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MEDIATION AND ITS PRACTICE IN INDIA AND UNITED STATES OF AMERICA (USA)

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Introduction:

This study has aimed to clarify the obstacles and opportunities that face the process of mediation in USA (United States of America), and to take learnings from this more developed practice to assist the fledgling mediation practice in India. The data provided by the interviews has provided an immediate and practical response to the questions posed by the researcher with regard to mediation development in both countries. This has enabled a comparison to be made that has helped to determine different understandings and, where there are opportunities for changes, to further improve mediation as a dispute management process. As USA has a more advanced use of mediation in its current legal system when compared with India. As previously noted, the India legislated mediation practice appears to follow an evaluative model. In contrast, the facilitative model, along with some blended processes, are encouraged in USA practice. As described in this thesis, over the past decade, there have been a variety of efforts to move mediation into the mainstream of the court dispute handling system in USA. The disputants are encouraged to use mediation through the court-mandated approach, as well as through legislation to adopt a prelitigation mediation approach. Several factors have contributed to the development

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of this process, such as institutions having encouraged its use, federal and state legislation, and sustained research providing evidence to support the effectiveness of the mediation process. On the other hand, even though India has enacted legislation supporting mediation for seventeen years, there has been no significant uptake by parties or lawyers, nor any significant research supporting its usage. There are no training programs for mediators and using this process depends highly on the parties' acceptance. Little research has been aimed at evaluating the current mediation system. As in the states even though there is a mediation department in all Indian courts, it is not operating to its full potential, which is supported by the interview data.

Mediation Definition The interviews commenced with a preview of interviewees' understandings of what is understood by the term 'mediation' and the concept of the process used. This was an important starting point in order to gain knowledge on what the interviewees understood by the term mediation, and to identify any nuances in how it was described in the two countries. Generally, interviewees, when asked to clarify their understanding of the term 'mediation', identified a similar basic outline of a process that was common to both countries. However, on further analysis of the subtle choice of wording, the data indicates that the India interviewees did not clarify the mediator role in helping the parties achieve an agreement. In particular, was this role inclusive of giving advice, or more just controlling the process and not the content? This could also be seen in some of the USA responses. All interviewees identified the use of a neutral third party and the assistance by that party for the disputants to reach an agreement. The USA interviewees suggested mediation as an alternative process to litigation to facilitate the discussion between the disputants and put an end to their dispute, and some added that occurred without the input or advice of the mediator. Comments include: …Mediation is about parties coming together to be able to resolve their concerns in a productive way without having to proceed down the litigation pathway… (A2)

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…Mediation is a process in which a mediator does not give advice but clearly facilitates the communication and assists parties to come to a wise decision... (A3) …Mediation is a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute... (A4) The Indian interviewees indicated a generally aligned understanding. Their answers identified that mediation is a process in which a third-party facilitates an effective negotiation between the disputants by bringing their views closer in order to settle their problem peacefully with assistance from the third party. One interviewee's comment supported the idea that the parties come to their own decisions as part of party empowerment: …Mediation is a process which is facilitated by a neutral and impartial person, hopefully skilled in mediation, to work with the parties to help them negotiate … in order for the two parties to reach their own decisions …. (J1) Three other interviewees were ambiguous as to how the third party assists the disputants, leaving open the possibility of giving advice, as in an evaluative mediation: …Mediation is an informal means of resolving disputes between people … a neutral person … helps the parties to resolve the dispute ... (J2) It is a method of alternative dispute resolution conducted by a neutral third party who … provides a forum to bring parties' views together in an attempt to reach an amicable solution…(J5) Mediation is a method … that provides a forum for parties to the dispute, to meet in dialogue and bring together views with the help of a neutral person...(J6) The interview responses from both countries indicate that mediation, when described generally, can really encompass varied models of the actual process, and such a broad understanding of the term can lead to misunderstandings by mediators and the public about what mediation actually means as a process. The subtlety of just

how the mediation is facilitated, and the role of the mediator and parties, was not established by these general descriptions of mediation. As described in chapter 1, mediation can offer a safe and supportive environment in which the disputants can negotiate openly to explore their acceptable mutual solutions in order to reach a consensus. That the interviewees' understandings of the term 'mediation' indicated a broad common understanding only suggests that further work is needed

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to establish a more refined definition that explains the different models, for the benefit of both the mediator and the parties involved. At the moment it would appear that the term 'mediation' can be understood to include all forms of decision making in which someone external to the dispute assists the disputants to facilitate their decision making in various ways. However, mediation should not be about imposing a decision on parties as this is for other forms of DR such as arbitration. 5 This research indicates that when defining mediation, it should always encompass the model of mediation being addressed, so all are clearly distinguished and not just included under the broad description, which can lead parties and mediators towards uncertainty and misunderstandings as to the actual process they are applying. This will thus encourage greater understanding by the practitioners and the disputants as to what to expect when undertaking mediation. This is important as the different models of mediation vary in significant ways and, depending on parties' expectations, these may or may not be satisfied, which can potentially lead to giving 'mediation' a bad name. Furthermore, if a mediator gives advice, then they need insurance to cover the risk of negligent advice, which is not applicable in facilitative or therapeutic mediation where the mediator only controls the process and not the outcome. Not having this refined understanding will influence mediation's ability to enhance the legal system and support the delivery of justice. An accurate understanding of the process that will be utilised supports the rule of law requirement of equal treatment, at least procedurally, and generally will assist the justice system to step closer to delivering fair and appropriate outcomes for its disputants. However, knowledge of mediation models, the importance of the mediation following aparticular model, and the parties' awareness vary, as the next two sections establish. This means that if mediation is to become more nuanced in its description, more work needs to be done in both countries. The next section reveals the level of agreement or disagreement among the interviewees concerning the importance of understanding different models.

Mediation Models The interviewees were asked whether they could describe their perspective of their role in mediating disputes. This question sought insight into the level of understanding of different models and what was considered the dominant style used by mediators in the respective

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countries. It appeared from the USA interviewees that the facilitative style was preferred as the number one model: '...I really engage in the facilitative model. And I think that is a very positive model...' (A2). This interviewee indicated that the hybridisation and personalisation of the manner of mediation was strong in USA. The interviewees further indicated that the model was often adapted to the type of dispute or the context in which it was taking place. This was also influenced by the disputants' ability to make their own decisions and the mediator's experience: If you believe people can make their own decisions, you are probably more facilitative and if you've got a counselling background you maybe just add a bit of therapeutic in your mediation style. (A1) … the model that is taught is the facilitative model because it's a good model for training… However, the reality is different, each dispute has a different scenario…A4 My style is what I bring to the mediation, what is my own experience, my own commitment, my own passion for working for people in dispute… People have to be very, very self-aware, self-critical regarding how they fit in the mediation space and whether they can make a real difference to people's lives and help people to find the win/win solution. (A5) One participant made a significant observation that having a preferred mediation model is not essential because there is no model better than the rest, and the mediator

should be free to offer different models in the mediation process. This interviewee believed that discussing the different models was essential only for the mediator to learn how to practice the process in order to extend their own understanding and to improve and further develop their own practice: I found the whole discussion about styles is not that useful. It is useful for a mediator to look at different ways of practicing mediation. In my view, mediators need to be free and need to be able to offer different styles... None is better than the other… (A3) Nevertheless, the same interviewee acknowledged that understanding what the model is that one is using as mediator remained important, as regards advertising and advising the party of the process: … this discussion is important when the mediators have to inform their client about the kind of service they offer and explain to the client what that means and then follow that [model]… (A3) Using different models in one mediation, while acknowledged, brought some reservations. Interviewees

believed that the mediator could use different models when the parties could not reach their own solution, provided the parties were made aware of the switching between models: It depends on what framework you are using. If you believe people can make their own decisions, you are probably more facilitative … and if you're an evaluative mediator, you need to say, I'm an experienced builder so when I do this builder construction mediation, I can give you some expert information. (A1) … I think it's important to have a mix if it's necessary… (A2) The mediators can bring several [models] in one mediation sometimes, but they have to make the parties aware … (A5) However, one USA interviewee suggested that mixing different models in the mediation process does not produce effective results because it needs an expert mediator to do that: … mixing the different [models] doesn't always work and it takes a fair bit of experience to be able to use different styles. It's about being quite aware of where each approach or model fits. (A3) Thus, it would appear USA mediators were conscious of the different models that could be used, and the significance of using one model over another. While the facilitative model was the dominate approach, it appears mediators in USA like to be able to adapt the model they use to fit the actual dispute they are mediating. Hence, there was a growing acknowledgment that mediators may be utilising a hybrid model, including facilitative, settlement or evaluative aspects. When this is the case, they were also aware of the importance of being clear to the parties, which model they would follow, as liability for any negligent advice could become a possibility if using the evaluative model. This is supported in the literature discussed in chapter 5 when Peisley found that the mediator must make the disputents aware that they are using the evaluative model. 6 The interviews with Indian participants supported the observations in the literature, which found that the evaluative model was dominant in India, particularly for mediations conducted pursuant to the Mediation Act states that art 6 of this law gives the mediator the ability to evaluate the parties' legal status and to advise them of likely legal solutions.7 Interestingly however, in an exact reversal of the move in USA from facilitative to evaluative models, in India it appeared some mediators are preferencing first using a facilitative approach as they were trained in using this model by the American Bar Association. The

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interview results indicate these mediators will move to the more dominant evaluative model if the facilitative model does not produce outcomes. This then is also a hybrid approach: My role as a judicial mediator is evaluating the legal positions of the parties but I would not have resorted to this style unless it was the lastchoice. I will facilitate their communication, I will ask some question to clarify their misunderstanding, I will help them to reach their own solution. (J2) … Many judge mediators in India used to go directly to the parties and tell them if your case goes to the court, it will be failed which is the legislature adoption model but not me … because I prefer giving the parties the opportunity to communicate and discuss their dispute, if they cannot reach their own solution I will intervene …(J3) The two schools (evaluative and facilitative …) exist in India. The first was introduced in the law and the last introduced in the courses that were offered by the American Bar Association and Ministry of Justice for judges and lawyers more than 10 years ago. (J5) These observations indicate the preferable mediation model in Indian. In the beginning, 40 judges and lawyers were trained to use the facilitative mediation model by the American Bar Association.8 However, the Indian legislation is worded in an open manner that is conducive to the adoption of the evaluative style, which gives the mediator a directive role in managing the disputants in order to solve their issues and reach a solution. The data contributes to a clearer understanding of how mediation is practised in the two countries. It was largely found to support the observations in the literature. Yet, a clearer and more nuanced understanding of how the professions see and practice mediation within their respective countries is developed with this data. All interviewees indicated that an experienced mediator could mix different models in the one process as appropriate, and provided the disputants were willing. These answers lead to asking the participants about the extent to which they felt it was essential to explain the different models to the disputants.

Statement of the Research Problem

The research problem aims to consider USA's advanced experience and how it can contribute to understanding and improving Indian's mediation practice. The research problems are aimed at

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exploring knowledge from USA's experience to assist the system of mediation in India. The specific research problems engaged with are:

1. What are the current challenges that face mediation in India?

2. Are there practices and learning from the more advanced USA system that could be adopted to enhance mediation practice within the USA courts?

3. What recommendations can be made for the legal system and mediators in Indian to respond to these challenges?

Literary Reviews:

Evaluation of Adversarial Adjudication and Divorce Mediation as Options for High-conflict Parents Experiencing Divorce Desmond Ellis* (2022) La Marsh Centre for Research on Children and Youth, Faculty of Health, York University, North York, Canada

During the past 25 years concerns about the adverse effects of parental conflict on the health and wellness of children have been expressed in legislation – the amended Canadian Divorce Act, 2021 (s 7.2)- and in an increasing number and variety of social science publications (American Bar Association, 2000; Archer-Kuhn, 2018; Braver and O'Connell, 1998; Dalton, Carbon and Olesen, 2003; Emery, 1999; Fidler, Bala, Birnbaum & Kavassalis, 2008; Kelly 2003; Saini and Birnbaum, 2007). High conflict parents also tend to increase the financial cost of administering the family court system by increasing re-litigation rates (motions courts), rates of abuse of the court process (Ellis, 2019; Fitch and Easteal, 2017; Government of Canada, 2001:1) and escalating conflicts to the point where they significantly increase the risk of serious and fatal injuries being inflicted on mothers (Ellis, 2015)

Evaluation of claims made by high conflict researchers using the Kelly and Johnson typology of violence were evaluated by content subsumed under five sub-headings. Content included under the subheading of Definition reveals that high conflict researchers define conflict in a way that

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conflates it with its indicators. Consequently, the possibility of assessing the intensity of conflict (low/high) independently of its indicators is negated. Content included under Disclosure reveals the use of narrow definitions of conflict. Narrow definitions limit screening and disclosure to a narrow range of intentionally inflicted harms that do not accurately reflect the wide range of intentionally inflicted harms experienced by family members. Narratives elicited by divorce mediators during private intake sessions tend to reveal a wider range of intentionally inflicted harms, their types and patterning. Evidence and argument presented under Differentiation indicates that determining the appropriateness of participation in litigation adversarial and divorce mediation on the basis of differentiating low conflict/use of coercive control violence resulting in serious injuries and high conflict/conflict instigated violence resulting in minor injuries is an unsound basis for differentiation on these grounds for two reasons. First, as the use of CCV by male partners does not reliably result in control of female partners- especially female partners who changed the balance of power by unilaterally deciding to end the relationship- and who may possess and use other means of controlling the user of CCV, the appropriateness of settlement proceedings should not be determined on this ground alone. Second, use of the greater severity of CCV as a factor determining the appropriateness of participation in adversarial family court proceedings is an artifact of minimizing the equally or more serious injuries resulting from conflict instigated violence. Findings presented under the sub-headings of Safety and Fairness clearly indicate that participation in adversarial family court proceedings is neither safer nor fairer than participation in divorce mediation. Taken together, evidence and argument subsumed under all five sub-headings supports the conclusion that divorce mediation is a more appropriate proceeding than adversarial adjudication for couples experiencing divorce.

Markus Petsch (2021) The enforceability of mediation clauses: A critical analysis of English case law.his article shows that the English case law on the enforceability of mediation clauses presents a number of flaws. First, and most importantly, English courts generally fail to distinguish between the positive and the negative obligations created by such clauses. As a result, they wrongly apply the certainty requirement to the former, rather than the latter, which leads to

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frequent refusals to enforce mediation clauses in situations where enforcement should be granted. These decisions discourage parties from agreeing to multi-tier dispute resolution clauses providing for preliminary mediation, thus undermining the general policy favouring the use of alternative dispute resolution (ADR) mechanisms. Moreover, judicial discretion in deciding whether to give effect to a valid mediation agreement is unjustified and exercised on the basis of questionable considerations.

Research Methodology

This research reviews the practice of mediation, which has been in force for at least contemporary period in USA and Ten years in India. These two countries were selected as study sites for comparative research because USA has a wealth of experience in this field. This may provide significant benefits to scholars and legislators in India so they can identify and improve on any weaknesses in mediation practice and learn from USA's experience. The study will also learn from any issues still facing mediators in USA practice. For the purpose of the research, the mediation systems in the place and Amman provide the central focus. This place of system is a representative sample of mediation practice in USA overall. Some variations are present between states, and this will be considered where it is essential to comparisons being made. To address any deficit in this, not all USA interviewees are from this place. India has applied the law of mediation in the supreme courts in the first instance, and this is also where it is most developed, so the focus is on this area. Through exploration and comparison of the development and growth of the mediation processes in USA and India, this thesis aims to consider the main factors operating in relation to mediation practice in both countries, with a view to making recommendations for improvements in India. This is done through an exploration of the differences and similarities of the legal systems through literature analysis and their respective contexts, and their cultural positions, using a comparative methodology. In addition, interviews with key stakeholders were undertaken to gauge their perceptions about mediation practices in

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both countries. The key stakeholders were a cross-section of mediators, lawyers, judges, and academics.

The research uses literature analysis, comparative theory and interviews in this undertaking. The literature covers primary materials such as legislation and case law, as well as secondary reports and texts, to provide a situation analysis. When doing a comparative study, the legal framework and cultural variations are essential to understand to provide a fully contextualised understanding of the similarities and differences at play within the compared systems. This approach enables informed understandings that provide an opportunity to make suggestions in answer to the focal questions being addressed by the research.

Theory As the primary aim of this research is to find differences, similarities, problems, and possible solutions, a comparative study is an appropriate method to adopt. A comparative study is considered as an instrument that provides valuable insight into and knowledge about a topic relevant to the two legal systems. According to Eberle , '… the essence of comparison is then aligning similarities and differences between data points, and then using this exercise as a measure to obtain an understanding of the content and range of the data points.' Bell suggests that comparative law is 'a sub-branch of legal research'4that aims to identify the principles and features of the existing legislation of the countries studied. In this, the primary role of the researcher 'is comparing his or her reconstruction of a foreign legal system with his or her reconstruction of his or her own national system'. Frankenberg expands this by suggesting that comparative law can be seen as 'intellectual travelling' to the different country to have an opportunity to learn about their legal system and their culture to suggest reform of the traveller's own legal system.8 The latter represents the actual position of the researcher in this thesis, with an intellectual and researchernot only travelling but indeed physically embedding herself in another country (USA) to undertake the comparison with her home country India. As a Indian lawyer, I bring a certain perspective to my research, which is an influence I acknowledge. My belief is that the mediation process in India is not activated to operate to its full potential. I

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worked as a lawyer in Banglore for two years, and I found that lawyers have a lack of knowledge about mediation and its benefits. I found that the judges have started to ignore notifying the parties about the importance of using this process as the majority of disputants tend to not choose the mediation process. This observation is supported by Reviews. I worked as a lawyer for six months in Banglore, which is a state in the south India with a strong population. While working there, I found that the potential for a court mandated mediation was not well known by clients, lawyers and even Judges as there have been no awareness campaigns conducted within the legal and broader communities. This is concerning given traditional familiarity with the concept of privately resolving disputes. As a researcher, I wanted, through this thesis, to evaluate the operation of the mediation law in India to determine the main issues encountered in relation to its adoption. Furthermore, there is very little current literature on this topic in India. Comparing it to the American experience helped me to identify the success factors, along with the challenges, that this process has faced in USA, a country more advanced in its adoption of mediation. Using a qualitative methodology has helped me to explore and understand this phenomenon. I was interested in talking to the people who are involved in the process to know how to advance its operation. Thus, my outlook has influenced my choice of questions in the interviews and how I have interpreted the data to seek specific answers is related to the issues that may hinder mediation's progress.

The literature on comparative methodology agrees that there are six different approaches to comparative legal research. These are referred to as the functional, the structural, the analytical, the law in context, the historical, and the common-core method. After an investigation of each for this comparative study, the law in context method was adopted as the best fit for achieving the objectives of the research. The law-in-context method means contextualising the law by understanding the historical, political and legal systems in which the law operates.Such a rich approach situates the main goals of the law through an understanding of the cultural dimensions. This approach is adopted as it has several advantages in providing a holistic understanding, rather than just the similarities and differences between two legal systems' legislation and case

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law, which approaches such as the functional, structural and common-core adopt. When doing comparative research, caution is to be observed for as Samuel notes, comparative studies tend to cover similarities more than differences. To avoid this dilemma, Hoecke's suggestion was adopted as it encourages comparatists to focus on common legal problems and solutions more than on differences and similarities. This approach is appropriate in this thesis as it addresses dispute management, a common legal problem, and the specific solution of mediation as a solution process to address disputes. This research provides the reader with an understanding of how the solution of mediation operates in both countries, to lead to a comprehension of the challenges that mediators and legislators face, and to propose possible solutions to any issues, whilst taking account of cultural differences that can affect this process.

A further perceived difficulty for this contextual comparative study is that the legal systems compared differ. USA is a common law jurisdiction, and India is a civil law jurisdiction, which provides an immediate difference in legal systems. However, as Wailes et al. suggest, research that applies to comparing two different cases that share the same phenomenon is vital, and certainly there is more room for comparison between their respective civil and common law systems when addressing the same phenomenon, namely the use of mediation to manage disputing. Alexander indicates, there are a minimal number of comparative studies in mediation involving civil law countries, no doubt because the mediation phenomenon is still in its infancy in these jurisdictions. However, both countries in this study have supported the use of mediation because it may be a cheaper, quicker and a more confidential alternative to traditional court litigation. The process of mediation is a universal one and creating a comparative study in mediation between common and civil law jurisdictions therefore provides a useful opportunity for reflection on the differences and similarities in the development of mediation in the different legal systems. It is valuable, in terms of understanding the approach of a common-law jurisdiction such as USA, to compare and analyse it with the practice of mediation in a civil law country such as Indian, after the concept has been introduced. Learnings from each country can provide insights that can advance the process in a way that avoids duplication of unnecessary

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roadblocks or a 'reinventing of the wheel.' The comparison undertaken would not be complete without acknowledging cultural factors. On this basis, the researcher has adopted a dimensional values approach along with an etic-essentialist view for this comparative study as it is not addressing intercultural conflict, but looks at cross-cultural communication/ conflict in that it is making direct comparisons. The approach draws on the highcontext/low–context cultural framework, which is well known in mediation research. In addressing the big picture, the essentialist approach is appropriate given the study looks at a contextualised comparison of a geographical or country region, its history, peoples and institutions. The etic approach is taken as the researcher has engaged in comparison of Indian dispute management with USA's system of dispute management – in particular mediation. For Indian, a more unified culture than the diverse multicultural society of USA, this is perhaps simpler for making more overarching statements. This factor is a central consideration and has resulted in the researcher taking a dimensional values approach considering individualism-collectivism, powerdistance incorporating an etic essentialist approach. There are many research methods to adopt when considering culture but as this is a cross cultural comparative study the researcher is addressing the two countries through their institutions, history and legal structures, thus an essentialist consideration is appropriate when comparing Indian mediation practices with a Western country such as USA. The research will explain the background to the development of mediation in both USA's and Indian's legal systems. It will analyse mediation legislation in Indian and USA, such as the Civil Dispute Resolution Act and Mediation Law for Settlement of Civil Disputes Act .In addition, it will investigate the models of mediation used and the mediator styles. The difficulties and successes faced in both jurisdictions are uncovered. One of the difficulties in the research is that there has been very little research on the mediation process in Indian. However, there has been extensive research in USA into this process as it has been in operation for longer. Within Indian literature, Reviews has provided an evaluative study that criticises the Indian law of mediation and outlines what he considers to be a more perfect law, which was initially hoped to have been adopted by the legislature. For example, Reviews indicates that there is no continuous training program for

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mediators to improve and develop their skills and no accreditation certificates for those wishing to operate in this profession. Reviews conducted a descriptive study about the mediation process in India between 2007 and 2009. A researcher found that there is a need to educate the lawyers and the parties about the importance of using this process. Salee also illustrated how the modern practice of mediation in India was affected by Western practices of mediation, especially the American one. John has examined the mediation process and noted that the process has faced several barriers, resulting in low demand for it in India. Concerns Rashdan highlight include the Indian legislation's broad-brush approach that makes the process hard to follow at first glance. There is also an absence of the mediators' codes of conduct and mediator accreditation mechanisms. Sarhan has provided an examination of the process of mediation practised by judge mediators under the new laws, and has suggested that clarification and amendments are required. These studies provide a starting point in examining the mediation process in Indian. However, these studies have not taken a comparative approach that can provide greater insight into what works well and what can be improved, through an outsider lens that acknowledges a cultural contextualisation.For USA, there has been an extensive examination of mediation with many changes and adaptations over a longer period. The USA literature provides a wealth of information about the development of dispute resolution in general, and mediation more specifically. Qualitative, evidence-based research is available, including observation of mediation sessions and interviews with participants to measure their satisfaction. Many studies in USA concentrate on evaluating the process of mediation by using empirical qualitative research to determine the efficiency of this process.For example, Sourdin and Balvin explore in their study the various mediation processes used in court related mediations in the Supreme and County Courts of USA. Their research aimed to enhance the quality of mediation and dispute resolution practice through examining the role of legal representatives and studying mediator and litigant perceptions in the process. Noone and Ojelabi also address the use of mediation as a vital way to improve the access to justice for disputants. Their research concludes that the quality of mediation could be measured to ensure access to justice is enhanced for the disadvantaged.

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Lastly, as mandatory mediation has become USA's default dispute resolution mechanism, Waye also delineates how this adoption has led to widespread improvements in access to justice in USA. Thus, the American literature has rich information about the bright side of mediation that can be a benefit to enhance the Indian experience in advancing the mediation process to flourish. A difficulty in contextualized comparative studies is that the literature has a lag time from conducting the research to the reporting of the findings. While this thesis analyses the literature, it has made sure it is contemporary and cutting edge by the addition of data from interviews conducted with mediators, judges, lawyers, and academics from both countries. As there has been some debate regarding the relative merits of these techniques of data collection, it is pertinent here to review the methodologies associated with those techniques before discussing the research techniques used in this study. This section commences with an overview of the qualitative methods used.

Qualitative Research

Qualitative research is defined as a type of research that produces descriptive data about people's experience and observable behaviour within a specific setting. The research methodology for the interviews has adopted this qualitative approach using semi-structured interviews. The method seeks to understand the participants' perceptions and experiences within their lives and in specific settings. In using this method, the participants could express their views about the topic of research, which relied on their perceptions of the realities that surrounded them. This then enabled the research to apply a thematic analysis that captured the perspectives as a basis to know '[w]hat is happening here, specifically? What do these happenings mean to the people engaged in them?' So, the aim of the qualitative method was to discover and explore explanations that contributed to a deeper understanding of the topic of study. The literature is considered in order to inform the research problem, and this has provided a basis to conduct an analysis of the mediation process, which informs the perspectives of the interviewees who practice this process. This aimed to provide a current perspective on key concerns around

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enhancing mediation performance in both countries. This thesis has not refocused interviewees' perceptions from the point of view of an existing theory or framework. Instead, this study provides an analysis of key factors perceived by interviewees with a view to formulating some recommendations for improving mediation practice in both countries. Comparative law has not only been employed as a discipline to understand foreign law, but also considered the culture through a law in context approach. To do this, the underlying influences and structure of the use of mediation in both countries has been addressed in order to understand how the respective laws have been developed and how they currently influence the use of mediation within the respective societies. Therefore, the exploration has included an overview of the Indigenous cultures and their influence on dispute management practices in both countries. It also addresses key difference in cultural communication practices. This contextualised approach to cultural differences and similarities provides an understanding of the cultural influences and their level of impact on the law and its actual operation within these countries. This thick level understanding of the mediation process, as now provided for in the law, along with cultural influences, has enabled this thesis to suggest reforms of mediation practices by taking into account the opinions of the interviewed key figures who use the mediation process in both countries. After a contextual comparative and literature analysis, this study has concentrated on aspects of the mediation legislation and practices, as currently implemented in Indian and USA. It will focus on three levels: the nature of the models of mediation adopted; the role of the judge in mediation, particularly in India; and the role of the mediator and lawyer advisors in both countries. It has considered these three aspects through factors such as the legislative mechanisms used by the government to encourage the use of mediation, mediation models used, and the evidence of the issues raised by the literature and the interviewees.

Data Collection :

Primary materials such as legislation and case law, and secondary materials such as reports, journals and written materials, were accessed. These were sourced from the library databases to

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identify studies relevant to the phenomenon of mediation. The researcher has reviewed studies published within the period from 2013 to 2023. This period was chosen to understand the more contemporary development of mediation and the dilemmas that this process has faced since its uptake in USA and India, and also to provide the research with a workable parameter. As mentioned earlier, this thesis has conducted eleven semi-structured interviews. Qualitative interviews create a special kind of conversation between the researcher and the interviewees, and a semi-structured interview enables open-ended and expansive responses. These questions encourage interviewees to explain their unique perspectives on the specific issues, which help to reveal information to understand their world. Conducting interviews in this research has enabled identification of the specific challenges and issues that mediation implementation and practice are facing in both countries. The interviews gathered in-depth information about the interviewees' thoughts, knowledge and experience, by asking the same semi-structured questions of each participant. They provided a range of perspectives from the actors involved in mediation practice, and they were directly comparable as the different discipline and professional areas were closely represented from each of the two countries. Five interviewees came from USA and six from Indian. All interviews were conducted using Skype from within India, USA. The USA interviews were undertaken from 5 March to 9 April 2022. All interviewees resided in the cities although a number have practised in other states. The Indian interviews were conducted from 5 May to 9December 2022.

Interviewees resided in both the US and Indian. Those interviewed included one person who had participated in introducing the mediation process in India through encouraging the Indian legislature to adopt this process. The other five interviewees were Indian practitioners in the civil jurisdiction, who utilise the mediation process, and academics.

Debate exists around the appropriate number of interviews that should be conducted. Some researchers argue eleven interviews are not enough for gathering information. Patton, however, confirms that there is no specific number of interviews that should be used. Yin suggests that a

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sample of eight to ten interviews is sufficient for qualitative research. The researcher chose eleven interviewees, five from USA and six from Indian. Echoing Yin, various states that a '… sample size of 10 may be judged adequate for certain kinds of homogeneous or critical case sampling…' In this researh, the interviewees represent sophisticated and high-level practitioners in the specific domain of mediation. It is, therefore, an effective approach to ensure currency of the information rather than relying solely on published materials, which can lose some of its currency from the time between being written and being published. It is clear from the variation in scholars' opinions that there is no clear rule that can be applied when it comes to the number of interviews. Nevertheless, considering the aim of this thesis, it is considered that the selection of ten interviewees was more than adequate, as the researcher is entitled to stop gathering information via interviews at the point where no new data is being presented. The interview data collected in this thesis demonstrated that a point of data saturation was reached in the eleven interviews conducted when the same views were being repeated in response to the questions. Recruitment was conducted via email contact, based on publicly available listings of people working in the relevant field in both countries. These listings included law school academics, Law Society member listings, and Court websites, because they provided contacts for elite specialists working in this particular domain. Interviewees were selected from the relevant domains such as judges, mediators, lawyers, tribunal mediators and academic researchers in the area of mediation practice. Selection was based on their level of participation in their respective domains of mediation. They were identified as important figures with a depth of knowledge on mediation. One-hour interviews were conducted with eleven participants. The interviews were conducted via phone or asynchronous virtual technology, such as Zoom or Skype, for flexibility, cost and time saving. Several steps were taken to ensure the protection of the participants' welfare. To overcome time inconvenience to the participants, the interviews were arranged at a pre-agreed time suitable to the interviewee and breaks in the interview were offered, if required by the participant. Furthermore, the participants were informed in the participants' information sheet.that there was no obligation to participate, nor any consequences if they did not want to.

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Three participants did withdraw prior to the scheduled interview due to work demands. All interview data were anonymised to protect interviewee identity. The interviews were audio-recorded and transcribed. Transcription was done by a professional transcriber and was subject to a confidentiality agreement. Interviews were held at a convenient time nominated by the interviewee. The interview questions were designed to elicit challenges, successes and solutions, based on experience faced by the practitioners. The semi-structured interviews provided the interviewer with more freedom 'to modify the style, pace and ordering of questions to evoke the fullest responses from interviewees.' The interviews started with opening questions followed by more probing question to get detailed information related to the mediation practice. The interviews provided a range of perspectives from the interviewees involved in mediation practice, and they were directly comparable between the different discipline and professional areas represented and between the two countries.

Qualitative Data Analysis

The qualitative data from the interviews were compared, whilst looking for the main themes raised. The researcher used NVivo software to assist in this process. NVivo is a tool that assists in managing the data and ideas from interviews, asking simple or complex questions of the data to find answers, and to visualise the data in order to represent relationships within the information as well as draw conclusions on common themes. The researcher also conducted a manual analysis of the interviews to ensure all data were covered and themes were addressed. This process involved manually comparing keywords, as well as the responses to each of the semi structured questions, for example mediation definitions, development, cultural effect, and issues that may face the progress of mediation. After finishing this analysis, the themes, sub-themes and examples of direct quotes were carried over the presentation of the data in this research.

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Conclusion

This study has provided details about the theory and methodological approach undertaken to conduct the research. Justifications for adopting a contextual comparative approach have been addressed along with any difficulties and limitations in this approach. It has provided the details of the research design and the theoretical underpinnings in choosing this design. The study has also provided an explanation of how the data were collected and analysed. The understanding of the legal framework within which the use of mediation as a dispute management mechanism is situated.

The first research question explored the interviewees' understanding of the term 'mediation'. The analysis of the interviews in this study indicated that a similar basic understanding of mediation was typical in both countries. The participants in the interview provided a broad understanding of the term, which could lead to misunderstanding as to what the mediation actually means as a DR process. This needs refinement to start addressing a clearer understanding of the different models in order to educate the public, the parties, and the mediators and lawyers operating in the field. Although not all interviewees would agree, it is clear that at the very least the mediators and legal profession should have a clearer grasp of these differences. The next two questions aimed to determine the use and adoption of different mediation models and parties' awareness of the models used. The interview analysis confirmed that the facilitative and evaluative mediation models were followed in both countries. These results indicated that using a blended process was not uncommon but generally requires an expert mediator for the process to be managed successfully. There was disagreement on the level of the disputants' awareness of the model followed. Some thought it was important for disputants to have clear expectations of the process, while others thought it was less important, as they were

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mostly just focused on getting an outcome, rather than on how they got there. The position of mediation within the spectrum of available DR methods was considered. The USA interview results showed that this process fits into a middle tier of processes as a facilitative communication focus for resolving disputes, while the Indian findings confirmed that mediation ranges between informal Bedouin type mediations to the more formal court mandated mediation, but behind arbitration.

In regard to the history of the DR system in both countries, important changes that have occurred over the years from the participants' perspectives were revealed. The analysis of the USA interviews in the chapter indicates that there were three key factors that contributed to the development of this phenomenon: mediation becoming more compulsory, a growing professionalism as the role of the mediator becomes professionalised, and mediation becoming an accepted part of the legal system, such as being recognised as enforceable as a DR process in contract clauses. The Indian findings concurred with the earlier discussion in the thesis, which showed a lack of critical growth in the mediation process in this country. The interviewees were asked what further improvements needed to be adopted in the mediation process. The USA interviewees suggested three improvements that they hoped could be adopted in USA: further professionalizing the mediation process, supervision of mediators, greater improvements in training programs and the education system. The Indian interviewees suggested five improvements that they hoped would be adopted in Indian: establishing a national centre, changing the minds of decision makers and citizens, activating this process in all Indian courts, marketing the process, and legislating for mediation to be adopted as a pre-court procedure. Aspects identified as requiring more attention from researchers included from the USA interviews: evaluating the mediation system, comparing Western and cultural forms of mediation, the role of lawyers, parties' active listening, the quality of decision-making, and family mediation. The analysis from the Indian interviews indicate that there were four aspects that should be considered by researchers: training and accreditation, private mediation, parties' satisfaction, and addressing the legal community's conviction. Culture in relation to progress of

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the mediation process in both countries was considered. The USA interviewees indicated that mediation has existed as a concept followed by Indigenous cultures, but also that the Christian culture has influenced a rational economic thinking in USA. By contrast, the Indian interviews confirmed that its mediation process was deeply rooted in the Indian culture. However, when the legislature adopted this process, even though they were impressed with the American experience in using the facilitative process, mediators tended to adopt an evaluative style. To increase the uptake of mediation in India, it may be valuable to demonstrate to Indian citizens the mediation-rich history and its tradition in Indian culture. This could occur through raising educational awareness of reform measures, which could be implemented as a requirement of government programs to encourage using mediation. The interview data largely supported what the research in the earlier chapters had flagged, but it also provided refined nuances to be considered.

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