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JUDICIAL REFERRAL TO ADR UNDER SECTION 89 OF THE CODE OF CIVIL PROCEDURE, 1908: DISCRETION, COMPULSION, AND CONSTITUTIONAL LIMITS

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I. ABSTRACT

Section 89 of the Code of Civil Procedure, 1908 represents a legislative effort to institutionalize alternative dispute resolution (ADR) within the Indian civil justice system as a response to mounting judicial pendency. Conceived as an enabling provision, Section 89 empowers courts to refer disputes to ADR mechanisms where elements of settlement appear to exist. However, its practical application has generated significant constitutional and procedural concerns, particularly regarding the erosion of judicial discretion, voluntariness of participation, and party autonomy. This paper critically examines the transformation of Section 89 from a discretionary judicial tool into a quasi-mandatory procedural step in trial court practice. Through doctrinal analysis and judicial interpretation, especially the jurisprudence developed in Salem Advocate Bar Association and Afcons Infrastructure Ltd, the study explores how mechanical and unreasoned referrals to ADR risk converting facilitation into indirect compulsion. The paper further analyses the constitutional implications of such practices under Articles 14 and 21 of the Constitution of India, highlighting concerns of arbitrariness, denial of access to justice, and dilution of procedural fairness. It argues that while ADR serves an important complementary role, its legitimacy depends upon preserving informed consent, suitability assessment, and reasoned judicial application. The paper concludes by advocating a model of structured judicial discretion that reconciles efficiency

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with constitutional discipline, ensuring that ADR remains a genuine alternative to adjudication rather than an imposed procedural diversion.

II. KEYWORDS

Section 89 CPC, Judicial Discretion, Alternative Dispute Resolution, Party Autonomy, Constitutional Limits on ADR Referral.

III. INTRODUCTION

The Indian judicial system continues to grapple with an ever-increasing pendency of civil disputes, prompting sustained institutional emphasis on alternative dispute resolution mechanisms. In this context, Section 89 of the Code of Civil Procedure, 1908 (“CPC”) was introduced as a legislative attempt to integrate alternative dispute resolution (“ADR”) into the formal adjudicatory process. However, the legal framework governing Section 89 has undergone a substantial transformation with the enactment of the Mediation Act, 2023, which came into force on 14 September 2023.

The amended Section 89, as substituted by the Mediation Act, removes the requirement that courts must formulate possible terms of settlement prior to ADR referral, updates procedural cross-references, and clarifies the distinction between mediation and judicial settlement that had generated interpretative confusion under the earlier regime. While this paper primarily engages with the judicial interpretation and constitutional concerns arising from the pre-2023 version of Section 89, the analysis remains relevant in assessing whether the amended framework adequately addresses concerns relating to judicial discretion, voluntariness, and party autonomy, or whether such constitutional issues persist notwithstanding legislative reform.

While the objective of the provision is efficiency-driven, its implementation has raised complex legal questions about judicial discretion, the voluntariness of participation, and constitutional safeguards.

Although Section 89 is framed as an enabling provision, judicial practice increasingly treats referrals to ADR as routine or near-mandatory, particularly at the pre-trial stage. Such practices raise concerns about whether judicial discretion under Section 89 has, in effect, been transformed into indirect compulsion. This shift has significant constitutional implications, particularly with respect to the right to access justice under Article 21 and the guarantee against arbitrariness under Article 14 of the Constitution of India.

This paper critically examines the scope and limits of the judicial power to refer disputes to ADR under Section 89 of the CPC. It argues that while judicial referral to ADR is constitutionally permissible, it must remain strictly discretionary and be exercised through informed consent, suitability assessment, and reasoned judicial application. Any mechanical or coercive referral undermines party autonomy and risks violating fundamental constitutional principles.

A. Research Objectives

The primary objective of this research is to critically examine the scope and limits of judicial discretion in referring civil disputes to alternative dispute resolution mechanisms under Section 89 of the Code of Civil Procedure, 1908. The study aims to analyse whether judicial practices have transformed an enabling provision into a quasi-mandatory procedural step and to assess the constitutional implications of such practices, particularly in light of Articles 14 and 21 of the Constitution of India. A further objective is to evaluate whether the legislative changes introduced by the Mediation Act, 2023 adequately address the constitutional concerns identified under the earlier framework.

B. Research Questions

This study is guided by the following research questions:

1. To what extent does Section 89 CPC confer discretionary power on courts to refer disputes to ADR mechanisms?
2. How have judicial interpretations and trial court practices affected the voluntariness and autonomy underlying ADR referral?
3. Do mechanical or unreasoned referrals under Section 89 violate constitutional guarantees under Articles 14 and 21?
4. Has the substitution of Section 89 by the Mediation Act, 2023 mitigated or perpetuated these constitutional concerns?

C. Research Hypotheses

The study proceeds on the hypothesis that although Section 89 CPC is framed as an enabling provision, judicial practice has increasingly rendered ADR referral routine and quasi-mandatory, thereby diluting judicial discretion and party autonomy. It is further hypothesised that mechanical referral practices risk violating Articles 14 and 21 of the Constitution, and that the legislative amendments introduced by the Mediation Act, 2023, while clarificatory, may not fully resolve these constitutional concerns in the absence of disciplined judicial application.

D. Research Methodology

This research adopts a doctrinal and analytical methodology. It is based on the examination of statutory provisions, constitutional principles, judicial precedents of the Supreme Court and High Courts, and authoritative secondary sources such as Law Commission Reports and scholarly writings. The study does not involve empirical or

field-based research. Judicial decisions are analysed to trace interpretative trends, assess constitutional reasoning, and evaluate the practical operation of Section 89 CPC before and after the enactment of the Mediation Act, 2023.

E. Literature Review

Existing scholarship on Section 89 CPC has largely focused on its role in reducing judicial backlog and promoting alternative dispute resolution. Early commentary and Law Commission Reports, particularly the 129th Law Commission Report, advocated mediation as a means of urban dispute management. Subsequent academic analyses have examined judicial interpretations in the Salem Advocate Bar Association and Afcons Infrastructure decisions, highlighting ambiguities surrounding consent and suitability. However, limited scholarly attention has been devoted to the constitutional implications of routine ADR referral practices and the erosion of judicial discretion. Further, literature assessing the impact of the Mediation Act, 2023 on Section 89 remains nascent. This paper seeks to bridge this gap by situating Section 89 within a constitutional framework of access to justice, non-arbitrariness, and party autonomy.

IV. LEGISLATIVE FRAMEWORK OF SECTION 89 CPC

Section 89 of the Code of Civil Procedure, 1908 was originally inserted by the Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999) and brought into force in 2002 with the objective of encouraging settlement of civil disputes through alternative dispute resolution ('ADR') mechanisms as a response to mounting judicial arrears. Under the pre-2023 framework, courts were required, where elements of settlement appeared to exist, to formulate possible terms of settlement and thereafter refer parties to arbitration, conciliation, mediation, judicial settlement, or Lok Adalats.

This legislative framework has undergone a significant change pursuant to the enactment of the Mediation Act, 2023. Section 59 of the Mediation Act, 2023, read with the Fourth Schedule, has substituted Section 89 of the CPC. Under the amended provision, the requirement that courts must first formulate possible terms of settlement has been expressly removed. The substituted Section 89 now provides that where it appears to the Court that the dispute between the parties may be settled and there exist elements of settlement acceptable to the parties, the Court may (a) refer the dispute to arbitration; or (b) refer the parties to mediation, including court-annexed mediation centres or any other mediation service provider or mediator, as per the option of the parties.

The amended framework thus streamlines the referral process, updates procedural references, and addresses the earlier conceptual ambiguity between judicial settlement and mediation. While the revised provision reinforces mediation as the primary court-referred ADR mechanism, it continues to vest discretion in the judiciary by employing permissive language and by linking referral to the satisfaction of the court regarding the existence of settlement possibilities. The constitutional and procedural concerns examined in this paper must therefore be assessed in light of whether the removal of the settlement-formulation requirement and the restructured referral mechanism meaningfully curb mechanical or coercive referrals, or whether such concerns persist under the post-2023 regime.

The procedural framework supporting Section 89 is provided under Order X, Rules 1A to 1C, CPC. These provisions envisage ADR referral after completion of pleadings and recording of admissions and denials. A harmonious reading of Section 89 and Order X suggests that ADR referral is intended as a structured, post-pleadings exercise rather than a blanket procedural step.

However, the drafting of Section 89 has been criticised for its lack of precision. The provision groups together diverse ADR mechanisms—some consensual and others adjudicatory without clarifying the role of consent or suitability criteria. This legislative ambiguity has contributed significantly to inconsistent judicial application.

V. JUDICIAL INTERPRETATION OF SECTION 89 CPC

The Supreme Court first undertook a detailed constitutional examination of Section 89 CPC in *Salem Advocate Bar Association v Union of India*, (2003) 1 SCC 49 ('Salem I'), where the validity of the 1999 CPC amendments was challenged. The Court upheld Section 89 as constitutionally sound, emphasising that the provision was conceived as an enabling mechanism to facilitate settlement and reduce judicial backlog, rather than as a coercive mandate. Importantly, the Court clarified that ADR referral under Section 89 does not compel parties to settle and that adjudication remains available if settlement efforts fail.

In *Salem Advocate Bar Association v Union of India*, (2005) 6 SCC 344 ('Salem II'), the Court revisited Section 89 in the context of implementation difficulties. Acknowledging drafting ambiguities, the Court reaffirmed that ADR processes are inherently voluntary and directed the framing of procedural rules to operationalise referrals. The decision underscored that judicial discretion under Section 89 must be exercised judiciously and cannot be reduced to a mechanical procedural formality.

The most authoritative exposition of Section 89 was delivered in *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd*, (2010) 8 SCC 24, where the Court clarified the consent requirements and suitability criteria governing ADR referrals. The Court held that reference to arbitration and conciliation requires the consent of parties, whereas mediation and judicial settlement may be referred by the court without prior consent,

subject to an assessment of suitability. The judgment also identified categories of disputes generally unsuitable for ADR, thereby seeking to discipline judicial discretion and prevent indiscriminate referrals.

More recently, the Supreme Court's decision in *Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd*, (2022) 10 SCC 1, though rendered in the context of Section 12A of the Commercial Courts Act, 2015, assumes relevance for understanding the evolving judicial approach to court-referred mediation. The Court upheld the mandatory nature of pre-institution mediation, while simultaneously emphasising that such statutory compulsion must be clearly grounded in legislative mandate. Read alongside the Mediation Act, 2023, the decision reflects a judicial shift towards institutionalising mediation, while reinforcing that any curtailment of access to courts must be explicitly authorised by statute and remain consistent with constitutional guarantees.

This jurisprudence provides an important backdrop for assessing whether the amended Section 89 CPC adequately addresses earlier concerns relating to coercion, discretion, and voluntariness. The Court clarified that reference to arbitration and conciliation requires consent of parties. At the same time, mediation and judicial settlement may be referred without prior permission, subject to suitability. The Court also identified categories of disputes generally unsuitable for ADR, such as cases involving serious allegations of fraud or matters requiring authoritative judicial pronouncement.

While *Afcons* provided clarity, it also expanded judicial discretion by permitting non-consensual referral to mediation. This distinction has blurred the line between encouragement and compulsion in practice, particularly at the trial court level.

VI. JUDICIAL DISCRETION AND THE PROBLEM OF UNIFORM APPLICATION

A recurring concern in the judicial application of Section 89 CPC is the tendency toward uniform referral practices. Judicial discretion, by its very nature, requires contextual differentiation. However, trial courts often employ a standardised approach, referring a wide range of disputes to mediation without examining the factual complexity, legal questions involved, or relational dynamics between the parties.

Such uniformity defeats the very purpose of discretion. Discretion exercised identically across cases ceases to be discretion and instead becomes an administrative routine. This undermines the Supreme Court's emphasis on suitability analysis and transforms Section 89 into a procedural checkpoint rather than a judicial assessment. The absence of recorded reasons further weakens accountability and forecloses meaningful appellate scrutiny.

Moreover, judicial discretion under Section 89 must be understood as a constitutional function rather than a mere case-management tool. Courts are not simply managers of docket efficiency; they are constitutional actors obliged to uphold procedural justice. Any exercise of discretion that prioritises numerical disposal over qualitative justice risks eroding public confidence in the justice system.

VII. DISCRETION OR COMPULSION? JUDICIAL PRACTICE AND GROUND REALITY

Despite repeated judicial assertions that Section 89 is discretionary, trial court practice often reflects a contrary approach. Referrals to mediation are frequently made at the first hearing through standardised orders, without recorded reasons or analyses. Such routine referrals convert discretion into a procedural expectation.

Although participation in ADR is ostensibly voluntary, the court's authority creates implicit pressure on litigants to comply. For parties with unequal bargaining power, consent becomes illusory rather than informed. Mechanical referrals thus undermine both judicial discretion and party autonomy.

The emphasis on disposal statistics further incentivises indiscriminate referrals. While efficiency is a legitimate institutional goal, it cannot override procedural fairness. When discretion is exercised uniformly without differentiation, it effectively becomes compulsion, contrary to the legislative intent of Section 89.

VIII. CONSTITUTIONAL LIMITS ON JUDICIAL REFERRAL TO ADR

A. Article 21: Access to Justice

Article 21 guarantees the right to access justice through fair and reasonable procedures. Forced or unsuitable referral to ADR has, in several instances, operated as a tangible barrier to access to justice rather than as a facilitative mechanism. Trial courts frequently direct parties to mediation at the threshold stage through standardised orders, without recording reasons or assessing suitability. In disputes involving urgent interim relief, significant power imbalance, or pure questions of law, such mechanical referrals have resulted in procedural delay and denial of timely adjudication. These practices undermine the constitutional guarantee under Article 21, which protects not merely access to a forum but access to justice through fair, effective, and proportionate procedures.

The Supreme Court's jurisprudence on access to justice extends well beyond *Hussainara Khatoon v State of Bihar*, (1980) 1 SCC 81. In *Anita Kushwaha v Pushap Sudan*, (2016) 8 SCC 509, the Court articulated access to justice as a facet of Article 21 comprising four essential elements, including adjudicatory mechanisms that are effective, reasonably

accessible, and capable of providing timely relief. Mechanical diversion of disputes to ADR, particularly where settlement is implausible, fails this constitutional standard. Similarly, in *Roadways v Kishan Lal*, (2020) 10 SCC 681, the Court reaffirmed that procedural devices cannot be employed in a manner that obstructs substantive justice or disproportionately burdens litigants. Access to justice is not limited to the mere availability of a forum but extends to the right to have disputes adjudicated through procedures that are neither arbitrary nor oppressive.

Judicial referral to ADR under Section 89 of the CPC, when appropriately exercised, may enhance access to justice by offering expeditious and cost-effective resolution. However, forced or unsuitable referral to ADR can have the opposite effect. Where parties are compelled to participate in mediation or settlement processes against their will, such referrals may delay adjudication and operate as procedural barriers to court access rather than as facilitative mechanisms.

The constitutional guarantee under Article 21 requires that any diversion from adjudication must be based on voluntary and informed choice. ADR cannot replace the right to judicial determination unless parties consciously elect such a course. Mechanical referral under Section 89, particularly without assessing the nature of the dispute or the willingness of parties, fails to satisfy the constitutional standards of reasonableness and proportionality. Consequently, judicial discretion exercised without regard to these considerations' risks violating the right to fair procedure. Any restriction on court access must satisfy the test of reasonableness and proportionality. Mechanical referral under Section 89 fails this constitutional requirement.

B. Article 14: Non-Arbitrariness

Article 14 further imposes a constitutional limitation on judicial referral to ADR by mandating non-arbitrariness in state action. Empirical inconsistencies are evident where similarly situated litigants are treated differently some being routinely referred to mediation while others are permitted to proceed to trial without intelligible criteria or recorded reasons. Such unreasoned referrals not only frustrate appellate review but also violate the equality principle articulated in *EP Royappa v State of Tamil Nadu*, (1974) 4 SCC 3, where arbitrariness itself was held to be antithetical to equality. Discretion exercised uniformly and mechanically ceases to be discretion and assumes the character of arbitrary state action.

Accordingly, judicial referral to ADR under Section 89 CPC must be constitutionally constrained by reasoned decision-making, contextual suitability assessment, and respect for voluntary participation. Absent these safeguards, mechanical referrals risk infringing both Articles 14 and 21 by substituting procedural efficiency for constitutional fairness.

In the context of Section 89 of the CPC, the absence of uniform criteria governing referrals to ADR has led to inconsistent practices across courts. While some litigants are directed to mediation as a matter of routine, others are permitted to proceed directly to trial in similar factual circumstances. Such inconsistency, when unaccompanied by recorded reasons, undermines the constitutional mandate of non-arbitrariness.

Unreasoned referral orders also restrict meaningful appellate review, thereby insulating arbitrary exercises of discretion from judicial scrutiny. To comply with Article 14, courts must ensure that decisions to refer disputes to ADR are supported by brief but intelligible reasons demonstrating the application of the mind. Equality before the law requires not uniform outcomes, but uniform application of rational standards.

Article 14 mandates non-arbitrariness in state action. Judicial discretion exercised without guidelines or recorded reasons risks unequal treatment of similarly situated litigants. Unreasoned referral orders, therefore, violate constitutional equality principles.

C. Party Autonomy as a Constitutional Value

Party autonomy constitutes the philosophical foundation of alternative dispute resolution and has increasingly been recognised as an implicit constitutional value flowing from Articles 14 and 21. The freedom to choose whether to resolve disputes through adjudication or settlement is an aspect of procedural liberty and personal autonomy.

ADR mechanisms, particularly mediation, derive their legitimacy from voluntary participation. When courts compel parties to engage in ADR, the consensual nature of such mechanisms is diluted. Coerced mediation not only undermines the efficacy of settlement but also erodes constitutional legitimacy by subordinating individual choice to institutional efficiency.

Respect for party autonomy requires courts to ensure that participation in ADR remains genuinely voluntary. Judicial encouragement must not cross the threshold into compulsion. Preserving autonomy is essential not only for constitutional compliance but also for sustaining public confidence in ADR as a credible alternative to adjudication.

Party autonomy, though not expressly enumerated, flows from Articles 14 and 21. The freedom to choose dispute resolution mechanisms is an aspect of procedural liberty. Coerced mediation undermines both ADR philosophy and constitutional legitimacy.

D. Procedural Fairness and Informed Consent

Procedural fairness under Article 21 requires that litigants understand the nature, consequences, and alternatives of any process to which they are subjected. In the context of ADR referral, this necessitates informed consent. Merely directing parties to mediation without explaining its implications does not satisfy the constitutional standard of fairness.

In many instances, litigants particularly those from marginalised or economically weaker backgrounds are unaware that participation in ADR is not compulsory. The lack of legal literacy, combined with the court's authority, creates a coercive environment in which refusal appears impermissible. This undermines the voluntariness that underpins mediation.

A constitutionally compliant referral process must therefore include judicial explanation of ADR mechanisms, clarification of the right to return to court, and assurance that refusal will not prejudice the merits of the case. Without these safeguards, referral under Section 89 risks becoming a procedural hurdle rather than a facilitative option.

E. Reconciling Efficiency with Constitutional Discipline

The constitutional concerns surrounding Section 89 do not require dilution of ADR. Instead, courts must adopt structured discretions. Referral should follow a brief suitability assessment, informed consent, and reasoned orders. Refusal to participate in ADR must not attract adverse inference.

Judicial training and clear guidelines can ensure that ADR remains facilitative rather than coercive, preserving both efficiency and constitutional values.

F. Need for Structured Judicial Guidelines

One of the most effective ways to reconcile efficiency with constitutional safeguards is to develop structured judicial guidelines for ADR referrals. Such policies would not curtail discretion but would discipline it. Factors such as the nature of rights involved, the complexity of legal questions, the power imbalance, the urgency of relief, and prior settlement attempts should inform the referral decision.

Structured discretion ensures consistency without uniformity. It preserves judicial independence while preventing arbitrariness. Adoption of brief, reasoned referral orders would further enhance transparency and align Section 89 practice with constitutional norms.

IX. SUGGESTIONS AND RECOMMENDATIONS

In order to ensure constitutional compliance in the operation of Section 89 CPC, courts should adopt a model of structured judicial discretion. Referral to ADR should be preceded by a brief suitability assessment and accompanied by recorded reasons. Judicial training programmes must emphasise the voluntary nature of mediation and the constitutional importance of party autonomy. Clear guidelines should be evolved to prevent indiscriminate referrals, particularly in cases involving urgent relief, power asymmetry, or pure questions of law. Finally, legislative reform must be complemented by disciplined judicial practice to ensure that ADR remains a facilitative alternative rather than a procedural obstacle.

X. CONCLUSION

Section 89 of the CPC represents a progressive attempt to integrate ADR into the civil procedure. However, its legitimacy depends upon preserving its discretionary character.

Mechanical or indirect compulsion in ADR referral undermines Articles 14 and 21 and erodes party autonomy.

Section 89 of the Code of Civil Procedure, 1908, represents a significant shift in the Indian civil justice system's approach to dispute resolution. By formally incorporating alternative dispute resolution mechanisms into the procedural framework, the legislature sought to address chronic judicial delays while promoting consensual and efficient settlement of disputes. However, the effectiveness and legitimacy of this provision depend not merely on its existence, but on the manner in which it is interpreted and applied by courts.

This paper has demonstrated that while Section 89 is constitutionally valid in principle, its practical implementation has increasingly raised concerns regarding the erosion of judicial discretion and party autonomy. The growing tendency of trial courts to treat ADR referrals as routine or near-mandatory steps reflects a departure from the legislative intent of the provision. When discretion is exercised mechanically, without assessment of suitability or recorded reasons, it risks transforming an enabling provision into an instrument of indirect compulsion.

From a constitutional perspective, such practices are problematic. Forced or unsuitable referral to ADR can operate as a barrier to access to justice under Article 21, particularly when litigants are compelled to participate in processes they neither understand nor consent to. Similarly, unreasoned and inconsistent referral orders raise concerns under Article 14, as they expose litigants to arbitrary and unequal treatment. Party autonomy, which underpins ADR, cannot be sacrificed at the altar of efficiency without undermining both constitutional guarantees and the credibility of alternative dispute resolution.

The solution, however, does not lie in diluting Section 89 or retreating from ADR. Instead, it lies in adopting a constitutionally disciplined model of judicial discretion. Courts must treat ADR referrals as a judicial function requiring application of mind, transparency, and sensitivity to the nature of the disputes and the positions of the parties. Suitability assessment, informed consent, and brief reasoned orders should become integral to the referral process.

Ultimately, ADR must remain a genuine alternative to adjudication, not a procedural detour imposed upon unwilling litigants. When applied with constitutional restraint and judicial care, Section 89 can fulfil its intended role of enhancing efficiency without compromising fairness. The future of ADR in India, therefore, depends not on compulsion but on consent, discretion, and constitutional fidelity. Judicial referral to ADR is constitutionally valid only when exercised with informed consent, a suitability assessment, and a reasoned judicial application. A structured discretion model offers a constitutionally sound path forward, ensuring that ADR remains an alternative to adjudication rather than an obstacle to justice.

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