

UNRAVELLING THE MEDIATION MAZE: A CRITICAL EXAMINATION OF THE MEDIATION BILL, 2021 AND ITS JOURNEY TOWARDS JUSTICE

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Introduction

India, a country with a population of more than 1.4 billion,¹ has been witnessing an unprecedented rise in legal disputes in recent years due to the rising awareness amongst the masses regarding their legal rights. With the country's rapidly growing population comes a corresponding increase in disputes. As per the latest data released by the National Judicial Data Grid, more than 4.25 crore civil and criminal cases are pending in Indian courts. As of August 2022, around 70,000 cases are pending in the Supreme Court, and the corresponding figure for all the High Courts combined is about 6 million.

The government has time and again taken various measures to bring down these figures by introducing and promoting various modes of Alternative Dispute Resolution [“ADR”]. While arbitration has immensely evolved the Indian dispute resolution jurisprudence over the years, the new centre of focus is rapidly shifting towards mediation. The Indian legislature has, for quite a long time, been mulling over introducing legislation to regulate mediation as a form of ADR mechanism.

On 20 December 2021, the Mediation Bill 2021 [“**2021 Bill**”] was introduced in Rajya Sabha. After due parliamentary deliberations and standing committee reports, the Bill received approval and was passed by the Rajya Sabha on 1 August 2023. This article will analyse the chief provisions of the Bill and also deliberate on whether it is a progressive step or whether a need for reconsideration exists. It would subsequently delve into analysing whether the Mediation Bill 2023 [“**2023 Bill**”]

¹ Matthew A. Winkler, 'India's Surging Population Is an Economic Virtue' (*Bloomberg*, 19 January 2023) <<https://www.bloomberg.com/opinion/articles/2023-01-19/india-s-1-4-billion-population-is-an-economic-virtue>> accessed 20 May 2023.

has been able to redress the shortcomings that exist. The article will cover the various strengths and weaknesses of the 2021 Bill and set a plan for the way ahead.

Understanding the Concept of Mediation

“An ounce of mediation is worth a pound of arbitration and a ton of litigation.” - This quote by one of the most significant mediators of present times, Joseph Grynbaum,² summarises the importance of mediation as an efficient mode of ADR. Unless it is court-driven, mediation is an informal process under which consenting parties seek to resolve the disputes between them amicably.

Under this mode of dispute resolution, a neutral third party is appointed as the mediator to facilitate and resolve issues between parties. As these are informal, the settlements that are arrived at between the parties via mediation do not remain legally binding. The exception to the non-binding nature of settlements reached in mediation exists in court-referred mediations and settlements arrived therefrom.³ The same would be duly recorded and treated as the final determination of the dispute between the parties.

The Mediation Bill brought by the Parliament is a great step ahead in formalising and institutionalising mediation. It would help promote a faster resolution of disputes with minimum costs, thereby easing the burden on the judiciary. Although the procedural formalities involved may initially look burdensome and inflexible, they can be very beneficial for dispute resolution amongst the masses in the long run.

The Mediation Bill 2021: Is It a Step forward in the Right direction?

The draft 2021 Bill introduced by the Legislature aims at organising and developing mediation as an ADR mechanism in India and regulating the various aspects relating to the process, such as mediation agreements, enforcement of the settlements, appointment, and termination of the Mediators.

² GS Bajpai, ‘Explained | The Mediation Bill, 2021’ (*The Hindu*, 3 October 2022) <<https://www.thehindu.com/news/national/explained-the-mediation-bill-2021/article65967986.ece>> accessed 20 May 2023.

³ ‘The Mediation Bill, 2021’ <<https://prsindia.org/billtrack/the-mediation-bill-2021>> (*PRS India*, 21 January 2023) accessed 21 May 2023.

In the already existing system of mediation in India, broadly, there exist three ways of starting the mediation process,⁴ namely- (1) By adding mediation as an ADR mechanism within the clauses and provisions agreed-upon of the Contract; (2) By court's exercise of the power of referring the case to mediation under Section 89 of Civil Procedure Code, 1908; and (3) By way of certain specific provisions of statutes providing for mediation.

Formulating the 2021 bill to regulate mediation is a significant step forward as it officially recognises that mediation as an ADR mechanism has attained maturity. It effectively attempts to overcome shortcomings in India's existing mediation framework. The 2021 Bill has also given official recognition to mediation as a profession. This is a worthy improvement, unlike the previous status of mediation as an ADR mechanism in the Indian legal regime when the court-annexed mediation schemes were carried out in an honorarium-based part-time model.

The 2021 Bill also provides training programs for mediators and encourages service providers to offer structured mediation facilities per the guidelines. The mandate of Pre-Litigation Mediation is another remarkable move. Under this mandate, the parties must attempt mediation before filing a civil or commercial dispute in the court or tribunals. However, the mandatory nature of the same should be converted into an optional one. Another significant step forward is that it also recognises the concept of Online Dispute Resolution, which would help mediation reach the centre stage in dispute resolution worldwide in the post-Covid era.⁵

Scope of Improvement in the Bill: Its Shortcomings and the Way Ahead

Certain provisions in the 2021 Bill are open-ended, and ambiguities exist in their interpretation. Thus, the same needs to be addressed by the drafters with utmost urgency for the 2021 Bill to succeed in its purpose. The following is a thorough analysis of such provisions and the author's suggestion to overcome the existing shortcomings in the text of the 2021 Bill.

1. Pre-litigation mediation made Mandatory

Clause 6 of the 2021 Bill makes seeking redressal through mediation mandatory before being involved in litigation. As such, the parties in dispute would have to give mediation a try before

⁴ Meera Shah and Nikita D'Lima, 'Mediation Bill, 2021: An Analysis of the Paradigm for Alternative Dispute Resolution in India' (*IJALR*, 3 December 2022) <<https://ijalr.in/volume-3/issue-1/mediation-bill-2021-an-analysis-of-the-paradigm-for-alternative-dispute-resolution-in-india-by-meera-shah-nikita-dlima/>> accessed 21 May 2023.

⁵ V. Shankar, 'Mediation Bill 2021— A Step Forward?' (*Either View*, 6 December 2022) <<https://eitherview.com/mediation-bill-2021-a-step-forward/>> accessed 21 May 2023.

seeking resolution through court.⁶ A major issue that exists in the clause mentioned above is its mandatory nature.

The compulsion to enter into mediation before approaching the court in every case violates the right to unfettered access to justice as enshrined under Article 21 of the Constitution. Mediation has been made mandatory regardless of any mediation agreement between the parties.⁷ It would be arbitrary to expect that for any dispute to reach court, it must go through the mediation process, given that thousands of cases are being filed daily. Further subjecting the same to other provisions of the 2021 Bill makes it inconsistent because if it is made mandatory, how can it be subjected to other provisions?

In addition, it is neither practical nor practicable to direct every dispute to mediation before entertaining the same in a court of law. Such a compulsion would go against the tenet of ‘Party Autonomy’, which forms the very base of the concept of mediation. The will and autonomy of the parties need to be kept at the highest pedestal in any ADR mechanism, and deliberately imposing a particular remedial mechanism would lead to more harm than good.⁸

Also, mediation on such a large scale would face various procedural and logistical issues. Providing the necessary infrastructure on a large scale would undoubtedly be impracticable. Instead, the mediation regimes would be overburdened rather than flourishing. The Madras High Court’s observation in *Shahi Exports*⁹ warrants its mention here that pre-litigation mediation cannot be mandated on the parties, and the right to approach the courts forms the fundamental right of every aggrieved person as guaranteed by the Constitution.

Indian legislators can take inspiration from the Italian adjudication model¹⁰ while formulating laws relating to mediation. Under that model, the parties to the dispute would apply to participate in an informative session with the mediator before filing a lawsuit before the court. After this session, they can either continue the mediation process or opt out. Introducing the ‘opt-out’ model in India could be a better alternative than the proposed provision in helping disputing parties better

⁶ Vasujit Dubey and Harshit Phatak, ‘The Mediation Bill Is a Step in the Right Direction’ (*The Leaflet*, 8 November 2022) <<https://theleaflet.in/the-mediation-bill-is-a-step-in-the-right-direction/>> accessed 22 May 2023.

⁷ *M.R. Krishna Murthi v. New India Assurance Co. Ltd.* & Ors. 2019 SCC Online SC 315.

⁸ Jeevan Ballav Panda and Meher Tandon, ‘Draft Mediation Bill 2021: A Critical Analysis’ (*January 2022*) 2 (3) GNLU SRDC ADR Magazine <https://www.khaitanco.com/sites/default/files/2022-01/draft-mediation-bill_0.pdf> accessed 22 May 2023.

⁹ *Shahi Exports Pvt. Ltd. v. Gold Star Line Ltd.* & Ors. 2021 SCC OnLine Mad 16514.

¹⁰ Giuseppe Conte, ‘The Italian way of Mediation’ (*Arbitration Law Review*, 2014) <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1059&context=arbitrationlawreview>> accessed 22 May 2023.

understand the process and prospects of mediation as an ADR mechanism. At the same time, it can even substantially fasten the adaptability of mediation against litigation as a mode of dispute resolution.

2. *A Professional Regulatory Body, but no member from the profession*

The Legislature has contemplated a professional regulatory body in the form of the Mediation Council of India by inserting Section 33 in the Bill. It would act as the nodal regulatory body for regulating mediation as a mode of ADR in India. The Central Government has vast powers in appointing the Chairperson of the proposed body.¹¹

Mediators, the most critical stakeholders in the Mediation regime, have been entirely left out of a definite place within the same body that would be regulating their whole profession. Further, the use of the term ‘full-time member’ indicates that the individual who would be appointed cannot be an active practitioner. The council is composed to look more like a typical government regulatory body rather than a professional regulatory body.

3. *Infringing Party Autonomy in the Selection of Mediators*

As per the Proviso to Section 10(1) of the proposed 2021 Bill, foreign mediators can be selected for mediation in India only once they have the requisite qualifications, experience, and accreditations specified in the Bill. However, it directly opposes the fundamental principle of mediation, i.e., party autonomy.

The parties to the mediation process should have complete autonomy to choose any mediator, even a foreign mediator. Any criteria should be brought up by the Mediation Council of India, a body proposed in the 2021 Bill. A similar provision seeking to prescribe qualification of arbitrators was added to the Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”] via an amendment in 2019. This inclusion, however, was heavily criticized, leading to its deletion in 2021.¹² If such a provision continues in the 2021 Bill, it too will meet a similar fate.

4. *Loosely Worded*

¹¹ Amol Verma, ‘Draft Mediation Bill, 2021: Paving the path for the future while weakening the foundation?’ (*TCCLR*, 9 February 2022) <<https://www.tcclr.com/post/draft-mediation-bill-2021-paving-the-path-for-the-future-while-weakening-the-foundation>> accessed 24 May 2023.

¹² Shubham Prakash Mishra, ‘Impact of Arbitration and Conciliation (Amendment) Act, 2021 on India’s pro-arbitration outlook’ (*Bar & Bench*, 30 March 2021) <<https://www.barandbench.com/apprentice-lawyer/impact-of-the-arbitration-and-conciliation-amendment-act-2021-on-india’s-pro-arbitration-outlook>> accessed 23 May 2023.

The 2021 Bill, in many instances, is loosely worded and has certain unwarranted exclusions. Using words such as ‘indicative’ while enlisting matters that are not suitable to be taken up for mediation poses the threat of subjectivity creeping in.¹³ The exclusions in the 2021 Bill include those disputes in which there is an allegation of fraud, forgery, impersonation, and fabrication of documents, among others.

However, such loose wording can have disastrous consequences on the success of mediation as an ADR mechanism in the Indian dispute resolution regime. The trend of throwing every kind of charge possible at the other party is already on the rise in India. The same could even involve the aforementioned allegations, which might lead to the exclusion of many cases from being subjected to mediation because of such allegations, which are excluded from the ambit of mediation under the 2021 Bill.

5. *Unwarranted Exclusions*

It is worth noting that the first Schedule of the 2021 Bill provides for keeping out disputes involving criminal prosecutions from the purview of mediation. While it is indeed a right step forward as so to not make heinous crimes like rape, murder, dacoity, etc., a subject of mediation, the Legislature needs to take notice of the fact that in some criminal offenses, the mode of mediation can be a much lucrative and practical choice for dispute resolution. The same can be illustrated by the Hon’ble Apex Court’s observation of the *K. Srinivasa Rao*¹⁴ case, where the court observed that cases under Section 498A of the Indian Penal Code [“**IPC**”], although non-compoundable, can be subjected to mediation for faster dispute resolution.

6. *The Principle of Confidentiality Diluted*

The requirement in Section 18 of the Draft 2021 Bill that the mediator shall communicate ‘the view of each party to the other to the extent agreed to by them’ could give rise to a possible conflict of interest, besides striking at the root of the confidentiality requirement of the mediation process. Further, under the proviso to Section 24(1), it has been made mandatory to disclose information when professional misconduct or malpractice has been claimed, thus diluting confidentiality as guaranteed under Section 17 of the 2021 Bill.

¹³ ‘Mediation Bill, 2021: Promotion of Mediation & Concerns’ (*Next LAS*, 2021) <<https://www.nextias.com/current-affairs/04-10-2022/mediation-bill-2021-promotion-of-mediation--concerns>> accessed 23 May 2023.

¹⁴ *K. Srinivas Rao v. D.A. Deepa* 2013 5 SCC 226.

A mere allegation of professional misconduct or malpractice against the mediator can lead to the disclosure of confidential information, thereby breaching the confidentiality guaranteed. As such, the Legislature needs to look into this issue and make changes to the 2021 Bill.

7. *Unwarrantedly Juxtaposing Mediation and Conciliation*

Conciliation has been included within the ambit of mediation, as defined under Section 4 of the proposed 2021 Bill. The same remains problematic basically for two major reasons. The first is that both these concepts are two distinct concepts of law. While under the Arbitration Act, conciliators play a far more proactive and empowered role in bringing about a settlement between the parties to the dispute. The proposed Mediation Bill nowhere matches the conferment of such powers to Mediators. Under Section 18 of the proposed 2021 Bill, the role of the mediators has been confined to just that of a facilitator and nothing more.¹⁵

Further, while Section 61 of the proposed 2021 Bill talks of doing away with conciliation under the Arbitration Act, there are no corresponding conciliation provisions under the 2023 Bill. This poses the threat of a complete dispensing away of conciliation as a concept in the Indian legal regime. Thus, conciliation should be kept out of the Mediation Bill's purview and should continue to be governed in the same way it has been governed until now under the Arbitration Act.

8. *Unwarranted Clubbing of International and Domestic Mediation*

While domestic mediation implies mediation that has been done in India, international mediation, according to Section 3(f) of the 2021 Bill, is a kind of mediation in which at least one of the parties is an individual, body corporate, association, or government of a foreign country. A bare perusal of these provisions would make it clear that the two of the above types of mediation are certainly different.

However, in direct contradiction to the above, Section 2(1) of the 2021 Bill equates them both. As such, if the parties to a dispute undertake international commercial mediation in India and the same culminates into a successful settlement agreement, then under Section 28(2), the same would gain the status of a judgment or decree of the court.¹⁶ Such an equivalence drawn via the 2021 bill

¹⁵ Rangon Choudhury, 'A Critical Analysis of the Indian Mediation Bill 2021' (*Kluwer Mediation Blog*, 28 November 2022) <<http://mediationblog.kluwerarbitration.com/2022/11/28/a-critical-analysis-of-the-indian-mediation-bill-2021/>> accessed 25 May 2023.

¹⁶ Faranaaz G Karbhari and Akriti Shikha, 'An Analysis of Draft Mediation Bill, 2021' (*HSA Legal*, 2021) <<https://hsalegal.com/wp-content/uploads/2021/12/HSA-Dispute-Resolution-Draft-Mediation-Bill-2021.pdf>> accessed 25 May 2023.

between international and domestic mediation would make the parties reluctant to undertake such mediation in India, thus resulting in a final death blow to India's hope of becoming a dispute resolution hub.

Improvements of Mediation Bill, 2023 over Mediation Bill, 2021

1. Commencement of the Mediation

Under the 2021 Bill, mediation was deemed to have been commenced upon issuance of notice by the party; the 2023 Bill lays down that if there is a mediation agreement existing, mediation proceedings are deemed to have commenced only upon receipt of the notice by the party.

2. Pre-Litigation Mediation

Unlike the 2021 Bill, the 2023 Bill has made the Pre-Litigation mediation voluntary. The pre-litigation with reference to commercial disputes would continue to be governed as per the Commercial Court Act, 2015, and the rules framed thereunder. For other disputes, it has been made voluntary.

3. Timelines

The 2023 Bill has also significantly reduced the time within which the Mediation process has to be completed, i.e., within 120 days, with a maximum extension of 60 days.

4. Interim Relief

The 2021 Bill's previous version included the provision pertaining to Interim relief as the pre-litigation mediation was mandatory under the same. Given that it has been made voluntary, the provision relating to Interim Relief has been deleted.

5. More Credibility to Mediation in Government Disputes

The 2023 Bill, in an important shift over its earlier version of 2021, brought and enabled government disputes under the purview of Mediation. It remains significant, especially in two respects: Firstly, that the government disputes would now be resolved through Mediation, and secondly, that it would be under the framework of the present law. It has added much to the credibility of Mediation as a dispute resolution process.

Conclusion

It can be in no way denied that the Mediation Bill, as it exists in its present form, has a share of both progressiveness and ambiguities. By bringing official legislation to recognise and regulate mediation as a mode of ADR, this government initiative is a positive development and a significant step forward. It would help lessen the backlog of disputes existing before the Indian judiciary.

It would bring more uniformity and simplicity to the Mediation process and also help generate greater confidence of people in utilising mediation as a mode of dispute resolution. However, to make this mechanism more effective and efficient, the need for a lot of improvements and clarification in the Bill still exists.¹⁷

The recent amendments cleared by the Union Cabinet to the Draft 2021 Bill, via the introduction and passing of the 2023 Bill in Rajya Sabha, is a positive development. These include removing mandatory pre-litigation mediation and making it voluntary, as well as reducing the time for concluding the process.

Via the recent changes to the 2021 Bill, pre-litigation mediation has been voluntary. As such, parties can participate in the pre-litigation mediation process rather than a mandate. Further, the reduction of the time period for the conclusion of the process from 180 days, extendable by another 180 days with the consent of the parties, to 180 days in total is commendable. These changes are completely in line with the standing committee's suggestions and the parliamentary panel's recommendation and have come as a major relief to make good some shortcomings of the 2021 Bill.

While the 2023 Bill has incorporated recommendations provided by experts and the parliamentary standing committee, the still existing stopgaps, as delineated above, need to be addressed for the legislation to reach its full potential. The author, thus, seeks to make a case for an expanded scope of the Bill, the introduction of mandatory mediation in a phased manner, and bridging the other pitfalls, thereby nipping them in their buds to avoid the creation of any legal anomalies in the future, which may result in unnecessary litigation and render mediation ineffective in resolving disputes of the population at large. Lawmakers should seriously consider the above analysis and suggestions, and corresponding changes should be made to the Bill.

¹⁷ Aditya Mehta and others, 'Analysis: Mediation in India' (*India Corporate Law*, 31 October 2022) <<https://corporate.cytilamarchandblogs.com/2022/10/analysis-mediation-in-india/>> accessed 26 May 2023.