# Integrating Mediation: A Holistic to Administration of Justice

*Laila T. Ollapally*[*]

*Abstract*

Justice is an evolving concept. Undoubtedly mediation is a dispute resolution mechanism that has come to stay in the Indian legal system. Institutionalizing mediation and effectively integrating it into our system of justice has become a priority. This paper focuses on how time has come for mediation to be an integral part of our system of justice, steps already taken in India to integrate mediation, inter play of Court annexed and private mediation, a necessary prerequisite and lastly way forward.

## Introduction

Over time, the search for justice evolved and led to 'trial by evidence', the adversarial/ adjudicative model. Sophisticated and complex mechanisms have been established to determine the singular truth. Today, with globalisation and increasing awareness to differing perspectives, where truth and reconciliation has found its place as an effective method to heal years of gross injustice, where maintaining relationship is a priority, truth is not the only value. It is increasingly important for practitioners of dispute resolution to expand their tool kit and become familiar with both adjudicative and non-adjudicative processes (especially mediation).

World over there is a growing recognition that a legal system acts in furtherance of justice when it leads its litigants to the most appropriate process for the problem at hand. If parties do not have a choice, there is over reliance on, and therefore inappropriate and indiscriminate use of the available process (namely, adversarial process). With 30 million cases pending in the Courts in India, it is critical to ask if this is a malady that resulted from indiscriminate and excessive use of adjudication.

* Mediator, Centre for Advanced Mediation Practice, Bengaluru.

As Abraham Maslow said, if the only tool you have is a hammer, everything looks like a nail.

In India, mediation was introduced into the legal system in 2002 through Section 89 and Order 10, Rule 1A of the Code of Civil Procedure, 1908 (**"CPC"**). This is fast proving to be a boon to many litigants. Where sincere efforts have been made to set up mediation centres; these are spaces of peaceful settlements and reconciliation, heart-warming stories of effective resolutions, family reunions and rivals turning collaborators, restoration of business relationships and amicable separation of spouses with minimal anguish for their children.

Professor Lon Fuller defined adjudication as 'a social process of decision-making which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favour.' While defining mediation he refers to, "the central quality of mediation, namely, its capacity to reorient the parties to each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship; a perception that will redirect their attitudes and dispositions to one another."

The justice in mediation can be best illustrated through a case mediated. From the year 1998, five brothers were neck-deep in litigation relating to their company and other properties. Cases were pending for over a decade in several Courts, including at the Company Law Board. In 2008, they stumbled upon mediation, an alternative to litigation, to resolve their long-drawn disputes. The mediation process involved communication and discussion in the presence of a neutral, impartial third party. The parties, along with the mediator, their lawyers and key managerial and technical personnel discussed, negotiated and settled eight cases in a span of 40 hours. When they presented their memorandum of settlement to the Chairman of the Company Law Board, much relieved, he remarked that this dispute occupied the most space in his record room.

Can the definition of justice not include happier families, better business collaborations and human beings who move beyond the shackles of dispute and bitter battles?

This article is based on the author's experience as a mediator and coordinator at the Bangalore Mediation Centre ("BMC"). She has also audited the Court-annexed mediation programs in Kochi, Chennai and Chandigarh. Besides, the author is the founder of Centre for Advanced Mediation Practice ("CAMP") – an institution dedicated to providing private mediation services, researching the process

of mediation and developing an ecosystem to promote and sustain mediation in India.

**Time has come for Mediation to be an Integral part of our system of Justice**

In 1906, Professor Roscoe Pound, Dean of Harvard Law School, predicted that if the legal system in the United States was dominated by the adversarial system, there was bound to be doom. Although disregarded then, his predictions came true and in April 1976, The Pound Conference, a seminal event, was organized in his memory to discuss dispute resolution systems. Professor Frank Sander of Harvard Law School proposed the concept of mediation and "multi-door Courthouses" that provided procedural choices to disputants.

The success of mediation in America and some other countries led to the Global Pound Conference ("GPC") series. Since 2016, International Mediation Institute ("IMI") has been conducting a series of conferences, to discuss world-wide, the effectiveness of the existing dispute resolution processes. The conference is in a unique electronic interactive format; conducted in 40 cities, covering 31 countries. The stakeholders interviewed are lawyers, arbitrators, judges, mediators, conciliators, academicians and parties (litigants). Certain core questions are asked, that enable collection of actionable data on how to better meet the expectations of litigants, locally and transnationally.

In the GPC series that was held in Chandigarh in May 2017, the findings are as follows:

1) Parties rank non-adjudicative processes as the most effective commercial dispute resolution process. Even the overall opinion of all the stakeholders show that combining non-adjudicative and adjudicative processes is the most effective commercial dispute resolution process.

2) For 50% of the parties, insufficient knowledge of options available to resolve disputes is the main challenge in resolving commercial disputes effectively. The same percentage of parties feel that the lawyers' advice has the most influence while choosing a dispute resolution process. 56% of the stakeholders believe that the lawyers' familiarity with a process is the most important factor in choosing a dispute resolution process.

3) While the most dominant expectation by parties from their lawyer is for the lawyer to work in collaboration with them to navigate the dispute resolution process, lawyers believe that their parties majorly want them to advocate on their behalf.

4) For parties, efficiency (time/cost) of the process is the most dominant factor in choosing a dispute resolution process.

Besides the GPC findings, there are several other arguments for incorporating mediation within the Indian dispute resolution framework. India is aspiring to be a hub for dispute resolution. In this context, arbitration and mediation necessarily have to complement each other. Sophisticated parties are increasingly looking for an array of dispute resolution processes to resolve their disputes; a one-size-fits-all approach to resolving disputes is becoming redundant in light of the "stepped" ADR clauses in commercial contracts that require good faith efforts at mediation as a precondition to initiating arbitration or litigation. Even in so-called hard-core arbitration contexts, such as investor-state disputes, the International Bar Association has prescribed rules for mediation.[1]

Internationally it is noticed that cases settle through mediation even after the commencement of arbitration. A significant portion of the parties choosing arbitration realise that other modes of dispute resolution are better tailored to their circumstances. It works the other way too. It is sometimes found that parties who initially prefer mediation later discover that the only way to reach a global settlement is to have one or more intractable issues adjudicated. Arbitration is generally preferred over litigation in these circumstances. In this way, mediation and arbitration can nourish the market for each other. Parties are more likely to choose a seat for dispute resolution where they can be assured of high quality mediation services in tandem with arbitration.

Section 30 of the Arbitration and Conciliation Act, 1996 is an important provision of the Indian law that combines the processes of arbitration and mediation, and needs much more attention regarding its interpretation and use.

**Steps taken to Integrate Mediation into the System of Justice in India**

The amendment to the CPC in 2002 led to efforts to set up Court-annexed mediation centres pan India. To kick off this initiative of Court-run mediation programmes, the Supreme Court of India constituted the Mediation and Conciliation Project Committee ("**MCPC**"). The role of the MCPC was to increase mediation awareness and support the growth and development of these centres. Currently, Bangalore, Delhi, Chennai, Kochi, Chandigarh and Allahabad are taking the lead as Court-annexed mediation centres in the country.

1 International Bar Association Mediation Committee, 'IBA Rules for Investor-State Mediation' (2012). *available at*: www.ibanet.org.

**Bangalore Mediation Centre (BMC) - A case study for Institutionalisation of Mediation in Indian Courts.**

Set up in 2007, BMC is a voluntary, Court-annexed mediation program of the Karnataka High Court, India. Cases are referred to BMC for mediation from the Courts in Bangalore and include referrals from the Supreme Court of India. From 2007 till 2015, about 51,000 cases have been referred to BMC, of which more than 39,000 cases have been mediated and approximately 65% of these have been settled. Many factors came together for the success of BMC:

A. The statutory backing for mediation at BMC

1. *Section 89 and Order 10, Rule 1A of the CPC*: Vide amendment in 2002, Section 89 of the CPC states, "*where it appears to the Court that there exist elements of a settlement*" in a civil dispute, the Judge may refer the case to any one of the alternative forms of dispute resolution - Arbitration, Conciliation, Mediation or Judicial Settlement/LokAdalat. After pleadings are completed, Order 10, Rule 1-A mandates Courts to direct parties to opt for any of the ADR processes as provided under Section 89 of the CPC.

2. *Notification No. LAW 291 LAC 2005*: Passed by the High Court of Karnataka which, among other things, prescribes procedures for Courts to direct parties to opt for alternative modes of settlement. It also requires all public-sector undertakings and all public authorities to nominate a person or group of persons, authorised to take a decision regarding the mode of ADR it proposes to opt. The Court shall provide guidance to the concerned parties to exercise their option for ADR while giving the direction.

   This notification provides that arbitration may be recommended '*when there is no relationship to be preserved*'. When there is a relationship to be preserved, conciliation or mediation may be preferred. While referring cases, even if the parties do not agree, the Court shall refer the matter to conciliation or mediation. In case the parties still do not comply, the Court may fix the matter for a hearing on the question of making a reference either to conciliation or mediation.

3. *Notification No. LAW 292 LAC 2005*: Passed by the High Court of Karnataka which among others provides for appointment of mediators, qualifications and disqualifications, creation of a panel of mediators, confidentiality, disclosure and inadmissibility of information, immunity, enforceability and ethics in mediation.

4. The law in family Courts mandates attempts at 'reconciliation' between the husband and wife in divorce petitions. However, the efforts made for reconciliation have not been effective and the judges in the family Courts at Bangalore prefer to comply with this mandatory requirement by, instead, referring them to 'mediation'. The location of BMC in the same building as the family Courts in Bangalore enables easier access to mediation services.

B. Supreme Court of India on section 89 of the CPC

Supreme Court of India interpreted Section 89 of the CPC in its judgment in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*[2] The Court held "*Civil Court should invariably refer cases to ADR process. Where the case is unsuited for reference to any of the ADR process, the Court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings to consider recourse to an ADR process under section 89 of the Code is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be a reference to ADR process. In all other cases reference to ADR Process is a must".*

The judgment lists the category of cases 'suitable' for mediation and the category of cases to be excluded from mediation. Major civil disputes are in the category found 'suitable' for ADR.

Through a process of elimination, among the ADR processes mentioned in Section 89 of the CPC the Court concluded that for the majority of cases, mediation is to be the mode of ADR.

The Court gave the following reasoning for its judgment: The Arbitration and Conciliation Act, 1996, govern both arbitration and conciliation. This law requires mutual consent of the parties for a reference. Unless the parties agree, the Court cannot refer a case for arbitration or conciliation. If there is no consensus between the parties on the choice of an ADR option, then among the remaining ADR processes, the Court shall refer the case for mediation unless a) it is possible to request another Judge to help the parties to settle the case through judicial settlement or b) it is an uncomplicated case which could be settled by applying clear cut principles of law and therefore can be referred to Lok Adalat.

As most cases are complicated, they are not suitable for Lok Adalat. Since judges in India are already overburdened, they may not be able to spare time

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

for a judicial settlement. It can therefore be concluded that whenever there is no agreement between the parties for arbitration or conciliation, they have to be mandatorily referred to mediation.

C. A Champion Chief Justice implemented the mandate of the Law

The then Chief Justice of the Karnataka High Court, Chief Justice Cyriac Joseph, passionately believed in mediation and founded BMC. He brought experts from institutions like ISDLS and FSRI in California to set up the program and to monitor progress through a sophisticated system of data collection. Lawyers were trained to be mediators. He garnered the support of all the other judges and the bar for this new process.

At the behest of the Chief Justice, the government sanctioned funds to set up an impressive institution. BMC has good infrastructure with a large building comprising 18 mediation rooms, two large waiting halls and play area for children, among other amenities. The ambience has been created and the environment made comfortable for mediation. Mediators are served, a hot lunch, free of cost, when they come for mediation. Sufficient staff has been provided by the High Court to maintain efficiency of the mediation services.

This Chief Justice ensured the enactment of the two notifications, discussed earlier, to provide added impetus to mediation in the State.

D. Mediation when presented appropriately, found favour

An analysis of the data at BMC since 2007 is encouraging:

1) As of 2015, out of the 51,000 cases referred by the Judges for mediation under Section 89 of the CPC, 85% of the parties agreed to participate in mediation. 39,000 cases were mediated and 65% of them settled.

   Clearly parties are inclined to participate, once a reference is made.

2) The number of cases mediated at BMC over the years has progressively increased:

**Fig. 1**, based on data compiled by the BMC over the past eight years, shows how the number of cases mediated at the BMC has steadily increased since it was founded.

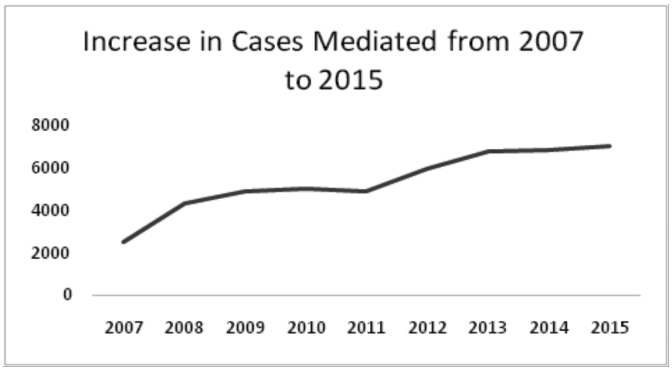


**Fig. 1**

3) Family Courts benefit immensely through Mediation. **Fig. 2** depicts the settlement rate of various disputes from the family Courts, which went for mediation and almost 80% of the contested divorce cases settled at mediation.

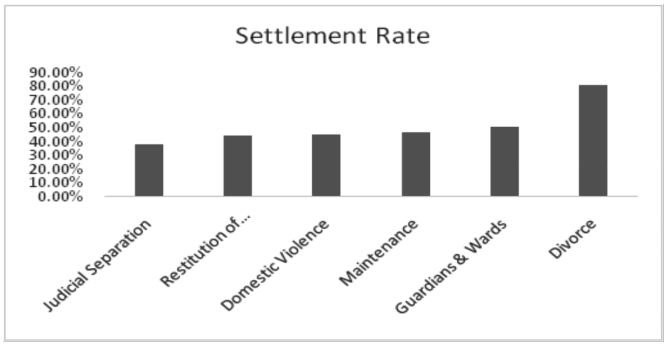


**Fig. 2**

**Fig. 3** depicts the number of cases mediated and settled across various commonly contended legal matters at the family Courts, including maintenance, divorce and child custody.

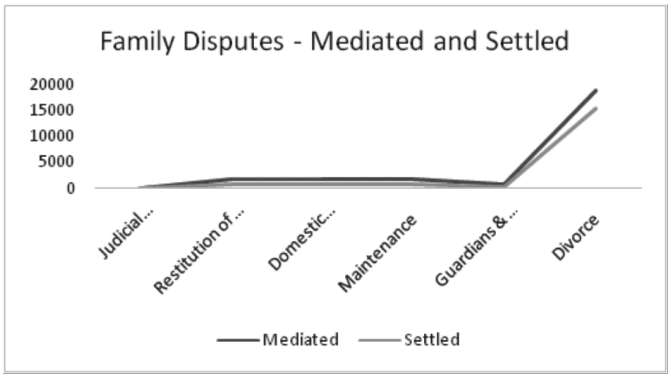


**Fig. 3**

A Judicial officer who took charge of the BMC was initially sceptical of what mediation could do. After a few months of observing the enthusiasm, joy and comfort of the litigants who participated in the process, in a discussion on mediation he passionately stated, "Mediation is not an alternative. It is an option that every Indian litigant is entitled to".

**Interplay of Court Annexed and Private Mediation: A Necessary Prerequisite**

When the ambit of mediation expands beyond the *pro bono* voluntary service in Court-annexed programs to the availability of private mediation, litigants benefit from a wider choice of mediators and mediation services. Court-annexed mediation programs are unable to provide a choice of mediator to the parties. The freedom to choose a mediator, in private mediation, enhances the 'voluntariness' of mediation and increases the acceptability of the process.

Court-annexed mediation is an ideal platform for mediators to transition into the world of private mediation. Mediators can improve their skills and earn a reputation in the Court-annexed program. They are kept motivated by the hope of a promising career in mediation later. When they leave for greener pastures, they create space for new mediators to enrol in the Court-annexed programs. As a result, the Court-annexed programs are robust and become incubation centres for mediators of excellence.

**Centre For Advanced Mediation Practice (CAMP) - A case study for Private Mediation**

CAMP was set up in Bangalore in 2015. It has a panel of mediators and provides private mediation services, following its own institutional rules. Wide variety of disputes are being mediated at CAMP- cross border, family, matrimonial, construction, property, transfer of business etc. Bangalore being a hub for start-up companies, founder disputes are mediated. Partnerships going wrong, oppression and mismanagement in companies, petitions for winding up a company when money is due, are some of the major commercial cases that have been mediated at CAMP.

Disputes pending in Courts are brought to CAMP when parties seek the ambience and specialisations available at CAMP. It creates a unique space for dispute resolution for those who stay away from Courts for several reasons. The need for confidentiality, resolving disputes without tarnishing reputation, the need for an efficient process and most importantly, the desire to resolve disputes without destroying relationships are some of the reasons that keep parties away from Courts, while they continue to

bear the burden of discord and conflict. Some examples of such cases mediated at CAMP are as follows:

Reputation Concerns: A start-up company came for mediation at CAMP, but did not want to use the word 'mediation' in their settlement agreement for restructuring the ownership pattern. They instead preferred to call it 'facilitated discussion'. Any hint of dispute could jeopardise their contracts with international parties. Confidentiality was paramount.

Aversion to Litigation: An eighteen-year-old dispute between a developer and an owner was brought to CAMP. The owner who was emotionally fragile had been refusing to resolve the conflict, because he wanted to avoid Courts.

Avoiding Litigation Backlash on Child: The parents of a disabled child could not agree on the terms of a family settlement that they wanted to draw up to secure the interest of their child. For them Court was a frightening option - further discord between the parents would aggravate the condition of the child.

The extensive ***convening and follow up*** practiced by skilled mediators in private institutions like CAMP enable a very high percentage of settlement. This is also the experience of skilled mediators internationally.

As a legislation is currently not available to provide enforceability to a settlement at mediation, parties have the option to:

1) Enter into a fresh contract.

2) File the settlement in Court for a decree, if the case has come from the Court.

3) In case of pre-litigation mediation, name the mediation process as a 'conciliation'.

The Supreme Court in *Afcons* judgment has held that mediation and conciliation are synonymous. The mediated settlement agreement is termed a 'conciliator's settlement agreement' which is equivalent to an arbitrator's award under sec 74 of the Arbitration and Conciliation Act, 1996.

CAMP has been creating an ecosystem for mediation in many ways, among others: (a) mediating cases; (b) training mediators; (c) training advocates for advocacy in mediation; (d) raising awareness of mediation in law schools and schools; (e) providing internships for law students (f) leadership training for judges and administrative staff of Court-annexed programs (g) awareness creation in the

community through seminars and conferences (h) working towards a standalone mediation legislation; and (i) research and writing on mediation to suit the Indian environment.

**Indian Stake Holders and their response to Mediation**

**The Indian Litigant**

It is most often a pleasure, at mediation, to see the 'Argumentative Indian' disputant once again claim her rightful place as the central figure to her dispute. She is able to quickly revert to the relationship her forefathers had had with the traditional village elder as the primary dispute resolver. She is comfortable, as the mediator is familiar with her culture, her language, and she is able to tell her story along with others she believes to be important to the dispute resolution process.

An experienced German lawyer who had observed mediations in Germany and mediated cases in the United States, on interning for two months at the BMC, and after observing mediations at Delhi and Chennai remarked, on a comparative basis the Indian society is much more receptive to mediation. According to her, once they understand the process, they can't wait to take matters into their hands; their enthusiasm and participation is unparalleled.

**Mediators**

At present, mediators at the Court-annexed mediation programs in India are mostly practicing advocates. They have been rendering their services on a voluntary and mostly *pro bono* basis (a minimal honorarium is paid). They set aside several hours of the week (time taken for a single mediation can range from two to 40 hours or more, depending on each case) to mediate cases.

In a general survey, most acknowledge that conducting mediations and facilitating a resolution to disputes gives them satisfaction of a spiritual nature. Many in our legal fraternity are thirsting to use their professional skills for peace building.

**Judges**

Judges are the most powerful influencers to lead parties to mediation. Experience has shown that Judges could be sceptical and apprehensive about mediation. However, those who have experienced the power of mediation through training or those who are naturally and intuitively inclined to peace building are the converts/ believers.

## Bar

A novice in the profession may be threatened by mediation. A veteran cannot see the justice in a system, which he misunderstands to be only a 'compromise'. A senior counsel, whose case was successfully resolved in mediation over a few sessions remarked, 'if cases resolve at mediation so fast, what is my pension plan?' These are the initial responses to mediation, faced by all countries when mediation is first introduced. An attorney who is familiar with advocacy in mediation (which is very different to advocacy in adjudication) recognises his major role in the success of mediation. The planning, preparing, convening and participation is a big part of the process and a major reason why the case resolves. These are opportunities for him to charge his client and in a short span make the money and provide quick and meaningful relief to his clients. Client satisfaction is a gateway to more work. They see the futility of imposing an adversarial process on parties who could otherwise find their own resolution to the dispute. They see the wisdom of a solution crafted by those who created, and are living, the problem. They experience the satisfaction of the creativity in mediation. They even see the financial benefits when their reputation spreads as advocates who help resolve disputes and bring about closure. Their time is freed to take newer cases. In one instance, upon completion of a mediation of a dispute, the lawyer of one of the parties remarked: "this is a silent revolution in our administration of justice".

## Legislation for Mediation in Other Jurisdictions

Many countries around the world have enacted legislations to promote mediation in the Courts and in private space. Some countries have both Court and private mediation. It is pertinent to note that private mediation is well used in all these countries and is progressively leading the movement of mediation. Examples of countries having enacted legislation promoting mediation:

## Italy

A new law in 2013 introduced an opt-out model in Italy as a pilot project, requiring mandatory participation in mediation for civil disputes under 13 subject heads. As per this legislation, parties and their lawyers, prior to initiating litigation, have to undergo a compulsory initial meeting with a mediator, after which they can decide to opt out of the process. The lawyers are obliged to inform their clients of pre-litigation dispute resolution options in writing. There are no Court-annexed mediation centres in Italy, resulting in several private mediation institutions operating in the country. A few of the private mediation institutions are run by the Italian Bar

Association, Italian Chambers of Commerce, International Chamber of Commerce, the ADR Group, and other private organisations and individuals who are registered as accredited mediation providers with the Italian Ministry of Justice. Participating in mediation has been incentivised in Italy as: (a) settlement (if applicable) is free of tax up to a limit of • 50,000; and (b) tax credit on the mediation fee paid, up to • 500 in case of a settlement and • 250 if there is no settlement, is available. The pilot project has clearly been showing results as Italy moved up 49 places in the World Bank *Ease of Doing Business Report* in 3 years. In 2013, Italy held the 160th spot and moved to the 111th spot in 2016.[3] It is pertinent to note that since 2016, ADR is a parameter in determining the rankings for *Ease of Doing Business.*

**United Kingdom**

The UK has several legislations that promote mediation. The Civil Procedure Rules is one of the legislations in the UK promoting domestic mediation in the country. The various legislations provide for confidentiality of the mediation process and enforceability of mediated settlement agreements. Court-annexed mediation programs are available at the county-court level, for smaller cases. There are several private organisations, such as CEDR, the ADR Group and others, besides individual mediators, who operate independently. Mediation in UK is regulated by a voluntary organisation – Council for Civil Mediation.

**Australia**

The Civil Disputes Resolution Act, 2011 requires all parties in a dispute to file a 'Genuine Steps Statement' which specifies the steps taken towards a genuine and sincere attempt to resolve the dispute, including through ADR. As per the statute, lawyers are required to inform the parties and assist them to file the same. The Judge may take account of failure of compliance of this requirement and award costs. Court-annexed mediation is available and private mediation is the well-used option. Private organisations such as the Australian Mediation Association, The Resolution Institute, Australian Bar Association and other private organisations and individuals operate in the country. Statutes exist to regulate mediation organisations and mediators.

3 Andrea Orlando, Italian Minister of Justice at the World Bank Conference, Washington D.C. (April 22, 2016). 'Reform of the Italian Civil Justice System – Recent Measures and Achievements'. *Available at* : http://pubdocs.worldbank.org/en/945411461601789807/Justice-Reformand Results2016.pdf. (Last accessed: June 22, 2017).

**United States of America**

Mediation in the US is governed by individual State's mediation statute. In an attempt to ensure uniformity in mediation regulation the Federal Uniform Mediation Act ("**UMA**") was introduced in 2001, later revised in 2003. The UMA has been enacted in 15 States.[4] The mediation market in the US is fairly advanced with several Court-connected programs and a plethora of organisations providing high quality private mediation services such as JAMS, CPR, American Arbitration Association and several other private institutions and individuals.

**Brazil**

The Brazilian Mediation Law, 2015 made enforcing contracts easier. If there is a mediation clause provided for in a contract, the parties shall attend the first mediation meeting. If a dispute is settled through mediation, prior to defendant's summoning, court fees shall not be due. This law provides for judicial mediation, out of court mediation, as well as settlement of disputes involving government and public entities. Private organisations such as JAMS, CPR and others are operating in Brazil.

National Civil Procedure Code (NCPC) encourages judges, lawyers, public defenders and members of public prosecutor's office to encourage ADR such as mediation and conciliation.

**Singapore**

Mediation in Singapore is governed by the Community Mediation Centres Act (CMCA), 1997, Rules of Court (Amendment) Rules, 2017 and Mediation Act, 2016. The CMCA established and governs the Court-annexed programs (Primary Dispute Resolution Centres). Support is given to private mediation in the following ways: (i) establishment of statutory bodies like Singapore Mediation Centre; (ii) encouraging independent organisations like Singapore International Mediation Centre, Harmony Mediation Group LLP and others; (iii) imposing costs on parties that do not make reasonable efforts at ADR; and (iv) providing tax and visa exemptions to non-resident mediators.

**Way Forward**

The following are suggestions for better integration of mediation into our system of Justice:

4 'Legislative Fact Sheet – Mediation Act'.*Uniform Law Commission – The National Conference of Commissioners in Uniform State Laws*. *Available at*: http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act. (Last accessed: June 28, 2017).

**Court-annexed Programs**

On studying various mediation centres in the country, some conclusions can be drawn as prerequisites to build mediation centres as institutions of excellence, for the future.

1. Strengthen collaboration between the Bench and the Bar to create institutions of excellence for mediation.

   Leadership of the Court-annexed mediation programs entirely by Judges will result in the mediation programs modelling themselves, naturally and intuitively, along adjudicatory lines. To experientially separate the processes of mediation from adjudication, it is important that administrators at mediation centres include mediators who are non-judges. Statutory provisions to include such non-judges on the administrative panels of Court-annexed mediation centres would ensure that the authority of such non-judge administrators would not erode over time.

2. Select mediators with passion and nurture their commitment

   A new process is being established in the society. Each mediator has to be carefully selected so that they are potential leaders, brand ambassadors and earnest service providers.

   At BMC, one mediator, over the last six years, singly mediated 1934 cases and resolved 72% of them. These settlements are final and non-appealable. Currently it is free for the parties. It comes at minimal cost for the administration of justice. These are mediators who work tirelessly and relentlessly, earning only an honorarium. It is time to ask if these heroes are being adequately rewarded. Are we sustaining the motivation of our mediators?

3. Create a physical space that honours the practice

   Mind-sets are being changed at mediation. The space must be conducive for active listening, sharing confidential information and making decisions in a comfortable and calm environment. Appropriate infrastructure lends credibility to the process in the minds of the litigant, especially when the judge has put pressure on them to participate

4. Sufficient funds

   The liberal budgetary allocation for mediation by 13$^{th}$ Finance Planning Commission is commendable. However, the allocation by the Central

Government was under the head 'mediation awareness'. This prevented expenditure for other important uses. There was a mismatch in the allocation and the actual need. The 14th Finance Planning Commission further aggravated the problem. The Centre changed its approach to the budgetary allocation and urged the State Governments to use the additional fiscal space provided by the commission in the tax devolution to meet expenses under fixed heads for mediation. Unfortunately, since 2015, the State Governments are unable to release sufficient funds, leaving mediation programs starved of funds. Funds are urgently needed for better mediation rooms, payment to mediators who have rendered *pro bono* service for many years, on-going training for mediators, training for judges to refer suitable cases to mediation, training for staff to maintain the spirit of mediation and others.

**Private Mediation**

Need for Standalone Legislation for Mediation in India

Legislation is required to enable the Indian litigant to confidently access mediation in the private sector.

Currently, few statutes in India govern mediation. The Companies (Mediation and Conciliation) Rules, 2016, for example, governs mediation of disputes arising from the Companies Act, 2013. Section 442 of the Companies Act 2013 requires setting up of the Mediation & Conciliation Panel at the National Company Law Tribunals ("**NCLT**"). The Real Estate (Regulation & Development) Act, 2016 (section 32-g) requires amicable dispute resolution between the promoter and the buyers. The Consumer Protection Bill ("**Bill**") has already received cabinet assent and is pending approval by the Rajya Sabha. Chapter V of the Bill deals with detailed provisions for setting up of Consumer Cells at the District Commissions and the State Commissions. For mediation to be embraced whole heartedly, these legislations need to allow parties a choice of private or Court-annexed mediation.

There is an urgent need for an overarching mediation legislation that consistently governs all types of mediation in the country. A standalone legislation can address enforceability of settlement agreements, accreditation and standards of practice, confidentiality, privilege, conflict of interests, voluntariness, self-determination and other ethical concerns that would inevitably arise from mediation practice, thereby rendering increased legitimacy for mediation. The drafting of such legislation needs to be done with utmost concern and care, without impacting the creativity and flexibility of the process.

**Conclusion**

As litigation has become more complex and time-consuming, as parties are looking for creative and quicker resolutions, as lawyers become more familiar with mediation and negotiation, and as underfinanced Courts are struggling to cope, demand for mediation will rapidly increase. We have no choice. Mediation has to be integrated into our system of justice by strengthening our Court-annexed and private mediation services.

At this juncture, I quote Derek C. Bock, former President of Harvard University:

> "*Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. These may be the most creative social experiments of our time*".

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