inadequate public awareness remain persistent challenges. The Mediation and Conciliation Project Committee, constituted by the Supreme Court, has developed training modules and standards for mediators, but implementation remains inconsistent.

The integration of mediation into the civil justice system raises questions about the role of lawyers and the preservation of due process safeguards. In mediation, parties often participate without legal representation, and the informality of the process may disadvantage legally unsophisticated parties. The Supreme Court has held that parties have a right to be represented by counsel in mediation if they so choose, but the mediator may regulate the participation of lawyers to preserve the facilitative character of the process. This balance between party autonomy and procedural fairness remains a site of ongoing doctrinal development.

The comparative experience of other jurisdictions offers instructive lessons. In Singapore, the Mediation Act, 2017, provides a comprehensive statutory framework for mediation, including provisions on confidentiality, enforceability, and mediator immunity. The Singapore courts have developed a culture of mediation through judicial encouragement, institutional support, and public education. In South Africa, the transformative constitutionalist project has led to the integration of restorative justice and community-based dispute resolution mechanisms into the formal legal system, reflecting a commitment to participatory and context-sensitive justice



delivery.

### 3. Transformative Constitutionalism and the Empowerment Rationale for Mediation

Transformative constitutionalism, as a jurisprudential framework, demands that legal institutions and processes be evaluated not merely by their procedural regularity but by their capacity to dismantle structural inequalities and enable substantive participation by marginalised communities. Mediation, when properly designed and implemented, embodies transformative constitutionalist values by decentralising adjudicative power, empowering parties to define and resolve their own disputes, and fostering outcomes that reflect relational and contextual realities rather than abstract legal rules.

The empowerment rationale for mediation is grounded in the recognition that adversarial litigation is often alienating, disempowering, and inaccessible to those without economic, social, or cultural capital. Formal court processes are conducted in a language and idiom that may be incomprehensible to ordinary litigants, and the hierarchical structure of the courtroom reinforces power asymmetries between judges, lawyers, and parties. Mediation, by contrast, is dialogic, participatory, and flexible, enabling parties to articulate their interests, concerns, and needs in their own terms and to craft solutions that are responsive to their lived experiences.

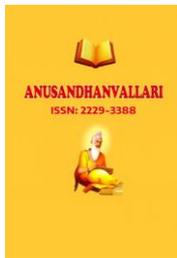
In *Anita Kushwaha v. Pushap Sudan*, the Supreme Court recognised the empowerment potential of mediation in the context of family disputes.<sup>xii</sup> The Court held that mediation is particularly suited to matrimonial disputes because it preserves relationships, reduces emotional trauma, and enables parties to arrive at holistic solutions that address not only legal rights but also emotional, financial, and social dimensions. The Court observed that adversarial litigation in family matters often exacerbates conflict, entrenches positions, and produces outcomes that are legally correct but relationally destructive. Mediation, by fostering communication and mutual understanding, enables parties to move beyond positional bargaining and to explore underlying interests and needs.

The Court also addressed the concern that mediation may disadvantage women and other vulnerable parties in family disputes, particularly where power imbalances exist. The Court held that mediators must be trained to recognise and address power imbalances and that mediation must be conducted in a manner that ensures informed consent, voluntary participation, and substantive fairness. The Court emphasised that mediation is not a substitute for judicial protection of legal rights but is a complementary process that, when properly conducted, can enhance access to justice and empower parties to exercise agency in the resolution of their disputes.

The transformative potential of mediation is also evident in the context of commercial disputes. In *Patil Automation Private Ltd. v. Rakheja Engineers Private Ltd.*, the Supreme Court held that commercial disputes involving complex technical and financial issues are often better suited to mediation than to adjudication because mediation enables parties to craft creative and commercially sensible solutions that preserve business relationships and avoid the costs and delays of litigation. The Court observed that adversarial litigation in commercial matters often produces win-lose outcomes that damage long-term business relationships and that mediation, by fostering collaborative problem-solving, enables parties to arrive at win-win solutions that maximise joint gains.<sup>xiii</sup>

The empowerment rationale for mediation is closely linked to the principle of party autonomy, which is a foundational value in both contract law and alternative dispute resolution. Party autonomy recognises that individuals are best placed to determine their own interests and that State intervention in private disputes should be minimised to the extent consistent with public policy and the protection of vulnerable parties. Mediation operationalises party autonomy by enabling parties to control the process, the outcome, and the terms of resolution, subject only to the requirement that the settlement be lawful and not contrary to public policy.

However, the empowerment rationale must be tempered by a realistic assessment of the structural constraints



and power imbalances that shape disputing behaviour. Critical scholars have argued that mediation, in practice, may reproduce and entrench existing inequalities, particularly where parties have unequal bargaining power, unequal access to information, or unequal capacity to withstand the costs of non-settlement. Feminist legal scholars have raised concerns that mediation in family disputes may disadvantage women, particularly in patriarchal societies where women may lack the social, economic, or psychological resources to negotiate effectively.

The Indian Supreme Court has acknowledged these concerns and has held that mediation must be conducted in a manner that safeguards the interests of vulnerable parties. Mediators must be trained to recognise power imbalances and to employ techniques that ensure substantive fairness and informed consent. Courts retain supervisory jurisdiction over settlements reached in mediation and may refuse to record a settlement if it appears to be unconscionable, fraudulent, or contrary to public policy.

The principle of confidentiality is central to the legitimacy and efficacy of mediation. Confidentiality encourages parties to engage in candid and exploratory discussions without fear that their statements will be used against them in subsequent litigation. The Supreme Court has held that communications made in the course of mediation are privileged and cannot be disclosed or relied upon in subsequent proceedings except with the consent of the parties or where disclosure is required by law. This principle is consistent with the facilitative character of mediation and ensures that parties can explore settlement options without prejudice to their legal positions.

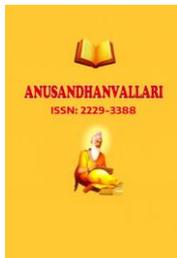
Comparative jurisprudence offers insights into the design and implementation of empowerment-oriented mediation systems. In New Zealand, restorative justice processes have been integrated into the criminal justice system, enabling victims, offenders, and communities to participate in the resolution of criminal matters through facilitated dialogue. These processes are grounded in indigenous Maori concepts of justice and reflect a commitment to healing, accountability, and community participation. In South Africa, the Constitution explicitly recognises customary law and traditional dispute resolution mechanisms, and courts have held that these mechanisms must be integrated into the formal legal system in a manner consistent with constitutional values of dignity, equality, and fairness.

The Indian experience with Lok Adalats, Gram Nyayalayas, and community-based dispute resolution mechanisms demonstrates the potential for integrating informal and participatory processes into the formal legal system. However, these mechanisms have faced challenges related to quality control, enforceability, and the risk of elite capture. The Supreme Court has held that alternative dispute resolution mechanisms must operate within a framework of constitutional accountability and that settlements reached through these mechanisms must be consistent with fundamental rights and public policy.

#### **4. Judicial Restraint, Institutional Autonomy, and the Constitutional Legitimacy of Mediation**

The constitutional legitimacy of mediation as a mode of dispute resolution depends on its compatibility with the constitutional scheme of separation of powers, the rule of law, and the judicial duty to adjudicate disputes in accordance with law. The Supreme Court's jurisprudence on the constitutional status of alternative dispute resolution has evolved from initial scepticism to robust affirmation, reflecting a growing recognition that mediation is not a subordinate or auxiliary mode of dispute resolution but is integral to the constitutional vision of access to justice.

The distinction between facilitation and adjudication is critical to the constitutional legitimacy of court-annexed mediation. The mediator does not exercise judicial power because the mediator does not make binding determinations of legal rights or obligations. The settlement reached in mediation is the product of party agreement, not mediator imposition, and the settlement acquires legal force only when recorded by the court as a decree under Order XXIII Rule 3 of the Code of Civil Procedure. This procedural structure preserves judicial



oversight and ensures that mediation operates within the constitutional framework of separation of powers.

The Supreme Court's decision in *Vidya Drolia v. Durga Trading Corporation* marked a significant doctrinal shift in the constitutional status of alternative dispute resolution. The Court held that arbitration and mediation are not inferior or subordinate modes of dispute resolution but are co-equal and constitutionally grounded mechanisms that give effect to the constitutional imperative of access to justice.<sup>xiv</sup> The Court observed that the constitutional courts' supervisory jurisdiction under Articles 227 and 136 must be exercised with restraint and deference to alternative dispute resolution mechanisms, recognising their institutional autonomy and constitutional legitimacy.

The Court held that judicial intervention in arbitration and mediation should be minimal and should be confined to cases involving jurisdictional error, violation of public policy, or breach of natural justice. The Court emphasised that the principle of party autonomy, which underlies alternative dispute resolution, is consistent with constitutional values of liberty, dignity, and self-determination. The Court held that courts must resist the temptation to substitute their own judgment for that of parties or mediators and must defer to settlements reached through mediation unless there are compelling reasons to do otherwise.

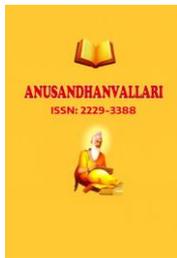
This doctrine of judicial restraint reflects a transformative constitutionalist commitment to pluralism and institutional diversity in dispute resolution. The Constitution does not mandate a monolithic model of adjudication but permits a variety of dispute resolution mechanisms that reflect different values, processes, and outcomes. Mediation, with its emphasis on facilitation, empowerment, and relational justice, represents a constitutionally legitimate alternative to adversarial adjudication, provided that it operates within a framework of constitutional accountability and procedural fairness.

The principle of institutional autonomy has important implications for the design and governance of mediation systems. It suggests that mediation centres and mediators should enjoy a degree of independence from the judiciary and should not be subject to excessive judicial oversight or control. At the same time, institutional autonomy must be balanced against the need for quality assurance, accountability, and the protection of vulnerable parties. The Supreme Court has held that mediation must be conducted in accordance with principles of natural justice and that courts retain residual supervisory jurisdiction to ensure that settlements are not unconscionable, fraudulent, or contrary to public policy.

The question of mediator immunity has not been definitively resolved in Indian jurisprudence, but comparative experience suggests that immunity is necessary to protect mediators from liability for decisions made in the course of mediation and to preserve the independence and integrity of the mediation process. In the United States, mediators generally enjoy quasi-judicial immunity for acts performed within the scope of their mediator role. In Singapore, the Mediation Act, 2017, provides that a mediator is not liable for anything done or omitted in good faith in the performance of mediator functions.

The constitutional legitimacy of mediation also depends on its compatibility with the right to a fair trial and the right to access to courts. The Supreme Court has held that referral to mediation does not violate the right to access to courts because mediation is voluntary and parties retain the right to decline referral or to withdraw from mediation at any stage. The Court emphasised that mediation is not a substitute for adjudication but is a complementary process that enhances access to justice by providing parties with an additional forum for dispute resolution.

However, concerns remain that court-annexed mediation may, in practice, create pressure on parties to settle and may undermine the right to a fair trial, particularly where parties are not adequately informed of their rights or where mediators exceed their facilitative role and engage in coercive or evaluative conduct. The Supreme Court has held that mediators must be trained to respect party autonomy and to conduct mediation in a manner consistent with principles of natural justice and procedural fairness. The Court has also held that courts must



ensure that referrals to mediation are based on a genuine assessment of settlement potential and that parties are not coerced into mediation as a means of docket control.

The integration of mediation into the civil justice system raises questions about the appropriate allocation of resources between adjudication and alternative dispute resolution. Some scholars have argued that the emphasis on mediation reflects a neoliberal agenda of privatising justice and reducing State responsibility for the provision of adjudicative services. Others have argued that mediation, when properly resourced and implemented, enhances access to justice by providing a more affordable, accessible, and participatory mode of dispute resolution. The Supreme Court has not directly addressed this debate, but its jurisprudence reflects a pragmatic recognition that the formal court system is overburdened and that alternative dispute resolution mechanisms are necessary to ensure timely and effective access to justice.

### **5. Synthesis and Future Directions: Mediation as a Constitutional Project**

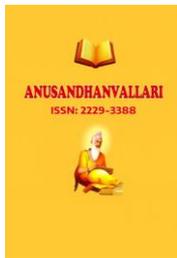
The integration of mediation into the Indian civil justice system represents a constitutional project aimed at operationalising the values of access to justice, substantive equality, party autonomy, and participatory governance. Mediation is not merely a procedural innovation or a case-management tool but is a constitutionally mandated mechanism for dismantling structural barriers to justice and enabling meaningful participation by marginalised and vulnerable communities.

The Supreme Court's jurisprudence on Section 89 of the Code of Civil Procedure has established a robust doctrinal foundation for court-annexed mediation, clarifying the scope of judicial discretion, the enforceability of settlement agreements, and the limits of mediation in relation to non-arbitrable subject matter. The Court has affirmed that mediation is not subordinate to adjudication but is a co-equal and constitutionally grounded mode of dispute resolution that gives effect to the constitutional imperative of access to justice. The Court has also recognised the empowerment potential of mediation, particularly in family and commercial disputes, and has held that mediation must be conducted in a manner that safeguards the interests of vulnerable parties and ensures substantive fairness.

However, significant challenges remain in the implementation and institutionalisation of mediation as a constitutional project. The quality and accessibility of court-annexed mediation centres vary significantly across states, and resource constraints, lack of training, and inadequate public awareness continue to limit the reach and effectiveness of mediation. The principle of confidentiality, while essential to the legitimacy of mediation, may create accountability gaps and may shield mediator misconduct or unconscionable settlements from scrutiny. The tension between party autonomy and the protection of vulnerable parties remains unresolved, and there is a need for clearer guidelines on the role of mediators in addressing power imbalances and ensuring informed consent.

The comparative experience of other jurisdictions offers instructive lessons for the future development of mediation in India. The Singapore Mediation Act, 2017, provides a comprehensive statutory framework that addresses confidentiality, enforceability, mediator immunity, and cross-border recognition of settlement agreements. The South African experience with restorative justice and community-based dispute resolution demonstrates the potential for integrating informal and participatory processes into the formal legal system in a manner consistent with constitutional values of dignity, equality, and fairness. The New Zealand model of restorative justice in criminal matters reflects a commitment to healing, accountability, and community participation that resonates with the transformative constitutionalist project.

The Mediation Act, 2023, represents a significant legislative development that may address some of the institutional and procedural gaps in the current framework. The Act provides a statutory basis for pre-litigation mediation, institutional mediation, and online dispute resolution, and it addresses issues such as confidentiality, enforceability, and mediator qualifications. However, the constitutional implications of the Act, particularly in



relation to the interplay between statutory mediation and court-annexed mediation under Section 89, remain to be judicially clarified.

The future of mediation as a constitutional project depends on sustained institutional investment, rigorous training and accreditation of mediators, public education and awareness campaigns, and ongoing doctrinal development through judicial interpretation. Courts must continue to exercise their supervisory jurisdiction in a manner that balances deference to party autonomy and institutional autonomy with the need to protect vulnerable parties and ensure compliance with constitutional values. Mediators must be trained not only in facilitation techniques but also in constitutional values, power dynamics, and the ethical obligations of neutrality, impartiality, and respect for party autonomy.

The transformative potential of mediation lies not in its capacity to reduce court backlogs or to expedite case disposal but in its capacity to reimagine justice as a participatory, empowering, and relational process that respects the dignity and agency of disputants. Mediation, when properly designed and implemented, can serve as a vehicle for substantive equality, enabling marginalised communities to access justice on terms that are meaningful, affordable, and responsive to their lived realities. It can foster a culture of dialogue, mutual respect, and collaborative problem-solving that extends beyond individual disputes and contributes to the broader constitutional project of social transformation.

The constitutional legitimacy of mediation ultimately depends on its fidelity to the values enshrined in the Constitution: dignity, equality, liberty, fraternity, and justice. Mediation must not be instrumentalised as a tool of docket control or State disinvestment but must be understood and implemented as a constitutional imperative that flows from the fundamental right to access to justice. The judiciary, the legal profession, the State, and civil society must work collaboratively to ensure that mediation operates within a framework of constitutional accountability, procedural fairness, and substantive justice, and that it serves the transformative constitutionalist goal of dismantling structural inequalities and enabling meaningful participation by all citizens in the governance of their own lives.

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<sup>i</sup>Constitution of India, art 39A.

<sup>ii</sup>*Hussainara Khatoon v. State of Bihar* (1979) 3 SCC 532.

<sup>iii</sup>*Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

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

<sup>v</sup>*Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

<sup>vi</sup>Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146, 150.

<sup>vii</sup>Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press 2009) 42.

<sup>viii</sup>*Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

<sup>ix</sup>*Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608; *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.

<sup>x</sup>*Vidya Drolia v. Durga Trading Corporation* (2021) 2 SCC 1.

<sup>xi</sup>*K. Srinivas Rao v. D.A. Deepa* (2013) 5 SCC 226.

<sup>xii</sup>*Anita Kushwaha v. Pushap Sudan* (2016) 8 SCC 509.

<sup>xiii</sup>*Patil Automation Private Ltd. v. Rakheja Engineers Private Ltd.* (2022) 10 SCC 1.

<sup>xiv</sup>*Vidya Drolia v. Durga Trading Corporation* (2021) 2 SCC 1.