CHAPTER XV
CONCLUSIONS AND SUGGESTIONS

“if our business methods are as antiquated as our legal system, we would have become a bankrupt nation long back”.
Lord Devlin

In this fast changing world everybody is busy with their schedules. No one will be interested to conduct litigations *ad nauseam*. People need quick remedy to their solutions. In such circumstances, in order to provide speedy remedy to the litigant public, promotion of Alternative Dispute Resolution methods like mediation, conciliation etc. may be one of the appropriate remedies available to people.

The statistical results obtained from various collected data (on the present status of the ADR system in Kerala and the opinions of its various stakeholders) have already been presented, discussed and summarized in the various previous chapters. Possible inferences have already been made in those chapters. Most conclusions have also been arrived at in those chapters. In addition, this chapter aims at presenting them in a brief and consolidated manner and adds a few more conclusions, suggestions and proposals, all related the further development of the ADR system in the state.

15.1. Some General Suggestions

The results obtained from this study primarily reveals that the law experts (advocates, judges etc.) are expected to take action for spreading awareness to the litigants about the different alternatives (provided by the ADR system), their advantages and disadvantages and making them aware about the right to choose the forum from among different alternatives to litigation. Before referring cases to various forms of ADR the referring courts should make the litigants aware of its importance, explain them about the different modes of settlement, and about the process in each forum.

One of the most important suggestions to be made here is on consultation before referring the case to ADR. Since the study reveals that
advocates in Kerala are not against ADR but many of them are against referring cases for settlement without consulting them and their clients. While referring the cases to ADR the courts need to consider the particular aspect that ADR process is a consensus one and therefore, the initiation of a consensual process also should be in a consensus manner (as against arbitrary manner). In other words, the courts are not expected to mechanically refer cases to ADR. It is generally expected that the court will discuss this matter with the appearing counsels (and if necessary, with the parties in litigation) before referring cases to ADR. The desirable (and not mandatory) consultations by the court (with the appearing counsels and parties) can sometimes be essential for taking the lawyers also into confidence (and there is nothing wrong in taking them into confidence if such an action will be ultimately beneficial to the parties in litigation). All the referring judges are expected to note down these points and if needed, bring an attitudinal change in their functioning.

This study has already revealed that (the fundamentals of the ADR system are quite different from those of adjudication and so,) all advocates are expected acquire the fundamentals of the ADR system to a certain extent. For instance, the fundamentals of mediation teach that the mindset of a mediator is not that of a judge and he or she needs a considerable amount of patience to listen others without interruption and interference. The mediation need not be a to-the-point-deliberation. It is not a process to investigate in to what is right and what is wrong. It is all about an art and science of winning the minds for getting to yes. Since the mediation process is different from adjudication, the mindsets required for both are different. Just like those of mediation, the fundamentals of adalats, conciliation etc. are also different from those of adjudication and so all advocates are expected to understand this truth.

This study suggests that there should be an education system to build ADR professionals from educated and skilled professionals. These professionals can even be drawn from areas outside law and judiciary like management, social work, science and technology. The selection process of ADR professionals are expected to be based on some internationally accepted stringent methods of tests to assess the aptitude of the mediator aspirants. All the trained ADR professionals must undergo apprenticeship training under well experienced efficient and successful ADR professionals for sufficient number of sittings. All ADR professionals should be given periodic refresher courses. Based on the responses from the feedback nonperforming and unsuccessful ADR professionals must be decertified.

The judicial officers manning the ADR processes can be slowly replaced by (the above mentioned) well trained ADR professionals with experience in negotiation and mediation. The judicial officers shall be redeployed to adjudication processes. Such a revised policy in turn can be beneficial to the judiciary too in the context of the insufficiency of judicial (Wo)man power for adjudication.

Also, this study emphasizes there is a need for eventual bifurcation between adjudication and consensual processes like conciliation and mediation.

ADR processes are expected to be treated as an independent status rather than a subsidiary means to clear the backlog of cases in courts. Thus there shall be measures to attract youngsters into mediation. Under the present rules, for example, one requires fifteen years legal practice to become a mediator. This is not only a restriction upon the youngsters entering into mediation but a discouragement to qualitative leap in the entire ADR processes. Therefore, the entry level restriction shall be brought to a minimum of experience from fifteen to five. For this purpose, the Civil Procedure (Alternative Dispute Resolution) rules may be amended accordingly.
In order to further develop the current ADR system to an attractive
dispute resolution programme as well as an attractive profession, more
importance to ADR must be given in the LL.B curriculum. Also, ADR
fundamentals need to be included in school curriculum.

The advocates’ associations are also encouraged to take up a proactive
role in strengthening the dispute resolution system and justice delivery in a
better manner. Every Bar association in the state is encouraged to set up (1) a
Dispute Resolution Division; (2) Continuing Legal Education Division; and
(3) a Research Division, all with an objective of the professional development
of its members in ADR.

On the strength of the various provisions contained in the Code of
Civil Procedure (Alternative Dispute Resolution) Rules, 2008 and the various
provisions of the Arbitration and Conciliation Act, 1996, the Bar Associations
in every District in Kerala can start their own centres for mediation and
arbitration and can conduct mediation and arbitration of cases with the help of
advocates with good aptitude in mediation and arbitration. There are
recommendations in supportive to this in the report of the 246th law
Commission. The dispute Resolution Division of every Bar Association shall
work in tandem with (and need not be under) the judiciary. When the Bar
takes up such a responsibility of consensual dispute resolution system in the
State and Nation, the judiciary will confine its functioning in the adjudication
process alone. This thesis argues that it is the absence of such a responsibility
shown by the Bar that encourages the Bench to remain proactive and also to
assume the lead role in the consensual way of dispute resolution. If the
advocate community is willing to take up such a responsibility, it will create a
new dispute resolution culture in our society.

The lack of chance for a legal scrutiny in settlements reported by
parties before Lok Adalats and mediation centres may lead to injustice and
violation of human rights. This may be a major setback for ADR initiatives
and it may become counterproductive. Therefore it is desirable that every
settlement reported shall be brought under the scrutiny of a statutory authority or statutorily recognised forum.

At present the Lok Adalat settlement or resolution of disputes at the court-annexed mediation centres are free of cost to rich and poor alike. At this initial stage of development of mediation in the country and state, it is desirable that the state providing it free of cost. But at the same time it is time to think about limiting the free delivery of service only to the poor litigants deserving legal aid under the provisions of the Legal Services Authorities Act, 1987. Those litigants with own financial support need not be given the benefit of free service. The fee collected should be utilised for the development of mediation and other ADR processes.

Court fee must be collected from Banks, financial institutions, and also from financially sound litigants. Poor people must be exempted from payment of court fees. Court fee refund shall not be given for all litigants. Only those deserving litigants must be given this refund. The amount collected by way of court fees should be utilised for the development of judicial administration and ADR.

15.2. Some Specific Suggestions on Lok Adalat

The long standing issues between the parties may not always be possible to resolve in a hasty manner within the available limited time of the Adalat. Hence the courts must take very much care in referring cases to Lok Adalats. Only those cases which do not involve confidential issues and those do not require much deliberations shall be referred to Lok Adalat settlement.

The need to consult the appearing counsels before referring case to ADR (including to Lok Adalat) and also to take them into confidence has already been discussed above. Such a discussion between the Bar and the Bench can also enable both of them to suggest / determine whether a particular case is suitable for settlement in Lok Adalat.

As it is generally seen in the Lok Adalat melaas, all the litigating parties of multiple litigations / cases reach the Adalat venue at the same time.
Such a mass gathering can often make the adalat venue, a busy and congested one. In addition, such a mass gathering often compels each party to wait for long before his/her case is called for. As an effective solution to the issues created by such a massive gathering, it is proposed that separate time slots be earmarked for each case. This slight change in the system itself can make the settlement process comfortable to the litigating parties. Such a change can also help avoid public discussion of the private, personal and confidential matters of the litigating parties in a particular case, particularly where there are no mediation centres.

15.3. Some Specific Suggestions on Mediation

This primary point that this study reveals is that the advocate community in general are in need of more theoretical exposure to the mediation process. They are expected to be given more awareness about the various dimensions of mediation, the role of advocates in mediation, the scope of mediation as a profession etc.

In addition, this study reveals that mediators too are in need of more theoretical exposure and practical training in areas like interpersonal skills motivation skills etc. Since the role of a mediator is chiefly to facilitate communication between parties and motivate them to arrive at an amicable settlement, it is not the province of the mediators to give legal counseling and advice to the parties involved in mediation. The study reveals that, during the mediation process. There have been chances that some mediators forgot their designated neutral role as mediators and often transgress their limits (as mediators) and self-importantly act themselves as legal counselors. The mediators, their trainers and also the authorities of the Kerala State Mediation and Conciliation Centre are expected not only to be aware of this fact but also to necessary and sufficient steps to emphasise and ensure the principle of neutrality in conducting mediation process.

The parties appearing in the mediation too need to be aware of the actual process of mediation and only through such an awareness campaign can
the authorities ensure that the mediation process can be carried out according to the principles of mediation. As part of this awareness campaign, waiting room are expected to be set up and parties are expected to compulsorily watch video shows on the mediation process, prior to their appearance before mediators. In addition, invocation classes can be given to the litigants at the mediation centre.

After the mediation process, the parties should be encourage to express their opinion and experience during mediation. Their feedback documents are expected to be properly analyzed and the results of such an analysis can be used by the ADR authorities to further strengthen and improve the process of mediation.

In addition, an ombudsman may be introduced to conduct surprise inspection in the mediation centers.

Amenities must be provided for litigants in the mediation centers including play area for children (after taking cue from the amenities provided at several modern mediation centres across the world, including the one at Delhi High Court).

The study reveals that there is widespread support for establishment of mediation centers in major centres across the state, even outside the premises of courts. Although most mediators do not want to move out of court premises, most advocates and most law faculty members support setting up mediation centres outside the court premises.

There is scope even for amending rules so that the disputants can approach such mediation centres (outside the premises of the court) first and try for settlement of their disputes before approaching courts. Thus mediation centres should be able to provide a venue for the parties to settle all kinds of disputes, whether referred to or not by the judiciary. Parties, who were unable to settle their disputes in a mediation centre, may subsequently consider instituting litigation before courts.
Such mediation centers will be helpful in many ways. Firstly, they can enable the courts to entertain only serious contentious cases which in turn can be useful to improve the quality of legal profession and standards of adjudication. Secondly, as is evident from the results of the data from general public, many are dreaded to approach courts and many litigants hesitate to again approach courts, in case of disputes in their future life.

In the absence of such mediation centers, there is likelihood that the unrecognized, unethical, informal and even illegal settlement practices will grow in the society and parties (especially those who are already disgruntled with their bad experience in courts) will be forced to resort to such unethical practices.

Now mediation is governed under the rules made by High Court. Since all the stakeholders are in support of the future development of mediation in the state, for the future development of mediation a comprehensive legislation is required with the constitution of a Mediation Commission of India with representatives from judiciary, Bar, mediators, government etc. the commission can lay down standards, certify decertify, conduct training, give accreditation, organize awareness programmes etc This shall be a national legislation. The people and the government of Kerala shall take initiatives for such legislation.

For the development of mediation as an effective way of dispute Resolution, awareness must be created among, Advocates, judges, Law teachers, General Public etc.

15.4. Some Specific Suggestions on Arbitration

Although arbitration, as an alternative to litigation, has its importance in commercial disputes, the lack of popularity for arbitration in Kerala is evident in the results of this study. This lack of popularity can be attributed to many aspects like (1) deficiencies of the present law on arbitration in the country; (2) the pending amendment bill before the parliament etc. Even then, there is scope for improvement in the arbitration process.
The government courts and advocate community need to take action for to help the business community to quickly resolve business disputes. An immediate suggestion is that advocates are expected to form arbitral forums under various Bar Associations and are expected to create instruments to train advocates in arbitration, prepare its own panel of arbitrators and educate the business community about the benefits of institutional arbitration and also to attract this community to the arbitration forum of bar associations. The High Court will have to prepare panel of arbitrators including advocates having experience in handling commercial disputes and shall take steps to appoint them in rotation.

There are several problems involved in the matter of appointment of arbitrators. Since the Arbitration and Conciliation Act, 1996 provides that a clause in the contract to submit any dispute for arbitration is misused by many parties who are in an advantageous position. The parties who are in a disadvantaged end are forced to sign the agreement that includes an arbitration clause. The financing companies situated at faraway places are able to manipulate the liberty that is provided by the Act and can appoint their own men as arbitrators. Therefore, in order to ensure the appointment convenient to parties, to avoid delay in appointment and also to ensure transparency in appointments, one important helpful step is to empower the Principal District Judges also as the Delegates of the Chief Justice. The Section 11 of the Arbitration and Conciliation Act, 1996 need to be amended to achieve this.

The introduction of Commercial courts in all districts may be a very good step as recommended by the 246th report of the Law Commission, but fixing Rs. One crore as its lowest pecuniary jurisdiction may not be helpful for all litigants. Therefore, the lower limit has to be brought to Ten Lakh Rupees.

Interim attachments ordered under section 9 of the Act are valid only for the period fixed in the order or till passing of the award, whichever is earlier. Because of these, as soon as the moment the award is passed, the attachment ordered by the court ceases. The award can be executed only after
the time for challenge to the award is over and the Act provides for an automatic stay of execution once the OP is filed in the District Court. The dangerous possibility is that the next day after the award the respondent against whom the award is passed can sell his property. Therefore, the period of interim stay should be extended to cover the period to challenge the award.

In order to achieve this amendment to the Arbitration rules is necessary.

15.5. Some Specific Suggestions in the form of Amendments in Law

1) **Code of Civil Procedure (Alternative Dispute Resolution) Rules, 2008:** In the rule 8(b) of the said rules; Legal Practitioners with at least ‘fifteen years’ standing at the bar has to be substituted in to ‘five years’ standing at the bar. In the rule (c) also similar change has to be brought.

2) **In the Arbitration and Conciliation Act, 1996:** In the Arbitration Act under Section 11 If powers are conferred upon the Chief Justice to empower all Principal District Judges to be his delegates the practical impediments like delay involved in the appointment of arbitrators, and to the problems can be overcome. Promotion of institutional arbitration is the next step. Preparation of a panel that includes the names of advocates who have experience in handling commercial disputes and appointing the arbitrators on rotation will be another desirable step. Introduction of video conferencing in arbitration proceedings as recommended by the Law Commission in its 176th report may be another useful step in this direction

3) **Arbitration and Conciliation (Kerala) Rules:**

   i. Any interim order granted by the Court u/s 9 shall remain in force for a period of six months unless it is extended, or modified by the Arbitrator on application by any of the parties.

   ii. The Arbitrator shall specify in the award whether such interim orders are to continue with or without any modifications as are deemed necessary.
4) **In the Indian Evidence Act 1872**

Confidentiality is an important factor in mediation. The litigant parties during the private session of the mediation may disclose several private secret and confidential matters relating to a case. According to the principles of mediation and also as part of ethics and law the mediator is bound to keep them confidential. Therefore, there is the need to include mediator also in the category of persons to whom is protection guaranteed by Section 126 of the Evidence Act, 1872.

**15.6. Future directions in this research**

Several suggestions have already been made in the various previous chapters (while discussing the various results obtained) along the future directions of this research. The remaining suggestions are given below.

It is seen that among the Pre-Litigation Petitions (PLP) considered in the Lok Adalats many of the cases are submitted by banks. In cases where the limitation period is exceeded, the banks approach the Adalats. Therefore, without paying the court fee the banks are able to recover the amount. The banks will not get a decree in such matters if they approach any other legal forum except the Lok Adalats. Similarly there are views that other corporate also use Lok Adalat forum for their benefit free of costs. The legal Services Authorities Act which was enacted chiefly to help the poor litigants have now appears to be turned as a relief for rich clients. The loss of money to the exchequer as a consequence of this practice needs scientific investigation.

It is seen that the average amount of compensation paid in the settlement of MACT cases through Lok Adalats in Kerala is very low compared to the national average. There may be several reasons for this average low amount of compensation paid in Kerala. Whatever be the reason, this lowest average amount in compensation awarded in Lok Adalat settlements in Kerala needs further investigation and analysis.
A considerable 30.2% advocates feel that cases bounced back to adjudication from ADR are usually short-shrifted (or dismissed rapidly and without sympathy) by the courts (see table-12.1 and figure 12.1). Why do a significant group of lawyers feel that judges act tough in such cases? Does their such a feeling arise from own experience? On behalf of clients (or not), why do advocates expect sympathy from judges and what shortage in the degree of sympathy did these advocates feel in such cases? Can judges denounce this feeling as prejudice of and absurdity from the part of advocates? All these aspects need to be further studied.

Although 68.2% advocates and many field experts feel that mediation centers should be established at places away from court premises, only 7.3% of mediators feel so. Is this reduced percentage among mediators a net result of their potential insecurity feeling in case they are forced to work outside the court premise? Or, is it due to their fear of possible reduction in their self-important and self-assumed status of a judge in a court premise? Given the fact that mediators are picked by courts from an approval panel, do mediators fear that establishment of mediation centers at places away from court premises will reduce their professional opportunities to act as mediators? All these questions demand further studies.

The question relating to the bifurcation of adjudication and the ADR systems is desirable or to the view that they should run independent of each other but under the same judicial structure? This question needs to be thoroughly explored with the help of more studies.

Given the fact that some cases, which are potentially eligible to create some important precedents, can be referred for settlement and thus, lose chance to create precedents. So, the apprehension of the 40.1% advocates cannot be disregarded. Since mediators and law faculty members are also expected to be aware of this lost chance, why did majority of them disregarded this fact while answering the questionnaire? This question needs to be further explored with the help of further studies.