ANALYSIS OF THE MEDIATION BILL, 2021

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ABSTRACT

The Mediation Bill, introduced in the Rajya Sabha on December 10, 2021, aims to tackle India's judicial backlog by promoting mediation as an alternative dispute resolution method. This article critically evaluates crucial aspects of the Bill, concentrating on sections that necessitate improvement. It scrutinizes the Bill's extent, obligatory pre-litigation mediation, alignment with global mediation conventions, party autonomy, and more. The article underscores the necessity for precise definitions, suitable jurisdiction, and harmonizing the Bill with worldwide benchmarks. It emphasizes that although the Bill marks a significant stride, thoughtful revisions are indispensable for ensuring effective execution and easing the load on the judiciary.

KEYWORDS: *Mediation Bill 2021, pre-litigation Mediation, Mediation Council of India, Mediation Settlement Agreement, mandatory Mediation, Mediation and conciliation, Singapore Convention on Mediation.*

1. INTRODUCTION

Indian judiciary is synonymous with lackadaisical and tardy processes of the courts. The backlog of cases in the judiciary is enormous, and to combat this, the Mediation Bill was introduced in the Rajya Sabha on December 10, 2021.[1] Mediation is a form of alternative dispute resolution where parties in conflict voluntarily choose an independent third person (the mediator) to settle their disputes. It is set to become an effective alternative dispute-resolution mechanism in a country with pending cases. A mediator plays the role of a facilitator and creates a conducive environment to help parties resolve their issue, not to impose or offer a solution. The mediation procedure is not governed by formal or legally enforceable principles; it is totally up to the parties wishes.[2]

At present, Mediation in India may be

1. the court referred (courts may refer cases to Mediation under the Code of Civil Procedure, 1908)[3]
2. private (for instance, under a contract having a mediation clause), or

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1 https://www.thehindu.com/news/national/explained-the-mediation-bill-2021/article65967986.ece.

2 July 13, 2022: The Hindu Editorial Analysis - Chahal Academy. https://www.chahalacademy.com/current-affairs/13-Jul-2022/903.

3 The Code of Civil Procedure, 1908, Acts of Parliament, 1908 (India).

3. as provided under a specific statute (such as the Commercial Courts Act, 2015,[4] the Consumer Protection Act, 2019[5], or the Companies Act, 2013).[6]

Mediation services are provided by private ADR centers or mediation centers, as well as and centers set up by courts or tribunals (known as court-annexed mediation centers). The Mediation Bill 2021 aims to encourage Mediation, particularly institutional Mediation, and to establish a framework for enforcing mediated settlement agreements.[7] The Bill has been forwarded for discussion to the Standing Committee on Personnel, Public Grievances, Law, and Justice. The Bill seeks to promote, encourage, and facilitate the use of Mediation, particularly institutional Mediation, to resolve commercial and other conflicts. The bill contains several commendable provisions, including the recognition of a mediated settlement agreement under the Indian Civil Procedure Code 1908 ("CPC")[8], provisions for the prompt conclusion of mediation proceedings, community mediation, and the establishment of a Mediation Council of India to institutionalize Mediation. Despite the preceding, some of Bill's crucial clauses have large gaps, making it a work in progress. This article aims to analyze those provisions critically and suggests suitable amendments to the Bill to make it a water-tight piece of legislation.

2. HABITUAL RESIDENCE AND PLACE OF BUSINESS

The Mediation Bill will be applicable to mediation proceedings held in India where (i) all or both parties have their "place of business" in India; (ii) the mediation agreement specifies that any disputes shall be resolved in accordance with the provisions of this Act; or (iii) there is international mediation. To clarify and prevent ambiguity, the phrases "habitual habitation" and "place of business" used in clause 2 must be defined. It is advised that the phrases "habitual residence" and "place of business" be either properly defined in the Bill or substituted by other relevant terminology because the absence of precise definitions frequently results in ambiguity and allows for alternative interpretations. Clause 2(2) states that, unless the matter is a commercial dispute, the provisions of Clause 2(1) shall not apply where one of the parties to the dispute is the Central Government or a State Government, or agencies, public bodies, corporations, or local bodies, including entities controlled or owned by such Government. In other words, issues involving the Central and State

4 The Commercial Courts Act, 2015, Acts of Parliament, 2015 (India).
5 The Consumer Protection Act, 2019, Acts of Parliament, 2019 (India).
6 The Companies Act, 2013, Acts of Parliament, 2013 (India).
7 https://prsindia.org/billtrack/the-mediation-bill-2021.
8 *Supra Note 4.*

Governments and the organizations they manage or own have been kept out of Bill's ambit. The proviso to Clause 2(2) allows the Central Government or a State Government to notify any dispute that it determines is appropriate for that Government to resolve through Mediation under this Act, including disputes in which that Government or any of its agencies, public bodies, corporations, or local bodies, including entities they control or own, is a party. Since the government is the biggest litigant in the nation, the Bill will be useless if it excludes non-commercial disputes involving the government from its purview.[9]

3. THE BILL HAS AN UNWARRANTED JUXTAPOSITION OF MEDIATION AND CONCILIATION[10].

The definition of Mediation in Section 4 of the Bill includes conciliation within its scope.[11] This is troubling for two reasons. To begin, conciliation and Mediation are two distinct legal ideas. The conciliator is significantly more proactive in conciliation and has the authority to offer settlement terms (See Section 67(4) of the Indian Arbitration and Conciliation Act 1996 ("Arbitration Act").[12] On the contrary, the Bill does not provide such powers for a mediator. Section 18[13] indicates that a mediator's role is limited to that of a facilitator. Second, section 61[14], when read with the Sixth Schedule, tries to repeal the Arbitration Act's conciliation provisions. In contrast, the Bill itself does not have separate provisions for conciliation. This would effectively abolish the concept of conciliation under Indian law, resulting in anomalous outcomes in which parties would no longer have effective recourse to conciliation under the Arbitration Act. As a result, it is proposed that conciliation be excluded from Bill's scope of Mediation because the legislation on conciliation is already codified in the Arbitration Act.

4. WHETHER MANDATING PRE-LITIGATION MEDIATION IS APPROPRIATE

Clause 6 of the Bill proposes mandatory pre-litigation Mediation, which would oblige the parties involved to first try Mediation before going to court. This clause applies to all cases except for criminal and other concerns. Mediation is a voluntary method of resolving disputes. Mediation, as opposed to litigation or

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9 *Supra Note 8.*

10 A Critical Analysis of the Indian Mediation Bill 2021. https://mediationblog.kluwerarbitration.com/2022/11/28/a-critical-analysis-of-the-indian-mediation-bill-2021/.

11 *Supra Note 8.*

12 The Indian Arbitration and Conciliation Act 1996, § 67(4), Acts of Parliament, 1996 (India).

13 The Mediation Bill, 2021, § 18.

14 The Mediation Bill, 2021, § 61.

arbitration, which require adjudication, includes resolution with the parties' permission. The concern is whether it is appropriate to mandate participation in a largely voluntary procedure. One can also argue that the Bill requires parties to participate in the process and not to reach an agreement. After two sessions, parties may withdraw from the mediation process. It should be noted that under the 1908 Code of Civil Procedure, courts can submit conflicting parties to Mediation without their consent. There are differing perspectives on the potential advantages and disadvantages of mandatory Mediation.

Pre-litigation Mediation is required for both parties before filing any suit or proceeding in court, regardless of whether they have a mediation agreement. Parties who fail to attend pre-litigation Mediation without a legitimate excuse may face financial penalties. However, according to Article 21 of the Constitution, access to justice is a constitutional right that cannot be hampered or limited.[15] Mediation should be entirely voluntary; otherwise, it would amount to a denial of justice.

In most circumstances, an ordinary citizen becomes trapped in years of court procedures, thereby denying him timely justice, when looking at the pendency of litigation in practically all justice delivery systems around the world, mandatory mediation seems a good way to resolve the issue. Supreme Court ruled in the landmark case of Hussainara Khatoon that the right to a speedy trial is an inherent part of the right to life protected by Article 21 of the Constitution. This needs Mediation, which is a faster method of delivering justice. It is quite an expeditious process as it requires less time for a trial and takes place in a relatively earlier stage of the dispute. Therefore, mandatory Mediation can lead to an amicable settlement between the parties, avoids arduous litigation battles, and helps reduce the court's burden by enabling out-of-court settlements.

Mandatory Mediation, on the other hand, infringes on their right to choose their preferred manner of dispute resolution and autonomy. Mandating participation in Mediation is contradictory to its voluntary character. It may not result in increased mediation use because hesitant parties may attend the initial mediation sessions as a formality before withdrawing from the process. This can delay the resolution of the problem and result in extra costs. The Bill stipulates that parties must attend at least two mediation sessions; else, fines may be imposed.

Mandating pre-litigation Mediation would also necessitate the availability of sufficient skilled mediators. According to NITI Aayog (2021), a framework for

[15] https://www.livelaw.in/access-justice-fundamental-right-guaranteed-article-14-21-constitution-sc-constitution-bench/.

mandated pre-litigation Mediation in India must be established with the number of mediators accessible and the ecosystem's ability to provide many mediators in mind.[16] It suggested implementing mandatory pre-litigation Mediation in stages, initially for specific types of conflicts and later for a broader variety of problems. It was found that as the classes of such disputes expanded, so should the capacity of mediators and ADR centers. Lawyers widely criticized Mandatory Mediation for being non-consensual, which contradicts the principle of Mediation. Lawyers' unhappiness may also stem from the fact that Mediation will result in fewer cases being filed.

5. THE PRECARIOUS GROUND UPON WHICH INTERIM RELIEF

The phrase "extraordinary circumstances" in Section 8(1) of the Bill, which limits when parties can seek courts for urgent interim relief, is unclear and subject to subjective interpretation. It also runs the risk of courts adopting arbitrary and inconsistent rules to deny temporary relief in an apparent effort to uphold the integrity of the mediation procedure. Therefore, t*he phrase "special circumstances exist*" should either be omitted or its contours should be laid out in the Bill by way of an Explanation, indicative but not exhaustive, in order to balance the interests of the parties and the interest of the Bill with regard to Mediation. Additionally, it will simplify the way in which this area of law is decided.

6. LIMITING PARTY AUTONOMY IN MEDIATORS SELECTION

Section 10(1) of the Bill is currently in direct conflict with the fundamental value of party autonomy. Parties should be unrestricted by any criteria set forth by the Mediation Council of India when engaging in a collaborative ADR procedure like Mediation. Instead, they should be free to select any mediator of a foreign country they see fit. Notably, in 2019, the Arbitration Act was amended to include a similar law defining qualifications for arbitrators. The clause received much criticism for being overly restrictive, and as a result it was eventually removed in 2021. Thus, comparable thought should be given to the proviso to Section 10(1)[17] of the Bill.

7. QUESTION OF JURISDICTION

In addition to the aforementioned, the Bill is vague in other places. The Bill's Section 15[18] links a mediation session's jurisdiction to the court's jurisdiction. In cases where the court has jurisdiction to hear the dispute, Mediation is therefore required. This is not required. In an ADR system, parties can select the mediation

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16 https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf.
17 The Mediation Bill, 2021, § 10 (1).
18 The Mediation Bill, 2021, § 15.

location and the court's jurisdiction, provided that their choice is consistent with the CPC and applicable laws. The Bill also does not address the repercussions of a mediated settlement agreement that is not registered or stamped.

8. TIMELY DISPUTE REDRESSAL

According to Section 20[19] of the Draft Bill, Mediation under this Act must be completed within 90 days of the Mediation's commencement date. The parties' consent could extend the time limit to ninety days. Even if the deadlines' application is being questioned, it is apparent that the provision is a step in the right way and will help to avoid delays in the mediation process. The mediation process's resolution, in the form of a Mediation Settlement Agreement (MSA), will be legally binding. It can be recorded with the State/District/Taluk legal authorities within 90 days to guarantee that the settlement is validated. The bill creates the Mediation Council of India and includes provisions for community mediation. The confidentiality of mediation discussions and information is crucial to the credibility and effectiveness of the process. Recognizing another important principle of Mediation, confidentiality, Section 22[20] of the Draft Bill states that the mediator, parties, and mediation participants must keep all important aspects of the mediation process confidential, including acknowledgments, opinions, suggestions, promises, proposals, apologies, and admissions made during the Mediation. It further says that all mediation procedures must be kept private, with the exception of the mediated settlement agreement. The aforementioned provision would provide the parties confidence in using Mediation as a method of conflict resolution.

9. THE BILL DOES NOT REQUIRE THE REPRESENTATION OF PRACTICING MEDIATORS ON THE COUNCIL

The Mediation Council's primary tasks include the certification, examination, and registration of mediators, as well as the establishment of professional and ethical standards for their conduct. The Council will have seven members, including two full-time members with Mediation or ADR experience, as well as ex-officio members such as the Law and Expenditure Secretaries. A professional mediator is not required to be a member of the Council under the Bill. It also needs to be clarified why the Expenditure Secretary was appointed to the Council. Statutory bodies regulating professions (such as lawyers, chartered accountants, and doctors) must include people with significant expertise or practicing relevant sectors. While full-time Council members must have knowledge or expertise with Mediation or ADR legislation and methods. The Bill, for example, would allow

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19 *Ibid.*

20 The Mediation Bill, 2021, § 22.

an arbitrator to be appointed a full-time member of the Council. An arbitrator may be someone other than the appropriate person to prescribe norms of professional conduct for mediators. It should be noted that the law governing arbitration in India was revised in 2019 to permit the establishment of the Arbitration Council of India, whose tasks include rating arbitral institutions and accrediting arbitrators. This clause has yet to take effect. According to the 2019 modification, the Arbitration Council must have a full-time member who is a prominent arbitration practitioner with extensive expertise and experience in institutional arbitration.

10. REQUIRING CENTRAL GOVERNMENT PERMISSION BEFORE DRAFTING REGULATIONS IS INAPPROPRIATE.

The Council will establish its principal functions under the Bill by establishing regulations. Before issuing such regulations, it must obtain approval from the central government. Regulations may

1. establish professional standards for mediators,
2. requirements for registering mediators, recognizing mediation institutes and mediation service providers, and
3. grading mediation service providers.

The question is whether it is proper for the Council to demand central government permission before issuing regulations. First, the Council may only play a ceremonial role if the central government permits it to carry out its fundamental functions. Second, mediations under the Bill may include the central government (or agencies, corporations, and public/local organizations owned or controlled by it). It should be noted that the National Medical Commission (which oversees medical education and practice) and the Bar Council of India do not require prior permission before drafting rules and regulations (except when prescribing the conditions for non-citizens to practice as advocates).

11. NO PROVISION FOR ENFORCING CERTAIN INTERNATIONALLY MEDIATED SETTLEMENTS

One of the key concerns with the Bill is its international enforceability and conformity to international mediation conventions. On December 20, 2018, the United Nations General Assembly ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation, popular as the Singapore Convention on Mediation.[21] The Convention establishes a consistent

[21] https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.

and efficient structure for executing international settlement agreements reached through Mediation and allowing parties to activate such agreements.

The Bill pertains to international mediation of business disputes undertaken in India if at least one party is a foreign party. However, there may be cases where an Indian party conducts the Mediation outside India. In such circumstances, the issue of enforcing settlement agreements in India emerges. The Bill states that mediated settlement agreements shall be enforceable in the same way as the court's judgment or decree. Furthermore, the Bill considers international Mediation to be domestic when it is conducted in India with the settlement recognized as a judgment or decree of a court. The Singapore Convention does not apply to settlements that already have the status of judgments or decrees. As a result, conducting cross-border Mediation in India will exclude the tremendous benefits of worldwide enforceability. It is worth noting that the Singapore Convention on Mediation establishes a framework for the cross-border enforcement of settlement agreements reached through international Mediation. India became a signatory to this Convention on August 7, 2019, but has yet to ratify it. The bill is a commendable step toward implementing the Singapore Convention. However, several areas are only partially consistent with the Convention. The settlement agreement reached through Mediation will be final and binding only if ratified by a court, according to Clause 28(1) of the Bill, whereas Article 1(3)(a)(ii) of the Singapore Convention states that if courts interfere in reaching a settlement, the Convention will not apply to settlements reached through Mediation. As a result, Clause 28 of the Bill and Article 1 of the Singapore Convention need to be revised. This could jeopardize the international enforceability of the mediation settlements reached in India. This will discourage India from taking advantage of the global benefits of international enforceability of mediation settlements. As a result, the government must address this issue as well.

12. GROUNDS FOR CHALLENGING THE MEDIATED SETTLEMENT AGREEMENT

Section 29[22] of the bill, allows parties to contest a mediated settlement within three months of receiving the settlement agreement. The clause goes against the conventional rule that the statute of limitations should start from when the fraud was discovered, not when the contract was signed. Therefore, there is a need to address the issues raised by the provision's restriction term. For the advantage of the parties to the dispute, the Bill includes some grounds for challenging the mediated settlement agreement in emergency situations. The grounds for

[22] The Mediation Bill, 2021, § 29.

challenging a domestic mediated settlement agreement are fraud, corruption, extreme impropriety, or impersonation. In the case of an internationally mediated settlement agreement, the grounds for challenge are as follows: the subject matter of the disputes is not capable of resolution through Mediation under Indian law, the settlement agreement was induced or effected through fraud or corruption, or it is contrary to Indian public policy. Such grounds were necessary because they would provide sufficient recourse to the parties if the agreement were not reached on a free and fair basis.

13. DISPOSITIONS CONCERNING COMMUNITY MEDIATION

Community mediation has a long history in India and plays an important role in resolving disputes that affect or have the potential to affect the peace, harmony, and tranquility of members of a certain community. The Draft Bill, Clause 44, specifies the types of disputes for which community mediation may be used, as well as the types of people who may be included on the mediation panel by the concerned authorities, such as people of standing and integrity who are respected in the community, representatives of area/resident welfare associations, and so on. Section 48 of the Bill further specifies the method for community mediation.

14. ACKNOWLEDGMENT OF ONLINE MEDIATION

The Bill has given due attention to the online mediation system established in Chapter 6 of the Bill. By recognizing Mediation, the Bill has also given the process legal recognition, and thus the parties can confidently choose a convenient manner to resolve conflicts.

15. THERE ARE FOUR REGISTRATIONS NEEDED FOR MEDIATORS CONDUCTING PRE-LITIGATION MEDIATION

In civil and commercial disputes, the Bill makes pre-litigation Mediation mandatory. Unless the parties agree otherwise, pre-litigation mediators must meet four conditions. They must be registered with the Mediation Council of India and endorsed by a court-accredited mediation center, a recognized mediation service provider, ***and*** a Legal Services Authority (National, State, or District). They must be registered/empaneled in each of the four locations. It is unclear why more than meeting these requirements is needed for such mediators. A mediator registered with the Council but not accredited by a court-annexed mediation center or a recognized mediation service provider, for example, will be ineligible to undertake pre-litigation Mediation.

16. OTHER AREAS THAT REQUIRE EXAMINATION

In addition to the aforementioned, the Bill is vague in other places. The Bill's Section 15[23] links a mediation session's jurisdiction to the court's jurisdiction. In cases where the court has jurisdiction to hear the dispute, Mediation is therefore required. In an ADR system, parties can select the mediation location and the court's jurisdiction, provided that their choice is consistent with the CPC and applicable laws. The Bill also does not address the repercussions of a mediated settlement agreement that is not registered or stamped.

17. DRAWING PARALLELS- INDIA AND ITALY[24]

India is not the first country to go for mandatory Mediation; it has been used in several countries, one of them being Italy, it is time to analyze objectively the verified results of different approaches in order to evaluate what worked and what failed. The Italian statistics from the last four years show starkly different outcomes from the three types of Mediation. The differing outcomes occur within the same jurisdiction—with the same citizens, lawyers, and judges—and demonstrate that the frequency of mediation is determined by the most effective legislative Mediation in place, not the "culture" or quality of mediators. According to statistics, "Recourse by Voluntary Agreement during a Required Initial Mediation Session" is the only effective model that may generate enough mediation for an entire jurisdiction in two or three years.[25] This works well under five key conditions: (1) the relevant parties to the dispute should be present in person; otherwise, there is little chance of moving forward with the full mediation process; (2) the session should be run by an experienced and trained mediator; (3) the session should be held within a short period of time following the filing of the request; and the fee should be reasonable so as not to be seen as a barrier to access. (4) When the parties are present, they can easily "opt out" without consequences or continue the procedure freely; and (5) Substantial punishments should be imposed in the instance of an absent party during the ensuing legal hearing.

18. WAY AHEAD

In conclusion, the Mediation Bill introduced in the Rajya Sabha on December 10, 2021, marks a significant step towards promoting and institutionalizing mediation as an effective alternative dispute resolution mechanism in India. While the bill

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23 The Mediation Bill, 2021, § 15.

24 D'urso, L. (2018, April 4) *Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation.* The Newsletter of the International Institute for Conflict Prevention & Resolution.

25 Deepika Kinhal & Apoorva, Mandatory Mediation in India - Resolving to Resolve Indian Public Policy Review, 2(2): 49-69, 2020.

brings commendable provisions such as the recognition of mediated settlement agreements, the establishment of the Mediation Council of India, and the inclusion of community mediation, there are crucial areas that require careful consideration and amendments. The Bill's attempt to mandate pre-litigation mediation raises questions about the appropriateness of compelling parties to engage in a largely voluntary process. Balancing the right to access justice and the voluntary nature of mediation is essential to avoid potential infringements on individual autonomy. Additionally, the Bill's handling of international mediation settlements, especially in relation to the Singapore Convention on Mediation, needs further alignment to ensure global enforceability. Several provisions, including those related to jurisdiction, interim relief, and the selection of mediators, necessitate clearer definitions and refined language to prevent ambiguity and ensure the smooth functioning of the mediation process. The inclusion of practicing mediators on the Mediation Council is crucial for establishing professional and ethical standards within the field.

While the Bill acknowledges online mediation and community mediation, it should also address the need for sufficient skilled mediators and streamline the registration process for pre-litigation mediators. Furthermore, the requirement for central government permission before drafting regulations raises concerns about the Council's autonomy.

In moving forward, it is imperative to strike a balance between promoting mediation as an efficient dispute resolution mechanism and respecting the rights and preferences of individuals involved. The completion of the Mediation Bill, with thoughtful revisions, will not only bolster India's position in the realm of alternative dispute resolution but also contribute to a more efficient and accessible justice system for its citizens.