
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

MEDIATION ACT AT A GLANCE: HISTORY, EVOLUTION AND CHALLENGES- Shivam Mishra¹**INTRODUCTION**

"An ounce of mediation is worth a pound of arbitration and a tonne of litigation."

- Joseph Grynbaum

The Mediation Act of 2023, a landmark piece of legislation, has been signed into law by the President of India, bringing a new chapter in the country's dispute resolution mechanism. India's legal system needed a vital piece of legislation: a dedicated law on mediation. The Mediation Act 2023 addresses this gap and aligns India with other major countries.

Although mediation has long been a part of Indian legal tradition, the Mediation Act 2023 is the first time the Indian Parliament has sought to consolidate mediation as an Alternative Dispute Resolution (ADR) process.

In the pivotal case of **M Siddiq (D) Thr Lrs v. Mahant Suresh Das Ors**², commonly known as the Ayodhya title dispute case, the Supreme Court referenced mediation for the involved parties. The court appointed three mediators; they tabled the mediation report. Despite mediation efforts, the parties could not reach a mutually acceptable solution.

In the case of **B.S. Krishnamurthy v. B.S. Nagaraj**³, the Supreme Court issued a directive instructing Family Courts to actively work toward resolving matrimonial disputes through mediation.

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²M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das, (2020) 1 SCC 1

³B.S. Krishna Murthy v. B.S. Nagaraj, (2011) 15 SCC 464

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A survey by the Federation of Indian Corporate Lawyers (FICL) and the Centre for Trade and Investment Law (CTIL) revealed that mediation/conciliation is India's second most preferred method for dispute resolution. This finding amply clarifies that mediation is emerging as a powerful force in the Indian legal landscape.⁴

Need for Mediation Law

Since there has yet to be a single dedicated mediation law, individuals and parties often do not perceive mediation as a dependable option. Instead, they consider it an alternative or a last resort. Introducing the Mediation Act 2023 would streamline court operations, leading to more effective and efficient dispute resolution. Decisions would not favor one party exclusively but would support both parties since they would be based on negotiations involving both parties. It will regain the trust of individuals in mediation and guarantee adherence to ethical practices during the mediation process. This Act will not solely incentivize individuals to opt for mediation but also expeditiously resolve matters by fostering mutual understanding between parties and providing optimal assistance.

In the case of **M.R. Krishna Murthi v. The New India Assurance Co. Ltd**, the Supreme Court of India, in an order issued in 2019, acknowledged the growing significance of mediation and emphasized the need to enact the Indian Mediation Act. The Supreme Court also emphasized the critical role of the legislature in recognizing the importance of mediation and urged the Government to develop the Indian Mediation Act.⁵

On page 85 of its 2017 report, the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India recommended that the government, after consulting with experts, consider the advantages of enacting a separate legislation for mediation.⁶

At the first IAMC India Mediation Day, Justice Hima Kohli, Judge, Supreme Court of India, underscored that the prevalence of ADR had been comprehensive in ancient and medieval India and ADR is commonly referred to as “*Appropriate Dispute Resolution*” in contemporary India. Moreover, Justice Kohli stated, “*The benefits of Mediation are plenty. They include its non-adversarial and voluntary nature, flexibility and confidentiality of the process, speed and cost-effectiveness, and the finality of consensual settlements. As a mode of ADR, Mediation helps to reduce the caseload burden on courts. It contributes towards the*

⁴ <https://www.ficl.org.in/law/2023/05/30/release-of-indias-first-survey-on-dispute-resolution-in-india-by-ficl-ctil-by-justice-navin-chawla-delhi-high-court>

⁵ <https://www.linkedin.com/pulse/does-india-need-legislation-mediation-badrinath-srinivasan/>

⁶ <https://www.linkedin.com/pulse/does-india-need-legislation-mediation-badrinath-srinivasan/>

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financial and commercial growth of the country.” Justice Kohli further commented on mediation laws in other countries, stating that “Australia, Singapore, and Italy have standalone laws on Mediation. But there is a legislative vacuum in India, which will be filled up soon with the Ministry of Law having drafted the Mediation Bill 2021 that seeks to promote Mediation, particularly institutional Mediation, and provides a mechanism for enforcing mediated Settlement Agreements. Presently, the Bill stands referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, for discussion”.⁷

History of Mediation

The Hon’ble Justice N.V. Ramana, former Chief Justice of India, in his keynote address at the India-Singapore Summit 2021, traced back mediation as a primary method of settlement in India, to Mahabharata, wherein Lord Krishna attempted to mediate a compromise between the Kauravas and Pandavas⁸. Disputes amongst the traders going as far back as the thirteenth century were resolved through regulatory bodies established by merchants. The Panchayats in Indian villages play a crucial role in village-based dispute resolutions. However, the advent of the British Court system in India in 1775 eroded community-based indigenous dispute-resolution mechanisms.

Ramayana, an epic battle between Lord Rama and Ravana, is an exemplary yet unfortunate example of failed mediation, resulting in a war, loss of several lives, and plentiful resources.⁹This further shows that conciliation has been deeply entrenched in Indian ethos.

Evolution of Mediation

The principle of mediation, as a mechanism for resolving industrial disputes, was formally enshrined in the Indian statutory framework through enacting the Industrial Disputes Act 1947. The conciliators appointed under Section 4 of the Act are " *charged with mediating in and promoting the settlement of Industrial disputes.*"¹⁰ The Act established a comprehensive framework for conducting conciliation proceedings.

⁷ <https://www.livelaw.in/events-calendar/mediation-settlement-justice-hima-kohli-adr-iamc-meditation-day-simc-226509>

⁸ <https://www.indiatoday.in/india/story/amicable-dispute-settlement-is-part-of-indian-cultural-ethos-says-cji-nv-ramana-1829436-2021-07-17>

⁹ <https://www.mediateguru.com/post/mission-possible-mediating-the-monumental-battle-in-ramayana>

¹⁰Industrial Disputes Act, 1947, s. 4

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Further, the insertion of Section 89 to the Code of Civil Procedure, 1908, by the Civil Procedure Code (Amendment) Act, 1999, was a significant development in Indian law. The section comprehensively enumerates a variety of alternative dispute resolution (ADR) mechanisms, including mediation.

In **Salem Advocate Bar Assn.(I) v. Union of India**, the court affirmed the constitutionality of Section 89 of the Code of Civil Procedure. Furthermore, the Court constituted a committee chaired by Retired Justice M. Jagannadha Rao to evaluate the complexities of executing the amendments. By the committee's recommendations, the Supreme Court directed all the High Courts to establish rules governing ADR and mediation. The Court, in a subsequent judgment, affirmed the committee's recommendations.

In the landmark decision of **Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.**¹¹, In this case, the Supreme Court undertook an in-depth examination of the scope of Section 89 of the Code of Civil Procedure. In doing so, the court furnished clarification on the procedural steps the courts must adhere to when referring disputes to ADR by the methods stipulated in Section 89. Moreover, the Court, through the employment of purposive interpretation, rectified a material draftsman's error by transposing the definitions of "judicial determination" and "mediation" in Sections 89(2)(c) and (d) of the Code of Civil Procedure.

Later, the honourable Supreme Court in **M/s Patil Automation Private Limited and Ors. v. Rakheja Engineers Private Ltd.**¹² addressed the issue of mandatory pre-institutional mediation mandated by the Commercial Courts Act of 2015 and determined that this provision is not merely procedural but rather a mandatory requirement that must be carefully adhered to, and failure to comply with this requirement will result in the dismissal of a commercial suit.

In a landmark move to streamline the mediation process in India, the government first introduced the Mediation Bill 2021 on December 20, 2021, in the Rajya Sabha. After the introduction of the bill, the Parliamentary Standing Committee on Personnel, Public Grievances, Law, and Justice, under the chairmanship of Mr. Sushil Kumar Modi, meticulously scrutinized the bill and presented its comprehensive report.¹³

¹¹ Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24

¹² https://www.livelaw.in/pdf_upload/678-patil-automationpvt-ltd-v-rakheja-engineers-private-ltd-17-aug-2022-431042.pdf

¹³ The Mediation Bill, 2021, PRS Legislative Research (Dec. 28, 2021)

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On August 1, 2023, the Mediation Bill 2021 was presented and approved by the Rajya Sabha. Subsequently, on August 7, 2023, the Bill was introduced and approved by the Lok Sabha. After that, the bill received the assent of the President of India and was published in the Gazette of India on September 15, 2023, thereby becoming law.¹⁴

Current status of different statutes

The Mediation Act of 2023 introduces substantial changes to various statutes, fostering mediation as a preferred method for resolving disputes.

Amendment to the Indian Contract Act, 1872¹⁵

Section 58, read with the Third Schedule of the Mediation Act, 2023, seeks to amend Section 28 of the Indian Contract Act 1872. Section 28 of the Indian Contract Act 1872 provides that an agreement in restraint of legal proceedings is void, except for agreements to refer disputes to arbitration given under Exceptions 1 and 2. With the enactment of the Mediation Act 2023, the word "mediation" is inserted into Exception 1 and Exception 2 of Section 28 of the Indian Contract Act, 1872, like arbitration.

Amendment to the Code of Civil Procedure, 1908¹⁶

Section 59, read with the Fourth Schedule of the Mediation Act, 2023, seeks to amend Section 89 of the Code of Civil Procedure, 1908. Under Part V, under the heading SPECIAL PROCEEDINGS, the sub-heading "Arbitration" shall be omitted. Section 89 of the Code of Civil Procedure, 1908 will be amended to provide a comprehensive and structured procedure for settling disputes through mediation, and the provisions of the Mediation Act, 2023, shall apply to all Court-referred mediations.

Amendment to the Legal Services Authorities Act, 1987¹⁷

Section 60, read with the Fifth Schedule of the Mediation Act, 2023, seeks to amend Section 4(f) of the Legal Services Authorities Act, 1987. Section 4(f) of the Act mandates the promotion of alternative dispute resolution (ADR) mechanisms, including negotiations,

¹⁴<https://www.barandbench.com/news/mediation-act-2023-president-india-approval>

¹⁵Mediation Act, 2023, s. 58 & Third Schedule

¹⁶Mediation Act, 2023, s. 59 & Fourth Schedule

¹⁷Mediation Act, 2023, s. 60 & Fifth Schedule

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arbitration, and conciliation by the central authority. Following the amendment, the foremost authority will explicitly incorporate mediation as an additional encouraged ADR method.

Amendment to the Arbitration and Conciliation Act, 1996¹⁸

Section 61, read with the Sixth Schedule of the Mediation Act, 2023, seeks to amend viz.

- Section 43D of the Act
 - Section 43D(1) of the Act outlines the Arbitration Council of India's responsibility to take measures to promote arbitration, mediation, conciliation, and other ADR mechanisms. Following the amendment, the terms 'mediation' and 'conciliation' will be expressly deleted from sub-section 1.
 - Within Section 43D(2) of the Act, clauses (e), (f), and (i) currently include the term "conciliation" alongside "arbitration." Following the amendment, the term "conciliation" will be omitted from these clauses.
- In addition, Section 61 of the Act is proposed to be amended to explicitly clarify that the conciliation process outlined in both the Arbitration Act and the Code of Civil Procedure shall be construed as a reference to mediation as defined in Section 3(h) of the Mediation Act, 2023.

Amendment to the Micro, Small and Medium Enterprises Development Act, 2006¹⁹

Section 62, read with the Seventh Schedule of the Mediation Act, 2023, seeks to amend Section 18, MSMED Act, 2006. Section 18 of the MSMED Act stipulates the procedure for seeking resolution through the Facilitation Council. The amended provisions establish that in any dispute involving a monetary claim, either party may initiate a reference to the Facilitation Council. Upon receiving such a reference, the Council shall either conduct mediation proceedings by the Mediation Act, 2023, or refer the matter to a mediation service provider as per the Mediation Act, 2023.

Amendment to the Companies Act, 2013²⁰

Section 63, read with the Eighth Schedule of the Mediation Act, 2023, seeks to amend Section 442, Companies Act, 2013. The amended Section 442 pertains to the process of referring a matter to mediation, and such matters referred to mediation shall be regulated by the provisions outlined in the Mediation Act 2023.

¹⁸Mediation Act, 2023, s. 61 & Sixth Schedule

¹⁹Mediation Act, 2023, s. 62 & Seventh Schedule

²⁰Mediation Act, 2023, s. 63 & Eighth Schedule

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Amendment to the Commercial Courts Act, 2015²¹

Section 64, read with the Ninth Schedule of the Mediation Act, 2023, seeks to amend Section 12A of the Commercial Courts Act, 2015. The heading of Chapter III A and Section 12 A of the Commercial Courts Act, 2015 is also proposed to be changed from "Pre-Institution Mediation and Settlement" to "Pre-Litigation Mediation and Settlement."

Amendment to the Consumer Protection Act, 2019²²

Section 65, read with the Tenth Schedule of the Mediation Act, 2023, seeks to amend different areas of the Consumer Protection Act, 2019. The substituted Section 37 provides that *"the District Commission or State Commission or the National Commission, as the case may be, shall either on an application by the parties at any stage of proceedings refer the disputes for settlement by mediation under the Mediation Act, 2023"*.

Position in Other Countries

Several nations have enacted mediation laws or established legal frameworks to facilitate and regulate mediation practice. While it is acknowledged that the scope and particular provisions of these legal enactments exhibit variances, it is imperative to note that the extensiveness and the intricate details of these statutes differ.

Singapore: In Singapore, mediation law governs the process of mediation as a method of resolving disputes. The primary legislation related to mediation in Singapore is the Mediation Act, which came into effect in 2017. This Act promotes and facilitates mediation as an effective means of dispute resolution. *"The Singapore International Mediation Institute (SIMI) is the independent professional body for mediation in Singapore. Mediation providers such as the Singapore Mediation Centre (SMC) and Singapore International Mediation Centre (SIMC) have their respective mediation procedures and rules"*.²³

United States of America: In the United States, mediation laws exist both at the federal and state levels. The Uniform Mediation Act (UMA)²⁴, which functions as a model statute, has been adopted by multiple U.S. states, providing a foundational framework for mediation

²¹Mediation Act, 2023, s. 64 & Ninth Schedule

²²Mediation Act, 2023, s. 65 & Tenth Schedule

²³https://www.rajahtannasia.com/media/4446/rajah-tann-singapore_lexgtdt-mediation-2021.pdf

²⁴<https://www.uv.es/medarb/observatorio/leyes-mediacion/euu/usa-uniform-mediation-act-2001.pdf>

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processes. Furthermore, the federal government has enacted the Alternative Dispute Resolution Act, which promotes the utilization of mediation and various alternative dispute resolution techniques.

United Kingdom: In the United Kingdom, mediation is governed and promoted by using two legal instruments: the Civil Procedure Rules (CPR)²⁵ and the Mediation Act of 2017, which applies to England and Wales. However, it is pertinent to emphasize that Scotland and Northern Ireland possess autonomous judicial systems.

France: In 1995, France passed a fundamental law on mediation. Since then, mediation has developed through the establishment of mediation centers. "*Order No 2011-1540 of 16 November 2011 transposed EU Directive 2008/52/EC into French law. The Directive establishes a framework to facilitate the amicable resolution of disputes by the parties, with the aid of a third party, the Ombudsman. The Order broadened the scope of the provisions in the Directive to cover internal mediation besides cross-border mediation.*" The French Code of Civil Procedure (CPC) provides for judicial mediation and conventional mediation.²⁶

Object of the Act

The Act has been enacted to "*promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for the registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost-effective process and for matters connected in addition to that or incidental to it.*"

Structure

The Mediation Act 2023 is a comprehensive and well-structured legislation divided into 11 chapters comprising 65 sections and ten schedules. This reflects the Act's ambitious scope and its intention to provide a comprehensive framework for mediation in India.

The definition of mediation under the Mediation Act, 2023

Section 3(h) of the Act defines the term mediation as "*including a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community*

²⁵<https://www.justice.gov.uk/courts/procedure-rules/civil/rules>

²⁶<https://amstelseine.com/en/news/mediation/>

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*mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute.*²⁷

The Mediation Bill initially proposed to make pre-litigation mediation mandatory for all parties planning to file a lawsuit. However, deferring to the recommendations of the 117th Standing Committee, the Bill was amended to make pre-litigation mediation voluntary.

The Act's provision for online mediation is a commendable endeavor to overcome geographical constraints and reduce expenses. However, establishing clear guidelines for online mediation procedures and conduct is essential to ensure the security and efficacy of this new method.

The Act's introduction of community mediation provides a valuable mechanism for resolving disputes that impact the peace, harmony, and tranquillity of communities and localities. This novel approach to mediation requires the prior mutual consent of the disputing parties, reflecting the Act's commitment to voluntary and consensual dispute resolution.

Distinctive characteristics of the Act

Time restriction: According to Section 18 of the Act, the mediation proceeding must be concluded within 120 days from the date fixed for the first appearance before the mediator. This deadline may be extended by a maximum of 60 days by mutual consent of the parties.²⁸

Safeguarding of Confidentiality: Section 15(3) of the Act protects the confidentiality of the mediation process, the information the mediator may obtain about the parties, and the subject matter of the mediation.²⁹ Moreover, Section 22 of the Act mandates preserving the confidentiality of all information and communications relating to mediation proceedings by the mediator, mediation service provider, parties, and participants. No mediation party may disclose such information or contact in any proceedings before a court or tribunal, including an arbitral tribunal.³⁰ Furthermore, Section 17 of the Mediation Act of 2023 fortifies confidentiality. It provides that *“the mediator shall not act as an arbitrator or as a*

²⁷Mediation Act, 2023, s. 3(h)

²⁸Mediation Act, 2023, s. 18

²⁹Mediation Act, 2023, s. 15(3)

³⁰Mediation Act, 2023, s. 22

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representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute in respect of the subject matter of a dispute that is the subject matter of the mediation proceedings."³¹ Despite the general requirement of confidentiality, the Act also specifies that this confidentiality does not apply to the mediated settlement agreement when its disclosure is necessary for registration, enforcement, or challenge.

Mediation Council of India:The Mediation Act 2023 mandates the establishment of a Mediation Council of India with seven members. The Mediation Council of India shall comprise a Chairperson, two full-time Members with expertise in mediation or alternative dispute resolution, three ex-officio Members, including the Secretaries of the Ministries of Law and Justice and Finance, and one part-time Member representing an industry body.³² The Mediation Council of India's primary function is to promote the practice of domestic and international mediation, register mediators, and accredit mediation service providers and institutes, etc.³³ Establishing the Mediation Council of India is equivalent to the 2019 proposal to establish an Arbitration Council of India. (not yet implemented)

Institutional mediation:Chapter 9 of the Act governs the registration and regulation of mediation service providers and institutes. The functions of mediation service providers are outlined in Section 41 of the Mediation Act 2023. These functions include the accreditation of mediators, the provision of secretarial assistance and infrastructure for mediation proceedings, the facilitation of the registration of mediated settlement agreements, etc.³⁴

Drawbacks and challenges

1. The Singapore Convention on Mediation provides a robust mechanism for the cross-border enforcement of settlement agreements arising from international mediation. India was among the first signatories to the Singapore Convention on Mediation. The Mediation Act 2023 does not incorporate the Singapore Convention on Mediation. The Indian Government has explained its decision not to integrate the Singapore Convention on Mediation into the Mediation Act of 2023, citing the Convention's relative novelty and India's preference for broader acceptance by other major economies.

³¹Mediation Act, 2023, s. 17

³²Mediation Act, 2023, s. 32

³³Mediation Act, 2023, s. 38

³⁴Mediation Act, 2023, Ss. 40, 41 & 42

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2. The third provision of the First Schedule of the Mediation Act, 2023, states that disputes related to the prosecution for criminal offenses are not suitable for mediation. However, excluding compoundable criminal offenses from this provision and making them amenable to conciliation would have been beneficial. This adjustment would have effectively reduced the case load associated with minor criminal offenses.
3. Section 3(g) of the Mediation Act 2023 defines international mediation. However, international mediation conducted outside of India is not covered by the Mediation Act 2023 and will not be enforceable in India.
4. The Act defines a “party” under Section 3(s) of the Mediation Act, 2023 as *“a party to a mediation agreement or mediation proceeding whose agreement and consent is necessary to resolve the dispute and includes their successors.”* The narrow definition of “party” in the mediation context excludes necessary parties not part of the mediation process. Consequently, essential parties may be precluded from challenging the mediated settlement in a court of law.
5. The other challenge is the composition of the Mediation Council, a proposed body to govern mediation and professional mediators. The Council comprises government appointees, while professional bodies should be autonomous in managing their affairs. Furthermore, unlike the Bar Council of India, the Mediation Council of India needs more adequate representation of experienced mediators. This raises serious doubt about its ability to regulate mediation effectively.
6. Section 7(2) of the Mediation Act, 2023, empowers the court or tribunal to pass suitable interim orders to safeguard the interests of any party. Unlike Section 9 of the Arbitration and Conciliation Act, the Mediation Act does not explicitly define the nature and scope of interim orders, nor does it specify a time limit for initiating the mediation proceedings following the granting of temporary relief.
7. Community mediation, defined under Section 43 and Section 44 of the Mediation Act 2023, has become regulated. In a dispute in any community or locality, mediation shall be conducted by a panel of mediators established by the District Magistrate or the Legal Services Authorities in the jurisdictional area. The qualifications for selection to the board of mediators are ‘persons of standing,’ ‘persons who have

contributed to the society,' etc. These qualifications are ambiguous/imprecise and could infringe upon the parties' autonomy in mediation.³⁵

8. The Mediation Act, 2023, under Sections 19 and 28, provides that a settlement agreement can only be challenged on limited grounds, namely fraud, impersonation, corruption, and where the mediation was conducted in disputes or matters not fit for mediation under section 6. The law is imprecise in what the words impersonation and corruption convey, which could lead to uncertainty and abuse. Any challenge to the mediation settlement agreement can not be done after a maximum of 180 days from the date the party making the application has received the copy of the mediated settlement agreement. In cases where the challenge is based on fraud, corruption, or impersonation, it may be more appropriate to calculate the challenge period from the date the challenging party became aware of the alleged wrongdoing, as stipulated under the Limitation Act.
9. In contrast to Section 12, read with Schedules 5 and 7 of the Arbitration and Conciliation Act, 1996, the Mediation Act of 2023 lacks explicit provisions for assessing the independence and impartiality of mediators. While Section 15(2) of the Mediation Act 2023 mandates that the mediator shall assist the parties in an independent, neutral, and impartial manner, it does not elaborate on the specific procedures and criteria for evaluating these qualities.

Conclusion

The Mediation Act of 2023 marks a welcome development in Indian law, representing a significant step towards institutionalizing mediation as a viable alternative to litigation. However, the statute may contain certain shortcomings; as discussed earlier, these could be addressed through legislative amendments.

The ultimate success of this Act hinges on its effective implementation and the consequent societal transformation it promotes. The Act is expected to play a significant role in reducing the pendency of cases in courts.

³⁵https://www.livelaw.in/articles/evaluating-the-mediation-bill-237563?infinite_scroll=1

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