CHAPTER IV

MEDIATION

The concept of mediation is in fact an age old concept and no way foreign to our Country. It is in fact in vogue as a traditional Indian dispassionate, elderly and out of Court dispute resolution process. Mediation involves a confidential meeting at any time during the law suit between the parties, their legal representatives and a neutral-third party (who - whether former judge or lawyer or any trained expert in the field). The mediator is a trained facilitator at conflict resolution. The mediation is a negotiation carried out between the parties with the assistance of the neutral-third party and thus it is only facilitative process. The mediator often allows the parties to voice their positions in a joint session before meeting privately to discuss settlement opportunities. Frequently, the mediator shares with both parties or privately with each party an informal prediction of the outcome of the litigation, results in the parties gaining a better understanding of their respective positions and the likely outcome if they proceed with litigation.

Disputes are inevitable part of human relationships. Effective method/methods for resolution of disputes prevent the relations from falling apart. Mediation is one such method of resolving dispute which is being used by societies from time immemorial. The importance or relevance of the method is highlighted due to the fact that mediation as a method of dispute resolution values human relations, human feelings and their decisions in respect of the conflict over the legal process and positions.

According to the concept of participatory justice, disputes belong to the disputants and they should control how their conflicts are resolved. A primary goal of ADR is to provide greater self-determination to the parties
relative to trial. Apart from this conception which was acknowledged, lately, by the western countries, a new movement was evolving in the courts - one that was focused on promoting ADR for efficiency-related institutional reasons. After World War II, the laissez-faire judicial system whereby judges managed their assignment without much supervision from other judges was heavily scrutinized. Critics started arguing that the courts are needed to adopt a more business-like approach to using public resources, including judge time. Decreasing court budgets combined with increased case-filing sparked the court management revolution. Courts began to experiment with different approaches to preparing cases for trial and expediting resolution; the goal for many courts was to save time and money. To that end, many courts adopted mandatory mediation and non-binding arbitration in an effort to reduce time required to resolve civil cases involving smaller amounts in controversy. By removing these cases from judicial dockets, they expected to make judges more available for difficult cases. However, beneath the surface, these purported institutional goals were simply a socially desirable way of protecting the true motivation for ADR in the courts.

Initially, the voluntary mediation programs have not been well attended because of various reasons like lack of awareness among the parties regarding benefits of mediation, parties prefer to choose familiar processes, when angry people tend to choose adversarial rather than co-operative processes, hostility of the lawyers, parties do not want to look weak by being the first to suggest mediation. But now the situation has changed, due to court-annexed mediation, there is increased public awareness regarding the benefits of mediation, understanding and acceptance of mediation and other ADR methods by the lawyers and judges and increased availability of expert dispute resolution professional. The most significant change in the perception of the people brought by court’s adoption of ADR is that
litigation is not the only (and the appropriate method) to resolve disputes. This is the essence of the multi-door court house approach. This view of appropriate dispute resolution method has been accepted by the Supreme Court of India in various cases like Salem Bar II case. Another significant contribution of growth of ADR is the beginnings of a revolutionary change in the court’s conception of its role, from that of a passive provider of trials to an active, problem solving case manager. Courts are beginning to embrace the concept of litigation as a last resort, rather than a first resort, at least for some types of cases.

The institutionalization of mediation in the courts has led to far greater use of mediation, throughout the world. The conception of the courts role has moved increasingly in the direction of the multi-door court house envisioned by Frank Sander in 1976 at the Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (commonly referred to as the Pound Conference). Other benefits of institutionalization include increased public awareness of alternative to litigation and growing sophistication regarding appropriate alternative process among lawyers and judges. Parties can choose the dispute resolution process that best meets their interests. There is evidence that ADR options can lead to more efficient use of resources by the courts, saving of time and money by litigants, and reduced level of subsequent litigation. There is also evidence that ADR options have increased the public trust and confidence in the courts.

But while the growth in the court’s use of ADR appeals to have roots in the past, serious concerns are being raised, chiefly around courts use of mediation. The concerns stem from the court’s robust and rapid embrace of mediation without sufficient attention to and clarity about the goals and quality of the mediation process adopted. While designing any court-annexed mediation program, one has to be very careful about the core values
and goals of mediation. Firstly, the core value that mediation as an alternative offers litigants is the opportunity to have an experience with conflict that is only not alienating, but actually enhances human connections. This core value of mediation comes from the alternative it promises: voice and choice of all participants. Secondly, mediation as an alternative does not lose sight of settlement; it is not, however, the core value. While settlement is often important to litigants in dispute, it is not what is most important to litigants. What is most important is the quality of the interaction at the mediation, including being respected, being understood, being able to face the other person and talk or to have questions addressed, and the responsiveness of the other party.

Getting one or both sides to compromise on their perceived positions or on their perceived amounts of damages is what mediation has come to mean and the way that mediation has come to be practiced in many court settings. Instead of providing litigants the originally intended alternative process of mediation, the court’s mediations provide for a process which is not trial. Critics are beginning to raise the question of whether court-annexed mediation has lost sight of the core values of mediation and simply become absorbed into the court’s traditional methods of adversarial dispute resolution.

Apart from the above discussed difference and correlation between the concepts, if we consider further it appears that, arbitration is more privatised than judicial settlement including Lok-Adalat and conciliation is more privatised than arbitration. As judicial settlement including Lok Adalat in so far as they relate to the matters of Permanent Lok Adalat concept, like in arbitration it involves species of adjudication, the committee or authority concerned like the arbitrator render their verdicts and impose them inspite of dissent of the parties, whereas in conciliation,
the conciliator even expressed any decision, it is no way binding on the parties. Coming to mediation the mediator can't express decision of his own to impress the parties. The significant difference in the roles being played by conciliators and mediators is that, in mediation process the mediator generally shares opinions in confidence by acting like a mirror to reflect only the reality; where as in conciliation process, the conciliator by keeping in view the rights and obligations of the parties and merits and de-merits of the dispute as a fact finder and nonbinding decision maker, can make non-binding recommendations concerning the area of dispute for its settlement and in that process no-doubt he must act fairly and honestly and to the confidence of both sides. In mediation process though the range of remedies available are unlimited, the role of mediator is only participatory in nature and thus he cannot recommend or impress his opinion on either of the parties since the parties find their own way of forming opinion in reaching to terms for settlement of dispute to the acceptance of both sides.

Mediation has a long history and has roots in many cultures. However, its form keeps changing over time and contains diverse cultures or intellectual traditions. Originally, mediation presented a forum through which members of the community achieve reconciliation, empowerment, healing, peace and ultimately, justice. This ideal has been long diluted and eventually buried as mediation became subsumed within the adversarial judicial system and corporate-driven dispute resolution process.

In India, Mediation, no doubt, is the idea whose time has come. Mediation as a method of dispute resolution is being accepted by the Asian community due to its various positive attributes which distinguishes it from other methods of dispute resolution like litigation and arbitration. Inspite of this, the researcher is of the view that the quest for a best model of mediation is still on. The issues agitating the minds of most of the judicial reformers
and policy makers is, not what is mediation or why it is necessary but how it can be best institutionalized to supplement the existing justice delivery system. In this chapter, the researcher intends to empirically analyze the current mediation practice in India. For the purpose of the study, researcher has visited and interviewed various stake-holders in the mediation procedure like judges, mediators, lawyers, parties indulging in mediation process. Researcher also intends to analyze the current attempt to institutionalize mediation in India and also critically evaluate the working of Mediation Centres in India, especially at Delhi. In the first part of the chapter, the researcher will present a critical analysis of various laws governing institutionalization of mediation and in the second part, the researcher will present the report of the field study.

4.1 DEFINITION OF MEDIATION

Mediation is facilitated negotiation. It is a process by which a neutral third party, the mediator assists disputing parties in reaching a mutually satisfactory resolution. The term ‘mediate’ is derived from the Latin “mediare”, which means “to be in the middle”. Certainly the mediator finds himself in the middle of a dispute. But mediation involves much more than placement of the mediator. A variety of definitions for the term “mediation” exist. While these definitions differ, and are subject to debate, most people agree on the purpose of the process: to assist people in reaching a voluntary resolution of a dispute or conflict. Definitional debates primarily surround the specifics of how the assistance is actually provided.157

Some of the more basic definitions of mediation include:158

- The broad term describing the intervention of third parties in the dispute resolution process.

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158 Id.
- A process in which a third party facilitates and coordinates the negotiation between the disputing parties.
- The intervention into a dispute or the negotiation process by an acceptable impartial and neutral third party who has no authoritative decision-making power. This individual will assist disputing parties in voluntarily reaching their own neutral acceptable settlement of the issues in dispute.
- A voluntary process where an impartial mediator actively assists disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions.
- A forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.
- A process in which a neutral third party assists the parties in developing and exploring their underlying interests (in addition to their legal positions), promotes the development of options and assists the parties toward settling the case through negotiation.

The number and variety of definitions demonstrate that the mediation process is a flexible one. Although there is a structure to the mediation process, it is rigid, but rather fluid in nature. Over the last few years, especially within the ADR field, very few items spark more controversy than the definition of mediation.

The term “mediation” has tended to be used interchangeably with “conciliation”, though “mediation” has become the preferred term. Sometimes mediation is understood to involve a process in which the mediator is more pro-active and evaluative than in conciliation; but
sometimes the reverse usage is employed. There is no national or international consistency of usage of these terms.\footnote{Henry J. Brown & Arthur L. Marriott Q.C., ADR PRINCIPLES AND PRACTICE, 2\textsuperscript{nd} ed., 1999, Sweet & Maxwell, London, p.127}

Unlike most third party “neutrals” – notably the binding arbitrator and the judge – the mediator does not issue a decision that the parties must obey. Although, sometimes the parties are compelled to participate in mediation and may be pressured towards settlement, any party nonetheless may choose not to settle and may pursue other remedies.

There are also concerns that the term “mediation” continues to be used in statutes for processes that are primarily predictive in nature, resembling informal non-binding arbitration. Perhaps in reaction to this concern, several new statutes have attempted to define mediation process as a negotiation-assisting process, for example, in Florida.\footnote{Keating & Shaw, “Compared to What?: Defining Terms in Court Related ADR Programmes”, 6 Negotiation J. (1991), p.217} Other statutes have emphasized a non-adversarial discussion. One commentator, Professor Judith Resnik suggests that the resulting managerial role for judges reduces their effectiveness as adjudicators.\footnote{Resnik, “Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication,” 10 Ohio St. J. on Disp. Resol. (1995), p.211}

The growth of civil case mediation and dispute resolution has been prompted in large measure by concerns about delay, the costs to parties and the costs of judicial processing of disputes. Increasingly, discussions on dispute resolution are integrated with examination of case management practices by judges and courts.

4.2 MEDIATION - AS METHOD OF DISPUTE RESOLUTION

In the field of resolving legal controversies, mediation offers an informal method of dispute resolution, in which a neutral third party, the mediator, attempts to assist the parties in finding resolution to their problem.
through the mediation process. Although mediation has no legal standing per se, agreements between the parties can (usually with assistance from legal counsel) be committed to writing and signed, thus rendering a legally binding contract.

Mediation contains three aspects; feature, values and objectives. The three aspects, although different, can and do at times overlap in their meaning and use. There are a number of values of mediation including non-adversarialism, responsiveness and self-determination and party autonomy.

Each party, mediator and mediation process has values that can be attributed to them. These values are as diverse as human nature itself and as such provides for no uniformity amongst the values and on how those values are enforced by each party. The non-adversarial value of mediation is not based on the attitudes of the parties involved, but is based on the actual process of mediation and how it is carried out. To clarify the context of the meaning it is said that litigation is adversarial as its process must come to a logical conclusion based on a decision made by a presiding judge. Mediation does not always end with a decision. Responsiveness, another value of mediation, responds to the interests of the parties without the restrictions of the law. It allows the parties to come to their own decisions on what is best for them at the time. Responsiveness shows how the mediation process is informal, flexible and collaborative and is person centered. Self-determination and party autonomy gives rise to parties being able to make their own choices on what they will agree on. It gives the parties the ability to negotiate with each other to satisfy their interests, generate some options which could lead to an outcome satisfactory to both parties. This autonomy or independent structure provided by the mediation process removes the need for the presence of professional bodies and turns the responsibility back
on to the parties to deal with the issue and hopefully to a satisfactory conclusion.

Mediation is appropriate in four situations: First, when negotiations reach a deadlock i.e., when both sides quit moving. This often happens when one side is irrational, when one side has not properly evaluated a case, or when a conflict of styles and personalities has created a deadlock. In this situation, mediation is an opportunity to use a process that enforces rational thinking, a process that helps to educate the other side as to proper evaluation and a process where the mediator steps in between the styles and personalities of the parties. Second, mediation is appropriate when the legal process becomes expensive. Generally, for about the cost of conducting a deposition, mediation has an 85% chance of resolving a case. The decision to mediate is often made in order to reduce the expense associated with a case. It also reduces the risk associated with a case. Finally, because of the time/value weight that plaintiffs tend to put on a case, mediation often reduces the expected value of a case. Third, when time constraint is there mediation can help resolve things sooner instead of later. Finally, the decision to mediate implies that the party initiating mediation has something to gain by involving a neutral third party. Suggesting mediation, when done for the right reasons, should be a sign of belief in the value of the case. The decision to mediate should be made whenever any of these four situations occur.162

Parties get to a mediation session either by agreeing to mediate or by a court sending them to mediation. Once a law suit is filed, the parties can agree to mediation and obtain a court order or the court can order mediation on its own initiative or on the motion of any party.

Several different styles of mediation exist: evaluative, facilitative, and theuraptic.\textsuperscript{163} Evaluative mediation does have somewhat of an advisory role in that its practitioners evaluate the strengths and weaknesses of each side's argument should they go to court; whereas facilitative mediators and theuraptic mediators do not do this. Furthermore, their definitions of mediation differ in that evaluative mediation has the main drive and goal of settlement while theuraptic mediation, in contrast, looks at conflict as a crisis in communication and seeks to help resolve the conflict thereby allowing people to feel better about themselves and each other. The agreement that arises from this type of mediation occurs as a natural outcome of the resolution of conflict.

4.3 MEDIATOR’S ROLE AND FUNCTIONS

The mediator is being appointed at the expense of the parties either by the parties as per agreement or mutual understanding or by the Court. He mediates the disputes between the parties and in the process he facilitates discussion between the parties directly or by his communicating with each other to assist them in identifying the real issues, in reducing the misunderstandings, in clarifying priorities, in exploring the areas of compromise, in generating options in an attempt to solve the dispute and in emphasizing that it is the parties own responsibility for making decision which will bind and affect them. In that process the mediator has no power to make any decision to impose an out-come on the disputing parties. Since he got no adjudicatory powers, he cannot pass any enforceable or binding or executable award or verdict or settlement. Like in conciliation, the Court shall affect a compromise between the parties from efforts of mediation if fructified as per 23 read with Sec 89 CPC. Sec. 89 CPC clearly lays down

the same. But, he can use his skill to help the parties to negotiate for an agreed settlement of the dispute without adjudication. He can assess alternatives to settlement, learn about to those and invent solutions to meet the interest of all parties. He can encourage the parties to define problems and to find solutions for themselves. Thus, a mediator has no pro-active role since mediation is a facilitative passive process.

Mediator’s functions are creating favorable conditions for the parties’ decision-making, assisting the parties to communicate and facilitating the parties’ negotiations. Mediators can contribute to the settlement of disputes by creating favorable conditions for dealing with them. This can occur through: 164

- Providing an appropriate physical environment- this is through selection of neutral venues, appropriate seating arrangements, visual aids and security.

- Providing a procedural framework - This is through conduct of the various stages of mediation process. As the chair of the proceedings, they can establish basic ground-rules and provide order, sequence and continuity. The mediators opening statement provides an opportunity to establish a structural framework, including the mediation guidelines on which the process will be based.

- Improving the emotional environment - This is a more subtle function and varies among mediations and mediators. They can improve the emotional environment through restricting pressure, aggression and intimidation in the conference room

by providing a sense of neutrality and by reducing anxiety among parties.

4.4 MEDIATOR’S LIABILITY

Mediators should take necessary precautions to protect themselves, as they are putting themselves in a vulnerable position in terms of liability. Mediators need to be qualified and properly trained before they can mediate a legally binding mediation. In mediation, there are a number of situations in which liability could arise. For example, a mediator could be liable for misleading parties about the process and/or process of alternative dispute resolution. If a mediator deems mediation as the correct dispute resolution method, when in fact the dispute is not suitable, the mediator can be held liable. A breach of confidentiality on the mediator’s behalf could result in liability. These situations can all lead to court proceedings, although this is quite uncommon. Three areas exist in which liability can arise for the mediator:

❖ Liability in Contract
❖ Liability in Tort
❖ Liability for Breach of Fiduciary Obligations.

4.5 CONFIDENTIALITY AND MEDIATION

Confidentiality is a powerful and attractive feature of mediation. The private and confidential aspect of mediation is in contrast with the courts and tribunals which are open to the public. Privacy is a big motivator for people to choose mediation over the courts or tribunals. Although mediation is promoted with confidentiality being one of the defining features of the process, it is not in reality as private and confidential as often claimed. In some circumstances the parties agree that the mediation should not be private and confidential in parts or in whole. Concerning the law there are
limits to privacy and confidentiality, for example if their mediation entails abuse allegations, the mediator must disclose this information to the authorities. Also the more parties in a mediation, the less likely it will be to maintain all the information as confidential. For example some parties may be required to give an account of the mediation to outside constituents or authorities. There are a number of reasons why mediation should be kept private and confidential and these include: 165

- It makes the mediation appealing.
- It provides a safe environment to disclose information and emotions.
- Confidentiality makes mediation more effective by making parties talk realistically.
- Confidentiality upholds mediators reputation, as it reinforces impartiality.
- Confidentiality makes agreement more final, as there is little room to seek review.

4.6 SIGNIFICANCE OF MEDIATION

Dispute resolution is at the core of administration of justice. Traditionally, administration of justice was considered one of the essential functions of the state. The law and order within the state is maintained through the administration of justice and the citizens are made to realize the existence and the importance of the state. After independence, India adopted British system and the British administration of justice was only meant for the maintenance of law and order in India. Though it is true that Britisher’s built up a judicial system in India, which in due course of time imbibed some of the positive values of the English legal system like rule of law, independence of judiciary and equality before law, etc., but it also resulted in

165 ibid, supra note 6.
a system of dispute resolution, which is dilatory, expensive, formal, rigid, complex and orthodox.

With the advent of the welfare state, the concept of dispute resolution has changed. There has been great insistence on minimal state i.e. decentralizing of state function. Moreover, with the globalization and liberalization the disputes do not, generally, require a win-lose equation but rather a win-win equation. Most of the disputes, worldwide, are settled or resolved without reference to lawyers or the formal system. Out of those which reach lawyers, many are resolved with the assistance of lawyers and without litigation. Out of those dispute that do enter the court or tribunal system, most resolve without a hearing. This is being made possible by the ADR methods.

Support for ADR is strong in court systems all over the world because of the growing variety of effective alternatives for resolving disputes. Using some of the alternatives can help relieve some of the backlog of cases pending in State's court system. With increasing frequency, courts are supporting ADR and are actively introducing court programs. In some cases, all over the world, courts are requesting that lawyers and their clients participate in court settlement devices. Section 89 of the Code of Civil Procedure is also a step in this direction.

Mediation, Conciliation and Arbitration as methods for resolving disputes are historically more ancient than the Anglo-Saxon adversarial system of law. Thus ADR is by no means a recent phenomenon in India, however, it has been organized in a more clear and scientific lines and used more widely in dispute resolution in recent years than before. Now, arbitration and conciliation are governed by the Arbitration and Conciliation Act, 1996, Lok Adalat and judicial settlement are governed by the Legal Services Authority Act 1987. For the purpose of arbitration, we also have the
ICADR Arbitration Rules, 1996 and for conciliation also there are ICADR Conciliation Rules, 1996. So we can say barring arbitration, conciliation and Lok Adalats, other ADR procedures like mediation are virtually unknown in India. For a successful pursuit of ADR movement in India, three things are absolutely necessary: good law; infrastructural facilities for holding ADR proceedings; and professionally trained ADR practitioners.

In this context, it is necessary to examine during this new millennium the age-old systems of resolving disputes and supplement them with new global innovations. In his speech at the ADR Conference in Mumbai, former Chief Justice of India, Mr. Justice R.C. Lahoti, quoting Victor Hugo, the great thinker, said, "Stronger than armies of the world is the idea whose time has come." It is now felt all over the world, and Justice Lahoti also stated that mediation is the idea whose time has come. The development of mediation in India holds enormous promise. In particular, because the most widely used method of ADR i.e. the arbitration has acquired the same shortcoming of the court system like it tends to be more and more formal, dilatory and expensive. The neutralizing communication skills and powerful bargaining strategies of facilitated negotiation can strengthen the system's capacity to bring justice to the society.

Despite these, there are several obstacles, which block the path to mediation in India. Exposure to these facilitated negotiation processes, though spreading rapidly remains limited. Judges and lawyers harbor understandable apprehensions about the relationship between mediation and the formal judicial process and deep skepticism over the application of

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166 ibid. supra note 6.

167 Keynote address by Niranjan J. Bhatt on Alternative Dispute Resolution Methods. Problems. Concerns and Prospects at the First South Asian Conference on Clinical Legal Education, organized at Goa on 17th December 2005 by V.M. Salgaokar College of Law
mediation to a vide variety of Indian legal disputes, especially outside the commercial area.\textsuperscript{168} The Courts still lack an operational case management trigger, under Section 89 of the CPC for referring cases to mediation (even all forms of ADR methods).\textsuperscript{169} Trained Mediations in most courts are not yet available. Through this study, the researcher seeks to make critical choices on how best to navigate around these obstacles, issues, and tradeoffs in order to resolve conflicting views and positions on mediation within the Indian Justice System. The study will have two aspects: Why and how mediation can be used to resolve legal conflicts and how to overcome the system-wide conflicts over the shape, scope and timing of mediation reforms.

4.7 COURT - ANNEXED ADR AND MEDIATION - IN VARIOUS COUNTRIES

The emergence of ADR is one of the most significant movements as a part of conflict management and judicial reforms. In recent years, throughout the world over, courts have shown an increasing willingness to encourage parties to explore mediation and other ADR methods before or even after going to trial.

4.7.1 COURT - ANNEXED ADR IN USA

The principal objective of court-annexed ADR in the United States has been to achieve settlements, or failing that, to streamline litigation at both first instance and on appeal. ADR is widely used in the State and Federal Courts. Statutory approval of ADR in Federal District (trial) Courts was given under the 1990 Civil Justice Reforms Act, but the use of ADR in the courts goes back to the mid 1970s when the first arbitration pilot project began and to the 1980s when experiments such as Summary Jury Trials and


\textsuperscript{169} Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353
Early Neutral Evaluation were introduced. Under the 1990 Act, ADR was one of the six case management processes recommended. In 1998, the Alternative Disputes Resolution Act was passed. The Act requires each Federal District Court to authorize the use of ADR in all civil cases and to establish its own ADR programme. The Act also requires the District Courts to establish procedures for making neutrals available, to adopt local rules requiring confidentiality, compensation, and conflict of interest and to appoint a judge or staff person to administer the programme. The courts need also to adopt rules requiring litigants to consider ADR and they are given authority to compel parties to use mediation and other ADR processes. The courts are also given authority to exempt cases or categories of cases from using ADR.\(^\text{170}\)

One of the most significant developments arising out of the relationship between ADR procedures and the court system has been the creation in the United States of multi-door courthouses. Certain criteria were considered by Professor Frank E.A. Sander, to be important for determining the effectiveness of a dispute resolution system, namely: “cost, speed, accuracy, credibility to the public and the parties, and workability. In some cases, but not all, predictability may also be important.”\(^\text{171}\)

Professor Sander identified two questions as important:\(^\text{172}\)

- “What are the significant characteristics of various alternative dispute resolution mechanisms?
- How can these characteristics to be utilized so that, given the variety of disputes that presently arise, we can begin to


\(^\text{172}\) Id, p.130-132
develop some rational criteria for allocating various types of disputes to different dispute resolution processes.”

In setting out the range of ADR systems, Professor Sander regarded the factor of decreasing external involvement by a neutral in the process as critical. He outlines a spectrum of processes, on a decreasing scale of external involvement. At the maximum end of the involvement scale he placed adjudication. At the minimum involvement end, he put “avoidance” (an approach he described as “clearly undesirable) which was followed by negotiation and then mediation and so on.

In multi-door courthouse concept has been tested in experiments in various parts of the U.S. such as Columbia, New Jersey, Houston, Philadelphia, California etc. and now a number of States offer multi-door programmes.173

4.7.2 COURT - ANNEXED ADR IN CANADA

In 1996, a Task Force of the Canadian Bar Association reported on systems of civil justice within Canada. The Report of the Task Force took almost exactly the same approach as Lord Woolf by recommending measures for promotion of settlement, the streamlining of procedures and the harnessing of new technology, all seeking to achieve lower cost and improving access to justice. A very important element of the Task Force proposal was the introduction of case-flow management systems to provide for early court intervention and the definition of issues used for the supervision of progress of the cases. Court intervention for the purpose of facilitating settlement was proposed as an integral part of the case flow management system.174

174 Ibid., supra note.
The Task Force went even further than Lord Woolf in defining how what is called a “multi-option civil justice system” would work ensuring that disputes rest within the court system in order to preserve the basic right of access to the courts and respecting basic principles of fairness. The multi-option concept envisioned by the Task Force involves a mandatory role for the parties at various stages of the dispute resolution process. Hence, the proposed obligation upon parties to explore settlement possibilities and the duty was imposed on the court to ensure that the obligation was met. As a result number of ADR Projects and Pilot Schemes started in Canada like Ontario, Toronto, Saskatchewan, Quebec, etc. Since 1999, court-connected ADR has been deeply entrenched in Canadian legal system.

4.7.3 COURT-ANNEXED ADR IN AUSTRALIA

Australia has statutory mediation in many important areas of economic and social activity. Professor John Wade considers that mandatory mediation clauses has been routine in new legislation since 1998 and describes the result as a “legislative avalanche.”

Since 1987, there has been a court-annexed programme of assisted dispute resolution in the Federal Court of Australia. The scheme has been described by the Hon. M.E.J. Black, Chief Justice of the Court in a paper delivered on November 12, 1995. Statutory powers were conferred on the court in 1991. The mediation scheme is an integral part of the court’s procedures. The majority of mediations were conducted by the Registrars of the Court who have been specifically trained, as been some of the judges. By
the statute the process is utterly confidential and the mediators are given the same immunity as the judges. 178

The role of ADR in the Federal Court was increased in 1996 and there is now a power to direct parties to mediate. The Chief Justice also made clear his opinion that:179 “The Court’s system of case management has always been well suited to a programme of court-annexed ADR because the process of direction hearings brings cases before judges at an early stage and so enables cases suitable for ADR to be identified. The policy of identifying cases suitable for referral to ADR as early as possible, enhances the likelihood of resolving disputes that might otherwise proceed to a trial as a result of the investment of legal costs.”

The experience in Australia with court-annexed schemes is encouraging and the conclusions of Chief Justice Black are very broadly consistent with the experience in the U.S. and in Canada.

4.7.4 COURT - ANNEXED ADR IN SINGAPORE

The Singapore Judiciary obtained the idea of introducing mediation into its system from Australia. The ‘Singapore Court’s Mediation Model’ was first mentioned by Chief Justice Yong Pun How in his 1997 Opening of the Legal Year speech. It was created in view of diverse ethnic and cultural backgrounds of Singaporeans and present day social conditions. 180

The Singapore Courts Mediation Model applies where civil cases before the District Courts and Magistrates’ Courts mediated as a part of various dispute resolution processes that the courts provide. This model involves a settlement conference, presided over by a Settlement Judge, who

178 Id.
179 Id.
180 Lawrence Boulle and Teh Hwee Hwee, MEDIATION: PRINCIPLES, PROCESS, PRACTICE, 2000, Butterworth Asia, p. 221
acts as a mediator. The parties are deemed to have consented to participation in mediation unless they opt out by notifying the Registrar of the Subordinate Courts, in writing, of their intention to dispense with it. The parties’ lawyers are required to submit their respective Opening Statements, in a form prescribed by the Subordinate Courts Practice Directions, in order to assist the Court in understanding of facts and law involved in the case.\(^{181}\)

The role of the Settlement Judge in the Settlement Conference is an active one, and he/she serves both as mediator and neutral evaluator. The Settlement Conference is conducted on a ‘without prejudice’ basis, and all communications arising out of it are treated confidential. If the parties are unable to settle the case at the settlement conference, their case will be fixed for a hearing before a Judge other than the one that conducted the Settlement Conference.\(^{182}\)

The judicial systems of Australia and Singapore stem from the same origin, i.e. common law system. Mediation in their current systems, however, develops in different ways. In Australia, based on the idea that mediation is the embodiment of the principles of private autonomy, private mediation organizations are active. Although recently by statutes court-annexed mediation is commenced in the course of the litigation procedure through referral by the court, mediation is conducted by mediators who are not judges. On the other hand in Singapore, court-based mediation is the most popularly used mediation. The significant feature of the Singapore Courts Mediation Model is that the District Judge serves as a mediator under the name of Settlement Judge in the Settlement Conference, though the

\(^{181}\) Id.
\(^{182}\) Id.
mediation process is separated from the litigation process in terms of communication confidentiality.\textsuperscript{183}

4.7.5 COURT - ANNEXED ADR IN NEW ZEALAND

New Zealand provides a particularly interesting comparison with England. In January 1997, the Courts Consultative Committee published a Report on Court Referral to Alternative Dispute Resolution. The Report drew heavily upon existence elsewhere and was clearly influenced strongly by the need to protect the fundamental right of New Zealand citizens to access to the courts. The Committee was of the view that any scheme should cover the district courts as well. Parties should have the right to elect arbitration or mediation. If parties chose to go to arbitration they would leave the court process altogether or alternatively one of the parties could apply for an order that their case is not referred if special reasons apply such as previous bonafide attempts at ADR. Parties would have a right to choose a mediator but this would be subject to ratification by the court which could appoint mediators or terminate appointments in defined circumstances.\textsuperscript{184}

There are number of legislations which provide for mandatory ADR process prior to litigation for example, Disputes Tribunal Act, 1999, Employment Contracts Act, 1991, Residential Tenancy Act, 1986, Family Proceedings Act, 1980 etc. Some of these services are also free of cost to the litigants.\textsuperscript{185}

4.7.6 COURT - ANNEXED ADR IN INDIA

In India, resort to Alternative Dispute Resolution processes was found necessary to give speedy relief to the litigants and to reduce pendency in courts, through a user-friendly system of dispute resolution. But it was

\begin{footnotesize}

\textsuperscript{184} Ibid, supra note 116, p.99

\textsuperscript{185} Id. p. 100
\end{footnotesize}
found that the litigants were not resorting to ADR processes with the desired frequency, either on account of ignorance or reluctance or indifference. However, Parliament of India inserted Section 89 (as also Order X Rules 1-A to 1-C) in the Code of Civil Procedure, to ensure that the ADR was resorted to before trial of the suits.

4.8 MANDATORY MEDIATION

Another very sensitive area of concern in mandatory mediation is the settlement pressure. There can be number of reasons for pressure to settle in a mandatory mediation like:186

(i) Financial risk: Some State’s Rules permit the court to impose either costs or attorney’s fees or both (incurred by the adverse party) on the party who rejects a unanimous recommendation of the hearing panel but fails to improve upon it by at least ten percent at trial.187 A related pressure to settle prior to mediation is created when the mediation process ordered by the court is expensive or requires out of town participants to appear.

(ii) Delay: For some parties, the prospect of delay in judgement creates strong pressure to settle.

(iii) Public Disclosure: Public rather than financial pressure is created by public employee collective bargaining statutes. In a modified form of mediation, called fact-finding, the pressure created by release of fact-finding report to the public is designed to embarrass the parties who frivolously hold out against settlement. Because the alternative to settlement is usually a strike or binding arbitration, these particular

186 Id.
settlements pressures do not however, raise legal or policy issues related to the justice system.

(iv) Report to the trier of the facts: In California, the statues mandating mediation of child custody disputes permit local courts to require a recommendation by the mediator to the child custody referee if the parties do not settle through mediation.

(v) Med-Arb for unrepresented parties: In some courts, parties are asked to agree to mediation by a person who will become a binding arbitrator if the parties do not settle – a process known as med-arb. According to Prof. Lon Fuller, in med-arb a third-party tries to persuade the parties to settle, “perhaps reinforcing his persuasive skills with ‘the gentle threat’ of a decision.” The mediator’s recommendation seems likely to become the arbitrator’s award.

(vi) Judicial pressure: Informal pressures to settle through mediation also raise policy and legal issues, especially when a judge acts in a role similar to that of a mediator.

(vii) Good faith bargaining required: Some commentators and judges argue that “good faith” participation or bargaining requirements in a few mandatory mediation statutes place subtle or overt pressures on the parties to settle. Under this argument, the mediator may threaten charges of noncompliance to induce unwanted concessions, a threat that

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189 Id.
191 This indicates that judges use settlement techniques that a substantial number of other judges consider to be improper and calls for reform of judicial practices in settlement conferences
is rarely without credibility due to the vague nature of the requirement. Most mediation statutes do not state the minimum level of participation required for mandatory mediation. Parties participating in mandatory mediation do not know the limits of participation, which result in a “discretionary decision by the parties and inconsistent results from the process.”\textsuperscript{193} The United States Court of Appeals for the Second Circuit rules that the line was crossed when a party was ordered to make a bonafide settlement offer under threat of contempt, noting that the party was forced to guess what was meant by the vague phrase.\textsuperscript{194} In \textit{Texas Parks and Wildlife Department V. Davis} \textsuperscript{195}, the trial court sanctioned The Parks Department for failure to participate in mandated mediation in good faith. The Texas Court of Appeals reversed, stating that the court may order parties to participate in mediation as mandated by the state statutes, but cannot force the parties to mediate in good faith or to settle the dispute.\textsuperscript{196} This case is one example of a mandatory mediation statute that fails to provide useful or meaningful participation standards for the parties or the courts.

(viii) Non-compliance and sanctions: When the litigation is pending, the courts have used both inherent and explicit authority to penalize non-compliance with pre-trial orders or rules by imposing costs and or attorney’s fees, excluding evidence, denying a trial de novo, and, in egregious cases,

\textsuperscript{194} Hess v. New Jersey Transit Rail Operations Inc., 846 F2d 114 (CA 21988)
\textsuperscript{195} 988 S. W. 2d 370 (Tex App, 1999)
\textsuperscript{196} Id, p.375
entering a default judgment or dismissal.\textsuperscript{197} Contempt sanctions are normally based on willful violation of explicit court orders. Where bad fault is not indicated, the courts are often more lenient in sanctions. The United States Court of Appeals for the Sixth Circuit had noted that dismissal was a severe sanction that should be used only in extreme situations after the court has considered less drastic sanctions.\textsuperscript{198}

Thus the problems associated with participation standards in mandatory mediation statutes result in loss of time, money, and diminished efficiency for all parties, including courts and the appointed mediator, and possibly even the loss of mediator’s impartiality and confidentiality.\textsuperscript{199} Moreover, some studies have found that there is no reduction in expenditures of the parties’ time and cost attributable to mediation. Even more importantly, studies also indicate mandatory mediation has “not reduced court delays, caseloads or pre-case costs.”\textsuperscript{200} Other critics are of the view that mandatory mediation “goes too far and encroaches on the right to use the court system to litigate their dispute, they are being forced to increase their litigation expenses because of mandatory mediation.”\textsuperscript{201}

4.9 MEDIATION PROCESS AND PRACTICE: GLOBAL PERSPECTIVE

The last decade has witnessed exponential growth in both the theory and practice of mediation. Mediation has started to be recognized as a potential mode of dispute resolution which has actually realized the cherished ideals of self determination, empowerment of masses, participatory justice and peace and harmony. People have been able to

\textsuperscript{197} Ibid, supra note 153, p. 7.43 – 7.44
\textsuperscript{198} Robinson v. ABB Combustion Engineering Services Inc., 32 F3d 569 (6th Cir. 1994)
\textsuperscript{199} Holly A. Streeeter-Schaeger, Note, “A Look at Court Mandated Civil Mediation”, 49 Drake L. Rev. 389 (2000-2001)
\textsuperscript{201} Id., p. 571-572
understand that mediation is a process different from both litigation and arbitration. Increased interest has resulted in more research into the concept of mediation which in turn has lead to the development of various models of mediation. Each model has its unique characteristics and different perspectives on various ethical and legal issues of mediation. These various models and their hybrids can be used for different categories of disputes. Inspite of the some shortcomings of these models, these have played a great role in development of the theory and concept of mediation.

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Mediation movement has been adopted both by the States and the Judiciary, across the world. States have helped by spreading awareness among the masses through enacting legislation mandating mediation in some categories of disputes and also by financing court-annexed mediation programs. Courts have shown an increasing willingness to encourage parties to explore mediation and other ADR methods before or even after going to trial. The principal objective of court-annexed ADR has been to achieve
settlements, or failing that, to streamline litigation at both first instance and on appeal. However, this enthusiasm of the State and the judiciary also raises serious causes of concerns. The court-annexed and mandatory mediation presents serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its core values are lost. Sadly, when mediation is mandatory it becomes patriarchal paradigm of law it is supposed to provide an alternative to. Though, court – annexed mediation and mandatory mediations have their own benefits but there is a need to do more research on how to regulate these efforts at institutionalization of mediation without losing its core values.

4.10 MEDIATION PROCESS AND ROLE OF THE MEDIATOR

The central quality of mediation is its capacity to reorient parties towards each other and in this context the role of the mediator is that of assisting the parties to develop a relationship of mutual respect, trust and understanding. Mediators perform variety of roles and functions at different times during the mediation process, sometimes consecutively, sometimes simultaneously. In order to perform these roles and functions mediators use various skills in conducting the mediations. The quality of the mediator is one of the biggest factors which determine the quality of the mediation process.

In this Chapter, various stages of mediation process i.e., before mediation (like engaging parties, obtaining commitment and agreeing on rules), during mediation (identifying issues, information gathering, discussion, recording of agreement) and after the mediation (like implementation), are discussed. The chapter further contains discussion on the role, qualities, skills, qualifications, powers and duties of a mediator. Many factors affect the quality of the mediation process. One of the biggest factors is the quality of mediator. Being a mediator involves a significant
personal and professional commitment. It demands a new approach from virtually all occupations of origin. Existing attributes and qualities may need to be re-examined and new understanding will be needed. A “mediation construct” is discussed which summarizes the essential aspects of being a mediator. The various legal issues related to mediation like confidentiality, neutrality, enforceability of mediated agreement, liability of the mediator and mediation and the Rule of Law, require further research as how to strike a balance among all these essential attributes of mediation. In a court-annexed mediation scheme, the issues of accreditation and quality assurance of mediation and the need for a Model Code of Conduct for mediators assumes important to ensure the success of the program.

Assuring quality of mediation require deep analysis of various ethical and legal issues involved in mediation. Mediation began with the assumption of a cloak of confidentiality but the validity of this assumption is currently not clear. The western countries are still grappling with the issue of whether there should be absolute or qualified mediation privilege. The enforceability of mediated agreement also is faced with two diagonally opposite view-points. Western legal systems are at a cross-road regarding how to ensure participation in “good faith”. Some scholars fear that strict implementation of “good faith” requirements will jeopardize confidentiality and neutrality which are core values of mediation. There is a considerable amount of controversy surrounding the duties and responsibilities of the mediator with regard to neutrality, impartiality vis-à-vis fairness. Regarding liability of the mediator also there is no consensus among various legal systems; some are in favour of total immunity and some are in favour of liability. Addressing and dealing with these issues is better and more desirable than allowing the mediation process to be mutated and abused.
Though, mediation is still in its nascent stage but ethical considerations of training, certification and regulation of mediators also merits attention. Keeping in mind the complexities of human interactions and nature of disputes, uniform training and evaluation criteria is not practicable. However, there is a need to have some standards to ensure quality control and to continuously monitor the conduct of the mediators and for upgradation of their skills. At the same time, there is a requirement to allow the mediation movement to grow for the time being and to not hamper its development by extraordinary codification of its various aspects.

4.11 MEDIATION IN INDIA

Though ADR methods like mediation have been an important part of Indian ethos and traditions, it still faces various challenges in the present context. In India, mediation has come a long way from the panchayat of ancient India to the Industrial Dispute Act, 1947. The concept of ADR was institutionalized through the Legal Service Authorities Act, 1987. The concept has been fully recognized through Arbitration and Conciliation Act, 1996 and the CPC Amendment Act, 1999 which inserted Section 89 in the Code of Civil Procedure, 1908. In 2005, the Supreme Court in Salem Bar I case has made out that the reference to ADR methods is mandatory for courts. The ruling is really a trigger for courts to operate Section 89 of CPC, 1908. Thus, ADR methods are accommodated within the framework of Civil Procedure Code, 1908 and other laws.

While mediation has been one of the oldest forms of dispute resolution in human history, its success as an adjunct to the judiciary is relatively new. Though formally organized mediation movement is of recent origin but ADR methods, especially, Conciliation and mediation has long been recognized as appropriate method of dispute resolution in certain categories of disputes. The Industrial Disputes Act, 1947 provides for
mandatory attempt at conciliation in cases of industrial disputes before approaching any adjudicatory forum. In family matters, the courts are under duty to first explore the possibility of settlement between the parties. Organizing Lok Adalats for petty civil as well as criminal cases have become a part of the administration of justice. The concept of pre-litigation conciliation and mediation is institutionalized through the establishment of the Permanent Lok Adalats and the Mediation Centres by the Delhi Dispute Resolution Society. Hence, the movement to organized mediation is propelled by both legislative and judicial initiatives.

A revolution has been brought in institutionalization of court-annexed mediation after the amendments to the Code of Civil Procedure in 1999 and 2002. Under the supervision of the Mediation and Conciliation Project Committee, Mediation Centres are established, all over the country, in the District Court Complexes. The Mediation Centres have started functioning and debates regarding who should become mediators; best methods of imparting training; role of courts in court-annexed mediations; quality control in mediation; working of the Mediation Centres; etc. are gaining momentum.

4.12 MEDIATION IN PRACTICE

4.12.1 In Punjab, Haryana, Chandigarh & Delhi

The researcher has conducted extensive study of working of the mediation centres setup in Delhi, Punjab, Haryana and Chandigarh. For this purpose the researcher visited mediation centres at Tis Hazari Courts at Delhi and closely observed the working of mediation centres setup in Delhi. The researcher interacted with judge in-charge of mediation centres of Tis Hazari Courts, trained mediators-Judges and advocates, litigants, lawyers and staff of mediation centres and gathered detailed information about working of various centres of Delhi.
The researcher himself had undergone 40 hours mediation training programme organized by Punjab and Haryana High Court from 11.10.2008 to 14.10.2008. Thereafter, the researcher had undergone advance mediation training programme at Chandigarh Judicial Academy organized by Punjab and Haryana High Court from 30.7.2010 to 1.8.2010 and handled 189 mediation cases and successfully settled 39 cases during the period of November, 2008 to April 2010 apart from doing regular court work at Kurukshetra. The researcher also worked as Nodal Officer of mediation centre setup at Kurukshetra (Haryana). This has helped the researcher to have first hand information about the course designing, training methodology and actual practice of mediation in India.

**TABLE – TRAINING PROGRAMMES FOR MEDIATORS AND REFERRAL JUDGES IN PUNJAB, HARYANA & CHANDIGARH**

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Name of the programme</th>
<th>Date on which the programme was conducted</th>
<th>Numbers of participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>40-Hours Training Programme for Advocates, Faculty members of Chandigarh Judicial Academy and Judicial Officers</td>
<td>18th - 20th July, 2008 25th - 27th July, 2008</td>
<td>28 (21 Advocates of High Court, 5 Faculty Members of CJA and 2 Judicial Officers, one each of Punjab and Haryana).</td>
</tr>
<tr>
<td>2.</td>
<td>40-Hours Training Programme for Judicial Officers</td>
<td>11th - 14th October, 2008</td>
<td>38 Judicial Officers (17 of Punjab and 21 of Haryana)</td>
</tr>
<tr>
<td>3.</td>
<td>40-Hours Training Programme for Advocates</td>
<td>8th &amp; 9th November, 2008 and</td>
<td>44 (25 Advocates from Punjab &amp; Haryana High Court Bar Association, 13</td>
</tr>
<tr>
<td>Sr. No.</td>
<td>Name of the programme</td>
<td>Date on which the programme was conducted</td>
<td>Numbers of participants</td>
</tr>
<tr>
<td>---------</td>
<td>---------------------------------------------------------------------------------------</td>
<td>------------------------------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td></td>
<td>Judicial Officers &amp; Faculty Members of CJA</td>
<td>13th &amp; 14th December, 2008</td>
<td>Advocates from District Court Bar Association Chandigarh, 2 Judicial Officers of District Courts, Chandigarh and 4 Faculty members of CJA.</td>
</tr>
<tr>
<td>4.</td>
<td>Awareness Programme on Mediation for the Advocates of District Court, Chandigarh.</td>
<td>31st January, 2009</td>
<td>About 75 Advocates</td>
</tr>
<tr>
<td>5.</td>
<td>Mediation training for referral judges in the States of Punjab and Haryana by way of video conferencing.</td>
<td>7th February, 2009</td>
<td>All the judicial Officers of Punjab, Haryana and Chandigarh</td>
</tr>
<tr>
<td>7.</td>
<td>Training Course for Co-ordinators/Nodal Officers of Mediation Centres.</td>
<td>30th May, 2009</td>
<td>19 Judicial Officers (8 of Punjab, 9 of Haryana and 1 each of High Court and District Court Chandigarh)</td>
</tr>
<tr>
<td>8.</td>
<td>40 hours Mediation Training Programme</td>
<td>18th &amp; 19th July, 25th &amp; 26th July and 1st &amp; 2nd August, 2009</td>
<td>18 Judicial Officers (8 of Punjab and 10 of Haryana)</td>
</tr>
<tr>
<td>10.</td>
<td>40 Hours Mediation Training Programme for the Advocates of District Mediation &amp;</td>
<td>23-25 April &amp; 1-2 May, 2010</td>
<td>61 Advocates of Haryana Mediation Centres and 47 Advocates of Punjab Mediation Centres = 108</td>
</tr>
</tbody>
</table>

Advocates from District Court Bar Association Chandigarh, 2 Judicial Officers of District Courts, Chandigarh and 4 Faculty members of CJA.
<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Name of the programme</th>
<th>Date on which the programme was conducted</th>
<th>Numbers of participants</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Conciliation Centres have been set up</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11.</td>
<td>Advance Mediation Training for Mediators</td>
<td>30th July to 1st August, 2010</td>
<td>20 Advocate-Mediators of High Court, 4 Advocate Mediators of District Court, Chandigarh, 22 Judicial Officers-Mediators (12 of Haryana 9 of Punjab and Director, Mediation &amp; Conciliation Centre)</td>
</tr>
<tr>
<td>12.</td>
<td>18 Awareness Programmes held in 10 Districts of Haryana and 8 Districts of Punjab</td>
<td>On different dates as approved by the Authorities.</td>
<td>About 65 Advocates per District</td>
</tr>
<tr>
<td>13.</td>
<td>17 Referral Judges Training Programmes held in 9 Districts of Haryana and 8 Districts of Punjab</td>
<td>On different dates as approved by the Authorities.</td>
<td>Judicial Officers posted at respective District.</td>
</tr>
<tr>
<td>14.</td>
<td>40 Hours Mediation Training Programme for the Advocates of Punjab and Haryana</td>
<td>14-16 October, 2011 &amp; 21-23 October, 2011</td>
<td>20 Advocates, 5 of each District Rupnagar, Fatehgarh Sahib, Bathinda in Punjab and Fatehabad in Haryana</td>
</tr>
<tr>
<td>16.</td>
<td>40 hours mediation training Programme and also referral Judges Training for</td>
<td>12th to 16th March, 2012</td>
<td>28 Trainee Judicial Officers of Haryana</td>
</tr>
<tr>
<td>Sr. No.</td>
<td>Name of the programme</td>
<td>Date on which the programme was conducted</td>
<td>Numbers of participants</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------</td>
<td>-------------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>17.</td>
<td>40 hours Mediation Training Programme for the Advocates</td>
<td>16th to 18th March, and 23rd to 25th March, 2012 at Chandigarh Judicial Academy,</td>
<td>25 Advocates, 6 each Panchkula, Sirsa, Kaithal, Ambala and one of Gurgaon</td>
</tr>
<tr>
<td>18.</td>
<td>40 hours mediation training Programme Trainee Judicial Officers of Punjab</td>
<td>19th to 23rd March, 2012</td>
<td>30 Trainee Judicial Officers of Punjab</td>
</tr>
<tr>
<td>19.</td>
<td>40 hours mediation training Programme and also Judges Training for Trainee Judicial Officers</td>
<td>26th to 30th March, 2012</td>
<td>27 Trainee Judicial Officers of Haryana</td>
</tr>
<tr>
<td>20.</td>
<td>40 hours mediation training Programme and also referral Judges training for Trainee Judicial Officers</td>
<td>2nd to 4th April and 9th to 10th April, 2012</td>
<td>27 Trainee Judicial Officers of Haryana</td>
</tr>
<tr>
<td>21.</td>
<td>40 hours mediation training Programme Trainee Judicial Officers of Punjab</td>
<td>16th to 20th April, 2012</td>
<td>27 Trainee Judicial Officers of Haryana</td>
</tr>
</tbody>
</table>
### TABLE- NUMBER OF MEDIATION CENTRES, NUMBER OF MEDIATORS, NUMBER OF TRAINING PROGRAMMES FOR MEDIATORS.

#### IN INDIA

<table>
<thead>
<tr>
<th>S. No</th>
<th>State</th>
<th>No. of Mediation Centres</th>
<th>Number of Mediators</th>
<th>Number of Training Programmes Conducted</th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Judges Mediators</td>
<td>Advocates Mediators</td>
<td>Others</td>
</tr>
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<td></td>
<td></td>
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<td>1.</td>
<td>Andhra Pradesh</td>
<td>24</td>
<td>19</td>
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<td>Bihar</td>
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<td>4.</td>
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<td>4</td>
<td>59</td>
</tr>
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<td>5.</td>
<td>Chhatisgarh</td>
<td>17</td>
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<td>71</td>
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<tr>
<td>6.</td>
<td>Delhi</td>
<td>4</td>
<td>111</td>
<td>147</td>
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<tr>
<td></td>
<td></td>
<td>Dwarka Tis Hazari</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Karkardooma Rohini</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Delhi High Court</td>
<td>1</td>
<td>267</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mediation Centre</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>Goa</td>
<td>3</td>
<td>-</td>
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<td>8.</td>
<td>Gujarat</td>
<td>17</td>
<td>16</td>
<td>374</td>
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<td>9.</td>
<td>Haryana</td>
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<td>10.</td>
<td>Himachal Pradesh</td>
<td>10</td>
<td>1</td>
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<tr>
<td>11.</td>
<td>Jharkhand</td>
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<td>111</td>
<td>138</td>
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<tr>
<td>12.</td>
<td>Karnataka</td>
<td>29</td>
<td>-</td>
<td>-</td>
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<td>14.</td>
<td>Kerala</td>
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<td>15.</td>
<td>Madhya</td>
<td>13</td>
<td>88</td>
<td>115</td>
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</table>
### TABLE- CASES REFERRED AND SETTLED THROUGH MEDIATION IN INDIA

<table>
<thead>
<tr>
<th>S. No</th>
<th>State</th>
<th>Total No. of cases referred</th>
<th>No. of cases settled</th>
<th>Success rate of Mediation in %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Andhra Pradesh</td>
<td>12220</td>
<td>5957</td>
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<td>2.</td>
<td>Assam</td>
<td>1431</td>
<td>447</td>
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<td>3.</td>
<td>Bihar</td>
<td>6848</td>
<td>2705</td>
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<tr>
<td>4.</td>
<td>Chandigarh</td>
<td>3517</td>
<td>706</td>
<td>28.04</td>
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<tr>
<td>5.</td>
<td>Chhattisgarh</td>
<td>2925</td>
<td>369</td>
<td>12.79</td>
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<tr>
<td>6.</td>
<td>Delhi</td>
<td>56105</td>
<td>43915</td>
<td>73.41</td>
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</table>

For Dwarka and Tis Hazari, the data is not provided in the table.
<table>
<thead>
<tr>
<th>S. No</th>
<th>State</th>
<th>Total No. of cases referred</th>
<th>No. of cases settled</th>
<th>Success rate of Mediation in %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Karkardooma Rohini Delhi High Court Mediation Centre</td>
<td>8725</td>
<td>5572</td>
<td>62.00</td>
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<tr>
<td>8.</td>
<td>Gujarat</td>
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<td>776</td>
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<td>9.</td>
<td>Haryana</td>
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<td>2826</td>
<td>28.21</td>
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<td>10.</td>
<td>Himachal Pradesh</td>
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<td>30.00</td>
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<tr>
<td>11.</td>
<td>Jharkhand</td>
<td>5991</td>
<td>1700</td>
<td>28</td>
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<td>12.</td>
<td>Karnataka</td>
<td>33539</td>
<td>13611</td>
<td>40.58</td>
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<td>13.</td>
<td>J&amp;K</td>
<td>566</td>
<td>180</td>
<td>31.80</td>
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<td>14.</td>
<td>Kerala</td>
<td>9849</td>
<td>2327</td>
<td>23.60</td>
</tr>
<tr>
<td>15.</td>
<td>Madhya Pradesh</td>
<td>1224</td>
<td>194</td>
<td>15.85</td>
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<tr>
<td>16.</td>
<td>Madhya Pradesh</td>
<td>41232</td>
<td>8718</td>
<td>32</td>
</tr>
<tr>
<td>17.</td>
<td>Orissa</td>
<td>4344</td>
<td>2431</td>
<td>55.96</td>
</tr>
<tr>
<td>18.</td>
<td>Punjab</td>
<td>7232</td>
<td>1592</td>
<td>22.01</td>
</tr>
<tr>
<td>19.</td>
<td>Rajasthan</td>
<td>2261</td>
<td>293</td>
<td>13.00</td>
</tr>
<tr>
<td>20.</td>
<td>Sikkim</td>
<td>127</td>
<td>53</td>
<td>43.73</td>
</tr>
<tr>
<td>21.</td>
<td>Tamil Nadu</td>
<td>17141</td>
<td>2929</td>
<td>17.00</td>
</tr>
<tr>
<td>22.</td>
<td>Uttarakhand</td>
<td>101</td>
<td>13</td>
<td>12.87</td>
</tr>
<tr>
<td>23.</td>
<td>West Bengal</td>
<td>14</td>
<td>9</td>
<td>28.67</td>
</tr>
<tr>
<td>24.</td>
<td>Supreme Court Mediation Centre As on 31.05.2012</td>
<td>635</td>
<td>157</td>
<td>24.72</td>
</tr>
</tbody>
</table>
1. Number of Mediation Training Programmes conducted in various States for training mediator. 319

2. Number of Referral Judges/Awareness Programmes conducted in various States for training the Judges for effective reference for Mediation. 2343

3. Total number of Mediation Centres in India. 353

4. Total number of cases referred by various States in India. 229506

5. Total Number of cases settled in India. 97385

6. National success rate of mediation. 42.43

WORKING OF MEDIATION CENTRES IN HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH, PUNJAB, HARYANA AND U.T. CHANDIGARH.

PUNJAB

MEDIATION & CONCILIATION CENTRES IN PUNJAB:

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>District</th>
<th>Sr. No.</th>
<th>District</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Amritsar</td>
<td>7</td>
<td>Patiala</td>
</tr>
<tr>
<td>2</td>
<td>Ferozepur</td>
<td>8</td>
<td>Sangrur</td>
</tr>
<tr>
<td>3</td>
<td>Hoshiarpur</td>
<td>9</td>
<td>Bathinda</td>
</tr>
<tr>
<td>4</td>
<td>Jalandhar</td>
<td>10</td>
<td>Rupnagar</td>
</tr>
<tr>
<td>5</td>
<td>Ludhiana</td>
<td>11</td>
<td>Kapurthala</td>
</tr>
<tr>
<td>6</td>
<td>Moga</td>
<td>12</td>
<td>Fatehgarh Sahib</td>
</tr>
</tbody>
</table>

There are total 12 Mediation Centres setup in the State of Punjab. 8 Mediation & Conciliation Centres at Amritsar, Moga (Faridkot), Ferozepur, Hoshiarpur, Ludhiana, Jalandhar, Patiala and Sangrur were inaugurated on November 8, 2008 through video-conferencing facility. Mediation and Conciliation Centre in Bathinda started working from
December, 2011. 3 more Mediation Centres at Rupnagar, Kapurthala and Fatehgarh Sahib have been set up in the year 2012. These Centres are being run by the Judicial Officers and 73 Trained Advocated-Mediators who have been imparted mediation training of 40 hours.

**TABLE- CASES REFERRED AND SETTLED THROUGH MEDIATION**
**UPTO MAY, 2012**

<table>
<thead>
<tr>
<th>Sr.No.</th>
<th>Particulars</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cases referred for mediation</td>
<td>7854</td>
</tr>
<tr>
<td>2</td>
<td>Cases settled through mediation</td>
<td>1750</td>
</tr>
<tr>
<td>3</td>
<td>Connected cases settled through mediation</td>
<td>174</td>
</tr>
<tr>
<td>4</td>
<td>Pending cases</td>
<td>265</td>
</tr>
</tbody>
</table>

**HARYANA**

**MEDIATION & CONCILIATION CENTRES IN HARYANA:**

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>District</th>
<th>Sr. No.</th>
<th>District</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Faridabad</td>
<td>8</td>
<td>Rohtak</td>
</tr>
<tr>
<td>2</td>
<td>Gurgaon</td>
<td>9</td>
<td>Sonepat</td>
</tr>
<tr>
<td>3</td>
<td>Hisar</td>
<td>10</td>
<td>Narnaul</td>
</tr>
<tr>
<td>4</td>
<td>Jind</td>
<td>11</td>
<td>Fatehbad</td>
</tr>
<tr>
<td>5</td>
<td>Kurukshetra</td>
<td>12</td>
<td>Yamuna Nagar</td>
</tr>
<tr>
<td>6</td>
<td>Karnal</td>
<td>13</td>
<td>Panipat (ADR)</td>
</tr>
<tr>
<td>7</td>
<td>Rewari</td>
<td>14</td>
<td>Panchkula</td>
</tr>
</tbody>
</table>

There are total 14 Mediation Centre set up in the State of Haryana. 9 Mediation Centres at Faridabad, Gurgaon, Hisar, Jind, Karnal, Kurukshetra Rewari, Rohtak and Sonepat, were inaugurated on 8th November, 2008 through video-conferencing facility. Mediation Centre at Narnaul was inaugurated on 07th February, 2009. Mediation and Conciliation Centre in
Fatehabad started working from December, 2011. 3 more Mediation Centres at Panchkula, Panipat and Yamuna Nagar at Jagadhri have been set up in the year 2012.

These Centres are being run by the Judicial Officers and 102 Advocates-Mediators who have been imparted mediation training of 40 hours.

**TABLE- CASES REFERRED AND SETTLED THROUGH MEDIATION**

**UPTO MAY, 2012**

<table>
<thead>
<tr>
<th>Sr.No.</th>
<th>Particulars</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cases referred for mediation</td>
<td>10725</td>
</tr>
<tr>
<td>2</td>
<td>Cases settled through mediation</td>
<td>3102</td>
</tr>
<tr>
<td>3</td>
<td>Connected cases settled through mediation</td>
<td>642</td>
</tr>
<tr>
<td>4</td>
<td>Pending cases</td>
<td>391</td>
</tr>
</tbody>
</table>

**CHANDIGARH**

**MEDIATION CENTRE AT PUNJAB AND HARYANA HIGH COURT, CHANDIGARH**

The Mediation & Conciliation Centre at Punjab and Haryana High Court, Chandigarh, was set up on 17th March, 2008, by Hon’ble Mr. Justice S.B. Sinha, the then Chairman, Mediation & Conciliation Project Committee, Judge, Supreme Court of India.

The Mediation Proceedings in the Centre are being conducted by 48 Trained Advocates-Mediators.
TABLE - CASES REFERRED AND SETTLED THROUGH MEDIATION

UPTO MAY, 2012

<table>
<thead>
<tr>
<th>Sr.No.</th>
<th>Particulars</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cases referred for mediation</td>
<td>3020</td>
</tr>
<tr>
<td>2</td>
<td>Cases settled through mediation</td>
<td>623</td>
</tr>
<tr>
<td>3</td>
<td>Connected cases settled through mediation</td>
<td>103</td>
</tr>
<tr>
<td>4</td>
<td>Pending cases</td>
<td>277</td>
</tr>
</tbody>
</table>

MEDIATION & CONCILIATION CENTRE AT DISTRICT COURTS, CHANDIGARH

Mediation & Conciliation Centre was set up in District Courts, Chandigarh, on 16\textsuperscript{th} May, 2008 by Hon’ble Mr. Justice Vijender Jain, the then Chief Justice, Punjab and Haryana High Court, Chandigarh.

This Centre is being run by 13 Advocates, who are trained mediators.

TABLE - CASES REFERRED AND SETTLED THROUGH MEDIATION

UPTO MAY, 2012

<table>
<thead>
<tr>
<th>Sr.No.</th>
<th>Particulars</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Cases referred for mediation</td>
<td>709</td>
</tr>
<tr>
<td>2</td>
<td>Cases settled through mediation</td>
<td>131</td>
</tr>
<tr>
<td>3</td>
<td>Connected cases settled through mediation</td>
<td>11</td>
</tr>
<tr>
<td>4</td>
<td>Pending cases</td>
<td>22</td>
</tr>
</tbody>
</table>
All these Centres are functioning effectively. The success rate in the High Court is 20.49% while the collective success rate of all the District Centres including Chandigarh is approximately 25.34%. This success rate has been arrived at by including even those cases in which no Mediation could take place either due to:-

- non-appearance of both parties; or
- their blank refusal to participate in the process of Mediation; or
- mediation could not be concluded within stipulated 90 days and the Hon'ble Court had not enlarged time; or
- cases had to be sent back due to fixation of actual date of hearing by the Hon'ble Court.

As against 20765 cases referred to the Mediation Centres, (including Mediation Centre at High Court), 5124 cases have been settled successfully alongwith 825 connected cases.

4.13 REPORT REGARDING WORKING OF MEDIATION CENTRES IN DELHI

4.13.1 Location and Infrastructure

The location of the Mediation Centres in the Court complexes has dual advantages; firstly, the parties as well as their advocates do not have to travel to some other place to attend to mediation meetings and secondly, as most of the government complexes are very well connected so the access to the Mediation Centres is not a problem. Most of the Centres are air-conditioned so as to have a comfortable atmosphere to discuss the problems of the parties. All the Mediation Centres have separate rooms for mediators to meet the parties. Special efforts are made to keep the settings of the Mediation Centres to be informal and cordial like a Central Hall with good
and comfortable furniture for parties to serve as waiting-lounges with magazines, newspapers and sometimes light instrumental and devotional music. Facilities of drinking water and canteen are also close to the Mediation Centre. In some of the Centres, mediation rooms are decorated with bunch of fresh flowers. All these things help in de-stressing the parties and giving them a venue for resolution of disputes which is different from a court room.

The researcher has noticed that in some Centres, the mediators use a Judge’s writing elevate which in the opinion of the researcher should be avoided as it gives an impression to the parties that the mediator is at par with a judge. The seating arrangement of the rooms also need to be changed as the parties are made to sit facing each other on the two sides of the table with the mediator at the third side of the rectangular table. This kind of seating arrangement reinforces the adversarial set-up and so instead of using rectangular tables, circular tables can be used. The researcher has observed that some of the Judge-mediator conducts mediations from their chambers due to paucity of the rooms at the Centre. This is highly objectionable as the concept of having Mediation Centre was to provide an informal setting which is not there in a Judge’s chamber. The power imbalance between the mediator and parties is very evident as well as for the parties it was same as appearing in court though judges try to make it as informal as possible. So there is a need to provide more chambers in the Centres. In the mediation rooms, mediators in some of the Centres are provided with one water-bottle / judge and one glass and in some, none. However, if the mediator wants to offer even water to the litigants, in case of need, it is not possible for them to do so. The attendants are available in the Centres but most of the time, they are either attending to the Judge In-charge or are not to be found. There is a need to have a dedicated support staff at the Centre who have a flair for
social service. In some of the Centres, there are no facilities (nearby the Centre) of even tea or snacks for the mediators who are expected to be at the Centre from 10 am to 4 pm. There is a need for installing tea or coffee machine near the Mediation Centre so that this inconvenience may not be there for mediators who can then concentrate on their work.

The researcher has found that in the District Courts, there is no separate budgetary allocation for the Mediation Centre as is there in case of the Delhi High Court Mediation Centre. The money given to the Centres is disbursed from the Contingency Fund. There is a need to have separate budgetary allocation of funds for all the Mediation Centres.

The researcher has observed that the High Court Mediation Centre has good facilities for litigants as well as the mediators. There is a tea/coffee vending machine at the reception of the Centre. The attendants at the Centre keep offering water and tea/coffee to the litigants, mediators and visitors, at intervals. The mediators can also offer tea/water to the parties in case if the meeting is going for long.

4.14 STAFF AT THE MEDIATION CENTRE

The Mediation Centres do not have a staff of their own and the administrative staff is borrowed from the court. In most of the Centres, the researcher has noticed a dearth of steno-typists as mediators as well as parties have to wait at times for than an hour to have a settlement agreement ready for signing. This has to be avoided as the whole concept of mediation process is not to harass the parties unnecessarily. There are attendants to call the parties, carry file and documents and attend to any other work but still the researcher has observed mediators sitting idle and parties waiting in the Central Hall because nobody is there to inform them that their mediator is free and they can go to his chamber. The researcher has personal experience of requesting the centre staff to telephonically inform the parties of next date
for mediation in case one or both the parties were absent but the same was not done by the staff inspite of the fact that this was also written by the researcher in the order-sheet. This shows a careless and negligent attitude of the office staff which is the hallmark of any government office staff. This should be avoided and there is a need to keep a strong check on the staff by the In-charge. At one of the Centres, the researcher has observed that instead of the Judge In-charge, it is the officer In-charge who is allocating cases to the mediator. This practice is not acceptable as the officer staff has no knowledge about the expertise of the mediator and moreover, this work is of the In-charge and it cannot be delegated to the clerical staff by him/her. In the same Centre, to the utter shock of the researcher, it was observed that the staff was marking the cases which were on the verge of settlement to the Judge mediators after asking the parties whether they want to settle the matter or not. This is being done for obvious reasons for appeasing the Judge-mediators and for helping them to earn more credits for having a good success rate. This is highly objectionable as the unwritten rule of assignment of cases as discovered by the researcher was that difficult cases are marked to the judge-mediator due to their expertise in judicial sphere. In the view of the researcher, there is a need to give some preliminary training regarding mediation to the administrative staff also so that they better appreciate the kind of work they are involved in.

4.15 QUALIFICATION OF THE ADVOCATE MEDIATORS

Initially, 40 judicial officers were trained by the trained professionals from ISDLS. After the trainers from ISDLS left, four judicial mediators HMJ G.P. Mittal, HMJ M. L. Mehta, Sh. Sudhir Jain and Smt. Deepa Sharma started training the members of the Bar and the Bench. Later on, some 13 or 14 judge mediators and one advocate mediator received the Training of Trainers from the CEDR, UK. These were called as Master
Trainers. Now, the Delhi Mediation Centre has created in-house training for trainers. Any mediator who has completed a minimum of 50 mediations can undergo the Training of Trainers Programme on the recommendation of the Judge In-charge.

Earlier, the qualification for empanelment for advocates was a minimum of 10 years of experience at the Bar and 40-hour training. The training used to be imparted free-of-cost to the prospective mediators. Recently, there has been a change in the policy in respect of the qualifications for advocates. Now, an advocate who has a minimum income of at least three lakhs per annum only can apply. This additional requirement is made to ensure that only good quality advocates become mediators and the advocates who join mediation with the only purpose to earn money because they do not have a good practice may not be empanelled. As according to the Delhi Mediation Centre, mediation should be used by the advocates to do their part of social service. This is a welcome step to check the quality of advocates at the entry level. However, whether the requirement that only successful advocates can become mediators is slightly doubtful, especially, when mediation require certain skills which can be acquired by people regardless of whether they are good advocates or not. Researcher thinks that as it is case of court-annexed mediation, this requirement may pave a long way to restrict the entry of greedy people to become mediator.

Another, welcome step initiated by the Delhi Mediation Centre is that they have started charging an amount of Rs 3000 towards the administrative cost of the training. The researcher is of the view that this amount can be increased to help the already fund-starved Mediation Centres.

4.16 APTITUDE OF THE PARTIES

The researcher has found during the course of her field study that the parties are more or less satisfied with the process of mediation. The
entire concept of ADR as means of resolving the dispute in a court setting is new to the large category of masses. So most of the people were not in a position to comment on the process but they were at least exploring the option due to the application of Section 89 of CPC. For the respondents, the experience at the Centre was a pleasant one different from the court system. They liked the informality atmosphere where they are not intimidated by the system. Litigants are happy to be able to participate in the proceedings.

The researcher is of the view that it is going to take a decade for Indian masses to be able to comment on the quality of process, competence of mediator, etc. Inspite of the fact that the still in its infancy, the researcher has observed that some parties have started taking the system for granted by not turning up on the date inspite of reminder from the Centre staff on phone. As the process is cost-intensive, the parties at times take it lightly. Some parties abuse the process to gain time from the court proceedings. Some parties keep on receiving phone calls during the mediation process. This can be avoided if there is a firm attitude of the mediator. There is a need for closer cooperation between the mediator and Centre In-charge to keep the parties under check.

Western countries in acute cases, Mediation Centre may impose cost on parties for not taking the mediation process seriously.

4.17 APTITUDE OF THE ADVOCATES REPRESENTING LITIGANTS

There are two mutually exclusive views about the role of advocates in mediation process: according to the first view, advocates should not be allowed to be present during the mediation process as adversarial tendencies ingrained in their personality and so they hinder the parties from entering into any kind of settlement. Apart from this, if parties fail to reach a settlement then the matter will go back to court.
Court and advocates will be able to earn and in case parties reach a settlement at the Mediation Centre, not only the present case but all the connected matters also get settled which will mean a loss to the advocates. These reasons obviously create a bias in the minds of the advocate against settlement. According to the second view, the advocates can be allowed in the process because the presence of advocates may help the successful completion of the mediation process. The advocates can act as negotiators on behalf of the parties so that the party may not enter into any unjust settlement but as advocates are well-versed with all the legal technicalities of the matter they are in a better position to negotiate a settlement which can maximize the benefits to their parties. Moreover, the mediator can take the help of the advocates of the parties at the times of ‘reality-testing’ as sometimes the parties have lofty demands from an exaggerated claim of their rights which hardens their position. In such situation, the advocates can help parties to come to the ground realities. However, the mediator has to be very cautious while using the advocate for reality testing as if the mediator discloses the weakness of the case in front of the party there is a chance that the party may lose faith in its advocate and this may offend the advocate.

Mediation Centres had to face a lot of opposition from the Bar because advocates considered it to be blow to their earnings and in fact Karkardooma Centre initially faced lot of opposition and it was boycotted by the Bar for few months also. Later on, the attitude of lawyers has changed. The change is brought by Awareness Programmes which are organized periodically at all the District Courts in Delhi for educating the lawyers on benefit of ADR and court-annexed mediation. More so the court is under a mandate to refer the cases to mediation / Lok Adalat, etc., under Section 89 of CPC and lawyers do not have a choice but to follow the orders of the court. But it is equally true that you can take the horse to the well but you
cannot make it to drink the water. Similarly, even now there advocates who still consider mediation to be a mere waste of time another step in the civil proceeding due to their selfish motives. Advocates tutor the parties before they go for mediation to keep their positions. In India, litigants are so unaware of their rights complexities that they are totally dependent on their advocates. But important is the fact that majority of lawyers have understood the ADR methods. Some advocates have started looking mediation as an alternative career option which apart from generating money is very satisfying. Some advocates are of the view that earlier they only one case to fight for years, now they can have more cases as some will get settled in mediation and hence more business for them. Advocates have devised methods of securing their full-fee even if the case get settled through mediation process commence so that even if the case get settled they suffer any loss.

4.18 APTITUDE OF MEDIATORS

There are two categories of mediators in India: judge and advocate mediators. For both the categories, 40-hour training is necessary. The Judge mediator offer mediation services as part of judicial duty and advocate mediator offer mediation services as part of regular practice for which they receive an honorarium. When mediating a case, the researcher has observed that automatically the judicial office generates respect in the mind of parties, wisdom honesty, are some of the qualities which a judge-mediator brings him as these are qualities which are attached to all judicial officials. Acceptability of the mediator is not an issue in case of judge mediator whereas a judge-mediator is in a better position to handle the advocates of the case, they are creating hurdles in the process whereas an
mediator cannot very straight-forwardly handle such situations as the other advocates are also brethren and he cannot be very strict with them. Some of the Judge-mediators told the researcher that even before enactment of Section 89 also the judges were effectively helping the parties to settle their case. The researcher has found the judge-mediators to be doing the work of mediation very sincerely. Most of the judge-mediator were very passionate about this entire concept of ADR and consider this opportunity to be able to help the masses even in a better way by getting their cases settled. The researcher has found that initially judge had some problem in adjusting their work in five days but later due to numerous refresher course and orientation programmes on case-management and ADR, now there is no problem.

However, the researcher has also observed that while mediating, the judge-mediator find it very difficult to control the urge to give an evaluation on the merits of the case. The researcher has also observed that some judge-mediators get angry if their suggestions are not accepted by the parties. Also some judge-mediators were almost coercing the parties into settlement because they thought it was the best settlement for the parties. Without questioning the appropriateness of these gestures by the Judge-mediator which the researcher know was done in best of intentions to help the parties but these, in the humble view of researcher, are against the process of mediation which require the parties to decide for themselves. Majority of the judge-mediators are doing mediations in its true spirit but there is a need for change of attitude in the judge-mediator to be more humble and patient with the parties.

The advocate-mediators are also equally devoted to their work as mediators. The researcher has observed that the advocate mediators are behaving very patiently with the parties. They try to help the power imbalance between the parties as well as general ignorance of the masses in
a subtle and oblique manner without directly giving any legal opinion about their cases. Most of time, it was observed that the mediators have to do a reality check with the parties in caucuses. The advocate-mediators are, also, respected by the parties. The advocate-mediators told the researcher that this work gave them a satisfaction which they never achieved after winning a case in the court. The mediators are also of the view that the training has actually changed their perception of the disputes and dispute resolution. Most of the mediators were very appreciative of the mediation as a method of dispute. For most of the advocate-mediators, this is an opportunity to do some community service and they feel that mediation has actually helped them in broadening their horizons.

However, there were also a considerable number of respondents who were agreeable to the positive aspects of mediation but were slightly sceptical about their future in this area. Some of the mediators were under an impression that through mediation they will get a chance to be elevated to the judiciary. Some were of the view that it is affecting their practice as for one whole day they are expected to sit in the centre and not allowed to attend to their work in the court. Whereas, most of the mediators were of the view that mediation is not affecting their practice negatively but rather positively as they are now getting more clients due to their good reputation as mediators.

The researcher has also observed that some of the mediators were coercing the parties to enter into a settlement because they will be paid only on the settled cases and their success rate also depend on total number of settled cases. Researcher has also observed some of the advocate-mediators doing their own work from the Centre like making phone calls during the process, entertain clients at the mediation chamber, etc.

4.19 JUDGE IN-CHARGE OF THE MEDIATION CENTRES
The role of the Judge In-charge is very crucial in the successful running of the mediation programme. Every Centre has an In-charge of the level of Additional District Judge. The Judge-In-charge has to perform this role full-time and they are relieved from the judicial work. The In-charge is responsible for receiving the cases from the referral courts. On receiving a case, the In-charge is required to call the parties and talk to them to ensure consent of both the parties for mediation. In case, there is no consent either on part of one or both the parties to the dispute, the In-charge is expected to discuss the merits of the mediation process and try to get their informed consent for the process. Now-a-days, as the court files are not sent to the Centre but only a referral order, which is also formatted. So the In-charge can briefly ask the parties regarding the nature of the dispute. After this, he may assign the case to either the Judge or the advocate mediators who are present for that day. The In-charge can himself act as mediator, in case, he wants to do it. One of the most important works of the In-charge is the assignment of the cases. Proper assignment of cases to the mediator is very important for the success of the programme. As told to the researcher, the In-charges generally assign cases depending on the area of expertise of the advocate mediators and difficult categories of cases are marked to the Judge-mediator. This requires a very close co-ordination between the mediators and the In-charge so that the In-charge is well-versed with the area of interest of the mediators of his Centre. In most of the Centres, the researcher has observed the In-charge to be very cordial with the mediators of his/her Centre and mediators also feeling comfortable to approach their In-charge in case of any difficulty either at mediation or otherwise. The researcher has observed that towards the evening when the work is slightly relaxed, the mediators informally meeting the In-charge over a cup of tea and discussing their problems and gaining lot of insight from the In-charge’s experience and expertise. This showed great administrative skills of the In-charge for
making themselves available to their colleagues. However, in one Centre, the researcher has also noticed no contact between the judge In-charge and the mediators. In this case, the judge In-charge occasionally visits the Centre may be because he/she may be doing their judicial work but even when the In-charge is there in the Centre, he/she is hardly bothered and interested to show any interest in the running of the Centre as the case are assigned by his Office In-charge who is meeting the parties to know the nature of their dispute. The same clerical staff is asking the parties whether there is any chance of settlement and also marking the cases to the mediator. In short, the In-charge is not performing his duty and not concerned about the problems of the mediators.

Apart from assigning cases to the mediators, the In-charge is also required to co-ordinate with the court for sending the files back to the court both, in case of a settlement or no settlement. The mediators are not expected to talk to the court under any circumstances so in case they want extension of time, they are required to approach the In-charge and he can in turn request the court on behalf of the Centre. The In-charge is also required to prepare a statistical data of number of cases assigned to each mediator and the fate of those cases. As periodically, the Centre has to send to MCPC a data of total number of cases marked to the Centre and total number of cases settled as well as the total number of connected cases settled.

The In-charge is also required to manage the working of the Centre and its various facilities. It is also expected to organize refresher courses for the mediators as well as periodical meeting of the mediators to know their experiences and problems. The In-charge is also expected to hear complaints of the parties against the mediator, the Centre staff or any other problem regarding their case and the mediators can also complain regarding
the behavior of any party or its advocate to the In-charge. Hence, the role of the In-charge is very important for the working of the Centre.

The researcher observed that most of the In-charges were performing their work very efficiently. However, there is a need for the In-charge to take some more initiative to explore the problems being faced by the mediators as their job-satisfaction is very crucial for the success of the process. Also, the In-charge are required to keep a check on the office-staff so that everyone perform their duties effectively. The In-charge can be proactive in order to improve upon the facilities in his Centre so that it gives an overall good experience to all the stakeholders. Also, the researcher in her view thinks that there is no need to have a judicial officer as a Centre In-charge and should save the scarce judicial resources that we have for the adjudicatory system. There can be an administrative officer or a manager at the Centre who is tuned into the process of mediation.

4.20 Periodic Meetings and Refresher Courses at the Mediation Centres

Though the mandatory 40-hour training is compulsory for all to be empanelled but equally important is to monitor the progress during training and subsequently, since training is concerned with helping participants to modify their behavior and to develop increased skill it is important that trainers look for sign that trainees are, for example:

- observant, distinguishing between issues of substance, procedural issues, issues of interaction between the parties, identifying specific success and difficulties in the way negotiations are conducted.
- purposive, focusing on what needs to be achieved in the future and underlying interests.
- able to diagnose or interpret underlying causes of successes and difficulties.
❖ able to propose general approaches for tackling causes of difficulties and for extending causes of successes.
❖ able to develop ways for trying out those approaches

While some development in skill should be observable during a training programme, as pointed out earlier, significant improvement can only come about over time and with repeated experience. The implication is that training needs to be followed up afterwards by reviewing with participants their efforts to apply ‘lessons’ they derived from their training and encouraging them in their efforts to build on experience. For a period, after training such reviews between trainers and participants are useful not only in monitoring whether the trainees are actually trying to apply ‘lessons’, but also in helping them to keep on learning.

The researcher has found that the requirement of imparting 40-hour training is religiously followed but in respect of refresher course and periodic meeting to share experience, the trend is not very appreciable. The researcher has found that in most of the Centres, there has hardly been any meeting of the mediator being called by either the Centre In-charge or the mediators themselves. All the mediators were of the view that such meeting would be very good and will help them in sharing their problems and learn from the experience of others. When the Centre In-charges were asked about these meeting, they were of the view that it will be very difficult to find a day on which all the mediators will be free and willing to come for a meeting. The researcher is of the view that inspite of this, the possibility of such meeting can be explored and nobody knows that the mediators may come to attend these meetings. In Dwarka Mediation Centre in its initial months of establishment, the Judge In-charge used to call meetings of the mediators on every Saturday. Such experiments can be repeated in other Centres as well.
In Karkardooma Mediation Centre, the researcher has herself participated in refresher course which was conducted for the mediators. The Judge In-charge had called good and expert speakers to talk on some of the tricky issues of mediation process like an impasse, etc. The refresher course was very informative for the mediators but throughout her field study of two years, researcher has not found much follow-up courses to be organized for the mediators.

4.21 AWARENESS CAMPAIGN

According to Ms. Sadana Ramchandra, Organising Secretary of Samadhan, Delhi High Court’s Centre for Mediation and Conciliation, apart from training equally necessary is to create awareness among the legal fraternity and the public at large. The Bar must believe in mediation and the judiciary must believe in it as the success of mediation depends on the right cases being referred at the right time. Hence, there is a need not only to create awareness among the masses but among the lawyers and the judges as well. The Centres are doing lot of activities to create awareness among the people, by using radio and television, newspapers and magazines for advertisement of the mediation process and its advantages. One very innovative step by the Delhi Mediation Centre is to send the pamphlet of mediation with the summons of every case to the defendants as well as the witnesses. The Mediation Centres also organize awareness programmes for the advocates so as to explain to them that mediation should not be considered by them as something which has come to hamper their practice but realize its positive aspects so as to help them in adopting mediation, as part of the practice at the Bar and a good and satisfying alternative or additional career. Such awareness programmes are also conducted periodically to educate them in the use of ADR methods.
4.22 ROLE OF REFERRAL JUDGE

In mediation, the key to success depends on referral of appropriate cases at the appropriate time. Though Section 89 read along with Order X, Rule-1A provides that a case can be referred after recording the admission and denials and before framing of the issues by the court. However, it was told to the researcher by the respondents that the courts are referring case at any stage of the case if the parties are willing to explore the option of mediation. In some matrimonial case the matter is referred immediately after the sending of summons to the defendant. Sending the cases at such early stage has its own advantages as well as disadvantages. The positive aspect is that the position of the parties are not very much hardened at the initial stage because it was experienced that after the pleadings are completed the stand of the parties become more rigid due to allegations and counter-allegations of the parties which is generally there in exaggerated form. However, one very important thing which researcher has noticed that in such cases, sometimes it is very difficult for the mediator to help the parties to settle the cases as parties come to the court with very high expectations and unless and until they have a real-time experience of court and court procedure they are not in a position to understand the importance of resolving the dispute amicably. Moreover, some of the judges were also of the view that in India people have a very revengeful attitude in actuality and they derive some sadistic pleasure in causing inconvenience to the opposite party by dragging them in the court, especially, when in India being involved in court proceedings are still considered to be causing loss of reputation to the respectable people. The researcher herself while mediating has found that it is very difficult to convince people that they will not get anything by dragging the matter in the court as the response of the parties to such
discussion is that if they will not get anything the other party will also have to suffer loss of time, money and reputation.

In the backdrop of such mental attitude of the litigants, the role of a referral judge becomes very important. The Supreme Court while interpreting Section 89 and Order X, Rule 1A of CPC in Salem Bar I Case, has held that even if the parties are not agreeable to explore any option under Section 89 then also the court may refer them to an appropriate mode keeping in mind the nature of the dispute. The fact that consent is the basis of any settlement makes the work of referral judge more crucial as it should not appear to the parties that they are forced to adopt any mode of ADR under Section 89. Hence, it is the duty of the referral judge to inform the parties regarding the various modes available to them and educate them, in case of need to do so and help them to understand the benefits of exploring these modes like these processes are free of cost and even the court-fees will be refunded in case a settlement is reached and that the parties cannot be forced to enter into any settlement even at mediation. In order to bring uniformity, a uniform format of referral order (Annexure - VI) is followed in the Delhi Mediation Centre which has necessary features like nature of the case, stage of referral, phone numbers of the parties and their advocates so that the Mediation Centre can contact them easily. The Delhi Mediation Centre has also passed Guidelines for Referral Judges (Annexure – VII) regarding do’s and don’ts for referral judges and categories of cases fit for mediation. In spite of all these guidelines and directions of the Supreme Court, the researcher has observed that some of the referred judges are marking cases to Mediation Centre without applying their judicial mind. The nature of the referral order is judicial and hence it requires the judge to first see whether the case can be settled and then obtain an informed consent of the parties. It was told to the researcher that about 20% of the cases were
returned under the category ‘not fit for mediation’ which implies that the referral judges are mechanically sending the cases to the Centres. In order to avoid that the mediation become just another stage of the court proceeding, there is a need to create more awareness among the members of the Bench. There is also a need for the referral judges to write referral orders as these are judicial orders which cannot be formatted.

Referral Judges have other important roles to play apart from referring cases to the Centre like keeping a check on the parties to see that the parties are not getting the case referred to mediation just to gain time and prolong the proceedings. The referral judge also has to see that the settlement which is achieved during the mediation process was voluntary and the parties were not coerced into the settlement. The referred judge also has to closely scrutinize the settlement to check its legal authenticity as parties are not permitted to agree on illegal terms.

One complaint which advocate mediators have from judges is that they do not accommodate advocate mediator by not giving them the dates on the days when they are not mediating. It implies that still there is a need to create more awareness among Bench so that they help the advocate mediators to adjust their cases on the five days when they are practicing at the courts.

4.23 HONORARIUM OF THE ADVOCATE MEDIATORS

Initially, the mediators were not aware that they would be paid. According to Sh. Jitender Pal Sengh, the first Organising Secretary of Samadhan, it was all pro bono work. According to him, the motivation for the work was service. The advocates wanted to do something good for the society. The lawyers were of the view that this was the way they could help the system cope with arrears. Now a mediator in the Delhi High Court gets Rs.10,000 for every successfully concluded case and Rs.7,500 for cases
which were not resolved. The High Court mediators are paid to the country. The mediators’ fees are lower in the other courts. for successful cases and Rs.2000 for a successfully concluded case and no fee for an unsuccessful case. The Delhi Dispute Society is following a different model of paying the honorarium Rs.1000 per day irrespective of cases settled or not.

Some of the advocate mediators were of the view that the honorarium is too less as compared to the efforts which are neither parties reach an amicable settlement. However, when the discussed with HMJ Madan Lokur, one of the pioneers of the movement in India, regarding the issue of honorarium, he was of the view that the mediator should not consider mediation as source of income but consider it as a way of service to the society, especially the process is free for the parties. His Lordship was of the view that the honorarium is increased it can lead to more corruption in the Sengh was hopeful that in future commercial litigation will be sent to Mediation Centres and then the mediators will be able to fees. Even though the mediators do not charge fees at Samadha settled some commercial disputes and the parties have signed donations to the Centre. Firstly, the parties wanted to pay the mediator when they were told that the mediator could not accept the donation made a donation to the Centre so even if today a mediator may almost pro bono, but once people accept the mediation process will be sought out and can quote their fees to the parties.

However, the researcher is of the view that either the no payment to the mediator or some payment on the basis of success Centre. The fear that this will be a de-motivator to the mediation efforts to settle the case is not very significant but the fact that
sitting in the Centre and not doing any of his work on that which is important. Moreover, paying honorarium only for settled cases might have side effects like the mediators coercing parties to settle the case. One significant complaint of the advocate mediator is the irregular payments. The amount which is paid to them. Some of them were really frustrated with the fact that whatever small amount they are entitled, that too being sometime after a financial year. Any kind of incentive with importance after a certain period of time.

Another problem that the mediators are facing is the irregularities in the honorariums are calculated. The researcher was told by many advocates that there were errors in calculations and they were paid whatever small amount they are entitled, that too sometime after a financial year. Any kind of incentive with importance after a certain period of time.

4.24 TRAINING FOR THE MEDIATORS

As has already been mentioned by the researcher that the mediators undergone the 40-hour training to not only have a first-hand information about the contents of the training module but also methodology of training. The report of the researcher was published in the Mediation Newsletter published by the Delhi High Court. It was observed by the researcher that the training programme is an ideal blend of theoretical and practical components of mediation process. The 40-hour training schedule was completed over a period of ten days (at Dwarka Court Complex) and was spread over a period of ten days (at Dwarka Court Complex) to have adequate time for practical components of the training. The study and handouts provided during the course were comprehensive, understandable and very relevant for the participants. Each day's schedule...
designed to include lectures, discussions, exercise and role-plays. The curriculum design enabled the participants not only to understand the concepts but also apply the same to the specially designed role plays for each day, drawn from many different contexts like family, matrimonial, business, etc. All the resource persons with their vast experience as judicial officers as well as mediators made the understanding of the concepts easy by supplementing it with their practical experience of mediating cases.

The main emphasis in the training was an enabling the participants to effectively use the mediators tool box of skills i.e. communication and negotiation skills. The significance of verbal and non-verbal communication skills helps in picking up non-verbal clues from the disputants which can be critical in some mediations. Collaborative problem solving methods were new to many participants in the training. After the training, participants experienced a shift in their personal approach to conflict and conflict resolution. This paradigm shift was facilitated because of lectures on the principles of collaborative or win-win/problem-solving approach, real-life examples of unexpected but clearly optimal solutions arrived at through an interest based approach, and the use of role-plays and exercises. After each exercise, participants were told to compare their observations with rest of the participants. These reviews were used by the training faculty both to encourage the identification of useful “lessons” by the participants themselves and, where relevant, to provide short inputs in useful ideas, concepts and methods. Apart from such inputs, the training faculty used to coach and facilitate, particularly, during the role play and review sessions to encourage the testing of ideas or theories, and to elaborate, illustrate and demonstrate points as appropriate. By the end of the training, the participants acquired an ability to use effectively the following:

(i) A process for resolution of disputes;
(ii) communication skills;
(iii) causes of conflicts including psychological factors;
(iv) to identify underlying interests of the parties;
(v) listening skills;
(vi) appropriate questioning skills;
(vii) ethical consideration; and
(viii) application of spirituality in mediation

The training, as told to the researcher by her co-participants, was a life changing experience for the participants due to its emphasis on positive thinking and positive approach towards life, itself.

The training also have a practical component to it which require the trainee mediators to do ten successful mediations as co-mediators with senior mediators after which only they are given certificate of the successful completion of the training. This is very good as trainee mediator got to learn by watching an experienced mediator doing real-time mediations. During this period, the trainees can also get accustomed to the working of the Mediation Centre, writing settlements and performing other works as mediators. The trend of giving trainee mediators independent cases should be discouraged as was observed by the researcher in one of the Centres as this can give a wrong signal to the parties due to inexperience of the mediators in handling the matters.

The training module only discussed one model of mediation i.e. the problem solving model and the other models of mediations are not even introduced to the participants. The reason for this may be that the mediators are required to follow only the ‘GETTING TO YES’ model due to various reasons. But it has been accepted throughout the world that as litigation is not the only way to resolve disputes similarly problem-solving model of
mediation cannot be a panacea for all types of disputes. As has been mentioned by the researcher in previous chapter that for family disputes and other disputes involving inter-personal relations, problem-solving model is not adequate with its emphasis on reaching an agreement by expanding the pie to maximize the interests of all the stakeholders. The transformative or narrative models of mediation are more appropriate for such disputes because these models allows the parties to vent out their emotions fully and then empower them to reach a settlement or just help them to understand the perceptive of the other party. Obviously, these models need lot of time to be devoted by the mediator and a totally different type of methodology and approach. These models required to be atleast introduced in the training so that if anybody is interested to apply them can do so by getting more information regarding these models. Moreover, in the present system, time is a problem for mediators as their success is rated on number of settled cases not how effectively they are able to help parties to empower them to take decision for themselves.

4.25 THE MEDIATION PROCESS

According to the training module used in District Court Mediation Centres, Mediation is a process in which a third party who is neutral is engaged for resolving a dispute between the parties. Basically, mediation is a non-binding negotiation process, in which a neutral third person facilitates the disputants in arriving at a mutually acceptable settlement. To assist the parties, the mediator uses specialized negotiation and communication techniques to arrive at dispute resolution. The mediation process is structured and informal. Parties control the outcome of the dispute which is in the form of an agreement/settlement. The mediator controls the process through which the parties arrive at their own settlement. The entire process is confidential. According to the Training Module, mainly three types of
mediation models are being followed in India: Commercial Mediation, Community Mediation and Family Mediation. The stages of process are introduction, joint session, separate session (caucus) and agreement. In the introduction, mediator is supposed to welcome the parties, introduce himself, describe mediation process, describe the role of mediator, confidentiality of process and explain the general rules to be followed during the process. The basic object of the joint session is to gather information and to know background of the dispute. The separate session (caucus) is optional and is arranged after conclusion of joint session. In caucus, the mediator meets with each of the parties with their counsel, separately. During caucus, the parties interact with the mediator in confidence. The mediator can also have sub-caucus with either parties or their counsel separately to facilitate negotiations. The mediators, generally, uses the caucuses and sub-caucus for reality testing and to discuss the BATNA or WATNA with the parties. Agreement is the last phase of the process. According to the Training Module, the mediator is expected to perform both the roles of a facilitator and an evaluator. The mediator as facilitator is expected to manage interaction, facilitate communication, identify barriers to agreement and develop terms of settlement based upon interest of parties. As an evaluator, the mediator is expected to do reality testing both on law and facts. However, evaluation is required to be done at appropriate time and in appropriate manner.

Ideally, the mediator’s role according to the Mediation Rules 2004 and also theoretically is supposed to be purely facilitative and there is a large debate about whether the mediator can/should do evaluations at any stage of the process. However, the researcher is of the view that in a court-annexed mediation situation is slightly different. The researcher has observed that the parties want some evaluative input from the mediator. This feeling is an
organic outgrowth of the setting in which our mediations occur - lawsuits. The outcome in lawsuits turns on law and evidence. These are the matters which beg for analysis. Another significant thing which the researcher has observed is that many lawyers and litigants want to use the mediation process to learn whether their evidence and arguments are persuasive- and if they are not, why. Some lawyers hope that the mediation process will provide their client with more confidence in the lawyer’s competence and advice. Apart from these, the researcher has observed the lack of legal awareness in masses even highly qualified people require the mediator to play a slightly pro-active role to prevent power-imbalances between the parties, avoid the parties from coercing each other into entering one sided settlement and also simply to empower the parties to take an informed decision regarding whether to enter into a settlement or not. Hence, most of the mediations hosted by our neutrals involve both group and private session and that most include both the facilitative and evaluative inputs. Most of the mediations are blurred or hybrid undertaking in which the mediator emphasizes a facilitative approach for some portion of the proceedings, but also, in appropriate circumstances and in measured ways, engage-at last, in caucus – in some dialogue with the parties about substantive aspects of the case. Our training teaches the mediators that it is generally wise to give the process considerable facilitative play before venturing into any evaluative role, but acknowledges that the parties often really want and really appreciate careful and appropriately qualified evaluative feedback about some aspects of the case.

4.26 DEFINITION OF SUCCESS IN THE MEDIATION PROCESS

The issue of how success is defined in mediation is very relevant for evaluation of ADR Programmes and for improving the training methodology and conduct of mediators. In any court-annexed mediation,
main reason for having any ADR method is development of alternate courts with case-loads and full dockets is considered to be a concern, the practical question of whether the parties have agreement, and what qualifies of it are, is very important. However, the view of the researcher treating agreement as the final stage of mediation should not be the approach as is there in the training module practical application because though agreement should always be a goal of mediation but it is not the only goal of mediation. There are other purposes which can be fulfilled by sincerely undergoing mediation like the mediation process can open the channel of communication between the parties; it can clear misunderstanding between the parties; unsuccessful mediation can help in narrowing down the issues between the parties; the mediation process can help the parties to realize what are the real causes of conflict between them and can assist the parties and their counsel in prioritizing the issue. Hence, it is said that a mediation effort never fails. This aspect of mediation needs to be highlighted. There are other reasons also as to why agreement should not define success in mediation. One very important reason is a mediator is paid only for a successfully settled case which sometime can force the mediator to coerce the parties to some settlement without bothering about the long-term life of the settlement it creates an artificial division between the mediator which is classified as successful and other classified as unsuccessful appreciating the fact that mediators may have honestly helped the parties to resolve the issues, it generates a rival to the mediators as was observed by the researcher in her field study.

The researcher has also observed that another negative aspect of this issue is that it has made the mediators to explore a way to
increase their statistics of success rate. In the mediation (Annexure – VIII) by the Centre there are six categories of reasons a case has not been settled (which is used by the Centre for purposes). These categories are not fit for mediation; one or more necessary party could not obtain authority to negotiate; one or more necessary parties appeared; parties did not participate/deferred to participate; parties and participated but later referred; and parties could not reach agreement terms. The mediators by now have realized that if they return a case as “not fit for mediation” then it will not change their statistics of success rate will not be treated as an unsuccessful case on part of the mediator researcher has seen, irrespective of the reason for not reaching an agreement, the mediator send back the case under this category even after several meetings (because if a case is not fit for settlement it can be observed by the mediator in 10-15 minutes of discussion with the parties). This is highly unethical on part of the mediators. The researcher also is of the view that some of these categories are highly artificial and impractical; the difference between one or more necessary party never appeared; parties did not participate is not understandable. Similarly, having a category as “not fit for mediation” is slightly controversial as it gives a scope to the researcher to question the competence of the referral judge and is convenient to misused by mediator. Also the researcher was told on confidentiality that in high-powered meeting it was directed to the mediator not to write ‘not fit for mediation’ but instead of giving such direct direction category can be removed.

4.27 EVALUATION PROGRAMME

Mediation programs and mediators have the responsibility to ensure they are providing high quality dispute resolution services. They are responsible for the quality of service provided by any mediator.
they refer matter directly or indirectly. Quality control efforts are thought not only to protect consumers but also to maintain the legitimacy and public confidence in both the mediation process and the courts. Presently, there is no process to evaluate the mediator’s performance. However, feedback forms are kept in all the Centres. In order to meet their responsibility for ensuring the quality of services provided, courts or the Mediation and Conciliation Project Implementation Committee needs to monitor the performance of the mediators as well as the operation of the mediation programme more broadly. Internationally recognized methods for assessing on-going mediator performance include education, training and experience; Written Exams; Settlement Rates; Performance-Based Assessment; User Complaints and assessments; etc. The various methods have their own advantages and disadvantages and measure different aspects of mediator competence. Accordingly, any assessment program should not rely on a single method to assess mediation quality, but should use several of these methods.

4.28 PRE-LITIGATION MEDIATION

In India, apart from court-annexed mediation for pending matters, pre-litigation mediation is also offered now-a-days under various initiatives. Institutionalisation of pre-litigation conciliation has a long history from the Industrial Disputes Act, 1947 and recently by introduction of Chapter - VIA in the Legal Services Authorities Act, 1987 in 2002. Chapter – VIA provides for establishment of Permanent Lok Adalats for pre-litigation conciliation in Public Utility Service’s disputes. However, institutionalization of pre-litigation mediation has happened recently by establishment of the Delhi Dispute Resolution Society which has started functioning through its eight Centres, in 2010.

4.29 SUGGESTIONS
Amendments of the Laws Governing Institutionalization of Mediation in India

Amendments in Section 89, CPC and Order X, CPC, 1908

1. The language of Section 89(1) needs to be amended and the requirement of ‘formulation and reformulation of the possible terms of settlement’ should be deleted.

2. The definitions of ‘judicial settlement’ and ‘mediation’ is clauses (c) and (d) of Section 89 (2) shall have to be interchanged to correct the draftsman’s error.

3. Order X Rule 1 may be amended to include the latest interpretation of the Supreme Court in Afcon Industries case regarding the need of consent of the parties for referring the case to arbitration and conciliation and no need of the consent of the parties for referring the case for other ADR methods.

4. There is a need to amend the language of clause (d) of Section 89 (2) so as to clear the doubt that it is the mediator before whom the settlement has to reach and not the judge.

Amendment of Mediation and Conciliation Rules, 2004

These Rules were framed initially but now after a period of seven years, there has been lot of change in the mediation practice and number of developments has taken place which require amendment of these Rules.

1. There is a need to amend the title of the Rules - the word ‘conciliation’ can be deleted as these Rules deal with only mediation.

2. There is a need to amend Rule 2 which talks about appointment of mediators. The Rule should incorporate the current method of referring the case to the Mediation Centre.
3. Rule 4 needs to be amended to include the requirement of undergoing 40-hour training and successfully co-mediating ten cases.

4. The researcher also suggest that the requirement of minimum experience of 10 years at Bar or 15 years in other services should be deleted as the skills needed for mediation has got nothing to do with the experience of mediator. This is currently followed in the Delhi Dispute Resolution Society where any respectable citizen of the locality, public spirited persons, lawyers, social workers, etc. can become mediators if they have undergone the training prescribed by Mediation and Conciliation Project Committee.

5. Rule 10 (b) (iv) is needed to be deleted as mediation is a paperless proceeding and in actual practice parties are not required to submit written memorandum of their submissions to the mediator.

6. Rule 26 can be amended or deleted as for the parties mediation is free of cost. This Rule can include the detail regarding the honorarium to be paid to the mediator.

7. The researcher suggests that the present Rules are more appropriate for private mediation practice and there is a need to formulate another set of Rules for court-annexed mediation.

Amendments to Chapter – VIA of the Legal Services Authorities Act, 1987

1. Section 22B (2) (b) may be amended to include one trained dispute resolution professional so the new composition can be
one judicial member, one member from the Public Utility Services and one mediator/conciliator.

2. There may be an amendment in Section 22C (8) by adding that in case the parties fail to reach agreement then on the oral/written request of both the parties, the Permanent Lok Adalat may decide the dispute.

3. In case the suggestion in previous point is not feasible than Section 22E may be amended to add some limited grounds on which the award of the PLA can be challenged because even an arbitral award can be challenged on limited grounds under Section 34 of the Arbitration and Conciliation Act of 1996.

4. Further, Section 22B (1) may be amended to include more categories of dispute under the jurisdiction of PLA.

Suggestions to Avoid Discontentment Regarding Court-Annexed Mediation

A primary goal for courts in offering mediation and supporting mediation programs is efficiency. Related to that goal of efficiency is how the courts can best utilize their limited resources to most expeditiously and fairly dispose of cases on their docket. Efficiency is a strong motivation for promoting processes that increase the number of settlement before trial. But an unbridled focus on short-term efficiency can have harmful results for litigants and for the society. Most notably, short term efficiency can breed lack of quality and the use of various coercive tactics to effectuate settlement. Coercion in social institutions leads to disrespect of such institution and erosion of democratic ideals.

Efficiency as a long-term goal is consistent with both court and mediation values. Long-term efficiency requires the need for court supported interventions that impact positively on the quality of dispute resolution such
that the litigants do not repeatedly return to use the court’s resources. Litigants engaged in conversation with each other and deciding how best to resolve a dispute in their own unique context can lead to greatest long-term efficiency.

Mediation is a process that may or may not always produce settlements. But whenever a settlement is reached in mediation while following its core values, such settlement will be more genuine and personally satisfying and hence long testing. Such settlements are long-term goals of efficiency in mediation as well as court. Mediation when practiced not as a settlement conference but rather as a conversation inviting litigants and attorneys to make decision about not only settlement but also other aspects of the conflict has a better chance of bringing these types of result. However, mediation when practiced as settlement conference may only achieve short-term efficiency - settlement on paper. This can be avoided by taking following measures:

1. There is a need to differentiate mediation into at least two categories: transactional approach and transformative approach; with settlement as possible outcomes in both - for the former approach settlement is the goal but for the later approach settlement is a likely by-product of a meaningful conversation. With clarified terms, the definition of a successful mediation would reflect the core values of the mediation process: connection, voice and choice by all participants. Transactional approach would merely focus on settlement as the primary goal.

2. There is a need to eliminate possibility of coercion in mediation process. This can be accomplished by various methods like restricting court staff and judges with decision-
making authority in a case from engaging with litigants in
mediation in that case; maintaining confidentiality of the
process; disclosure to the parties that they do not have to
agree to settle their case, if they do not want; eliminating any
“good faith” reporting requirement from the mediator /
Mediation Centres; and establishing disciplinary procedure
for judges in mediators who put pressure on parties to settle
based an express or implied threats.

There is also a need to reconsider the allotment of time for
mediation in India. Allotment of time should be case specific
instead of the present uniform time period of 60 days which
can be extended to 90 days. There is a need for the mediators
to let parties speak instead of telling them to keep quite
(because according to the mediators if they start speaking
they will take lot of time and process can go out of control).

3. All these strategies can be implemented only when there is
more thorough mediation education given to the litigants and
their counsel. Parties should be very clear about the goals of
mediation, core values of mediation, role of mediator and
their own role in mediation. For funding the awareness
programs, a small amount like Rs.50 or 100 can be added in
court fees for creating a fund for mediation programmes.

4. There is a need to Improve the Program through Quality
Control. There is a need to develop measure for quality
control in Indian court-annexed mediation program. Some of
the ways can be:

(i) Court programs should provide ongoing mediator
development programs like Refresher Courses, Lectures,
workshop on newer techniques and skills, etc.
(ii) Courts should also create a mechanism for parties to voice their complaints or grievances when dissatisfied with their mediator or services of the Mediation Centre. These programs should be sufficiently publicized.

(iii) There is a need to have more checks to ensure that people who become mediators are actually competent to be so. Presently, whoever undergoes the training can become a mediator and in the training method there is no way to check whether the trainees have acquired all the skills needed for the mediation services. Even in the requirement of doing ten successfully mediated case for getting the certificate of successful completion of training also does not specify the role of the trainee in these mediations.

a) Some suggestions can be / devising a written as well as practical examination of the trainees after the training is over. Written examination can have questions regarding theory, concept, core values, ethical consideration, etc. in mediation and practical test can be either a simulation exercise or a role-play.

b) During the co-mediation, it may be made necessary that the report of the senior mediator as well as feedback of the parties in those cases should be considered relevant in evaluating the performance of the trainee.

(iv) Success of a mediator should be cumulative of both the yardsticks like his success-rate and parties feedback.
(v) There is a need to incorporate mediation courses in the educational curriculum. Right now ADR courses are part of the curriculum of Law Degrees but disputes resolution is inevitable part of human life so courses on mediation can be included in other disciplines also starting from school level. In case of law schools and Law Faculties, ADR courses should not be only theory courses but should include both theory and practical component. The course curriculum as designed by the researcher in National Law University Delhi, (NLUD) can be used as a model. The clinic-I course of NLUD include theory of negotiation, conciliation, mediation and arbitration; case-study on these concepts; role-plays to demonstrate and acquire the skills of negotiation and mediation. The course also includes a module on institutionalization of ADR processes through Section 89 of CPC and the Legal Services Authorities Act 1987. Another very important component of the course is client-consultation and role-plays on it. In this component, students are taught their responsibility of advising the appropriate mode of resolution of disputes to their clients and about other ethical issues.

Suggestions regarding various aspects of setting-up Mediation Centres

1. There is a need for improvement of facilities in the Mediation Centres so as to provide a good experience to all the stakeholders. While deciding upon facilities for a Centre, the interest of all the stakeholders should be kept in mind and
mediators being the most important part of the Centre, their needs should also be kept in mind.

2. There is a need to have a specially qualified staff for the Mediation Centres. Instead of depending upon court staff, the Centres should have their own staff. There is also a need to give introductory training in mediation to the administrative staff so that they are better equipped to understand the nature of work of the Centre.

3. There is a need to keep a close watch on the administrative staff to observe whether they are performing their work effectively. Neither the parties nor the mediators should be harassed by the negligent and casual behavior of the staff. That is why, there is a need to train the staff in basic philosophy of mediation process and how its treatment of parties is different from the court systems.

4. There is a need to reconsider the qualifications needed to become a mediator. It is understandable that for a court-annexed mediation advocates will be needed for mediation but the requirement of a minimum 10 years experience is not understandable. As told to the researcher by the mediators working for Delhi Dispute Resolution Society, there is no requirement for advocates to have a minimum of ten years of experience. In spite of the fact that court-annexed mediation is different from pre-litigation mediation, still this aspect can be given a thought.

5. There is also a need to include professionals from field like sociology, psychology, etc. to become mediators as even in court-annexed mediation it is not only legal issues which are important but other issues are also important and at times
more important than legal issues. There can be provision for co-mediation with these experts in cases involving serious emotional or psychological issues and matrimonial matters.

6. The additional condition of an advocate to be having a minimum income of three lakhs also require more research as simply because an advocate is earning more than three lakhs a year does not mean he is a very good lawyer as being a successful lawyer does not necessarily imply that the lawyer is good in all the aspects.

7. The researcher recommends that there should be some arrangement of cost of mediation to be taken from the parties as any system cannot run for free for eternity. For the initial years, in order to make people aware of the program it was appropriate to keep the system free-of-cost. But now, it is been more than five years since these Centres are set-up. There can be various ways of achieving this purpose like imposing the cost on both the parties to be shared equally as both the parties get benefit from the mediation process. The yardstick should be minimum or maximum depending upon the nature of the disputes.

8. Another way of helping the Centres to become self-sufficient is designating a specific budgetary allocation for mediation.

9. There can be some small amount taken at the time of filing of case for funding mediation program to discourage filing of non-serious cases.

10. The Centres may be allowed to generate their own funds by conducting mediation training programs for other professionals on payment.
11. The researcher recommends imposition of some amount as cost for mediation services so as to avoid the misuse and abuse of the process by the parties.

12. There is a need to create more awareness among advocates regarding the mediation process, its advantages, their role in the process and the fact that it can also be an alternative or additional career option for them.

13. There is a need to reconsider whether a Judge is necessary for the post of Centre In-charge keeping in mind the fact that the work of In-charge does not require any skills which only a Judge can possess. More so when in India, the number of judge vis-à-vis the population is still very low. The judges can continue as mediators and as trainers but for the post of Centre In-charge, the researcher, suggests that any person expert in managerial skills can be employed after imparting him/her 40-hour training. Still if officials from court system are required to be employed, the researcher suggests that officers from the administrative side of the courts can be employed for this post.

14. There is a need for adequate staff to help the In-charge in preparing every day statistics of all the mediators and also for the purpose of research work regarding various issues like success rate, reasons for non-settlement, categories of cases in which settlement is taking place quickly, categories of cases which require more time, etc. so as to help in development of future strategies and plans.

15. There is a need for creating more awareness among the referral judges regarding their role. The judges should be aware of the fact that they have to take informed consent of
the parties to refer them for ADR process in spite of the fact that Section 89 mandate referral of cases in case the Judge is satisfied that there are elements of settlement. Judges need to explain the advantages of these processes, nature of these methods and help them in choosing the appropriate mode.

The role of the referral judge does not end after referral of case, he should give short dates to check on the parties. However, a referral judge should not be stepping into the confidential aspect of the process in his over-enthusiasm to promote ADR process and reduce his own docket. Even after failure of first attempt, the Judge should be open to give another opportunity to the parties for mediation, in case, the parties genuinely wants to do so. Referral judges should be able to select the appropriate case and appropriate time for referring it for ADR processes.

16. The researcher feels that if the cases are referred at an appropriate time or mediation it can become a very effective tool for case management.

17. The researcher suggests that the referral Judges should be required to write a reasoned referral order instead of using the formatted referral order so as to avoid mechanical referral of cases to mediation.

18. The Judges should also be sensitized to accommodate advocate mediators in respect of giving them dates only on the days when they are appearing in the courts and not on their mediation days.

19. There is a need to reconsider the entire criteria of payment of honorarium to the advocate mediators in the District Courts as this is creating frustration among the mediator which is
very detrimental for their work as mediator. The methods followed in Delhi High Court Mediation Centre and Delhi Dispute Resolution Society are better and can be given a consideration. Regardless of whether a case has been settled or not, mediator is required to put in his efforts. The reasons as to why a particular case could not be settled may be many and mediator’s incompetence may or may not be a reason. As already discussed by the researcher, settlement is not the only goal of mediation. So there may be cases, where though no settlement is reached but parties went home satisfied with the efforts of the mediator. So the researcher recommend either the mediators should be paid a sitting fee as in case of Delhi Dispute Resolution Society or paid more for successful and less for unsuccessful case as is there in Delhi High Court Mediation Centres. Apart from this, a mediator should be treated at par with any other professional like lawyers, doctors, etc who are paid by their clients irrespective of the result of their efforts.

20. The researcher also wants to recommend that there is a need to revise the scale of honorarium.

21. The researcher is of the view that the mediators should also be allowed to practice private mediations.

22. The ideal that mediation should be considered not as a source of income but as a means of social service is very high but forcing anybody to do social service is also not advisable. So as is the requirement, in the Delhi Dispute Resolution Society that there is a form which needs to be filled, in which there is a column regarding the preference of the trainees as to whether they want to do pro bono work or want to be paid for
their services, the same can be adopted in other Centres as well and people who want to do pro bono work can be allowed to do so without any compulsion.

23. The currently charged Rs.3000/- towards administrative cost of training can be increased so as to help the Centres for using this fund for other activities like creating awareness, organizing refresher courses, etc.

24. The researcher suggests that training module should also include discussion of other models of mediation.

25. There is a need to create more awareness among the mediators as to their role in mediation, core values of mediation, ethical duties of mediator, and its difference from court procedures.

26. There is a need to create more awareness regarding the pre-litigation mediation which is a very laudable initiative of the Delhi Government and Samadhan. The process is at very nascent stage and the researcher cannot comment on their initiatives.

27. There is a need to do more research before the model recommended by Alignor can be adopted in the court-annexed mediation.

28. There is a need to impart basic dispute resolution skills to the rural people on the lines of Rural Peacemaker Project of National Law University Delhi.

4.30 MISCELLANEOUS SUGGESTIONS

1. There is a need to clarify that there is no difference between mediation and conciliation. The only difference is in the approach followed by the neutral. Due to this artificial
difference, in India, we have Part-III of the Act of 1996 and Mediation and Conciliation Rules, 2004. This is high time to reconsider whether there is a need to maintain this distinction which results into an important distinction that an agreement of conciliation process is at par with the court decree where as a settlement reached at mediation process is not. In the view of the researcher, if we do away with this distinction, then we can safely say that Part-III of the Act of 1996 will deal with private mediation/conciliation and Mediation Rules will deal with court-annexed mediation/conciliation (with suggested amendments in previous pages).

2. There is a need to initiate a second phase of reforms of the institutionalization of mediation practice.

3. There is a need for further research on issues like the impact of court-annexed mediation on court’s work-load and the long term effect of settlements reached in mediation.

4. The other legal and ethical issues which are very significant in western countries are not very relevant presently in India due to the fact that court-annexed mediation is not even a decade old.

5. As far as codification of mediation is concerned, the researcher is of the view that now there is no need to pass a Mediation Act because the mediation field is still growing and codification at this stage will hamper its growth. However, amendments of Mediation Rules should be done, at the earliest.

6. There is a need to have proper Rules drafted regarding the running of the Mediation Centre and various aspect of the working of the Centre.
Mediation practice over the last 10-20 years has grown like a silent revolution across the globe. The mediation movement has changed and is changing the structure of the grievances, negotiations, dispute resolution and concept of justice as well as leading to a reappraisal of its own strengths, vulnerabilities and dangerous under currents. Mediation is more than a passing phenomenon and what we are witnessing and participating in stems from a deeper social impulse to fill a gap in society’s needs and carries the potential of radically transforming our institutions of and attitudes to conflict management. The magic of mediation works on at least two levels, first in its ability to transform individual cases and second as an expression of potential for social transformation.

Even within the limited framework of discourse on mediation as a procedure, training and scholarship we sometimes neglect the wider aspects of mediation practice. The effectiveness of mediation is determined by the processes and organizations offering such services as well as by the skills and qualities of mediators, parties and their counsel. Significant within this is the role of mediation advocates and institutions in attracting wider social credibility to the mediation process. This is gradually changing the mindset of lawyers, judges and other social groups.

The model and structure of the mediation practice of the future, the development and professionalization of the various fields of mediation, the linkage between mediation practice and court systems, all of these remain compelling topics of research and analysis. Professor Karl Mackie has rightly said, “The future is nearly always different from what most of the experts predict, but perhaps the encouraging aspect for mediators is that the very core of our practice encourages us to belief that while the future may be unpredictable, it is certainly negotiable”.

4.31 CONCLUSION
The last decade has witnessed exponential growth in both the theory and practice of mediation. Mediation has started to be recognized as a potential mode of dispute resolution which has actually realized the cherished ideals of self determination, empowerment of masses, participatory justice and peace and harmony. People have been able to understand that mediation is a process different from both litigation and arbitration. Increased interest has resulted in more research into the concept of mediation which in turn has lead to the development of various models of mediation. Each model has its unique characteristics and different perspectives on various ethical and legal issues of mediation. These various models and their hybrids can be used for different categories of disputes. In spite of the some shortcomings of these models, these have played a great role in development of the theory and concept of mediation.

Mediation movement has been adopted both by the States and the Judiciary, across the world. States have helped by spreading awareness among the masses through enacting legislation mandating mediation in some categories of disputes and also by financing court-annexed mediation programs. Courts have shown an increasing willingness to encourage parties to explore mediation and other ADR methods before or even after going to trial. The principal objective of court-annexed ADR has been to achieve settlements, or failing that, to streamline litigation at both first instance and on appeal. However, this enthusiasm of the State and the judiciary also raises serious causes of concerns. The court-annexed and mandatory mediation presents serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its core values are lost. Sadly, when mediation is mandatory it becomes patriarchal paradigm of law it is supposed to provide an alternative to. Though, court – annexed mediation and mandatory mediations have their
own benefits but there is a need to do more research on how to regulate these efforts at institutionalization of mediation without losing its core values.