Page 65 - 75 **DOI:** *https://doij.org/10.10000/IJLSI.111581*

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 5 | Issue 2

2023

The Indian Mediation Bill, 2021: Opportunities and Obstacles

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ABSTRACT

Mediation as a process is the dialogue carried out by parties to a dispute to reach an amicable settlement to the same with assistance of a neutral third party. Along with arbitration and reconciliation, mediation has found an increasing importance in delivering solution in disputes in an effective and fast manner in comparison with the traditional adjudication process.

The need for Alternate dispute resolving systems in India for relieving the Indian judicial system of unending litigation has been pondered a lot, as the quasi-judicial system formed to achieve the objective is overwhelmed. The mediation bill, 2021 thus can be considered to be another effort from the part of the legislature to deliver justice by institutionalizing the mediation process. A step in the right direction the bill aims to establish pre-mandatory mediation, mediation councils, community mediation, online mediation, mediation fund etc.

Although an inspirational initiative, the said bill had some issues found on further analysis which was visibly marked by the parliamentary committee which did recommend various changes in the report it had submitted. Including these, a plethora of issues can be found in the bill that needs to be addressed such as the legality and reasoning of the pre-mandatory litigation, absence of provision for enforcing internationally mediated agreements, the constitution and independence of the mediation council among many.

As there are many models of mediation based on different criteria and different frame works of mediation that has been implemented in many western nations successfully, our nation can look up to them for some light that can be shed upon on our own problems. The success stories of mediation includes the Italian one where there is a unitary and mandatory implementation of mediation and that of the Australian one where there is federal and liberal implementation of mediation, both reaping positive effects.

The mediation bill, 2021 can undoubtedly become a game changer if it could be chiseled out more sharply by addressing the issues it is burdened by.

Keywords: *Mediation, Mediation bill, 2021, International models of mediation*

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I. INTRODUCTION

Mediation can be defined as a voluntary conflict-resolution process where, an impartial third party helps the disputing parties to arrive at an agreement through certain procedures, techniques and skills. it can be referred as a 'party-oriented' way by which the interest of both the parties are safe-guarded unlike an adversarial system like adjudication where one party is forced to share the perspective of the other.

Although there has been a haze over the correct definition of the "mediation", the basic features of the process should necessarily include an impartial mediator for facilitating a flexible, confidential and speedy negotiation for reaching a consensual resolution. Edward de bono in "Conflicts: Better way to resolve them" said that "In any dispute the two opposing parties are logically incapable of designing a way out, there is fundamental need for a third party[1].

Mediation is defined by the Singapore Convention On Mediation as "a process, irrespective of the expression used on the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with assistance of a third person lacking the authority to impose a solution upon the parties to dispute[2]. Mediation is found to be helpful in dealing with disputes arising from commercial and civil disputes, environmental and labor disputes, community, neighbour-hood disputes and international issues – both public and private. Mediation models may change on basis of different criteria such as level of intervention, voluntariness or on the number of mediators used. Other models would include interest based and rights based models as proposed by Pepperdine institute of ADR[3].

II. THE INDIAN CONTEXT

The Indian judiciary system has struggled to cope up with an increasing amount of litigation, a difficult problem which even after several charades of solutions is still prevailing. Many tribunals of administrative nature and quasi-judicial nature such as Lokpal and Lok-adalats have been introduced dealing with both specific and general subjects to relieve the courts of unwanted litigation and to provide speedy justice. Recognizing the importance of the alternate dispute resolution systems, the Arbitration and conciliation Act was passed in the year 1996 based on the model law on International Arbitration and Conciliation by the United Nations, establishing arbitration tribunal and councils.

The methods had an effect on the increasing litigation, yet it was found to be inadequate by itself to over- power the growing menace.

According to the National judicial data grid, about 5. 9 million cases are now handled by the

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judiciary, out of which 4. 2 million are civil cases and 83. 36% of the said cases are more than a year old[4]. The mediation here could play a good role in reducing this burden to some extent by providing speedy solutions.

In India, there is a great-felt absence of institutional mediation; although there are statutes referring to mediation practices such as the Code of civil procedure, 1908, the Companies Act 2013, the Commercial courts act, 2015, Consumer Protection Act, 2019 and the Arbitration and Conciliation Act, 1996. Until the mediation bill, 2021, there was no specific legislation for governing the domestic as well as the International mediation. Currently there are 464 ADR centers along with 570 mediation centre with judicial and provide mediation settling about 52968 cases from period of April 2021 to March 2022[5.] .

III. THE MEDIATION BILL, 2021

The bill was first of its kind in terms of its objective to institutionalize mediation. The bill was introduced on December 20, 2021 and was left subject to a parliamentary standing committee on personal, public grievance, law and justice. The Bill in general provides, definitions, detailed description of the process of mediations, explains the enforceability of the mediated argument, and establishes a mediation council, thus institutionalizing the same. Its objectives at the fore front are to promote and facilitate the practice of mediation to reduce the burden on courts.

Mediation is defined in the chapter 3, section 4 of the bill as process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation on an expression of similar import, whereby party on parties request a third person referred to as a mediation on mediation service provides to arrest them in their attempt to reach an amicable settlement of the disputes[6].

The term mediator is defined as person who is appointed to be the mediator to undertake mediation including a person registered as mediator with the council.

The main features of the bill includes:

- Mandatory pre-litigation mediation

Section 6(1) of the Chapter III of the bill makes its mandatory for the parties in a dispute relating to civil or commercial matters to take steps to settle dispute by mediation before approaching the court. This provides for an absence of discretion from the parties to dispute, it is not mandatory to reach a settlement, and a court or tribunal may at any stage refer the parties to mediation if they request for the same.

- Mediation

Chapter IV Section 10 to 14 if the bill deals with mediation. The parties to dispute under section 10(2) are free to appoint mediator of their choice and if they wouldn't, they shall apply to the mediation service provider who shall appoint one under section 11. The said mediator appointed by the service provider shall disclose the conflict of intent or prior conduct and can be terminated by the parties or the Mediator service provider.

- Mediation proceeding

A mediation proceeding must be completed within 180 days which could be extended by the parties under section 21 under chapter 5 of the bill and by section 20 a party may withdraw from mediation at any time after first two mediation sessions. It also suggest the information that the mediator needs to keep confidential and describes about the mediation settlement agreement. The bill also refer to the duties of the mediator to assist and attempt to facilitate the mediation process.

- Enforcement

Chapter VI section 28 of the bill provides that the mediator settlement agreement reached by the parties shall be final and the binding on the parties. Under section 29 of the Bill, the mediator settlement agreement can be challenged on grounds of fraud conception and in and when the moderator has been done on disputes under section 7.

- Online mediation

The Bill provides for on line mediation demanding procedural integrity and confidentiality for the same under section 32 chapter VII.

- Application

The bill's scope of application is mentioned in section 2, which restricts the applicability of the said bill to mediation conducted in India involving, only domestic parties or at least one foreign party and relating to commercial dispute, if the mediation agreement states that the mediation will be as per the bill and commercial, notified disputes where the central or state government is a party.

- Mediation Council of India

By section 33, the central government shall establish a mediation council. It would consists of a chairperson, two full time members and a part time member appointed by the central government having professional experience or teaching experience in the field of A D R and

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commerce and industry. Further secretary to the government of India or his representative from department of legal affairs or secretary to Government of India or his representative from department of Expenditure shall constitute the council.

The council shall have functions mentioned in section 40 of the bill including promoting domestic and inter-national mediation, laying guidelines for the certification and assessment of mediators etc.

- Disputes not fit for mediation.

The bill provide that some disputes may not fit for mediation under section 7. These disputes are mentioned in first schedule including claims against minor or persons of unsounded mind or criminal prosecution or which affect the right of third parties.

- Community mediation

The bill provide for the community mediation to be held for any dispute, likely to affect peace, harmony and tranquility among residents of a community. It also provides for the appointment of permanent panel of mediation notified by the authority or District Magistrate or Sub Divisional Magistrate selected from the community itself.

- Mediation Fund

A mediation fund by section 46 is to be collected for the purpose of promotion, encouragement, facilitation of mediation which shall be found from money provided by central government, fee and other charges received by the mediator service provider etc.

IV. PARLIAMENTARY STANDING COMMITTEE REPORT

The parliamentary standing committee on Personal, Grievances, Law and Justice had presented its one hundred and seventeenth report(117^{th} repot) on mediation bill, 2021 to the chairman of the Rajyasabha on 13^{th} july 2022[7]. The committee had held ten meetings spanning more than 17 hours in all and considered views of more than 125 witnesses while drafting the report.

The issues found by the committee were:

- Government as litigant

The committee found that non –commercial disputes with government as one party are outside the preview of the bill unless specifically notified. It recommendes to include government related disputes under bill by duly modifying the words of closure 2(2).

- International mediation

The committee recommended that, although India had not ratified UNCISARM, the present

definition of international definition be altered to incorporate the provisions of the Singapore convention.

- Pre-litigation mediation, court- annexed mediation.

The committee recommend that the clause 6-9 be re arranged to have a better clarity on section relating to pre-litigated mediation and court –annexed mediation observing that pre-litigation mediation being made applicable to matter pending before the tribunal -, which the committee finds to be absurd.

The committee recommended for revisiting the provision which makes pre-litigation mediation mandatory and feels it should be introduced in a sequential manner than with immediate effect on the observation that it may actually result in delay of cases and may be taken advantages of by an adversary.

- Mediation proceeding

The committee recommends the time limit for completion of mediation process be reduced from 180 days to 90 days and an extended period of 180 days. This is on the view that reduced time limit would further serve the object of the bill.

- Mediation of the bill

The committee recommends the clause 22 to be divided in to three clauses.

First one deals with details of mediator settlement agreement procedure.

The second clause deals with submission of non-settlement report.

The third clause deals with registration of MSA.

The committee on viewing the importance of online mediation in the pandemic and the speedy cost-effective justice it provides recommends for a detailed provisions for online mediation to be included in the bill than a single clause.

- Community mediation

The committee recommends the term mediation used in the context of community mediation be replaced by the term community mediation on the ground that the mediators are not qualified as the mediators in a regular mediation.

The committee recommends the deletion of section 45(4) of the bill on the view making the settle agreement as non-enforceable defeats the primary object of the bill.

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V. ANALYSIS

One of the main issue that have been pointed out by the parliamentary standing committee report as well as critics of the mediation bill is the mandatory pre – litigation mediation.

Mediation as such is often regarded as a voluntary path where the option to choose is always available to parties, yet mandatory mediation is not a new concept to be concerned about.

Mandatory pre-litigation mediation like a coin has two sides;

Advantages

- Mandatory pre-litigation mediation helps to reduce the pendency of cases before the court, thus relieving the judiciary of the burden. In the Indian context it may be the most beneficial thing arising out of the said system.
- Another major advantage of mandatory pre-litigation is the way it disposes myths relating to mediation. When the law makes mediation mandatory, the burden of suggesting mediation is removed and parties at both sides does not have to appear weak by suggesting mediation.
- Another myth that puts a shadow on the remedy or justice provided by mediation is removed by the legitimacy provided by the law.
- It also reduces the guilt of the lawyer involved, as the lawyer does not have to strictly abide by the client's attitude of "make them pay".
- Lastly the rise of the mediation as a distinct profession will make additional employment opportunities create demand for mediation institutions[8]

Disadvantages

- Voluntariness is a major feature of mediation and making it mandatory seems to defeat its objective in the first place. Although an argument here is that the bill only demands mandatory pre-litigation mediation, it allows the parties to opt out of the mediation after the completion of two sessions and it is not mandatory to reach a mediation settlement agreement
- Another argument against the mandatory mediation is that forcing parties to attempt mediation may result in parties looking down upon mediation and begin viewing it as irrelevant gateway to litigation. This may result in the parties sabotaging the possibility of agreement to reach the stage of litigation.

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- Another opposition raised by the critics of the pre-litigation mediation is that the hasty implementation of the system would actually cause chaos due to the lack of a capable mediation machinery and mediators with required qualifications with experience.
- Another argument is that making pre-litigation mediation mandatory will result in the violation of Article 21 which covers the access to justice as a right.
- Mandatory mediation might also lead to disclosure of sensitive information by one party which may be used against the part during litigation after the mediation.

ABSENCE OF PROVISIONS FOR ENFORCING INTERNATIONAL MEDIATED AGREEMENTS

The bill provides that it does not cover mediation settlement agreement resulting from international mediation constituted outside India. On the objection raised by the parliamentary standing committee on the issue it has been notified that the Indian government has not ratified the Singapore convention in mediation although the nation is the party to the same. This absence may result in degeneracy of the institution of mediation in India as a whole as there is a gap formed between the domestic and international law in mediation. Another thing to be noted is that many international institutions dealing with the alternate dispute resolution system especially relating to commerce and other disputes are located outside the territory of India. The binding nature of the decisions of these institutions is internationally acknowledged, and its non-binding nature in the country could create a scenario which could undermine the integrity of the mediation system in the country. Hence their decision should be made binding by amending the provisions relating to the enforceability of the mediated agreements empowering the domestic mediation law with the international law.

Mediation council

There was also some criticism regarding the mediation council. The first issue was about the constitution of the of the mediation council. The mediation council consists of members with professional experience and teaching experience on the field of mediation, secretary or his representative from the department of legal affairs and expenditure and member from a body of commerce. Here one could easily notice the absence of practicing professional mediator in the council. The said absence may result in the council lagging behind on up to date advice as a practicing mediator is more aware of the new hurdles that may arise in the field. For example council such as Indian medical association have practicing professionals increasing their efficiency and their ability to tackle new problems

The second one is regarding the independence of the council. It has to obtain permission from the central government to enact a new regulation. These regulations include professional

standard for mediators, conditions for registering mediators, mediation institutes and mediation service providers. This may result in the council playing a nominal role. This will also lead to absurdity when the central government becomes a part to the dispute.

It is more appreciable if the council is independent in issuing rules and regulations like the Bar council of India or the National medical commission as the council is expected to play a good role in facilitating the mediation which in turn is expected to facilitate justice delivery to large section of the aggrieved. This may be the main issue in the bill along with other issues

VI. INTER-NATIONAL MEDIATION MODELS

While discussing the applicability of pre-litigation mediation in India, we may consider scenarios of nations which have administered mandatory mediation.

- Italian Model

Italy is one of the few nations where mandatory mediation has been done successfully. Italy during the last two decades have experimented with different models for mediation. This is due to opposition shown against the mandatory mediation from lawyers and judiciary in the country.

By decree no 28/2010, Italy had made mediations mandatory for commercial and civil disputes. In 2012 the court held the decision to be unconstitutional resulting in a drastic decrease in the number of mediations. To cope with fall of mediations, the state then brought a new amendment, decreasing the number of subjects where mandatory mediation is required and making it compulsory for lawyers to participate in mediation. In Italy as of now only 8% of the commercial and civil cases are to be mandatorily mediated, yet the success rate of the mediations stood at 44% and those of 8. 19% voluntarily mediated cases, the success rate stood at 60%. This shows that an easy opt out model for mandatory mediation helps in increasing the number if mediation settlement agreement.

This is a model that the Indian system can be look up to as an inspiration.

- Australian Model

Australia is a nation where federal system has more say than in Italy. In Australia's complex and highly fragmented civil justice system, the focus is not just on mandatory mediation, but also on other forms of dispute resolution as well. Yet Australian civil courts and the judiciary system are more moving onto mandatory mediation, with some federal laws and several state laws requiring mandatory mediation. Unlike in Italy, here there was no opposition to the idea of mandatory mediation and lawyer fraternity along with other involved personnel embraced

the notion in an effective manner. Italy is also different on the fact that it is more of a unitary state where a uniform law is more easy to implement as this, on the other hand in federal nation like Australia where division of legislative powers make it hard to implement it in a straight forward manner. Even after the said hurdles faced by the country, it boasts of a success full model of mandatory mediation.

Australian research studies on the said matter shows that the settlement rates and satisfaction rates of parties of both the voluntary and mandatory mediations are similar. This shows that a number of factors unique to a country has to be considered while enacting mandatory mediation.

The thing that has to be learnt from the Australian model is that in country a like India having a wide variety of unique factors including its quasi-federal nature, the law makers have to think very cautiously to accommodate the country's climate to the law. it would be certainly absurd to blindly follow a model adopted by another nation, rather it would be more logical to chisel out a model suited for the nation.

- United States of America

Although notorious for the intense and unending litigation process the American judicial system is one of the systems where there is an advanced alternate dispute resolution scheme outside the court. There are currently a few statutes demanding mandatory mediation in the country and due to a lack of response to the voluntary mediation program the state is looking forward to make more statutes under the purview of the mandatory mediation program.

- United Kingdom

In England and Wales mandatory mediation is demanded in certain cases. For example in Children's Act, 1989 section 8 an application made to the court for residence or contact must be referred for conciliation or mediation. These mandation can only be overcome by leave granted by a court.

Currently in India under the Commercial Courts Act, 2015 section 12 (A) makes it mandatory for disputing parties to attempt mediation before instituting a court.

By analyzing both the positive and negative aspects of the mandatory mediations and visiting the several models by which mandatory mediation is implemented in various nations we could easily reach the conclusion that mandatory pre-litigation mediation will do good in the long run, but it should not be implemented in a jiffy or in the way mentioned in the bill. Rather it should be implemented by keeping in mind several factors which is only possible by amending

the current provision relating to pre-litigation mediation in the bill. For example the mandatory mediation should only deal with certain or few issues like in the United kingdom in the first instance than the wide spectrum as it is allotted as of now. Gradually the mandatory nature can be extended to other matters dealt with mediation on considering the pendency of cases on such a subject and on logical basis.

From analyzing these issues with the Mediation bill, 2021, one can observe the Indian legislation could drum its chest to proclaim that the said bill would change the judicial system in the country. The intiative taken by the state to enact such a statute is, sailing the ship to the correct sea, yet it must be careful not to find itself stranded in doldrums by taking the current criticisms lightly. The changes recommended by the critics and the parliamentary standing committee must be taken with a sip of water and be implemented. Although with good intention a law enacted rashly in a complex nation like ours could produce ill-effects, The Mediation bill, 2021 as a ship is strong enough to withstand the storm and the waves if anchored cautiously.

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