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STRENGTHENING MEDIATION IN INDIA

INTERIM REPORT ON COURT ANNEXED MEDIATIONS

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EXECUTIVE SUMMARY

From our doctrinal research, it has become evident that the challenges of regulating and implementing mediation are not unique to the Indian legal system; it is a conundrum witnessed across the globe in different jurisdictions which have and continue to explore ways to expand the scope and usage of alternate dispute resolution mechanisms, with a focus on mediation. A survey of the "study jurisdictions" viz. Australia, Singapore, United States of American and the United Kingdom, has presented a list of takeaways which may facilitate the establishment of an efficient framework for court connected mediation in India. The list of these takeaways include:

(i) Pre-litigation mediation, criteria for referring cases to mediation, qualification standards for mediators, etc. are better addressed through a legislative framework.

(ii) A well-coordinated effort from the government as well as the judiciary is imperative to ensure successful implementation of a modern and institutionalised mediation framework.

(iii) Mediator training and continued education are a must to upkeep professional standards, and transform mediation into a more lucrative profession.

(iv) In order to ensure genuine attempts at pursuing mediation, courts must be allowed to impose costs on parties and attorneys culpable of disregarding such attempts for baseless reasons. Even in the absence of mandatory mediation in any law, this practice has ensured a higher referral rate.

(v) Emphasis must be laid on the education and training of referral judges and mediators.

(vi) Independent guidelines or regulations prescribing minimum qualification standards for accreditation and certification can be issued by the concerned authorities.

Based on an analysis of the empirical data made available to us from the Delhi High Court Mediation and Conciliation Centre, and the Bangalore Mediation Centre between 2011 and 2015, the following points emerged:

(i) The numbers present a more robust practice of mediation in Bangalore, compared to the mediation centre of the Delhi High Court, across different parameters, including number of referrals, number of cases mediated and settlement rates.

(ii) The number of cases which are non-starters are higher in Bangalore, but could be attributable to the overall higher number of cases referred.

(iii) Despite having more mediators, the efficiency of the mediation centre at Delhi High Court falls behind its counterpart in Bangalore, which is indicative of the fact that better infrastructure is only one of the steps which must be taken to enhance court annexed mediations in India.

In view of the doctrinal overview of different jurisdictions, as well as the partial empirical research conducted, this Interim Report seeks to present some facts and statistics which will form the basis of a more comprehensive reform strategy and framework, as will be proposed in the Final Report.

PREFACE

A. Background

Civil justice dispensation in India has been struggling. Several attempts to understand, contextualise, and examine the causes of the inability to refine the system have been debated, discussed, and proposed. Alternative dispute resolution ("**ADR**") has been one of the 'go to' reforming tactics that has been advocated by all stakeholders to a dispute system – the judge, the litigant, the litigator, the lawmakers, and the executive. Each stakeholder has voiced and raised different concerns as to the failing implementation of ADR that seems to have been lost in translation at the implementation level. Judges have voiced issues in relation to number and some have stated the lack of adequate training in case management as the cause,[1] litigators have voiced lack of appropriate forums and service providers, lawmakers struggle with existing laws that are still facing implementation issues and are sceptical to suggest repeal owing to heaving monetary infusions made for implementation, the executive worries about structure and litigants are unaware and unhappy with the long drawn unending costs in general thereby without patience to understand ADR (in particular non adjudicative ADR). This report analyses one form of ADR that has been considered by various jurisdictions as fundamental to refining the legal system namely, mediation.[2]

Mediation is a voluntary non-adjudicative process where a neutral third party assists parties to reach resolution to their conflict.[3] The neutral is a mediator who is a process expert and understands communication and dialogue. While being a non-adjudicative form, mediation is conducted in the shadow of the law and requires the presence of lawyers to assist the mediator in facilitating the process by lending legal expertise to the process and their clients. While India has seen mediation in various forms, such as the panchayat system, however, its formal inclusion into the civil system has today become a challenge.

Statutorily, amendments were made to the Code of Civil Procedure, 1908[4] ("**CPC**") to include adopting different and appropriate forms of ADR (including mediation) for civil cases prior to resorting to trial. In *Salem Advocate Bar Association v. Union of India*[5] ("**Salem I**"), the court recognised that despite the existing ADR (mediation included) framework, there was insufficient case management or strategic methodology in place to implement the methods that were envisaged to *ipso facto* take the case outside the judicial system. It may be interesting to point out here, that the Law Commission of India had in fact suggested mediation as an alternative method in 1988, almost a decade before

[1] *Salem Advocate Bar Association* v *Union of India*, (2003) 1 SCC 49.
[2] Laura Fishwick, 'Mediating with Non- Practicing Entities', Harvard Journal of Law and Technology, Volume 27, Number 1, 2013, 344; Kevin R. Casey, 'Alternative Dispute Resolution and Patent Law', 3 FED CIR B.J. 1, 3 n 8 (1993); Steven J. Elleman, 'Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions', 12 Ohio State Journal on Dispute Resolution, 759, 771 (1997).
[3] 'Mediation Training Manual' (*Mediation and Conciliation Project Committee, Supreme Court of India*), 16 <http://supremecourtofindia.nic.in/> accessed 15 July, 2016.
[4] The Code of Civil Procedure (Amendment) Act, 2002.
[5] *Salem Advocate Bar Association v Union of India,* (2003) 1 SCC 49.

the amendments to the CPC and the judicial/legal system conversations on mediation began. However, two decades later, there is little evidence to suggest that mediation has found its foothold as a popular dispute resolution method within the Indian legal system.

Post Salem I, the Law Commission revisited the implementation methods of ADR in general, however, it was in *Salem Advocate Bar Association v. Union of India*[6] (**"Salem II"**) that focus was laid on mediation. Model rules to be implemented by high courts and case-flow management guidelines were a consequence of the Supreme Court's judgment in Salem II, and led to the establishment of the functioning court connected mediation centres, four of which will be analysed in the present project namely, Allahabad, Bangalore, Chennai, and Delhi. These centres have also been benchmarks in respect of the implementation, given their early inceptions and growth trajectory, particularly since the case types that can be mediated that were laid down in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd*.[7] have been mediated in these centres. However, these centres will also provide an insight into the lack of mass acceptance towards mediation as a process and the cause of India's continuous battle with docket.

B. Research Methodology

The present Interim Report has been prepared on the basis of doctrinal and empirical research. Chapter 1 is a comparative study of the court annexed mediation mechanisms in four jurisdictions, namely Australia, Singapore, the United Kingdom and the United States (**"Study Jurisdictions"**). These jurisdictions have been chosen primarily for the reason that they are all common law jurisdictions which have implemented court annexed mediation mechanisms in the recent past. Furthermore, they also present a diversity of approaches on the question of codification of law relating to mediation. The Study Jurisdictions have been discussed on five aspects of court related mediation, namely role of referral judges, accreditation of mediators, infrastructure development and administration of mediation centres, user awareness, and codification. The basis and the rationale for studying these jurisdictions on these parameters has been discussed in greater depth in the Chapter.

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[6] *Salem Advocate Bar Association v Union of India,* (2005) 6 SCC 344.

[7] *Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd*. (2010) 8 SCC 24. In Afcons, the Supreme Court has illustratively set out the following cases as 'mediatable': **(i)** all cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims); disputes relating to specific performance; disputes between suppliers and customers; disputes between bankers and customers; disputes between developers/builders and customers; disputes between landlords and tenants/licensor and licensees; disputes between insurer and insured; **(ii)** all cases arising from strained or soured relationships, including disputes relating to matrimonial causes, maintenance, custody of children; disputes relating to partition/division among family members/co-parceners/co-owners; and disputes relating to partnership among partners, **(iii)** all cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including - disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.); disputes between employers and employees; disputes among members of societies/associations/Apartment owners Associations; **(iv)** all cases relating to tortious liability including claims for compensation in motor accidents/other accidents; and **(v)** all consumer disputes including disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

Chapter 2 of this Report contains an analysis of the data collected from the Bangalore and Delhi High Court Mediation centres. While the project covers four mediation centres, the present report covers only the two mediation centres which responded to our request for data on their functioning. The questionnaire which was given to the mediation centres has been annexed to this report. The raw data which was provided to us has also been annexed to the report. All the data reflected in this report is based on the data that has been recorded and maintained by the mediation centres. We were not in a position to independently verify the numbers from the files themselves or generate data from the original records if the data was not being recorded by the centre. As we have outlined in the chapter discussing the numbers, there are significant differences in the manner in which the Bangalore and Delhi mediation centres maintained data.

The present Interim Report is part of a larger research project studying the functioning of court annexed mediation centres in India and their impact on mediation in India. The preliminary findings presented in this Interim Report will be expanded upon and examined in greater depth in the final report. The final report will be prepared after consultations and further, detailed examination of the data from the all the mediation centres which are proposed to be covered under this report.

C. Structure of the Report

The present Interim Report has three chapters. The first chapter contains the comparative analysis of the Study Jurisdictions and takeaways that can provide a platform for analysing the pitfalls and revisiting the present legal framework. Each jurisdiction has been examined separately with reference to the parameters outlined in the chapter. The second chapter is an analysis of the data collected from the two mediation centres from which we have been able to gather data for the purposes of this report. The data obtained from the respective centres has been discussed separately and together in this chapter. The final chapter will be a summary of the main findings of the previous chapters and the path ahead for the final report.

1. MEDIATION FRAMEWORKS IN DIFFERENT JURISDICTIONS

A. Overview

Mediation forms an integral part of the dispute resolution framework of several jurisdictions. In fact, there are studies that indicate that mediation has played a fundamental part of improving civil justice dispensation and refining dispute resolution.[8] Countries have adopted mediation either through statutory codification, or through usage, or both. Different models to introduce mediation into mainstream legal practice have been adopted and implemented. The Study Jurisdictions have managed to entrench mediation as a go-to option for civil and commercial disputes (pending litigation and pre-trial), whereas despite a decade of statutory implementation and infrastructure investment into the court annexed centres, India struggles to adopt mediation as a dispute resolution tool.[9] The Study Jurisdictions become relevant because they have debated issues with respect to codification and implementation related measures that India faces today. In some cases, the introduction has been through awareness building programmes and judicial case management, in others through legislative mandate and/or a combination has been adopted. These have been juxtaposed to the present Indian scenario on mediation.

As defined in the introduction to this Report, mediation as a process is voluntary in nature. This has been one of the primary concerns in several jurisdictions (including the Study Jurisdictions) who have developed and refined mediation frameworks (mostly through practice), over decades. Various countries have debated whether to enact exhaustive legislations on mediation, and the debate still continues. Pending this debate, as an implementation mechanism, these Study Jurisdictions have governed mediation through practice directions to judges, lawyers or in some cases, legislation mandated mediation in civil cases prior to going forward with any form of adjudication.[10] In the Study Jurisdictions, a commonality in the usage of mediation is that it presently exists in three forms: (a) court connected mediation, (b) private mediation, (c) mediation programmes in tribunals, and government departments and agencies.

Though the introduction to the process of mediation has varied from country to country, India can identify with the issues that many Study Jurisdictions have faced. The most glaring concern being

[8] Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice', Yale Journal of Law & Humanities, Volume 24, Issue 1, 397-398; Nadja Alexander, 'Mediation in the Modern Millennium', Speech at the University of Queensland, Brisbane XVIth Congress of The International Academy of Comparative Law, 2002, 6 <http://espace.library.uq.edu.au/view/UQ:8893> accessed 15 July, 2016.

[9] 222nd Report of the Law Commission of India, 'Need for Justice-dispensation through ADR' <http://www.lawcommissionofindia.nic.in> accessed 15 July, 2016.

[10] Lord Justice Beldam, 'Report of the Committee on Alternative Dispute Resolution to the General Council of the Bar', 1992; Bergin PA., 'Mediation in Hong Kong: The Way Forward – Perspectives from Australia', (2008) 82 ALJ 196, 203-204; Kimberlee K. Kovach, 'The Evolution of Mediation in the United States: Issues Ripe for Regulation May Shape the Future of Practice' in Nadja Alexander (eds), *Global Trends in mediation* (Kluwer Law International, The Netherlands, 2006), 391-392.

that of a docket, which reached a figure of around 3.14 crore cases in December 2015.[11] The judiciary, the executive and the legislature in India have recognised the need to curb this docket explosion and introduce measures by implementing mechanisms that assist in the restoration of the civil justice delivery framework.

Different viewpoints, including training of judges, timeframe for disposal of cases, and policies and pledges have been put forward by the identified stakeholders – lawyers, litigants, judges, lawmakers, and policy framers,[12] to overcome roadblocks and hurdles that are faced by the Indian legal system for effective execution of the statutory mandate of section 89 of the CPC and the *Salem Bar I, Salem Bar II* and judicial directives as laid down in *Afcons*.

Studies of various jurisdictions including the Study Jurisdictions show that mediation has found popularity due to several reasons, the primary ones being: alarming docket issues and prolonged time and cost of adjudicatory processes.[13] Overcoming these barriers has been a challenge even for the Study Jurisdictions, as discussed below. Moreover, the fact that mediation has played a pivotal role in clearing dockets and reducing caseloads is a common finding in all these Study Jurisdictions and is accepted as a universal truth.[14] Data from the Study Jurisdictions have also shown that mediation has made an important contribution to the economic benefit and refining process of the justice system.[15] Given the availability of information and documentation, these Study Jurisdictions have been selected as comparatives for this Report to analyse the pitfalls, roadblocks and necessary implementation mechanisms that India requires to revisit its present court mediation framework. The Study Jurisdictions will lend a comparative to the empirical study in Chapter 2 and provide a stepping

[11] Latest available figures show that as of December, 2015 there are 3,13,99, 836 cases pending at all levels in the Indian courts, as per data on the Supreme Court website <http://sci.nic.in/courtnews/Supreme%20Court%20News%20Oct-Dec%202016.pdf> accessed 15 July, 2016; Also *see example:* Tom Lasseter, 'India's Stagnant Courts Resist Reform' (*Bloomberg Businessweek*, 9 January, 2015), <http://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases> accessed 15 July, 2016; '3.2 million cases pending in India's 1,000 fast track courts' (F*irstpost India,* 23 December, 2013) <http://www.firstpost.com/india/3-2-million-cases-pending-in-indias-1000-fast-track-courts-1302637.html> accessed 15 July, 2016; Court News is available at <http://supremecourtofindia.nic.in/courtnews.htm> accessed 15 July, 2016.

[12] Hiram E. Chodosh, 'Mediating Mediation in India', (*Law Commission of India)* <http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf> accessed 18 July, 2016; Dr. Justice Dhananjaya T. Chandrachud, 'Mediation- realizing the potential and designing implementation strategies' (*Law Commission of India)*, <http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf> accessed 18 July, 2016; Paper for the conference sponsored by the Law Commission of India on ADR/Mediation <http://lawcommissionofindia.nic.in/adr_conf/sriram17.pdf> accessed 18 July, 2016; Don Peters, 'Court-Annexed Mediation, Issues of Democracy: Mediation and The Courts', Electronic Journals of the US Department of State, Volume 4, No 3, 20-21, in relation to mediation and stakeholders to mediation in the United States.

[13] Jay Folberg, 'Development of Mediation Practice in the United States', Juris Dicto, Volume 17, (February-July 2015) <https://www.usfq.edu.ec/publicaciones/iurisDictio> accessed 15 July, 2016; Scott Brown, Christine Cervenak, 'Alternative Dispute Resolution Practitioners Guide' <https://www.usaid.gov/> accessed 15 July, 2016.

[14] *See example* Judge Joe Harman of the Federal Circuit Court of Australia, 'From Alternate to Primary Dispute Resolution: The pivotal role of mediation in (and in avoiding) litigation', National Mediation Conference Melbourne 2014 <http://www.federalcircuitcourt.gov.au/> accessed 15 July, 2016.

[15] *Id.;* Michael McIlwrath, Director and Former Chair of the Board of the International Mediation Institute, 'Can Mediation Evolve into a Global Profession?', <https://imimediation.org/> accessed 15 July, 2016.

stone for a way forward to the betterment of mediation practice in India, as discussed in Chapter 3. On the specifics, this chapter will closely look at the following ("**Specific Areas**"):

1. Building a successful mediation practice

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.[16] These include judges' training programmes on dispute resolution strategy and design, increased case referrals to mediation centres, quality (and well trained) mediators, developed infrastructure facilities for mediation and increasing user awareness. These significant elements have also been considered as key to implementing an effective mediation model and have been elaborated below:

(a) Role of referral judges

Judges across jurisdictions have played a fundamental role in the advancement of mediation.[17] In fact, most jurisdictions (including the Study Jurisdictions) have mandated training of judges in understanding various dispute processes, particularly ADR processes and how case referrals should be analysed. In this context, Justice Henry Klide (Retd.), of Stark County Common Pleas Court and a known mediation evangelist in the United States, has said, "Judges, in dealing with society's social, economic and racial issues, must embrace innovative legal tools to assist litigants and the judicial system".[18] An understanding and an ability to 'fit the forum to the fuss', tempered with good case management is extremely critical for the development of a better civil justice system.[19] In the Study Jurisdictions, court connected mediation has been contingent on a judges' inclination towards mediation, as will be established in the course of this chapter.

(b) Accreditation of mediators

The qualifications of a mediator have increasingly become a subject matter of discussion. Devising training programs and the importance of advanced/refresher courses have been a global phenomenon, though training to be a mediator is also a result of this development. A good mediator is key to the mediation process.[20] Taking the American example, when the practice of mediation was introduced in the early 90s/late 80s, mediators were primarily lawyers or retired judges who were facilitating out of court settlements. There was no training and accreditation facility that was set

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[16] Justice R.V. Raveendran, 'Mediation-Its Importance and Relevance', (2010) PL October 10.

[17] Justice K.S. Radhakrishnan, 'Human Relationships in the Concept of Mediation' <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.

[18] Beverly Draine Fowler, Paul Garever et.al, 'Planning Mediation Programs, A Deskbook for Common Pleas Judges', The Ohio State University College of Law (2000), Supreme Court of Ohio Office of Dispute Resolution, 4-14, <http://www.supremecourt.ohio.gov/Publications/pmd.pdf> accessed 15 July, 2016.

[19] 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.

[20] Sriram Panchu, *Mediation Practice & Law: The Path to Successful Dispute Resolution* (2nd 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.

out at that point. 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, became key elements of effective mediators and subsequently effective mediations.[21] Accreditation on the other hand is a contentious issue, particularly since it is based on what constitutes a qualified accreditation agency.[22]

Moreover, there is global recognition that awareness building and usage will increase only if there is a quality of service, including *inter alia*, effective mediators. The absence of good mediators is interlinked with the regression of mediation.[23] In this context, it is pertinent to note, that being a 'mediator' should be viewed as a profession as opposed to a volunteer workshop; an area where even the Study Jurisdictions have struggled.[24] The fact that the government financially supports the court connected mediation programmes and the services provided are free of cost, makes mediation less lucrative as a profession in this context. Given that the costs of mediation are almost nil and the fact that it saves time is undisputed. This part will study the importance afforded to training and accreditation by the Study Jurisdictions in building an efficacious mediation regime, whereas part 3, will analyse the time-cost benefit of mediation.

(c) Infrastructure development and administration of mediation centres

Infrastructure development and efficient administration of mediation centres are crucial to development of a mediation practice. The importance of neutral chairs who oversee the activities of the mediation centres, a non-court like environment for mediation, case managers, pre-conferencing facilities, have been understood and has gained importance.[25]

(d) User Awareness

Awareness building of litigators, advocates and litigants of the mediation process and how to use the process is pertinent to comprehend its usefulness and usage. In India, of course, the biggest hurdle has been misunderstanding the process, where some believe mediation to be akin to a Lok Adalat set up which is only for the purpose of settlement and others believe it to be legal aid! The ruling in the *Afcons* case also lends to the confusion.[26] Countries (including the Study Jurisdictions) through

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[21] *Id.*; State Requirements for Mediators (Mediation Training Institute International) <http://www.mediationworks.com/medcert3/staterequirements.htm> accessed 15 July, 2016.
[22] NSW Law Reform Commission, 'Report on Training and Accreditation of Mediators', Report 67 (1991), <http://www.lawreform.justice.nsw.gov.au/Documents/report_67.pdf> accessed 15 July, 2016.
[23] Douglas A. Henderson, 'Mediation Success: An Empirical Analysis', 11 Ohio State Journal On Dispute Resolution 105 (1996), 113.
[24] *Id.*; Rachael M. Field, 'A mediation profession in Australia: an improved framework for mediation ethics' Australasian Dispute Resolution Journal, 18(3), 180-181, Thomson Legal & Regulatory (2007); Susan S. Raines, Sunil Kumar Pokhrel et. al, 'Mediation as a Profession: Challenges That Professional Mediators Face', Conflict Resolution Quarterly, Volume 31, Issue 1, 2013, 83-84.
[25] 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.
[26] The definitions of judicial settlement and mediation in the Afcons case are overlapping and have received criticism. Sriram Panchu (n 20) 364-365.

seminars, advocacy programmes and pledges (that have been signed by large corporate houses and multinationals) have focussed on awareness drives that have played a fundamental part in advancing the practice of mediation in civil/commercial cases.[27]

The importance to these key elements has been analysed from a Study Jurisdiction perspective in this chapter.

2. Codification

Several countries (including the Study Jurisdictions) have considered introducing a comprehensive statute on mediation. In court connected mediations, while there are model laws and rules that have been followed by different courts in the same jurisdictions, the larger question of consistency and a comprehensive statute has been raised and in some cases like the USA, left untouched. The primary objective of codification and legislation has been to determine how referrals should be made (as identified in Australia), how to deal with immunity of mediators, and most importantly and commonly, the finality of outcomes of mediation.

In India, at present, in court connected programmes mediated settlement agreements are ordered as non-appealable, final and binding when furnished to court for execution.[28] Therein lies the concern. In court connected programmes, the finality element is usually ensured through execution and recording in court. It is here that the essence of the process comes to be challenged. A vital element of mediation is 'confidentiality'. The process is based on the principle of non-disclosure and mediators, parties, and lawyers are bound by it. Settlement agreements are also confidential. Making it a matter of public record is where the debate of codification lies. In addition to this, what constitutes as immunity for mediators and whether privilege is extended to mediators also becomes a concern translating to the question - how to carry out their duties if they expect to be summoned by court to justify it? In respect of finality of settlement agreements, the open ended question arises: is it sufficient to execute the contract and is that binding without having to produce the agreement in court for sanction?

In addition to the question of codification so as to give the process a statutory structure, the move towards a legislation by countries is also based on enforcing the mediated settlement agreement against government agencies which have been studied in the course of this chapter.

As outlined in the preface to the Report, the aim and purpose is to understand, analyse and evaluate the court connected mediation programmes in India and to chart out an effective implementation scheme. The key takeaways which can be used as a basis for a comprehensive way forward are also identified through this chapter.

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[27] Refer to section D for detailed discussion.

[28] Training Manual (n 3) 21; Kurian Mathew, 'Mediation India' http://www.kurianmathew.com/Mediation%20India.html accessed 18 July, 2016.

B. Jurisdictional Analysis

1. Australia

The advent of mediation in Australia, like in most common law jurisdictions was through the introduction of community justice centres.[29] However, Australia was one of the first countries to statutorily provide for mediation (and recently pre litigation ADR which has been dealt with in detail below) in 1991, though the contemporary introduction of mediation was through a court annexed programme in the state of Victoria in 1983.[30] Subsequently, the Federal Court of Australia formally launched a court annexed mediation programme in 1987. In 1991, with the amendment to the Federal Court of Australia Act, 1976, courts were allowed to refer proceedings to a suitable ADR method (in this case arbitration or mediation). Four years after this amendment, the National Alternative Dispute Resolution Advisory Council (**"NADRAC"**) was established to delve into how to introduce different forms of ADR in civil cases.[31] After several deliberations and in-practice implementation schemes, the Civil Dispute Resolution Act, 2011 (**"CDR 2011"**) was enacted which required parties to pursue ADR as a rule, prior to embarking on civil litigation, as a federal action.

Prior to CDR 2011, Australian states, Victoria and New South Wales both had separate legislations civil procedure which included mediation. However, the need for a universal legislation was suggested to include the 'genuine steps statement'; it involved trying ADR before court as a proactive approach. Therefore, while pending litigation, court referrals and directions had previously existed, post 2011, a statement was to be filed with the court that adequate attempts at mediation (or other ADR processes if applicable) were undertaken prior to commencing on litigation. In the case of *Superior IP International Pty Ltd v. Ahearn Fox Patent and Trade Mark Attorneys*,[32] the Federal Court of Australia ruled that costs would be imposed on parties, in the event that the 'genuine steps' mandate was not adhered to by the parties.

While no specific provision on pre litigation mediation exists in CPR 2011, there have been legislative schemes that have imposed pre litigation dispute resolution.[33] Moreover, the general drive is to approach a voluntary framework of mediation, where court referrals are usually made only when parties are willing to mediate as practice.[34] In addition to the court programmes, there are specific tribunals with connected mediation centres[35] where mediation is statutorily mandated. This is a trend in most jurisdictions (including the Study Jurisdictions), where certain identified areas such as family

[29] Kenneth R. Feinberg, 'Mediation - A Preferred Method of Dispute Resolution', Volume 16, Issue 5, Pepperdine Law Review, 16 Pepperdine Law Review 5 (1989) <http://digitalcommons.pepperdine.edu/plr/vol16/iss5/2> accessed 15 July, 2016.
[30] John North, 'Court Annexed Mediation in Australia – An Overview', Malaysian Law Conference, November 17, 2005, 2-3 <https://www.lawcouncil.asn.au/> accessed 15 July, 2016.
[31] *Id.*
[32] *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys,* (2012) FCA 282.
[33] Family Law Act, 1975, Legal Profession Act, 2007.
[34] Courts have also increasingly started referring matters to mediation when they consider the matter to be suitable for mediation, even if the disputants do not consent. See, for instance, CPR, 2011.
[35] National Native Tribe Tribunal constituted under the Native Title Act, 1993.

and matrimonial cases[36] are understood to be as "mediate-able" cases. However, what is different about Australia is that tribunals have a list of '*reference criteria*' for ascertaining mediation viability. For example, the National Native Tribe Tribunal, which essentially deals with issues of ownership and property (owing to the large aboriginal population) has to assess the following for mediation referrals: (i) number of parties, (ii) number of parties with same agent, (ii) how long it will take to reach agreement, (iii) size of area, (iv) nature of non-native title rights, (v) other relevant factors. Determining these criteria ultimately becomes judicial discretion. Another example would be of the Family Courts that are constituted under the Family Law Act, 1975 where the following criteria are considered:[37] (i) the degree of equality, (ii) risk of child abuse, (iii) risk of family violence, (iv) emotional and psychological state of parties, (v) whether mediation is being used as a delay or other tactic, (v) any other relevant matters. In this context, despite the vague discretionary framework, data for the years 2010 and 2011 (as depicted in the table below) was quite remarkable:

Table 1: Data for 2010 and 2011

Year	Settled	Not Settled	Still Negotiating
2010	57.7% (267 cases)	14% (65 cases)	28.3% (131 cases)
2011	56.2% (264 cases)	20.2% (95 cases)	23.6% (111 cases)
Total	56.9% (531 cases)	17.1% (160 cases)	25.9% (242 cases)

There have also been studies conducted that cases such as the 17.1% above that do not conclude at mediation, usually reach some form of settlement before being sent back to trial.[38]

As a jurisdiction, in terms of adopting the mediation movement, Australia is interesting in respect of the manner in which ADR (in particular mediation) has been assimilated. In addition to referral criteria, there are also legislations such as the Family Provision Act, 2002, which was amended by the Succession Amendment (Family Provision) Act, 2008, where a formal application for pre-litigation mediation could be made to the court and a direction for such mediation would be undertaken. On the question of when is it most appropriate to refer cases in addition to eligibility criteria, there has been case type specific data that has been made available by academics who have attempted analysis on sample sizes at different stages of the disputes (pre litigation, intermediate litigation stage and an advanced stage of the court proceedings).[39]

[36] Laurence Bouelle, 'Minding the Gaps – Reflecting on the Story of Australian Mediation', Bond Law Review, Volume 11, Issue 2, Bond University, 9, 14; John North (n 30).
[37] 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.
[38] *Id.*
[39] *Id.*

Data pertaining to commercial and construction disputes, of a sample of 104 referrals across 99 cases to mediation by courts, between January 2008 and December 2011, indicated that 46% were settled at mediation. The categorisation of the stages that the referrals have been made in comparison to the phase of referral is noteworthy as depicted below.[40]

Table 2: Data pertaining to commercial and construction disputes

Referral Stage	Settlement Percentage	Non Settlement Percentage	Total Settlement Percentage
Pre litigation	35% (16 cases)	38% (22 cases)	42% (38 cases)
Intermediate litigation	30% (14 cases)	29% (17 cases)	45% (31 cases)
Advanced litigation	35% (16 cases)	33% (19 cases)	46% (35 cases)

It is interesting to note from the data presented above that the highest settlement rates are of court referrals that have been made at an advanced stage, followed by referrals made at the before trial phase. It is possible to conclude that at an intermediate stages, the reason for considerably lesser conclusive mediations (in terms of settling the dispute out of court) have been largely because the dispute has not sufficient ripened an and has already commenced, therefore, the parties do not cognitively see the pitfalls of pursuing with the trial.[41] Prior to the CDR 2011, where a legislative shift towards pre litigation mediation has been envisaged, it was concluded through studies that the proper time to refer the matter to mediation would be at an advanced stage of the court proceedings.[42] This becomes important since the timing of the mediation determines the voluntariness of the parties to participate in the mediation.[43]

In light of the above, Australia is an example of understanding the benefit of laying down a good referral system and legislative framework for mediation. The discussion above is significant, since the court connected programmes and in particular court referrals have been instrumental in driving the mediation movement in India. On the basis of past practice and thereafter the two-decade progress trajectory, the Australian model in relation to the Specific Areas has been analysed as below.

(a) Building a Mediation Practice

The Australian set-up deviates from the Singaporean model where the private sector and the government work closely together in understanding different cases and ascertain the suitability for

[40] *Id.*
[41] 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.
[42] *Id.*
[43] *Halsey v Milton Keynes NHS Trust* (2004) EWCA Civ 576; Moya Moore, 'Promoting Mediation while Protecting Voluntariness' (*CPD Seminars*, 1 April, 2011), <https://www.cpdseminars.ie/mediation/promoting-mediation/> accessed 15 July, 2016.

mediation. While the end goal may be to promote ADR, and in particular mediation, the interlinkages between these various avenues promoting mediation – private bodies, tribunals and courts is lesser compared to Singapore. Therefore, the practice of mediation is built in a manner that converges in objective but diverges in approach. In this backdrop, we analyse the following Specific Areas:

(i) Role of referral judges

In this context, the study and the deductions made have left open a larger debate – how does a court determine the right time for mediation and assess the willingness of the parties for mediation. For instance, the 99 cases had 104 referrals discussed hereinabove, implying that there were cases that were referred at multiple stages of the mediation process. The statistics do not take into account whether these particular repetition referrals to mediation eventually settled. With this background the role of a referral judge in a mediation becomes extremely important. As is evident from the information set out above, the importance of referrals (in terms of timing and case relevance) has been examined at great length. Despite the statutory attention to betterment that is afforded to ADR, theorists have questioned the discretion that is afforded to the judges in making these referrals.[44] The NADRAC 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, (iv) the meaning of "success" or effectiveness. The unavailability of data post 2011, on increase or decrease in referral rate, limit theory to the extent of how beneficial the referral criteria is. Moreover, as opposed to docket size, the Australian model is to promote and establish a good civil disputes practice,[45] for which the appropriate diagnosis and referral methods have been given substantial importance and take precedence over others aspects.[46]

(ii) Accreditation of mediator

Accreditation being not mandatory, judge led mediation (which is prevalent in Singapore as detailed in Section B below) is a contentious issue. In fact, it has been quite a controversial topic, where NADRAC has observed that it was inappropriate for ADR services to be provided by judges, judicial

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[44] Kathy Mack, 'Court Referral to ADR: Criteria and Research', National Alternative Dispute Resolution Advisory Council and Australian Institute of Judicial Administration (2003), 8, available at: <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Court%20Referral%20to%20ADR%20-%20Criteria%20and%20Research.PDF> accessed 15 July, 2016.

[45] Campbell Bridge, 'Comparative ADR in the Asia Pacific – Developments in Mediation in Australia', The 5Cs of ADR – Alternative Dispute Resolution Conference, Singapore, October 04-05, 2012, <http://campbellbridge.com/wp-content/uploads/2012/12/Comparative-ADR-in-the-Asia-Singapore-5cs-Conference.pdf> accessed 15 July, 2016; 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 <http://www.lawcouncil.asn.au/FEDLIT/images/Inquiry_into_Alternative_Dispute_Resolution_in_the_Civil_Justice_System.pdf> accessed 15 July, 2016.

[46] Kathy Mack (n 44).

registrars or other court officials to mediate, unless a formal mechanism of establishing neutrality or impartiality (as applicable) was established.[47] The debate in this regard is yet to be concluded.

As a practice, in court connected programmes and in the tribunal frameworks, accreditation of mediators is not mandatory. However, in 2008, the National Mediator Accreditation System (**"NAMS"**) was brought into effect.[48] While this system is voluntary in nature, it formulates the basis for setting mediator standards. As a result, most court connected mediators are NAMS certified.[49] Moreover, Australia today, has the Recognised Mediation Accreditation Bodies which handle the process of accreditation requirements such as experience, training and education of the individuals who are to mediate.[50] While the process is not mandatory, voluntary non-trained / NAMS certified mediators in the court connected programmes are a rarity.

The other type of mediators are judges. However, this is not a popular form of conduct.[51] The states that provide for judge led mediations have strict rules on confidentiality and conduct of judges during the mediation proceedings. While practitioners have found judge led mediations to be effective,[52] today, there is a deviation in form of mediation.

(iii) Infrastructure development and administration

Quality of service particularly in the court connected programmes has been rated high.[53] Moreover, the mediators at the court connected programmes are well paid and mediation is recognised as a separate profession.[54] There are also complaint mechanisms in place and in general the user satisfaction rates have been quite high.[55] Further, as a process, the court connected programmes are either free or have minimal usage costs which has allowed mediation to maintain itself as a lucrative option once there has been use. Moreover, since mediators are adequately remunerated and the facilities are of high standards, then the quality in the service provided remains consistent.[56]

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[47] A Framework for ADR Standards, National Alternative Dispute Resolution Advisory Council, April 2001, <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Body%20of%20Report.pdf> accessed 15 July, 2016; 'Who Says You're A Mediator? Towards a National System for Accrediting Mediators', National Alternative Dispute Resolution Advisory Council, July, 2004 <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/who-says-youre-a-mediator.pdf> accessed 15 July, 2016.

[48] 'National Mediator Accreditation System (NMAS)– A History of the Development of the Standards', Mediator Standards Board, <http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf> accessed 15 July, 2016.

[49] Says You're A Mediator (n 47); Response by the Law Council of Australia (n 45).

[50] Response by the Law Council of Australia (n 45).

[51] *Id.*

[52] Greg Rooney, 'The Australian Experience of Pre-Litigation ADR Requirements', 6th Symposium of the Institut de médiation et d'arbitrage du Québec Montréal, 4 November, 2015, <http://www.mediate.com/articles/RooneyG3.cfm> accessed 15 July, 2016.

[53] Response by the Law Council of Australia (n 45), 11.

[54] Kathy Mack (n 44) 16.

[55] Response by the Law Council of Australia (n 45), 11.

[56] *Id.*

(iv) User awareness

Based on informal surveys, the trend towards mediation is on the rise. However, the general knowledge in relation to mediation amongst the parties is relatively low. NADRAC surmised that voluntary participation in mediation is low, therefore, the rates of referrals as depicted above are also low. As an education mechanism, the Australian government has mandated mediation and ADR suitability exercise as a core law school curriculum.[57] The fact that there is insufficient depth and analysis on the end user was recognized by the NADRAC. NADRAC has also introduced user guides and awareness manuals for disputants to familiarize themselves with ADR and various process. Post CDR 2011 scrutiny and observations are yet to be seen.

(b) Codification

Legislative support has been fundamental to introducing mediation in Australia.[58] In this context, an important element of CDR 2011, is that it looks at an overarching umbrella framework that encompasses all forms of mediation. It consolidates all legislations that provide for mediation and makes necessary inclusions and exclusions in relations type of cases and types of proceedings. For example, specific cases such as family court cases are excluded. Moreover, proceedings relating to a civil penalty, criminal offence, appeals, *ex parte* proceedings and vexatious litigations are also excluded. [59]

In relation to the outcome of the mediation, i.e., mediated settlement agreements, there is no elaborate mechanism provided for under the CDR 2011. A mediated settlement agreement is executed as a contract and is enforced as one. Issues such as capacity to contract have been raised before the court but need not be dealt with in detail for the purposes of this Report. Also, in court connected programmes, parties can request the court to order based on the findings in the mediated settlement agreements.

In the above background, the ADR movement in Australia, becomes highly relevant to India in terms of the efforts to understand the referral mechanisms that have been made by NADRAC and the courts in general – to increase party participation to mediation particularly voluntary participation. Further, while there is immense judicial support, the legislative sanctions are the primers popularising and driving the mediation movement in Australia. The evaluation of the CDR 2011 is still under

[57] 'Teaching Alternative Dispute Resolution in Australian Law Schools', National Alternative Dispute Resolution Advisory Council, 2012, <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/teaching-alternative-dispute-resolution-in-australian-law-schools.pdf> accessed 15 July, 2016.
[58] There are over 2000 statutes that mandate mediation in Australia (as of 1995). Nancy H. Rogers and Craig A. McEwen, *Mediation: Law, Policy, Practice*, Chapter 7 (2nd edn, Lawyers Co-operative Publishing Company, 1994 and 1997 Supplementary).
[59] CDR 2011, Section 15.

consideration by the Australian government.[60] There is no publicly available information on the efficacy of mediation post introduction of CDR 2011.

Takeaways:

(i) Comprehensive legislation should be followed by an implementation strategy. User awareness is important for mediation to be integrated and popularised.

(ii) The following issues should be examined and addressed by a legislation: (a) pre litigation mediation process and (b) criteria for referrals, (c) the qualifications of a mediator, (d) application processes and mediation briefs should be filed and provided for.

(iii) A formal execution process for mediated settlement agreements may be considered.

2. Singapore

Singapore is considered as one of the most developed users of mediation in South East Asia. In 2008, the special centres that were set up in Hong Kong to mediate the Lehman Brothers cases was considered a stepping stone into commercial mediation in South East Asia and was considered unparalleled in respect of efficiency and complexity handling,[61] however, mediation in general in Hong Kong subsequently did not develop as compared to Singapore.

Historians have traced (much like India), community mediation by headman (akin to heads of village panchayats) of villages who would facilitate dispute resolution in the late nineteenth and early twentieth centuries as the advent of mediation in Singapore.[62] It is pertinent to note that the recognition that mediation has as a dispute resolution tool is owed to the law makers, the government and the judiciary who assisted in the success of the Court Mediation Centres, now known as the Primary Dispute Resolution Centres (**"PDRCs"**). The PDRCs on establishment were attached to the subordinate courts in 1994.[63] The success of the PDRCs also gave another boost to the government to

[60] An evaluation survey of the Civil Dispute Resolution Act ran from August 2012 until August 2013. In conjunction with Australian Survey Research (ASR), the department conducted surveys of interested lawyers, alternative disputes resolution practitioners, and anyone who had been involved in a federal court proceeding. A final evaluation report is under consideration by government. Official statement available at <https://www.ag.gov.au/legalsystem/alternatedisputeresolution/pages/civildisputeresolutionact2011.aspx> accessed 15 July, 2016.

[61] Gary Soo, Yun Zhao et.al, 'Better Ways of Resolving Disputes in Hong Kong – Some Insights From the Lehman Brothers Related Investment Product Dispute Mediation and Arbitration Scheme', Journal of International Business and Law, Volume 9, Issue 1, 2010, 138 <http://scholarlycommons.law.hofstra.edu/jibl/vol9/iss1/6> accessed 15 July, 2016; Lehman-Brothers-Related Products Dispute Mediation and Arbitration Scheme, Hong Kong Monetary Authority, <http://www.hkma.gov.hk/eng/other-information/lehman/lehman_dispute.shtml> accessed 15 July, 2016.

[62] Goh Joon Seng, 'Mediation in Singapore: The Law & Practice', 159, 8th General Assembly, Singapore, 159 <http://www.aseanlawassociation.org/docs/w4_sing2.pdf> accessed 15 July, 2016.

[63] Chief Justice Sundaresh Menon, 'Building Sustainable Mediation Programmes: A Singapore Perspective', Asia-Pacific International Mediation Summit, New Delhi, India, 14 February, 2015, 4 <http://www.aseanlawassociation.org/docs/w4_sing2.pdf> accessed 15 July, 2016.

delve into and promote the private mediation space thereby establishing the Singapore Mediation Centre (**"SMC"**) in 1997 to handle complex civil/commercial disputes. Interestingly, despite being known as a country that evangelises mediation, mediation was accepted primarily through practice and as a method of good advocacy,[64] though there is a bill which has been drafted to provide legislative backing to mediation.[65]

The only statutory provisioning of mediation was in relation to the community mediation centres that were along with the SMC established under the Community Mediation Centre Act, 1997, to govern family, neighbourhood and relational disputes.[66] Here, it would be pertinent to note that the role of complex emotion handling was an integral part of mediator training programmes and the differentiation is in the approach to how different disputes are handled.[67] In this backdrop, Singapore also understood the need for other niche areas for mediation, thereby establishing government agency and tribunal connected centres such as mediation centres attached to insolvency offices, industrial arbitration courts, government procurement tribunals, to name a few, where mediation as a process has garnered success and popularity.[68]

The focus of this section will be on PDRCs (which as on March 2015 were converted and renamed as the State Courts Centre for Dispute Resolution (**"SCDR"**) and their efficiency and developments.[69]

Given the attention to detail to various forms of dispute resolution through mediation, an important facet of mediation as practiced in Singapore is the distinction between evaluative and facilitative mediation.[70] This is considered also as the distinction between subject matter expertise versus process expertise. It is important to make this distinction in the context of Singapore since SCDRs even today have the concept of a 'Settlement Judge' who acts as a mediator and assists the parties in evaluating merits of the case. Many have argued that this would be contrary to the process of mediation since mediators are to be neutral and non-adjudicative.[71] The draft mediation legislation (**"Singapore Mediation Bill"**) is silent on the qualification criteria for mediators.

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[64] *Id*, 1.

[65] Singapore Mediation Bill, 2016 is available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20Mediation%20Bill.pdf> accessed 15 July, 2016; Singapore publishes draft Mediation Bill, Herbert Smith Freehills, 28 April, 2016 <http://hsfnotes.com/asiadisputes/2016/04/28/singapore-publishes-draft-mediation-bill/> accessed 15 July, 2016.

[66] Mediation in Singapore (n 62).

[67] Mediation training programmes for family / matrimonial dispute mediators are available at <http://www.mediation.com.sg/business-services/family-services/> accessed 15 July, 2016.

[68] Lawrence S. Boo, 'The Framework and Practice of ADR in Singapore', 5-9, 9th General Assembly, ASEAN, Bangkok <http://www.aseanlawassociation.org/9GAdocs/w4_Singapore.pdf> accessed 15 July, 2016.

[69] The conversion to SCDR was envisaged to include minor criminal offences such as motor accident, personal injury and sexual harassment cases in addition to the civil cases and facilitate mediation of such cases (through better infrastructure and trained and increased number of mediators).

[70] Facilitative and evaluative mediations are the two main schools – wherein facilitative involves the mediator in the role of a mere communicator between parties, the evaluative role involves a higher level of intervention by the mediator, including appraisal of merits of the case and making suggestions on settlements that the parties must explore and evaluate between themselves. Sriram Panchu (n 20) 64-65, 296-297.

[71] However, in Singapore, the practice remains that the Settlement Judge typically proceeds to adjudicate the dispute should be mediation fail. The authenticity of the mediation process has been questioned owing

While for at least the first five years, Settlement Judges were the only Mediators for the SCDRs, 2003 onwards there was a steady increase in the pool of mediators that include legally trained, accredited from recognised institutions (dealt with in detail below) as well as volunteer mediators.[72] Moreover, as the pool of mediators has steadily increased, the settlement rates against the numbers referred in the years 2003 to 2013 and 2014 (figures and percentages in approximate) has decreased steadily in relation to the SCRDs. [73] Data on the function of the SCDRs and the PDRCs after they were converted to SCDRs are presently unavailable.

Table 3: Data pertaining to SCDRs and PDRCs

Year	1995	1999	2003	2013	2014
Case Referrals	1113	4703	4988	7292	6420
Settlement Rates	89%	97%	96%	92%	89%

From the above data, one can infer that there is significant increase in the case referrals and use of SCDRs). However, there is a marginal decline between 2013 and 2014. This decline would definitely need assessment, since between 2011-2013, 22,000 cases were referred to mediation and 85% were settled, though, the recent trajectory shows decline.[74] On a no names basis,[75] several legal practitioners have attributed this decline to the failing mediator quality and therefore withdrawal from the SCDR mediation process. Parties thereafter either opt for mediation at the SMC and/or use *ad-hoc* mediators to complete the process or go back to trial.[76] Here, consistency of mediation services and quality mediator training becomes significant, given that despite being a 'mediation developed' country, the court connected mediation centres are statistically declining in efficacy. While pre-trial conferences allowing the judges' discretion to facilitate parties towards mediation / conciliation have been procedurally set out,[77] their usage and execution does not have statistical

to this facet and 'judicial mediation' is heavily criticised. This question was raised in the case of *Jonathan Lock v Jesseline Goh,* (2008) 2 SLR(R) 455, wherein user feedback was relied on and it was stated that there is sufficient public confidence in the judges to be impartial. It was also observed that the SCDRs model is sui generis, and is particularly suited to a jurisdiction where litigants respect the impartiality of judges in giving objective views on the merits of the claim and defence respectively. Therefore, the Settlement Judge/Mediator concept has continued to exist.

[72] Primary Dispute Resolution Centres were renamed and converted to State Dispute Resolution Centres in 2014. 'History of Mediation Centres' is available at <https://www.statecourts.gov.sg/AboutStateCourts/Pages/History-of-State-Courts.aspx> accessed 15 July, 2016; 'New centre for dispute resolution launched at the State Courts' *(The Straits Times*, 4 March, 2015) <http://www.straitstimes.com/singapore/courts-crime/new-centre-for-dispute-resolution-launched-at-the-state-courts> accessed 15 July, 2016.

[73] Combination of statistics made available by Lawrence S. Boo (n 68) 9 and Chief Justice Sundaresh Menon (n 63) 5.

[74] Mediation, Analysis by the Singapore Academy of Law, <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-3> ¶ 3.5.7.

[75] This was an informal discussion with several law firm partners and mediators in Singapore. This was the general perception of the court connected programmes.

[76] *Id.*

[77] Available at <http://statutes.agc.gov.sg/> accessed 18 July, 2016.

documentation. However, given that parties' acceptance to mediation at a pre-trial stage is referred to the SMC and not to a court connected programme could also be attributed as a reason for the decreasing popularity of the court programme.[78]

In light of the above, an important aspect to consider would be to gauge how important it is to mandate mediation through statute. Data on the SCRDs since 2012 indicate that when mediation in civil cases that are filed in courts were made mandatory, and the willingness of the parties to mediate was placed as second priority, the settlement rates have declined.[79] However, mandatory mediation has also played a fundamental role in increasing mediation visibility. The flipside of the above can also be construed as the fact that voluntariness in mediation also has a similar effect where the number of cases that were settled through mediation are contingent on party awareness, understanding, and willingness to mediate. Chief Justice Sundaresh Menon in his speech at the Asia Pacific International Mediation Summit, 2015;[80] stated that:

> '…as mediation of Supreme Court cases is not mandatory and is ultimately subject to the parties' willingness to mediate, fewer cases from the Supreme Court actually proceed to mediation. However, of the cases actually mediated, the rate of settlement has been encouraging, ranging between 66% to 81% over the last three years.'

In this context, it may be advisable to adopt a combination model as opposed to focussing on one over the other.

Unlike in India, Singapore seems to have strong governmental support, absolute judicial backing in terms of initiatives launched to facilitate public access to mediation, lawyers who understand the process and equalise the process with the same significance as trial (also understand that these are different civil remedies and mediation is not a pre cursor or a formality before adjudication), and the presence of responsive users to mediation. The Singaporean example is an ideal scenario where all the stakeholders involved in a dispute scenario rallied to promote mediation, however, the 'presumption of ADR' movement for all civil disputes in 2012,[81] can also be viewed as one of the causes of mediations becoming inconclusive. Briefly put, the presumption of ADR movement, was an initiative where civil cases in the courts were automatically referred to the most suitable form of ADR – mediation, neutral evaluation or arbitration, unless the parties to the dispute chose to opt out of the ADR process.[82] Lord Woolf (as detailed in part 4 to this chapter) brought mediation to England

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[78] 'Pre-Trial Conference (PTC)', Singapore Supreme Court, <http://www.supremecourt.gov.sg/rules/court-processes/civil-proceedings/pre-trial-matters/pre-trial-conference-(ptc)> accessed 18 July, 2016.
[79] Singapore Academy of Law (n 74) ¶ 3.3.12.
[80] Chief Justice Sundaresh Menon (n 63).
[81] 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; Press Release is available at <http://www.lawgazette.com.sg/2012-05/415.html> accessed 15 July, 2016.
[82] Singapore Academy of Law (n 74) ¶ 3.3.12.

through a similar mandate. The trend in India through in family and matrimonial cases and consumer disputes is similar.[83]

Despite the pitfalls of the recent past, Singapore still is an advanced user of mediation without any formal legislation, with secondary problems. In this background, analysing the Singaporean model and implementation mechanism to the Specific Areas is as below.

(a) Building a Mediation Practice:

At this juncture, it is necessary to reiterate that the private mediation limb (SMC), the government and the courts work closely to sustain the mediation practice. In respect of suitability of referral to mediation the court takes the SMCs views on any situations of impasse to assess whether the particular case is suitable to mediation. In general, the practice is to encourage mediation at the judicial level and infuse the necessary capital and provide manpower for the mediation practice.

(i) Role of referral judges

After the 2012 'presumption of ADR movement', the 'ADR Offer Procedure' was introduced in 2014 by the Supreme Court of Singapore.[84] In order to facilitate just, expeditious and economic disposal of civil cases, a process to understand and accept/refuse mediation was to be made available to parties by all judges. An important facet of these directions was in relation to costs of mediation, where a party who refused mediation would bear additional costs.[85] Moreover, limitation was excluded pending mediation under these directions. The rationale behind this was to uphold the principles of fair trial. Judicial intermediation has been key to the introduction of mediation in Singapore. At several stages, to ensure case management either through 'pre-trial conferences' or mandatory court referrals, the Singaporean referral model has undergone several changes and continues to evolve with time.[86] Moreover, proactive case management through mediation by the courts of Singapore have aided in further reducing caseloads.[87]

(ii) Accreditation of mediators

The mediators in SCRDs are State Courts' Judges (earlier referred to as Settlement Judges) who have been specially appointed and trained in mediation, and court volunteers who are trained and accredited by the State Courts and the SMC.

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[83] *K. Srinivas Rao v. D.A. Deepa,* (2013) 5 SCC 226; Summary of the Consumer Protection Bill, 2015 <http://www.prsindia.org/billtrack/the-consumer-protection-bill-2015-3965/> accessed 15 July, 2016.
[84] Supreme Court e- Practice Directions, Rule 35B, 35C, available at <http://www.supremecourt.gov.sg/> accessed 15 July, 2016.
[85] *Id,* Rule 35 C (5).
[86] Foo Chee Hock, 'Civil Case Management in Singapore: of Models, Measures and Justice', 3-6, 11th ASEAN Law Association General Assembly, Bali, Indonesia, February, 2011, <http://www.aseanlawassociation.org/11GAdocs/workshop2-sg.pdf> accessed 15 July, 2016.
[87] *Id.* In fact, there are training programmes in case management that are made available <https://www.scp.gov.sg/> accessed 15 July, 2016.

As an independent organisation, the Singapore International Mediation Institute (**"SIMI"**), an independent professional body which lays down standards and qualifications for mediators and trains/accredits mediators has been established. SIMI is supported by the Singapore Ministry of Law and the National University of Singapore. SIMI also runs a partner programme where select international bodies are recognised and verified as mediator training centres, the prime one being the International Mediation Institute. However, SIMI is modelled as a private training academy and lacks the mandate of training for mediations engaged at the SCDRs.[88] The choice of mediator appointment is left to the parties. The open ended question here which is left unaddressed is who determines the qualification of an '*ad-hoc mediator*'. Though the concern in Singapore may be less important than in India, given the stronghold of the SMC, in India, adequate care may have to be taken, in determining the qualifications of a mediator.

(iii) Infrastructure development and administration

The administration of the SCDRs are overseen by the members of the judiciary and SCDRs are run adjacent to the court premises. There has been a recent move to deal with the decline in court referrals and increase the efficiency of the SCDRs. Moreover, an executive programme has been recommended to be introduced for the court administrators and case managers for the mediations.[89] Singapore has also introduced an e-filing and administration system which simplifies the filing process. The processes that are required to be adhered to are non-tedious and publicly available but comprehensive. For instance, mediation briefs are a must in all mediations. These are comprehensive to acquaint the mediator with the facts and lead to pre mediation conference calls through which the SCDRs facilitate the mediation.

(iv) User Awareness

Singapore has a refined mechanism given the accessibility of information, data that is readily web available and also the constant education awareness through news reporting and continuous public awareness of the developments and changes in the justice system. This is on the executive front. The Singaporean system has even introduced an app 'Justice@StateCourts' (https://www.statecourts.gov.sg/Pages/justice@statecourts.aspx) that constantly educates the mass population on the various ADR methods and the justice system.

In August 2015, Singapore also introduced the Singapore Mediation Charter that pledges parties to mediate before trying any other form of the dispute process for civil cases. As on date there are 83 signatories to this charter which includes top corporate houses and private equity funds and

[88] Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, 2-3 < https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf> accessed 15 July, 2016. Note that the Singapore Mediation Bill is silent on what qualifies a 'mediator'.
[89] *Id.*

international banks. Moreover, the Singapore has witnessed an over 50 billion USD increase in foreign investment owing to a robust and efficient legal system.[90]

(b) Codification

As outlined above, mediation in Singapore has remained largely uncodified. SDRCs are based on court referrals and the mediators are bound by a code of ethics. Further, a mediated settlement agreement in an SDRC is given the sanction of a decree. The Singapore Mediation Bill focusses largely on ad hoc and private mediations and the court programmes work bereft of them. Though, strangely, the application of the Singapore Mediation Bill also covers mediations conducted by the SDRCs. While the principles of limitation (stay of court proceedings pending mediation), binding government authorities to mediated settlements agreements and mediator immunity to divulge information have been outlined, the process of mediation – how it is conducted and qualification thresholds have not been clearly set out. Given the importance of quality mediators particularly to enhance the SDRCs, this would be an important inclusion. The need to streamline the infrastructure, resource allocation and case disposal is amiss.

Takeaways:

(i) Government and judicial support has to be synchronised to provide mediation the legitimacy it requires. The government needs to invest in infrastructure and the judiciary need to partakes in mandatory training programmes to strength the referrals to mediation.

(ii) Mediators require training and constant refresher courses along with pay that makes mediation a lucrative practice area. This is needed to increase the quality of the service which could result in an increase in mediations. There is a need to establish an accreditation agency.

(iii) Case management discussions/directions should be implemented. Example, pre-trial conferences.

(iv) Mediation advocacy needs to be supported by lawyers. Mediation though being non-adjudicative and lacking in terms of discovery and evidence requires preparation and client counselling that lawyers need to be trained in.

(v) Voluntary understanding through pledges and contractual inclusions are fundamental. Mandatory mediation can also be a deterrent to the process.

(vi) Mediation supports civil justice enhancement which attracts economic development.

(vii) The mediation process should be excluded from statutory limitation.

[90] Chief Justice Sundaresh Menon (n 63).

3. United Kingdom

Civil mediation in the UK found formal basis by implementing Sander's multi-door court house theory, which was the first step towards modern institutionalised mediation in the UK. [91] The formal introduction of ADR was in the 1980s.[92] Here, an interesting point to note would be the popularisation of the term 'dispute resolution' as opposed to adjudication/litigation of proceedings.[93] As in India where mediation and conciliation are being treated synonymously,[94] the method that was first adopted in the United Kingdom was conciliation and the type of disputes that were deemed fit for conciliation were family disputes. Owing to this, Practice Directions were issued by family courts in the United Kingdom and the National Family Conciliation Council ("**NFCC**") was established in 1981.[95] Moreover, community mediation programmes were the kick-starter of mediation programmes and, were set up in England and Wales, Scotland and Northern Ireland.

From a civil justice reformation perspective, advancements and regime revisions can be mostly traced in England (which will be focussed on for the purposes of this chapter). With the establishment of the NFCC, the regime of court connected mediation programmes for family disputes to be conducted by district judges or welfare officers emerged.[96] Discussions in relation to mediation increased in the early 1990s to reorganise and structure the 'litigation mania' and work towards civil justice reformation.[97] A crucial facet of the mediation regime in England and Wales was the rallying of lawyers, (in particular lawyers engaged in commercial litigation) judges, academics and the government (in particular the Department of Trade and Industry) which played a significant role in the development of mediation.

Typically, in most jurisdictions, family and property disputes were the drivers of mediation. However, in England, personal injury and cases on negligence also followed suit. In the early 1990s, the suitability of commercial/civil cases was recognised in the UK. Consequent to which Practice Directions were issued which focussed on the resolution of Commercial Cases ("**Practice Directions**").[98] Here, to draw a distinction from Singapore, judges did not act as mediators or be involved in the ADR process. These directions required the parties and their representing counsels to adopt mediation prior to pursuing litigation. The Practice Directions also took into consideration the need to empower judges. Judges were required to recommend appropriate ADR methods and had the

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[91] Frank Sander & Mariana Hernandez Crespo, 'A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse', 5 U. St. Thomas Law Journal 665 (2008); M. Palmer and S. Roberts, *Dispute Process: ADR and the Primary Forms of Decision Making* (Butterworths 1998) 45-46.
[92] *Id.*, Palmer, 25-26.
[93] H. Brown and A.L. Mariott, *ADR Principles and Practice* (2nd edn, Sweet and Maxwell 1998) ¶ 1-001-1-42.
[94] *Afcons* (n 7).
[95] Kate Aubrey-Johnson with Helen Curtis, 'Making Mediation Work for You – A Practical Handbook' (1st edn, Legal Action Group 2012) 24.
[96] 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.
[97] *Id.*
[98] Practice Statement (Commercial Courts), December 10, 1993, [1994] 1 All ER 34.

power to adjourn proceedings pending resolution through alternative methods. To make the ADR option more lucrative, pro bono court schemes were also introduced wherein, the parties were offered free cost services.[99] The prime intent behind these Practice Directions was to ensure 'judicial conversation', and to promote the resolution of the civil disputes that would be less costly to the state and ensure efficient usage of judicial resources and time.[100]

Despite the Practice Directions issued for at least a span of almost 8 years, the usage of court connected ADR (in general) was struggling to find a foothold. A need to revisit the schemes and the Practice Directions was felt by the judicial members and the executive. Also, monitoring schemes were brought in place to understand the mechanics of improving the implementation strategy that was being used to promote ADR.[101] This also led to a closer examination of different processes, particularly mediation in civil and commercial disputes. On a sample survey, it was deduced that parties found deliberating on whether mediation should be an option, tedious and a cause of delay. This was particularly problematic, since the appointment of the mediator and agreeing to mediation in the first place was a time consuming process.[102] Moreover, there was a lack of knowledge amongst the parties and experience amongst most attorneys on and about mediation.[103] In 1998, Lord Woolf made recommendations to amend civil procedural laws and provide a structured framework for ADR specifically, mediation in England.[104] This led to the Civil Procedure Rules (**"CPR"**). The CPR simplified procedure in relation to opting for ADR by cost reduction, judicial case management, pre-action protocols, and encouragement of out of court settlements by judges and lawyers. The reaction was instant in England. Between May – August 1999, there was a 25% reduction in the number of proceedings in the count courts and by the end of 2000, there was another 23% reduction in court case loads. Moreover, judges in several cases remarked on the importance of trying mediation as a method prior to trial and ruled/awarded costs accordingly.[105] Moreover, it is the efficiency of the court encourage ADR systems that has led to a better dispute resolution practice and a reduced backlog as opposed to private programmes.[106] England and Wales had commercial court cases as their starting points whereas in the USA, insurance cases began the mediation movement and popularised mediation in terms of mass appeal.

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[99] Court of Appeals ADR Scheme is available at <https://www.justice.gov.uk/courts/rcj-rolls-building/court-of-appeal/civil-division/mediation> accessed 15 July, 2016; Pilot National Family Mediation Scheme available at <http://www.nfm.org.uk/index.php/separation-issues/co-parenting/at-court-mediation-pilot-project> accessed 15 July, 2016.

[100] A. Pugh-Thomas, 'The Commercial Court of England and Wales and Alternative Dispute Resolution', (1999) 10 (1) International Company and Commercial Law Review (ICCLR), 26-27.

[101] *Id.*

[102] ADR in England and Wales (n 96).

[103] Hazel Genn, 'What Is Civil Justice for? Reform, ADR, and Access to Justice', Yale Journal of Law & Humanities, Volume 24, Issue 1, 397-39 <http://digitalcommons.law.yale.edu/> accessed 15 July, 2016,]; Hazel Genn, 'Court Based ADR Initiatives for Non Family Civil Disputes: The Commercial Court and The Court of Appeal', 2002, <https://www.ucl.ac.uk/laws/judicial-institute/files/Court-based_ADR_Initiatives_for_Non-Family_Civil_Disputes.pdf> accessed 15 July, 2016.

[104] Lord Woolf, Access to Justice: Interim Report on the Civil Justice System in England and Wales (June 1995), Lord Woolf, Access to Justice: Final Report on the Civil Justice System in England and Wales (June 1996).

[105] *Cowl v Plymouth City Council*, (2001) ECWA Civ 1792.

[106] What Is Civil Justice for? (n 103).

(a) Building a Mediation Practice

(i) Role of referral judges

Referral judges have been fundamental to mediation in England and Wales. The judicial case management, post the Woolf Reforms, has been a driving force, where claims have been referred to mediation irrespective of financial weight or complexity. Judges conduct pre-trial reviews of cases to identify cases that are suited to ADR. Thereafter, within the ADR options available, they suggest an appropriate ADR option. Court control and judge control over a dispute and the method of resolution, given that the judge provides adequate reasoning for referring a case to a particular ADR option has seen significance in the UK. Further, there has been a strong judicial influence on encouraging parties to ADR, especially mediation, and on lawyers to understand the appropriateness of the process for a particular dispute.[107] Mediation advocacy and dispute strategy is a judicially enforced concept in England. Cost are sanctioned on parties who refuse to mediation.[108] Further, lawyers who do not encourage mediation for suitable cases are frowned upon.

(ii) Accreditation of mediators

Accreditation in England and Wales has been an open debate like in the other Study Jurisdictions. Though there exist several training providers, in particular the Centre for Effective Dispute Resolution (**"CEDR"**), the standards of accreditation have been debated. As of now, a regime of accreditation and self-regulation is followed. The self-regulation framework was laid down in the European Code of Conduct for Mediators which laid down principles that voluntary mediators should commit to.[109] The premise of this has been professional development amongst mediators who want to practice mediation as a profession. There has been no formalisation of accreditation of mediators, though training and refresher courses have found place in several guides and practice frameworks that courts in England have adopted.[110] This is largely owing to the Civil Mediation Council that has assisted in framing an overarching standard framework for mediators.[111]

It may be important to note that UK, CEDR conducts annual audits that look at the efficacy of the mediator and captures pay, categorisation and performance of the mediators. These audits are taken as improvement benchmarks and the improvements are captured in the subsequent year audits.[112] Quality of mediators has been given extreme importance and is mapped every two years. An extract from the 2016 audit:[113]

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[107] *Halsey v Milton Keynes General NHS Trust,* (2004) 1 WLR 3002; *PGF II SA v OMFS Company Ltd.,* (2013) EWCA Civ 1288.
[108] *PGF II SA v OMFS Company Ltd,* (2013) EWCA Civ 1288.
[109] ADR in England and Wales (n 96) 173.
[110] *Id.*
[111] *Id.*
[112] CEDR Audits are available at <http://www.cedr.com/> accessed 18 July, 2016.
[113] 'Mediation Market grows by 5%: The 2016 Mediation Audit', (*CEDR News, 11 May, 2016)* <https://www.cedr.com/news/?item=Mediation-Market-grows-by-5-percent-The-CEDR-2016-Mediation-Audit> accessed July 18, 2016.

> 'The 2016 audit also shows that in the last 12 months £10.5 billion worth of commercial claims were mediated and that through mediation this year businesses will save £2.8 billion in management time, relationships, productivity and legal fees. As a profession, Mediators and Service Providers in the last year earned £22.6 million - this is an impressive return on investment for the UK economy when compared with the savings for businesses in costs.'

Mediation is (as a recognised profession) contributed heavily to its usage in the UK.

(iii) Infrastructure development and administration

Most court programmes have dedicated court staff who administer the mediation (example arrange for the mediator, have discussion on fees etc.) Most UK court programmes (other than the schemes) have costs in context of the value of claims. Fixing fees and time limit for the mediation, there is infrastructure that is in place in most court programmes.[114] There is insufficient doctrine on development / administration of court mediation programmes in India, though funding and budgetary allocations are constantly revised.

(iv) User awareness

In the UK, the role of lawyers has been given significant importance in building user awareness. Moreover, the need of parties to have conversations with lawyers in relation to mediation was construed as essential for awareness building.[115] The fear of lawyers to suggest mediation in terms of their "billable" and client interactions was documented and empirically studied. Moreover, other issues such as the redundancy that lawyers felt in relation to the mediation process, given that mediation is a party driven process required tackling for mediation to settle down in the UK.[116] In the past decade, there has been equal focus on educating the lawyer, in fact, more the lawyer, than the party to enhance mediation usage. The annual audits that are conducted by CEDR also capture issues in relation to usage increase.[117]

The UK and the USA have worked collaboratively on creating user awareness. CEDR initiated the 21st century corporate pledge along with CPR (defined in Section D below) and has over 33 multinational signatories as dedicated users of mediation including Microsoft, IBM, Pfizer.[118] The usage of mediation in the UK and the awareness amongst lawyers and parties today is quite high. Further, with

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[114] Miryana Nesic, 'Mediation - On the Rise in the United Kingdom?', Volume 13 Issue 2, Bond Law Review, (2001).
[115] Hazel Genn, 'Central London County Court Mediation Pilot: Evaluation Report', LCD Research Series, No 5/98, 20, 135.
[116] CEDR, Civil Justice Audit, April 2000 <https:www.cedr.com/> accessed 18 July, 2016.
[117] The annual CEDR lawyer survey is yet to be released. Mediation Market (n 113). In India, there were audits that were previously conducted of Allahabad and Bangalore. However, there has been no audit conducted in the past 6 years.
[118] 'The 21st Century Corporate ADR Pledge', CEDR <https://www.cedr.com/foundation/corporate-adr-pledge> accessed 15 July, 2016.

governmental support, there are several low cost, court connected mediation schemes that provide high quality services.

(b) *Codification*

There is no governing statute in the UK on mediation. However, a prime concern (at least in England and Wales) has been in relation to the enforceability of mediated settlement agreements and mediator liability. Though, certain statutes provide for mediation and related procedure elaborately, but such statues are disputes specific such as family, personal injury etc. While England and Wales are focussed on victim-offender mediation laws such as the Arbitration and Mediation Services (Equality) Bill, 2016,[119] a framework 'General Scheme of Mediation Bill' has been passed in Northern Ireland. The purpose here was to promote mediation through a mandatory framework, which vis-à-vis England, which has through-practical adoption implemented mediation universally, was required in Ireland.

Takeaways:

(i) Judicial case management directives are key.

(ii) Educating the lawyer is as important as educating the party.

(iii) Audits of court programmes should be conducted

(iv) Imposition of costs on parties and advocates who do not offer appropriate dispute strategy could be a directive.

(v) Mediation advocacy is necessary. Corporate influencers play an important role in advocacy.

(vi) Usage is key to disputants understanding the process. However, viewing it as a nuanced process becomes relevant. Mandatory mediation in certain cases may be the way forward.

(vii) Subject matter expert mediators for cases requiring specific knowledge such as bankruptcy etc. should be developed. Tribunals can have connected programs or can refer matters to such court annexed programmes.

4. United States of America

The USA model of mediation is unique since it is largely based on in practice acceptance of mediation. In fact, today, it is recognised as one of the most advanced systems of the ADR usage and implementation and mediation is considered a profession.[120]

[119] A bill in relation to victim-offender mediation in relation to domestic abuse cases, available at <https://services.parliament.uk/bills/2015-16/arbitrationandmediationservicesequality/stages.html> accessed 15 July, 2016.
[120] Folberg (n 13).

Historically, the mediation movement in USA began with neighbourhood disputes followed by family and matrimonial cases, in the early 1960s. As a consequence of the rise in community based issues, community justice centres were established.[121] The purpose of introducing mediation was primarily to deal with urban disorders that were a consequence of docket explosion.[122] In the mid-1970s, the courts of USA were extremely burdened and the tediousness of litigation surfaced. Further, given the costs involved, access to justice through litigation became unavailable to the general population.[123] In April 1976 at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (**"Pound Conference"**), Justice Warren Burger remarked that:[124]

> 'The notion that ordinary people want black-robbed judges, well-dressed lawyers and fine-paneled courtrooms as the setting to resolve their disputes isn't correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible. People want alternatives to the adversarial process of litigation that reduces crowded court dockets, and is more efficient, less formal, less expensive, less stressful and takes less time that the traditional system.'

Following the Pound Conference, a task force was commissioned which helped set up several community mediation centres and commenced 5 pilot centres; these mediation centres later went *en masse*. As of 2012, there were 408 community mediation programmes, with 1300 full time staff members, 20,000 voluntary community mediators nationwide.[125] These centres receive at least 400,000 case referrals annually.[126] Further, the annual budget sanctioned for the National Association for Community Mediation, the overseeing body for these community centres ranges from USD 150,000 – USD 200,000.[127]

Over the last 20 years, USA which was battling backlog (may not be in number but much like India today) has seen a sharp decline in court case loads.[128] ADR is a preferred resolution option. At this juncture, it may be necessary to discuss Frank Sanders' concept of a 'multi door courthouse' which was theorised in 1994 and brought to life with the inclusion of dispute design and strategy through advocacy and the judiciary.[129] As a fall out of the ADR movement with the Pound Conference and

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[121] J. Clifford Wallace, 'Review: Judicial Reform', Vol 80, No 4, 1982, Survey of Books Relating to the Law (March 1982), 592-596; A. Leo Levine and Russel Wheeler, *The Pound Conference: Perspectives on Justice in the Future* (West Publishing Company 1979) 377.

[122] J. Resnik, 'Failing Faith, Adjudicatory Procedure in Decline', (1986) 53 University of Chicago Law Review 494, 516.

[123] M. Galanter, 'The Day After the Litigation Explosion', (1986) 46 Maryland Law Review 3, 3; M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', (2004) 1 Journal of Empirical Legal Studies 459, 459.

[124] J. Clifford Wallace (n 121); The Pound Conference (n 121).

[125] Justin Corbett, 'The State of Community Mediation', (*Mediate.com,* March 2012) <http://www.mediate.com/articles/CorbettJ1.cfm> accessed 15 July, 2016.

[126] *Id.*; Rafal Morek, '20,000 Volunteer Mediators!', (*Kluwer Mediation Blog,* 9 May) <http://kluwermediationblog.com/2012/05/09/20-000-volunteer-mediators/> accessed 15 July, 2016.

[127] 'Key Statistics: Community Mediation Program Funding', The State of Community Mediation, 2011, <http://www.nafcm.org/?page=funding> accessed 15 July, 2016.

[128] The Vanishing Trial (n 123) 500.

[129] Frank Sander's approach on the dissatisfaction of the court system and his theory of the multi-door court house theorisation has been adopted by several jurisdictions and has become the theory behind any

theoretical implementation schemes, the Alternative Dispute Resolution Act, 1998 ("**ADRA**") was enacted. This legislation directed all federal district courts to establish an ADR programme including mediation. Taking California as an example, there was a drastic decline in the civil filings

With the global appeal of mediation, after the successful implementation of the ADRA, particularly to the litigant, and as the practice of mediation evolved, the need to address concepts such as discovery, admissibility and confidentiality were raised. As a consequence of this, the Uniform Mediation Act, 2002 ("**UMA**") was adopted. This legislation is however a base legislation, which codifies three issues: (i) simplification of confidentiality norms (evidentiary privilege and discovery), (ii) creating uniformity in respect thereof and (iii) preserving the mediation process by clarifying principles of fairness and self-determination.[130] Unlike Australia, the American system is entirely decentralised in relation to the court connected programmes. Each court has its own rules of mediation and its own processes. The court programmes also differ depending on the state. However, one big commonality is that most of these programmes are judge driven.[131] The intent is to relieve the attorney and litigant from initiating any settlement discussion, which was initially, the roadblock that was faced by the advocates of mediation. While it is difficult to generalise the mediation practice through an empirical analysis, given the number of states involved, some may have higher settlement rates while the others may be lower in number, a universal truth is that even though most cases are involuntarily referred to mediation, satisfaction rates are generally high.[132]

Though mediation evangelism in USA has been quite strong, an important observation that needs to be made is that judges in general are ardent supporters and facilitators of mediation to the extent that judges recognise the capacity of court connected programmes and refer cases that require more time, subject matter expertise or are extremely complex to private mediation centres such as JAMS International ("**JAMS**"). Moreover, institutions such as JAMS, have several centres across USA and offer pro bono services on a monthly/annual basis. The courts and the private space work in tandem with each other to promote each other. The Singapore example is similar.

(a) Building a Mediation Practice:

Popularising mediation in practice requires the support of various stakeholders namely, mediators, lawyers, parties (disputants) and the judges. Further, support mechanisms in the form of court staff and case managers play a crucial role in formalising the process, particularly in complex commercial disputes. Here, an important point to be highlighted is that mediation in the USA has a combination of various types that require mediation – (a) statutory mediation – labour disputes and domestic disputes are two types of specific areas where the statutes recognises mediation, (b) court referred

practical implementation of mediation, including in countries such as Brazil, Italy, Malaysia and Australia. *See* J. Clifford Wallace (n 121); The Pound Conference (n 121).

[130] 'The Uniform Mediation Act and Mediation in New York', New York State Bar Association's Committee on Alternative Dispute Resolution, 1 November, 2002, 5 < https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26854> accessed 15 July, 2016.

[131] Don Peters (n 12) 21.

[132] Kimberlee K. Kovach (n 10) 394.

mediation, (c) contractually provided mediation – courts in the USA have ruled that mediation clauses are a mandatory requirement before any other option is chosen if a contract provides for it, (d) voluntary mediation – where parties themselves opt for mediation. This example is may be significant in the Indian context, particularly on points (a) and (b). Analysing the regime in the Specific Areas:

(i) Role of referral judges

The USA, much like Singapore, had keen practice of settlement conferences that were conducted by judges. However, the concept of 'informal settlement weeks' with case evaluation panels comprising of judges and volunteer lawyers led to institutionalisation of ADR programmes particularly mediation.[133]

Judge training programmes and refresher courses are mandatory in the USA. At a preliminary hearing stage, judges are required to inform and educate the parties in relation to understanding different available processes of ADR and what will benefit them the post. In this context, unlike Australia (in section B above), there is no specific legislative criteria that is laid down for judges to analyse suitability. The jurisdiction mind-set is such that most cases are suitable for mediation at the first instance. Thereafter, any form of adjudicative method (ADR or litigation) can be pursued.

(ii) Accreditation of mediators

The training and accreditation mechanisms in the United States vary from state to state, and no overarching legislation presents a federal regulatory framework establishing minimum training and accreditation standards.[134] States having their sponsored mediation programmes generally requiring mediators to meet certain standards and qualifications for being empanelled on the state courts' rosters of mediators. That said, these standards do not pose restrictions on an individual's ability to privately practice as a mediator without such certification.[135]

While mediator training standards and their enforcement is a growing concern in the United States, it is safe to state that no uniform or singular solution has been devised to deal with it, yet. The primary challenge faced by the advocates of minimum and standardised training and certification programmes is the debate of creativity versus prescription;[136] simply put, balancing the need to regulate and professionalise mediation practice, while still retaining its flexibility of procedure. To this effect, training programmes and regulatory frameworks have been divided into the following main segments:[137]

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[133] Folberg (n 13).
[134] A study conducted by the University of Arkansas actually lists the different criteria for mediator training and certification. The completed report giving a state wise breakdown, is available at State Requirements (n 21).
[135] *Id.*
[136] Ansley Barton, Susan Raines and Timothy Hedeen, *'Improving Mediation Training and Regulation Through Collaborative Assessment'*, 14 Disp. Resol. Mag. 47 2007-2008.
[137] Charlie Pou, *'Quality Assurance for Community Mediation'*, as cited in Barton, *id.*

a. Intensive training and limited supervision or regulation of mediators;
b. Intensive training followed by intensive regulatory framework;
c. Regular training and regular level of supervision of mediators; and
d. Regular training but intensive supervision of mediators.

Such training programmes and continued regulatory frameworks for supervision of mediators to ensure quality standards, are modelled on any one of these abovementioned classes, taking into account the logistical implementation of these programmes and frameworks.

(iii) Infrastructure development and administration

Being an advanced practitioner of mediation, USA court programmes in general, particularly the pioneering programmes such as the court mediation programme in San Francisco, have an elaborate management system with case managers to assist mediators, mediation rooms that are designed to be cognitively appealing,[138] e-mediation services and such. Moreover, the court connected programmes also have adequate charges and have break-even costs. Sample surveys in the state of Florida and San Francisco indicate that court connected programmes have developed owing to the infrastructure and administrative support made available to these centres. Here, an important point to mention annual audits of mediation centres that certain courts implement.[139] Further, the audit reports result in strategic corrective actions that are undertaken by the respective state judicial councils.[140] Further, emphasis is made on budgetary allocations to the centres based on the audit committee reports. The audit committee typically comprises of judges, reputed members of the bar and the mediation profession.[141]

(iv) User awareness

Mediation in the USA is viewed as an independent profession. In fact, there are studies which show that students at an early age gear towards mediation, though it is viewed as an age-barred profession. Moreover, the user awareness is such that in the early 1980s, corporate policy statements and initiatives were adopted. A pledge to avoid litigation is geared towards since litigation is extremely expensive. More than 4000 operating companies and 1500 law firms have joined the support ADR prior to litigation pledge.[142] Additionally, mediation now forms as a practice area, in relation to mediation advocacy. As a professional, lawyers at law firms, on a no names basis, have commented that their mediation practice often remunerates them higher than their corporate practices. The USA, is also

[138] On psychological and cognitive barriers in mediation, see Bennett G. Picker, Gregg Relyea, 'Cognitive Barriers to Success in Mediation: Irrational Attachments To Positions And Other Errors Of Perception That Impact Settlement Decisions' (*Mediate.com*, January 2011) < http://www.mediate.com/articles/PR_CognitiveBarriers.cfm> accessed July 18, 2016.
[139] News Release, Judicial Council of California on Audit Reports for the Courts of Colusa, Lassen, Merced, Plumas, San Matea, San Franciso, Santa Cruz, Shasta and Tehama Counties, <http://www.courts.ca.gov.12050.htm> accessed 15 July, 2016.
[140] *Id.*
[141] *Id.*
[142] 21st Century Corporate ADR Pledge (n 118).

an example of the need for an active bar to support ADR practices, for instance, the American Bar Association, Dispute Resolution Section has the highest number of members, and websites such as the mediate.com also offer regular updates, insights and inputs on mediation.

(b) Codification

While an overarching federal legislation on mediation (in relation to conduct, procedure etc.) is still finding its foothold, the mediation mandate has existed with the Civil Justice Reform Act, 1990 and thereafter by the ADRA and the UMA. Issues such as enforceability, conflict of interest, privilege, mediator accreditation has been the cause of discussion in the modern day envisaged statues. While the discussions are quite similar to the other Study Jurisdictions, a main feature of the codified framework that exists in the USA, and what stands out, is the use of mediation by government bodies and federal agencies and enforcement of settlement agreements against such agencies provided for under the Negotiated Rulemaking Procedure Act, 1990 and the Administrative Dispute Resolution Act, 1990, which also included dealing with intra agencies disputes.[143] State and local governments have played a significant role in promoting mediation. To the extent now, that intra-state disputes in relation to tax, water and environment are mediated and are found to reduce economic costs for states.[144] Court connected programmes are well networked within each other and while a comprehensive statistic of the use and benefit of mediation in the court programmes is absent, despite the absence of encompassing legislation such as Australia,[145] the continuous expansion and the beneficial impact of mediation on the legal system in the USA has been affirmed and reconfirmed by several academics and practitioners.[146]

Takeaways:

(i) Mechanism for enforcing settlement agreements against government corporations/ bodies to be identified (so that they are bound by mediated settlement agreement).

(ii) Intra-court networking and support for the process can be developed.

(iii) Combination implementation of mediation – statue (legislative support), contract (mediation advocacy, lawyer training, bar support), court referral (judicial support), voluntary/pre litigation (user awareness)

(iv) Education of judges and training programmes in dispute resolution strategy are essential.

(v) Programmes in advocacy in mediation need to be provided. Legal counselling in relation to different avenues available to resolve a dispute must be an integral part of advocacy training.

[143] Kimberlee K. Kovach (n 10) 398.
[144] P.S. Adler, State Offices of Mediation: Thoughts on the Evolution of a National Network (1992--1993) 81 Kentucky Law Journal 1013 at 1019.
[145] Refer to Part 1.
[146] T.J. Stipanowich, 'ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution', (2004) 1 Journal of Empirical Legal Studies, 3.

(vi)	Contractual inclusion of mediation must be propagated. An ADR pledge may be the necessary trigger to boost the practice of mediation.

2. EMPIRICAL ANALYSIS OF MEDIATION CENTRES

A. Introduction

The present chapter undertakes an empirical review of the performance of the Bangalore Mediation Centre ("**BMC**") and the Mediation and Conciliation Centre of the Delhi High Court ("**DMC**"). Data received from the centres, apart from data publicly available, have been relied upon to analyse the functioning of these centres and highlight the existing concerns on subject matters like efficiency, benefits, and resources, *inter alia*. Through the analysis, this chapter also makes an assessment of the effectiveness of mediation, as a dispute resolution mechanism, in each of the identified court connected mediation centres and the various trends that are surfacing in the practice of mediation. To this end, data for each centre has been analysed separately before examining them together in order to see if any broader conclusions about court connected mediation in India can be drawn from the two data sets.

1. Prior empirical analyses of mediation in India

An empirical analysis of dispute resolution through mediation in India was conducted by members of the Indian Law Institute in 2014 in a study titled 'Alternative Dispute Resolution in India- ADR: status/effectiveness study' ("**2014 Study**").[147] The 2014 Study limited itself, so far as mediation is concerned, to an empirical analysis of the effectiveness of the mechanism in court connected programmes in Delhi and Bangalore, in addition to briefly examining mediation in Mumbai.[148] It analysed data related to mediation in centres across Delhi between 2003 and 2008, and in Bangalore pertaining to the year 2007. Moreover, it also examined the aspect of mediator training in each of the cities and found a consistent absence of quality training programmes.[149] The 2014 Study concluded by highlighting public awareness, absence of quality training, lack of efficient leadership, etc. as areas of concerns and emphasized on the benefits of a formal procedure for mediation.[150] Even as the statistical analysis for each of these cities in the Study relates to data from nearly a decade ago, it will merged and relied on with our empirical study of the court annexed mediation centres of Delhi and Bangalore, where relevant.

[147] Vishnu Konoorayar, K. N. Chandrasekharan Pillai, Jaya V. S., Alternative Dispute Resolution in India- ADR: status/effectiveness study (*Open Access Repository*, New Delhi, 2014) <http://www.ssoar.info/ssoar/bitstream/handle/document/41034/ssoar-2014-konoorayar_et_al-Alternative_Dispute_Resolution_in_India.pdf?sequence=1> accessed 15 July, 2016.
[148] *Id.*, 80.
[149] Only a handful of institutions provided mediator training in Delhi and Bangalore. Some training programmes were also conducted in Mumbai.
[150] 2014 Study (n 147), 95.

2. Data Collection for the Interim Report- A broad overview

Data for the purposes of the Interim Report was sought from the BMC and the DMC 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 /information that addresses all the issues and questions that were raised. Some of data received was not maintained in the form sought by Vidhi and in light of the limited time available for the Interim Report, could not be obtained from the material available. The present the analysis is, therefore, limited to the extent of data obtained from the centres, as depicted below, in addition to data that is available on the Supreme Court website under 'Court News':

Table 4: Data sought and obtained from the BMC and the DMC

Data sought	BMC	DMC
(i) Cases referred	Yes	Yes
(ii) Cases settled, cases sent back	Yes	Yes
(iii) Average time period	Yes	No
(iv) Pre-trial mediations	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.
(vi) Classification of cases	Yes.	No

3. Terminology for the Interim Report

The data received from the BMC and DMC does not use uniform terminology, making a comparative analysis difficult. For this reason, even as the two sets of data assign different meanings to terms like "cases referred", "cases settled", etc., as is evident from the data presented for each of the centres below, the Interim Report will adopt certain uniform terms across this chapter for easier comparative analyses and understanding of the centres. To this end, the terms used in this chapter are as follows:

(i) **"New cases referred for mediation"** are those cases which were referred for mediation by the High Courts in a particular year.

(ii) **"Cases that have been carried forward from the previous year"** are those cases that are pending at the beginning of each year at the centres.

(iii) **"Total number of cases"** is a sum of the new cases referred for mediation and the cases that were carried forward from the previous year.

(iv) **"Cases settled"** are those cases wherein parties participated in the mediation process and it concluded in the settlement of the dispute.[151]

(v) **"Cases not settled"** are those cases wherein parties attempted mediation but were unable to arrive at a mutually acceptable settlement.

(vi) **"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.

(vii) **"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 not settled" but merely those cases wherein mediation was never initiated as a result of parties' unwillingness to mediate or the case being unfit for mediation, among other reasons.

B. Data from the BMC

The data obtained from the BMC was titled 'General Statistical Report', 'Statistical Report', 'Cases Type Report' and 'Cases by Mediator Name'. The first three sets of data were provided for each of the five years, as well as in a combined form for the entire period of 2011 to 2015. The data under the head of 'Cases by Mediator Name', on the other hand, was provided as a combined data set for the entire period of 2011 to 2015. In addition to the data received from the BMC, data available on

[151] 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, settlement could also connote settlement through payment. Additionally, sometimes mediation may conclude but not result in the dispute ending. For instance, in some cases, a concluded mediation may be the step before trial. However, given that the data received is silent on these fronts, the terms 'settled' has been used in the manner expressly specified.

the Supreme Court's website under 'Court News' regarding cases instituted in, and disposed of by, the Karnataka High Court for the relevant period has also been utilised.[152]

1. Data obtained from the BMC and the Supreme Court website

While the complete data sheets are available as annexures, in this section, we present the data collected independently from the BMC, as well as the information available on the Supreme Court's website regarding the cases instituted in, and the cases disposed of by, the Karnataka High Court between the period of 2011 and 2015.

(a) Number of cases for mediation

From the data made available by the BMC, it is possible to infer the nature of the cases being referred to mediation based on the classification of cases by the Karnataka High Court. However, we were not in a position to effectively classify all cases into categories of "civil" and "criminal". This is because while it is clear that some categories obviously relate to civil cases and some to criminal cases, some categories such as 'Writ Appeal', 'Writ Petition', 'Miscellaneous', etc., are not so vertically classifiable. We understand from the discussion with BMC representatives that the unclassifiable cases include a combination of civil and criminal cases such as family disputes including domestic violence. Therefore, the number of cases in Table 5 below includes both civil and criminal. For better, though limited, insight, Table 6 depicts the cases referred for mediation as civil, criminal and unclassifiable.

Table 5: New cases referred for mediation, as a percentage of cases freshly instituted in the Karnataka High Court

Year	No. of cases freshly instituted in the Karnataka High court	No. of new cases referred for mediation to the BMC	No. of new cases referred for mediation, as a percentage of cases freshly instituted in the Karnataka High Court
2011	175453	4903	2.79%
2012	133388	5933	4.45%
2013	141254	6765	4.79%
2014	136972	6820	4.98%
2015	145285	7020	4.83%
Total	732352	31441[153]	4.29%

[152] Court News (n 11).
[153] This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 31442.

Table 6: Cases referred for mediation from 2011 to 2015 classified as civil, criminal and unclassifiable

Case type	No. of cases	No. of cases as a percentage of the total no. of cases
Civil	26935	83.10%
Criminal	4180	12.90%
Unclassifiable	1296	4%
Total	32411	100%

It may be noted here that the vast majority of the cases referred, more than 80% of the cases referred to mediation are civil cases. While it may superficially seem to reflect the overall ratio of civil (87%) to criminal cases (13%) filed in the Karnataka High Court as evident from the Court News data,[154] It may also be a reflection of the fact that civil cases are generally more amenable to mediation than criminal cases. Ignoring the 4% of cases which cannot be classified, the chart below gives us a clearer picture of what percentage of civil cases are actually being referred to mediation.

Table 7: Civil cases referred for mediation from 2011 to 2015, as a percentage of civil cases freshly instituted in the Karnataka High Court

Year	No. of civil cases freshly instituted in the Karnataka High court	No. of new civil cases referred for mediation to the BMC	No. of new civil cases referred for mediation, as a percentage of civil cases freshly instituted in the Karnataka High Court
2011	154626	4745	3.07%
2012	118536	5736	4.84%
2013	126522	6648	5.25%
2014	122135	6289	5.15%
2015	128304	7039	5.49%
Total	521819	30457	5.84%

(b) Cases mediated, settled and not settled

Table 8 below discusses the how many cases went through the process of mediation after being referred to the BMC, and after that, how many were settled and how many not settled.

[154] Court News (n 11).

Table 8: Cases mediated, settled and not settled, in numbers and percentages

Year	Cases Mediated		Cases settled		Cases not settled	
	No.	% of total the no. of cases referred	No.	% of the no. of cases mediated	No.	% of the no. of cases mediated
2011	4255	72%	2904	68%	1351	32%
2012	4844	71%	3275	68%	1569	32%
2013	5256	66%	3532	67%	1724	33%
2014	5310	64%	3397	64%	1913	36%
2015	5320	61%	3271	61%	2049	39%
Total	24985	77%	16379	66%	8606	34%

(c) Non-starters and why they did not take off

Of the cases referred for mediation every year, several are returned to court for various reasons Tables 9 and 10 below) and are, therefore, also referred to in the General Statistical Report as cases not mediated. 'Cases returned to court', in the BMC data, does not include cases that are mediated but not settled, even though they are also returned to court for adjudication once the mediation is inconclusive. Therefore, the figure merely reflects the number of cases that were non-starters. The subsequent chart notes why these cases were classified as "non-starters".

Table 9: Cases that were non-starters

Year	No. of cases that were non-starters	No. of cases that were non-starters, as a percentage of the total no. of cases referred for mediation
2011	722	12%
2012	762	11%
2013	1230	15%
2014	1320	16%
2015	1356	16%
Total	5390	17%

Table 10: Non-starters classified based on reasons, in numbers and as a percentage of the total number of cases returned

Reasons for cases being non-starters (in numbers and in percentage)		2011	2012	2013	2014	2015	Total
Case was not fit for mediation	No.	16	56	140	117	98	427
	%	2.22%	7.35%	11.38%	8.86%	7.23%	7.92%
One or more parties did not appear for a follow-up mediation	No.	393	402	549	554	554	2452[155]
	%	54.43%	52.76%	44.63%	41.97%	40.86%	45.51%
One or more necessary parties never appeared	No.	224	210	334	536	551	1855[156]
	%	31.02%	27.56%	27.15%	40.61%	40.63%	34.45%
One of more parties appeared but refused to participate in mediation	No.	78	75	114	74	103	444
	%	10.80%	9.84%	9.27%	5.61%	7.60%	8.24%
One or more parties did not have sufficient authority to	No.	5	6	2	2	6	21

[155] This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 2453.
[156] This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 1857.

negotiate or settle the case	%	0.69%	0.79%	0.16%	0.15%	0.44%	0.39%
Others	No.	6	11	91	36	44	188
	%	0.83%	1.44%	7.40%	2.73%	3.24%	3.49%

(d) Total number of mediation hours, average time per case and average number of sessions per case

The General Statistical Reports also provide details regarding the total number of mediation hours put in by the mediators at the BMC, the average time spent per case and the average number of mediation sessions per case. However, the data is silent on the duration of a 'session'.

Table 11: Total number of mediation hours, average time per case and average number of sessions per case

Year	Total no. of mediation hours	Average time per case (in minutes)	Average no. of sessions per case
2011	9250	141	1.32
2012	11484	153	1.23
2013	11104	136	1.00
2014	12172	147	0.97
2015	14666	173	0.98
Total	58676[157]	150[158]	1.10[159]

(e) Pendency at the end of the year

The number of cases pending for mediation at the end of the relevant period can also be extracted from the data received. This number, which reflects the pendency at the BMC, includes the cases not assigned to mediators as well as the cases that have been assigned. The 'total number of cases' before the BMC for a particular period is a sum of the number of cases carried forward from the previous year and number of new cases referred for mediation during the period. Therefore, the number of cases pending at the end of each period forms a part of the 'total number of cases' for mediation for the subsequent period, as per the General Statistical Report.

[157] This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 58675.
[158] This figure is the mathematical average of the figures from each year. The data provided by the BMC stated the average for 2011 to 2015 to be 151
[159] This figure is the mathematical average of the figures from each year. The data provided by the BMC stated the average for 2011 to 2015 to be 1.08.

Table 12: Cases pending for mediation at the end of the year

Year	No. of cases pending for mediation at the end of the year	No. of cases pending for mediation, as a percentage of the total no. of cases
2011	896	15%
2012	1223	18%
2013	1502	19%
2014	1692	20%
2015	2036	23%

(f) Types of cases referred for mediation the most

As per the Cases Type Report, certain types of cases are referred for mediation in greater numbers than others. Table 13 below depicts ten types of cases referred for mediation in the greatest numbers (in descending order) in the period between 2011 and 2015. It is pertinent to note that in the Case Type Reports, the figures depict the total number of cases under each case type and, therefore, include the cases carried forward from the previous year.

Table 13: Top ten types of cases referred for mediation the most

Case Type	No. of cases referred for mediation
Matrimonial Case (Divorce)	15029
Criminal Miscellaneous (Domestic Violence Act)	2038
Matrimonial Case (Restitution of Conjugal Rights)	1887
Original Suit (Partition)	1522
Matrimonial Case (13 B)	1443
Criminal Miscellaneous (u/s 125(Maintenance)	1441
Original Suit (Injunction suit)	1224
Original Suit (Money suit)	1041
Regular First Appeal	720
G &WC (Guardians and Wards Act)	711

(g) Family law cases, divorce cases and mediation

The Case Type Report revealed an overwhelming number of family law matters being referred for mediation. While the Report does not classify matters as 'family law cases', 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, broadly pertain to 'family law'. Cases under each of these heads have, therefore, been classified as such for the purposes of this report. Moreover, even as this classification

is helpful, the number of divorce cases, in particular, referred for mediation and settled every year is also presented below.

Table 14: Family law cases referred for mediation

Year	No. of family law cases referred for mediation	No. of family law cases referred for mediation, as a percentage of the no. of cases referred for mediation
2011	3625	61.72%
2012	4621	67.67%
2013	5426	67.93%
2014	5861	70.42%[160]
2015	6347	72.85%[161]
Total	25880[162]	79.85%[163]

Table 15: Divorce cases referred for mediation and settled

Year	No. of divorce cases referred for mediation	No. of divorce cases referred for mediation, as a percentage of no. of cases referred for mediation	No. of divorce cases referred for mediation and settled	No. of divorce cases referred for mediation cases and settled, as a percentage of the no. of divorce cases mediated
2011	2680	45.63%	2046	88.19%
2012	3374	49.41%	2374	85%
2013	3805	47.63%	2508	83.77%
2014	3796	45.61%	2300	80.79*
2015	3144	36.08%	1340	64.80%
Total	16799[164]	51.83%	10568	62.91%

[160] This has been calculated based on the total number of cases referred for mediation provided in the Case Type Report for the year, which is 8323. The total number of cases referred for mediation provided in the General Statistical Report is 8322.
[161] This has been calculated based on the total number of cases referred for mediation provided in the Case Type Report for the year, which is 8713. The total number of cases referred for mediation provided in the General Statistical Report is 8712.
[162] This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 22735.
[163] This has been calculated based on the total number of cases referred for mediation provided in the Case Type Report for the period, which is 32411. The total number of cases referred for mediation provided in the General Statistical Report is 32412.
[164] This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 15029.

(h) Property law cases and mediation

'Property law cases' is a classification that has been created for the purposes of this report and includes matters provided for in the Case Type Reports that pertain to house rent control, house rent revision petitions, land acquisition, declaration and injunction, declaration and possession, declaration/compensation, ejectment, mortgage suit, partition and possession. This classification has been created to drive home a larger point pertaining to these cases, given the similar nature of such cases.

Table 16: Property law cases referred for mediation

Year	No. of property law cases referred for mediation	No. of property law cases referred for mediation, as a percentage of the no. of cases referred for mediation
2011	762	12.97%
2012	642	9.40%
2013	797	9.98%
2014	642	7.71%
2015	665	7.63%
Total	3508[165]	10.82%

(i) Allocation of cases among mediators

The Report containing cases sorted by mediator name and provides data regarding the allocation of mediation cases among 101 mediators for the period from 2011 to 2015, the number of cases mediated by each of them, the number of cases settled and not settled, the settlement rate, the average sessions held and average time to conclude a mediation. For the purposes of this report, it has been assumed that each of these mediators was on the BMC panel from 2011 to 2015. The data pertaining to allocation is depicted below:

Table 17: Allocation of cases among mediators

Range of no. of cases referred to mediators	No. of mediators to whom no. of cases in this range have been referred	% of mediators on the panel who have been referred range of cases	Total no. of cases allocated to these mediators	Total no. of cases allocated to these mediators, as a percentage of total no. of cases referred for mediation
0-500	74	73.27%	9533	29.43%

[165] This figure is the mathematical sum of the figures from each year. The data provided by the BMC stated the total to be 2873.

500-1000	21	20.79	14479	44.69%
1000-1500	5	4.95%	5986	18.48%
1500-2000	-	-	-	-
2000-2500	1	0.99%	2399	7.41%
	101		32397	

2. Analysis of BMC data

In this part, we have analysed the data tabulated above in order to draw meaningful inferences about the following:

(i) Usage of mediation: Under this head, we will focus on the way the BMC has been utilized for mediation in terms of number of cases mediated, settled, not settled, number of non-starters, reasons underlying cases that are non-starters and impact of BMC's work on the overall disposal of cases in the Karnataka High Court.

(ii) Efficiency: Under this head, we will focus on the efficiency of the BMC as an institution by examining the pendency at the BMC.

(iii) Benefits of mediation: Under this head, we analyse the rate of settlement in mediation and cost and time implications of the mechanism in order to highlight its benefits.

(iv) Case type analysis: Under this head, we will analyse different case type patterns emerging from the data at hand and view them in light of commonly held perceptions about the suitability of mediation as a mechanism of dispute resolution for various case types.

(v) Resources for mediation: Under this head, we will analyse case allocation to mediators in order to understand resource allocation and utilisation. The increase in the number of mediation hours will also be examined.

By analysing the data under these broad heads, we aim to gain insight into the overall functioning of the BMC, as well as the position that mediation, as a dispute resolution mechanism, enjoys in the Karnataka among litigants, lawyers and the judiciary.

The 2014 Study analysed mediation in Bangalore primarily through focus on BMC. In doing so, it examined data pertaining to roughly the first year of its operations (January 1, 2007 to January 18, 2008).

The 2014 Study also noted that the BMC stipulated a minimum 15 years of experience and a mandatory 40 hours training programme before acting as mediators.[166] Analysis pertaining to total number of mediators, cases referred for mediation, cases mediated, average time, etc. was also undertaken for the BMC for the period of 2007-2008 and will be drawn upon wherever relevant through the course of this empirical analysis.

[166] 2014 Study (n 147), 92.

(a) Usage of mediation

(i) Number of cases for mediation

The statistical data available shows a steady increase in the number of new cases referred for mediation each year, between 2011 and 2015 (as depicted in Table 5). While 4903 new cases were referred for mediation in 2011, the number rose to 7020 in 2015. This shows that the BMC's workload has been steadily increasing over the period between 2011 and 2015. This also represents an overall increase of approximately 43% over a period of five years. Additionally, there is also a steady year-wise increase in the number of cases being referred to mediation.

Moreover, when compared to the data in the 2014 Study, where 2906 new cases were referred for mediation in its first year of operations,[167] we see that the number of cases referred has increased by two and a half times in a span of less than a decade.

Even as the number of new cases referred for mediation has seen an increase over the five year period, in order to arrive at a more accurate assessment of whether the acceptance of mediation as a dispute resolution mechanism has truly grown among the judiciary over the years, a comparison between this number with the number of cases freshly instituted in the court (as depicted in Table 5 above) is apposite. This data reveals that the number of cases instituted in the Karnataka High Court is exponentially higher than the number of cases referred for mediation (4% of the cases freshly instituted).) This number has increased from 2.79% of cases in 2011 to 4.98% in 2013, before dipping marginally in 2014 and 2015. This analysis indicates that even as the number of new cases referred for mediation in each period (when looked at in absolute numbers), is increasing significantly, it is not necessarily indicative of a greater acceptance of mediation among the judiciary.

A more suitable comparison in this respect can be made with reference to the civil cases instituted in the Karnataka High Court each year and the percentage of those which have been referred to mediation. While only 5.84% of the freshly instituted civil cases have been referred for mediation in the five-year period[168], this figure has been increasing over the years (with the exception of 2014, which saw a marginal decline in this percentage from the previous) and was at its highest in 2015 with 5.49%.

The increase in the number of new cases referred for mediation could also be a consequence of the increasing number of cases being instituted every year at the Karnataka High Court and may not necessarily reflect a greater acceptance of mediation as a dispute resolution mechanism among the judiciary. Based on the above, the very low percentage of cases being referred to mediation, and the lack of significant improvement are pertinent issues which need to be addressed.

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[167] 2014 Study (n 147), 92.

[168] While drawing this conclusion, one must bear in mind that 4% of the cases referred were unclassifiable. However, given the small percentage figure, the margin of error is not enough to take away from the conclusion completely.

(ii) Non-starters and why they did not take off

From 2011 to 2015, the total number of cases that were before the BMC was 32412. Out of these, 17% of cases were non-starters for a variety of reasons (as depicted in Table 9 above). It is also interesting to compare this to the figure from the first year of BMC's operations, wherein 44% of the cases referred for mediation were non-starters.[169]

While this data suggests that a greater percentage of cases referred are being mediated now as against 2007-2008, it provides little relief, given that nearly a decade has passed since 2007. Moreover, a worrying trend emerges in that the number of cases being non-starters as a percentage of the total number of cases referred for mediation has been steadily increasing through the period between 2011 and 2015, with 12% cases being sent back in 2011 to 16% cases being sent back in 2015. This suggests that the Court has erred in referring these matters to mediation when they were not really a fit case for mediation. It is possible that the judges have mechanically referred the matter to mediation without examining the possibility or desirability of a settlement in this case.

The data reveals that the predominant reason for mediations being non-starters is attributable to disinterest in pursuing mediation or lack of cooperation by one or all the parties involved in the dispute (as depicted in Table 10). While 96.25% of the non-starters in 2011 were so for this reason, the figure was 89.09% in 2015. Interestingly, the figure for 2007 was 78%.[170] This disinterest and non-cooperation of the parties could be attributed to a lack of public confidence in mediation as a dispute resolution mechanism. It could also be indicative of a lack of sufficient deterrence (in the nature of costs imposed on parties for not making efforts to mediate) to prevent a callous approach towards mediating disputes.

Additionally, this data could also be indicative of inadequate training of the mediators, as one of the crucial roles to be played by a mediator is to enable the parties to appreciate the various benefits of mediation as a dispute resolution mechanism. Sufficient training equips mediators to persuade parties to mediate their disputes as opposed to spending years litigating the same, thereby resulting in a greater number of cases being mediated.

However, the reduction in these numbers over the five-year period suggests that the situation is improving and that there may be greater willingness on the part of the parties to seriously follow through on mediation and resolve their disputes amicably. At the same time, there is significant scope for improvement in reducing the number of non-starters either by reducing references or by ensuring parties participate in mediation voluntary and under the process before participation.

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[169] 2014 Study (n 147), 92.

[170] *Id.* While the reason for this significant rise in the percentage of cases being returned to court for reasons of parties' lack of interest and/or cooperation since 2007 is not known, it certainly merits attention.

(iii) Cases mediated

Despite the above mentioned *per annum* increase in the number of new cases referred, the percentage of cases mediated every year, whether resulting in settlement or not, has dropped in the period from 2011 to 2015 (as depicted in Table 8 above). While 72% of the cases before the BMC in 2011 underwent mediation, the percentage fell steadily each year before reaching a figure of 61% in 2015. This reflects that a slightly larger percentage of cases have been non-starters over the years. This data must be seen in light of the data from 2007, which revealed that about 56% of the cases referred (a mere 5% less than the figure in 2015) were mediated. Evidently, the percentage of cases referred increased over the years before starting to drop, which is a trend worth highlighting.

(iv) Impact on overall disposal of cases

The data available provides an opportunity to test Marc Galanter's findings about judicial promotion of settlements in the United States in the Indian High Courts that are subject of the Interim Report.[171] In 1985, Galanter stated that that studies pertaining to different courts revealed that there is little evidence that increased judicial promotion of settlements results in greater productivity of the courts (disposal rates were commonly used as a marker of such productivity).[172]

Data from the BMC and the Karnataka High Court, incidentally, affirms this insight, as an increase in the number of new cases being referred for mediation during the period between 2011 and 2015 is not supported by an increasing number of cases being disposed of by the Karnataka High Court during the said period, as is depicted in Table 18 below. It is evident that for all but 2012-2013 and 2014-2015 the increase in number of cases referred for mediation was not supported by an increase in the number of cases disposed of.

However, it is also possible that the overall number of cases referred to mediation, less than 5% of cases filed in the High Court, are too few to have had a meaningful impact in any case on the overall disposal of cases by the High Court.

Table 18: Disposal of cases by the Karnataka High Court and number of new cases referred for mediation

Year	No. of cases disposed of by the Karnataka High Court	No. of new cases referred for mediation
2011	141544	4903
2012	121624	5933
2013	128134	6765

[171] Marc Galanter, '"Settlement Judge, not a Trial Judge:" Judicial Mediation in the United States', Journal of Law and Society, Vol 12, No 1 (Spring, 1985), 1, 8<http://www.jstor.org/stable/1410244> accessed 15 July, 2016.
[172] *Id.*, 8.

2014	119824	6820
2015	121951	7020

That being said, given that over 80% of the cases referred for mediation are civil, in comparison to the United States, where settlements in certain types of criminal cases has long been common[173], it may be apposite to examine civil cases[174] as a distinct category. With respect the civil cases alone, as depicted below, in two out of the five years, an increase or decrease in the number of new cases referred for mediation was supported by a respective increase or decrease in the number of cases disposed of by the High Court.

However, given that less than 10% of civil cases filed in the High Court were referred to mediation, they are too few to have had a meaningful impact on the overall disposal of cases by the High Court.

Table 19: Disposal of civil cases by the Karnataka High Court and number of new civil cases referred for mediation

Year	No. of civil cases disposed of by the Karnataka High Court	No. of civil cases referred for mediation	No. of civil cases referred for mediation, as a percentage of the no. of cases disposed of by the Karnataka High Court
2011	124086	4745	3.82%
2012	107917	5736	5.32%
2013	114223	6648	5.82%
2014	104837	6289	6.00%
2015	107346	7039	6.58%

Thus, Galanter's argument that an increased judicial involvement does not necessarily result in a greater disposal of cases by the courts seems to stand reaffirmed for the Karnataka High Court. That being said, a few caveats ought to be borne in mind. First, Galanter used the term 'judicial involvement' to include a host of ways whereby the judiciary participates in and promotes settlement, and was not limited to cases being mandatorily referred to mediation. However, referral

[173] *Id.*, 12. It must, however, be borne in mind that even in the US, where criminal cases are mediated more frequently than in India, not all criminal cases can be mediated. For instance, while personal injury claims are commonly mediated as victim-offender mediation, certain crimes, like mass murder, cannot be mediated.

[174] As stated earlier, while some categories in the Case Type data provided by the BMC obviously relates to civil cases and some to criminal cases, some categories such as 'Writ Appeal', 'Writ Petition', 'Miscellaneous', etc., are not so obviously classifiable. For this analysis as well, only those cases that are obviously classifiable as civil have been termed as 'civil cases'.

of cases for mediation by the judiciary can certainly be seen as a kind of 'judicial involvement' in the promotion of mediation. Second, how the term 'settlement' is defined when examining the position in the United States is also a complex matter and deserves attention in order to draw meaningful conclusions regarding the rate of settlement.[175] Third, the failure of the production argument does not take away from other possible benefits of mutually arrived at settlements, such as the quality of justice, time and cost savings, etc.[176]

(b) Efficiency of mediation

(i) Pendency

One of the crucial benefits of mediation as a dispute resolution mechanism is that it is substantially more expeditious than litigation.[177] This benefit is significantly undermined when mediation centres project an increasing pendency. As per the data, the Compound Annual Growth Rate (CAGR) of the pendency of cases at the end of each year at BMC has been 0.18%. While 15% of the cases referred for mediation in 2011 were pending at the end of the year, it increased to 23% in 2015.

Although the increasing pendency at the BMC could be reflective of the overall increase in the number of new cases being referred for mediation every year, which could in turn be a reflection of an increasing number of cases being instituted in court, it certainly points to an inadequacy of the BMC to cope with the increase. An increase in the number of new cases being referred to the BMC merits a proportionate increase in resources in terms of mediators, infrastructure, administrative support, etc. The steady increase in pendency is certainly a cause for alarm if mediation is to serve as a legitimate alternative dispute resolution mechanism, one that seeks to alleviate judicial workload and assist in efficient case management. Having said that, it must also be borne in mind that the time taken in mediation tends to increase with the level of complexity of the dispute, and, while the data is silent on this, the referral of more challenging cases could also be a reason for the increase in pendency. Moreover, the increase in pendency could also be attributed to prolonged unavailability of mediators, since the BMC works on a volunteer mediator basis.

(c) Benefits of mediation

(i) Rate of settlement

While the percentage of cases mediated has declined over the five years, a strong positive trend has emerged in actual settlement of disputes through mediation. The data (as depicted in Table 8 above) reflects that 66% of the cases mediated in the period from 2011 to 2015 concluded in a settlement between the parties. Although the chances of settlement vary based on the type of case, quality of

[175] Theodore Eisenber et al., 'What is the Settlement Rate and Why Should We Care?', Journal of Empirical Legal Studies, Vol 6, Issue 1, 111-146, March 2009, < http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1202&context=facpub> accessed 15 July, 2016.
[176] Galanter (n 171), 10-15.
[177] Refer to Chapter II.

mediators, willingness of parties, etc., this figure certainly highlights the potential of mediation as a successful dispute resolution mechanism.

That being said, this data must also be examined in light of the findings of the 2014 Study, which revealed that 55% of the cases mediated in 2007 concluded in settlement. Even accounting for the larger number of cases being referred, it is significant that the overall settlement rate has only improved.

(ii) Average time per case and average number of sessions per case

Mediation is seen as an expedient means of dispute resolution and the same in reinforced by the data (as depicted in Table 11 above). The average time spent per case has ranged between 136 minutes (in 2013) and 173 minutes (in 2015), with the average for the period of 2011 to 2015 being as low as 150 minutes (about 2.5 hours). These figures do not signify a significant change since 2007, when the average time spent per case was 131 minutes.[178] Additionally, the average number of sessions per case has ranged from 0.97 sessions (in 2014) to 1.32 sessions (in 2011), with the average number of sessions per case for the period of 2011-2015 being 1.10 sessions. This figure was 1.81 sessions in 2007.[179] While knowing the duration of a mediation 'session' would enable us to make more informed inferences as to the efficiency of the mediation process at BMC, given the lack of such information, the 'average time per case' can serve as a useful metric.'

Additionally, although time taken for the settlement of mediation cases is a function of multiple factors, such as the type of case (explored in detail below), the parties' willingness and style of the mediator, *inter alia*, an overall inference about mediation being an efficient dispute resolution mechanism will not be out of place, especially given how litigating cases often takes several years.

(d) Case type analysis

(i) Civil and criminal disputes

Even though reference to mediation is not found anywhere in the Code of Criminal Procedure, 1974, it is significant to note that a high number of criminal cases (4180) have also been referred to mediation between 2011 and 2015. Given the fact that matrimonial disputes also tend to involve criminal cases (such as those pertaining to domestic violence, dowry, maintenance under Section 125 of the CrPC, et al) this is keeping in line with the judgment of the Supreme Court in *K. Srinivas Rao v. D. A. Deepa*[180], which directed family courts to refer all matrimonial disputes for mediation, including cases under Section 498A of the Indian Penal Code. In fact, a significant majority of criminal cases referred for mediation pertain to matrimonial disputes.

[178] 2014 Study (n 147), 92.
[179] *Id.*
[180] *Srinivas Rao* (n 83) ¶ 46.

(ii) Family law cases, divorce cases and mediation

The data reveals interesting patterns with respect to the different types of cases that have been mediated, confirming the commonly held perception that some types of cases are considered better suited for mediation than others. For example, 70% of the total number of cases referred for mediation during the five-year period pertained to family law matters (as depicted in Table 14 above). This figure went from being about 62% of the total number of cases referred for mediation in 2011 to about 73% in 2015. This trend could be seen as a consequence of the Supreme Court's directions that mandated all matrimonial matters to be referred for mediation.[181] It also reaffirms the larger international opinion that family law disputes are considered to be particularly well suited for resolution through mediation. Another point that can be deduced from this could be that mandating mediation could be a route to be adopted in certain types of cases to increase efficiency in case management by the judiciary. This takes away the burden of analysing the utility of mediation in each case and popularise it by mandate.

Furthermore, the case type report for the period of 2011 to 2015 reveals that about 52% of the cases referred for mediation involved divorce proceedings as depicted in Table 15). Moreover, a majority of about 63% of the divorce cases mediated concluded in a settlement. This highlights that divorce disputes are considered particularly well suited for mediation, and with good reason, given the high settlement rate.

(iii) Property law cases and mediation

A similar analysis of the property cases also reveals an interesting trend (as depicted in Table 16). About 11% of the cases referred for mediation from 2011 to 2015 pertained to property matters, thus highlighting that the judiciary perceives property matters as being well suited to be resolved through mediation.

(iv) Other suitable case types

Apart from the broad trends highlighted above, the data is also revealing in so far as the other types of cases and their settlement rates during mediation are concerned. The settlement rate 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. Even as family law and property law matters form a majority of cases referred for mediation and settled, other types of cases are regularly mediated with high rates of settlement and this trend merits attention. The following table depicts number of cases referred for mediation, number of cases mediated, number of cases settled and the settlement rates for those types of cases for which at least 100 cases were mediated in the period of 2011 to 2015. Family law matters and property law matters have been excluded from this table (as they have already been analysed above).

[181] *Id.*

Table 20: Number of cases referred for mediation, number of cases mediated, number of cases settled and the settlement rates (in descending order) for types of cases for which at least 100 cases were mediated in the period of 2011 to 2015

Case Type	No. of cases referred for mediation	No. of cases mediated	No. of cases settled	Settlement Rate
EX (Ex. Petition)	158	102	66	64.71%
S.C. (Small Causes)	156	108	65	60.19%
Original Suit (Money Suit)	1041	682	387	56.74%
Original Suit (Specific Performance)	288	190	101	53.16%
Original Suit (Other Civil)	649	421	204	48.46%
Criminal Miscellaneous	151	103	42	40.78%
Original Suit (Injunction Suit)	1224	756	288	38.10%
C.C. (u/s 138, NI Act)	211	119	47	29.41%
W.P. (Writ Petition)	275	165	40	24.24%
Regular First Appeal	720	480	114	23.75%
Miscellaneous First Appeal	297	205	46	22.44%
Civil Petition	189	128	27	21.09%
Regular Second Appeal	203	112	22	19.64%

*The acronyms used in the Case Type Report have been used.

The above data shows that a significant number of cases which were not family law or property law cases also had a high settlement rate in mediation. This points to the fact that mediation is an efficacious mechanism of dispute resolution in not only the cases traditionally perceived to be well suited for mediation but also in other types of cases. That being said, the number of cases referred for mediation under these cases is not significant. This could possibly indicate ignorance among the judges referring cases as to the suitability of cases for mediation, lack of understanding amongst lawyers in advocating mediation and the dissatisfied end user of mediation.

(v) Case types and non-starters

The Case Type Reports also shed light on the types of cases most often non-starters. The following table depicts the type of cases for which more than ten cases were referred for mediation and over 35% of the cases were non-starters in the period of 2011 to 2015. This analysis could indicate that certain types of cases tend to be less suitable for resolution through mediation than others. It could also indicate that some types of cases see lesser cooperation from parties involved in the dispute than others.

Table 21: Case types for which more than ten cases were referred for mediation and over 35% of the cases were non-starters (in descending order), for 2011-2015

Case type	No. of cases that were non-starters as a percentage of the total no. of cases before the BMC
Regular Second Appeal ()	57.14%
Regular Second Appeal	40.89%
P&SC (Probation and Succession Certificate)	38.71%
Original Suit (declaration/compensation)	37.50%
AA (Arbitration Application)	37.50%
Regular First Appeal ()	35.90%
Review Petition	35.71%
Final Decree Proceedings	36.36%

*The acronyms used in the Case Type Report have been used.

(vi) Case types and average time

With respect to the average time (in minutes) spent on different types of cases, the Case Type Report reveals that certain types of cases take more average time during mediation than others. The data regarding ten types of cases with the highest average time during 2011 and 2015 is depicted below (in descending order):

Table 22: Case types with the highest average time (in descending order) for the period of 2011 to 2015

Case type	Average time (in minutes)
Matrimonial Case (Divorce)	1042.37
Matrimonial Case (Restitution of Conjugal Rights)	403.57
Matrimonial Case (13B)	344.63
T.P.	316.25
Criminal Miscellaneous (u/s 125 Maintenance)	277.26
Appeal	275.20

G &WC (Guardians & Wards Act)	239.14
Criminal Miscellaneous (Domestic Violence Act)	228.51
S.L.A.	227.65
Regular First Appeal	226.43

*The acronyms used in the Case Type Report have been used.

Even as the above table pertains to case types for which the highest average time for disposal through mediation, the time saving potential of mediation as a dispute resolution mechanism cannot be overstated and these cases could, if resolved through adjudication, take exponentially more time. For instance, maintenance cases can sometimes take more than 15 years[182]. Furthermore, a study revealed that a significant number of cases under the Domestic Violence Act in the courts under study took over 2 years for final disposal.[183]

(e) Resources for mediation

The success of mediation as a dispute resolution mechanism must be analysed in light of the resources available at the disposal of, and the manner of their utilization by, the BMC. From the data received, crucial inferences can be drawn in relation to the efficiency of the mediation process including but not limited to the strength of the panel of mediators, allocation of cases among mediators and number of mediation hours.

(i) Allocation of cases among mediators

The data received as 'Cases by Mediator Name' reveals that the BMC has had 101 mediators for the period from 2011 to 2015. When compared to the number of mediators on the BMC panel in the first year of its inception (72), this number indicates an inadequate increase in the mediator strength. Even as the workload at BMC has almost tripled since 2007 (as elaborated above), the number of mediators on its panel has seen less than a 50% increase. Given that mediators constitute an essential human resource for the expedient and efficient resolution of disputes at the BMC, this trend is problematic and could be a probable cause for the increasing pendency at the BMC (as depicted in Table 17) over the years.

The data pertaining to the number of cases mediated by each of the mediators, number of hours put in by each mediator, etc. reveals a disturbing trend of a disproportionately large number of cases being mediated by a few mediators. As many as 26% of the cases referred for mediation between 2011 and 2015 were allocated to 6% of the mediators on the panel at BMC.

[182] Aneesha Mathur, 'High Court wants divorce cases disposed of in 6 months' (*The Indian Express*, New Delhi, 1 October 2014) < http://indianexpress.com/article/cities/delhi/high-court-wants-divorce-cases-disposed-of-in-6-months/ > accessed 15 July, 2016.
[183] Monica Sakhrani and Trupti Jhaveri Panchal, 'A study of the implementation of the protection of women from Domestic Violence Act, 2005), (*Ministry for Women and Child Development, Government of India)* < http://wcd.nic.in/Schemes/research/TISS-Final%20PWDVA%20STUDY%20FINAL.pdf> accessed 15 July, 2016.

Table 23: Disproportionate allocation of cases among mediators

Range of number of cases referred to mediators	No. of mediators corresponding to the range of no. of cases referred	No. of mediators corresponding to the range of no. of cases referred, as a percentage of the total number of mediators on the panel	No. of cases allocated to these mediators	No. of cases allocated to these mediators, as a percentage of total number of cases referred for mediation
0-500	74	73.27%	9533	29.43%
500-1000	21	20.79	14479	44.69%
1000-1500	5	4.95%	5986	18.48%
1500-2000	-	-	-	-
2000-2500	1	0.99%	2399	7.41%
	101		32397	

While all mediators on the BMC panel are given structured mediator training with the technical cooperation of the experts from institutes such as the Institute for the Study and the Development of Legal Systems, San Francisco, Foundation of Sustainable Rule of Law Initiatives[184], the disproportionate allocation of cases among mediators is worrying. Not only could the manner of allocation be indicative of some mediators being preferred over the others, the trend could also point to inefficiency in the allocation of cases among mediators. Additionally, it could also be seen as indicating the lack of accountability and oversight over mediators, which is crucial to ensure that all mediators put in sufficient number of hours at the centre.

(ii) Mediator to cases referred ratio

Moreover, with 101 mediators for the period of 2011 to 2015, the data reveals an alarming mediator to cases referred ratio of about 1:333, i.e., for every mediator, there are about 333 cases being referred for mediation for a five-year period. That about 40% of the mediators have been referred less than 100 cases each sheds further light on how skewed the allocation of cases among mediators is and how largely it depends on the availability of the mediators. Moreover, the median for allocation of cases (determined by the number of cases referred to each mediator) is 196. Given that about 6% of the mediators have been referred more than 1000 cases each, the median is yet another reflection that puts case allocation at the BMC in perspective.

[184] Who are the Mediators?, available at <http://bangaloremediationcentre.kar.nic.in/whoAreMediators.html> accessed 15 July, 2016; Mediation Training Manual (n 3).

Table 24: Disproportionate allocation of cases among mediators

No. of mediators to whom less than 100 cases have been referred	40
No. of mediators to whom less than 100 cases have been referred, as a percentage of total number of mediators (101)	39.60%
Total no. of cases referred to these mediators	563
Total no. of cases referred to these mediators as a percentage of total no. of cases referred for mediation	1.74%

(iii) Mediation hours and number of cases

The number of mediation hours required to be put in varies significantly depending on various factors such as the type of case at hand, preferences of the mediator (between private sessions and joint sessions) and efficiency and style of the mediator, *inter alia*. That being said, an attempt to look for some correlation between the number of cases being referred and number of mediation hours would not be completely out of place. A comparison between the rate at which the total number of cases before the BMC has increased every year and the rate at which the number of mediation hours have increased (as depicted in Table 25 below) reflects little correlation between the two. While caveats ought to be borne in mind, it may not be incorrect to state that an increase in the number of cases referred every year should be coupled with a commensurate increase in the number of mediation hours, and the lack of correlation between the two sets of data below points at an ignorance of this pressing need.

Table 25: Percentage increase in the total number of cases before the BMC compared with the percentage increase in the number of mediation hours

Year	Rate of increase of the total number of cases before the BMC (in percentage)	Rate of increase of the number of mediation hours (in percentage)
2011-2012	16.28%	24.15%
2012-2013	16.97%	-3.30%
2013-2014	4.18%	9.62%
2014-2015	4.69%	20.49%

(f) Concluding comments

The following brief conclusions can be drawn from the above analysis of mediation at the BMC:

(i) Usage of mediation- While number of new cases referred for mediation has seen an increase over the years, the number of cases mediated has seen a decline. The number of non-starters has increased over time, with patent lack of trust and cooperation among parties in mediation being a leading reason. Mediation does not seem to have had a significant impact on increasing the overall disposal of cases in the Karnataka High Court as yet.

(ii) Efficiency- There exists an issue of increasing backlog at the centre, owing to insufficient infrastructure and resources, that requires to be addressed.

(iii) Benefits of mediation- Mediation has resulted in immense time and cost savings for the parties and a significant majority of cases mediated have concluded in settlements.

(iv) Case type analysis- Mediation is largely undertaken to resolve family disputes and property disputes, in particular and civil disputes, in general. While these areas are no doubt well suited to mediation, there is perhaps scope for broadening the kind of cases which are referred to mediation.

(v) Resources for mediation- Skewed allocation of the current mediation work load among mediators raises issues that merit attention and institutional reform.

C. Data from the DMC

The data obtained from the DMC was to the extent indicated in Table 4 above in response to the questions posed to them regarding DMC's functioning for the period between 2011 and 2015. In addition to this, data available on the Supreme Court's website under 'Court News' regarding cases instituted in, and disposed of by, the Delhi High Court for the relevant period has also been utilized.[185] While the complete data sheets are available as annexures, in this section, we present the data collected independently from the DMC, as well as the information available on the Supreme Court's website regarding the cases instituted and carried forward in, and disposed of by, the Delhi High Court between the period of 2011 and 2015.

1. Data obtained from the DMC and the Supreme Court website

(a) Total number of cases

The data obtained from the DMC, with respect to the total number of cases referred for mediation is indicated in the table below. This number is a sum of the cases carried forward from the previous year and the number of new cases referred for mediation during the period at the centre. Additionally, this number also includes connected cases. Therefore, when a case is referred for

[185] Court News (n 11).

mediation before the DMC, the number of connected cases are also seen as having been referred for mediation and are added to the new cases referred for the year.

Table 26: Total number of cases

Year	Total number of cases
2011	2632
2012	2635
2013	2791
2014	2981
2015	2607
Total	13646

(b) Total number of cases referred for mediation, as a percentage of the total number of cases in the High Court

The Supreme Court website provides quarterly information regarding the number of cases freshly instituted and the number of cases pending in each of the High Courts. A comparison between the number of cases freshly instituted and new cases referred to the DMC each year provides interesting insight into the acceptance of mediation as a dispute resolution mechanism among the judiciary. However, since the DMC data does not provide information for the bifurcation of total number of cases into cases carried forward and new cases referred, it is appropriate to compare the total number of cases before the DMC to a sum of the cases freshly instituted and the cases carried forward at the Delhi High Court. This sum has been termed as the 'total number of cases' in the Delhi High Court.

Table 27: Total number of cases before the DMC, as a percentage of the total number of cases in the Delhi High Court

Year	Total no. of cases in the Delhi High court (freshly instituted cases plus cases pending at the beginning of the year)	Total no. of cases before the DMC (As obtained from data obtained from the DMC)	Total no. of cases before the DMC, as a percentage of the total no. of cases in the Delhi High Court
2011	91988	2632	2.86%
2012	100897	2635	2.61%
2013	100023	2791	2.79%
2014	107143	2981	2.78%
2015	112968	2607	2.31%

Total	513019	13646	2.66%

(c) Cases settled, not settled and cases that were non-starters

The data obtained from the DMC provides insight into the number of cases settled, those not settled and those that were non-starters. The number of cases settled, as per the data provided by the DMC, includes 'connected matters settled along with the main matter referred'.

Table 28: Cases settled, not settled and non-starters, in numbers and percentages

Year	Cases settled		Cases not settled		Non-starters	
	No.	% of the total no. of cases	No.	% of the total no. of cases	No.	% of the total no. of cases
2011	1221	46%	1264	48%	286	11%
2012	1534	58%	1270	48%	350	13%
2013	1382	50%	1446	52%	384	14%
2014	1542	52%	1372	46%	368	12%
2015	1965	75%	1467	56%	652	25%
Total	7644	56%	6809	50%	2040	15%

(d) Number of mediators

The DMC data states that the total number of mediators at the centre since the year 2011 is 265. We have been given to understand that this number has remained constant over the five-year period between 2011 and 2015 and, therefore, the total number of cases for each year shall be seen against this figure for the purposes of deriving the mediator to cases ratio for each of the five years.

(e) Types of cases referred for mediation

The data states that "matrimonial disputes, intellectual property rights disputes, commercial contract disputes, properties disputes, family disputes, testamentary disputes, disputes relating to recovery of money, labour disputes, disputes relating to service matters, arbitration disputes, company disputes, etc." are broadly the types of cases that are referred to the DMC. However, data pertaining to each of the above classes has not been provided as it is not maintained by the centre.

2. Analysis of DMC Data

In this part, we have analysed the data tabulated above in order to draw meaningful inferences about the following:

(i) Usage of mediation: Under this head, we will focus on the way the BMC has been utilized for mediation in terms of the total number of cases, the number of cases not settled, number of

non-starters and the impact of DMC's work on the overall disposal of cases in the Delhi High Court.

(ii) Benefits of mediation: Under this head, we will examine the increasing number of cases that end in settlement as a result of mediation.

(iii) Resources for mediation: Under this head, we will analyse the manner in which mediators as crucial human resources in a mediation framework, are utilized by looking at the mediator to cases ratio for the five-year period.

By analysing the data under these broad heads, we aim to gain insight into the overall functioning of the DMC, as well as the position that mediation, as a dispute resolution mechanism, enjoys in the Delhi High Court among litigants and judiciary.

While examining the state of mediation in Delhi, the 2014 Study analysed three sites of court connected mediation, namely, the DMC, the Delhi High Court Legal Services Committee and Court-Annexed Mediation Centres at Karkardooma and Tis Hazari Courts.[186] With respect to DMC, the study provided a general overview of the number of lawyers trained in mediation by the centre and the types of cases mediated, apart from examining data pertaining to the first year of the centre's operation (which has been incorporated in the Interim Report, where relevant).[187] It also undertook a brief examination of the operations of the Delhi High Court Legal Services Committee between 2003 and 2006[188] and carried out a detailed statistical analysis of the mediation centres at Karkardooma and Tis Hazari courts[189] for the period between 2005 and 2008. The latter involved not only comparing the number of cases mediated, settled, not settled, types of cases referred, etc. at the mediation centres at the two district courts but also examining the impact of the stage at which a case is referred on settlement rates.

(a) Usage of mediation

The statistical data available shows a marginal increase in the total number of cases before the DMC each year in three out of the four time periods between 2011 and 2015 (as depicted in Table 26). Interestingly, the total number of cases fell from 2981 in 2014 to 2607 in 2015.

(i) Number of cases for mediation

Moreover, the 2014 Study reveals that in its first year of operation (2006-2007), the 730 disputes were referred to the DMC for mediation. Given that the DMC has been in operation for ten years now, the increase in the number of cases being referred since 2006 is not encouraging. Furthermore, the growth in the number of cases being referred over the period from 2011 to 2015 has nearly stagnated and reflects a lack of court referrals by the judiciary in the Delhi High Court.

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[186] 2014 Study (n 147), 82-91.
[187] *Id.*, 82.
[188] *Id.*, 83.
[189] *Id.*, 84-88.

When seen against the total number of cases in the Delhi High Court, however, the data reveals that as little as about 2.66% of the total number of cases are referred for mediation to the DMC (as depicted in Table 27). As stated above, for this analysis, the total number of cases, i.e. the sum of the number of cases carried forward from the previous year and the number of cases freshly instituted in the Delhi High Court, was compared with the total number of cases, i.e. the sum of cases carried forward from the previous year and the new cases referred for mediation at the DMC. This figure has varied from 2.86% in 2011 to 2.31% in 2015, showing minuscule variation over the five years. This suggests that there is little change in the acceptance of mediation as a dispute resolution mechanism among members of the judiciary in the Delhi High Court suggesting that more needs to be done on this front. One of the key means of addressing this stagnation is to boost judicial confidence in mediation. This can be facilitated by providing the judges with information regarding case type analyses from other courts indicating the success of mediation as a dispute resolution mechanism.

(ii) Cases not settled

The number of cases not settled over the years provides significant insight into the practice of mediation at the DMC. While a total of 1264 cases remained not settled in 2011, the number increased to 1467 in 2015. Each year between 2011 and 2015, other than 2013-2014 (which saw a decline), saw an increase in the number of cases 'not settled'.

While the precise reasons for this trend cannot be determined, it could be seen as a reflection of inadequate training of mediators at the centre, insufficient resources at its disposal, non-suitability of cases for resolution through mediation, lack of inclination among the parties to settle their dispute through mediation, *inter alia*.

(iii) Non-starters

Each year between 2011 and 2015, other than 2013-2014 (which saw a decline), saw an increase in the number of non-starters. While 286 cases were non-starters in 2011, the number increased to more than twice in 2015, with 652 cases. This reflects an increase in the disinterest of parties in pursuing mediation or lack of cooperation on their part and highlights the pressing need to instil greater public confidence in mediation as not only an alternative manner of dispute resolution but also as the appropriate dispute resolution mechanism in many cases.

(iv) Impact on overall disposal of cases

As elaborated above, the data at hand also allows us to test Marc Galanter's findings about the impact of judicial promotion of settlements in the context of Delhi High Court.[190] An analysis of the DMC data and the data pertaining to disposal of cases obtained from the Supreme Court website affirms Galanter's findings. As depicted in Table 29 below, an increase or decrease in the number of cases being referred for mediation each year during the period between 2011 and 2015 was not necessarily

[190] Galanter (n 171), 8.

supported by an increasing or decreasing number of cases being disposed of by the Delhi High Court. Only in 2013-2014 was the increase in the number of cases referred accompanied by an increase in the number of case being disposed of. That being said, the caveats stated in the context of BMC apply with equal force to this analysis of the Delhi High Court and must, therefore, be borne in mind.

Table 29: Disposal of cases by the Delhi High Court and number of cases referred for mediation

Year	No. of cases disposed of by the Delhi High Court	No. of cases referred for mediation
2011	43241	2632
2012	36966	2635
2013	35371	2791
2014	40153	2981
2015	44184	2607

(b) Benefits mediation

(i) Rate of settlement

Apart from the period from 2012-2013 (which saw a decline), the number of cases settled through mediation at the DMC, as a percentage of the total number of cases before the centre has increased, suggesting a positive trend. While 1221 cases were settled in 2011, the number increased to 1965 in 2015. This highlights that over the years, a greater number of mediations concluded in a settlement among the parties, thus highlighting the benefits of mediation as a dispute resolution mechanism.

(c) Resources for mediation

The number of mediators on the DMC panel since 2011 is 265 and this number has remained constant over the five-year period. Since. This data reveals a mediator to cases ratio of about 1:51 for the five-year period at the DMC. The mediator to cases ratio for each of the years has been depicted below. As is evident, the ratio has been a comfortable 10-11 cases per year per mediator. While this ratio is encouraging, it is a result of an alarmingly small and largely constant number of cases being referred for mediation to the DMC each year. The strength of the centre in terms for the number of mediators is an issue that ought to be revisited if the total number of cases before the centre were to increase significantly.

Table 30: Mediator to cases ratio

Year	Total no. of cases before the DMC	Mediator to cases ratio
2011	2632	1:10
2012	2635	1:10
2013	2791	1:11
2014	2981	1:11
2015	2607	1:10

(d) Concluding comments

The following brief conclusions can be drawn from the above analysis of mediation at the DMC:

(i) Usage of mediation- While the total number of cases before the DMC for mediation has seen minimal fluctuation over the years, the number of cases settled reveals a positive trend. The number of cases not settled and the number of non-starters, however, has increased for the most part, and the DMC's work has had no consistent impact on increasing the overall disposal of cases in the Delhi High Court.

(ii) Benefits of mediation- The number of cases settled as well as those not settled has seen an increase.

(iii) Resources for mediation- The DMC enjoys a comfortable mediator to cases ratio as the number of cases referred to the centre is not significant.

D. Concluding comments on the empirical analysis

Having examined each of the centres individually above, this part enlists certain comparative observations of the two centres and concludes with key takeaways on mediation in India based on the above analyses.

1. Comparative analysis- the BMC and the DMC

(i) The above numbers and the analyses reveal a more robust practice of mediation at the BMC in comparison to the DMC, be it in terms of the number of cases referred, the number of cases mediated, the settlement rates or the maintenance of data. The BMC is administering a significantly higher number of cases, which have only increased over the years. The increase in DMC, however, has been gradual, at best. The rates of settlement at the BMC are also significant higher than the rate at the DMC.

(ii) A greater number of non-starters exist in the BMC when compared to the DMC. However, it is crucial to note that absolute numbers are not reflective of the real picture, given the disparity of work load between the two centres and the important take away is that the

number of non-starters in each of these centres has more than doubled over the five year period.

(iii) An interesting comparison emerges from the above analyses in terms of resources for mediation. The BMC has had less than half the number mediators as the DMC, and the number of cases referred to the BMC has, during some years, been about three times the cases referred to the DMC. Evidently, the mediator to cases ratio at the DMC is considerably more favourable than that at the BMC. Despite these favourable odds, the DMC shows lesser output than that of the BMC, be it in terms of the number of cases being mediated or the rate of settlement. This further strengthens the observation that a mere increase in the number of mediators is not sufficient to address the systematic issues plaguing mediation centres today. While the reasons for this trend merit a closer analysis, lower output at the DMC could be attributed to the several factors such as lack of sufficient infrastructure, inefficient operation of the centre, among others.

2. Concluding comments- mediation in India

As elaborated above, certain elements have been identified as key to successful mediation practice and the above data analysis for each of the centres, when seen together, sheds some light on these elements:

(i) Role of referral judges: The data from each of these centres reveals that only an insignificant minority of cases freshly instituted in the High Courts is referred for mediation to these centres, which reflects a lack of inclination among the judiciary to refer cases for mediation. Given the fundamental role that judges have played across jurisdictions in the advancement of mediation, this trend merits significant attention.

(ii) Accreditation of mediators: With there being no publicly available stipulated training and accreditation standards for mediators at either of the centres[191], the data highlights some grave concerns as to the quality of mediation in India. There seem to be a significant number of non-starters at the centres, which could be attributed to a lack of sufficiently trained mediators.

(iii) Infrastructure development and administration of mediation centres: The above exercise of data analysis has brought forth several concerns relating to infrastructure development and administration of the mediation centres, starting from concerns regarding the insufficient number of mediators to the arbitrary allocation of cases among mediators, inadequate number of hours spent by them at the centre and maintenance of relevant data, *inter alia*.

[191] Although the BMC website states that their panel of mediators consists of "experienced advocates with a minimum standing of 15 years at the Bar and who have been given special training in the art of mediation by the High Court with the technical cooperation of the experts from the Institute for the Study and Development of Legal Systems (I.S.D.L.S.), San Francisco", there is little clarity on where this standard is stipulated, how it is implemented and what exactly the training entailed.

The increasing pendency is yet another reflection of either a lack of sufficient resources, or the inefficient utilization of the existing resources.

(iv) User Awareness: The analysis also reveals significantly low user awareness about mediation and its potential, reflected in the number of non-starters in each of the centres. Non-starters include those cases wherein one or both parties did not appear for mediation, which could be a reflection of parties to disputes having little faith in the mechanism, despite there being sufficient evidence reflecting cost and time saving potential of mediation.

3. CONCLUSION AND THE WAY FORWARD

After an initial review of court annexed mediation in India, specifically at the Delhi High Court and the Bangalore mediation centres (as presented in this Interim Report), the need for structured and concrete reforms is patently clear. While the amendment to Section 89 of the CPC was a firm step towards institutionalising ADR practices, including mediation, the empirical data certain difficulties and impediments to the acceptability and integration of mediation with the civil justice dispensation framework, which must be suitably addressed.

A. Way Forward Strategy

Following the study and analysis conducted in the present Interim Report, two further tasks remain, which will lead to our Final Report. These have been discussed hereinafter:

1. Additional empirical research

While the data analysed in the preceding chapter focuses on the mediation centres at Bangalore and Delhi, similar data is awaited from the mediation centres at Allahabad and Chennai. Furthermore, we will be undertaking personal interviews and group discussions with mediators and administrators at the Delhi and Bangalore mediation centres. The interviews will involve queries for determining the qualitative state of the mediation frameworks implemented in Delhi and Bangalore. With a comprehensive quantitative and qualitative review of mediation frameworks in the mediation centres at Delhi, Bangalore, Chennai and Allahabad, the Final Report will present an accurate and succinct picture of the evolution of court annexed mediation at these centres between 2011 and 2015.

2. Discussion with stakeholders

The process of policy reform benefits significantly when conducted in collaboration with the concerned stakeholders. It instils greater diversity and insight to policy perspectives and recommendations, as well as simplifies the implementation of such reformatory steps by bringing on board the various stakeholders. To further this collaborative process, after the dissemination of this Report, as well as the collation of the remaining empirical data, we will be conducting a round table discussion to generate discussion and debate on our findings, as well as on possible solutions to alleviating the situation of court annexed mediation in India, with the concerned stakeholders. The exercise will not merely be an academic discourse; inputs and suggestions that are put forward will be incorporated in the recommendations for reforms, both regulatory and institutional, made to the Department of Justice.

B. Recommendations on Regulatory Framework

Different jurisdictions have grappled with and adopted multitude of ideas regarding regulation of mediation. These have been broadly classified into four main types:[192]

(i) *Market Contract Regulation* – With little oversight from external regulators, this framework ensures quality of mediator standards through the market forces of demand and supply. Underqualified or incompetent mediators will find no demand and as such their supply is constricted. Most jurisdictions without a formal legislative framework, like the United Kingdom and Singapore, have forged mediation frameworks on this self-regulatory mechanism.

(ii) *Private Regulators* – As the name suggests, this framework prefers private bodies and institutions to regulate mediation practice, rather than a state regulator. The main justification for this model is that such private players are an intricate part of the mediation framework within the country, and as such offer better regulation with knowledge of what the practice requires. Countries like the United Kingdom have numerous private institutions regulating mediators affiliated to them to ensure quality and competence in practice.

(iii) *Formal Regulation without Legislation(s)* – Without the existence of an overarching legislation, this framework is well established in federal structures like that of the United States of America. It allows states to have a mandatory framework in place, while taking into consideration local conditions.

(iv) *Formal Regulation through Legislation* – To ensure uniformity and consistency in certain basic standards, it may be appropriate to enact overarching legislations. This framework has become commonplace in several countries in Europe.[193]

The present study, as discussed in the preface, is aimed at enhancing mediation framework in India in context of court annexed mediations. In pursuit of this, it is imperative that a comprehensive and viable regulatory framework for mediation should be in place. The four broad parameters discussed in the preceding chapters of this Interim Report, will have to be addressed by the reforms proposed in our Final Report by, *inter alia*, addressing the following questions:

1. Role of Referral Judges

(i) What reforms within the judiciary can improve the sensitivity and acceptance of mediation as an integral mechanism for dispute resolution and justice dispensation?

[192] Nadia Alexander, 'Mediation and the Art of Regulation', 8 Queensland U. Tech. L. & Just. J. 1 2008.
[193] *Id.*

(ii) Whether issuing practice directions, or mandating regulations is better suited for enhancing the knowledge of referral judges, thereby positively impacting the referral rates to mediation?

2. Training and Accreditation of Mediators

(i) With respect to mediator training and accreditation, is it better to allow states to formulate their own respective training standards (as in the United States), or does a centralised training framework offer a more pragmatic approach (as in Australia)?

(ii) For determining training standards, either centrally or in a decentralised manner, should accreditation be left to private bodies, or be conducted under the auspices of the state high court, or through an additional governmental entity?

3. Infrastructural Development and Administration

(i) Given the evident lack of infrastructural facilities, should a greater percentage of the state judiciary's budget be allocated for improving the same?

(ii) As discussed hereinabove, simply augmenting infrastructure is not a solution, as is evident from the data made available by the DMC. What additional reforms, at an institutional level, must be effectuated to bolster better infrastructure?

(iii) Should the mediation rules effectuated by each state, or practice guidelines of the respective mediation centres, mandate a minimum number of hours per mediator, to ensure a better allocation of cases referred to mediation?

4. User Awareness

(i) Is mandatory mediation a feasible option, as has been read into Section 89 by the Supreme Court in *Afcons*?

(ii) In the alternative, what measures can courts adopt to enhance awareness, as well as genuine usage of mediation as a dispute resolution mechanism?

(iii) Given the often lacking knowledge of ADR mechanisms, including mediation, is it plausible to government to initiate state wide campaigns in collaboration with the respective legal departments, for public rallies and programmes to generate awareness?

(iv) To what extent can print, social and mass media be utilised in enhancing user awareness?

5. Pre-litigation mediation

(i) Whether pre-litigation mediation should be made mandatory and if so, for what category of cases?

Whether pre-litigation should be statutorily provided for?

C. Codification of Mediation Framework

From the comparative study of jurisdictions conducted and presented in this Interim Report, it is evident that no standard regulatory framework has been envisioned anywhere. Most jurisdictions operate on hybrid regulatory frameworks involving some form of codification. Keeping that in mind, the Final Report, and the recommendations to be made therein, will explore the prospect of codifying court annexed mediation in a better manner, by enacting a legislation for institutionalising mediation and reforming the beleaguered provisions under the existing Section 89 of the Civil Procedure Code. It will also explore at length, the need, viability, and scope and ambit of such a legislation, determining areas which must be addressed by it to ensure uniformity and sustainability in the court annexed mediation frameworks across India, as well as making it a viable profession for individual mediators.

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