MANDATORY PRE-LITIGATION 'COMMERCIAL' MEDIATION: TURKEY'S LESSONS FOR INDIA

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In 2018, the Parliament of India legislatively introduced a mandatory requirement to exhaust 'pre-litigation' mediation before a party could institute a suit for 'commercial' disputes. Exploring this, the paper begins by countering criticisms of mandatory pre-litigation mediation generally by using theoretical and principled justifications for imposing such a requirement. Thereafter, it explores similar mandatory requirements that were introduced by the Republic of Turkey in the past decade with great success. This inquiry into Turkey's successes with compulsory pre-litigation mediation is undertaken to compare Turkey's journey with India's more recent efforts. In this comparative study, it is found that there are several systemic changes and measures accounted for by Turkey prior to enforcing such mandates that ensures their effective execution. Parallelly assessing the Indian framework, it is concluded that such changes have not been implemented by the Indian Parliament even two years after its mandate for 'commercial' disputes. Enabled by insights into Turkey's strides, this paper locates and argues for rectifying the primary deficiencies in India's pre-litigation mediation framework.

Keywords: *Pre-litigation mediation, Turkey, Comparative Analysis*

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I. INTRODUCTION

In August 2020, the Bar Council of India ("BCI") issued a circular notifying that 'Mediation', including theoretical as well as practical skills, would thereon be a compulsory course component for all law programs in India.[1] The circular signifies India's growing recognition of mediation as a viable method of dispute resolution.[2] Indeed, this development was prompted by former Chief Justice Bobde's expression of his view that teaching mediation compulsorily would strengthen efforts to tackle the incessant backlog of cases that

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[1] Bar Council of India, 'Introduction of Mediation (with Conciliation) as compulsory paper/subject to be taught with effect from the Academic Session 2020- 2021 in 3 year and 5 year LL. B degree course/s' (*SCC Online*, 8 August 2020) <www.scconline.com/blog/wp-content/uploads/2020/08/Mediation_Mandatory_Bar_Council_Course.pdf> accessed 28 November 2020.

[2] Akshita Saxena, 'BCI Notifies Mediation With Conciliation As Compulsory Subject For LLB Courses Wef Academic Session 2020-21' (*LiveLaw*, 16 August 2020) <www.livelaw.in/news-updates/bci-notifies-mediation-with-conciliation-as-compulsory-subject-for-llb-courses-wef-academic-session-2020-21-read-letter-161480> accessed 28 November 2020.

have plagued the judiciary for decades.[3] Thus, the circular has been commended by observers as an unprecedented measure that will improve access to justice significantly.[4] However, the perceived significance of this circular highlights a well-known reality – mediation is presently far from a popularly accepted dispute resolution method in India. This unpopularity of mediation is somewhat surprising, particularly given Indian communities' historical emphasis on amicably resolving disputes locally,[5] such as for land disputes.[6] Nonetheless, today, both the Indian judiciary and the Parliament have begun to show strong and consistent efforts towards building a robust mediation framework in India,[7] indicating that mediation indeed has a ripe future as an alternative dispute resolution mechanism.

One of the most significant recent initiatives in this vein was an amendment enacted in 2018 ("2018 Amendment"), to the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("Commercial Courts Act"). Section 12A(1), inserted by the 2018 Amendment, provided that no suit, except one that necessitates an urgent interim relief shall be instituted for 'commercial' disputes, *unless* the plaintiff exhausts the remedy of 'pre-litigation' mediation. Under Section 12A(3), the mediation would have to be completed within three months, subject to an extension of two months that the mediator may allow if the parties so consent. Evidently, this is distinct from 'court-referred' mediation, which concerns the power of courts to refer parties to mediation *after* litigation has already begun, under Section 89 of the Civil Procedure Code, 1908 ("CPC").[8] In the Commercial Courts Act, to summarise briefly, 'commercial' disputes are defined under Section 2(1)(c), read with amended Section(2)(i), as disputes arising out of trade or commerce, where the amount claimed is over three lakh Indian rupees. Such mandates to exhaust mediation before instituting a suit, considering their important role in increasing the ease of doing business,[9] are not uncommon, since judicial backlogs are nearly a universal predicament. Indeed, similar mandates have existed in Australia,[10] Italy,[11]South Africa,[12] Canada,[13] the United States,[14]and several other states. However, the focus of this

[3] Rintu Mariam Biju, 'Mediation with Conciliation to be a compulsory subject in Law Colleges from academic year 2020-2021: BCI' (*Bar And Bench*, 15 August 2020), <www.barandbench.com/news/lawschools/bci-mediation-with-conciliation-compulsory-subject-law-colleges-academic-year-2020-2021> accessed 28 November 2020.

[4] Tarun Nangia, 'Welcome move by BCI to make mediation compulsory' (*The Daily Guardian*, August 22, 2020), <https://thedailyguardian.com/welcome-move-by-bci-to-make-mediation-compulsory> accessed 28 November 2020.

[5] Anil Xavier, 'Mediation: Its Origin and Growth in India' [2006] 27 HAMLINE J Pub L&Policy 275.

[6] Laju P. Thomas, 'Dispute Resolution In Rural India: An Overview' [2019] 2(5)Jof L Stud& Res 96, 101.

[7] Shraddha Bhosale, 'Confidentiality in Mediation: An Indian Perspective' (*Kluwer Arbitration Blog*,18 January 2016) <http://mediationblog.kluwerarbitration.com/2016/01/18/confidentiality-in-mediation-an-indian-perspective/> accessed 28 November 2020.

[8] For a thorough analysis of Section 89 and other laws on voluntary or court-referred mediation in India, see Vijay Kumar Singh, 'Resolving Commercial Disputes in India: Focus on 'Mediation' As An Effective Alternative 'Towards Ease of Doing Business'' [2018] 5(2) RFMLR 1.

[9] Purbasha Panda, 'Unravelling Section 12 A of the Commercial Courts Act, 2015' (*The RMLNLU Law Review Blog*, 16 February 2020) <https://rmlnlulawreview.com/2020/02/16/unravelling-section-12-a-of-the-commercial-courts-act-2015/> accessed 28 November 2020.

[10] Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' [2016] 45 Common L World Rev 214.

[11] S. K. Zagaynova et al, 'Mandatory Mediation in Italy: The Problems of Implementation' [2017] 2017 Russ Jurid J Elec Supp 56.

[12] Stella Vettori, 'Mandatory Mediation: An Obstacle to Access to Justice' [2015] 15 Afr Hum Rts LJ 355.

[13] Randy A. Pepper, 'Mandatory Mediation: Ontario's Unfortunate Experiment in Court-Annexed ADR' [1998] 20 Advoc Q 403.

[14] Daniele Cutolo and Mark Alexander Shalaby, 'Mandatory Mediation and the Right to Court Proceedings' [2010] 4 Disp. Resol. INT'l 131.

paper shall be on comparing India's recent efforts with the laws enacted in the past decade by the Republic of Turkey regarding mandatory pre-mediation litigation in certain categories of disputes.

The reason that Turkey is chosen for this comparison is that there have been certain situational similarities between Turkey and India within which their mandates were introduced. Both Turkey and India's trysts with mediation have been very recent, as against the long-established backdrop of judicial backlogs and delays. Most importantly, there was little to no awareness amongst their peoples on mediation as a viable route.[15] However, the way the Parliaments of both states have responded to these concerns is methodologically distinct. In this paper, I shall argue that Turkey's adoption of mandatory pre-litigation mediation for commercial disputes was preceded by several systemic changes, none of which have been incorporated in India. Thus, while India has adopted the 'form' of Turkey's mandate for mediation, the foundations which contributed to the latter's success are absent. However, before commencing with this comparison, it is vital to consider the meaning, utilities, and principled justifications of 'mandatory' pre-litigation mediations.

Accordingly, Part II of this paper shall argue in favour of adopting mandatory pre-litigation mediation on various grounds on a principled basis, without considering questions of its proper execution. Thereafter, Part III shall consider the recent evolution of Turkey's pre-litigation mediation laws along with the jurisprudence and effective execution thereof. After this, Part IV shall inquire into the precise differences between Turkey and India's models, highlighting the lessons that India must learn from the former. Finally, this paper concludes in Part V, summarising the improvements needed in laws governing mandatory pre-litigation commercial mediation in India.

II. ARGUING FOR MANDATORY PRE-LITIGATION MEDIATION

Mediation is a non-adjudicatory and relatively informal process, where parties participate to reach solutions to resolve their legal disputes.[16] It is a collaborative effort that is fully voluntary, in that its potential culmination is a 'settlement', which refers to an agreement reached through the mutual 'consent' of the parties.[17] In the sessions, the mediator serves a 'passive' role, without the power to declare any binding order; and is empowered only to facilitate dialogue to reach a settlement. As per the new Section 12A(5) of the Commercial Courts Act, if a settlement is reached for a commercial dispute in India, then it shall be enforceable with a status equivalent to an arbitral award defined under Section 30 of the Arbitration and Conciliation Act, 1996. If such a settlement cannot be reached, the parties are free to pursue litigation to resolve their dispute through conventional means.[18]

The most tangible benefit of mediation is that it allows the avoidance of long-drawn-out litigations owing to court backlogs, saving time and resources for both parties. Moreover, unlike a courtroom, mediation offers the parties with significant flexibility to reach agreements that may be more suitable and creative than the limited reliefs granted by the

[15] Ameen Jauhar, 'Hearing the Little Guy – Litigant Involvement to Promote Alternative Dispute Resolution Mechanisms in India' [2019] 15 SOCIO-LEGAL REV. 29, 30; Gizem Halis Kasap, 'A Comparative Overview of Mediation Practice in Turkey in Light of the U.S. Experience' [2018] 16:192 LEGAL HUKUK DERGISI 5501, 5579.
[16] Jacqueline Nolan-Haley, 'Mediation: The New Arbitration' [2012] 17 HARV. NEGOT. L. REV. 61.
[17] Richard M. Calkins, 'The Future of Mediation in India' [2012] 3 NLIU LR 1 30.
[18] ibid.

courts.[19] In addition, parties have the assurance of 'confidentiality' in mediation, which implies that any information discussed in mediation sessions would not be disclosed by any attendant. In India, the requirement of confidentiality has been codified in Rules 7(vi), 8, and 12(5) of the secondary rules framed to enforce the 2018 Amendment by the Indian Central Government ("2018 Amendment Rules"). This, along with the informal setting of the dialogue, also allows parties to express their emotions and concerns with greater ease and comfort.[20] The aforesaid benefits blossom, especially in commercial disputes, given that confidentiality allows parties to converse on business information that would otherwise not be disclosed, while protecting their public reputation. Further, it allows parties to sustain their commercial relationships and rebuild trust.[21] Business secrets, risks and other information can also be deliberated upon with little hesitation to lead to honest dialogue. It is through such a dialogue, that mediation can produce a 'win-win' situation for both parties, without straining their relationship. Evidently, this has been regarded as one of its most important advantages over adversarial litigation.[22]

However, several authors believe that all these benefits are compromised if mediation is undertaken 'mandatorily' and not 'voluntarily'.[23] The primary contentions in this regard are twofold. *First*, on a principled basis, the voluntariness of mediation supposedly covers even the step of initiating it,[24] and the essence of mediation requires that it must be entered into by parties' own volition.[25] Indeed, such arguments have been commonly raised even prior to the 2018 Amendment, in relation to court-referred mediations.[26] However, proponents of mandatory mediation would assert that party autonomy and consent are limited to '*within* the process of mediation'. This means that the supposed 'essence' of mediation is simply that a binding settlement, if any, would be reached with the mutual consent of both parties, even if mediation was not initiated 'voluntarily'.[27] Further, the right of parties to litigate, should a good-faith mediation fail, is not precluded by such a dialogue. Thus, proponents of such schemes contend that the 'voluntary' character of mediation is preserved even if participation is mandatory.

Second, as a practical criticism, some authors speculate that unwilling participants in mediation would not behave as collaboratively as willing participants.[28] In practice, their focus would be "distracted" by the power dynamics that envelop their perception of the process and the mediator.[29] In other words, opponents assert that unwilling participants are subconsciously less open to finding amicable resolutions when mediation is not undertaken

[19] M. Gaylanne Phelan and Mary L. MacGregor, 'Mandatory Mediation of Estate Disputes' [2004] 28 LAWNOW [29].
[20] Elizabeth Ellen Gordon, 'Why Attorneys Support Mandatory Mediation' [1999] 82 JUDICATURE 224, 226.
[21] Danny McFadden, 'Developments in International Commercial Mediation: US, UK, Asia, India and EU' [2015] 8 CONTEMP. Asia ARB. J. 299.
[22] Anirudh R, 'Adversarial Process Problems: The Need for Mediation as an Alternative Dispute Resolution Mechanism' [2016] 3 RSRR 55, 56.
[23] *See generally* Ben Barlow, 'Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion' [2004] 52 Clev. State L. Rev. 499,525.
[24] A. I. Zaitsev, 'Mandatory Mediation: Arguments for and against' [2012] HERALD CIV. PROC. 57.
[25] ibid.
[26] Devershi Mishra and Komal Khare, 'Realigning Afcons Infrastructure Case With International Jurisprudence: Contextualizing The Requirement Of Consent In Non-Adjudicatory Processes Under Section 89 Of The CPC' [2017] 4 KIIT Student L Rev 38.
[27] Laila T Ollapally, 'Mandatory Court Referral for Mediation: Parties retain the right to Voluntary Decision' [2011] 4 SCC J- 27, J-30.
[28] Gary Smith, 'Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not' [1998] 36 Osgoode HALL L. J. 847 874 (1998).
[29] ibid.

by choice. However, this claim lacks any empirical basis. For instance, in Italy, the settlement rate of mandatory mediations required under a law enforced in 2003 was over a staggering eighty percent.[30] Similarly, the experiences of Turkey highlighted in Part III confirm the potential successes of its mandatory mediation programs, if executed well. As mentioned, mediation is meant to be a constructive, meaningful, and open dialogue 'moderated' by the mediator. Such an environment can be cultivated even if initial participation in the process is not by choice, provided that the mediator is well-skilled.[31] Thus, the success of mediation primarily rests on the availability of quality-mediators, and not necessarily on whether it was entered into willingly. This confirms the merit of the previous contention, i.e., that even if participation in mediation is mandatory, its voluntary character can indeed be sustained. Furthermore, some authors have argued that parties are often psychologically reluctant to initiate settlement dialogues fearing that this would be seen as an indication of "weakness" on the initiating party's side.[32] Consequently, if a mediation process is compulsory, neither party would face such anxieties, and be more open to reaching mutually acceptable settlements.

Additionally, there are primarily four reasons that can justify the adoption of mandatory mediation from a public policy perspective. The first is the compelling need to ensure speedy and prompt justice to all litigants, as is their right.[33] Logistically, mediation has emerged as a feasible mechanism to resolve disputes that saves the resources of the parties as well as already overburdened courts, as discussed earlier. Since mediation would lead to an honest and amicable dialogue between the parties, and as it would save them from the long-drawn adversarial atmosphere of litigation, it would also safeguard their emotional well-being. Having said this, there could be parties who may have concerns against the effects of being compelled to resort to mediation to resolve commercial disputes.

In my view, any such concerns would be triumphed by the above considerations, since the prospects of avoiding litigation and resolving disputes promptly would be mutually beneficial for *all* stakeholders concerned. In any event, should mediation fail, the option for parties to pursue litigation shall remain. Thus, any inconvenience caused by exploring the prospect of prompt resolution would not be remarkable. Moreover, the reluctance of parties may initially arise from unfamiliarity with the process of mediation, which may change as they are introduced to the same.[34] Further, resonating with Turkey's experiences as discussed below, studies have proven that even mandatory mediation processes have resulted in impressively high settlement rates.[35] While encouraging the need for further research in this regard, Professor Quek wrote as early as 2010 that most studies had satisfactorily cemented the benefits of mandatory mediation.[36]

Consequently, the broader benefits offered by mandatory mediation would outweigh any alleged disadvantages thereof. Needless to say, these assertions are cautioned by the fact

[30] Melissa Hanks, 'Perspectives on Mandatory Mediation' [2012] 35 U.N.S.W.L.J. 929, 937.
[31] See this sample video for an illustration, Mediation GreenBay, 'Tenant-Landlord Mediation' (*Youtube*, 28 March 2018) <www.youtube.com/watch?v=j6JEpg10pbw&ab_channel=MediationGreenBay> accessed 28 November 2020.
[32] *See generally* Campbell C Hutchinson, 'The Case for Mandatory Mediation' [1996] 42 LOY. L. REV. 85, 89.
[33] *Hanks* (n 30) 929. On discussions on the right to speedy justice vis-à-vis mediation in India, *see generally* K.G. Balakrishnan, 'Judiciary in India: Problems and Prospects' [2008] 50 JILI 461, 463.
[34] Frank Sander, 'Another View of Mandatory Mediation' [2007] DISP. RESOL. MAG. 16.
[35] Craig A. McEwan, 'Toward a Program-Based ADR Research Agenda [1999] 15(4) NEG. JOUR. 325, 331.
[36] Dorcas Quek, 'Implementing A Court-Mandated Mediation Program' [2010] 11 CARDOZO J. CONF. Res. 479, 482.

that in certain cases, the factual situation may require the imminent assistance of courts.[37] This could include the classic circumstance[38] of a party requiring the preservation of evidence that is indispensable to fact-finding (should mediation fail). Another such example is parties wishing to prevent the opposite party from selling the assets over which the dispute arose.[39] Here, a mandate to pursue mediation first may cause irreparable harm to a party.[40] However, both Turkey[41] and India acknowledge the exceptional nature of such cases and allow exemptions from the mandatory requirement for 'interim reliefs'. Hence, by balancing the interests of specially placed parties, mandatory mediation requirements of this kind ensure prompt reliefs, while also maximizing friendly access to justice.

Second, and concurrently, the creation of a mandate results in expanding awareness regarding mediation as an option for dispute resolution. This is important since such awareness is otherwise absent in most societies where mandatory mediation is implemented, including Turkey and India. Third, the requirement of mandatory mediation results in the rectification of 'information asymmetries' between parties.[42]In other words, a mandatory requirement assures courts that both parties were equally aware of their right to exercise the option to initiate and participate in mediation prior to instituting the suit.

The third policy benefit is complementary to the second. This is because the idea of information asymmetries takes it for granted that there is not sufficient awareness regarding mediation amongst the people of a State. Had mediation been well-known, then in most cases, both parties would likely be equally placed in terms of the knowledge that mediation was indeed an option. Courts could then take it for granted that both parties *consciously* chose to forgo a non-adversarial process. In this vein, it is now well-acknowledged that such mandates can help to promote a "*change in culture*" in dispute resolution mechanism preferences.[43] Thus, in India, a mandatory requirement would situate parties equally in recognizing mediation as an option, while simultaneously creating greater awareness thereof generally.

Fourth, dialogues on mediation necessitate considering the interplay of such a mandate with the two categories of justice that Dr Amartya Sen formulated[44] – as 'Niti' and as 'Nyaya'. While Niti focuses on institutions, rules and precedents meant to deliver justice, Nyaya emphasizes human life and experience. Ms. Laila Ollapally argues that litigation, with its heed to procedural justice, attends to Niti; while mediation accounts for Nyaya, as the latter emphasises human experience in expression, emotion, collaboration, mutual accommodation, and amicable dialogues.[45] Expanding on her beliefs, if mediation (Nyaya) is made mandatory as a matter of procedure (Niti), such a mandate would arguably enable the delivery of both kinds of justice posited by Sen, especially considering the role of mediation

[37] On the point that judicial intervention is crucial when parties seek urgent relies, *see generally* Julian D.M. Lew, 'Does National Court Involvement Undermine the International Arbitration Process' [2009] 24:3 AMER. UNI. ILR 489.

[38] Chan Leng Sun and Tan Weiyi, 'Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief'[2013] 6 CONTEMP. ASIA ARB. J. 349.

[39] ibid.

[40]Nikhil J. Variyar, 'Tribunal-Ordered Interim Measures and Emergency Arbitrators: Recent Developments Across the World and in India' [2016] 4 IJAL 33, 34.

[41] *See* Part III.

[42] Klaus J. Hopt and Felix Steffek, *Mediation: Principles Regulation Comparative And In Perspective* (OUP 2012) 49.

[43]*See generally* Joyce Low, 'Introducing a presumption of ADR for civil matters in the Subordinate Courts' [2012] 5 SINGAPORE L. GAZ. 1, 4.

[44] Amartya Sen, *The Idea of Justice* (first published 2009, Harvard University Press2012) 496.

[45] Laila T. Ollapally, 'Nyaya in the Administration of Justice through Mediation' [2013] PL April 73, 74.

in tackling informational asymmetry. This assumes prominence since most litigants in India are overwhelmingly attracted to Niti (litigation procedures), which can tend to disregard clients' emotional well-being and disrupt the potential for collaborative processes. Here, Niti (the pre-litigation mandate) is used to guide parties to Nyaya (which heeds the human elements in dispute resolution). The resultant amalgam allows Nyaya to obtain its maximal reach. It also acknowledges that at times, Niti must be pursued further as a last resort if collaborative efforts fail. Hence, this balance between the two kinds of justice attends to all major stakes in litigation.

Thus, for all the aforementioned reasons, I conclude that mandatory mediation is justified on a perspective that is principled, practical, and which heeds to public policy. Such a mandate is the most desirable in the pre-litigation stage, as it would potentially result in avoiding litigation altogether and thereby, allow parties to communicate amicably at the earliest possible juncture. As discussed above, the benefits of mandatory pre-litigation mediation will blossom especially in commercial disputes where the sustenance of healthy business relationships is a vital consideration for most parties. Having outlined the justifications for pre-litigation mediation, Part III shall now turn to study the evolution of mediation laws in Turkey in the past decade.

III. TRACING TURKEY'S JOURNEY FROM 2012 TO 2020

Mediation first secured legal recognition in Turkey in its ordinary form where parties initiate it of their own accord. This was realised under Law Number 6325[46] ("Mediation Code") enacted in 2012, which gained effect from 2012. The enactment of this legislation was prompted by two overarching factors, one domestic and the other international. The domestic factor was the well-known fact that Turkey's courts were overburdened with workload, resulting in excessively prolonged judicial processes, consuming several years on average. The Mediation Code sought to counter these litigatory hurdles, while concurrently increasing flexibility, confidentiality, and efficiency through potential settlements.[47] From an international law and relations view, this enactment was necessitated by Turkey's contemporaneous accession to the European Union ("EU"), and the subsequent need to harmonise its laws with the EU's mediation frameworks.[48]

Later, in a paradigm shift in 2017, Law Number 7036[49] was enacted to amend the Mediation Code for enforcing a mandate of pre-litigation mediation, specifically for certain sub-categories of 'labour' disputes such as employee compensation of reinstatement.[50] The effect of this was that prior to instituting a suit for 'monetary' claims, plaintiffs became bound to attempt mediating their dispute with the opposite party.[51] Upon failure to provide a statutory declaration attesting to pre-litigation mediation, the suit would be rejected on procedural grounds.[52] Thus, the suit would be instituted only if it were proven that either a

[46] HUKUK UYUŞMAZLIKLARINDA ARABULUCULUK KANUNU, Law Number 6325, 2012.

[47] Orçun Çetinkaya and Burak Baydar, 'Turkey introduces new legislation regarding mandatory mediation for commercial disputes' *EuroFenix* (2019) 39.

[48] Ash Gurbuz Usluel, 'Mandatory or Voluntary Mediation? Recent Turkish Mediation Legislation and a Comparative Analysis with the EU's Mediation Framework' [2020] J. DISP. RESOL. 445, 477.

[49] İŞ MAHKEMELERİ KANUNU, Law Number 7036, 2017 (Law Number 7036).

[50] Law Number 7036, art. 3(1). For detailed information on these sub-categories, see 'Mandatory Mediation in Labor Disputes in Turkey' (*HG.org*, Date of publication unavailable), <https://www.hg.org/legal-articles/mandatory-mediation-in-labor-disputes-in-turkey-44070 accessed 28 November 2020.

[51] Law Number 7036, art. 3(2).

[52] Hasan Kadir Yilmaztekin, 'Turkey introduces mandatory civil mediation for commercial cases including IP rights', [2019] 14 6 Journal of Intellectual Property Law & Practice 432, 433.

settlement could not be reached, or the other party refused to attend mediation. Further, the mediation would be required to be concluded within three weeks; and an additional period of one week could be comprised only in exceptional situations.[53] Nonetheless, similar to India's 2018 Amendment, this did not preclude a litigant from seeking *interim* injunctions in urgent situations.[54]In addition, disputes arising from work accidents or occupational diseases were excluded from this mandate.[55]The mandate also did not apply if the parties had a prior arbitration agreement. Naturally, however, the question arises as to why mandating mediation was considered necessary, and upon what basis were labour disputes thought fit for this framework.

Dr Elveris correctly explains[56] that this was based on two grounds. First, from over 21,000 voluntary mediations conducted between 2013 and 2017, over 19,000 had ended with satisfactory settlements.[57] This high success rate showed the viability of mediation as a solution to Turkey's judicial backlogs. However, the total number of civil suits before courts crossed several million, thus highlighting the need for expanding the reach of mediation to litigants, which was made possible by enacting the pre-litigation mandate. Second, the subject-matter of an astounding ninety percent of the aforesaid mediations involved labour disputes.[58] Consequently, there was a strong empirical impetus to experiment withthe mandatory requirement for labour disputes, before potentially expanding it to other forms of cases.[59]It is noteworthy that following Turkey's new mandate, similar regulations relating to mandatory pre-litigation mediation were also introduced in Romania and Greece.[60]Further, contemporaneously with these developments, the European Court of Justice ("ECJ") had concluded that such mandates were not violative of EU law, since access to litigation was not denied if mediation fails.[61]

The most remarkable facet of Law Number 7036 was the excellent results delivered by Turkey in its execution. Over the first year of the law's implementation, the Turkish Ministry of Justice reported that sixty-seven percent of all cases assigned to mediators reached a successful settlement (the total thereto amounting to 297,147 cases).[62] Thus, Turkey managed not only to mitigate a significant portion of its courts' workloads, but also to facilitate 'amicable' resolutions to labour disputes efficiently.[63] Dr Ash Usluel's studies reveal that while on average, a civil case took 404 days to resolve in courts, ninety-six percent of these labour disputes were resolved in less than a day through mandatory mediation.[64] When the

[53] Law Number 7036, art. 3(9).
[54]*Usluel* (n 48) 456.
[55] Law Number 7036, art. 3(3).
[56] Idil Elveris, 'Turkey: Mandatory Mediation Is The New Game In Town'(*Kluwer Mediation Blog*,3 March 2018) <http://mediationblog.kluwerarbitration.com/2018/03/03/turkey-mandatory-mediation-new-game-town/> accessed 28 November 2020.
[57] ibid.
[58] ibid.
[59] ibid.
[60] Rafal Morek, 'To compel or not to compel: Is mandatory mediation becoming "popular"?', (*Kluwer Arbitration Blog*,19 November 2018) <http://mediationblog.kluwerarbitration.com/2018/11/19/to-compel-or-not-to-compel-is-mandatory-mediation-becoming-popular/> accessed 28 November 2020.
[61] C-75/16 *Livio Menini, Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa* [2017] OJC 156.
[62] Tuba Bilecik, 'Turkish Mandatory Mediation Expands Into Commercial Disputes' (*Kluwer Arbitration Blog*,30 January 2019) <http://mediationblog.kluwerarbitration.com/2019/01/30/turkish-mandatory-mediation-expands-into-commercial-disputes/> accessed 28 November 2020.
[63] 'Turkey: Mandatory mediation on commercial disputes' (*CMS Law-Now*, 21 December 2018), <www.cms-lawnow.com/ealerts/2018/12/mandatory-mediation-on-commercial-disputes?cc_lang=en> accessed 28 November 2020.
[64]*Usluel* (n 48) 453.

constitutionality of Law Number 7036 was challenged before the Turkish constitutional court, the court held in favour of its constitutional validity and accorded great weight to the merits of its aforesaid principled aims as well as its positive practical impact.[65] In a similar vein as the ECJ, the court recognised that even if participation in mediation is mandatory, any settlement therein would be reached voluntarily, and thus, would not prejudice party autonomy and due process.[66]

Evidently, a refined understanding and execution of mandatory mediation as an amalgam of Nyaya and Niti[67] began to blossom in Turkey, within the span of a decade. In fact, as of January 2019, the Turkish Bar's Association reveals that over ten percent of the total number of Turkish lawyers comprised of 'registered' mediators,[68] confirming Turkey's infrastructural competence to handle the high number of mediations. Considering these victories, the Turkish Parliament enacted Law Number 7155[69] in 2018to amend the Mediation Code, and further mandate pre-institution mediation of 'commercial' disputes; specifically for cases where their subject-matter concerned the payment of a debt or an indemnity claim.[70]However, given the relatively complex character of such disputes, the duration of mediation was extended to six weeks, as compared to three weeks in labour disputes; while two additional weeks can be secured in exceptional situations.[71]Most recently, i.e., in 2020, the Turkish Parliament enacted Law Number 7251, to create a similar requirement for consumer protection law disputes.[72]The positive impact of Turkish mandatory mediation for commercial disputes has been acknowledged,[73] and indeed, a settlement rate of sixty-eight percent was announced by the Turkish Ministry within six months of its implementation.[74] Similar results are anticipated for the consumer disputes' mandate[75] (although consolidated data is presently unavailable given its recency[76]). Consequently, a culture conducive to mediation has expansively flourished in Turkey in less than a decade. Given this backdrop, Part IV of this paper shall speculate the reasons for

[65] 'Decisions number 2017/178 E. & 2018/82 K.', (*T.C. Cumhurbaskanligi Mevzuat Bilgi Sistemi*, 11 July 2018) <https://www.resmigazete.gov.tr/eskiler/2018/12/20181211-15.pdf> accessed 28 November 2020.

[66] For a deeper analysis of this decision, *See* E. Benan Arseven and İpek Ünlü Tık, 'Turkey: The Turkish Constitutional Court Decided That The Compulsory Pre-Mediation Process Set Forth In The Labour Court Law Is Not Unconstitutional' (*Mondaq*, 8 February 2019) <https://www.mondaq.com/turkey/contract-of-employment/779822/the-turkish-constitutional-court-decided-that-the-compulsory-pre-mediation-process-set-forth-in-the-labour-court-law-is-not-unconstitutional> accessed 28 November 2020.

[67] *See* Part II.

[68] Gizem Halis Kasap, 'Silver Bullet of Mediation? Turkey Implements Mandatory Pre-Litigation Mediation in Commercial Disputes' (*Turkish Law Blog*, 11 January 2019) <https://turkishlawblog.com/read/article/50/%22#_ftn1%22> accessed 28 November 2020.

[69] ABONELİK SÖZLEŞMESİNDEN KAYNAKLANAN PARA ALACAKLARINA İLİŞKİN TAKİBİN BAŞLATILMASI USULÜ HAKKINDA KANUN, Law Number 7155, 2018 (Law Number 7155).

[70] Law Number 7155, art. 20.

[71] For further reading on this law's features, *See* Burce Cangir and Cansu Soysal, 'Turkey: Mandatory Mediation Now Extended To Commercial Disputes!' (*Mondaq*, 5 March 2019) <www.mondaq.com/turkey/arbitration-dispute-resolution/783638/mandatory-mediation-now-extended-to-commercial-disputes> accessed 28 November 2020.

[72]HUKUK MUHAKEMELERI KANUNU ILE BAZI KANUNLARDA DEĞIŞIKLIK YAPILMASI HAKKINDA KANUN, Law Number 7251, 2020.

[73]*See generally* Derya Bulgin Gunes, 'Mandatory Mediation In Light Of High Court Decisions In Turkish Law' [2020] 11:2 InULR 514, 515.

[74] 'Development of Mediation in Turkey' (*ADR Istanbul*, 11 October 2020) <https://www.adristanbul.com/en/development-of-mediation-in-turkey/> accessed 10 July 2021.

[75]*Gunes* (n 73).

[76] Vahit Bicak, 'The Mediation Scene in Turkey' (*Sage Mediation*, 16 October 2020) <https://sagemediation.sg/blog/the-mediation-scene-in-turkey/> accessed 10 July 2021.

Turkey's emergent successes; and concurrently, consider their bearings over the potential failures of India's recent efforts with similar aims.

IV. COMPARING TURKEY'S STRIDES WITH INDIA'S EXPERIENCES

Assessing from Turkey's initiatives in the past decade, there are at least three major reasons that Turkey's efforts at making mediation for certain disputes (including commercial ones) were able to fruition, which are absent in India. *First*, the Turkish Parliament undertook its due diligence in carving extensive regulations to institutionalise mediation. Article 19 of the Mediation Code prescribed that the Ministry of Justice shall maintain a registry of persons who secure the 'authority' to mediate private disputes. Accordingly, Article 20 specifies that these registered individuals shall be required to; a) be law graduates with at least five years of professional experience, b) complete 'mediation training', c) pass the written exam held by the Ministry, and so forth. Finally, they must not breach the grounds under Article 20 that would make potential candidates ineligible, such as past criminal records. Given the need for specialisation and expertise in mediation, the training programs mandated by the Ministry were crucial to the success of mandatory mediation in Turkey.[77] As discussed in Part III, over ten percent of lawyers in Turkey had become registered mediators. Consequently, regulations acted as the means to ensuring the end of quality control, and the availability of experienced mediators. Moreover, such institutionalisation ensured optimal public faith in favour of mediation, while also promoting awareness regarding its viability as a credible dispute resolution method. Most importantly, in Turkey, mediation had been institutionalised *prior* to the enactment of the successive laws by its Parliament, mandating mediation in certain cases.

Regrettably, despite countless calls by mediators in this regard,[78] such thorough institutionalisation of mediation through regulations was not undertaken by India before the enactment of the 2018 Amendment that made the pre-litigation mediation of commercial disputes mandatory. Even at present, there are no laws or regulations in India to ensure a minimal quality-control of mediation.[79] In fact, owing to this lapse, Supreme Court of India was compelled to form a committee in early 2020 to formulate a draft legislation governing mediation to be sent to the Parliament for review.[80] The status of this draft remains pending, and somewhat unclear in light of COVID-19. The lamentable reality is that even for the most high-profile disputes, the need for demonstrable expertise in mediators has been consistently ignored in India. This includes the mediation concerning the infamous Amarchand Mangaldas split, which was assigned to veteran lawyers and judges with no experience in mediation.[81] This general ignorance is based on the prevalent misunderstanding that

[77] *Usluel*(n 48) 464.

[78] Geetha Ravindra, 'Institutionalizing Mediation in India' (*Virginia's Judicial System*, June 2002) <www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/resolutions/2002/june/institutionalizing.html> accessed 28 November 2020.

[79] Rashika Narain and Abhinav Sankaranarayanan, 'Formulating a Model Legislative Framework for Mediation in India' [2018] 11 NUJS L. REV. 75, 95.

[80] Ajmer Singh, 'Supreme Court forms committee to draft mediation law, will send to government' (*The Economic Times*, 19 January 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms> accessed 28 November 2020.

[81] Rohan Dhariwal and Shrey Patnaik, 'Shifts or Illusions? The Reality of India's Growing Mediation Scenario' (*Kluwer Arbitration Blog*, 28 May 2015) <www.mediationblog.kluwerarbitration.com/2015/05/28/shifts-or-illusions-the-reality-of-indias-growing-mediation-scenario/> accessed 28 November 2020.

mediation does not require any additional training, and that any lawyer can enter the profession with ease.[82]

The Indian Parliament was prone to the same misunderstanding, as Section 12A(2) of the Commercial Courts Act requires the State and District Legal Services Authorities ("LSA") to conduct pre-litigation mediation for commercial disputes. Unfortunately, LSAs are reported to have little to no expertise or specialisation in commercial matters and they also lack any experience or training in mediation.[83] This is problematic on two counts. First, as Dr Lowry explains, a mediator must understand the substantive matters of disputes, without which he may be unable to facilitate a good dialogue in complex commercial matters.[84] Second, LSA personnel comprise of practicing lawyers or judicial officers, who are fundamentally trained in 'adversarial' processes.[85]An indispensable part of mediation's essence is to substitute such hostile confrontations with amicable ones.[86] This is highly unlikely to fruition if 'untrained' LSAs familiar only with adversarial processes are accountable for the mediation proceedings. Moreover, in any case, LSAs are already overburdened with their existing workloads in litigation. Under amended Section(2)(i) of the Commercial Courts Act, there is now a low pecuniary threshold of three lakh Indian rupees for disputes to fit in the 'commercial' category. This, by implication, would result in a greater number of required mediations. This move may be well-intentioned, aiming to provide greater coverage of disputes for mediation. However, it is doubtful that LSAs would have the capacity to deliver on the added number of required mediations.[87]

In the same vein, unlike Turkey, the Indian Law Ministry does not mandate any training programs or written exams through an official 'registration' process. In other words, the Indian Parliament lacked the foresight to ensure adequate institutionalisation of mediation and the availability of 'quality' mediators before making it mandatory for commercial disputes. Further, common perception dictates that advocates in India often tend to exploit underprivileged or uninformed clients by deliberately avoiding the possibility of settling the dispute at an early stage, so as to charge higher fees from them.[88] Given this, the possibility

[82] Gracious Timothy Dunna, 'Are we Missing the Point? – A Young Mediator's Perspective about Mediation in India' (*Kluwer Arbitration Blog*, 12 April 2016) <www.mediationblog.kluwerarbitration.com/2016/04/12/6513/> accessed 28 November 2020.

[83] Juhi Gupta, 'Mandatory Pre-Institution Commercial Mediation In India: Premature Step In The Right Direction?' (*Kluwer Arbitration Blog*,31 August 2018) <www.mediationblog.kluwerarbitration.com/2018/09/01/mandatory-pre-institution-commercial-mediation-india-premature-step-right-direction/> accessed 28 November 2020.

[84] L. Randolph Lowry, 'Mediation: fulfilling its promise for effective dispute resolution' [2001] 3 2 Asian Dispute Review 67.

[85] Deepika Kinhal and others, 'ODR: The Future Of Dispute Resolution in India' (*Vidhi Centre For Legal Policy*, July 2020) <https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727_ODR-The-future-of-dispute-resolution-in-India.pdf> accessed 28 November 2020.

[86]*See* Part II.

[87]*Gupta* (n 83).

[88]Professor Chodosh, who is noted as being instrumental in mediation's growth in India, had indeed predicted that lawyers could perceive the growth of mediation as simply an "*alarming drop in revenues*", *see* Hiram E. Chodosh, 'Mediating Mediation in India' (*Law Commission of India*, Date unknown) <https://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf> accessed 10 July 2021. On a more general note, Dr Chandrachud, J. has also emphasized the need to "radically" modify advocates' roles, so as to ensure that they guide parties to mediation before the dispute becomes a court case. This reflects a presupposition that currently, advocates are reluctant in this regard, *see*Justice Dhananjaya Y. Chandrachud, 'Mediation – realizing the potential and designing implementation strategies' (*Law Commission of India*, Date unknown) <https://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf> accessed 10 July 2021.*See also*Gaurav, 'Liberating India from the Shadow of Delayed Justice: Imperative Themes for Consideration' [2016-17] 24 ALJ 197, 206.

of advocates misguiding clients who are unfamiliar with mediation remains. In addition, from a public policy perspective, prior institutionalisation was vital in India as it would have allowed parties to trust mediation and be better aware of their rights and expectations thereto.

Second, Turkey's decision-making relied strongly on data-collection concerning its successes or difficulties of past mediation. As discussed in Part III, the Turkish Parliament had a strong empirical impetus to experiment with mandating mediation for 'labour' disputes, as they earlier comprised over ninety percent of successful voluntary mediations.[89] Only after the evident success of this mandate for 'labour' disputes was it extended to 'commercial' disputes, and later, to 'consumer law' disputes.[90] In contrast, the Indian Parliament considered little to no statistical data before embarking on its mandates for 'commercial' disputes. The grim truth is that the Union Government had, till that juncture, maintained no statistical data whatsoever over the number of 'commercial' disputes referred to mediation, let alone their success rate.[91]Although voluntary private mediation to settle commercial disputes had seen some growth in India,[92] the 2018 Amendment lacked any strong empirical basis comparable to Turkey's Law Number 7036.Equally unfortunately, following 2018, no statistical data on the success of mandatory pre-litigation mediation in commercial disputes has been published by the Union Government till date. Thus, no commentator can empirically gauge whether this mandate has had satisfactory 'large-scale' impact, which has also made it difficult to assess the empirical difficulties in its execution. Based on these lapses, the likelihood of their success to a meaningful extent is improbable.

Third, the Turkish Parliament had anticipated that even when the notice was sent to the opposite party for mediation, they could simply refuse to attend such proceedings, making the process futile. It was also foreseen that the potential plaintiffs themselves could fail to attend these sessions to rush to litigation. To safeguard against this,[93] Article 18A(11) of the Mediation Code and Article 3(12) of Law Number 7036 provided that if the mediation failed owing to either party's failure to attend mandatory meetings (without a valid excuse); then such a party would be liable to pay costs for the ensuing litigation *in toto*, even if courts rule over the dispute in her favour. Thus, either party would be liable for sanctions in the event of their unexcused non-participation in mediation. Provisions for similar sanctions had also been enacted in Italy with great success.[94] In India, Rule 8 of the 2018 Amendment Rules stipulates that parties must participate in the mandatory mediation in 'good faith'. However, there are no sanctions covering the event that any party, in bad faith, refuses to attend such proceedings.[95] The only consequence of such situations is that under Rule 3(6), the non-participation of the opposing party would lead to the formulation of a 'non-starter' report by the mediator, after which a suit could be filed. Thus, it is conceivable that opposing parties may simply choose to circumvent this requirement, defeating the intent of making mediation participation 'mandatory'. Furthermore, although it is principally appreciable that the 2018 Amendment allows an exception from this mandate in case of "urgent interim reliefs", the

[89]*Elveris* (n 56).
[90]*See* Part III.
[91] Alok Prasanna Kumar et al, 'Strengthening Mediation in India: Interim Report on Court Annexed Mediations' (*Vidhi Centre For Legal Policy*, July 2016) <https://vidhilegalpolicy.in/wp-content/uploads/2020/07/InterimReport_StrengtheningMediationinIndia.pdf> accessed 28 November 2020.
[92] Alok Prasanna Kumar et al, 'Strengthening Mediation in India: A Report on Court Sponsored Mediations' (*Ministry of Law And Justice, Government of India*,December 2016) <https://doj.gov.in/sites/default/files/Final%20Report%20of%20Vidhi%20Centre%20for%20%20Legal%20Policy.pdf> accessed 28 November 2020.
[93]*Yilmaztekin* (n 52).
[94]*Zagaynova et al;* (n 11).
[95]*Gupta* (n 83).

Amendment has been criticised for failing to clarify the contours of this term.[96] Hence, the exception remains open to the possibility of misuse by creative litigants.

Having regard to all these concerns, the Bombay High Court's recent Single bench decision in *Ganga Taro v. Deepak Raheja*[97] merits mention. Here, the court has held, *inter alia*,[98] that the requirement under Section 12A(1) introduced by the 2018 Amendment does not create a 'mandatory' requirement. Rather, the court has taken the view that if the parties are of the belief that they cannot and do not desire to resolve the dispute amicably, courts can permit them to institute suits without exhausting pre-litigation mediation.[99] In reaching this conclusion, the court laid great emphasis on the intent of the 2018 Amendment to enable the speedy disposal of cases.[100] The court's opinion regards a reading of Section 12A(1) as creating a 'mandate' for mediation to be against this intent.

With respect, it is argued that this holding does not meaningfully capture how mandatory mediation works in practice and is against the 2018 Amendment's intent. India's population continue to remain unaware as to the prospects and benefits of mediation as a viable route to settle disputes. Hence, Section 12A(1), much like the mandates in Turkey, Italy, and various other States[101] would have resulted in promoting mediation as a viable route to resolving disputes and corrected information asymmetries. The workload of courts and litigation costs for parties would have been minimized. Moreover, as this paper has proven, even when parties are reluctant to enter mediation, their participation in the process can be extremely fruitful with capable mediators.

Further, since interim reliefs are treated as an express exception to this requirement, the norm must be a mandate. Courts' 'inherent' powers to allow exemptions from the mandate should hence be limited to very exceptional situations. The court's reading in *Ganga Taro* disregards these factors and may strengthen the misperception that treats mediation as a niche mechanism, one suited only to rare cases. This would go against the intent of the 2018 Amendment. However, it is acknowledged that the Indian Parliament did not perform the due diligence of institutionalising mediation adequately or ensuring the presence of quality mediators before the mandate was introduced. It is likely that these omissions have contributed to the court's lack of confidence in mandatory mediation. Thus, realistically, it is possible to expect more such judicial dilutions of the mandate created by Section 12A(1), so as to prevent parties from the inconveniences borne from unskilled and untrained LSA mediators. Needless to say, this distance between the aims and the realities of mandatory mediation in India is concerning.

Consequently, when compared to Turkey's measures, India's efforts at popularising mediation for commercial disputes contain several deficiencies. Nonetheless, inspiration must be drawn from Turkey's successes, and reforms made urgently, to enable the creation of a robust mediation framework and culture within India.

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[96] *Gupta* (n 83).
[97] *Ganga Taro Vazirani v Deepak Raheja* 2021 SCC OnLine Bom 195 ('Ganga Taro').
[98] For a detailed analysis of the other holdings in this case, *see* Bhaven Shah, 'Mandatory pre-institution mediation – Purpose v. Procedure' (*SCC Online*, 18 May 2021) <www.scconline.com/blog/post/2021/03/24/mediation-2/> accessed 12 April 2021.
[99] Ganga Taropara 18.
[100] Ganga Taro para 15.
[101] *See* Parts II & III.

V. CONCLUSION

Part II of this paper established a firm theoretical groundwork that justified the enactment of mandatory pre-litigation mediation laws, especially for disputes of a 'commercial' character. Part III analysed the successes of Turkey in gradually and systematically executing this theoretical groundwork in practice. Finally, Part IV proceeded to discuss the primary reasons for Turkey's successes, and cautioned that while India has enacted a similar mandatory pre-litigation mediation law for 'commercial' disputes, it has failed to perform the pre-conditions that would truly put the law and its intent to effect. In view of Part IV, it is argued that India has at least three lessons to learn from Turkey. First, mediation needs to be institutionalised through regulations to ensure quality-control (reliable expertise in mediation) and improved infrastructure. Accomplishing this may require reforms and deliberations of significant scales, as it did for Turkey. However, the costs of these reforms would be commensurate with the scale of the predicaments they seek to counter – judicial backlogs and delays of justice.

The Indian legal fraternity must remain in anticipation of the draft legislation to be proposed by the committee formed by the Supreme Court of India,[102] and hope that the Legislature is able to take corresponding measures to usher the institutionalization of mediation in India. Further, India must officialise statistical data-collection processes that seek to record the performance of the 2018 Amendment. This is important not only to evaluate the merits of the existing mandate for 'commercial' disputes, but also since it ought to act as a pre-condition to expanding this mandate to other forms of disputes, drawing from Turkey's experiences. While India's lapse in enforcing the 2018 Amendment without empirical bases cannot be rectified, greater caution may be had for the future. Third, the Parliament must consider potential sanctions for non-participation in the mandatory mediation process, lest the law become infructuous.

Recourse to the pre-litigation mediation regime, as it stands, could entail greater suffering and inconveniences borne from the 2018 Amendment's errors as recorded in this paper.This is especially evident from the Bombay High Court's view in *Ganga Taro*, which reflects a lack of confidence in the quality of LSA mediators. Had steps been taken to ensure the institutionalization of mediation, it is very likely that the High Court would instead have upheld the intended mandatory character of pre-litigation commercial mediation. Regrettably, the potential for more judicial views akin to *Ganga Taro* now looms large, which would result in defeating the purposes of the 2018 Amendment. Both the BCI, in making 'Mediation' a compulsory course in legal education,[103] and the Supreme Court's recent efforts have confirmed their commitment and encouragement to strengthening mediation's frameworks and culture in India. Therefore, it is hoped that this paper's findings encourage the Indian Parliament to consider rectifying the deficiencies of the 2018 Amendment. The Parliament must also heed the lessons that Turkey's journey with mediation have to offer, as outlined in this paper. Without this, the Niti of this mandatory requirement may not truly translate into Nyaya.

[102] *Singh* (n 80).
[103] *Bar Council of India* (n 1).