# A CRITICAL ANALYSIS OF THE INDIAN MEDIATION BILL, 2021 WITH RECOMMENDATIONS

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*This paper analyses the provisions of the Mediation Bill, 2021 in India, with a particular focus on the mandatory pre-institutional mediation in Section 6 of the Bill. The paper examines the benefits and limitations of mandatory mediation, including empirical evidence from other jurisdictions, such as Italy and Singapore. The paper also discusses the imposition of costs as a sanction on parties who unreasonably refuse to participate in mandatory mediation sessions and other incentives to mediate, such as tax benefits and reduced Court fees. Furthermore, the paper analyses other provisions of the Mediation Bill, including online dispute resolution (ODR), the Mediation Council of India, and mediation service providers (MSPs). It argues that Courts and tribunals should provide parties with access to IT infrastructure to promote ODR, particularly in areas where access to technology is limited. The paper also discusses the role of the Mediation Council of India in promoting and developing the practice of mediation in India and highlights the benefits of community mediation. Moreover, the paper examines the use of mediation in government disputes and the provisions of Sections 50 and 51 of the Mediation Bill in India, highlighting the concerns surrounding the use of mediation in such disputes. The paper concludes that the Mediation Bill provides a strong framework for the promotion and development of mediation and ODR in India but also identifies challenges in promoting accessibility and adoption.*

***Keywords**: Mediation Bill, Mandatory Mediation, Mediation Council of India, Mediation Service Providers, Mediation Training Institutes, ODR, Community Mediation, Government Mediation.*

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## I. INTRODUCTION

*"Constitutional morality is not a natural sentiment. It has to be cultivated."*

- B.R. Ambedkar, Annihilation of Caste

The Mediation Bill, 2021 is an all-encompassing law that sets out the law and the procedures to regulate mediation in India. This has been long awaited since the laws regarding mediation have been spread thin across various Acts, such as the Family Courts Act, Industrial Disputes Act, Consumer Protection Act, Companies Act, Commercial Courts Act, etc. It was introduced in the Rajya Sabha on 20th December 2021, referred to the Parliamentary Standing Committee on the same day, public comments were invited on 11th January 2022, and finally, the Committee gave its report on 13th July 2022. Currently, as of 22nd December 2022, the final recommendations are being prepared by a Working Committee set up by the Department of Legal Affairs.

The Mediation Bill, through its annexures, overrides and modifies all these other laws to bring about a cohesive law to govern mediation, its practice and sets out the structure to support the growth of Mediation in India.

The Mediation Bill covers a range of topics. In my paper, I will be dealing with the following – Mandatory Pre-Institutional Mediation, how it works, the scope of it, and its potential challenges; the definition of Mediation Service Providers, how they will be regulated, and what potential standards can be set; Mediation Training Institutes, their purpose, what kind of standards must be set for the training of mediators, the content both theory and practice of the training; Community Mediation, how it can be beneficial, the suitability of disputes fit for community mediation, and some real-life examples; the Mediation Council of India, its composition, powers and how to regulate the mediation industry; Incentives to Mediation, such as tax deductions, refund of Court fees, and how this is been used in other parts of the world; Government and Mediation, how is it encouraged, safeguards for the government, and scope of disputes covered; and lastly the

"Mediate-ability" of certain types of disputes, what is within the scope of mediation and what is excluded. I will also discuss the intersections of Mediation with Online Dispute Resolution and the path for its growth in India. I will also provide a comparative analysis, where possible, with empirically tested standards from across the globe.

## II. MANDATORY PRE-INSTITUTIONAL MEDIATION – SECTION 6

Section 6 of the Mediation Bill "…any party before filing any suit or proceedings of civil or commercial nature in any court, shall take steps to settle the disputes by pre-litigation mediation...". This provision mandates that every civil or commercial dispute in any Court shall be attempted to be resolved via mediation before the commencement of litigation.

Commercial disputes of specific value[1] mentioned under the Commercial Courts Act would be guided by the Pre-institutional Mediation Rules, 2018 under Section 12 A of the Commercial Courts Act. It would be worth noting here that recently a Supreme Court bench in *M/S. Patil Automation Private Limited And Ors. v. Rakheja Engineers Private Limited*[2] held that the requirement of mandatory mediation could not be completely evaded by filing for an urgent interim relief application that allows parties to skip the mandatory mediation requirement as an exception to the rule.

Mediation is only mandated as a process and not as an end to address concerns regarding a litigant's constitutional right to be heard by a Court. Parties must give full and informed consent over the terms of their settlement. A trained mediator will explain the process to the parties, its benefits, how it can be useful for them, with respect to time, costs, and possible outcomes. Parties can decide how they want to proceed. Italy passed Law No. 98 of 9th August 2013, which makes mediation mandatory for all civil disputes. Mediation in the European Union has been more successful when it involves elements of mandatory nature. Parties are free to pursue litigation or other processes if mediation fails. Countries that offer a two-step process, mediation followed by litigation, compared to a direct one-step litigation method, saved time and reduced costs for the parties. "In Belgium, the two-step process saved an average of 450 days and reduced costs by €16,000. In Italy, the two-step process saved an average of 1,160 days and reduced costs by €15,000."[3]

In essence, it is not mandatory to settle in mediation, but only to attempt to reach a settlement that is mandatory.

In the words of the present Chief Justice of India, Justice DY Chandrachud *"At an intrinsic level, I consider the value of mediation as an end in itself. One of the central tenets of mediation is self-determination by parties — it provides a distinct participatory role for the stakeholders to negotiate and reach creative and practical solutions beyond the constraints of legal remedies."*[4]

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[1] Commercial Courts Act, s 2(i).
[2] *M/S. Patil Automation Private Limited And Ors. v. Rakheja Engineers Private Limited* Civil Appeal SLP (C) No. 14697 of 2021.
[3] Mokal Mohit, 'Enabling ODR and Mediation in India' (2021) SSRN <https://ssrn.com/abstract=3919621>accessed 19 May 2023.
[4] Y.V. Chandrachud, Memorial Lecture on 'Future of Mediation in India' (19th August 2022).

Below we will see how mandatory mediation case studies around the world can help guide us to the right direction.

### *A. MANDATORY MEDIATION: MAPPING THE GLOBAL LANDSCAPE*

Italy serves as one of the leading examples of successful mandatory mediation law and policy. Voluntary mediation was first introduced as an option to disputants in Italy in 2003 but was hardly used. In 2010 Italian lawmakers introduced mandatory mediation legislation, recognizing a clear reluctance by parties to engage in mediation and to address the heavily overburdened courts. Legislative Decree No. 28/2010 required mandatory mediation for certain kinds of disputes.[5] Before a filing in court, parties and lawyers are required to engage in an initial mediation session with the ability, thereafter, to easily opt out of mediation. Tax reliefs were offered to parties who engaged in the mediation process, and it was to be quadrupled if an agreement was achieved. This mandatory initial mediation session model has not only drastically increased the number of cases that are attempted and settled in mediation but also recorded a substantial decrease in the number of court filings.[6]

In Singapore, the regulation concerning mandatory mediation is diverse and not explicit. Mediation in itself is divided into court-annexed and private. In 2010, the State Courts increased the use of mediation in civil disputes by adopting the 'ADR Form at the Summons for Directions' stage. Both attorneys and clients are required to sign a document certifying that they have explored ADR possibilities and indicating their decision regarding the same. In 2012, a "presumption of ADR" was implemented, which requires all civil cases to be automatically directed to mediation or other types of ADR unless one or more parties opted out. Refusing to employ ADR for reasons considered unacceptable by the registrar results in financial fines under Rules of Court Order[7].

Mediation in the European Union has also had more success when it involves elements of mandatory nature.[8] Turkey introduced mandatory mediation for certain categories of disputes and has recorded a drop of up to 70% in court filings in those categories.[9] Greece and the UK are also using strong mandatory mediation policies to increase the culture of collaboration and reduce pendency in Courts.[10]

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[5] Disputes related to condominiums, property, division of goods (or partition), family-business covenants and agreements, wills and inheritance, leases, loans, business rents, medical and paramedical malpractice, libel, insurance, and banking and financial contracts. Legislative Decree No. 28 of 4th March 2010, Italy.

[6]Urso Leonardo, 'Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary mediation' (2018) 36(4) Alternatives to the High Cost of Litigation<https://www.adrcenterfordevelopment.com/wp-content/uploads/2020/04/Italys-Required-Initial-Mediation-Session-by-Leonardo-DUrso-5.pdf>accessed 19 May 2023.

[7]'Code of Ethics and Basic Principles of Court Mediation' <http://www.subccourts.gov.sg>accessed 19 May 2023.

[8] Chandrachud (n 4).

[9]Bilecik Tuba, 'Turkish Mandatory Mediation Expands Into Commercial Disputes'(*Kluwer Mediation Blog*, 30 January, 2019)<http://mediationblog.kluwerarbitration.com/2019/01/30/turkish-mandatory-mediation-expands-into-commercial-disputes/>accessed 19 May 2023.

[10]Mohit (n 3).

India is in critical need of multiple solutions to address the crisis of 48 million cases pending in our Courts.[11] The government and the people have a shared responsibility to try Mediation to resolve our disputes in the light of the failure of the current justice system.

## III. CASES SUITABLE FOR MEDIATION – SECTION 7

Mediation is more suitable for disputes where parties have an ongoing or a past relationship, either personal or professional.[12] Mediation works best when parties are looking for a viable solution rather than making trouble for the other party. In cases where the expertise of one particular individual would be required, are also more suitable for mediation, as it is a flexible and party-oriented process, their needs can be accommodated efficiently.[13]

Here are a few examples:

1. Divorce and family disputes: Divorce and family disputes can be highly emotional and can involve issues such as custody, support, and property division. Mediation can help parties work through these issues in a less adversarial manner and with the goal of preserving important family relationships.

2. Workplace disputes: Workplace disputes can arise between co-workers, between an employee and their supervisor, or between employees and the company. Mediation can help parties resolve their issues and move forward in a way that is productive for everyone involved.

3. Contract disputes: Contract disputes can arise in many contexts, including business-to-business transactions, employment agreements, and real estate contracts. Mediation can help parties work through these issues and come to a mutually acceptable resolution that avoids the cost and uncertainty of litigation.

4. Personal injury claims: Personal injury claims can be highly emotional and involve significant financial stakes. Mediation can help parties work through these issues in a way that is less adversarial and with the goal of reaching a settlement that is fair and reasonable.

While there is no definitive answer to which cases are more suited for mediation, there are some factors that can make a case more conducive to successful mediation.

1. The parties are willing to negotiate: Mediation requires both parties to be willing to engage in negotiations and to work towards a mutually agreeable solution. If one party is not willing to engage in this process, mediation is unlikely to be successful.

[11]National Judicial Data Grid, Pending Dashboard, <*https://njdg.ecourts.gov.in/njdgnew/?p=main/index%20(pending%20cases%20at%20the%20district%20and%20high%20courts%20of%20India)*>accessed 19 May 2023.
[12]Mohit (n 3).
[13]Sander Frank and Lukasz Rozdeiczer, 'Matching Cases And Dispute Resolution Procedures: Detailed Analysis Leading To A Mediation-Centered Approach' (2006) 11 Harvard Negotiation Law Review <https://ssrn.com/abstract=904805> accessed 13 February 2023.

2. The issues in the case are well-suited to compromise: Mediation is most successful when the issues in dispute are capable of being resolved through compromise. If the issues are legal or factual in nature and require a clear winner and loser, mediation may not be the best option.

3. The parties want to preserve their relationship: Mediation is often a good choice when the parties want to maintain their relationship, whether it be personal, business, or professional. Mediation allows the parties to work together to find a solution that works for everyone, which can help preserve their relationship moving forward.

4. The parties want to avoid the cost and uncertainty of litigation: Litigation can be expensive, time-consuming, and uncertain. Mediation can be a cost-effective and efficient way to resolve a dispute, as it allows the parties to come to a resolution on their own terms rather than relying on a judge or jury.

5. The parties want to maintain privacy: Mediation is a private process, which can be appealing to parties who want to keep their dispute out of the public eye. Unlike litigation, which is conducted in open court, mediation allows the parties to keep their dispute confidential.

It's worth noting that even if a case meets all of these criteria, there is no guarantee that mediation will be successful. However, cases that meet these criteria are generally considered to be more suitable for mediation than cases that do not.

In the Indian context, the Supreme Court of India, in the landmark case of *Afcons Infrastructure Ltd v. M/s Cherian Varkey*[14] laid down the type of cases that are suitable for mediation –

*A. CASES WHICH ARE NOT CAPABLE OF BEING REFERRED TO ANY ADR MECHANISM (ARBITRATION / MEDIATION)*[15]

1. Representative suits under Order 1 Rule 8 CPC, which involve public interest or interest of numerous persons who are not parties before the Court.

2. Disputes relating to election to public offices (as contrasted with disputes between two groups trying to get control over the management of societies, clubs, association, etc.).

3. Cases involving the grant of authority by the court after inquiry, as for example, suits for grant of probate or letters of administration.

4. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

[14] *Afcons Infrastructure Ltd v. M/s Cherian Varkey Construction* (2010) 8 SCC 24.
[15] Department of Justice, <https://doj.gov.in/>accessed 19 May 2023.

5. Cases requiring protection of Courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the government.

6. Cases involving prosecution for criminal offences.

*B. CASES WHICH ARE CAPABLE OF BEING REFERRED TO ANY ADR MECHANISM.*[16]

1. All cases relating to trade, commerce, and contracts, including – disputes arising out of contracts (including all money claims):
a. Disputes relating to specific performance;
b. Disputes between suppliers and customers;
c. Disputes between bankers and customers;
d. Disputes between developers/builders and customers - disputes between landlords and tenants/licensor and licensees;
e. Disputes between the insurer and insured

2. All cases arising from strained or soured relationships, including:
a. Disputes relating to matrimonial causes, maintenance, custody of children;
b. Disputes relating to partition/division among family members/coparceners/co-owners; and
c. Disputes relating to a partnership among partners.

3. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including:[17]
a. Disputes between neighbours (relating to elementary rights, encroachments, nuisance, etc.);
b. disputes between employers and employees;
c. disputes among members of societies/associations/Apartment owners associations;

4. All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents; and[18]

5. All consumer disputes including disputes where a trader/supplier/manufacturer/service provider is very keen on maintaining his business/professional reputation and credibility or product popularity.[19]

However, it is to be noted that the above list cannot be applied uniformly to all types of ADR mechanisms. Matrimonial disputes, for example, can be referred to mediation. However, it cannot be referred to arbitration.

The "Mediatability"[20] of cases would have to largely depend on this criteria. From Schedule 1 of the Mediation Bill, certain types of disputes, including those relating to minors or persons of unsound mind, must be allowed to be mediated, albeit with valid representation on their

[16]ibid.
[17]ibid.
[18]ibid.
[19]ibid.
[20] In reference to mediation, as arbitrability is in reference to arbitration.

behalf from their legal guardian with a condition that only actions can be taken are those in the interests and to the benefit of such minors or persons in good faith.

Further, even cases of quasi-criminal nature, for example relating to matrimonial cases or promissory notes under Section 138 of the Negotiable Instruments Act, must be allowed to be settled in mediation as they have been to meet the ends of justice. As the Supreme Court has held and confirmed in many cases, "High Court is entitled to quash proceedings if it comes to the conclusion that the ends of justice so require. It is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue." Section 482 CrPC enables the High Court and Article 142 of the Constitution enables the Supreme Court to pass such orders.[21] As per this judgment High Courts, along with the Supreme Court, have inherent powers to quash criminal cases that are connected to civil cases or otherwise, if the Court is satisfied that there is no further need to conduct criminal proceedings since the parties have voluntarily and in good faith chosen to settle the dispute amicably. This helps in protecting close relationships and avoids the unintended escalation of disputes with a strict and restricted interpretation of the law.

## IV. SANCTION ON PARTIES BY IMPOSING COSTS - SECTION 20

Section 20 of the Bill empowers the Court to impose costs on parties when they have unreasonably refused to participate in the first two mandatory mediation sessions. This is a welcome incentive for mediation.

The 240th Law Commission Report on Awarding of Costs in Civil Litigation[22] provides some guidance as to when and how to award costs. Generally, the rule is that 'Except where specifically provided by the statute or by the rule of Court, the costs of proceedings are in the Court's discretion.'

In the *Vinod Seth v. Devinder Bajaj,*[23] the Supreme Court confirms the intended purpose to be kept in mind while awarding costs considering the Law Commission Report -

1. It should act as a deterrent to vexatious, frivolous, and speculative litigations or defences.

2. They should ensure the provisions of the law governing procedures should be scrupulously and strictly complied with so that the parties do not adopt any delaying tactics or mislead the court.

3. The costs awarded should be sufficient to indemnify the party for the costs incurred by the other party for the litigation.

4. The provision of costs should incentivize the parties to opt for Alternative Dispute Resolution processes and arrive at a settlement before the trial commences.

[21] *B.S. Joshi & Ors v. State of Haryana & Anr* (2003) 4 SCC 675, *Mohd. Shamim & Ors v. Nahid Begum &Anr*(2005) 3 SCC 302, *Gian Singh v. State of Punjab &Anr* (2012) 10 SCC 303, *Jitendra Raghuvanshi & Ors v. Babita Raghuvanshi & Ors* (2013) 4 SCC 58.
[22] Law Commission of India, *Report on Awarding of Costs in Civil Litigation* (Law Com Report No 240, 2012).
[23] *Vinod Seth v. Devinder Bajaj & Anr* 2010(8) SCC1.

5. The provisions relating to costs should not, however obstruct access to Courts and justice.

The Justice Jackson Reforms on the Costs of Civil Litigation from the United Kingdom refer to a series of changes to the rules and practices governing civil litigation costs in England and Wales, which were introduced as part of the Civil Justice Reforms in April 2013. These reforms were named after Lord Justice Jackson, who was commissioned by the British government to review the civil justice system in England and Wales and make recommendations for reform.

The key objectives of the Justice Jackson Reforms with respect to costs were to:

a) Encourage early settlement of disputes: The reforms aimed to encourage parties to settle their disputes early rather than incurring the time and expense of full litigation.

b) Improve cost certainty: The reforms sought to provide greater cost certainty for parties so that they could budget for the costs of litigation and make informed decisions about whether to proceed with a claim.

c) Promote proportionality: The reforms aimed to ensure that the costs of litigation are proportionate to the value of the claim and the complexity of the case.

d) Reduce the number of satellite proceedings: The reforms sought to reduce the number of satellite proceedings (such as applications for disclosure or interim injunctions) that can increase the costs of litigation.

e) Encourage alternative dispute resolution (ADR): The reforms aimed to promote the use of alternative dispute resolution (ADR) methods, such as mediation, to resolve disputes more efficiently and cost-effectively.

Overall, the Justice Jackson Reforms aimed to make the civil justice system in England and Wales more efficient, accessible, and affordable while ensuring that the costs of litigation are proportionate to the value of the dispute.

The principles to be considered while awarding costs in civil litigation according to the Justice Jackson Reforms are:

a) Conduct of the parties: The conduct of the parties during the course of the proceedings is an important factor to be taken into account while awarding costs. The Court may award costs against a party if it considers that the party has acted vexatiously, frivolously, or abused the process of the Court.

b) Reasonable grounds for instituting or defending a suit: The Court may award costs in favour of a party if it considers that the party had reasonable grounds for instituting or defending the suit.

c) Success or failure of a party: The success or failure of a party is an important consideration while awarding costs. The general rule is that costs follow the event, meaning that the successful party is entitled to recover its costs from the losing party.

d) Complexity of the case: The complexity of the case is also taken into consideration while awarding costs. In cases where the issues are complicated, the Court may award higher costs to the successful party.

e) Conduct of the advocate: The conduct of the advocate representing a party is also taken into account while awarding costs. If the advocate has conducted the proceedings in an unreasonable or vexatious manner, the Court may award costs against the party.

It's important to note that these are general principles, and the Court has the discretion to award costs as it deems appropriate in each case, taking into account the circumstances of the case.

"A study shows that mediation in the European Union (EU) has been implemented more effectively when it involves elements of mandatory nature.[24] Italy has been the leader to introduce mandatory mediation in 2010[25] that makes mediation mandatory in all civil disputes. It is important to highlight that it is not settling disputes with mediation that is required, but it is using mediation at the first instance to resolve the dispute which is mandated. This ensures compliance with the Constitutional requirement that access to a Court of law will not be denied, however it can be procedurally regulated."[26] A study by the European Parliament conducted in 2013 to uncover the reasons why mediation was not more frequently used discovered that most participants proposed better regulation for mediation, including a stronger model of mandatory mediation for certain cases before parties can attempt to litigate in the Courts.[27]

Hence introducing the incentive to mediation by imposing costs as a sanction on parties who unreasonably refuse to mediate is much needed and thus very welcome. On the contrary, as opposed to sanctions, let us explore what incentives can be provided to participants in Mediation.

### *A. OTHER INCENTIVES TO MEDIATE*

#### 1. Tax Benefits

In Italy, if mediation is held and concludes with a settlement agreement, the parties receive a tax credit of up to Euros 500, which is reduced in half if the parties participate in mediation but do not reach a settlement. In addition, property transfer taxes (when applicable) are waived in relation to any settlement agreement reached in mediation valued at up to Euros 50,000. Any documents relating to the mediation that would otherwise require payment of stamp taxes are deemed exempt from such duties.[28] Something along these lines should also be considered to be implemented in the Mediation Bill, 2021.

[24]Chandrachud (n 4).
[25] Legislative Decree No. 28/2010.
[26]Mohit (n 3).
[27]Palo Giuseppe and others, 'Rebooting' The Mediation Directive: Assessing The Limited Impact Of Its Implementation And Proposing Measures To Increase The Number Of Mediations In The EU, Directorate General For Internal Policies, Policy Department C: Citizens Rights And Constitutional Affairs' (*Europarl.europa.eu*, 2014) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf> accessed 14 February 2023.
[28]Giulio Zanolla, 'Mediation Developments in Italy' (*Weinstein International Foundation*) <https://weinsteininternational.org/italy/italy-bio/>accessed 19 May 2023.

2. Refund of Court Fees

Since the insertion of Section 89 in the Code of Civil Procedure, another provision for the refund of Court fees for the parties has been inserted in the Court Fees Act and has also been held valid by the Supreme Court in *A. Sreeramaiah v. The South Indian Bank Ltd*., "Considering the object behind the Amendment Act 1999 inserting section 89 CPC and also insertion of section 16 in Court Fees Act, it is clear that the object of providing a refund of full court fees is to encourage the settlement of the disputes in terms of section 89 CPC."[29]

This benefit has also been extended to settlements in the Lok Adalats by the Supreme Court in *Ranganathan v. In the Court of District Judge*, *Tiruchirappalli* "Irrespective of the conditions prescribed under Sections 69 of the Tamil Nadu Court Fees Act, a person would be entitled to a refund of Court Fee, if his case is settled in Lok Adalat."[30]

It has been confirmed again that any settlement under Section 89 would be provided a full refund of Court Fees by the Supreme Court in *Kamalamma & Ors v. Honnali Taluk Agricultural Produce Co-operative Marketing Society Ltd*, "If the parties get the dispute settled by invoking section 89, then in that event, the party paying Court fees should be entitled to the refund of the full Court fees as provided under section 16 of the Court Fees Act."[31]

This benefit and incentive should also be clarified and inserted in the Mediation Bill for overall coverage on the subject of Mediation in India.

3. Payment of Stamp-Duty on Mediated Settlement Agreements

In the Karnataka High Court, in the case of *Smt. N S Geetha v. Sri B Raghuveer*, the Court ordered the payment of stamp duty on the settlement agreement effected as per Section 73 of the Arbitration and Conciliation Act, 1996. The Court held that "a settlement agreement effected as per Section 73 of the Arbitration Act shall be deemed to be an arbitral award for all purposes as it shall have the same status and effect as any other arbitral award in view of the legal fiction created by Section 74 r/w Section 30(4) of the Arbitration Act and consequently is chargeable with duty as indicated in the schedule to the Stamp Act."[32]

This must be clarified at a national level and must not be a deterrent to parties from settling in mediation. Exemptions on such duties and levies must be considered for the promotion of mediation and settlement of disputes outside of Court.

## V. REGISTRATION OF SETTLEMENT AGREEMENTS - SECTION 22(7)

Section 22(7) of the Bill provides for the registration of mediated settlement agreements, "For the purposes of record, mediated settlement agreement arrived at between the parties... shall be registered with an Authority ... and such Authority shall issue a unique registration number to

[29] *A. Sreeramaiah v. The South Indian Bank Ltd. & Anr* ILR 2006 Kar 4032.
[30] *Ranganathan v. In the Court of District Judge Tiruchirappalli* 2007 SCC OnLine Mad 826.
[31] *Kamalamma & Ors v. Honnali Taluk Agricultural Produce Co-operative Marketing Society Ltd. & Ors* 2009 SCC OnLine Kar 744.
[32] *Smt. N S Geetha v. Sri B Raghuveer* ILR 2008 KAR 3850.

such settlements". Registration of Mediated Settlement agreements is not only uncommon but also completely goes against the privity of the parties to contract and the principle of confidentiality in mediation. There are several reasons why settlement agreements should not have to be registered.

*A. Confidentiality*

When parties agree to mediate their dispute, they do so with the understanding that anything discussed during the mediation process will be kept confidential. This means that the mediator cannot disclose anything discussed during the mediation process without the parties consent. However, if the parties choose to register their mediated settlement agreement with a court or other public entity, the confidentiality of the mediation process is compromised.

Registration of a mediated settlement agreement typically involves filing the agreement with a court or government agency to make it enforceable as a legal judgment or order. This means that the terms of the settlement agreement become part of the public record, which can be accessed by anyone, including third parties who were not present during the mediation process. This can be particularly problematic in cases where parties have agreed to settle sensitive or personal matters.

The confidentiality principle in mediation encourages parties to be more candid and open during the process, as it creates a safe and private space for parties to engage in constructive dialogue to reach an agreement. If parties know that their mediated settlement agreement could become part of the public record, they may be less willing to engage in the mediation process or to disclose certain information, which could hinder settlement negotiations.

The Principle of Confidentiality has been reaffirmed several times by the Supreme Court, including in *Moti Ram (D) v. Ashok Kumar*.[33] The Court has even held that anything mentioned in the mediation report is liable to be struck off, except to the extent of communication that the mediation has settled/failed, as held in *K. Prabhavathy v. The Director General of Police*.[34]

Therefore, registration of a mediated settlement agreement is generally considered to be against the principle of confidentiality in mediation, as it undermines the trust and confidentiality necessary for parties to reach a mutually agreeable resolution.

In some cases, there may be requirements for certain types of settlements, such as those involving real estate or certain regulated industries, to be filed or recorded with specific government agencies. However, this should not be made mandatory for all types of settlement agreements.

*B. Costs*

Registering an agreement may involve additional costs, such as filing fees or other expenses, which could make the process more expensive for the parties involved. This would be another deterrent for parties to settle by mediation. Registering a mediated settlement agreement can be a time-consuming process. The parties may need to gather additional information or documentation to complete the registration, and this can require additional time and effort from

[33] *Moti Ram (D) Thr. Lrs. & Anr. v. Ashok Kumar & Anr.* (2010) 14 (ADDL.) SCR 809.
[34] *K. Prabhavathy v. The Director General of Police* 2012 (3) KLT 934.

both parties and the mediator. This delay can be frustrating for the parties, especially if they have already spent a significant amount of time and money on the mediation process. Overall, registration of mediated settlement agreements can add to the overall cost of mediation and can create additional challenges for the parties involved.

*C. Complexity*

To begin with, the registration process may involve additional legal procedures and paperwork, such as a settlement agreement and a Court application, which may require the assistance of lawyers or other legal professionals. This would include where the registrations can be made in terms of establishing jurisdiction and whether this will have to be physically done or online. Difficulty in establishing jurisdiction when parties are from different cities or countries. In some cases, parties may also be required to attend court hearings or provide further evidence, which can further increase the time and cost involved. The registration process can act as a deterrent for parties to settle their disputes through mediation. As a result, it is important to carefully consider the potential benefits and drawbacks of registration before deciding whether or not to pursue this option.

There are potential benefits to registering mediated settlement agreements, such as creating a public record of the settlement that can be used to enforce the agreement in court or to show proof of the resolution to third parties. However, these benefits are outweighed by the potential drawbacks, such as increased cost and complexity of the mediation process and the potential violation of the confidentiality principle in mediation.

In addition, the registration of mediated settlement agreements may not provide any real benefits if the parties are able to enforce the agreement without going to Court. For example, if the parties are able to follow through with the terms of the settlement on their own, then registering the agreement may not be necessary.

Furthermore, parties may prefer to keep the details of their settlement private and may be hesitant to register the agreement if it means disclosing sensitive information to the public. This could also discourage parties from using mediation as a means of resolving their disputes, as they may prefer to keep the details of the settlement confidential.

Registering a mediated settlement agreement does not offer any significant benefits to the parties involved, as the agreement is already enforceable as a private contract and as an order/judgement of a Court.

Presently, there are no provisions that mandate the registration of arbitral awards or even private contracts. Hence we must also apply the same principles to mediated settlement agreements.

## VI. ENFORCEABILITY – SECTION 30

It is necessary to explicitly provide for the enforcement of a mediated settlement agreement in the Mediation Bill in India because, without a clear legal framework for the enforcement of mediated settlement agreements, parties may be hesitant to enter into mediation in the first place

or may not be fully committed to the process, knowing that any agreement they reach may not be legally enforceable.

In the absence of explicit provisions for enforcement, parties may need to rely on the general provisions of contract law to enforce a mediated settlement agreement. This could be time-consuming, expensive and ultimately result in parties being unable to enforce their agreements. In addition, the lack of clarity regarding the enforceability of mediated settlement agreements could lead to increased litigation and court proceedings, defeating the purpose of the mediation process. Explicit provisions for the enforcement of mediated settlement agreements would provide parties with greater certainty and confidence in the mediation process. It would ensure that parties are able to fully realize the benefits of mediation, such as faster, more cost-effective, and less adversarial resolution of disputes.

Explicitly providing for the enforcement of mediated settlement agreements in the Mediation Bill would create a more predictable and certain legal framework for parties involved in mediation, encouraging more parties to engage in the process and reach mutually acceptable solutions to their disputes.

"Currently, settlement agreements reached during mediation for disputes that are pending in Court are enforceable as a decree of the Court, under Section 89 of the Code of Civil Procedure (CPC). The Judge may only check whether the parties had a valid agreement to mediate if there are any valid objections to the enforcement, for example, fraud and coercion, impartiality by the mediator, etc. and if the settlement agreement is signed by the parties. Under Section 89 of the CPC, the settlement agreement can be directly executed as a decree of the Court."[35]

Further private disputes that are not filed in Court can be enforced under the Arbitration and Conciliation Act, 1996, under Section 30 recognises and provides for its enforcement as an Arbitral Award on agreed terms. Further, Section 73 of the Act provides for the procedure for enforcement of a private settlement agreement. Section 74 further states that all settlements arrived at through the mediation will have the same status as an Arbitral Award under Section 30. If the parties choose to enforce the settlement as an Arbitral Award under Sections 73 and 74 read with Section 30, then the Settlement Agreement becomes legally binding on the parties.

In the Mediation Bill, enforcement of settlement agreements is explicitly provided for under Section 28. This is also valid for mediations that take place virtually and those settlement agreements that have concluded with e-signatures and whose records are only available digitally and that are accessible through computers or other electronic devices.[36]

There are several countries that provide for the enforcement of mediated settlement agreements, including:

1. United States: In the United States, the Uniform Mediation Act (UMA) has been adopted by several states, including Alabama, Arizona, Colorado, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, Ohio, Oregon, South

[35]Mohit (n 3).
[36]ibid.

Carolina, Texas, Utah, Vermont, and Washington. The UMA provides a framework for the enforceability of mediation agreements.[37]

2. Australia: In Australia, the National Mediation Accreditation System (NMAS) sets out standards for the accreditation of mediators and includes provisions for the enforceability of mediation agreements.[38]

3. United Kingdom: In the United Kingdom, the Civil Procedure Rules (CPR) provide for the enforcement of mediation agreements. In addition, the Mediation Agreement and Procedure Order 2018 sets out the procedure for enforcing mediation agreements.[39]

4. Canada: In Canada, the Ontario Mandatory Mediation Program provides for the enforceability of mediation agreements.[40]

For the enforcement of cross-border disputes that have been settled via mediation, the Convention for the Enforcement of International Settlement Agreements Resulting from Mediation (the Singapore Convention) has been effective as of 12th September 2020. There are currently 53 countries that have signed the convention and 6 countries have ratified it as well. India is one of the signatories to the Singapore Convention.[41] Under the Mediation Bill, currently, two provisions in Sections 3(f) and 40 define international mediation and talk about making India a hub for cross-border mediation. This definition in the Bill will need to be considered in light of Article 1 of The Singapore Convention. The Singapore Convention only applies to cross-border commercial disputes and does not apply to mediated settlement agreements related to disputes arising from transactions engaged in by one of the parties for personal, family, or household purposes and family, inheritance, or employment law matters. The definition of international mediation in the Bill may need to be reviewed, after examining the international law implications, from the perspective of enforcement of such mediated settlement agreements. Further, a clear ratification of the Singapore Convention must be made in the Mediation Bill, one that allows for automatic enforcement of settlement agreements from cross-border cases. This has also been echoed by the Parliamentary Standing Committee in their report.[42] A similar statute already exists for the enforcement of awards resulting from international arbitration proceedings under the Arbitration and Conciliation Act, 1996.[43]

[37]Uniform Law Commission, 'Mediation Act' (*Uniform Law Commission*) <https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110#:~:text=Uniform%20Law%20Commission%20The%20Uniform,areas%20of%20state%20statutory%20law.>accessed 19 May 2023.

[38]Mediation Institute, 'National Mediator Accreditation Standards'(*Mediation Institute*, 2017) <https://www.mediationinstitute.edu.au/nmas/>accessed 19 May 2023.

[39]Ministry of Justice - Mediation, 'Mediation'<https://www.gov.uk/guidance/mediation> accessed 19 May 2023.

[40]Ontario Court of Justice - Ontario Mandatory Mediation Program, 'Ontario Mandatory Mediation Program'<https://www.ontariocourts.ca/scj/civil/mandatory-mediation-program/>accessed 19 May 2023.

[41]'United Nations Convention On International Settlement Agreements Resulting From Mediation' (*Treaties.un.org*, 2020) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed on 14 February, 2023.

[42] Parliamentary Standing Committee - Mediation Bill 13.7.22 Vol.1.

[43]Arbitration and Conciliation Act, 1996, s 44-58.

Overall, providing for enforcement of mediated settlement agreements in the Mediation Bill would help to strengthen the credibility and effectiveness of mediation as a dispute resolution mechanism and would encourage greater use of mediation to resolve disputes in India.

## VII. ONLINE DISPUTE RESOLUTION (ODR), SECTION 32

Section 32 of the Bill describes online dispute resolution as disputes resolved with the "use of electronic form or computer networks but not limited to an encrypted electronic mail service, secure chat rooms or conferencing by video or audio mode or both."

According to my research, ODR can be defined as 'any mechanism used for resolving disputes through the use of electronic communication tools and any other variety of mixed information and communication technologies'.[44] This covers any electronic software or tools used in direct virtual communication without discrimination between the form of communication whether synchronous or asynchronous, text-based, audio or video-based, and any other ancillary tools that help facilitate ODR such as transcription tools, file storage software or other such platforms.[45]

As per my study, to tackle the problem of access to technology, especially in India, Courts and allied government tribunals (Consumer forums / RERA tribunals, etc.) must mandatorily set up the facilities at the Court whereby parties could have access to IT infrastructure to access ODR services if they cannot do so on their own. A computer with a stable internet connection, a video camera of good quality, a microphone and earphones for audio clarity are some basic tools that are required.[46] Courts have a duty to ensure that justice is accessible and affordable to everyone. ODR can be a more cost-effective and efficient method of dispute resolution, making it more accessible to those who cannot afford traditional legal proceedings. By providing ODR infrastructure, Courts can ensure that access to justice is not limited by financial constraints. Secondly, Courts have the expertise and resources to develop and maintain an effective ODR system. They can ensure that ODR providers comply with legal standards and ethical practices, protect data privacy, and provide secure and reliable services. Lastly, Courts can play a role in promoting the use of ODR and building public trust in the system. By endorsing ODR and providing infrastructure, Courts can signal to the public that ODR is a legitimate and effective alternative to traditional legal proceedings. Under the Mediation Bill, Section 32 the Act gives the parties the choice to opt for online mediation at any stage of the dispute, including pre-litigation mediation.

In fact, on Monday, 13th February 2023, Chief Justice of India DY Chandrachud, during a Court hearing, said that "Whether you are pro-technology or not, all Chief Justices of High Courts need to learn that technology is to be used." He even went on to discuss its importance in more detail, "In the third phase of e-courts project, in the last budget which has been declared by the Union Government, Rs. 7000 crores is made available. That of course will be used for improving the infrastructure in all the district courts also...Irrespective of whether a Chief Justice is

[44]'UNCITRAL Technical Notes On Online Dispute Resolution' (*uncitral.un.org*, 2017) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf> accessed 14 February 2023.
[45]NJDG (n 11).
[46]Geetha (n 32).

technology friendly or not, this is not how you deal with public money. You have to ensure that infrastructure is available".[47]

After the pandemic, ODR has already taken its roots in India. Compared to a few years ago, when ODR was almost non-existent, now there are many players who have already set up suitable technology, and many have identified their niches in arbitration or specific industries and have found success, the challenge before us today to promote ODR is accessibility and adoption. With several industry leaders and the government working together to tackle this challenge, I am positive the ODR boom is coming to India very soon after the Mediation Bill.

To conclude with some words from a former Chief Justice of India, NV Ramana, "Online Dispute Resolution (ODR) can be used to successfully resolve inter-alia consumer, family, business/ commercial disputes. The Ministry of Law and Justice has recently issued a list of agencies/organizations which have online dispute resolution services. The Ministry has advised various government departments to avail of such online services."[48]

## VIII. MEDIATION COUNCIL OF INDIA – SECTION 40

Under the Bill, the Mediation Council of India is the supervisory body to be established to promote and develop the practice of Mediation in India. It is given the responsibility to recognise mediation institutes and mediation service providers and renew, withdraw, suspend, or cancel such recognition under Section 40(h).

The functions of the Mediation Council of India include:

1. Promoting the use of mediation as a dispute resolution method.
2. Developing and maintaining standards for mediation practice.
3. Accrediting and training mediators and mediation institutes.
4. Encouraging research and education in the field of mediation.
5. Facilitating cooperation and exchange of information among mediation professionals.
6. Representing the interests of mediation practitioners and the mediation community.
7. Advocating for the recognition and use of mediation by Courts and other dispute resolution forums.

Section 34 provides for the qualifications and appointment of the Chairperson and Members of the Council. It provides that the Chairperson and Full-time Members have 'shown

[47]Padmakshi Sharma, 'CJI DY Chandrachud's Strong Message To HC CJs : Don't Disband Hybrid Hearing Option, Technology Was Not Only For Pandemic Time' (*Live Law*, 13 February 2023)<https://www.livelaw.in/top-stories/cji-dy-chandrachud-expresses-anguish-at-hcs-disbanding-infrastructure-for-virtual-hearings-221460>accessed 19 May 2023.

[48] 14th Conference of Chief Justices of the Supreme Courts of Shanghai Cooperation Organisation (SCO), 18th June, 2019.

capacity' and 'knowledge & experience' in dealing with problems relating to 'Alternative Dispute Resolution' and 'Mediation or Alternative Dispute Resolution', respectively. I believe it is important to have a senior mediator or expert in mediation on the council. In its current form, an arbitrator could be appointed to fill the requirement of this clause hence having no mediation practitioner to represent Mediators in the Mediation Council of India. This has also been noted by the Parliamentary Standing Committee and they have recommended that the term 'Alternative Dispute Resolution' and 'Mediation or Alternative Dispute Resolution mechanisms' in clause 34 may be considered for substitution by the term 'Mediation'."[49] Further they have also recommended that State Mediation Councils be set up for better efficiency.

In my opinion the composition of the Mediation Council of India may include representatives from various stakeholders, including:

1. Mediation practitioners and organizations
2. Legal professionals and organizations
3. Academia and research institutions
4. Government agencies
5. Consumer and user organizations
6. Other relevant organizations and individuals.

The exact composition may vary, but the idea is to have a balanced representation of relevant parties to ensure that the council operates in the best interests of the mediation community and serves its functions effectively.

## IX. MEDIATION SERVICE PROVIDER - SECTION 41 & 42

A Mediation Service Provider (MSP) is an individual or organization that offers mediation services to resolve disputes between parties. This can include conducting mediations, training and accrediting mediators, and providing support and resources for the mediation process. A mediation service provider may work as an independent practitioner or as part of a larger organization. They may provide services for a fee or on a pro bono basis. Under the Mediation Bill, Section 42 (e), MSPs can also facilitate the registration of settlement agreements.

A Mediation Service Provider typically performs the following roles:

1. Facilitating negotiations between disputing parties.
2. Helping parties identify the underlying issues in their dispute.
3. Assisting parties in finding mutually acceptable solutions.

[49] Parliamentary Standing Committee - Mediation Bill 13.7.22 Vol.1.

4. Maintaining impartiality and neutrality throughout the process.
5. Providing a safe and confidential environment for parties to communicate and negotiate.
6. Encouraging and facilitating communication and cooperation between parties.
7. Providing training and support for parties to engage in the mediation process effectively.
8. Facilitating the creation of a written agreement or settlement between parties.

The specific duties and responsibilities of a mediation service provider may vary depending on the context and the nature of the dispute. The goal is to provide an effective and efficient process for resolving disputes through mediation.

Currently, in India, Mediation Service Providers predominantly consist of Court Annexed Mediation Centres, with a limited pool of Private Mediation Institutes and even fewer independent mediators. When Mediation becomes mandatory in India, we will have a high demand for experienced and trained professionals to assist in resolving the huge backlog of pending cases. We must be especially careful in maintaining a high standard of education, training, and consistency in quality of service.

## X. MEDIATION INSTITUTES, SECTION 43

Although the definition of Mediation Institutes is not specified and will be specified by the Mediation Council of India, we can estimate the unlike Service Providers, the purpose of Mediation Institutes will be to facilitate the training and accreditation of Mediators, encourage research in the field of mediation, provide continuous professional training for mediators, to facilitate the growth of mediation in the community and to represent and promote the interests of mediators across the country.

Some examples of leading institutes around the world include the International Mediation Institute (IMI)[50] and the Singapore International Mediation Institute (SIMI).[51] IMI standards are adopted as is in several countries like Italy, the USA, Spain and even in the UK. SIMI standards have also been adopted more recently by various institutions across Asia, Africa and the UK.

IMI and SIMI norms are widely accepted as global best practices. One of the main differences in the accreditations is that IMI Mediators are certified after a training program, practical experience and an assessment. Whereas SIMI certified mediators have different levels of certification; where Level 1 is when one has completed the training program and an assessment; Level 2, in addition to the requirement of Level 1 requires 50 hours of practical experience; and Level 3, in addition to the requirement of Level 1 requires 120 hours of practical experience.

To discuss the training programs and practical assessments in more detail. Currently in India, after the Supreme Court of India formed the Mediation and Conciliation Project Committee

[50]International Mediation Institute,<https://imimediation.org/>accessed 19 May 2023.
[51]Singapore International Mediation Institute, <https://www.simi.org.sg/>accessed 19 May 2023.

(MCPC),[52] they laid down the standards for a 40-hour Mediator Training Program, which is a mandatory requirement for mediators in the Court annexed mediation centres. For private mediation, there are no such training standards in India yet. Many options from training and certifications are available, based on the 40-Hour MCPC Training Manual and other international standards such as IMI and SIMI. The Bar Council of India, in August 2020, introduced Mediation as a mandatory subject for all law schools in the LLB program with a detailed course curriculum.[53] Unfortunately, in most universities, this is not yet implemented due to a lack of infrastructure to provide for such training, both in the classroom and outside, as part of practical learning.

To maintain uniformity and high standards, based on the IMI and SIMI training and certifications, I believe it would be best to follow the standards set out below for private, professional mediators.

1. 40 Hours of Basic Training, covering:

   Mediation principles – neutrality, its voluntary nature, confidentiality, party self-determination; and process – the opening statement by the mediator, the steps of mediation and the mediator's role within each step. An overview of negotiation and conflict resolution theory. Mediator ethics, including appropriate ethical standards.

   Skills - Forms of listening skills and communication strategies. Process management skills include but are not limited to the use of joint and private meetings. Negotiation strategies and skills to manage the content of the dispute. Ways of responding to the diverse behaviours of the parties. Handling parties from different cultures and social backgrounds.

2. Four to six mediation simulation exercises which are assessed by a panel of trainers and assessors.

3. Further specialised or advanced training must be provided for up to 20 hours on the use of Online Dispute Resolution, Real Estate Disputes, Matrimonial Disputes, Government Disputes etc.

4. Refresher courses must also be made available as part of continuous professional learning for practicing mediators.

Certification and recognition of mediators based on their level of experience would also promote a culture of transparency and disclosures with parties to help them make their decision with all the information available when they are choosing a mediator. Hence implementing a Level 1, 2, 3… identical to the SIMI model would be highly recommended.

[52] *Salem Advocate Bar Association v. Union of India* AIR 2003 SC 189.
[53] Bar Council of India, 'Mediation mandatory bar council course' (*SCC Online*, 2020)<https://www.scconline.com/blog/wp-content/uploads/2020/08/Mediation_Mandatory_Bar_Council_Course.pdf>accessed 19 May 2023.

## XI. COMMUNITY MEDIATION – SECTION 44

Community mediation is a process of resolving disputes between individuals, groups, or communities without the use of lawyers. In India, where the population is growing rapidly and social tensions are increasing, community mediation may be an ideal solution to help lower communal tensions, increase communication and understanding, and promote better social cohesion.

Community Mediation is a tool that can help in resolving differences, disputes, and conflicts between individuals, groups, and organisations through constructive processes. Community mediators may be better equipped to understand the needs and interests of the parties involved. This process will help the parties reach a more favourable and desirable resolution than litigation. Community mediation also strengthens relationships, builds connections between people and groups, and creates processes that make communities work for everyone.

Chapter X of the Mediation Bill deals with community mediation in detail. Clause 44 of the Bill sets out the procedure that should be followed in case of community mediation. Community disputes are defined under the Bill as "Any dispute likely to affect peace, harmony, and tranquillity amongst the residents or families of any area or locality may be settled through community mediation with prior mutual consent of the parties to the dispute."[54] These include family, neighbourhood, religion, land, property and other related disputes.

### *A. TRUTH AND RECONCILIATION COMMISSION, SOUTH AFRICA*

The Truth and Reconciliation Commission (TRC) in South Africa can be considered a form of mediation, as it provides a platform for victims and perpetrators of human rights abuses to engage in dialogue and work toward reconciliation. The TRC was established by the Promotion of National Unity and Reconciliation Act, No. 34 of 1995, as part of the South African government's efforts to address the injustices of apartheid and promote healing and reconciliation in the country.

At its heart, it followed a restorative theory of justice rather than a retributive theory which is most commonly reflected in the adjudicatory processes today. The TRC allowed victims to tell their stories and perpetrators to confess to their crimes and ask for forgiveness. The public hearings held by the TRC were an opportunity for both victims and perpetrators to engage in dialogue and work towards a shared understanding of the past and a shared vision for the future. Through this process, the TRC aimed to promote reconciliation and healing between different racial and ethnic groups in South Africa and to help the country move forward in a positive and constructive way after the end of apartheid.

Overall, the TRC can be considered a form of mediation, as it provided a space for conflicting parties to engage in dialogue and work towards a resolution and helped to promote reconciliation and healing in South Africa after the end of apartheid.[55]

[54]Mediation Bill, 2021, s 44(1).

[55]National Centre for truth and Reconciliation, 'History of TRC' (*NCTR*)<https://nctr.ca/about/history-of-the-trc/trc-website/>accessed 19 May 2023.

### *B. COMMUNITY MEDIATION IN THE US*

Community mediation in the US began in the 1960s during the civil rights movement as efforts to achieve racial, ethnic, class, and gender equality gained momentum.[56] The federal government embedded the Community Relations Service within the Department of Justice in the 1964 Civil Rights Act. This required the creation of a non-violent and constructive model for dealing with community conflict that continues to be used today. Initially, localised resolution services and organisations focused on prosecutor-sponsored programs where community members would mediate minor criminal conflicts and neighbour disputes. Another way in which community mediation developed is because there was a need for forums for the resolution of community civic issues within the community itself. Community Mediation spread throughout the country. Starting with about 10 programs in 1975, the movement grew. However, there was a continuous connection between community mediation centres with courts. Such mediation centres provided services to the courts and also offered services that aimed to meet the community's dispute resolution needs at earlier stages of conflict.

The National Association for Community Mediation, during a landmark conference in 1992, set out the 9 Hallmarks for Community Mediation.[57] The hallmarks focus on core strengths needed by community mediation centres, of creating a safe forum for participants and recognising the strengths found by raised community consciousness.

1. A private non-profit or public agency or program thereof, with mediators, staff, and governing/advisory board representative of the diversity of the community served.

2. Using trained community volunteers as providers of mediation services, the practice of mediation is open to all persons.

3. Providing direct access to the public through self-referral and striving to reduce barriers to service, including physical, linguistic, cultural, programmatic and economical.

4. Providing service to clients regardless of their ability to pay.

5. Providing service and hiring without discrimination on the basis of race, colour, religion, gender, age, disabilities, national origin, marital status, personal appearance, gender orientation, family responsibilities, matriculation, political affiliation, and source of income.

6. Providing a forum for dispute resolution at the earliest stage of conflict.

7. Providing an alternative to the judicial system at any stage of a conflict.

8. Initiating, facilitating, and educating for collaborative community relationships to effect positive systemic change.

[56]Resolution Systems Institute, 'Community Mediation Basics' (*RSI*)<https://www.aboutrsi.org/special-topics/community-mediation-basics>accessed 19 May 2023.
[57]National Association for Community Mediation, '9 Hallmarks of Community Mediation Centres'(*NAFCM*) <https://www.nafcm.org/page/9Hallmarks>accessed 19 May 2023.

9. Engaging in public awareness and educational activities about the values and practices of mediation.

### *C. COMMUNITY MEDIATION IN SINGAPORE*

Community mediation in Singapore was established in 1998. The first CMC was set up to provide an accessible, affordable, and effective means of resolving social and community conflicts for residents in Singapore. Together with its volunteers and partnering government agencies, the CMC contributes towards the development of a harmonious, civil, and gracious community living. The first CMC was opened in Marine Parade in 1998, with 47 volunteer mediators appointed to its panel. A majority of the mediators were grassroots leaders.[58] The sessions are facilitated by 2 mediators in a private room. Over 9000 cases were mediated until 2017. In 2015, The Community Disputes Resolution Tribunals (CDRTs) were set up as part of the State Courts to provide a more affordable and streamlined service to resolve intractable disputes between neighbours. The CDRTs are part of the enhanced Community Dispute Resolution Framework (CDRF).[59]

Another reason why I believe community mediation can take strong roots in India comes from an anecdote about how community mediation began in Singapore. It was said during a conference that in the early 1990s Singapore being a multicultural hub of different communities, was facing a unique problem given its small size. Since people generally live in very densely populated areas, around the evening time when many schools would get over, and students would go home, some with buses, others would be picked up by their parents, and many students would walk home, the streets around the schools would get busy and crowded. Around the same time, people of the Muslim community would also gather around their local mosques to offer their evening prayers, which also attracted many people traveling via public transportation, in their own cars, and on foot. This became a particularly difficult affair since all of them ended up taking more time getting where they needed to go, and to find parking for their vehicles. This was brought to the attention of the local community leaders, who sat down together with representatives from the Muslim community and the local schools. They were able to sit down together and distribute paths they would take or avoid to allow the others to use them more efficiently, personnel from both sides would be deployed in the surrounding areas to help people move more efficiently and avoid any traffic jams or accidents.

The anecdote about Singapore's community mediation highlights the possibility of sitting down and having a productive discussion with people from different communities when faced with a common problem. In India, where communal or community issues are prevalent, we can take inspiration from this example. Rather than relying on third parties to dispense justice, which can take time, cost money and further disrupt relationships, we can take autonomy of our disputes, look at each other as humans who share a bond, and resolve our problems together, than by taking actions against each other. By doing so, we can build stronger relationships within our communities and create a culture of mutual respect and understanding.

[58]Ministry of Law, Singapore, 'Factsheet on Community Mediation Centres (CMC)'(*Ministry of Law Singapore*) <https://www.mlaw.gov.sg/files/news/pressreleases/2018/10/Community%20Mediation%20Centre%20Factsheet.pdf>accessed 19 May 2023.
[59]Ibid.

### *D. COMMUNITY MEDIATION IN INDIA*

In India, there are several opportunities where instead of the traditional adjudicatory system, one could use community mediation. To discuss a few below and try to understand why community mediation would be more appropriate in these situations.

1. The Cauvery Water Dispute

The Cauvery Water Dispute is a long-standing issue that dates back over a hundred years, beginning in 1892 between the Madras Presidency and the Princely State of Mysore. The disagreement over the sharing of the river Cauvery's water has been ongoing since 1807 when the Mysore State started building irrigation projects, and the Madras Government objected. The first attempts to resolve the differences were made in 1890 and led to the General Agreement of 1892. However, the agreement put severe restrictions on Mysore, which ultimately led to further disputes and failed negotiations.

In 1913, a Court of Arbitration was appointed by the Government of India, and its award was challenged by the State of Madras. Negotiations continued for years, leading to the Agreement of 1924. The division of water became a serious issue after the state reorganization in independent India, and multiple rounds of talks between the two states failed to find a resolution. In 1986, a demand was made for the constitution of a tribunal, and in 1990, the Supreme Court directed the two states to complete negotiations. However, negotiations failed, and the tribunal was constituted to pass an award in 2007.

In 2016, Tamil Nadu filed a petition in the Supreme Court seeking directions for the release of water, and the Supreme Court gave its judgement reducing the allocation of Cauvery water from Karnataka to Tamil Nadu in 2018. A dispute over arguably the essential item for survival, water, has been pending between two neighbouring states from the same country for over a century. The importance of community mediation in this context lies in its ability to resolve such conflicts in a peaceful and amicable manner, avoiding further unrest and disruption of water and other essential natural resources.[60]

2. Assam Nagaland Border Dispute

The Assam and Nagaland border dispute dates back to the colonial era when the boundaries between the two states were arbitrarily drawn. The dispute escalated in the post-independence period, leading to communal tension and violence between the two communities living in the border areas. The situation further escalated in the 1990s, resulting in the loss of lives and property.

In order to resolve the dispute, the Supreme Court referred the matter to mediation in 2010. Through community mediation, representatives from both sides have come together to hold dialogues and find common ground for a peaceful resolution. The mediators have worked to facilitate these conversations and bring the conflicting parties together, leading to a reduction in

[60]Imran Majid, 'A perpetual tussle over Water Resources: An inevitable need for Inter-State mediation in Inter-State Water Disputes' (*SCC OnLine*, 2021)<https://www.scconline.com/blog/post/2021/03/27/a-perpetual-tussle-over-water-resources-an-inevitable-need-for-inter-state-mediation-in-inter-state-water-disputes/>accessed 19 May 2023.

tension and the creation of an environment where both sides can work towards a mutually agreeable solution.

Although the dispute did not settle at the time, Nagaland has recently asked the Supreme Court to send the matter to mediation as they are interested in settling the dispute amicably. It demonstrates that by coming together and engaging in peaceful dialogue, conflicting parties can find common ground and work towards a resolution that benefits all parties involved.[61]

3. Ayodhya-Babri Masjid Case

The Ayodhya-Babri Masjid case was a long-standing dispute over the ownership of a religious site in Ayodhya, Uttar Pradesh. The case centred around the Babri Masjid, a mosque built in the 16th century, and the belief by some Hindu groups that the site was the birthplace of the Hindu god Lord Ram. In December 1992, a mob of Hindu extremists demolished the mosque, leading to widespread communal violence and riots across the country.

In an effort to resolve the dispute, the Supreme Court of India ordered mediation in 2019. A panel consisting of Justice (Retd.) Ibrahim Kalifula, former judge of the Court, Sri Sri Ravishankar, and Senior Advocate and Expert Mediator Mr. Sriram Panchu was appointed by the Supreme Court. The mediation process aimed to find a mutually acceptable solution to the dispute and bring an end to the decades-long conflict.

The importance of mediation, in this case, lies in its ability to provide a peaceful and non-violent resolution given the context, communities, history of violence, ancient archaeology and present ground realities, the interplay between law and logic and emotions and faith, and what the outcome boded for the future of hundreds of millions of people.[62] By bringing together representatives from different communities, the mediation process encouraged dialogue and understanding between opposing sides, helping to reduce tensions and promote reconciliation. Additionally, mediation allowed for a flexible and creative solution to be explored, one that could take into account the unique circumstances and interests of the parties involved.

The Mediation Bill 2021 in India includes a detailed provision for community mediation, which enables the promotion and development of community mediation in India. The provision outlines the establishment of community mediation centres, the qualifications and appointment of community mediators, and the procedure for conducting community mediation. This legal framework provides a solid foundation for the implementation of community mediation in India and enables the incorporation of best practices from other jurisdictions, such as the US, South Africa, and Singapore.

For example, the Mediation Bill 2021 can incorporate the best practices of community mediation in South Africa by promoting the use of community dialogues, which involve

[61]India News, 'Nagaland keen to pursue out-of-court settlement of border dispute with Assam'(*Hindustan Times*,25 January 2021)<https://www.hindustantimes.com/india-news/nagaland-keen-to-pursue-out-of-court-settlement-of-border-dispute-with-assam-101643051051045.html>accessed 19 May 2023.

[62]Sriram Panchu, 'Lessons from mediating Ayodhya' (*The Hindu*, 10 August 2020) <https://www.thehindu.com/opinion/op-ed/lessons-from-mediating-ayodhya/article32271588.ece>accessed 19 May 2023.

community members coming together to discuss their issues and find mutually acceptable solutions. The bill can also take inspiration from Singapore's community mediation model, which involves the appointment of community mediators who are trained and certified to resolve disputes in their communities. In addition, the bill can incorporate the US's restorative justice approach, which focuses on repairing harm and restoring relationships between the parties involved in a dispute.

By incorporating these best practices and tailoring them to the Indian context, the Mediation Bill 2021 can enable the effective implementation of community mediation in India, promoting social cohesion and building stronger, more resilient communities.

## XII. GOVERNMENT MEDIATION - SECTION 50 & 51

Government disputes are those cases where one of the parties in the dispute is the government. Due to the nature of mediation being one of compromising and collaborating, the government officers prefer to deal with disputes through litigation due to the fear of inquiries, investigation, prosecution, and political witch hunts.[63] This, unfortunately, means that even when there are cases that can be solved with the help of mediation, the government prefers to go to Court. This has led the government or one of its instrumentalities to be a party in almost 46% of all disputes that are currently pending before the Courts in India.[64] Under Section 50 of the Mediation Bill, Mediation is recommended for Government disputes where the government is acting in a commercial capacity. The Parliamentary Committee has recommended that "keeping in view of the current infrastructural and human resource constraints of the country, the Committee recommends that the wordings of clause 2 (2) may be suitably modified so that government-related disputes are not excluded from the purview of the Mediation Bill, 2021. The Committee is confident that such a move will inspire confidence in the stakeholders that mediation is a viable option, which even the government is ready to adopt for disputes where it is one of the parties."[65]

The National Highways Authority of India (NHAI) is a governmental corporation that is responsible for the highways and their development since 1995. This corporation functions under the Ministry of Road Transportation and Railways (MoRTH). Usually, the government is the only investor in this sector, but lately, the private sector has been authorized to do so as well in some cases. There are many public-private partnerships like these in place. This creates a new class of public/private disputes that are of significant importance. The NITI Aayog has proposed many measures in order to resolve disputes and complete projects. These include conciliation for the resolution of disputes between contractors and the government.[66] In 2016-17, Rs.8536.31 million in claims involving NHAI was settled for the amount of Rs.1646.49 million.[67]

[63]NJDG (n 11).
[64]Nair, Harish, 'How Centre And State Governments' Piling Court Cases Cripple Indian Judiciary' (*India Today*, 2017) <https://www.indiatoday.in/mail-today/story/centre-state-government-pending-court-cases-judiciary-983030-2017-06-16> accessed 14 February 2023.
[65] Parliamentary Standing Committee - Mediation Bill 13.7.22 Vol.1.
[66]NJDG (n 11).
[67]Annual Report 2016-17 (*Morth.nic.in*, 2021) <https://www.morth.nic.in/sites/default/files/other_files/Annual-Report-2016-17.pdf> accessed 13 February 2023.

The main reason for concern about mediation in this field is that it raises issues of accountability, transparency, and probity. The confidentiality of the process and the authority given to officers participating in mediation also open up the possibility of charges of collaboration and underhanded deals being made. Even the risk of such corruption charges is sufficient to dissuade government officers from going in for mediation. Further it can get complex when one tries to merge the concept of confidentiality in mediation with the right to information of the public about the government's actions. There may be a balance that can be struck between the two. Under the Mediation Bill, Section 51 it is mandated that no action can be taken against any officer in respect of a settlement reached in Mediation in good faith under the provision of the Mediation Bill, this may provide the opportunity for government officers to think of ways of settling cases by which the government could be benefited in terms of money, costs, time etc. This would make government officers feel safer and more comfortable settling disputes in mediation without worrying about unwarranted sanctions.

Investment treaty disputes that involve State parties would also fall under this category of disputes. In large international investment deals, that are made under any bilateral or multilateral treaty, a private or public-private organisation makes an investment in a foreign country. The country where investments are being made has duties and obligations to protect the investment of the foreign investor and provide them the same levels of protection as of its own citizens. In cases where there is a dispute in such investment disputes, one of the parties is most of the time a State or its instrumentality. The ICSID Convention[68] lead by the World Bank in 1966, was implemented for the promotion of foreign trade and protection of investments across borders. Chapter 3 of the Convention deals with Conciliation. The only practical difference between an Award by Arbitration and a Report by Conciliation is its nature.[69] Awards under ICSID are automatically binding upon the completion of the process under the Convention, whereas a Conciliator's Report has no such binding nature. India remains a non-signatory to the ICSID Convention, however India's 2016 Model BIT requires that parties make their best efforts to amicably resolve their dispute through meaningful consultation or third-party procedures (including mediation) for at least 6 months before initiating Arbitration.[70] There is also growing criticism that Awards under ICSID are inconsistent since they do not have strictly binding precedential value and that many Awards also go unpublished upon the consent of the parties.[71] In such cases, which are usually of high value, cover projects that span over years if not decades are matters that involve public interest, even though mediation may not directly lead to a final resolution, it will certainly help parties understand each other's positions and interests better, it will help them identify the issues that are of importance, their priorities, that can help in resolving some if not most of the issues

[68]'ICSID Convention|ICSID' (*Icsid.worldbank.org*) <https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview> accessed 12February 2023.

[69] Titi Catharine and Katia FachGómez, *Mediation In International Commercial And Investment Disputes* (Oxford University Press 2019).

[70]'Model Text For The Indian Bilateral Investment Treaty' (*Dea.gov.in*, 2015) <https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf> accessed 12 February 2023.

[71]Prabhash Ranjan, 'India And Bilateral Investment Treaties: Refusal, Acceptance, Backlash' (*Oxford Scholarship Online*, 2019) <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780199493746.001.0001/oso-9780199493746> accessed 12 February 2023.

amicably.[72] Other contentious issues could well be resolved by arbitration in a shorter period of time. In a recent survey conducted by Queen Mary, University of London in 2019,[73] discovered that over 61% of investor respondents responded favourably to the introduction of mandatory mediation.[74]

## XIII. ANALYSING THE IMPACT OF THE BILL

The Mediation Bill contains several key provisions aimed at promoting and facilitating the use of mediation as a method of resolving disputes in India.

One of the key provisions is Section 6, which mandates that every civil or commercial dispute in any Court in India shall be attempted to be resolved via mediation before the commencement of litigation. In mandatory mediation it is not mandatory to settle, but only to attempt to reach a settlement. Italy serves as one of the leading examples of successful mandatory mediation law and policy. In Singapore, the regulation concerning mandatory mediation is diverse and not explicit. Mediation in the European Union has also had more success when it involves elements of mandatory nature. Turkey, Greece, and the UK are also using strong mandatory mediation policies to increase the culture of collaboration and reduce pendency in Courts. Section 7 of the Mediation Bill lays down the type of cases that are suitable for mediation including civil, commercial, and family disputes.

Section 20 of the Bill allows the Court to impose costs on parties who unreasonably refuse to participate in mandatory mediation sessions. The 240th Law Commission Report provides guidance on awarding costs, which should deter vexatious and frivolous litigation and incentivise parties to opt for alternative dispute resolution. The Justice Jackson Reforms aimed to encourage early settlement, improve cost certainty, promote proportionality, reduce satellite proceedings, and encourage alternative dispute resolution. The study shows that mediation has been implemented more effectively when it involves elements of mandatory nature, and participants proposed better regulation for mediation. Incentives to mediate include tax benefits, reduced legal fees, and faster resolution.

Section 22(7) of the Bill requires mediated settlement agreements to be registered with an authority and issued a unique registration number. However, the provision has been criticized for going against the principle of confidentiality in mediation, which is protected by law. Mediated settlement agreements are private contracts between the parties involved, and registration may involve additional costs and complexity, making the process more time-consuming. Additionally, registering a mediated settlement agreement does not offer any significant benefits to the parties involved, as the agreement is already enforceable as a private contract and as an order/judgement

[72]Daniel Weinstein and others, 'Making Mediation More Attractive For Investor-State Disputes - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2019) <http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/> accessed 12February 2023.
[73]Catherine Kessedjian and others, 'Mediation In Future Investor-State Dispute Settlement' (*Jus.uio.no*, 2020) <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf> accessed 13February 2023.
[74]Mohit (n 3).

of a Court. It is argued that the same principles that apply to arbitral awards should also apply to mediated settlement agreements.

Section 30 of the Bill discusses the enforcement of settlement agreements in various contexts. Settlement agreements reached during mediation for disputes that are pending in court are enforceable as a decree of the court under Section 89 of the Code of Civil Procedure (CPC). Private disputes that are not filed in Court can be enforced under the Arbitration and Conciliation Act, 1996, under Section 30, which recognizes and provides for their enforcement as an arbitral award on agreed terms. Sections 73 and 74 provide for the procedure for enforcement of a private settlement agreement, and all settlements arrived at through mediation will have the same status as an arbitral award under Section 30. The Mediation Bill explicitly provides for the enforcement of settlement agreements under Section 28, which is also valid for virtual mediations and settlement agreements concluded with e-signatures. The Convention for the Enforcement of International Settlement Agreements Resulting from Mediation (the Singapore Convention) applies to cross-border commercial disputes and has been effective since September 12, 2020. India is one of the signatories to the Singapore Convention, and the Mediation Bill's provisions on international mediation will need to be reviewed in light of Article 1 of the Convention. The definition of international mediation in the Bill may need to be revised, and clear ratification of the Singapore Convention must be included in the Mediation Bill to allow for automatic enforcement of settlement agreements from cross-border cases. The Parliamentary Standing Committee has also echoed this need for a clear ratification of the Singapore Convention.

Section 32 of the Bill describes online dispute resolution (ODR) as disputes resolved using electronic communication tools. The author's research defines ODR as any mechanism used to resolve disputes electronically, including software, mixed communication technologies, and ancillary tools. To make ODR accessible in India, Courts and government tribunals must provide IT infrastructure for parties to use. The Chief Justice of India has emphasized the importance of using technology and improving infrastructure to support ODR. The challenge facing ODR in India is accessibility and adoption. Despite this, many players have already set up suitable technology, and industry leaders and the government are working to promote ODR.

Section 40 of the Bill establishes the Mediation Council of India, which is responsible for promoting and developing the practice of mediation in India. The Council's functions include promoting mediation as a dispute resolution method, developing and maintaining standards for mediation practice, accrediting and training mediators and mediation institutes, and advocating for the recognition and use of mediation by Courts and other dispute resolution forums. The Council is composed of representatives from various stakeholders, including mediation practitioners and organizations, legal professionals and organizations, academia and research institutions, government agencies, consumer and user organizations, and other relevant organizations and individuals. The qualifications and appointment of the Chairperson and Members of the Council are outlined in Section 34, which provides that they must have knowledge and experience in dealing with problems relating to alternative dispute resolution and mediation. The Parliamentary Standing Committee has recommended that the term "alternative dispute resolution" be substituted with "mediation" in Clause 34 and that State Mediation Councils be established for better efficiency.

Sections 41 and 42 of the Mediation Bill outline the role and responsibilities of a Mediation Service Provider (MSP) in India. MSPs are individuals or organizations that offer mediation services to resolve disputes between parties. They may work independently or as part of a larger organization and may provide their services for a fee or on a pro bono basis. The specific roles of MSPs include facilitating negotiations between parties, identifying underlying issues, finding mutually acceptable solutions, maintaining impartiality and neutrality, providing a safe and confidential environment, encouraging communication and cooperation between parties, and facilitating the creation of a written agreement or settlement. The Mediation Bill also allows MSPs to facilitate the registration of settlement agreements.

Currently, in India, there is a limited pool of private mediation institutes and independent mediators, with Court annexed mediation centres being the predominant providers of mediation services. However, with the implementation of mandatory mediation in India, there will be a high demand for experienced and trained MSPs to assist in resolving the backlog of pending cases. It is, therefore, important to maintain a high standard of education, training, and consistency in quality of service among MSPs in order to ensure an effective and efficient process for resolving disputes through mediation.

Section 43 of the Bill discusses the role of Mediation Institutes, which will be responsible for the training and accreditation of mediators, encouraging research in the field of mediation, and promoting the interests of mediators across the country. The Mediation Council of India will specify the definition of Mediation Institutes. The paper presents examples of leading institutes, such as the International Mediation Institute (IMI) and the Singapore International Mediation Institute (SIMI). IMI and SIMI standards are widely accepted as global best practices, and there are differences in their accreditation. IMI mediators are certified after completing a training program, practical experience, and an assessment, while SIMI-certified mediators have different levels of certification based on their experience.

The paper also discusses training programs and practical assessments for mediators in India. The Mediation and Conciliation Project Committee (MCPC) has laid down standards for a 40-hour Mediator Training Program, which is mandatory for mediators in the Court-annexed mediation centres. Private mediation has no such training standards in India yet. The Bar Council of India has introduced mediation as a mandatory subject for all law schools in the LLB program, but it has not been implemented due to a lack of infrastructure.

To maintain uniformity and high standards, the text recommends following the IMI and SIMI training and certification standards for private, professional mediators. The recommended standards include 40 hours of basic training, four to six mediation simulation exercises assessed by a panel of trainers and assessors, specialized or advanced training, and refresher courses. Certification and recognition of mediators based on their level of experience, identical to the SIMI model, is also recommended.

Section 44 discusses the procedure to be followed in community mediation, as set out in Chapter X of the Mediation Bill. According to the Bill, community disputes include those likely to affect peace, harmony, and tranquillity among residents or families of any area or locality. These disputes can be settled through community mediation with the prior mutual consent of the parties involved. The Truth and Reconciliation Commission in South Africa is also discussed, as it is

considered a form of mediation that aimed to promote reconciliation and healing between different racial and ethnic groups in South Africa after the end of apartheid. Additionally, the paper discusses the history and development of community mediation in the US, including the 9 Hallmarks for Community Mediation, which was established by the National Association for Community Mediation. The paper also mentions community mediation in Singapore, which was established in 1998 to provide accessible, affordable, and effective means of resolving social and community conflicts.

The paper discusses the use of mediation in government and investment disputes. It notes that the fear of inquiries, investigation, prosecution, and political witch hunts leads government officers to prefer litigation over mediation. However, Section 50 of the Mediation Bill recommends mediation for government disputes where the government is acting in a commercial capacity. The paper also highlights concerns about accountability, transparency, and probity in the use of mediation in the government sector. Section 51 of the Mediation Bill provides protection to government officers who settle cases in mediation in good faith. Investment treaty disputes involving State parties are also discussed, with the paper noting that mediation can help parties understand each other's positions and interests better, potentially leading to the resolution of some, if not most, issues amicably. The paper also notes that there is growing criticism of the inconsistent nature of awards under the ICSID Convention and that a recent survey found that over 61% of investor respondents responded favourably to the introduction of mandatory mediation.

Overall, the Mediation Bill presents a comprehensive and necessary framework for promoting mediation as an effective means of resolving disputes in India, and it is a step forward in reducing the burden on courts and fostering a culture of collaboration.

## XIV. CONCLUSION

The Mediation Bill, 2021 is an important and comprehensive law that regulates mediation in India. One of the most significant aspects of this Bill is the Mandatory Pre-Institutional Mediation provision, which mandates that parties attempt to resolve any civil or commercial disputes via mediation before commencing litigation. While some may have concerns regarding the constitutional right to be heard by a Court, the mediation process is only mandated as a process, not as an end. Countries such as Italy, Turkey, Greece, South Africa and Singapore have successfully implemented mandatory mediation legislation, which has reduced the burden on Courts, saved time and costs, and increased the number of cases that are attempted and settled in mediation. The principles of awarding costs in civil litigation, as proposed by Justice Jackson Reforms in the UK, also support the use of mediation and aim to encourage early settlement of disputes, provide greater cost certainty, and reduce the number of proceedings. The Italian approach to mandatory mediation demonstrates that when mediation involves elements of a mandatory nature, it can be more effective. Thus, imposing costs as a sanction on parties who unreasonably refuse to mediate and offering other incentives to mediate, such as tax benefits, are much needed to encourage the use of mediation and reduce the burden on the Courts.

The Mediation Council of India will have a crucial role in promoting mediation as a dispute resolution mechanism and facilitating the growth of the mediation community in the country. There is a need to formulate clear regulations regarding the registration of mediators and mediation service providers. The TRC in South Africa serves as an example of how community mediation

can be used to promote reconciliation and healing after a time of conflict. In the US and Singapore, community mediation centres offer services to meet the community's dispute resolution needs at the earliest stages of conflict. Overall, community mediation can be an ideal solution to help lower communal tensions, increase communication and understanding, and promote better social cohesion. Sections 50 and 51 of the Mediation Bill provide provisions for the use of mediation in government disputes, including those involving public-private partnerships and investment treaty disputes. The inclusion of these provisions in the Mediation Bill may encourage government officers to consider mediation as a viable option for resolving disputes.

While the Bill is an essential development, there is a need to ensure that it is implemented effectively and that efforts are made to address any concerns or gaps that may arise during its implementation.

To conclude with the words of the present Chief Justice of India, "I think the future of mediation in India is its ability to impact social change in a manner that the law does not... It empowers the marginalised in the course of the process...This is the future of mediation in India".[75]

[75]Chandrachud (n 4).