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CRITICAL ANALYSIS ON CONCILIATION AS A FORGOTTEN ALTERNATE DISPUTE RESOLUTION MECHANISM IN INDIA

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Abstract

Alternate Dispute Resolution is a method of solving conflicts or disputes outside the court with the assistance of a neutral third party. Conciliation is one of the essential mechanisms where a conciliator (neutral third party) assists the parties to resolve disputes amicably by providing real-life solutions to the problem.

Since ancient times, the method of solving disputes amicably through conciliation has existed. The role of a conciliator is not to enforce binding decisions on the parties but to give real-life solutions, explore various options, and act as a facilitator to resolve the disputes to reach a mutually agreed settlement. However, in the present times, more emphasis is given to arbitration and mediation, which overshadow conciliation.

This paper examines the historical development, conceptual framework, and legal foundations of conciliation, with a special focus on the Arbitration and Conciliation Act, 1996. It investigates the reasons behind the decline of conciliation, which include institutional limitations, lack of awareness among people, and the misconception that the conciliation process does not have binding authority on the mutually agreed decisions by the parties. In conclusion, it gives suggestions to revive conciliation, which is a cost-effective, flexible, and focused on relationship-oriented mechanism for dispute settlement in modern legal practice.

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Introduction

"A good settlement is better than a good lawsuit."

- Abraham Lincoln

The justice system across the world has evolved from a rigid ruling towards a flexible and mutually accepted mode of dispute resolution in a gradual shift. In India, the Alternate Dispute Resolution System focuses on resolving disputes between the parties amicably through mutually agreed settlement. The mechanisms of Alternative Dispute Resolution (ADR) include Arbitration, Mediation, Conciliation, Negotiation, and Lok Adalats. Among these, the roots of conciliation can be traced back to ancient times, occupying the central position in amicable settlement and reconciliation. Yet, in modern India, conciliation is the least opted Alternative Dispute Resolution (ADR) mechanism, even though it is codified under the Arbitration and Conciliation Act, 1996.

Section 64 of the Arbitration and Conciliation Act, 1996[1] defines conciliation. In conciliation, a neutral third party known as the conciliator assists the parties in dispute to reach a mutually and voluntarily agreed settlement amicably. Unlike arbitration, in which the arbitrator enforces a binding award on the parties, the conciliator focuses on mutual consent of the parties and cooperation among them rather than compulsion. The objective of a conciliator is to facilitate communication, retain the relationship, reduce bitterness and enmity between the parties, and give real-life solutions to the parties to reach an amicable settlement by ensuring peace.

Despite these merits, conciliation has been diminished due to the increased importance and significance given to arbitration and mediation. The neglect of the conciliation mechanism contradicts its statutory foundation, procedural flexibility, and its traditional dispute resolution significance since ancient times.

In the broader perspective, India's judiciary is overburdened with cases. There is a need for Alternate Dispute Resolution (ADR) system as it plays an important role in resolving disputes between the parties

[1] The Arbitration and Conciliation Act, 1996, No. 26, § 64 (India).

in an amicable manner and outside the court, unlike traditional litigation. It helps in reducing the overburdening of the judiciary with cases that can be settled through Alternate Dispute Resolution (ADR). The neglect of conciliation assumes even greater significance. The conciliation process is very simple without any procedural complexity and aims to preserve and retain relationships among the parties by settling matters in an amicable way. This nature of conciliation aligns with the provision of Article 39A,[2] which ensures access to justice and fairness for all.

To shape the Indian justice system from winning disputes to resolving conflicts amicably and sustainably, the revival of conciliation is very important, as it is not only a procedural reform.

Historical Background of Conciliation in India

The concept of conciliation can be traced back to the ancient period, such as India's indigenous legal systems, even though it was formally recognized in the Arbitration and Conciliation Act, 1996. During the Mahabharata, Krishna tried to reconcile between the Pandavas and Kauravas in order to avoid the Kurukshetra war. The focus of Ancient Indian Jurisprudence was more on reconciliation and not confrontation, following the principles of dharma and nyaya. In "Brhadaranayaka Upanishad"[3], there was a mention of 'Puga', which meant local courts, 'Srenis', which meant the same business or profession involved by people, and 'Kulas', which meant members being concerned with a social matter relating to a particular community.[4] These bodies were collectively known as Panchayats, which were headed by the elder members of the village or community who acted as a neutral third party in resolving disputes between the parties in an amicable manner without opting for traditional litigation.

To have social and political harmony, there must be a negotiated settlement. This early recognition was found in Kautilya's Arthashastra.[5] which makes references to sandhi (peace) and vigraha (conflict). Conciliation, though not in a formal way, continued under the neutral third parties known as panchs and local leaders, even during the Mughal period.

[2]INDIA CONST. art. 39A.
[3] Brihadaranyaka Upanishad, in *THE UPANISHADS* 88 (Shri Purohit Swami & W.B. Yeats trans., Faber & Faber 1997) (ca. 800 B.C.E.).
[4] P. V. Kane, *History of Dharmasastra* vol. 3, at 230 (Bhandarkar Oriental Research Inst. 1946).
[5] V. A. Mohta & Anoop V. Mohta, *Arbitration, Conciliation and Mediation* 535 (2d ed. 2008).

In India, Conciliation was first statutorily recognized in the colonial era. The Conciliation was confined to only industrial disputes under the Indian Arbitration Act, 1899,[6] and the Arbitration Act, 1940,[7] having a limited scope. The conciliation was formally recognized by the Industrial Disputes Act, 1947,[8] by authorizing the Conciliator officers and the Conciliation Board for resolving disputes between the employer and employee to reach a mutually agreed settlement.

Conciliation required a statutory backing and authoritative structure in order to be legally enforced.[9] Conciliation is not only a mechanism to resolve industrial disputes, but it also resolves disputes relating to civil and commercial matters. When India adopted the UNCITRAL Conciliation Rules, 1980[10] adopted on July 23, 1980, and recommended by Resolution 35/52 of the United Nations General Assembly on Dec. 4, 1980, as part of the Arbitration and Conciliation Act, 1996[11]Conciliation gained legislative codification. The Arbitration and Conciliation Act, 1996, consolidated both the arbitration and conciliation laws to balance domestic Alternate Dispute Resolution (ADR) mechanisms with international standards such as the UNCITRAL Model Law on International Commercial Conciliation (2002)[12]. The Arbitration and Conciliation Act, 1996, is drafted according to these international instruments.

Conceptual Framework

According to the Arbitration and Conciliation Act, 1996, conciliation as a mechanism to resolve disputes involves all types of matters, including contract-related matters, as per the provisions of Section 61[13]. Conciliation is a voluntary process where one party initiates the conciliation by sending a letter of invitation in writing to the other party. The other party should accept the letter of invitation; otherwise, the conciliation process ends there itself.

[6] The Indian Arbitration Act, 1899, Act No. IX of 1899 (India).
[7] The Arbitration Act, 1940, Act No. 10 of 1940 (India).
[8] The Industrial Disputes Act, 1947, Act No. 14 of 1947 (India).
[9] See *R.S. Bachawat's Law of Arbitration and Conciliation* (Anirudh Wadhwa & Anirudh Krishnan eds., 5th ed. 2010).
[10] See William K. Slate II et al., UNCITRAL (United Nations Commission on International Trade Law): Its Workings in International Arbitration and a New Model Conciliation Law, 6 *CARDOZO J. CONFLICT RESOL.* 73 (2004).
[11] The Arbitration and Conciliation Act, 1996, Act No. 26 of 1996 (India).
[12] UNCITRAL Model Law on International Commercial Conciliation, U.N. Doc. A/57/17 (2002).
[13] The Arbitration and Conciliation Act, 1996, Act No. 26 of 1996, § 61 (India).

In order to shape a dynamic process towards settlement, conciliators have wide powers.[14] The role of a conciliator is to facilitate a resolution between the parties to resolve the disputes and not to decide the dispute, unlike arbitration.[15] Parties may appoint one or more conciliators by mutually agreeing according to section 64[16]. A conciliator is not bound by the Code of Civil Procedure,1908, or the Indian Evidence Act, 1872.[17] An agreement settled between the parties through mutual consent has the same legal effect, and it is binding as an award given by the arbitrator once it is signed by the parties as per the provisions of Section 73 and 74[18]. The conciliation agreement should be an ad-hoc agreement entered after the occurrence of a dispute and not before it takes place.[19]

The advantages of conciliation include confidentiality.[20], flexible[21] and informal process, cost-effective[22] and party-centrality, where parties can decide the outcome of the dispute by mutually agreeing. The conciliator, as he deems fit, can call for private and joint sessions and motivate the parties to talk freely and comfortably, and may also suggest solutions to the parties, which is a unique feature in conciliation, unlike mediation and arbitration, which marks its legislative foundation.

By aligning with the international standards, Conciliation in India strengthens global trust in the Alternate Dispute Resolution (ADR) system. Conciliation was only legally recognized, and there was limited practical application. This led to the legal societies being drawn towards arbitration and mediation, which focused on practical application and its binding nature, ignoring or overshadowing conciliation as a dispute mechanism and making it underdeveloped and not utilized.

Distinction from Arbitration and Mediation

Conciliation shares the spirit of cooperation of mediation, but it had legislative backing under the

[14] P.M. Bakshi, "Conciliation for Resolving Commercial Disputes", 1 Comp. L. J. (Journal) 19 (1990).
[15] See Commentary on Draft UNCITRAL Conciliation Rules, U.N. Comm'n Int'l Trade L. (UNCITRAL) (2002).
[16]See supra note 1.
[17] Arbitration and Conciliation Act, 1996, Act No. 26 of 1996, § 66 (India).
[18] The Arbitration and Conciliation Act, 1996, Act No. 26 of 1996, §§ 73, 74 (India).
[19] V. Nageswara Rao, Conciliation Proceedings under the Indian Arbitration Conciliation Act of 1996 and CPC — An Overview, 5 *COMP. L.J.* 50 (2000).
[20] A.K. Bansal, Conciliation: Quick Settlement of Disputes, 1 *ARB. L.R.* 22 (1999).
[21] Mukul Mudgal, Conciliation: An Indian Perspective, 2(2) *NYAYA KIRAN* (Apr. 2003).
[22] Ashwanie Kumar Bansal, *Arbitration and ADR* at 26 (Universal Law Publ'g 2005).

Arbitration and Conciliation Act, 1996, way before mediation was statutorily recognized, until the Mediation Bill, 2021, in India.

In Arbitration, the arbitrator gives a binding decision to a dispute between the parties, whereas in Mediation[23] the mediator's role is only to facilitate between the parties to reach a common consensus in a dispute. But conciliation has a unique feature where the conciliator may propose a settlement agreement, and the parties may opt for it if they mutually agree.

The Arbitration process is more formal and rigorous compared to conciliation because the arbitral award is binding on parties and can be challenged only under certain grounds, whereas in conciliation, the entire process is party-centric and the parties decide the outcome of the dispute, which focuses on preservation and retention of relationships, its flexible nature, and mutual and amicable settlement of the dispute.

So, Conciliation as a dispute resolution mechanism is suitable for matters relating to family, employment, and long-term commercial relationships where preserving goodwill is essential.

Judicial Approach to Conciliation in India

The Indian judiciary has historically been vigilant with respect to conciliation, often confusing it with mediation or treating it as an inessential mechanism. However, important judicial decisions attest to its independent significance.

In ***Haresh Dayaram Thakur v. State of Maharashtra,*** the Supreme Court held that the role of a conciliator is to assist the parties in resolving the disputes and not to impose a decision on them, and under Section 74 of the Arbitration and Conciliation Act, 1996, a settlement agreement between the parties carries the same legal effect as that of an arbitral award.[24]

Similarly, in ***Mysore Cements Ltd. v. Svedala Barmac Ltd.,*** the Court stated that the settlement agreement decided by the parties is binding in nature and it attains the legal effect once the parties sign the agreement, which is equal to an arbitral award.[25]

[23] Henry J. Brown & Arthur L. Mariot, *ADR Principles and Practice* ch. 7, at 127 (2d ed. 1997, Sweet & Maxwell).
[24]Haresh Dayaram Thakur v. State of Maharashtra, 6 S.C.C. 179 (2000) (India).
[25] Mysore Cements Ltd. v. Svedala Barmac Ltd., 10 S.C.C. 375 (2003) (India).

The Supreme Court's decision in ***Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.*** acknowledged the pre-litigation settlement mechanism of conciliation, but still, mediation was the most preferred and popular means of dispute resolution.[26]

An important development occurred in ***Srei Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd.***, where the Supreme Court held that once the settlement agreement was signed by the parties, they cannot withdraw it unilaterally, highlighting the binding nature of the agreements settled during conciliation proceedings.[27]

Yet, practically, the conciliation provisions are hardly invoked by courts, and the institutional promotion is very limited. Conciliation has been overshadowed by mediation since it is aided by judicial training and court-annexed programs. This shows how mediation is promoted dynamically, and conciliation has been ignored due to a lack of judicial activism.

The matters relating to family and labour under the Industrial Disputes Act, 1947[28] and the Family Courts Act, 1984 hardly opt for conciliation to resolve the dispute between them.[29] Due to a lack of awareness among people and institutional support, conciliation has been restricted to legislative enclaves rather than general civil practice.

Reasons for decline of Conciliation in India

1) Conceptual and Institutional Limitations

One of the important reasons for the decline in India is the lack of institutional infrastructure. Arbitration as a dispute mechanism is encouraged by the Indian Council of Arbitration (ICA), International Centre for Alternative Dispute Resolution (ICADR), and sectoral arbitral centers, whereas conciliation has no institutional framework or support. The organizations that provide conciliation services are very few and subordinate to mediation and arbitration without any standardized procedures and professional conciliators who are specialized.

[26] Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co., 8 S.C.C. 24 (2010) (India).
[27] Srei Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd., 11 S.C.C. 470 (2018) (India).
[28] See supra note 6.
[29] Family Courts Act, Act No. 66 of 1984, § 9 (India).

There was confusion in the Arbitration and Conciliation Act, 1996 itself, as both arbitration and conciliation laws were combined in a single statute, overshadowing the conceptual distinction between the adjudicatory and facilitative processes. This became the reason for the legal litigants and practitioners assuming conciliation as a mere 'softer' version of arbitration and not as an independent and effective dispute resolution process.

2) Lack of Awareness and Professional Training

Conciliation is not in the same status nor is it as familiar as arbitration among the judges, legal practitioners, and litigants. Arbitration and traditional litigation are encouraged by the legal education system, as conciliation procedures provide a limited exposure. Presently, young generation lawyers do not consider specializing in conciliation as a profession. Since there is no standardized acknowledgment for conciliators, it reduces professional trust in the conciliation process. So, mediation is preferred because it is institutionally supported by the judiciary through mediation centers attached to High Courts and District Courts, and by the parties.

Moreover, Part III of the Arbitration and Conciliation Act, 1996 does not strictly govern the National Legal Services Authority (NALSA) and Lok Adalats, which are operably alike to conciliation, resulting in diminishing the prominence of conciliation as a formal process.

3) Misconceptions About Binding Authority

The misconception that conciliation lacks binding authority is the most common misbelief. According to Section 74 of the Arbitration and Conciliation Act, 1996, a duly signed settlement agreement "shall have the same status and effect as an arbitral award. A conciliator cannot impose binding decisions like an arbitrator. However, this binding authority of the conciliation is neglected due to a lack of awareness and restricted judicial invocation.

4) Rise of Arbitration and Mediation

Due to commerce being globalized and an increase in cross-border disputes, arbitration as the dispute

resolution mechanism has been preferred under the New York Convention, 1958,[30] and Part I of the Arbitration and Conciliation Act, 1996, over conciliation for commercial disputes. Similarly, after the ***Afcons Infrastructure and Salem Advocate Bar Association v. Union of India***[31] Judgment by the Supreme Court, the judiciary has played an important role in encouraging mediation. The Commercial Courts Act, 2015, mandates pre-institution mediation but not conciliation, showcasing how statutory developments have ignored it.[32] This reflects policy neglect and increased assumption that conciliation is an inessential and outdated mechanism.

5) Bureaucratic and Legislative Inertia

The International Center for Alternate Dispute Resolution (ICADR) was established in 1955 by the Government of India with the purpose of promoting arbitration and conciliation. But the institution mainly focused on promoting arbitration more, and conciliation was overshadowed as a secondary service. This led to a decline in the conciliation as there was no proper government funding, and there were no state-level centers for conciliation.

There was also less attention given to Conciliation by the Law Commission of India in its major reports on arbitration (Reports No. 176[33], 222[34], and 246[35]). Therefore, the legislative and bureaucratic environment focused and prioritized solely on arbitration reforms, and conciliation was completely ignored and overshadowed.

6) Absence of Policy Support

Arbitration and mediation are continually supported by the policy framework of Alternate Dispute Resolution (ADR) made by the Government of India. Mediation has been institutionalized under the Mediation Act, 2023[36] but oversees conciliation by creating a legislative gap. The lack of policy support and awareness among people results in conciliation as a neglected option.

[30] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.
[31] See supra note 27.
[32] Commercial Courts Act, Act No. 4 of 2016, § 12A (India).
[33] Law Comm'n of India, *Report No. 176: On the Law of Benami Transactions* at 15 (1999).
[34] Law Comm'n of India, *Report No. 222: On the Review of the Arbitration and Conciliation Act, 1996* at 20 (2012).
[35] Law Comm'n of India, *Report No. 246: On the Review of the Code of Criminal Procedure, 1973* at 45 (2014).
[36] The Mediation Act, Act No. 32 of 2023 (India).

7) Absence of Mandatory Conciliation

In countries like the United States, there is a mandatory conciliation at an early stage of litigation. But in India, conciliation is not made mandatory at a pre-litigation stage. The consent of both parties or the discretion of the court is the basis on which the conciliation is relied on, reducing its efficacy.

8) Over-Involvement of Advocates

The parties in dispute play a very important role in conciliation proceedings, as it is a party-centric process. In reality, the advocates participate more and show involvement than the parties, which results in limited settlement of disputes and a lack of communication with the parties directly.

Recommendations

1)Establishment of a National Conciliation Authority:

A National Conciliation Authority (NCA) under the supervision of the Ministry of Law and Justice should be established by India, modeled on the Singapore Mediation Centre and the UK's Centre for Effective Dispute Resolution (CEDR). The National Conciliation Authority should promote conciliation as a mechanism to resolve disputes between the parties, accredit conciliators by providing training and laying down ethical guidelines, maintain a registry, and coordinate with state-level centers to establish uniformity.

2) Integration with Judicial and Pre-Litigation Processes:

In disputes relating to commercial, family, employment, and contractual matters, conciliation should be made compulsory as a dispute resolution mechanism in pre-litigation stages. Under Section 89 of the Code of Civil Procedure, 1908[37], courts should refer matters where there is a chance of settlement with the consent of the parties to conciliation. The conciliator acts as a facilitator and may assist the parties by providing a solution to a dispute that the parties may accept. The settlement agreement can be drawn by the conciliator, which is legally enforceable under Section 74 of the Arbitration and Conciliation Act,

[37]Code of Civil Procedure (Amendment) Act, 1999, Act No. 104 of 1999 (India) (amending provisions effective July 1, 2002).

1996. In order to expand the scope of Alternate Dispute Resolution (ADR) mechanism, conciliation can be incorporated as a pre-institutional option by amending the Commercial Courts Act, 2015.

3) Professional Training and Accreditation:

Conciliators should be trained and certified, which is essential such as mediation training and certification. Specialized courses relating to conciliation should be offered by the Bar Council of India and judicial academies focusing on negotiation, communication, and drafting the settlement agreement. Accreditation should be given to the conciliators to establish quality and credibility, and to gain public confidence in conciliation proceedings.

4) Awareness and Public Outreach:

For conciliation to be a popular and essential mechanism for dispute resolution, as in ancient times, public awareness and understanding of its merits play an important role. Awareness campaigns should be conducted by the Government along with Legal Aid authorities and other professionals in the field of law, stressing on conciliation's advantages of conciliation, like confidentiality, cost-effectiveness, party-centric, preservation of relationship, etc. In addition to this, Clinical programs and experiential learning relating to conciliation should be added to the curriculum of law schools to develop future Alternate Dispute Resolution (ADR) practitioners.

5) Harmonization with the Mediation Act, 2023:

Conciliation should be harmonized with mediation to avoid conceptual destruction, integrating into an umbrella of Alternate Dispute Resolution (ADR) framework. To do so, the Arbitration and Conciliation Act, 1996 can be amended, or a comprehensive Alternate Dispute Resolution (ADR) code can be introduced, which consolidates arbitration, mediation, and conciliation. This results in promotion of all the Alternate Dispute Resolution (ADR) mechanisms rather than one mechanism being promoted and the others being overshadowed.

6) Judicial Promotion and Monitoring:

For conciliation to be revived, judicial support is crucial. The judges should refer the dispute between the

parties with their consent if there is a chance of settlement to conciliation, and the Supreme Court and High Courts should encourage the judges by issuing directions to do so. In addition to it, the statistical records of conciliation referrals and settlements should be maintained by the courts in order to observe their effectiveness.

Conclusion

In Indian tradition, Conciliation was once central to peaceful dispute resolution, but now it is overshadowed within the Alternate Dispute Resolution (ADR) framework. The reasons for its decline include institutional neglect and lack of awareness despite having a statutory backing under the Arbitration and Conciliation Act, 1996. It can be restored to the Alternate Dispute Resolution (ADR) system of India through trained professionals, stronger conciliation institutions, and integration into pre-litigation processes, and assert the nation's legacy of resolving conflicts through dialogue.

In order to establish conciliation again as an acceptable and accessible mechanism not only involves legal reform but also a shift in professional mindset. Conciliation can evolve as a cornerstone of India's participatory and humane justice system from a forgotten mechanism of Alternate Dispute Resolution (ADR) if it is supported by judicial motivation and policy innovation.