

# IS THE EFFICACY OF COMMUNITY MEDIATION OVERLY DEPENDENT ON COMMUNITY DYNAMICS? - A PARALLEL DRAWN WITH INDIAN KHAP PANCHAYATS

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## Introduction

The Mediation Act, 2023 [**“the Act”**] has introduced a new concept of ‘Community Mediation’ through Sections 43 and 44 under Chapter X of the Act. This concept tries to usher community dynamics into alternative dispute resolution practices. The community itself is made a part of the process of resolving community disputes that seek to affect “peace, harmony and tranquility” within the community.

However, in India, community structures for dispute resolution existed even before this Act. Such an example is that of the ‘Khap Panchayats’. Several instances have already suggested how the decisions of the Khap Panchayats have led to more disturbance rather than resolution for the community and the parties involved. The Supreme Court has declared time and again that Khap Panchayats are not legally recognized and should not be given a ‘formal institutional character’.<sup>1</sup>The question, therefore, arises whether a Khap Panchayat-like system can legally emerge through the ‘Community Mediation’ practices. If the answer to this is in positive, subsequently, one needs to analyse whether there should be sufficient safeguards incorporated in these provisions.

## Section 43 And 44 of The Mediation Act, 2023 - Entrenched in Problems

The major issues that lie in Sections 43 and 44 of the Act<sup>2</sup> are three-fold-

<sup>1</sup> Kashish Makkar, ‘Don’t encourage revival of Khaps’ (*Deccan Herald*, 5 September 2023) <<https://www.deccanherald.com/opinion/dont-encourage-revival-of-khaps-2672820>> accessed 29 December 2023.

<sup>2</sup> Mediation Act 2023, ss. 43, 44.

*Firstly*, the peace and tranquility of entire groups being ‘residents of the locality’ or ‘families’ are involved. Hence, they serve as “parties to the dispute” with whose mutual consent the dispute is submitted for mediation. However, in such disputes, many a time, the actual significant impact of the mediation can be on specific individuals whose approval may get muffled or improperly subsumed within the ‘community approval.’

*Secondly*, under Section 43(5)(a) specifically, it is stated that “*persons of standing and integrity who are respectable in the community*” can act as members of the panel of mediators. This concept of ‘integrity’ and ‘respect’ is very subjective to the community in which the mediation takes place. In many cases, such respect can be attributed to individuals who perpetuate illegality, as the same illegality in the Indian legal landscape may be perfectly legal and respectable for that particular community. It is herein that the parallel with persisting Khap Panchayats can be brought in as they, too, keep functioning in the community on this same ideology, resolving disputes by illegal means. Moreover, Section 43(5)(e) is also very vague, as it is not clear whether the “*person deemed appropriate*” is in the context of the community or the authorities as mentioned in the section.

*Thirdly*, the issue also lies in Section 44 of the Act. This is because, just like in every mediation, even in ‘Community Mediation’, once the panel is established, the entire dispute resolution up till the settlement is left with this panel. It is only where there is non-settlement that the authorities are again involved in the process. For a normal mediation, this serves well as it reduces the undue burden on the authorities. However, where community members get involved in the process, there is an inevitable ‘conflict of interest’ that arises in certain situations, which is in contradiction to Section 10 of the Act regarding ‘disclosure of conflict of interest’. Hence, discarding the authorities in these types of mediation can inevitably result in a forced settlement agreement being reached due to an indirect influence of ‘this respectable community panel member’ on the parties to the dispute.

### **Balancing Community Dynamics and Independence - Perspectives Of USA, China and Malaysia**

As already referred to hereinbefore, Section 10 of the Act<sup>3</sup> enunciates that in case there is a “conflict of interest”, proper disclosure of the same is mandatory. Such “conflict of interest” is quite extensive as it includes the term ‘otherwise’ in it. This is to ensure that there remains no doubt with regard to the independence and impartiality of the mediator involved. But when it

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<sup>3</sup> Mediation Act 2023, s. 10.

comes to 'Community Mediation', the independence of the body (panel of mediators) from the community seems far-fetched. Community influence is prominent in community mediation.

i. *US perspective:*

If one would look at the United States, early community mediation practices started early in the 1960s and focused heavily on democratic ideals. This could be connected with the 'community structure' at that time with democratic revolutions taking place during that phase, like the passage of the Voting Rights Act of 1965 that focused on removing racially discriminatory practices from the voting structure. The Rochester American Arbitration Association Community Dispute Service Project and the Boston (Dorchester) Urban Court Program emerged in the 1970s, focusing on racial struggles.<sup>4</sup> A case study done later of the San Francisco Community Boards in the USA showed that in the US, even though community mediation was focused more on 'popular justice notions' and 'empowerment', ultimately, the interpretation of such community was always based on certain 'common values'. As a result, the US community focused more on fostering social harmony even if it required a controlling structure as existed between colonial governments and indigenous populations.<sup>5</sup> Today, research suggests that Americans are turning more conservative by the day from an earlier liberal-conservative balance.<sup>6</sup> Therefore, it will not be folly to assume that community mediation in such situations will also tend to have a conservative outlook.

ii. *Chinese perspective:*

If one takes a look at the Chinese community, one will notice that many nations comment on China's assertiveness, tough attitude, and relative lack of freedom.<sup>7</sup> China states that its 'tough outlook' is often misunderstood, and it simply does not want to deviate from its basic core principles and is quite strict in that regard.<sup>8</sup> This tough community structure is also visible in its approach towards community mediation. Its mediation is very formal and strict and could also use

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<sup>4</sup> 'History of Community Mediation in the U.S.' (*Community Mediation Center*) <<https://2mediate.org/history1.html>> accessed 31 December 2023.

<sup>5</sup> Susan Coutin, 'Review- The Possibility of Popular Justice: A Case Study of Community Mediation in the United States by Sally Engle Merry and Neal Milner' (1995) 22(2) AMERICAN ETHNOLOGIST <<https://www.jstor.org/stable/646744>> accessed 28 December 2023.

<sup>6</sup> Molly Bohannon, 'Americans Suddenly More Conservative Than Liberal On Social Issues, Poll Says' (Forbes, 8 June 2023) <<https://www.forbes.com/sites/mollybohannon/2023/06/08/americans-suddenly-more-conservative-than-liberal-on-social-issues-poll-says/?sh=788de27c6b7d>> accessed 28 December 2023.

<sup>7</sup> Laura Silver et al., 'Large Majorities say China does not respect the personal freedoms of its people' (*Pew Research Centre*, 30 June 2021) <<https://www.pewresearch.org/global/2021/06/30/large-majorities-say-china-does-not-respect-the-personal-freedoms-of-its-people/>> accessed 31 August 2024.

<sup>8</sup> Michael D. Swaine, 'Perceptions of an Assertive China' 32 CHINA LEADERSHIP MONITOR <<https://carnegieendowment.org/files/CLM32MS1.pdf>> accessed 31 December 2023.

force to resolve disputes and determine the right rather than focusing too much on party autonomy and involvement through the process of listening and gathering information.<sup>9</sup>

iii. *Malaysian perspective:*

This Chinese form of community mediation is much in contrast with that of Malaysia. Malaysian community mediation is rather informal and gives due importance to party involvement rather than direct criticism and forceful determination of right and wrong like in China. Moreover, Malaysian community mediation is also influenced by religious leaders like the imam primarily for family and religious disputes. The other type of mediator is the secular ketua kampung. However, there is no water-tight classification of which disputes will go to which mediator, and hence, there lies a huge possibility of a normal civil dispute going to an imam which could result in religious influence over the dispute.<sup>10</sup>

Hence, by analysing the differences in the community mediation setups of different nations, we see how community mediation is heavily dependent on community perspectives and local outlooks rather than just focusing on impartiality during dispute resolution.

### **Why Community Mediation is not All Bad - Understanding who Forms ‘The Community’ - an Indian Perspective**

The significance of Community Mediation cannot be undermined if the ‘community’ that plays the primary role in such mediation is kept in proper check. Even community policing has been upheld as ‘democracy in action’.<sup>11</sup> However, one must note that community policing requires cooperation between the community involved and the police of that locality. It should not result in a structure where the police take a backhand, and the community substitutes the police in its primary duty of maintaining law and order.<sup>12</sup> The community must be utilized to supplement rather than to substitute.

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<sup>9</sup> James A. Wall Jr. and Ronda Roberts Calliste, ‘Malaysian Community Mediation’ (1999) 43(3) THE JOURNAL OF CONFLICT RESOLUTION <<https://www.jstor.org/stable/174671>> accessed 28 December 2023.

<sup>10</sup> James A. Wall Jr. and Ronda Roberts Calliste, ‘Malaysian Community Mediation’ (1999) 43(3) THE JOURNAL OF CONFLICT RESOLUTION <<https://www.jstor.org/stable/174671>> accessed 28 December 2023.

<sup>11</sup> ‘Community Policing is Democracy in Action: Foundation stone of new model police station laid in Gabu’ (UNDP, 6 April 2022) <<https://www.undp.org/guinea-bissau/news/community-policing-democracy-action-foundation-stone-new-model-police-station-laid-gabu>> accessed 31 August 2024.

<sup>12</sup> ‘Understanding Community Policing- A Framework in Action’ (Bureau of Justice Assistance, US Department of Justice) <<https://www.ojp.gov/pdffiles/commmp.pdf>> accessed 05 January 2024.

In the Indian scenario, we can also enumerate certain relevant yet not much-focused areas of community mediation where the importance of keeping a check on the communities involved and the community mediator has been recognized.

i. *Indian community mediation - taking from Vedas, Ramayana, Mahabharata, Mahajans, Panchas* Vedic times saw the emergence of mediation from the early Aryans, who believed in the principles of “Wisdom, Reason, and Prudence”. The institutions of Kula and Shreni also dealt with community disputes. Shreni specifically dealt with internal disputes in the artisan community. Famous figures like Lord Buddha and Patanjali also approved of mediation, stating that it brings wisdom and progress rather than a simple adjudication of right and wrong.<sup>13</sup>

In Ramayana, for the dispute between Lord Rama and Ravana, Hanuman is considered a mediator. But Hanuman again failed to prove an ideal mediator due to his already persisting bias for Lord Rama. This bias towards a certain set of beliefs alone upheld by the majority of the community could also give rise to a failed community mediation setup.

Failure of mediation, primarily when it involves two or more communities rather than individuals, can result in disastrous effects. This was well realized in Mahabharata when the failure of the mediation by Lord Krishna between the two communities of Pandavas and Kauravas led to the Kurukshetra war. The same was also noted by former CJI, Justice N.V. Ramana.<sup>14</sup> Hence, the importance of the community mediator cannot be disregarded.

Among the business community in India, the power of informal resolution of trade, business, and commerce-related disputes was vested in the Mahajans.<sup>15</sup> Mahajans were respected businessmen and hence, their role in resolving disputes for the business community was seen with reverence.

For the resolution of disputes among the tribal community, certain wise elderly tribal men, as considered by the community, known as Panchas or Pancha Parmeshwaras, have been taken to be the community mediators.<sup>16</sup> In most tribal communities, the precedence is given to the community as a whole rather than to the individual. This basic tenet among the tribal communities makes community mediation a well-established practice therein which may not be for other areas or communities. For example, the Kondh tribe of southern Odisha is famous for resolving disputes

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<sup>13</sup> Niranjan Bhatt, 'Evolution and Legislative History of Mediation' (2009) 1 GNLU JL Dev & Pol 83.

<sup>14</sup> Harish V Nair, 'Mahabharata teaches us significance of mediation, conciliation: CJI Ramana to business community' (*Times Now News*, 04 December 2021) <<https://www.timesnownews.com/india/article/mahabharata-teaches-us-significance-of-mediation-conciliation-cji-ramana-to-business-community/837757>> accessed 05 January 2024.

<sup>15</sup> Aditya Mehta et al., 'Analysis: Mediation in India' (*India Corporate Law*, 31 October 2022) <<https://corporate.cyrilamarchandblogs.com/2022/10/analysis-mediation-in-india/>> accessed 06 January 2024.

<sup>16</sup> Nivriti Dubey, 'Resolving the Issues of Tribal Community via Mediation' (2019) 6(6) JETIR <<https://www.jetir.org/papers/JETIR1906778.pdf>> accessed 28 December 2023.

through community mediation tactics. In this tribe, a tribal council known as baarika is formed to preside over and resolve the disputes.<sup>17</sup>

### **Khap Panchayats Revival Vis-À-Vis Section 43 And 44 - A Possibility If Not Controlled**

Khap Panchayats have been quite in the news recently. They are similar to community mediators, with certain village unions forming quasi-judicial bodies to resolve disputes that arise within the village community.<sup>18</sup> Similar to Section 43(5)(a) of the Act, Khap Panchayats comprise certain so-called “caste lords” that possess the authority granted to them by their village community to preserve the village honour and keep it in check.<sup>19</sup> They are considered as “*person of standing and integrity who are respectable in the community*”.

In the Jat community, it has been found that the elderly men therein form the Khap Panchayats. The major issue with these Khap Panchayats is that they are very strict about the rules they make, and most of the time, these rules are quite regressive. The penalties for non-compliance with these rules are very harsh punishments that cause harm not only to the individual concerned but also to the abiding families, like in the case of honour killing verdicts.<sup>20</sup> These ‘dictats’ of the Khap Panchayats can range from commenting on marrying a girl at an early age for preventing rape<sup>21</sup> to stereotypical and autocratic decisions like preventing marriages between two people because they were from the same village.<sup>22</sup>

Khap Panchayats were already in existence a long time back and they have been declared to be functioning illegally. Recently in 2018, the Supreme Court held that Khap Panchayats should have no business in unnecessarily blocking marriages between two people on arbitrary and unjustifiable grounds.<sup>23</sup> Hence, this is not something out of the blue. However, the novel issue that arises after the passage of the Act is that now there is some scope for legalizing the illegality being perpetrated

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<sup>17</sup> Minaj Ranjita Singh, ‘How Odisha’s Kondh tribe resolves conflicts’ (*Village Square*, 23 June 2023) <<https://www.villagesquare.in/odia-tribes-resolve-conflicts-through-dialogue/>> accessed 06 January 2024.

<sup>18</sup> ‘What is Khap Panchayat?’ (*India Today*, 11 October 2012) <<https://www.indiatoday.in/india/north/story/what-is-khap-panchayat-118365-2012-10-10>> accessed 08 January 2024.

<sup>19</sup> Rajika Chaudhary, ‘Lousy Truth of Khap Panchayat’ (*Times of India*, 22 May 2022) <<https://timesofindia.indiatimes.com/readersblog/premiumbytes/lousy-truth-of-khap-panchayat-43073/>> accessed 09 January 2024.

<sup>20</sup> Preetha Kadhira, ‘Khap panchayats for justice?’ (*The Hindu*, 21 March 2014) <<https://www.thehindu.com/in-school/signpost/khap-panchayats-for-justice/article5814495.ece>> accessed 09 January 2024.

<sup>21</sup> Ibid.

<sup>22</sup> Bhupendra Yadav, ‘Khap Panchayats: Stealing Freedom?’ (2010) 44(52) EPW <<https://www.jstor.org/stable/25663933>> accessed 10 January 2024.

<sup>23</sup> ‘Supreme Court Declares Khap Interference in Marriages ‘Absolutely Illegal’ (*The Wire*, 27 March 2018) <<https://thewire.in/law/supreme-court-khap-interference-marriages-illegal>> accessed 10 January 2024.

by the Khap Panchayats. This is because Khap Panchayats also act in a similar structure like ‘Community Mediation’.

Once the permanent panel of community mediators is notified, the authorities cease to have any significant part to play. From there on, the community mediators carry out the entire settlement procedure. Out of the five options given under Section 43(5) from whom the panel members will be chosen, only one option is “a person having experience in the field of mediation.” This could result in a huge problem in the future with panels of community mediators taking the shape of Khap Panchayat-like bodies, but this time legalized by way of the Act.

### **Preventing Legalization of an Illegality- Incorporating Better Safeguards**

A significant issue that may not yet be realized is that without any additional safeguards added to Sections 43 and 44 of the Act, the true impact of community mediation may not materialize. It cannot be disregarded that the ‘community’ has an important role in determining the ‘panel of community mediators’, and it is this ‘panel’ that thereafter determines the fate of the parties involved in the dispute.

Certain safeguards that may be incorporated into Sections 43 and 44 of the Act are as follows-

1. In the creation of the panel by the authorities involved, the parties themselves should be heard to ensure that their panel of community mediators does not consist of persons who may have an inherent bias against the matter to be dealt with, even if they are of persons of standing and integrity.
2. Most importantly, ‘experience in the field of mediation’ should be a mandatory requirement and not an option available for the constitution of the panel. This is to say that even if a person of standing and integrity is chosen as a community mediator, that person should first be trained in mediation and only then be permitted to resolve the disputes through community mediation. In Madhya Pradesh, the MP State Legal Services Authority trains the community mediators in mediation techniques and certain qualifications of community mediators are also provided, like they should preferably be graduates and should have no criminal antecedents.<sup>24</sup> This practice should be mandated under Sections 43 and 44 of the Act on the concerned authority under the State Legal Services Authority so that every state compulsorily has to take it up. Leaving such things

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<sup>24</sup> ‘Madhya Pradesh Community Mediation Programme’ (*Madhya Pradesh State Legal Services Authority*) <[https://www.mpalsa.gov.in/docs/mediation\\_training/Madhya\\_Pradesh\\_Community\\_Mediation\\_Programme\\_English.pdf](https://www.mpalsa.gov.in/docs/mediation_training/Madhya_Pradesh_Community_Mediation_Programme_English.pdf)> accessed 10 January 2024.

to the community itself could be less burdensome for the state authorities in the short run, but will become ineffective in the long run.

3. Section 43(5)(e) should be made more specific as to the factors that are to be considered for selecting the “*person deemed appropriate*” and the relevant determining authority (whether the SLSA or District Magistrate or Sub-Divisional Magistrate or the community itself or any combination of them) to take the concerned decision. Unless this is done, the vagueness of this sub-section can be used inappropriately to perpetuate Khap Panchayat-like structures.
4. Since in community mediation, the factor of influence can become more prominent- as can be seen in the case of Khap Panchayats (that follow a similar structure), the termination of the mandate of a community mediator should not be left to the parties involved or based on a complete reliance on third party information as is provided under Section 11<sup>25</sup> of the Act. The authorities mentioned under Section 44 should be given a suo moto power to terminate the mandate of a community mediator if it reasonably feels that the mediator is trying to impose any regressive practice of the community on the parties to the dispute.

## **Conclusion**

Community mediation as a statutory inclusion is a novel approach that has been introduced through the Act. There is no doubt that involving the community in a dispute resolution process will make the process better and less burdensome for the courts and authorities involved. However, with every community mediation, a ‘community’ gets attached, and so does the ‘community influence’ carried by that community. In certain cases, such influence can lead to better settlements, while in others, the same can lead to regressive and forced agreements for the parties involved. This conflicting position can disturb the entire impact of such mediation type. Finally, it cannot be denied that the efficacy of community mediation would depend a lot on the community involved, and no ‘one-size-fits-all’ independent and impartial approach can be applied.

Speaking about a negative community influence, if one looks at the Indian perspective, one cannot forget about the Khap Panchayats, who have been known for their illogical and regressive verdicts. Sections 43 and 44 of the Act have a lot of scope for legalizing the so-called Khap Panchayats and letting them flourish, albeit this time legally. Hence, there is a requirement for certain additional

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<sup>25</sup> Mediation Act 2023, s. 11.



safeguards to be incorporated in Sections 43 and 44 of the Act to realize the impact of 'Community Mediation' to its fullest.