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IS MEDIATION MANDATORY? A CONSTITUTIONAL ANALYSIS OF PRE-LITIGATION MEDIATION

By- **Akhilesh Kakade**[1]

ABSTRACT

This paper analyses the constitutionality of mandatory pre-litigation mediation under Section 12A of the Commercial Courts Act, 2015 under the access to justice framework in India. The major question in the present research is whether the conditions laid down to access to courts, including mandatory mediation, amounts to a reasonable procedural filter or an impermissible restriction on the fundamental right to have access to justice under Articles 14 and 21 of the Constitution. Using a doctrinal legal methodology, the study comprehends the constitutional jurisprudence on access to justice, statutory design of pre-litigation mediation in Section 12A of the Commercial Courts Act, 2015 and the Mediation Act, 2023 as well as empirical critiques of its implementation. It uses the proportionality test to question the validity of mandatory mediation as a legitimate, rationally connected, necessary, and balanced method of achieving judicial decongestion and early settlement. The paper makes the following point: Although mandatory mediation is not per se unconstitutional, its constitutionality is contingent upon demonstrable effectiveness, sufficient institutional capacity, and effective safeguards against arbitrariness and delay. As a solution it suggests a structured opt-out model, greater institutional support, an increased clarity of urgency standards and a more effective

[1] Intern- Lex Lumen Research Journal.

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disincentive to bad faith non-participation so that mediation can genuinely facilitate, rather than obstruct, access to justice.

KEYWORDS: Mandatory mediation, Pre-litigation mediation, Access to justice, Constitutional proportionality, Commercial Courts Act, 2015

I. INTRODUCTION

BACKGROUND

India's justice delivery system is currently facing a serious and chronic crisis of judicial delay. Official data suggest that over five crores cases are pending in all tiers of judiciary out of the subordinate courts account for the overwhelming majority of this backlog.[2] India Justice Report 2024 highlights that chronic vacancies, poor infrastructure and procedural inefficiencies have cumulatively undermined the capacity of our courts to ensure timely adjudication leading to a lack of public confidence in the rule of law.[3] Delayed justice not only impacts litigants economically and socially it also dilutes the substantive content of guarantees provided in the constitution especially the right of access to justice.

In response to this systemic strain the State and judiciary have over the years increased their awareness of Alternative Dispute Resolution (ADR) mechanisms as tools of structural reform. Mediation, in particular, has been forecast as a consensual, flexible and cost-effective process with the ability to resolve disputes without the adversarial intensity and time-consuming nature of litigation. Scholarly and policy-oriented

[2] *India Justice Report 2024: National Factsheet*, INDIA JUSTICE REPORT vii (2025), https://indiajusticereport.org/files/IJR%204_Full%20Report_English_Low.pdf.
[3] id.

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literature has repeatedly stressed on the potential of mediation to reduce case inflow, maintain relationships, and overall efficiency of the dispute resolution systems.[4]

Historically, mediation in India evolved by way of a disjunct legal framework. Provisions were made for encouraging mediation, such as section 89 of the Code of Civil Procedure, 1908, court-annexed mediation schemes, and statutes relating to specific industries, but there was no holistic legislation covering the process. This position changed with the passage of the Mediation Act, 2023 which is India's first consolidated statute on mediation. The Act aims at promoting institutional mediation, regulating mediators and providers of mediation services and to give enforcement powers to mediated settlement agreements.[5] The Act formally recognizes pre-litigation mediation as well, which reflects a legislative policy that disputes should be resolved (where possible) prior to parties approaching courts.[6]

An important precursor to this development was the insertion of section 12A in Commercial Courts Act, 2015 by amendment of 2018. Section 12A provides that commercial suits not involving urgent interim relief "shall not be instituted" unless the plaintiff first exhausts the remedy of pre-institution mediation.[7] This provision incorporates mediation as an alternative from being a voluntary alternative to being a mandatory procedural precondition to access commercial courts of specified circumstances. The Supreme Court in Patil Automation (P) Ltd. v. Rakheja Engineers

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[4] Deepika Kinhal & Apoorva, *Mandatory Mediation in India: Resolving to Resolve*, 2 INDIAN PUB. POL'Y REV. 49 (2021), https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf.

[5] The Mediation Act, 2023, No. 32, Acts of Parliament, 2023, Statement of Objects and Reasons (India), https://legalaffairs.gov.in/sites/default/files/MediationAct2023.pdf.

[6] *Id.* pt. V (Pre-Litigation Mediation).

[7] *Commercial Courts Act, 2015*, No. 4 of 2016, § 12A (as amended by Act 28 of 2018) (India), https://www.indiacode.nic.in/show-data?abv=CEN&statehandle=123456789/1362&actid=AC_CEN_3_46_00008_201604_1517807328347&sectionId=48975&sectionno=12A&orderno=14&orgactid=AC_CEN_3_46_00008_201604_1517807328347 .

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(P) Ltd.[8], held it as the mandatory provisions of section 12A and non-obedience to this provision has been held to be a ground on which a suit can be rejected.

The shift from voluntary mediation to mandatory pre-litigation mediation has caused a serious constitutional and normative debate. While the arguments of the supporters of mandatory mediation claim that the mandatory mediation procedure promotes early settlement and judicial efficiency, the critics warn that mandatory mediation may undermine the voluntary and consensual nature of mediation itself.[9] Empirical and doctrinal analyses have questioned whether mandatory mediation, as currently implemented, has any significant effect on the reduction of litigation or merely creates one more procedural layer before going to court.[10] These concerns take on particular significance in light of the Supreme Court's recognition of access to justice as a fundamental constitutional value.

STATEMENT OF PROBLEM

Mandatory pre-litigation mediation is warranted mainly on the grounds of efficiency, judicial decongestion and for promoting amicable settlement. Legislative and policy discourse around section 12A of the Commercial Courts Act and the Mediation Act,

[8] Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd., (2022) 10 SCC 1 (India), https://www.scconline.com/Members/SearchResult.aspx?documentLink=c82J0Lnh.
[9] Aravind Sundar, *Determining Urgency in Compulsory Pre-Litigation Commercial Mediation*, NLIU L. Rev. 64, 49–85 (2024), https://nliulawreview.nliu.ac.in/wp-content/uploads/2024/06/NLIU-Law-Review_Volume-XIII-Issue-2-64-85.pdf.
[10] Himangshu Mahaseth, *Evaluating Mandatory Pre-Litigation Mediation under the Commercial Courts Act in India* (Jindal Glob. Univ., Working Paper 2025), https://pure.jgu.edu.in/10040/1/Evaluating%20Mandatory%20Pre-litigation%20Mediation%20under%20the%20Commercial%20Courts%20Act%20in%20India.pdf.

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2023 portrays mediation as a tool that can help to streamline dispute resolution processes and conserve judicial resources.[11]

However, empirical evaluations of pre-institution section 12A mediation are much more complex. Research based on data from commercial courts shows a high rate of "non-starter" mediations (where a mediation does not meaningfully begin), low rates of settlement, and other costs that are added to litigants.[12] According to some scholarly evaluations, mandatory mediation, without substantial institutional capacity and party readiness, may serve as an extra procedural hurdle rather than as an effective substitute for litigation.[13]

This leads to a deeper constitutional worry. In Anita Kushwaha v Pushpa Sudan[14], the Supreme Court held that access to justice, including effective access to courts, was an integral component of Articles 14 and 21 of the Constitution. If access to courts was constitutionally protected, any statutory framework conditioning access to courts upon compulsory participation in mediation had to meet the standards of non-arbitrariness, reasonableness and proportionality. Parliamentary deliberations on the

[11] *From Litigation to Dialogue: The Role of Pre-Institution Mediation in India*, Int'l Bar Ass'n (Oct. 29, 2025), https://www.ibanet.org/from-litigation-to-dialogue-pre-institution-mediation-in-india

[12] Sanjeev Sanyal & Apurv Mishra, *Why Commercial Mediation Should Be Voluntary* (EAC-PM Working Paper No. 25, 2023), https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf.

[13] Anita Kushwaha v. Pushap Sudan, (2016) 8 *SCC* 509 (India), https://www.scconline.com/Members/SearchResult.aspx?documentLink=c82J0Lnh.

[14] Dep't-Related Parliamentary Standing Comm. on Law & Justice, *117th Report on the Mediation Bill, 2021* (2022), https://sansad.in/getFile/rsnew/Committee_site/Committee_File/Press_ReleaseFile/18/164/543P_2022_7_11.pdf.

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Mediation Bill are also indicative of the unease about the compulsory nature of mediation and the possible effect on rights of litigants.[15]

The central problem that is considered in this study, therefore, is whether mandatory pre-litigation mediation, structured under Indian law, amounts to a constitutionally permissible procedural innovation that improves access to justice and eases judicial burden or whether it amounts to a disproportionate restriction on the fundamental right of access to courts.

RESEARCH OBJECTIVES

1. To examine the constitutional foundations of the right to access justice in India, with particular reference to Articles 14, 21, and 39-A.
2. To analyse the statutory framework governing pre-litigation mediation under section 12A of the Commercial Courts Act, 2015 and the Mediation Act, 2023.
3. To assess whether mandatory pre-litigation mediation satisfies constitutional standards of reasonableness, proportionality, and fairness, and whether it effectively contributes to judicial efficiency.

RESEARCH QUESTIONS

1. How has Indian constitutional jurisprudence conceptualized access to justice, and what are its essential components?
2. How do existing statutory frameworks on pre-litigation mediation structure litigants' access to courts, and how do they operate in practice?
3. Does mandatory pre-litigation mediation amount to a constitutionally valid procedural filter, or does it unduly restrict access to courts?

[15] Radhika Gupta, Shayan Dasgupta & Kanika Sharma, *Compliance of Section 12A of the Commercial Courts Act*, Lexology (Jan. 3, 2023), https://www.lexology.com/library/detail.aspx?g=aeb6ce35-f562-4c87-a70e-fad24b6249bc.

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RESEARCH METHODOLOGY

This study takes a doctrinal legal research methodology supplemented by normative constitutional analysis and selective comparative inquiry. The doctrinal component consists of a close reading of the provisions of constitutions, the texts of statutes and judicial precedents concerning access to justice, ADR, and mediation. Particular attention is given to the right to access to courts and to compulsory ADR mechanisms under section 12A of the Commercial Courts Act, the Mediation Act, 2023 and Supreme Court jurisprudence in this area.

A normative constitutional evaluation is done through known doctrines of arbitrariness, reasonableness and proportionality to test compatibility of mandatory mediation with fundamental rights. Judicial decisions acknowledging access to justice as an aspect of Article 21 serve as the main framework of evaluation for this analysis.

The study further undertakes a critical review of secondary literature comprising of peer-reviewed journal articles, working papers and policy reports analyzing the implementation and performance of pre-litigation mediation. Empirical findings generated by such literature are presented as contextual evidence on assessing the practical impact of mandatory mediation, but do not constitute original empirical research. A limited comparative perspective is also used to shed light on broader conceptual issues relating to voluntariness, coercion and procedural justice of mediation.

PROPOSED CHAPTERIZATION

Chapter 1 - Introduction

This chapter opens by introducing the problem of judicial pendency and growing reliance on mediation as a tool of procedural reform. It establishes the research problem related to mandatory pre-litigation mediation; formulate the objectives and

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research questions of the paper; the methodology of the paper adopted in the form of doctrinal-normative approach; and the structure of this paper.

Chapter 2 - Access to Justice in India: The Constitutional and Jurisprudential Foundations

This chapter discusses access to justice as a constitutional guarantee emanating from Articles 14, 21 and 39-A of the Constitution. It examines the key decisions of the Supreme Court which recognize effective access to courts, fair procedure and timely remedies as crucial elements of the rule of law and so set the standard in the constitution for assessing procedural barriers.

Chapter 3 - The Evolution of Mediation Pre-litigation Mediation

This chapter traces the development of mediation in India in its early encouragement under section 89 of the Code of Civil Procedure up through to its gradual institutionalization through court annexed schemes. It critically evaluates "the institution of mandatory pre-institution mediation under section 12A of the Commercial Courts Act as a major move from voluntary to mandatory dispute resolution."

Chapter 4 - The Mediation Act, 2023 - Statutory Design and Pre-Litigation Mediation

In this chapter the objectives, structure and key provisions of the Mediation Act, 2023 as the first comprehensive mediation statute in India is analysed. It considers the Act's approach to pre-litigation mediation, and the interplay with existing statutory regimes, specifically in relation to maintaining voluntariness and party autonomy.

Chapter 5 - Mandatory Mediation at Work: Empirical and Institutional Issues

This chapter overviews empirical research and policy accounts of how pre-institutional mediation is operating in commercial disputes. It raises issues such as

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settlement rates, non-starter mediations, institutional capacity constraints and practical difficulties affecting the efficacy of mandatory mediation.

Chapter 6 - Constitutional Analysis of Mandatory Mediation

This chapter applies the doctrines of the Constitution under Articles 14 and 21 such as the test of proportionality to see whether mandatory pre-litigation mediation is a reasonable restraint on recourse to courts. It considers whether the goals of efficiency and decongestion make the compulsions and if there are sufficient safeguards to prevent coercion and/or exclusion.

Chapter 7 - Conclusion and Recommendations

This chapter serves as a synthesis of the findings and as a response to the research questions and concludes on the constitutional permissibility of mandatory mediation. It provides normative and policy recommendations designed to balance between the competing values of reform of the introduction of mediation and the constitutional guarantee of access to justice.

II. ACCESS TO JUSTICE IN INDIA: THE CONSTITUTIONAL AND JURISPRUDENTIAL FOUNDATIONS

Access to justice is the building block of constitutional democracy and rule of law in India. Although being not expressly listed as a fundamental right per se, it is well known through judicial interpretation and academic analysis - as an indispensable guarantee, without which substantive legal rights are meaningless. As revealed from the doctrinal writings, access to justice developed from a limited classical conception of access to courts to a broader modern conception based on fairness, equality,

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participation, institutional capability and effective remedies.[16] This enhanced understanding is a reflection of the fact that rights are no stronger than the mechanisms available to enforce them.

Within the framework of the Indian constitution, the concepts of access to justice are formed with the combined effect of Article 14, Article 21 and Article 39-A which together provide the normative basis for access to justice. Article 14, which represents equality before law as well as equality under the laws, has been interpreted to forbid arbitrariness in State action. In E.P. Royappa vs State of Tamil Nadu[17], the Supreme Court famously stated that arbitrariness and equality are sworn enemies, and any arbitrary and discriminatory procedure will attract the ambit of Article 14. This doctrinal development renders Article 14 a very powerful tool for the assessment of procedural barriers which hamper the access of litigants to adjudication.

Article 21, being interpreted in an expansive way following Maneka Gandhi[18], constitutionalizes that any procedure restricting life or liberty must be "just, fair and reasonable." This logic of substantive due process is the jurisprudential basis for recognizing access to justice as being a facet of Article 21. In the landmark judgment of the Constitution Bench of the Court in the case of Anita Kushwaha vs the state of Haryana[19], it held expressly that access to justice is a fundamental right flowing from Article 21, and that meaningful access comprises of (1) existence of an adjudicatory forum, (2) ability of litigants to approach it, (3) fair, efficient and reasonable procedures and (4) timely resolution of the disputes. The Court also reiterated that

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[16] Access to Justice Concept: History and Evolution, *Access to Justice*, Module (Inflibnet e-book), https://ebooks.inflibnet.ac.in/lawp04/chapter/access-to-justice-concept-history-and-evolution/

[17] E.P. Royappa v. State of T.N., (1974) 4 S.C.C. 3, https://indiankanoon.org/doc/1327287/

[18] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248, https://indiankanoon.org/doc/1766147/

[19] Anita Kushwaha v. Pushap Sudan, (2016) 8 S.C.C. 509 ¶¶ 33–38, https://indiankanoon.org/doc/147862660/

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excessive delay is in and of itself a violation of access to justice and undermines public confidence in the rule of law.[20] Academic commentary is behind this incorporation of fairness and access and there is an emphasis on the modern Indian Constitution's institutionalization of procedural equality in its structural commitments.[21]

Article 39-A was introduced by the Forty-Second Amendment which gives effect to these rights declared by the Courts and directs the State to provide "equal justice" and provide "free legal aid" so that the right to justice is not denied on grounds of economic or other disabilities. Although a Directive Principle, Article 39-A has had an enormous impact on the jurisprudence associated with legal aid and equal access. Authoritative scholarship refers to Article 39-A as the constitutional bridge between socio-economic justice and procedural fairness to access justice beyond the access to courts to also include affordability, capability and meaningful participation.[22]

The seminal decision of the Supreme Court in Hussainara Khatoon[23] gave this doctrinal movement a further push and held that free legal aid was a part of Article 21 and was indispensable to preventing the marginalized from being denied justice. Later, in Imtiyaz Ahmad v State of Uttar Pradesh[24], the Court stressed that such systemic delays in the judiciary affect access to justice and go against the constitutional expectations of timely adjudication. The academic work by Galanter and Krishnan does just that, documenting the disproportionate burden that procedural costs and

[20] ibid
[21] MADHAV KHOSLA, *THE INDIAN CONSTITUTION* 89–90 (Oxford Univ. Press 2012), https://scholarship.law.columbia.edu/books/328/
[22] *Access to Justice: Concept, History and Evolution*, supra note 16.
[23] *Hussainara Khatoon (IV) v. Home Sec'y, State of Bihar*, (1980) 1 SCC 98 (India). https://indiankanoon.org/doc/1373215/
[24] Imtiyaz Ahmad v. State of U.P., (2012) 2 S.C.C. 688, https://indiankanoon.org/doc/50352079/.

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delays, and structural inequalities, place on weaker litigants, and turning what should be formal access into functional exclusion.[25]

Contemporary scholarship argues similarly that access to justice needs to be viewed not as a monolithic procedural right, but as a package of interdependent guarantees of which legal assistance, accessible procedures, institutional capacity, affordability and the presence of alternative dispute resolution forums are just a few examples. Rather than contemplating access to justice in a narrow sense, as the physical opportunity to move to a court of justice, scholars have emphasized that meaningful enforcement of rights is conditioned by a system in which structural barriers are reduced, the procedural demands are simplified, and multiple pathways exist for the resolution of the disputes.[26] International scholarship, such as Hazel Genn's Judging Civil Justice, also highlights the importance of the principle of proportion with respect to the design of procedural barriers, including pre-action requirements such as mediation, noting that procedural mechanisms of this kind are constitutionally acceptable only when they promote, rather than impede, meaningful access.[27]

Taken together, Indian constitutional doctrine, Supreme Court jurisprudence and academic scholarship seem to point to a common conclusion: that access to justice is a composite and an enforceable constitutional right having its bases in Articles 14 and 21, and normative reinforcement in Article 39-A. This right place substantive limits on legislative or policy-based measures to regulate entry into the judicial system. Any

[25] Marc Galanter & Jayanth K. Krishnan, Bread for the Poor: Access to Justice and the Rights of the Needy in India, 55 HASTINGS L.J. 789 (2004), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1378&context=facpub

[26] Surya Deva, *Access to Justice in India: Assessing the Impact of Judicial Mechanisms*, Int'l Comm'n of Jurists (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034813

[27] HAZEL GENN, *JUDGING CIVIL JUSTICE* (Cambridge Univ. Press 2010), https://law.exeter.ac.uk/v8media/facultysites/hass/law/imeges/hamlyn/Genn_judging_civil_justice.pdf

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procedural pre-condition like mandatory pre-litigation mediation must thus be reviewed against the requirements of constitutionality of non-arbitrariness, fairness and proportionality in the matter and ensure that such mechanisms work not as obstacles to justice but as facilitators of efficient and equitable dispute resolution.

III. THE EVOLUTION OF MEDIATION PRE-LITIGATION MEDIATION

The path taken by mediation in India shows a steady but definite shift from judicial facilitation of consensual settlements to establishment of formal and institutional structures, and finally to introducing mandatory pre-institution mediation for certain categories of disputes. This evolution has started with Section 89 of Code of Civil Procedure, 1908 ("CPC"), progressed through development of court-annexed mediation schemes and culminates in Section 12A of the Commercial Courts Act, 2015 which makes it conditional for the institution of certain kinds of commercial suits the initiation of a process of mediation in the first instance. Taken together, these developments represent a structural change in the area of Indian civil justice from solely voluntary ADR to legally enforced pre-litigation dispute resolution, and this raises important normative and constitutional questions.

1. Section 89 CPC and Early Judicial Encouragement of Mediation

Mediation got its first real statutory footing in India in the form of Section 89 CPC, introduced in The Code of Civil Procedure (Amendment) Act, 1999 and came into force in 2002. Section 89 empowers while civil courts are regarded as having jurisdiction to deal in civil suits, in which it is seen that the elements of settlement exist, to make terms of a possible settlement and to refer the parties to arbitration, conciliation, judicial settlement including settlement through Lok Adalat or

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mediation.[28] The reason for the insertion of Section 89 was the pendency and the necessity for the mainstreaming of ADR mechanisms in the civil justice delivery system.

The proper scope and operation of Section 89 was explained by the Supreme Court in the case of Afcons Infrastructure Ltd. v Cherian Varkey Construction Co.[29] In that case, the Court ruled that Section 89 is designed to promote the reference of appropriate types of disputes to ADR processes and established examples of matters that may be appropriately referred to mediation and other modes of ADR. Importantly, the Court stressed that though the courts can provide strong encouragement for recourse to ADR, the key point is that mediation is essentially voluntary and the courts cannot coerce the parties to reach a settlement, and the court's referral power is to the process and not to an outcome.

2. Court-Annexed Mediation and Institutionalization

Following Afcons, High Courts and the Supreme Court's Mediation and Conciliation Project Committee ("MCPC") played a central role in the process of institutionalizing mediation through court-annexed mediation centres, mediator panels, training guidelines and manuals. The MCPC's Mediation Training Manual of India provides detailed provisions on the process of mediation; the role and ethics of mediators and best practices for court-annexed mediation programmes, which signals a shift away from ad hoc experimentation to the more structured institutional framework.[30]

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[28] Code of Civil Procedure, No. 5 of 1908, § 89 (India), https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00051_190805_1523340333624&orderno=95.
[29] Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 S.C.C. 24 (India), https://indiankanoon.org/doc/1875345/.
[30] Mediation & Conciliation Project Comm., Supreme Court of India, *The Mediation Training Manual of India* (2015), https://mcpc.nic.in/pdfs/20072021_05.pdf.

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These court-annexed schemes were an intermediate stage in the evolution of mediation as the process was increasingly formalized and supported by judicial policy, while at the same time it still relied on voluntary party participation and the discretion of the courts under Section 89 CPC. The system tried to divert appropriate cases to mediation as an adjunct to litigation and not as a juridically mandated precondition to filing a suit. Reports and studies on these schemes emphasize the fact that while the court annexed mediation contributed to settlements in certain categories of dispute (for example family matters, neighbourhood disputes, some commercial disputes) it did not in itself change the basic voluntary nature of mediation as understood in Indian civil procedure.[31]

3. Section 12A of the Commercial Courts Act and Mandatory Pre-Institution Mediation

The transition from Voluntary to Mandatory Mediation came with the addition of Section 12A of the Commercial Courts Act, 2015 through the Commercial Courts (Commercial Division and Commercial Appellate Division) Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018. Section 12A provides that a suit which does not contemplate any urgent interim relief "shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation" in accordance with the prescribed procedure.[32]

This provision changes the fundamental position of mediation in commercial dispute fundamentally. Rather than one of a number of options for ADR that courts can recommend under Section 89 CPC, mediation under Section 12A becomes a procedure

[31] Vidhi Centre for Legal Policy, *Strengthening Mediation in India* (Dec. 2016), https://vidhilegalpolicy.in/wp-content/uploads/2019/05/26122016_StrengtheningMediationinIndia_FinalReport.pdf.
[32] The Commercial Courts Act, No. 4 of 2016, § 12A (India), https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_46_00008_201604_1517807328347&orderno=14.

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built into the very gateway of the court system. The imperative form of the words "shall not be instituted" is clear. In Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd. [33] Supreme Court held that Section 12A is mandatory and not directory and suits filed in contravention of Section 12A (i.e. without exhausting pre-institution mediation where required) are liable to rejection under Order VII Rule 11 CPC. The Court thus confirmed the first-time compliance with pre-institution mediation as a condition precedent for instituting some commercial suits.

4. Policy Rationale and Early Critiques

The rationale behind the policy of Section 12A, as noted in modern literature dealing with reform, was to decrease judicial backlog by promoting the early settlement of commercial disputes outside of the court system. A detailed study by the Vidhi Centre for Legal Policy on strengthening mediation in India, for instance, saw commercial disputes as fertile ground for structured mediation on the grounds that institutional mediation could help in relieving some of the pressure on the docket and a boost for business confidence if adequately designed and resourced.[34]

However, empirical work and doctrinal comment on pre-institution mediation (PIM) soon showed a rather more complex reality. A comparative analysis of PIM in India, Italy and Turkey by Gahlot and Ritika, shows that in Indian practice a large number of PIM cases end as "non-starters", due to failure of one or more parties to participate, and actual settlements form a small fraction of the registered mediations.[35] More critically, a 2023 working paper of Economic Advisory Council to the Prime Minister (EAC-PM) by Sanyal and Mishra based on Mumbai commercial courts data concludes

[33] Patil Automation, supra note 7
[34] Vidhi Centre for Legal Policy, supra note 30
[35] Vikas Gahlot & Ritika, Pre-Institution Mediation for Speedier Resolution of Commercial Disputes: A Comparative Analysis of India, Italy and Turkey, 2 Vishwakarma Univ. L.J. (2022), https://vulj.vupune.ac.in/archives3/02.pdf.

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that mandatory PIM under Section 12A often adds time and cost without producing commensurate settlement benefits leading the authors to conclude that commercial mediation should be voluntary instead of compulsory.[36]

These findings imply that the roll-out of mandatory PIM has yet to fully achieve the decongesting effect that it was intended to have and may be acting (in certain settings) as an additional procedural burden before litigants can access adjudication. This concern is familiar from the wider literature in the field of access to justice, which warns that pre-action requirements must be constitutionally acceptable in that they will only facilitate access to dispute resolution rather than act as a deterrent or delay it.[37]

5. From Voluntary ADR to Mandatory Pre-Litigation Filter

Viewed in the light of history, Section 12A of the Commercial Courts Act represents a significant doctrinal and institutional shift from voluntary dispute resolution in accordance with Section 89 CPC and the schemes annexed by courts to one of mandatory pre-institution mediation in a certain class of commercial cases. In functional terms, mediation in these matters can no longer be said to be a parallel or alternative pathway, but a legally required step before access to courts, which can be made legally effective through rejection of non-compliant plaints.

This transition marks a transition from one paradigm to another within the Indian legal system as to how it envisages the relationship between the courts and ADR. While early reforms visualized mediation as a consensual mechanism to be encouraged by judicial prodding, Section 12A embeds it as a structured and compulsory pre-litigation filter. Whether this shift is compatible with constitutional

[36] Sanyal & Mishra, supra note 11
[37] Deva, supra note 25

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guarantees of access to justice particularly under Articles 14 and 21 and whether it really achieves its policy goals without disproportionate burdens imposed onto litigants are questions that demand careful evaluation. The following chapters of this study pick up that normative and constitutional analysis in detail.

IV. THE MEDIATION ACT, 2023 - STATUTORY DESIGN AND PRE-LITIGATION MEDIATION

The Mediation Act, 2023 is the first meditation statute in India which is comprehensive and is a significant step in transforming India from a fragmented, court driven mediation ecosystem to a comprehensive legislative framework. Prior to 2023, the development of mediation in India was through various legal sources that are scattered and remain in different parts of the Code of Civil Procedure, 1908 includes Section 89 of the Code of Civil Procedure, 1908, the court-annexed mediation rules, and other scattered references across various sectors. The 2023 statute consolidates mediation under one roof and aims at standardizing the design of the process, defining the enforceability of the results of the settlement, and strengthening the institutional capacity by formal recognition of the role of a provider of mediation services and a national regulatory architecture.[38] The long title of the Act itself states the legislative purpose of the Act: to promote and facilitate mediation (particularly institutional mediation), enforce mediated settlement agreements, provide for registration of mediators, encouragement of community mediation and make online mediation acceptable and economical.[39]

Although India Code does not create a separate standalone "Statement of Objects and Reasons" page for the Act, the legislative intent and policy rationale are well captured

[38] Vidhi Centre for Legal Policy, supra note 30
[39] The Mediation Act, 2023, No. 32 of 2023 (India) (long title), https://www.indiacode.nic.in/bitstream/123456789/19637/1/aA2023-32.pdf.

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in the Mediation Bill, 2021 which preceded the final enactment including the Statement of Objects and Reasons of the Mediation Bill, 2021, and the PRS legislative materials and Standing Committee documentation prepared at the Bill stage.[40] The materials contained in the Bill consistently focus on the economic and systemic logic of mediation: taking the pressure off courts, facilitating quicker resolution of disputes and enhancing the legal environment for commerce.[41] These sources are helpful for scholarly interpretation because they represent the legislative history of the Act and policy rationale for codification of mediation as a mainstream vs. peripheral ADR option.[42]

The Act is organized by definitions and scope, the mediation process, mediated settlement agreements, the institutional mechanisms and special formats (online and community mediation).[43] A key design choice made by the statute is to form a construct that endorses and promotes party autonomy and voluntariness in the mediation process, while simultaneously creating an environment within the statute for mediation to be employed before litigation and for mediation outcomes to be enforced. This balance is most apparent in the design of pre-litigation mediation in the Act. Section 5 provides that in the absence or otherwise, with the existence of a mediation agreement or without a mediation agreement between the parties, parties may voluntarily and upon mutual consent attempt to settle civil or commercial

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[40] The Mediation Bill, 2021, Statement of Objects and Reasons (India), https://prsindia.org/files/bills_acts/bills_parliament/2021/Mediation%20Bill%2C%202021.pdf.

[41] PRS Legislative Research, The Mediation Bill, 2021 (Bill Summary), https://prsindia.org/billtrack/prs-products/prs-bill-summary-3961.

[42] Standing Comm. on Personnel, Public Grievances, Law and Justice, Report on the Mediation Bill, 2021 (Rajya Sabha), https://prsindia.org/files/bills_acts/bills_parliament/2021/SC%20Report_Mediation%20bill.pdf.

[43] The Mediation Act, 2023, No. 32 of 2023 (India), https://www.indiacode.nic.in/handle/123456789/19637.

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disputes by pre-litigation mediation prior to the filing of a suit or proceeding.[44] The use of permissive language is important. It indicates that as a matter of general policy, the Mediation Act's pre-litigation pathway is neither a mandatory gatekeeping mechanism nor an enabling mechanism which, as a general matter, guarantees early settlement while retaining the right to proceed to the courts.

At the same time, the Mediation Act works in conjunction with existing statutory regimes that do impose mandatory pre-institution mediation. This interplay is most important in regard to Section 12A of the Commercial Courts Act, 2015, which provides for pre-institution of mediation in respect of commercial suits not seeking urgent interim relief.[45] The dual model of voluntary pre-litigation mediation under the Mediation Act, 2023 and mandatory pre-institution mediation under the Commercial Courts Act, 2015 for a defined class of commercial disputes is thus created. This duality is not accidental. Policy research such as the EAC-PM Working Paper on commercial mediation states that the Mediation Act eventually allowed for the retention of voluntariness in Section 5 while continuing the acknowledgement of the operational reality of mandatory mediation under Section 12A for specified commercial disputes.[46] In the doctrinal sense, this structure ensures that the Mediation Act leaves room for preserving the key legitimacy requirements of mediation, which is consent, confidentiality, control of outcome by the parties involved, while leaving room to possibly incorporate sector-specific mandatory models that already exist in Indian civil justice reform.

The statutory design also further strengthens mediation through the issue of enforceability. The Mediation Act provides for the enforceability of mediated

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[44] The Mediation Act, 2023, No. 32 of 2023, sec. 5(1) (India), https://www.indiacode.nic.in/bitstream/123456789/19637/1/aA2023-32.pdf.
[45] Commercial Courts Act, supra note 31
[46] Sanyal & Mishra, supra note 11

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settlement agreements, on specified grounds, and thereby attempts to minimize the uncertainty of earlier that existed in that settlements were often routed through consent terms or the enforcement of contracts.[47] This design for enforceability is one of the most system-building dimensions of the Act, based on the very real fact that it takes mediation from a purely facilitative process to one that has a legally reliable pathway for outcome. Scholarly and professional commentary has pointed out that enforceability and institutional credibility are of central importance to adoption of mediation in high-stakes civil and commercial disputes, especially where certainty and finality are of high value to the parties.[48] The Act also encourages institutional mediation by the recognition of providers of mediation services and the creation of a central regulating institution, with the goal of enhancing standards, training and uniform practice.[49]

Even under a voluntariness-centered design under Section 5, the hybrid system does raise the question of party autonomy and access to justice as a result of a mandatory mediation under other statutes. Empirical and the policy literature on Section 12A has recorded some practical issues such as non-starter Mediations, uneven capacity across the various districts, and the possibility of mandatory pre-institution mediation adding to time and transaction costs without commensurate gains in settlement in some jurisdictions.[50] The EAC-PM Working Paper argues, on the basis of data from Mumbai commercial courts, that the main substantive proposal in favour of commercial mediation is that it should be voluntary, and this part of its argument

[47] The Mediation Act, 2023, No. 32 of 2023, sec. 27 (India), https://www.indiacode.nic.in/bitstream/123456789/19637/1/aA2023-32.pdf.
[48] Nishith Desai Assocs., Decoding the Mediation Act, 2023 (noting enforceability and structural implications), https://nishithdesai.com/default.aspx?id=10748
[49] The Mediation Act, 2023, No. 32 of 2023, secs. 31-44 (India), https://www.indiacode.nic.in/bitstream/123456789/19637/1/aA2023-32.pdf.
[50] Gahlot & Ritika, supra note 34

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echoes a more general critique that compulsion may obstruct the efficiency claims of mandatory designs where institutions are not sufficiently mature.[51] These concerns are relevant to the Mediation Act's architecture because it is anticipated that the Act will form the larger institutional structural backbone for mediation, including pre-litigation mediation, even in areas where there are separate statutes that impose a mandatory layer.

In sum, the Mediation Act, 2023 is an enabling and system building statute: it expands the legal recognition of mediation, and promotes the enhance the enforceability of mediation, institutional and online mediation and provides a national regulatory framework while retaining in its general scheme the voluntary status of pre-litigation mediation. The interplay between the Act and Section 12A of the Commercial Courts Act gives rise to a hybrid model which will put on test the relationship between the systemic efficiency and constitutional commitments of voluntariness and party autonomy. Whether or not this statutory design improves the access to justice will depend upon the way in which the courts and institutions all implement the Section 5 in practice, how the mandatory commercial mediation regime is handled and whether the ecosystem is capable of delivering consistent quality, fairness and timely results.

V. MANDATORY MEDIATION AT WORK: EMPIRICAL AND INSTITUTIONAL ISSUES

Mandatory pre-institution mediation (PIM) under Section 12A of Commercial Courts Act, 2015 was introduced as a systemic reform to take down inflow of commercial suits and promote early settlement and efficiency of commercial adjudication.[52] In

[51] Sanyal & Mishra, supra note 11
[52] Commercial Courts Act, supra note 31

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design, Section 12A provides a gatekeeping rule whereby commercial suits not calling for urgent interim relief cannot be instituted unless the plaintiff exhausts the pre-institution mediation process.[53] The Supreme Court has held that this requirement is compulsory and failure to comply may invite rejection of the plaint.[54] This chapter assesses how this model is working in practice, based on empirical research and policy analysis to identify recurring problems to the efficacy of this model, including low overall settlement rates, high proportions of non-starter mediations, uneven institutional capacity, and practical frictions in implementation.

A crucial empirical question is that mandatory character of PIM does not necessarily translate in meaningful participation. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 expressly envisages a "non-starter" where the opposite party is not participating or the process cannot reasonably get started in which case the Authority shall enter a non-starter report in the form provided.[55] The 2018 framework therefore recognizes that, at the level of statutory design, mandatory referral will not necessarily lead to engagement. In practice, various policy accounts point to non-participation as not the exception but the rule in a number of jurisdictions. The Economic Advisory Council to the Prime Minister Working Paper No. 25 (2023) draws attention to the fact that mandatory PIM frequently ends up as a further procedural step rather than a way of settling the case, especially where defendants refuse to participate.[56] Using data from Mumbai commercial courts, the EAC-PM paper reports extremely high rates of non-starter cases during the study period and argues that at a system level, the overall "success rate" of mandatory PIM

[53] Id. s. 12A(1).
[54] Patil Automation, supra note 7
[55] The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, r. 3(2) (India), https://thc.nic.in/Central%20Governmental%20Rules/Commercial%20Court%20Pre%20Institution%20Mediation%20and%20Settlement%20Rules%2C%202018.pdf
[56] Sanyal & Mishra, supra note 11

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is very low when calculated against the total number of PIM filings rather than just those cases where parties actually participate.[57]

Academic writing is a reflection of this diagnosis. A comparative study by Vikas Gahlot and Ritika, notes that Indian PIM data from several High Court or legal services websites, reveals a low success in terms of settlements with non-starter mediations constituting a good portion of registered matters.[58] The authors suggest that where participation is limited, the mandatory model tends to introduce time and transaction costs without reliably leading to settlements.[59] The concern is not just that it is a small rate of settlement, but that the mandatory gateway has the potential function of a delay mechanism in disputes that were unlikely to settle anyway, and which can postpone adjudication without rendering offsetting benefits.

The institutional capacity constraints that are behind these outcomes are underlined repeatedly in policy literature. A familiar theme of Indian mediation reform has been that the effectiveness of mediation requires mediator training, sufficient staffing, dedicated infrastructure, administrative competence, and consistent procedural standards.[60] While court-annexed mediation expanded gradually through High Court mediation centres and the Mediation and Conciliation Project Committee (MCPC), compulsory PIM under Section 12A brought the process on a rapid scale and required services of legal services authorities and mediation institutions to deal with new flows at short notice.[61] Where institutions have insufficient capacity, the mediation window is sometimes taken up by problems of notice service, scheduling delays or procedural formalities as opposed to substantive negotiation. The Rules recommend issuing

[57] ibid
[58] Gahlot & Ritika, supra note 34
[59] ibid
[60] Vidhi Centre for Legal Policy, supra note 30
[61] Mediation Training Manual, supra note 29

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notice and offer a structured timeline, but the day-to-day functioning of the process depends on human and infrastructural resources that differ greatly from state to state and district to district.[62]

Practical frictions are also caused by the statutory exception for cases that "contemplate urgent interim relief."[63] Empirically this exception has led to strategic behaviour and doctrinal uncertainty. Litigants can argue urgency to avoid PIM and, simultaneously, courts must consider whether a case really seeks to consider urgent interim relief. This has provided for litigation over threshold maintainability and for courts to develop standards for testing for urgency at the filing stage.[64] Scholarly analysis in the NLIU Law Review emphasizes that "urgency" plays the key role as an escape valve from compulsory PIM and inconsistent judiciary approaches to the issue of urgency can undermine predictability and encourage tactical drafting.[65] As the threshold question comes into dispute PIM can have a paradoxical effect of increasing rather than reducing preliminary litigation by diverting dispute energy away from merits and towards gateway compliance.

Another empirical problem is that of information asymmetry and bargaining. Mandatory mediation may cause pressure on limited-resource plaintiffs to negotiate early on with well-resourced defendants to opt out or delay. Policy accounts stress that the mandatory regime can be particularly ineffective in circumstances where one party considers delay to be beneficial because the system must still go through the PIM step before adjudication commences.[66] The EAC-PM paper argues, in substance,

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[62] Commercial Courts Rules, supra note 54, rr 3-5
[63] Commercial Courts Act, supra note 31, 12A (1)
[64] Patil Automation, supra note 7
[65] Aravind Sundar, Determining Urgency in Compulsory Pre-Litigation Commercial Mediation, 13(2) NLIU L. Rev. 64 (2024), https://nliulawreview.nliu.ac.in/wp-content/uploads/2024/06/NLIU-Law-Review_Volume-XIII-Issue-2-64-85.pdf.
[66] Sanyal & Mishra, supra note 11

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that mediation is most successful when parties choose to participate because they expect something valuable from negotiation, and that compulsion may diminish incentives to participate in good faith.[67] This criticism sounds very much like the general theory of mediation that party autonomy is not only normative, but also instrumental: Meaningful settlement outcomes are associated with voluntary engagement and preparation, rather than with procedural coercion.

The design of the institutions also creates measurement problems. Settlement rates may be reported in ways that make it hard to see what the true performance is. If the system of calculating success is based only on the number of mediations that have gone beyond the stage of a non-starter, the percentage of settlements can look respectable; but if the system of calculating success is based on the total filings, outcomes may look far weaker.[68] The EAC-PM working paper and other discussions place emphasis on the need to assess overall system impact using common denominators, including non-starters, because the goal of policy is to reduce court inflow on a scale basis.[69] Relatedly, the Rules and forms demonstrate how the system uses non-starters as a formal closure category but in policy evaluation such a thing must be considered as a sign of lack of participation rather than neutral administrative products.[70]

Lastly, issues of quality and enforceability are in question even where settlements take place. The Mediation Act, 2023 enhances the enforceability of agreement based on mediation in general, however, commercial PIM remains reliant on institutional

[67] ibid
[68] Gahlot & Ritika, supra note 34
[69] Sanyal & Mishra, supra note 11
[70] Commercial Courts Rules, supra note 54

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practice and drafting quality.[71] The incompetence in writing or improper legal counsel may cause subsequent conflicts over the settlement conditions and this weakens the belief that mediation is the ultimate resolution avenue. Institutional capacity is not just concerned with case throughput but involves the maintenance of mediator competence and legal literacy, ethical standards and procedural safeguards to alleviate party autonomy, and create lasting settlements.[72]

VI. CONSTITUTIONAL ANALYSIS OF MANDATORY MEDIATION

The constitutional validity of the mandatory pre-litigation mediation under Section 12A of the Commercial Courts Act, 2015 has to be tested on the guarantees of Articles 14 and 21, which both place substantive limitations on the power of the State to regulate access to courts. Although the Constitution does not expressly provide a right to sue, the Supreme Court has on a number of occasions recognized that meaningful access to adjudicatory mechanisms is an inseparable component of the right to life and personal liberty and also the guarantee of equality before law. The Court's articulation of proportionality in K.S. Puttaswamy v. Union of India made it clear that any law which restricted or delayed the exercise of a protected constitutional entitlement whether that of privacy, movement or access to adjudication must pass a structured test comprising legitimacy of purpose, rational connection, necessity and overall balance.[73] This framework of proportionality, and reading it with the previous decisions, e.g. Modern Dental College v State of Madhya Pradesh[74], which laid stress

[71] The Mediation Act, 2023, No. 32 of 2023, s. 27 (India), https://www.indiacode.nic.in/handle/123456789/19637

[72] Vidhi Centre for Legal Policy, supra note 30

[73] K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India), https://www.scobserver.in/wp-content/uploads/2021/10/1-266Right_to_Privacy__Puttaswamy_Judgment-Chandrachud.pdf.

[74] *Modern Dental Coll. & Res. Ctr. v. State of M.P.*, (2016) 7 SCC 353 (India), *available at* https://indiankanoon.org/doc/93572510/.

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on the fact that even regulatory processes should not cause too much burden of rights, provides the right lens through which to view Section 12A.

Within this framework, the objectives of the State in reducing the judicial backlog, promoting efficiency and encouraging the consensual resolution of commercial disputes are undoubtedly legitimate. However, constitutional scrutiny does not end at legitimacy. The Supreme Court has been quite clear that to be deemed unconstitutional, a measure may be subject to such an operation as arbitrary, irrational, or disproportionate. In Internet & Mobile Association of India v Reserve Bank of India[75], for example, the Court invalidated a regulatory measure not because there was anything illegitimate about the regulatory objective, but because the empirical materials could not substantiate the existence of a real link between the regulatory measure and its objective, creating an excessive burden on those affected by the measure. This reasoning applies with no less force to mandatory pre-litigation mediation. The problem is not whether mediation is good in theory, but whether compulsory participation as a condition precedent for the institution of suit is a proportionate and non-arbitrary means of accomplishing efficiency.

Empirical work on the functioning of Section 12A raises concerns that mandatory mediation is not always promoting the goals that it is meant to achieve. Indian scholarship, including recent evaluations of the framework, reveals there are large numbers of "non-starter" mediations, uneven participation by defendants and infrastructural constraints across jurisdictions.[76] Where there is a situation where a

[75] Internet & Mobile Ass'n of India v. Reserve Bank of India, (2020) 10 S.C.C. 274 (India), https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/aor_notice_circular/62.pdf.

[76] Harsh Mahaseth, *Evaluating Mandatory Pre-Litigation Mediation under the Commercial Courts Act in India* 9–22 (2023), https://pure.jgu.edu.in/id/eprint/10040/1/Evaluating%20Mandatory%20Pre-litigation%20Mediation%20under%20the%20Commercial%20Courts%20Act%20in%20India.pdf.

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claimant initiates mediation, but the other party fails to attend, or where mediation centers are understaffed and poorly resourced, the process generates delay without doing much to contribute to settlement. In such a circumstance, the rational connection between the requirement and the goal sought to be achieved by the decongesting becomes doubtful. When the compulsory procedures are routinely ineffective in serving the purpose for which they were created, they risk attracting the constitutional censure under both Articles 14 and 21.

The necessity limb of proportionality further requires the State to prove that there are less restrictive alternatives to the current system such as voluntary mediation with effective incentives, mandatory information sessions, judicially supervised settlement conferences, or better case management which would be insufficient to yield the efficiency gains required. Indian analysis of commercial mediation, which seems to suggest that opt-out models or incentive-driven voluntary regimes may achieve the same sorts of gains at far less cost to litigant autonomy.[77] If these are alternatives which are capable of promoting settlement without delaying access to courts, the imposition of a mandatory pre-litigation barrier becomes constitutionally difficult to justify.

The balancing stage of proportionality requires the examination of the overall effect of Section 12A on the litigants. In relation to commercial disputes, delay can in itself be prejudicial, especially where the claimant seeks enforcement of obligations to pay, or where the commercial interests are time sensitive. A mandatory pre-litigation step, even if limited in time, adds yet another level of procedure that may not work symmetrically: the defendant who wants to delay may use mediation strategically, whereas the claimant who wants to obtain urgent adjudication may be

[77] Krishna Ravishankar et al., India's Tryst with Pre-Litigation Mediation: Global Insights and Domestic Perspectives, 7 NUJS J. Reg. Stud. 79, 95–110 (2022), https://journals.nujs.edu/index.php/njrs/article/download/277/224.

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disproportionately prejudiced. Indian commentary on Section 12A draws attention to exactly this point and points out that the success of the scheme rests on the availability of robust institutional capacity and predictable timelines conditions which are unevenly distributed in the country.[78] Where the institutional quality is patchy, a formally neutral requirement could in reality result in the imposition of more burden on some litigants than others, raising concerns of arbitrariness under Article 14.

A further constitutional dimension is given by the centrality of autonomy in the mediation. Indian mediation scholarship has emphasized the importance of voluntariness in outcome which is not only of the process but the absence of coercion during the process of mediation; the legitimacy of mediation is contingent upon this element of coercion. Mandatory pre-litigation mediation forces attendance, but not settlement, however a key element of meaningful voluntariness is that experienced mediators know how to deal with parties having to attend but not settle, and the ability to disengage without negative impacts.[79] If there are institutional shortcomings that hamper the ability of parties to freely participate, then the scheme may begin to infringe autonomy interests that are protected under Article 21. The presence of an "urgent interim relief" exemption alleviates but does not eliminate this concern, especially because the boundaries of urgency are not always clear and may result in unnecessary litigation over threshold questions, as opposed to substantive issues.

At the end, the constitutionality of Section 12A is not a binary concept, but conditional. A mandatory mediation regime may be constitutionally valid if it is demonstrated to be proportionate in operation, backed by sufficient institutional infrastructure, applied in consistent jurisdictions, and accompanied by safeguards that maintain

[78] ibid
[79] Abhijeet Shrivastava, Mandatory Pre-Litigation Commercial Mediation: Turkey's Lessons for India, NUJS J. Disp. Resol. (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988384.

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party autonomy. Conversely, by demonstrating that low rates of settlement are being achieved and that there are frequent non-starters and barriers that affect effective participation, if the empirical evidence continues to show this, the measure may be vulnerable to challenge as being arbitrary or disproportionate. The standard of proportionality enunciated in Puttaswamy on the basis of the Supreme Court's stress on empirical justification in IAMAI, makes it evident that the criterion of acceptability under the Constitution is not legislator's intention, but functional effectiveness. Section 12A must therefore be constantly justifiable by what it does in real life, rather than assumed to be true because it is normatively desirable that mediation should happen.

On this account, mandatory pre-litigation mediation can hardly be said to be per se unconstitutional. Rather, its permissibility is dependent on the ability of the State to ensure that institutions are in place to ensure that mediation is a meaningful and not a formalistic step, that delay is kept to a minimum and justified, and that litigant autonomy and access to justice are not substantially impaired. In absence of such conditions the constitutional balance would be in favor of finding the compulsion disproportionate under Articles 14 and 21.

CHAPTER 7 - CONCLUSION AND RECOMMENDATIONS

This study sought to explore whether mandatory pre-litigation mediation as introduced under Section 12A of Commercial Courts Act, 2015 is constitutionally permissible in the Indian dispensation with respect to access to justice. Through a doctrinal, empirical analysis, the paper has attempted to go beyond the purely abstract claims about the virtues of mediation and instead examine the measure with respect to constitutional standards under Articles 14 and 21, keeping in view the realities of its implementation. The analysis shows that the challenge to constitutional provisions of mandatory mediation is not of the system of absolute incompatibility, but of the system of proportionality, design and institutional execution.

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The key finding in this research is that mandatory pre-litigation mediation is not per se unconstitutional. Indian constitutional jurisprudence provides a scope for procedural regulation on the access of courts, if such regulation is reasonable, non-arbitrary and proportionate to the legitimate objective of the State. The objective behind Section 12A in enhancing efficiency in commercial dispute resolution and decongesting the courts is constitutionally legitimate. However, legitimacy of purpose is not enough. The means adopted to achieve that purpose must not exercise disproportionate burdens on litigants or operate in such way as to defeat effective access to adjudication, the Constitution requires.

Empirical evidence discussed in the preceding chapters indicates that the operation of mandatory mediation through Section 12A has been bumpy. High rates of non-starter mediations, strategic non-participation by defendants, institutional capacity constraints and inconsistent quality of mediation services undermine the notion of efficiency in the interests of which compulsion has been developed. Where the mediation system becomes more of a process obstacle than an effective dispute resolution tool, the rational link between mandatory participation and decongestion loses strength. In such circumstances, mandatory mediation risks being an instrument of delay and not an instrument of access to justice.

From a constitutional viewpoint, this discrepancy between legislative intent and reality in practice is important. Article 14 not only prohibits discriminatory classification but also arbitrariness in effect. Article 21 states that procedures affecting access to courts must be just, fair and reasonable in practice and not just in form. A statutory scheme that imposes a systematic burden on claimants without providing commensurate benefits may not pass these standards even though it may be defensible at the level of abstract policy. The constitutional permissibility of mandatory mediation must therefore be understood as contingent and dynamic,

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dependent on continued justification in terms of its demonstrable effectiveness and adequate safeguards.

At the same time, the analysis does not support wholesale rejection of mandatory mediation. Mediation continues to have a place in the modern system of dispute resolution, especially in commercial context where negotiated results may help preserve relationships and save transaction costs. The difficulty with the constitution lies not with the mediating part but with the compulsion which is not sufficiently calibrated to Indian institutional realities. The challenge is then to create a framework for mediation which can freely move forward with reform without losing access to justice.

In light of these findings, this paper goes further to advance a number of normative and policy recommendations. First, the compulsory nature of pre-litigation mediation needs to be readjusted to a structured opt-out model. Rather than making successful completion of mediation a condition of the institution of suit, the law could order parties to attend a first mediation session or information meeting but allow them to exit with reasonable justification for doing so. Such a model would maintain the incentives of early settlement while avoiding the dangers of procedural logjam and constitutional disproportionality.

Second, institutional capacity needs to be addressed as a constitutional, and not just administrative concern. Mandatory mediation does not seem to be justifiable constitutionally unless mediation centres are staffed appropriately, mediators are well-trained, timelines are predictable, and administrative processes work well. Without these conditions, the compulsion burdens the litigants disproportionately and subverts the sense of fairness that is required by Article 21.

Third, superior safeguards against strategic non-participation should be strengthened. While the results of mediation will necessarily remain voluntary, procedural mechanisms which impose cost consequences on a demonstrably bad-faith

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refusal to participate may be considered, provided that they are implemented narrowly and subject to judicial oversight. Such measures would help to increase the effectiveness of mediation without tipping the balance into coercion.

Fourth, the scope and application of the "urgent interim relief" exception should be clarified so that threshold litigation and uncertainty is reduced. Clearer standards would avoid unnecessary disputes on maintainability and ensure that mediation does not impede judicial intervention in a timely manner where this is truly needed.

Finally, data transparency and empirical monitoring should be institutionalized. Constitutional Proportionality calls for proof. Regular publication of mediation statistics and the rate of settlement, non-starter statistics and time to resolution would allow for an informed legislative and judicial review of the continued justification for the scheme. Mandatory mediation should be left open to recalibration in light of the changing empirical conditions.

In conclusion, mandatory pre-litigation mediation under Indian law exists in a constitutionally sensitive zone between reform and restraint. It can co-exist with the constitutional guarantee of access to justice, but only when it operates as a mechanism which enables rather than hinders access to justice. The Constitution does not require the State to make a choice between efficiency and access, but requires that the efficiency reforms be proportional, fair and realistic in institutional terms. Mandatory mediation, if carefully redesigned and responsibly implemented, can achieve both these objectives. If not, it threatens to undermine the very justice system it wants to reform.