



# Vidhi

Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE

## STRENGTHENING MEDIATION IN INDIA

### A Report on Court-Connected Mediations

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## EXECUTIVE SUMMARY

Vidhi Centre for Legal Policy has worked in collaboration with the Department of Justice, Ministry of Law and Justice (Government of India), to study and evaluate the progress of court-connected mediation programmes in India. This report is a follow up to the analysis presented in our Interim Report. The Interim Report, published on July 29, 2016, contained some of the preliminary conclusions from our doctrinal study, and the data made available to us by the Bangalore Mediation Centre and the Delhi High Court Mediation and Conciliation Centre regarding their operations between 2011 and 2015.<sup>1</sup>

Our main findings relating to the doctrinal study in the Interim Report are:

- (i) Numerous steps have been implemented in Australia, Singapore, the United States of America and the United Kingdom, to strengthen their respective mediation frameworks. These steps include development and promotion of pre-litigation mediation programmes, strong coordination between the judiciary and the government to implement institutional frameworks for mediation, high professional standards and adequate training for mediators, education and training of judges in their roles to refer matters for mediation, and accreditation and certification guidelines for mediators.
- (ii) Concerns regarding regulating the practice of mediation are not unique to India, and are being addressed in numerous other jurisdictions.

Some of the key findings of the Interim Report that emerged from our analysis of the data provided by the mediation centres in Bangalore and Delhi are:

- (i) The most significant cause for mediation not taking place in many cases was the lack of cooperation between parties to the dispute, or failure of the parties to turn up for mediation in the first place.
- (ii) Though different types of cases were referred for mediation, matrimonial cases stood out as a category most often referred by judges.
- (iii) Though mediation referrals at the centres generally increased between 2011 and 2015, there is scope for improving referral rates by increasing awareness amongst users, and enhancing interest towards mediation among referral judges.

This report is a continuation of our study of court-connected mediation programmes in India. In addition to the analysing statistical data provided by mediation centres in Bangalore and Delhi, we have also analysed data from the Allahabad High Court Mediation and Conciliation Centre. Further, we have conducted a series of interviews with mediators and administrators at the centres in

<sup>1</sup> Alok Prasanna Kumar et. al, 'Strengthening Mediation in India: Interim Report on Court Annexed Mediations', Vidhi Centre for Legal Policy, July, 2016, <<http://vidhilegalpolicy.in/reports-1/2016/7/25/strengthening-mediation-in-india-an-interim-report-on-court-annexed-mediations>> accessed 23 November, 2016.

Bangalore and Delhi to get insights into some of the qualitative aspects of the mediation process, as well as the operations of these centres.

Based on our study of the data, we have assessed the operations of these mediation centres under five broad areas - i) role of referral judges; ii) training and accreditation of mediators; iii) infrastructure development and administration of mediation centres; iv) user awareness; and v) codification: potential legislation for mediation. Some of our findings are presented below:

- (i) *Role of judges* - The use of mediation as an alternate dispute resolution mechanisms has not always found warm reception among members of the judiciary. In this regard, it may be helpful to undertake regular training sessions for judges to sensitise them about the benefits of the process, which in turn can encourage them to refer more matters for mediation. The role of judges is also crucial in facilitating the referral of atypical cases for mediation.
- (ii) *Training and accreditation of mediators* - In addition to sensitising judges, it is imperative to improve the quality of mediators by introducing regular and mandatory training programmes. Better trained mediators will ensure better process quality and improved rates of settlement; even cases where mediation does not yield a settlement agreement, a well-trained mediator may be able to bridge the gap between parties and improve their interaction. In addition to training standards, it may help to introduce accreditation process for mediators which would, *inter alia*, allow parties to make an informed decision about who they want to appoint as a mediator.
- (iii) *Infrastructure development and administration of mediation centres* - Issues of increasing backlog, pendency and inadequate number of mediators at these centres highlight administrative shortcomings which must be addressed. Mediation is intended to be an expedient alternate mechanism of dispute resolution, and it is imperative that infrastructure and administrative facilities at these centres keep pace with the increase in referral rates so that backlog and pendency do not become systemic issues.
- (iv) *User awareness* - Though court connected mediation programmes have been operating for almost a decade, there is insufficient awareness about them and their benefits compared to litigation or other alternate dispute mechanisms. This is largely attributable to haphazard data dissemination initiatives undertaken by the judiciary. It is necessary to ensure a continuous and accessible dissemination of data pertaining to the benefits of mediation to the existing and potential users. This will require collaborative and planned awareness drives from both the governments and respective state judiciaries. Further, lawyers must be sensitised about the process of mediation and its benefits, so that they are confident in recommending it to their clients when approached for counsel.
- (v) *Codification: potential legislation for mediation*- The lack of codification has resulted in a lack of uniformity across mediation centres on some of the key aspects of the mediation process. In this context, there is a broad consensus on two points: first, a legislation is needed to address certain regulatory aspects of mediation like training standards,



enforcement of settlement agreements, et al, and second, such a legislation should not over prescribe or compromise the flexibility of the mediation process and autonomy of parties mediating.

Based on the analysis, this report concludes with some recommendations under two heads- institutional and management reforms, and legislative reforms. Some of the key recommendations are briefly discussed below:

(i) *Institutional and management reforms*

- a. *Quality control and popularising mediation-* It is crucial to ensure the provision of quality mediators and the necessary infrastructure for an informal and comfortable experience to parties. Additionally, institutionally, the judiciary should involve itself to a greater degree in promoting mediation. Apart from regular training and sensitising programmes for judges and lawyers about the mediation process, it is also necessary for the judiciary to collaborate with the governments in improving dissemination of information about mediation.
- b. *Mediation as a profession-* To ensure better quality of mediators, it is necessary to professionalise the practice of mediation in India. It is necessary to incentivise people to become whole time mediators, and ensure they are providing high quality services. Further, lawyers handling mediation work should also be experts in mediation, something akin to arbitration practitioners in India.
- c. *Training of judges-* There is a pressing need to train existing and potential judges about the fundamentals of mediation to improve their understanding of the process, and train them for their role in preparing parties for mediation. Chief Justices of all High Courts should enforce a rigorous training framework for all judges in courts within their respective jurisdictions. Furthermore, Chief Justices should also monitor programmes focussing on continued training of judges.

(ii) *Legislative reforms*

- a. *Referral judges-* To facilitate the role of referral judges, legislation may prescribe normative standards to guide judges when determining suitability of cases for mediation. It should also list the types of cases where mediation should be mandatory and where judges should, as per their discretion, determine the suitability of mediation. Legislation should further provide for disincentives like imposition of costs on parties who do not give a fair chance to settling suitable disputes, and it should explicitly allow parties to opt for mediation at any stage of an ongoing litigation,
- b. *Code of ethics and professional standards-* It is necessary to enforce a code of ethics and professional standards to be followed by mediators across the board. This code should, *inter alia*, codify consequences of violation of the said standards by mediators.
- c. *Enforcement of settlements and confidentiality-* Legislation should provide for precise grounds available to a party to a settlement, to challenge the same. Additionally,

mediation being a confidential process, legislation should carve out precise exceptions to this confidentiality of proceedings.

- d. *Training and accreditation of mediators*- Legislation should prescribe the minimum training standards for mediators. Apart from training, accreditation of mediators should also be done based on their educational and professional background. Accreditation, while important to help judges choose mediators for parties or for court-connected mediation centres to prepare a panel, need not be made mandatory.

## PREFACE

### A. Background

Alternative dispute resolution (“ADR”) has been advocated as one of the ‘go to’ reforms by the legal community. However, many have also highlighted issues that point at the failed implementation of ADR mechanisms. These issues include docket concerns, lack of adequate training in case management,<sup>2</sup> poor judge to case ratios, lack of awareness and administrative and structural issues. While adjudicative forms such as arbitration still have wide acceptance, non-adjudicative forms such as mediation, despite over a decade of statutory mandate, have not been able to garner similar support.

As a process, mediation is a voluntary non-adjudicative form of dispute resolution where a neutral third party assists parties to a dispute to reach an amicable solution through negotiation and facilitation.<sup>3</sup> The neutral mediator is a process expert, understanding communication and dialogue. As a process conducted under the shadow of law, mediation typically requires the presence of lawyers who lend legal expertise to the process, the mediator, and their clients.

In India, statutory amendments were made to the Code of Civil Procedure, 1908<sup>4</sup> (“CPC”) to include different forms of dispute resolution (including mediation) for civil cases. In *Salem Advocate Bar Association v. Union of India*<sup>5</sup> (“Salem I”), the Supreme Court of India recognised that despite the existing ADR framework, there was insufficient case management in place to implement the methods that were envisaged by the CPC to take dispute resolution outside the court system. Almost a decade before the amendments to the CPC, the Law Commission of India (“Law Commission”) had suggested mediation as an alternative method of dispute resolution, which led to conversations on mediation among various stakeholders. However, two decades later, mediation is yet to gain a foothold as a popular dispute resolution method in India.

It was in 2005, based on the *obiter dicta* in *Salem Advocate Bar Association v. Union of India*<sup>6</sup> (“Salem II”) that mediation came into focus. Owing to the framework set out in *Salem II*, model rules to be implemented by High Courts, and case management guidelines, were adopted and court-connected mediation centres were established. In the decade since their creation, however, there has been limited study and evaluation of these court-connected mediation programmes. Such a study is essential to assess the success of mediation, and further expand its role in the justice delivery system in India.

<sup>2</sup> *Salem Advocate Bar Association v Union of India*, (2003) 1 SCC 49.

<sup>3</sup> ‘Mediation Training Manual’ (*Mediation and Conciliation Project Committee, Supreme Court of India*), 16 <<http://supremecourtsofindia.nic.in/>> accessed 15 July, 2016.

<sup>4</sup> The Code of Civil Procedure (Amendment) Act, 2002.

<sup>5</sup> *Salem Advocate Bar Association v Union of India*, (2003) 1 SCC 49.

<sup>6</sup> *Salem Advocate Bar Association v Union of India*, (2005) 6 SCC 344.

## B. Research methodology

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This project aims at studying the functioning of court-connected mediation centres in India and their impact on mediation in India based on doctrinal and empirical research. For the doctrinal part, a comparative study of four jurisdictions, namely Australia, Singapore, the United Kingdom and the United States (“**Study Jurisdictions**”) has been undertaken, owing to their continuous success in introducing and using mediation as a dispute resolution tool. For the empirical part, the functioning of three court-connected mediation centres, namely the Bangalore Mediation Centre (“**BMC**”), the Mediation and Conciliation Centre of the Delhi High Court (“**DMC**”), and the Allahabad High Court Mediation and Conciliation Centre (“**AMC**”), between 2011 to 2015 (“**Research Period**”), has been undertaken. The present project has been divided into two phases - (i) the preparation of a preliminary report (“**Interim Report**”),<sup>7</sup> and (ii) this report, which marks the conclusion of this project. An overview of each of these reports below details the methodology adopted in undertaking the above exercises.

### 1. The interim report

The Interim Report, which was published on July 29, 2016, and circulated among stakeholders and the public for comments, was divided into two parts:

- (i) A comparative study of the court-connected mediation mechanisms and the mediation frameworks in the Study Jurisdictions, focussing particularly on role of referral judges, accreditation of mediators, infrastructure development and administration of mediation centres, user awareness, and the need for a specific mediation legislation in India.
- (ii) A preliminary analysis of the quantitative data collected from the BMC and the DMC, based on the responses received from these centres.

### 2. The final report

This report builds on the initial findings of the Interim Report and examines them in greater depth. After the publication of the Interim Report, we undertook additional empirical research. Having already obtained quantitative data from the BMC and the DMC, we obtained and analysed similar data from the AMC. The questionnaire which formed the basis of the empirical study has been annexed to this report as **Annexure 1**. The data which was provided by the BMC, the DMC and the AMC has also been annexed to the report as **Annexures 2, 3 and 4**, respectively. As in the Interim Report, all the data reflected in this report is based on the data that has been recorded and maintained by the mediation centres. This data has not been independently verified by us and is based on the representations of the centres. During this report, we have also noticed significant differences in the way each of the mediation centres maintained data.

In respect of the qualitative study, we interviewed mediators and administrators at the BMC and the DMC. It should be noted that the interviews were conducted only at these two mediation centres in view of the limited time available. The interviews involved detailed one-to-one discussion at the BMC, and a group discussion at the DMC. They covered the role of referral judges, training and accreditation of mediators, infrastructure and administration of mediation centres,

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<sup>7</sup> Interim Report (n 1).

user awareness, and the feasibility and desirability of enacting an independent mediation legislation.

### C. Structure of the report

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This report has three chapters. The first chapter captures the quantitative and qualitative data obtained during this project. The second chapter contains a detailed analysis deduced from the data and links it to the doctrinal understanding of mediation frameworks in Study Jurisdictions. This chapter forms the basis of the third and final chapter, which outlines recommendations to strengthen the existing court-connected mediation framework in India, and suggests a way forward strategy.

## I. DATA OBTAINED FROM MEDIATION CENTRES

### A. Introduction

This chapter depicts the relevant statistical data obtained from three mediation centres in India—the BMC, the DMC and the AMC, and the qualitative information received from the administrators and members of the BMC and the DMC. Some of the data has also been extracted from the Supreme Court publication ‘Court News’<sup>8</sup>, which is publicly available. It is also pertinent to note that not all quantitative data received has been tabulated in this chapter. As stated previously, the complete data set which was provided to us, has been annexed to the report as **Annexures 2, 3 and 4**.

### B. Quantitative data

#### 1. Collection of quantitative data- an overview

Data for the purposes of the report was sought from in the form of the following questions:

- (i) The number of cases referred for mediation, between 2011 and 2015, per year;
- (ii) The number of cases settled through mediation, compared to the cases sent back to the Hon’ble High Court for adjudication, between 2011 and 2015, per year;
- (iii) The average time period (*per annum*) for completing the mediation process, culminating in an amicable settlement, or reverting the case to the Hon’ble High Court for further litigation;
- (iv) The total number of disputes that were referred to mediation before framing of issues (i.e. pre-trial mediations), between 2011 and 2015, along with the number of such cases that were settled as a result of the mediation;
- (v) The total number of mediators in the Mediation Centre in each year between 2011 and 2015, to determine the mediator to cases ratio; and
- (vi) The classes of civil suits and cases which have been frequently referred for mediation by the Hon’ble High Court, over the period of five years between 2011 and 2015.

We have not received data regarding all these queries. Further, some of data received was not maintained in the form sought by us. Also, owing to the inability to deduce the data from the information available and considering the limited time available for the Report, we were unable to extract some information from the material available. The present analysis is, therefore, limited to the extent of data obtained from the centres, as shown below, in addition to data that is available on the Supreme Court website under ‘Court News’:

Table 1: Data sought and obtained from the BMC, the DMC and the AMC

Data sought	BMC	DMC	AMC
(i) Cases referred	Yes	Yes	No. However, data regarding cases

<sup>8</sup> Court News, Supreme Court of India, <<http://supremecourtindia.nic.in/courtnews.htm>> accessed 15 July, 2016.

			registered for mediation at the centre was provided, which has been considered to be cases referred
(ii) Cases settled, cases sent back	Yes	Yes	Data for cases settled was provided but data for cases not settled was not provided
(iii) Average time period	Yes	No	Yes
(iv) Pre-trial mediations	Yes. Data for pre-litigation mediation for 2014 to 2016 was provided	No	No
(v) Number of mediators	The data was not provided for each year but for the entire period between 2011 and 2015	The data was not provided for each year but for the entire period between 2011 and 2015	The data was not provided for each year. For the purpose of comprehensive analysis, it is assumed that the data provided was for the entire period between 2011 and 2015
(vi) Classification of cases	Yes	No	No

It is pertinent to note here that the lack of uniformity in recording data constitutes a significant hindrance in the analysing of data or tracking the progress of mediation in India.

## 2. Terminology for this report

Data received from the mediation centres does not use consistent terminology. Therefore, unless expressly stated otherwise, the following terms and definitions have been used during the report, for the sake of uniformity:

- (i) **“Backlog”** is the difference between the cases referred and concluded cases during a particular period.<sup>9</sup>
- (ii) **“Cases freshly instituted in the High Court”** are the new cases, both civil and criminal, which are instituted in the said High Court during a particular period.
- (iii) **“Cases referred for mediation”** are those cases which were referred for mediation during a particular period.
- (iv) **“Cases mediated”** are those cases wherein mediation took place, whether it concluded in a settlement or not. This is a sum of the cases settled and cases not settled.
- (v) **“Cases that have been carried forward from the previous year”** are those cases that are pending at the beginning of each year at the centre.
- (vi) **“Cases settled”** are those cases wherein parties participated in the mediation process and it concluded in the settlement of the dispute.<sup>10</sup> This does not include connected cases that are settled when a case referred to the mediation centre is settled.
- (vii) **“Cases not settled”** is a sum of cases mediated but not settled, and non-starters.
- (viii) **“Cases mediated but not settled”** are those cases wherein parties attempted mediation but were unable to arrive at a mutually acceptable settlement.
- (ix) **“Concluded cases”** are those cases which are no longer pending for disposal at the centre.
- (x) **“Connected cases”** are those cases that are in connection with or are filed along with the case in question.
- (xi) **“Mediator to cases ratio”** is calculated using the total number of cases and the number of mediators at these centres.
- (xii) **“Non-starters”** are those cases which were referred to the mediation centre by the concerned court but wherein no mediation took place. This does not include “cases mediated but not settled” but merely those cases wherein mediation was either not initiated because of parties’ unwillingness to mediate, or one of more parties did not turn up for a follow up session, or the case was unfit for mediation, among other reasons.
- (xiii) **“Total number of cases”** is a sum of the cases referred for mediation during the period and the cases that were carried forward from the previous year.

### 3. Quantitative data obtained from the BMC, the DMC and the AMC

Since data is recorded non-uniformly, we have presented a snapshot of data for each of the three centres under separate heads below. Wherever there is a discrepancy in the parameters or terms used for recording such data, appropriate explanations have been provided.

#### (a) The BMC

Data regarding cases referred, cases settled, cases mediated but not settled and non-starters was provided by the BMC for the Research Period and has been depicted below. Moreover, from the data made available, backlog and mediator to cases ratio has also been computed.

<sup>9</sup> This definition has been taken from the 245<sup>th</sup> Report of the Law Commission of India, on ‘Arrears and Backlog: Creating Additional Judicial (wo)manpower, July, 2014, <[http://lawcommissionofindia.nic.in/reports/Report\\_No.245.pdf](http://lawcommissionofindia.nic.in/reports/Report_No.245.pdf)> accessed on 21 November, 2016.

<sup>10</sup> While the term ‘cases settled’ is used in this manner for this study, it is acknowledged that the term settlement can have other connotations. For instance, in certain cases mediation may conclude but not result in a closure of the dispute. A concluded mediation could also mean that the case was not suited for mediation and therefore is now a pre-trial step. However, given that the data received is silent on these fronts, the term ‘settled’ has been used in the manner expressly specified.



Table 2: Cases referred, cases settled, cases mediated but not settled and non-starters due to one or more parties not turning up or not wanting to explore mediation

Description Year	Cases referred for mediation		Cases settled		Cases mediated but not settled		Non-starters, due to one or more parties not turning up or not wanting to explore mediation	
	No.	As a % of cases freshly instituted in the Karnataka High Court	No.	As a % of the total no. of cases at the BMC	No.	As a % of the total no. of cases at the BMC	No.	As a % of the total no. of cases at the BMC
2011	4903	2.79%	2904	49.45%	1351	23.00%	695	11.83%
2012	5933	4.45%	3275	47.96%	1569	22.98%	687	10.06%
2013	6765	4.79%	3532	44.22%	1724	21.58%	997	12.48%
2014	6820	4.98%	3397	40.82%	1913	22.99%	1164	13.99%
2015	7020	4.83%	3271	37.54%	2049	23.52%	1208	13.86%
2011-2015	31441 <sup>11</sup>	4.29%	16379	50.53%	8606	26.55%	4751	14.67%

Table 3: Backlog and mediator to cases ratio

Description Year	Backlog	Mediator to cases ratio (65 mediators)
2011	648	1: 90
2012	1089	1: 105
2013	1509	1: 123
2014	1510	1: 128
2015	1700	1: 134
2011-2015	6456	1:499

Apart from data relating to court-connected mediation at the BMC for the Research Period, we also received data regarding pre-litigation mediation efforts at the centre. Pre-litigation mediation services have been provided at the BMC for matrimonial cases since 2014, consequent to the Supreme Court's decision in *K. Srinivas Rao v D. A. Deepa*,<sup>12</sup> wherein the Court urged all mediation centres to set up such pre-litigation mediation desks. Table 4 below shows data from BMC regarding pre-litigation mediation between 2014 and November, 2016. Similar data was not provided by the DMC and the AMC.

<sup>11</sup> This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 31442. The cause of this discrepancy has not been discussed. We have, at present, assumed the discrepancy to be typographical.

<sup>12</sup> (2013) 5 SCC 226.

Table 4: Pre-litigation mediation in matrimonial cases at the BMC, between 2014 and November, 2016

Number of cases	385
Cases mediated	353
Cases settled	18
Cases not settled	335
Cases pending	32

**(b) The DMC**

Instead of data regarding cases referred, data for the total number of cases was provided by the DMC and has been depicted below. Moreover, the data on cases settled also includes “connected cases” settled. The percentage figures alongside cases settled, therefore, are meant only for the purpose of understanding and do not reflect a percentage break-up of the total cases before the DMC. Lastly, data regarding backlog at the DMC could not be computed from the data provided.

Table 5: Total number of cases, cases settled (including connected cases), cases mediated but not settled, non-starters due to one or more parties not turning up or not wanting to explore mediation

Description Year	Total no. of cases before the DMC		Cases settled (including connected cases)		Cases mediated but not settled		Non-starters, due to one or more parties not turning up or not wanting to explore mediation	
	No.	As a % of total no. of cases in the Delhi High Court	No.	As a % of total no. of cases at the DMC	Number	As a % of total no. of cases at the BMC	Number	As a % of total no. of cases at the DMC
2011	2632	2.86%	1221	46.39%	1264	48.02%	286	10.87%
2012	2635	2.61%	1534	58.22%	1270	48.20%	350	13.28%
2013	2791	2.79%	1382	49.52%	1446	51.81%	384	13.76%
2014	2981	2.78%	1542	51.73%	1372	46.02%	368	12.34%
2015	2607	2.31%	1965	75.37%	1467	56.27%	652	25.01%
2011-2015	13646	2.66%	7644	56.01%	6809	49.90%	2040	14.95%

Table 6: Mediator to cases ratio

Year	Mediator to cases ratio (265 mediators)
2011	1:10
2012	1:10
2013	1:11
2014	1:11
2015	1:10
2011-2015	1:50

**(c) The AMC**

Data provided by the AMC provides information regarding cases referred. However, in the absence of data regarding cases pending, the total number of cases at the centre could not be computed. Thus, data regarding cases settled and cases not settled have been depicted as a percentage of the cases referred instead of total cases at the centre, unlike depictions for the BMC and the DMC. Moreover, data regarding cases mediated but not settled was not provided by the AMC. Instead, data regarding cases not settled was provided and has been depicted below. Lastly, data regarding non-starters due to one or more parties not turning up or not wanting to explore mediation was not provided.

*Table 7: Cases referred for mediation, cases settled and cases not settled*

Description Year	Cases referred for mediation		Cases settled		Cases not settled	
	No.	As a % of cases freshly instituted in the Allahabad High Court	No.	As a % of no. of cases referred at the AMC	No.	As a % of no. of cases referred at the AMC
2011	5504	2.01%	1064	19.33%	3443	62.56%
2012	3034	1.21%	1015	33.45%	2654	87.48%
2013	1034	0.38%	322	31.14%	870	31.17%
2014	641	0.02%	194	30.27%	520	81.12%
2015	1405	0.49%	260	18.56%	811	57.72%
2011-2015	11618	0.85%	2855	24.57%	8298	71.42%

Since data regarding total cases at the centre could not be computed for the AMC, the mediator to cases ratio below has been calculated using the cases referred and the number of mediators.

*Table 8: Backlog and mediator to cases ratio*

Description Year	Backlog	Mediator to cases ratio (129 mediators)
2011	997	1: 43
2012	-635	1: 24
2013	-158	1: 8
2014	-73	1: 5
2015	334	1: 14
2011-2015	465	1:90

## C. Qualitative data

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### 1. Collection of qualitative data- an overview

As mentioned in the Preface to this Report, in addition to collating quantitative data, we have undertaken a qualitative assessment of court-connected mediation programmes by interviewing mediators and administrators at the BMC and the DMC. Owing to limited time, the qualitative discussion could not be undertaken with the administrators and mediators at the AMC.

At the BMC we conducted independent interviews with the administrative coordinators as well as a few seasoned mediators. At the DMC, we interviewed members of the Overseeing Committee at the DMC (“**Overseeing Committee**”), and a group of eight mediators, each of whom has been at the DMC for almost a decade. The BMC and DMC individuals interviewed by us shall be referred to as “**Interviewee(s)**”. The discussions focused primarily around five areas which have been central to our study and review of court-connected mediation in India, namely, the role of referral judges, training and accreditation of mediators, infrastructure and administration of court-connected mediation centres, user awareness, and the need for a potential legislation for mediation. The present segment records the responses and suggestions made by mediators and administrators at the BMC and the DMC on these topics.

### 2. Qualitative data obtained from the BMC and the DMC

#### (a) **Role of Referral Judges**

Countries like the United States have mandated judges to undergo training to understand the process of mediation, and ADR mechanisms in general. This training has been viewed as crucial in developing a comprehensive dispute resolution system; particularly, it also enhancing a judge’s understanding of cases to ascertain the suitable dispute resolution mechanism. In the Study Jurisdictions, we noted that the role of referral judges was of paramount importance to the success of mediation, since without a judge appreciating the scope of mediation, referrals of cases and the success of court-connected mediation would not be achievable.

In the above context, the Interviewees made the following suggestions and observations:

#### (i) *Judicial Sensitisation*

Sensitising the judiciary at all levels, towards understanding the need and purpose of mediation is necessary to popularise and tap into the potential of mediation. Judges hearing cases must be favourable towards the usage of ADR in general, and specifically refer cases to mediation whenever possible. A pertinent observation made during the interviews was on the adjudicatory role of a judge, which may make it challenging for such a judge to objectively determine the possibility of settlement of disputes through mediation. This is where the need to sensitise judges to various ADR processes, and their role in enabling party confidence towards mediation was reiterated. A need for the judges to engage with the contesting parties and preparing them for mediation, including informing them of its benefits over a protracted trial (without compromising impartiality) was also considered as key to the success of mediation. For example, members of the Overseeing Committee illustrated that in some cases, even at the appellate stage parties had gone to mediation due to the efforts of the referral judges in convincing the parties to opt for mediation. The objective is to

ensure that mediation is on an equal pedestal as litigation and this can be achieved only with judicial support and awareness to mediation.<sup>13</sup> For this purpose, the referral judge needs to be able to discern the possibility of dispute resolution (and conclusion) through mediation in each case.

### *(ii) Specialised training programmes*

Specialised training for judges to acquaint them with the process of mediation and their role as a referral judge should be developed to generate their confidence in the process of mediation.

### *(iii) Role of Chief Justices of Courts*

Chief Justices espousing the enhancement of ADR in general, and mediation more specifically, are the primary drivers to a successful court mediation programme.

## **(b) Training of Mediators**

Study Jurisdictions have discussed in detail on the quality thresholds and requirements for well trained and domain expert mediators. In this context, the Interviewees offered the following observations and suggestions:

### *(i) Minimum training requirements*

There was a consensus among the Interviewees that all mediators must understand the mediation process and display knowledge and skill in relation to facilitation, communication, neutrality and confidentiality. It was urged that every mediator must undergo such basic training for becoming a mediator, and continued training through refresher courses must also be implemented at all court-connected mediation centres. The basic training courses should focus on developing process based expertise through simulation exercises and theory. For example, in Delhi, prospective mediators are required to undergo forty (40) hours of training, along with one year of co-mediating with empanelled mediators. As a co-mediator, they must attend at least ten (10) complete mediations before being empanelled as a full-time mediator for the DMC.

### *(ii) Accreditation framework for standardised mediator training*

There is a need to set up an institution for the formal accreditation of mediators and to ensure standardised training programmes for potential mediators. The accreditation should list details about the professional and educational background of the mediators, including previous mediations conducted, areas covering the issues involved in prior mediations, expertise in other discipline(s), if any, etc. The objective of accreditation is to allow a participant in the mediation process to assess the competence of a mediator, based on which a mediator may be considered more suitable for particular disputes and the issues involved in a case. The Interviewees made clear that the training programmes should not be conducted in an *ad hoc* manner.

<sup>13</sup> The Supreme Court's observations in *Afcons*, were also broached to highlight the crucial role of a referral judge, *inter alia*, in determining the possibility of a settlement in a case before him or her, as well as assessing the viability of the different forms of ADR listed under Section 89. *Afcons Infrastructure Ltd. and Anr. v Cherian Varkey Construction Co. (P) Ltd. and Ors.*, (2010) 8 SCC 24.

### (c) Infrastructure and Administration of Mediation Centres

Infrastructural challenges and inefficient administration pose significant impediments to the development of mediation practice particularly in relation to the efficiency of the court annexed mediation programmes. In this context, the Interviewees observed the following:

#### (i) *Administrative body to govern mediation centres*

The need for a focussed administrative body for mediation was made clear. The BMC has a Governing Body constituted by sitting judges (including the Chief Justice) of the High Court, as well as lawyers, and former judges of the subordinate judiciary in the state of Karnataka. Similarly, an Overseeing Committee, comprising judges, and distinguished advocates and senior advocates, operates as the governing body of the DMC. However, a focussed mediation body, as is common in other Study Jurisdictions, is absent at both the centres.

#### (ii) *Role of the state governments*

There is need for state governments to invest greater funds to bolster the infrastructure of mediation centres within their territories. Open communication between the state judiciaries and governments will prove to be more conducive in determining the infrastructural and resource needs of court-connected mediation centres. That said, the resolution of these challenges and the usage of resources, at the disposal of the mediation centres, must be decentralised. The governing bodies of mediation centres must have autonomy to discern the ground situation and accordingly utilise the funds available to them. Further, space expansion and increase in the number mediation rooms to enhance the functionality of the mediation centres is also needed in some centres.

#### (iii) *Enhancing the role of the bar associations*

On an administrative front, the judiciary, especially in the High Courts, must engage the members of the bar. The lack of confidence by the bar associations in the mediation process is a huge impediment. This has also not been alleviated by the judiciary. To bolster mediation, the members of the bar associations must be taken into confidence.

#### (iv) *Professional mediation and mediation as a profession*

Mediation also requires incentivisation for newer legal professionals. Mediation in court-connected programmes is usually undertaken by individuals for a nominal fee, rather than as a full-fledged profession like arbitration. Making mediation a more lucrative endeavour for individuals can prove to be decisive in improving the quality of people opting to be professional mediators, resulting in improved standards of mediation services in court-connected programmes.

### (d) User Awareness

User awareness about mediation and court-connected programmes is critically low, and steps to improve this are crucial. The Interviewees made the following observations and suggestions in this context:

*(i) Structured dissemination of information*

Steps taken at present to popularise and raise user awareness about mediation in India, have been haphazard rather than systematic. A major flaw in these initiatives has been the lack of a structured and continuous of dissemination of data depicting the success rates, cost efficiency and overall expediency of court-connected mediation programmes. This information is vital in allowing an individual considering litigation, to recognise the utility and efficacy of mediation as a dispute resolution mechanism. It is necessary for ongoing public awareness campaigns to be more structured, with a defined strategy on how to address the target groups.

*(ii) Lawyers' role in advising clients to mediate*

Any individual determining his or her legal options will seek legal advice regarding the same; as such it must be the lawyers who must recommend mediation for dispute resolution in suitable cases to their clients. Unfortunately, members of the bar themselves may have reservations about the feasibility and efficacy of mediation due to inadequate training and education (as discussed previously). Lawyers may also resist mediation as it poses a direct conflict to their own professional interests. This situation needs to be addressed by bridging the gap with local bar associations and bringing them on board in promoting mediation as a successful and viable alternative to litigation.

*(iii) Law school curricula introducing mediation*

A detailed and thoroughly researched course on mediation for law students should be introduced. The training and education of law students serves a twin-objective; first, it ensures familiarity with the mediation process from an early stage, allowing emerging lawyers to consider mediation as a full-time career, and second, it ensures that prospective lawyers and mediators are not introduced to the process of mediation belatedly, after law school, only upon entering the legal profession. Law schools are seminal in cultivating an appreciation of the utility of mediation as a strong tool to restore confidence of parties and communication between them, outside of the adversarial framework of litigation. Therefore, a comprehensive curriculum must be prepared to train students of law in the fundamentals of the mediation process, role of mediation as an ADR mechanism, and some practical simulations involving role playing as mediators.

**(e) Potential legislation for mediation**

There are two main issues which emerge in any discourse on legislating a mediation statute- first, how can certain regulatory concerns regarding mediation programmes (like training standards, enforcement of mediated settlements, immunity of mediators and confidentiality of mediation proceedings) be addressed; and second, how can the flexibility of the mediation process be retained. To understand these issues better, Interviewees were urged to shed light on two situations:

- (i) Whether mediation practice in India requires a statute; and
- (ii) If yes, the scope and ambit of such a proposed statute.

The following observations and suggestions were made:

*(i) Potential areas for regulation under a proposed legislation*

A legislation to govern mediation in India could be beneficial. The legislation *inter alia* should address issues like training and accreditation standards for mediators, confidentiality of mediation proceedings, enforcement of a settlement of mediation, and some framework for accountability of mediators. The broad objective of the legislation must be to bring uniformity to these issues in mediation. However, under no circumstances should the legislation compromise the flexibility of the mediation process, by prescribing set format(s) for conducting mediation in court-connected programmes.

*(ii) Regulatory authority under a proposed legislation*

Uniformity in the issues of training and accreditation of mediators, confidentiality of mediation proceedings, and enforcement of a settlement of mediation is a must. One suggestion by the Overseeing Committee and the mediators in Delhi suggested that a regulatory authority at the national level be set up. While the regulator may establish common standards or guidelines for implementation across mediation centres, autonomy of the mediation centres in issues pertaining to infrastructural needs and resource allocation cannot be subject to such a legislation, or a national regulator. The flexibility of the mediation process must not be compromised by prescribing format for conducting mediation in a prospective legislation. The regulator should be responsible for accreditation of mediators, as well as their accountability by formulating a grievance redressal mechanism for parties.

*(iii) Pre-litigation efforts for settlement*

On this issue the interviewees had different views. While at the BMC there was a near consensus for establishing some form of settlement procedure that should be created at a stage prior to litigation. The interviewees at the DMC, were of mixed opinion. Some interviewees felt that pre-litigation mediation is a useful mechanism which will ease the pressure on the judiciary, as well as the mediation centres, and become an additional step to temper parties towards settlement of their disputes. However, other interviewees felt that any efforts prior to the actual implementation of litigation would not amount to court-connected mediations. They also stipulated that it may not be feasible to implement a framework requiring a judge or court official to determine the possibility of settlement before the formal institution of a case. Further, parties who come to court and undergo challenges in litigating disputes are more amenable to the use of ADR mechanisms, especially mediation.

*(iv) Scope and ambit of any proposed legislation*

While some mediators interviewed at the DMC favoured a ‘strong’ legislation to adequately regulate mediation in India, most mediators at the two centres believed that any proposed legislation must be limited in scope and only provide for a framework. The overall regulation of mediation must be predominantly vested in the mediation centres who are better equipped to gauge ground realities and act accordingly.



## II. DATA ANALYSIS

The qualitative and quantitative data in the previous chapter show the growth trajectory of court-connected mediation in India. Justice (Retd) R.V Raveendran, former judge of the Supreme Court of India, in his writings on the relevance of mediation, has set out key elements of making mediation a successful practice area, which have been central to our research methodology for this report.<sup>14</sup> These include judges' training programmes, increasing case referrals to mediation centres, need for quality (and well trained) mediators, developing state-of-the-art infrastructure facilities for mediation and increasing user awareness. These significant elements have also proven as key to implementing an effective mediation model in the Study Jurisdictions and have, therefore, been used as parameters to analyse the mediation framework in India.

### A. Role of referral judges

Judges across jurisdictions have played a fundamental role in the advancement of mediation.<sup>15</sup> An understanding and an ability to determine the appropriate dispute resolution mechanism, tempered with good case management is critical for the development of a better civil justice system.<sup>16</sup> At the mediation centres under study, a strong correlation between court-connected mediation and judges' inclination towards mediation emerged, which has been analysed under three heads, namely case referrals to mediation, lack of cooperation among parties for mediation and types of case referrals.

#### 1. Case Referrals to Mediation

Of the three centres, only the BMC has consistently shown an increase in the number of cases referred each year during the Research Period. Interestingly, however, the annual increase between 2013 and 2015 was less significant than that between 2011 and 2013 (see Figure 1).

The data from DMC reveals a marginal increase in the total number of cases between 2011 and 2014, and a decline in the number in 2015 (see Figure 2). The total number of cases at the DMC, by and large, did not show significant change over the Research Period.

Furthermore, the data from AMC shows an even more erratic trend, with a drastic decline in the cases referred between 2011 and 2014, and an increase in 2015 (see Figure 3).<sup>17</sup>

<sup>14</sup> Justice R.V. Raveendran, 'Mediation-Its Importance and Relevance', (2010) PL October 10.

<sup>15</sup> Justice K.S. Radhakrishnan, 'Human Relationships in the Concept of Mediation' <[http://gujarathighcourt.nic.in/mediation/review\\_jsci.html](http://gujarathighcourt.nic.in/mediation/review_jsci.html)> accessed 15 July, 2016; Uma Ramanathan, 'Initiatives and Innovations for Effective Court-Mandated Mediation', presented at seminar on 'Mediation and The Role of Referral Judges', Cochin, 12 August, 2012 <<http://www.mediate.com/mobile/article.cfm?id=9805>> accessed 15 July, 2016.

<sup>16</sup> Frank E. A. Sander and Stephen B. Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure', *Negotiation Journal*, Volume 10, Issue 1, January 1994, 51-52.

<sup>17</sup> Since the cases registered are those cases which are have been listed for a particular date at the centre for mediation, the data from the AMC should not be seen as clearly indicative of the role of referral judges as data regarding cases referred for mediation in the BMC and total cases in the DMC. However, for the lack of sufficient data, it is fair to assume that most cases referred to the AMC by the court are listed for a particular date without significant delay from the date of referral.

Figure 1: Cases referred at the BMC

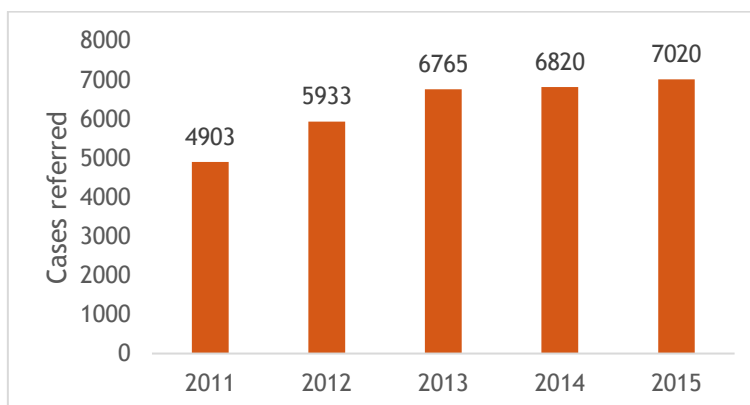


Figure 2: Total number of cases before the DMC

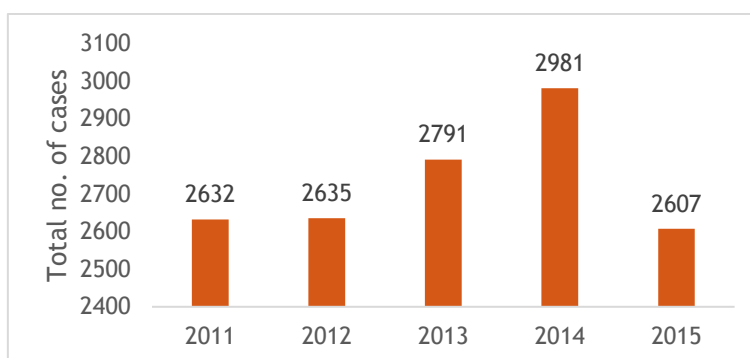
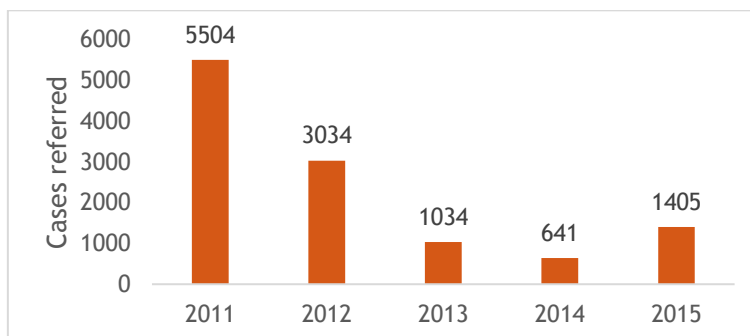


Figure 3: Cases referred at the AMC



These numbers seem to suggest a reservation among judges regarding the use and benefits of mediation, which may be problematic. The interviews with mediators revealed the importance of a supportive judiciary for strengthening any court-connected mediation programme. It was highlighted that, presently, most mediation programmes do not receive adequate support from the judiciary, which hinders their overall performance and success. It was stated that referral judges need objectivity while determining the possibility of settlement between parties; however, this objectivity may be hampered because judges may be more attuned to the adjudicatory process. The lack of proper training and sensitization about the process of mediation, it was further stated, adds to this problem. Moreover, the three High Courts to which the BMC, the DMC and the AMC are connected, have a high number of cases freshly instituted. Evidently, there is great scope for enhancing the referral rate given the high number of freshly instituted cases.

From the data, therefore, it can be concluded that the absence of a conducive environment for mediation is partly attributable to the lack of judicial understanding and training, especially in the subordinate judiciary. Increasing number of cases for mediation in the court-connected programmes is inextricably linked to the number of referrals a judge makes and how mediation friendly the judge is. This is also borne out by the experiences in Study Jurisdictions with stronger mediation frameworks. In Australia, Singapore and the UK, for instance, judges are actively involved in impressing upon parties the need to explore ADR mechanisms, and imposition of costs on parties where no genuine effort to this end is made is common practice.<sup>18</sup> The role of a referral judge in determining the possibility of settling a dispute through one of the ADR mechanisms has also been recognised by law makers and the Supreme Court in India<sup>19</sup>, which, based on the analysis, is the first point of roadblock that has to be addressed and will form a stepping stone to a stronger mediation regime.

## 2. Lack of cooperation among parties for mediation

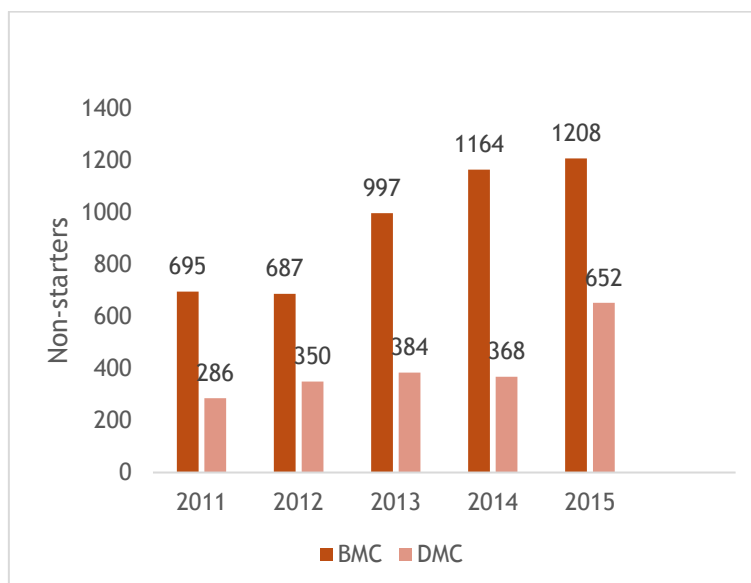
Non-starters, as defined above, are those cases which were referred to the mediation centre but where no mediation took place. Cases can be non-starters for different reasons; however, the data reveals interesting trends regarding cases that were non-starters due to parties' lack of interest or cooperation.

At the BMC, for instance, the number of non-starters for these reasons was high, and nearly doubled during the Research Period (see Figure 4). In fact, these cases constituted nearly 90 percent of all non-starters at the BMC. The number at the DMC also showed an increase of over two-folds (see Figure 4). Moreover, discussions at the BMC and the DMC also emphasised the role that a referral judge can play in moulding the parties' perception about mediation, which can significantly influence their willingness to actively co-operate during the mediation. If judges are ill-equipped to handle and prepare parties for mediation, it may have grave consequences for the outcome of such efforts. The parties need to have confidence in the process, which cannot be fostered through a mechanical referral of a dispute to mediation.

<sup>18</sup> See, *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys*, (2012) FCA 282; Supreme Court e- Practice Directions, Rule 35C(5), <<http://www.supremecourt.gov.sg/>> accessed 15 July, 2016; *Cowl v Plymouth City Council*, (2001) ECWA Civ 1792; *PGF II SA v OMFS Company Ltd*, (2013) EWCA Civ 1288.

<sup>19</sup> See, *Salem II* (n 6) and *Afcons* (n 13).

Figure 4: Non-starters due to parties not turning up or not wanting to explore mediation



From the data, therefore, it is evident that the lack of a judge's conviction in the potential of mediation can percolate onto the parties appearing before such judges. Such reservations inevitably adversely impact the possibility of mediating a dispute. Even if mediation is mandated for some or all civil disputes, the onus is on the referral judge to ensure that parties enter the process of mediation with an open mind. The problem of lack of cooperation among parties can, therefore, be mitigated by adequately training and sensitizing judges about mediation.

### 3. Types of case referrals

Data obtained from the mediation centres, and the discussions with mediators indicate the potential of mediation, which cuts across diverse case types. For instance, at the BMC, most cases referred for mediation during the Research Period were matrimonial cases<sup>20</sup> and property cases<sup>21</sup> (see Figure 5). However, the data reveals that cases, which may conventionally be considered less suitable for mediation, were also referred. Many such case types have high rates of settlement, which is determined by calculating the number of cases of a particular case type settled through mediation as a percentage of the number of cases of a particular case type mediated (see Figure 6).

<sup>20</sup> Matrimonial cases constitute cases referred for mediation under the heads of Dowry Prohibition Act, maintenance under Section 125, Domestic Violence Act, Guardians and Wards Act and matters relating to divorce, judicial separation and restitution of conjugal rights. Over 50 percent of the cases referred were divorce proceedings.

<sup>21</sup> Property law cases constitute cases referred under the heads of house rent control, house rent revision petitions, land acquisition, declaration and injunction, declaration and possession, declaration/compensation, ejectment, mortgage suit, partition and possession.

Figure 5: Total matrimonial cases and property law cases, as a percentage of the total number of cases before the BMC, between 2011 and 2015

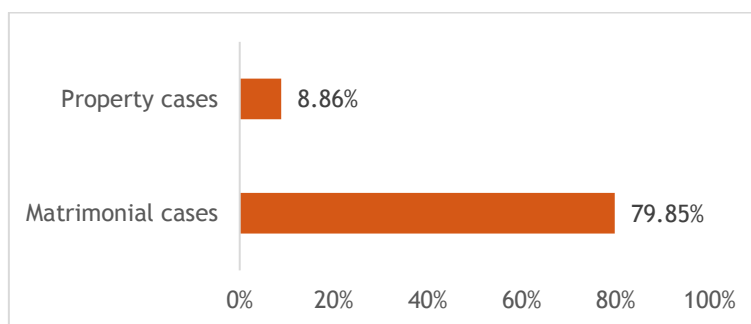
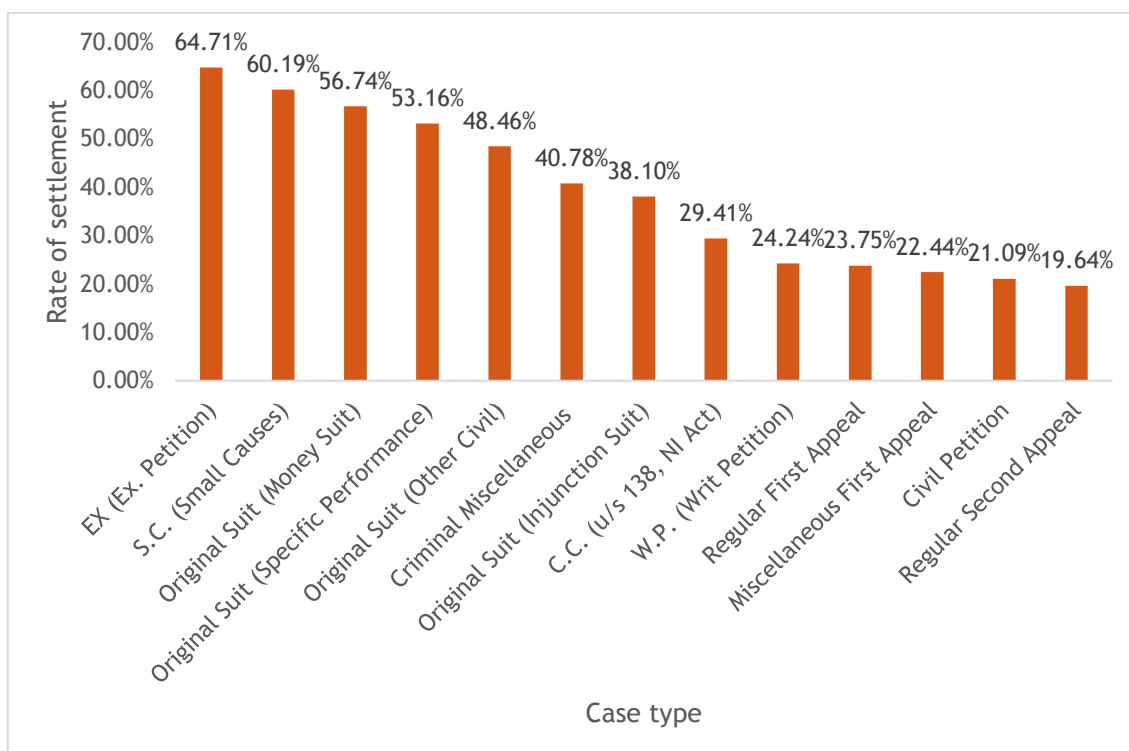


Figure 6: Settlement rates for types of cases at the BMC for which at least 100 cases were mediated between 2011 and 2015



In view of the above, it can be said that the potential of mediation lies across case types and at different stages in the adjudicatory process. This is also borne out by the experience of certain Study Jurisdictions where mediation has been found to be successful in diverse cases even at advanced stages of litigation.<sup>22</sup> Moreover, a referral judge can tactfully convince parties to attempt mediating settlement of disputes, even in unconventional and complicated cases. In fact, mediators and members of the Overseeing Committee at the DMC cited instances wherein efforts through mediation resulted in the settlement of complicated disputes, sometimes even at the appellate stage. Further, it was mentioned that these complex disputes primarily made it to mediation because of the efforts of the referral judges who could persuade parties to attempt at mediating disputes.

<sup>22</sup> Rebecca Westerfield, 'When is the Right Timing for a Mediation', (JAMS ADR, 2013) <<https://www.jamsadr.com/files/Uploads/Documents/Articles/Westerfield-Timing-Mediation-ABTL-2013.pdf>> accessed 15 July, 2016.

Additionally, the low or inconsistent number of referrals in some case types<sup>23</sup> could be attributed to the lack of concrete norms to help judges determine whether a case is suitable for mediation. This lack of guidance stands in stark contrast to practice in some other jurisdictions. In Australia, for instance, National Alternative Dispute Resolution Advisory Council has laid down the following guidelines to ascertain suitability for mediation: (i) the dispute, (ii) the disputants (including legal practitioners), (iii) the context, (iii) ADR process and providers and (iv) the meaning of “success” or effectiveness.

Therefore, even as the role of the judge in referring cases necessarily involves exercise of certain discretionary power, laying down of the criteria for such decision making can contribute to more consistent patterns in the kind of cases that get referred for mediation, enabling a more uniform and cohesive development of court-connected mediation in India.

## B. Training and accreditation of mediators

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Training programmes have been globally recognised as a necessity for mediators since pre-mediation preparation, understanding positions, interests and needs, effective communication and people handling skills, negotiation facilitation, understanding neutrality and confidentiality, have become key elements of effective mediators and subsequently effective mediations.<sup>24</sup> There is global recognition that awareness building and usage will increase only if there is a quality of service, including *inter alia*, effective mediators. In light of this, data on the importance of training and accreditation of mediators has been analysed below under three heads, namely cases settled, case types and rate of settlement, and frameworks for training and accreditation of mediators.

### 1. Cases settled

Data obtained from the mediation centres reveals significant variation in the percentage of cases settled during the Research Period. In the BMC and the DMC, over 50 percent of the total number of cases concluded in a settlement.<sup>25</sup> The AMC revealed a much lower figure of less than 25 percent.<sup>26</sup>

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<sup>23</sup> For instance, despite encouraging settlement rates in some years, the number of company appeals and company petitions before the BMC has shown severe fluctuation over the Research Period.

<sup>24</sup> Sriram Panchu, *Mediation Practice & Law: The Path to Successful Dispute Resolution* (2<sup>nd</sup> edn, Lexis Nexis, 2015) 209, 212-213; James Melamed, ‘So, You Want To Be A Mediator’ (*Mediate.com*, December 2013), <<http://www.mediate.com/articles/melamed10.cfm>> accessed 15 July, 2016; State Requirements for Mediators (Mediation Training Institute International) <<http://www.mediationworks.com/medcert3/staterequirements.htm>> accessed 15 July, 2016.

<sup>25</sup> Additionally, it must be noted that cases settled at the DMC also includes connected cases and it may, thus, not be accurate to compare the figures from the BMC and the DMC.

<sup>26</sup> It may also be noted that while the settlement rate for the Research Period at the AMC was less than 25 percent, in 2011 and 2015, the settlement rate was even lesser, around 20 percent.

Figure 7: Cases settled at the BMC as a percentage of the total number of cases

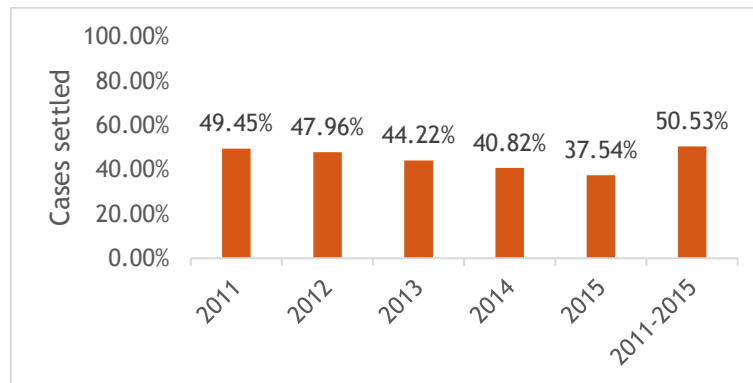


Figure 8: Cases settled (including connected cases settled) at the DMC as a percentage of the total number of cases

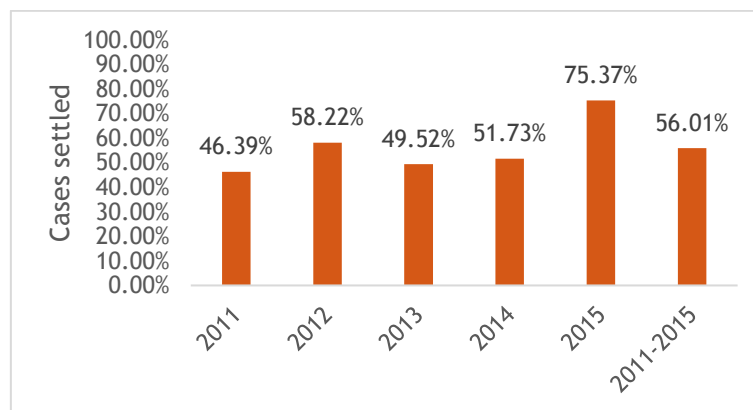
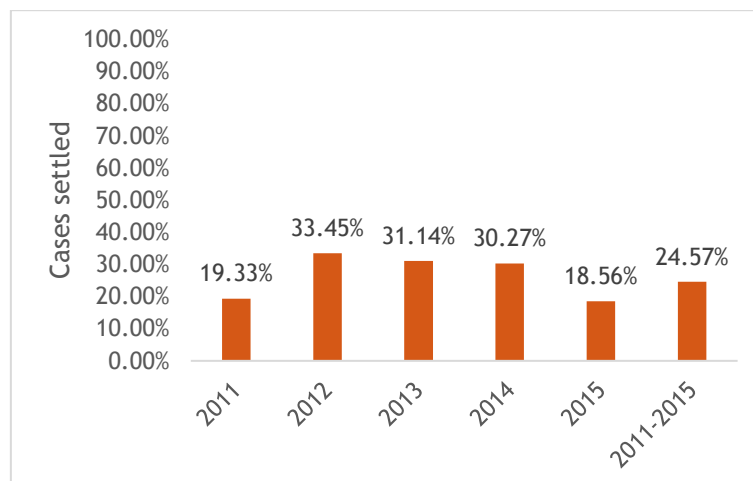


Figure 9: Cases settled at the AMC as a percentage of cases registered



A significant (but not exclusive) reason for lower settlement rates may be the insufficient quality and training of mediators. Interviews with mediators emphasised the positive impact of a well-trained mediator on the overall process of mediation. Though mediators are not singularly responsible for the success of mediation, it was stated that a mediator, exhibiting a thorough understanding of issues and facilitating negotiations in an impartial manner, can certainly enhance the possibility of a complete or partial settlement of issues. Even where no settlement is accomplished, a meaningful attempt by a competent mediator can bridge communication breakdown between parties. The impact of well-trained mediators is also evident in the Study

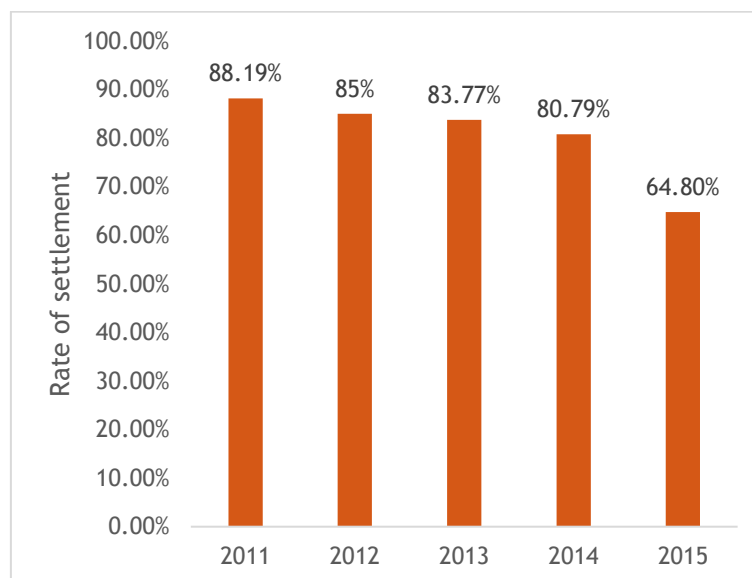
Jurisdictions. In Australia, for instance, studies have shown that mediators are required to undertake intensive training which ensures that even when cases are not entirely resolved through mediation, it often results in some partial settlement of issues.<sup>27</sup>

From the above, it is clear that a mediator's role is crucial to the outcome of a mediation. One way to improve settlement rates would be by implementing institutional reforms for setting minimum training standards and enhancing the quality of mediators. Furthermore, some form performance measures can also prove useful. For instance, in the UK, mediator quality is periodically monitored through audits conducted by the CEDR that assess the efficacy of mediators by capturing pay, categorisation and performance.<sup>28</sup> Similar measures may be introduced in India in order to improve the quality of mediators.

## 2. Case types and rate of settlement

Data from the BMC indicates that certain categories of cases have a higher rate of settlement, in comparison to others. For instance, in four out of the five years of the Research Period, divorce cases had a rate of settlement of more than 80 percent (see Figure 10). Figures for other case types, though favourable, were not as high (see Figure 6).<sup>29</sup> Even in the interviews conducted with mediators at the DMC, it was observed that matrimonial cases have higher settlement rates.

Figure 10: Rate of settlement in divorce cases at the BMC



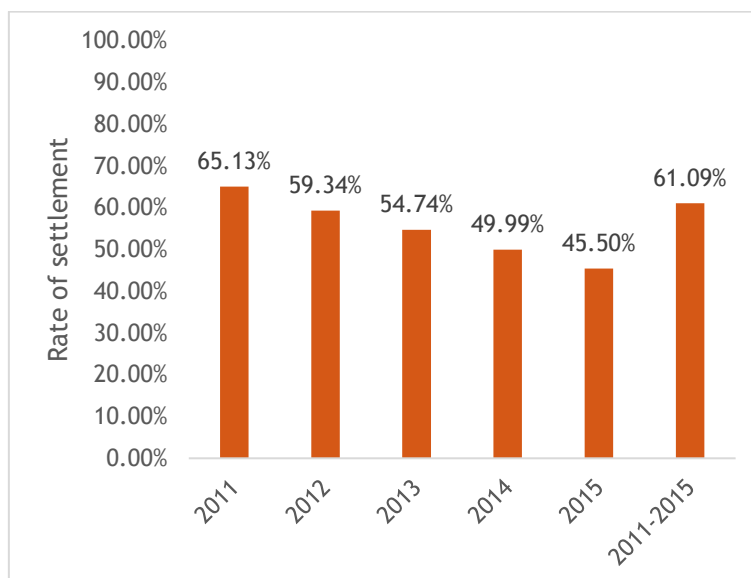
<sup>27</sup> Justice P A Bergin, 'Judicial Mediation: Problems and Solutions', (2011) 10 TJR 305, 308; Justice P A Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia', Mediate First Conference, (Hong Kong International Arbitration Centre and The Hong Kong Mediation Council, 11 May, 2012) 9 <<http://www.supremecourt.justice.nsw.gov.au/>> accessed 15 July, 2016.

<sup>28</sup> CEDR Audits, <<http://www.cedr.com/>> accessed 18 July, 2016.

<sup>29</sup> This is also to be viewed in light of the fact that mediation has been recognized as particularly suitable in matrimonial disputes by the Supreme Court. There is, therefore, a systemic support for mediation in such cases, which is also evidenced by the data.



Figure 11: Rate of settlement for matrimonial cases at the BMC



We have already concluded that competent mediators can positively impact the outcome of mediations. Data on case types and the settlement rates indicates that presently, mediators may be better equipped to mediate certain categories of cases, resulting in higher settlement rates of such cases. It also highlights a need to conduct advanced and continuous training for mediators which will allow them to mediate a more diverse array of cases, with similar success.<sup>30</sup> In the DMC for instance, many cases are referred for mediation at appellate stages of the ensuing litigation. Such cases are significantly more complicated given that one of the parties has already got some favourable verdict and as such may be disinclined towards a settlement. Nonetheless, with the efforts of well-trained mediators, such complicated cases are also often resolved by way of a mutual settlement of issues.

### 3. Frameworks for training and accreditation of mediators

Interviews at the BMC and the DMC highlighted that presently, mediators are trained in *ad-hoc* programmes conducted by mediation centres, which is often the first exposure for a potential mediator to the process of mediation. They emphasized the need to revamp legal education to ensure that legal professionals are familiar with the mediation process. This, it was stated, may be followed by specialised training and refresher courses for mediators, to equip them with the necessary skill-set. The interviews also revealed the need for a uniform accreditation framework for mediators across India. While accreditation of credentials may not be mandatory to become a mediator, it may serve to improve a mediator's popularity and reputation.

The Study Jurisdictions have varied frameworks for training and accreditation of mediators. Australia, for instance, has Recognised Mediation Accreditation Bodies which handle the process of accreditation requirements such as training, education.<sup>31</sup> In Singapore, training and accreditation is

<sup>30</sup> It is pertinent to caveat this conclusion by stating that settlement rates alone are not indicative of the success of a mediator; however, specialised and advanced training for mediators may prove decisive in improving their capacity to mediate complex cases.

<sup>31</sup> Response by the Law Council of Australia Alternative Dispute Resolution Committee to the NADRAC's Inquiry into the Alternative Dispute Resolution in the Civil Justice System, 2009, 26

conducted the Singapore Mediation Centre (“SMC”)<sup>32</sup>, and in the UK also, training is provided by different organisations<sup>33</sup>. India should consider creating a comprehensive training and accreditation framework along similar lines to address the issue.

### C. Infrastructure development and administration of mediation centres

Across jurisdictions, infrastructure development and efficient administration of mediation centres, including case managers, pre-conferencing facilities, etc., have been crucial to the development of a mediation practice.<sup>34</sup> This parameter is particularly relevant for the Indian experience, and, based on the data obtained, has been analysed under three heads, namely backlog and pendency, mediator strength and quality, and allocation of cases.

#### 1. Backlog and pendency

Data obtained from the mediation centres reveals a general trend that an increase in case referrals tends to be accompanied by higher backlog and pendency of cases. At the BMC, during the Research Period, higher referral of cases was met with an approximately three-fold increase in the backlog (see Figure 12). The pendency at the end of each year in the BMC also increased during this period (see Figure 14).<sup>35</sup> Our interviews also reinforced the problems in the overall operations at the mediation centre, caused by insufficient infrastructure. At the AMC as well, the backlog was directly influenced by case referrals, increasing with higher referrals and decreasing with a decline in said referrals (see Figure 13). The direct correlation between case referrals and pendency and backlog of cases may indicate that the mediation centres are not adequately equipped with infrastructure and administrative resources to cope with an increase in their work load.

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<[http://www.lawcouncil.asn.au/FEDLIT/images/Inquiry\\_into\\_Alternative\\_Dispute\\_Resolution\\_in\\_the\\_Civil\\_Justice\\_System.pdf](http://www.lawcouncil.asn.au/FEDLIT/images/Inquiry_into_Alternative_Dispute_Resolution_in_the_Civil_Justice_System.pdf)> accessed 15 July, 2016.

<sup>32</sup> See, ‘Mediation Skills Assessment’, Singapore Mediation Centre, <<http://www.mediation.com.sg/workshops/mediation-skills-assessment/>> accessed 22 November, 2016.

<sup>33</sup> Loukas A. Mistelis, ‘ADR in England and Wales: A Successful Case of Public Private Partnership’ *ADR Bulletin*: Vol. 6: No. 3, Article 6, 145-147, <<http://epublications.bond.edu.au/adr/vol6/iss3/6>> accessed 15 July, 2016.

<sup>34</sup> Seth Lubin, ‘The Impact of Case Management in the Initial Stages of Community Mediation’, (*Mediate.com*, June 2008) <<http://www.mediate.com/articles/lubinS1.cfm>> accessed 15 July, 2016.

<sup>35</sup> “Pendency” is defined as all cases at the mediation centre but not disposed of, irrespective of when the case was referred for mediation. This is an adaptation of the definition used in the 245<sup>th</sup> Report of the Law Commission of India, Law Commission (n 9).

Figure 12: Backlog at the BMC

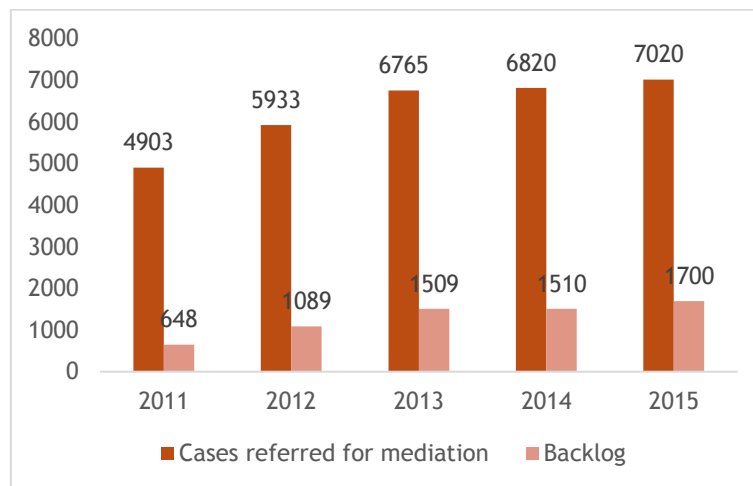


Figure 13: Backlog at the AMC

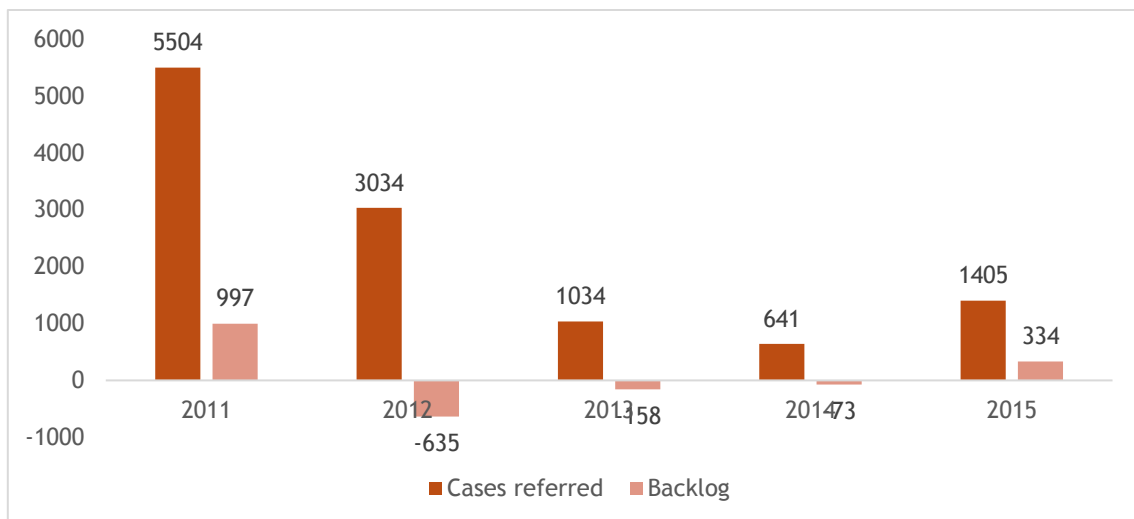
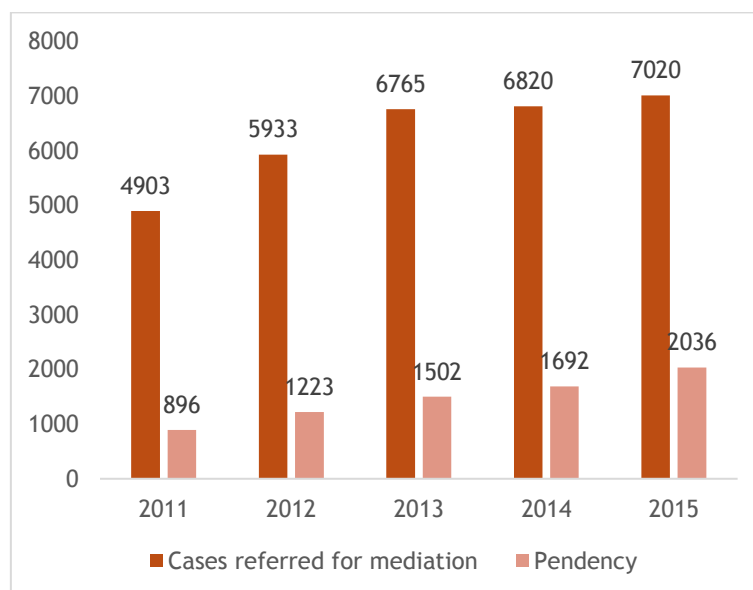


Figure 14: Pendency at the BMC



A review of the Study Jurisdictions presents numerous steps taken to improve the infrastructural development of court-connected programmes in those countries. These include facilities such as management systems, case managers, e-mediation services, adequate staffing, etc. that are available in such programmes.<sup>36</sup> Such infrastructural capabilities may also be implemented at mediation centres in India.

One way to tackle these challenges would be through greater support from the state and central governments. The interviews clearly emphasise the need for higher funding for these court-connected mediation programmes by the state governments to their respective judiciaries.<sup>37</sup> Moreover, since issues of infrastructure and administration pertain not only to allocation of funds but also of their optimal utilization, establishing periodic monitoring and evaluation frameworks for different mediation centres can be a crucial.

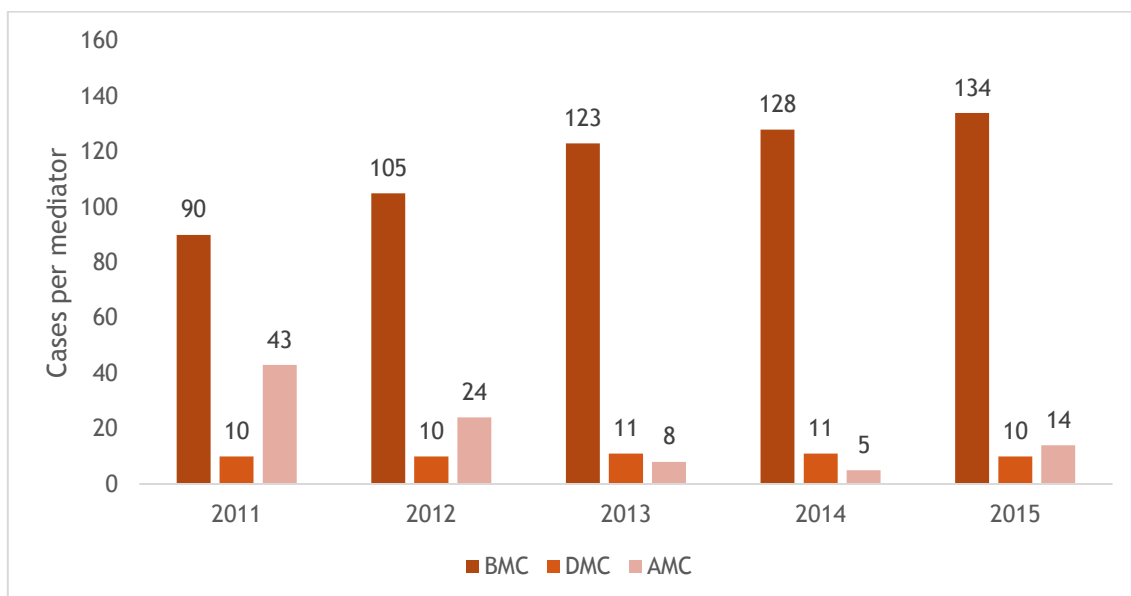
## 2. Mediator strength and quality

The number of mediators at each of the centres has remained constant throughout the Research Period. This means that over the years, when referrals increased (or decreased), theoretically, the workload of each mediator also increased (or decreased). This change in workload is seen in the mediator to cases ratio (see Figure 15). For instance, at the BMC, this ratio increased from 1:90 in 2011, to 1:134 in 2015. At the DMC, while the ratio remained largely constant (around 1:10), it can be attributed to the fact that case referrals saw only minor changes during the Research Period. The ratio at the AMC was erratic, ranging from 1:43 (2011) to 1:5 (2014). There is also a significant difference in the average number of cases handled by each mediator across the three centres. At the BMC every mediator handled between 90 to 134 cases, whereas this number was around 10 per mediator at the DMC, during the Research Period.

<sup>36</sup> In the UK, for instance, several court-connected programmes have dedicated court staff to assist with the administrations and operations. See, Miryana N-esc, 'Mediation - On the Rise in the United Kingdom?', Volume 13 Issue 2, Bond Law Review, (2001).

<sup>37</sup> It may be noted that mediation programmes in other countries like Singapore and Australia receive significant support from all stakeholders. In Singapore, for instance, each of the key stakeholders, such as mediators, judges, and the government, contributed to a concerted effort to make the mediation model a success. In Australia, such programmes receive significant financial support from the State. This is evident from the fact that mediators in such programmes in Australia are paid well, even though mediation services are offered free of cost or at a minimal charge to the parties. See, Ho Peng Ke, Keynote Address, The Law Society Mediation symposium, 20 May, 2016 <<http://www.mediation.com.sg/news-and-views/news-and-speeches/mediation-symposium-keynote-address/>> accessed 15 July, 2016; Response by the Law Council of Australia (n 31); Kathy Mack, 'Court Referral to ADR: Criteria and Research', National Alternative Dispute Resolution Advisory Council and Australian Institute of Judicial Administration (2003), 8, <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Court%20Referral%20to%20ADR%20-%20Criteria%20and%20Research.PDF>> accessed 15 July, 2016.

Figure 15: Mediator to cases ratio



This information highlights a problem of stagnation in the number of total mediators even with a change in case referrals. This results in disproportionate work load for the existing mediators, which may influence the quality of mediation. In some instances, it may also contribute to issues of backlog and pendency at the mediation centres.

While greater financial resources for court-connected mediation programmes will help in increasing the number of mediators on a ‘need-only’ basis, better incentives must be introduced to attract quality professionals to enrol as mediators. Crucial lessons in this regard can be learnt from countries such as Australia where mediators are paid well and mediation is perceived as a legitimate profession.<sup>38</sup> This is contrary to the perception in India where mediation is seen more in the nature of voluntary work. Similar steps may be introduced in India to make mediation a lucrative career option, which would also improve the overall quality of mediators.

### 3. Allocation of cases

Allocation of cases among mediators at the BMC, it was clarified, is not done automatically but is based on the discretion of the Director and the Deputy Director, keeping in mind the availability of mediators, nature of the case, suitability of the mediator to handle the case, et al.<sup>39</sup> Interviews with members of the Overseeing Committee of the DMC revealed a similar framework for allocation. While exercise of such discretion is desirable in comparison to a mechanical allocation of cases, the method has its own set of criticisms. Mediators at the BMC indicated that this method, based entirely on the discretion of a few officials, can give rise to problems of lack of transparency, arbitrariness in case allocation and insufficient information to the parties regarding the appointment of mediators.

Therefore, it is necessary to establish a more open and well-structured framework for allocation of cases. This framework, while taking subjective considerations into account, on a case by case basis,

<sup>38</sup> Kathy Mack (n 37).

<sup>39</sup> The clarification was provided by the Director of the BMC in an e-mail dated August 5, 2016.

should ensure that work is spread out as evenly as possible between mediators. Accountability mechanisms to ensure that mediators dispose of cases allocated to them expeditiously can also aid the efficient functioning of mediation centres. This would ensure greater efficiency from the mediators who will not be overworked, and promote an overall professional framework for conducting mediation.

## D. User awareness

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Awareness building of advocates, litigants and judges with respect to the mediation process is necessary to comprehend its usefulness and usage. User awareness drives have played a fundamental part in advancing the practice of mediation in civil/commercial cases across jurisdictions. In this background, data obtained from the mediation centres has been examined under three heads, namely lack of public confidence, data collation and dissemination and the role of lawyers in advising clients.

### 1. Lack of public confidence

As has been stated above (under Role of Referral Judges), the number of cases that have been non-starters for reasons of parties' disinterest in mediation, or their lack of cooperation, is significantly high. This may be attributable to the lack of public awareness regarding the benefits of mediation, which results in a general lack of confidence among litigants and potential users of the mechanism. The interviews conducted at the BMC and the DMC emphasised that greater user awareness about court-connected mediation programmes is a prerequisite for strengthening the framework.

The current state of low public awareness must be addressed through institutional reforms, as has been done in other countries. In Australia, for instance, the lack of public awareness about the benefits of mediation resulted in limited voluntary participation in mediation by litigants.<sup>40</sup> This issue was recognised and remedial steps, including circulation of user guides and awareness manuals among litigants, were implemented. It is imperative that measures addressing issues of user awareness be taken in India as well.

### 2. Data collation and dissemination

The interviews conducted at the BMC and the DMC indicated that existing framework for disseminating information about mediation is haphazard. Further, it was stated that a lack of proper structure and strategy for dissemination has reduced the impact of this framework and public awareness in general. The problem with the existing framework is two-fold:

- (i) First, the way data is recorded by mediation centres is varying and lacks uniformity. During this study, as well, we faced challenges in studying the data provided to us by the mediation centres, often due to variation in metrics being documented at these centres. This lack of uniformity makes it difficult to comparatively analyse and draw patterns across the data sets. It may also be pertinent to mention that uniformity in data archiving can prove significantly helpful for the public as it would allow the use of statistics from mediation centres across the country to improve awareness among different users.

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<sup>40</sup> Kathy Mack (n 37).

- (ii) Secondly, poor data dissemination also contributes to the problem of low user awareness. Even though data recorded by the BMC and the DMC regarding rates of settlement<sup>41</sup> and average duration spent in mediating cases<sup>42</sup> highlight the time and cost related benefits of mediation as a dispute resolution mechanism, this information is not disseminated effectively. A proper mechanism for disseminating this data in a simplified and accessible manner can prove decisive in improving awareness among potential users of mediation. While the numbers themselves may not be lucid, using them to corroborate the benefits of mediation compared to litigation and other forms of dispute resolution may be helpful. It is worth noting that in countries like Singapore, governments, the judiciary and mediation centres have devoted considerable resources to establish online platforms that make data about mediation easily accessible and understandable.<sup>43</sup>

It is therefore necessary that data recording is mandated across mediation centres, and such data is archived in a uniform format. Moreover, there must be a structured framework to utilise diverse media platforms to disseminate such data in a manner that is easily understood by the public. Such measures will bring the public's attention to the advantages of mediation, which will help in cultivating a positive attitude towards its usage.

### 3. The role of lawyers in advising clients

In the interviews at the BMC and the DMC, the importance of a bar that is more sensitised towards mediation was repeatedly emphasised. It was stated that this would ensure that, where settlement is possible, lawyers would actively recommend mediation to their clients.

Given the fiduciary relationship between lawyers and parties, undoubtedly, a lawyer is in a unique position to influence and advise his or her client to consider mediation at the foremost stage, even before a matter comes to court. In this manner, lawyers can also play a crucial role in enhancing clients' awareness about mediation and its benefits, highlighting the possibility of peacefully and amiably settling disputes. In jurisdictions, such as the UK, support of the bar has been crucial in increasing the visibility and usage of mediation, with lawyers actively counselling their clients to consider mediation of disputes, given its expediency and cost efficiency.<sup>44</sup>

Therefore, sensitising lawyers and advocates and actively engaging with them to propagate mediation can increase its overall usage, thus further strengthening the court-connected frameworks.

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<sup>41</sup> At the BMC, of the total cases mediated over the five years, 66 percent concluded in settlements. The settlement rate was around 56 percent over the five years, at the DMC. As stated above, however, it must be borne in mind that data obtained from the DMC includes connected cases settled in its computation of cases settled.

<sup>42</sup> The average duration spent in mediating cases at the BMC was approximately 150 minutes per case.

<sup>43</sup> 'Justice@StateCourts', State Courts, Singapore, <<https://www.statecourts.gov.sg/Pages/justice@statecourts.aspx>> accessed 22 November, 2016.

<sup>44</sup> Hazel Genn, 'Central London County Court Mediation Pilot: Evaluation Report', LCD Research Series, No 5/98, 20, 135.

## E. Codification: potential legislation for mediation

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The primary objective of codification and legislation has been to codify issues like how referrals should be made, immunity of mediators, and the finality of outcomes of mediation. Many of these questions remain unanswered or inadequately answered in the India context and the aim, through this parameter, is to examine the potential and scope for a legislation governing mediation in India to address such issues.

The Interviewees agreed on two points- first, a legislation could be brought in to govern certain regulatory facets of mediation such as training standards, confidentiality, enforcement of settlement agreements, accountability mechanism for mediators, and second, such a legislation should not compromise the procedural flexibility essential to mediation proceedings. There was also a near consensus that any proposed legislation should not impinge on either procedural or substantive flexibility inherent to the very process of mediation, by codifying such process. The need to preserve the autonomy of mediation centres regarding their infrastructural needs and utilization of available resources, was also strongly iterated.

It may be noted that most of the Study Jurisdictions have some form of legislative framework governing mediation. For instance, in the US, the Uniform Mediation Act is limited to creating uniform standards across states on procedural aspects such as confidentiality, enforceability, immunity of mediators, etc.<sup>45</sup> On the other hand, the Singapore Mediation Bill only governs aspects of private mediations, excluding court-connected mediations from its scope.<sup>46</sup> There is, therefore, considerable variation so far as the extent of legislative intervention across countries is concerned and the scope of such intervention in India warrants greater inspection. The challenge for such a proposed legislation, however, will be addressing regulatory concerns without stifling the process through strict procedural norms.

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<sup>45</sup>Uniform Mediation Act, <[http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf)> accessed 22 November, 2016.

<sup>46</sup>Draft Singapore Mediation Bill, <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20Mediation%20Bill.pdf>> accessed 22 November, 2016.



### III. RECOMMENDATIONS AND THE PATH AHEAD

As the Interim Report and analysis of the data suggest, there are certain measures which may be taken to fully unlock the potential of mediation in India. These will expand the use of mediation as a dispute resolution mechanism and also result in easing the caseload burden on the courts. Having assessed the present state of court-connected mediation in India, the suggestions have been divided into two categories: institutional and management reforms, and legislative reforms. The former deal with the changes from a governance and administrative standpoint, relevant for existing and future mediation centres. The latter relate to the need for a statutory and regulatory framework for the operation of mediation in India.

A few caveats are necessary. First, the institutional recommendations are not meant to prescribe the minutiae of how a mediation centre should be run. The aim is to address the ways in which the institutional framework can be strengthened to allow for scaling up and expansion, to meet present and future needs. Second, uniformity in the administration of mediation centres across the board is not the goal as mediation centres should look to meet local needs, first and foremost. Having said that, there should be a framework regarding minimum levels of support and governance that should be followed by the mediation centres to ensure standardisation in services rendered. Third, the legislative recommendations need not necessarily be changes made to parliamentary law, and could also be implemented through changes in rules and regulations made by the competent authorities.

#### A. Institutional and management reforms

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##### 1. Quality control and popularising mediation

###### (a) Quality mediators and infrastructure

Mediator and infrastructure quality is a prime concern. As discussed in the preceding chapters, well trained mediators can positively impact the settlement rates in mediation. They are also crucial to moulding the process favourably for the parties to objectively consider their differences. Hence, it is imperative that the mediators empanelled in the court-connected programmes are of the highest quality and possess the requisite domain expertise.

Further, the infrastructure such as waiting areas, board rooms and conference rooms should reinforce the cognitive comfort of an informal and open mediatory process. A party to a mediation process (the lawyer included), having had a good experience with the process is likely to opt for mediation for subsequent disputes, and is likely to recommend it to others, thus enhancing the popularity of the mechanism.

###### (b) Increased judicial involvement

To popularise mediation, the role of the judiciary has already been discussed at length. While the Supreme Court has repeatedly emphasised the suitability of certain types of cases for mediation, little has been done to implement this mandate.<sup>47</sup> The judiciary should look to actively engage with

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<sup>47</sup> See, *Salem II* (n 6) and *Afcons* (n 13).

the bar associations through workshops and training sessions, to sensitise them about the process of mediation, promoting it as an integral part of the justice dispensation framework.

### **(c) Increased user awareness through data dissemination**

A concerted effort needs to be made to inform potential users about the efficacy and other benefits of mediation. Data currently recorded by mediation centres gives information about some of these benefits (such as expediency of the process, impressive settlement rates, among other things) and must be widely disseminated to enhance user awareness. This can be done through structured and planned campaigns using mass media and social media to endorse and advertise mediation as a viable alternative to litigation. Mediation centres should also disseminate relevant information about mediators empanelled with them, such as their areas of expertise and years of experience, to enhance public confidence and involvement. All information should be made easily available in vernacular languages to make it widely accessible. This could be done through information manuals (like brochures, pamphlets, booklets etc.) which are available for free distribution in all court premises.

### **(d) Role of lawyers**

Given the fiduciary relationship between lawyers and their clients, it is important to sensitise lawyers about the process of mediation so that they may, in turn, advise their clients to mediate disputes whenever suitable. Without awareness and acceptance of mediation among lawyers, parties are unlikely to acknowledge the feasibility of mediating their disputes. It may be useful to consider some mandate for lawyers to recommend mediation as the first possible recourse for dispute resolution, especially in cases which reflect high rates of settlement (such as matrimonial disputes). Additionally, greater emphasis should be placed on educating and training law students about the process of mediation and its advantages. Minimal training in ADR mechanisms could also be made a prerequisite to practise law in India. For existing lawyers, an annual sensitisation workshop could be implemented as a mandatory bar council obligation.

### **(e) Law school curricula**

Law schools and universities can collaborate with foreign and domestic institutions, and individuals, who are renowned experts in mediation, to conduct lectures and courses on mediation practice and techniques. At present, the focus in the study curriculum at law schools on mediation is marginal as compared to litigation and arbitration. This lack of awareness at the student level translates into lack of conviction in mediation as an advocate and must, therefore, be addressed. The law school curriculum on ADR mechanisms should aim to educate students by optimally combining theoretical understanding of mediation with practical simulations and role play sessions.

## **2. Mediation as a profession**

### **(a) Professionalising and incentivising mediation practice**

Professionally trained mediators, lawyers and non-lawyers, who can devote their time and energies to the mediation centre full-time, are crucial to expand the operations at such centres. At present, mediation works as a voluntary initiative undertaken by few members of the bar, and other individuals in the legal fraternity, for a nominal fee. To make the practice of mediation more lucrative, offering greater remuneration for mediators is a must, especially since unlike their

counterparts in arbitration, they earn very nominal fees for their services. The court-connected programmes should ensure that mediators are paid reasonable amounts for their time and efforts, to ensure that they are committed to this cause in the long run. While passionate volunteers have been beneficial in the initial phases, it is necessary to professionalise mediation to further strengthen the mediation framework.

#### **(b) Lawyers specialising in mediation**

In addition to full-time mediators, it is also necessary to encourage the participation of lawyers specialising in mediation matters. Given its non-adjudicatory format, there are stark variations in the approach of lawyers towards mediation proceedings. Like arbitration, it is important to have enough lawyers who are devoted to mediation work rather than litigation. This would add to professionalising its practice and improving the quality of legal services rendered to parties during mediation.

### **3. Independent professional management**

#### **(a) Professional management**

Independent administrative decision making is important to ensure efficient functioning of the mediation centres. Day-to-day administration of mediation centres should, therefore, be handled by professionals trained in the management of institutions, ideally also having some familiarity with the legal system. Administration by competent professionals or a human resources department would also result in better management of inter-personal relationships at mediation centres, which is crucial to improving the quality of mediation services. It goes without saying that such professional managers would be unable to function without sufficient personnel and infrastructure to help run the mediation centre, and adequate provision must, therefore, be made for the same.

#### **(b) Autonomy**

Although the functioning of a mediation centre may be under the supervision of the jurisdictional High Court, all subjects except matters of policy should be left to the mediation centres. Persons heading mediation centres should have sufficient powers and discretion to conduct their day-to-day operations. A loose analogy may be drawn here with the corporate world: the jurisdictional High Court may act as a “Board of Directors” whereas the head of the mediation centre may function like a “Chief Executive Officer”, reporting to the High Court and being made accountable for the performance of the mediation centre, but otherwise enjoying autonomy of operation.

### **4. Financial support and management**

As discussed in the analysis, mediation centres require greater financial support. However, increased funding is not enough *per se*; the mediation centres must have the autonomy to utilise the funds, subject to accountability regarding the same. This autonomy should entail the freedom to draw up their own budgets and seek funds from the state government annually. In addition to state governments, the Union Government can also create a mechanism to support court-connected mediation centres.

## 5. Case management

### (a) Case managers

Presently, court-connected mediation centres do not have sophisticated case management procedures in place. Case management entails consolidating mediation briefs, co-ordinating the timing of mediation, and management of case data. Case managers are also required at the initial stage to reach out to parties and discuss the importance of mediation. Further, they help mediators from an administrative and management standpoint. Follow ups are also required once the mediation concludes to ascertain whether the resolution has been effective. Therefore, it is imperative that dedicated case managers are appointed to streamline case management in court-connected mediation centres.

### (b) Recording data and collection

Accurate and consistent data collection and archiving is crucial to improve the efficiency of court-connected mediation centres. As discussed previously, case managers help in archiving data, which can be used to undertake periodic evaluation of the progress of such centres and address any shortfalls in their performance.

## 6. Training of judges

There is a need to train existing and prospective judges about the fundamentals of mediation to improve their understanding of its role as an ADR mechanism, and to train them for their role in preparing parties for mediation. In addition to such basic training, continued training and refresher courses should also be regularly conducted to keep them up to date with the latest practices in ADR. Chief Justices of all High Courts should enforce a rigorous training framework for all judges in courts within their respective jurisdictions. Furthermore, Chief Justices should also monitor programmes focussing on continued training of judges.

## B. Legislative reforms

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### 1. Referral judge

As discussed previously, mediators and lawyers have expressed a need to codify the norms which must guide judges when assessing the suitability of cases for mediation. These norms should prescribe types of cases where referral to mediation should be mandatory and where it should be discretionary. Further, it should specify that parties may, at any stage during the litigation, opt for mediation to resolve their dispute and it must be the duty of the judge to make the parties aware of this option.

Along with imposing a duty on the judges to refer matters, parties should also be incentivised to adopt mediation, and should be penalised for not giving it a fair chance. The latter, for instance, can be accomplished by courts imposing costs on parties who are recalcitrant about the mediatory process.

## 2. Professional and ethical standards for mediators

A code of ethics, which would ensure fairness, transparency and accountability of mediators, must be prepared. As discussed previously, this code may be drafted by a regulator established under legislation, at the national level to oversee regulatory aspects of court-connected mediation programmes in India. The aim of this code should not be to over-regulate the mediation process but to build parties' confidence in the mediators. The code should also prescribe the possible consequences for failure of the mediators to adhere to its norms. The consequence could be as basic as removal from a case (for a minor transgression) to debarring them from the centre (for a major violation).

## 3. Mediator accountability

Legislation should provide for the establishment of a grievance redressal framework to enforce a uniform standard of accountability for mediators across court-connected mediation centres. The framework should aim towards allowing an expeditious and time-bound disposal of complaints against mediators. Moreover, it should also prescribe a penalty for when a mediator is found culpable; inversely, a mechanism should be adopted to deter frivolous complaints being pursued against mediators.

## 4. Enforcement of settlement and confidentiality

The major problem regarding enforcement of mediated settlements is the ambiguity regarding the grounds for challenging such settlements. Therefore, legislation should stipulate precise grounds for challenging mediated settlements by parties. Furthermore, regarding confidentiality of proceedings, legislation must carve out precise exceptions wherein the confidentiality requirement may be legally waived. Legislation should also prescribe punitive action against the illegal violation of the confidentiality of mediation proceedings.

## 5. Training and accreditation of mediators

Mediators should be trained by competent trainers who have experience and expertise in this field. The aforementioned national regulatory body may be tasked with recognising such individual trainers or institutes, provided they satisfy certain requirements relating to the quality and intensity of the training. The draft training manual prepared by the Mediation and Conciliation Project Committee ("MCPC") could be utilised to design a comprehensive training framework for mediators. The training standards and governing framework should be revised every two years to ensure updated training standards and international best practices.

Apart from training, accreditation of mediators based on educational and professional background, basic and advanced training undergone by mediators, experience as a mediator (including the types of cases mediated) etc., should also be made common practice. This should not be taken to mean that all court-connected mediations should necessarily be carried out only by an accredited mediator. Accreditation, while important to help judges choose mediators for parties or for court-connected mediation centres to prepare a panel, need not necessarily be made mandatory for all kinds of mediation. Accreditation should, therefore, only be a way of signalling quality to parties interested in mediation.

## 6. General suggestions

While this report has focussed on court-connected mediation, there are other modes of mediation, such as private mediation, community mediation and pre-litigation mediation, which could prove to be equally effective in resolving disputes and reducing the burden on the court systems. These are prevalent in India to some extent but are presently not covered within any legal framework. How and in what manner these forms of mediation should be incorporated in the existing framework will require an in-depth study and discussion, but suffice it to say that they can supplement court-connected mediation in improving the use of ADR mechanisms in India.

### (a) Private mediation

Even as private mediations are being availed of by parties to settle high value commercial and family disputes, parties in court referred mediation are referred exclusively to court-connected centres, making India an outlier when compared with other jurisdictions. Well-regulated and professionally conducted private mediation could, therefore, be explored as a viable mediation option that could reduce the burden of some of the court-connected mediation centres.

### (b) Community mediation

Community mediations are a time tested traditional mode of dispute resolution in India, especially through the village or caste *panchayat*. The latter is not without its problems<sup>48</sup> and panchayats have been known to perpetrate further injustice rather than resolve disputes<sup>49</sup>; however, it may not be a good idea to discard community mediation altogether. Suitably reworked and covered within a modern, liberal framework, private and community mediation can present viable mediation options to people in India.

### (c) Pre-litigation mediation

Although the Supreme Court has given some impetus to pre-litigation mediation in matrimonial cases<sup>50</sup>, there exists no overarching framework for these services. This results in a lack of uniformity across centres, with only some offering pre-litigation mediation services. An institutionalised pre-litigation model can supplement the court-connected model and could be explored further.

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<sup>48</sup> Jyothi Vishwanath et. al, 'Patriarchal Ideology of Honour and Honour Crimes in India', International Journal of Criminal Justice Sciences 6.1/2 (Jan-Dec 2011):386-395; Bhupendra Yadav, 'Khap Panchayats: Stealing Freedom?', Economic and Political Weekly Vol 44, No 52 (December 26, 2009- January 1, 2010), 16-19.

<sup>49</sup> *Arumugam Servai v State of Tamil Nadu*, (2011) 6 SCC 405.

<sup>50</sup> Srinivas (n 12).



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