THE ROAD LESS TRAVELLED – AN INCREASINGLY ATTRACTIVE PATH

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This paper discusses the role of mediation as a mechanism for alternate dispute settlement. Highlighting the failure of other systems, the author points out how the very nature of mediation means that if it is institutionalized, it should be effective. The author prescribes a policy model for increasing referrals to mediation and explains how, despite some potential disadvantages, such a model could be successful.

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I. INTRODUCTION

India's legal system, modelled on the colonial prescription, is the typical Anglo-Saxon method of squaring off parties against each other in the 'versus' mode, and letting them slug it out, with the judge umpiring to ensure that the rules of the game are obeyed, and awarding victory to the successful contestant. Roscoe Pound's "the sporting theory of justice" is an apt phrase.[1] Indeed, one might liken it to a 12th century jousting tournament where knights representing each side battled it out, and one might well find a great degree of similarity, not confined to the term "lists" being used for both forms of combat.

The pervasive reaction to the overload of cases has grown from annoyance to vexation to frustration, and has now assumed the proportions of a system breakdown. Indeed, it is proof of the famed resilience of the Indian people that they still continue to petition the Courts. Some, however, are turning to faster providers of resolution like the mafia and the 'cop turned adjudicator'; others swallow injustice not wanting to add litigation's injuries to their woes. Judge Augustus Learned Hand, once remarked- "...as a litigant I should dread a law suit beyond almost anything else short of sickness or death." Succinctly put, the traditional court system of dispute resolution suffers from the following cons. *First*, legal proceedings are costly and undoubtedly time consuming. They are strewn in a mass of hopelessly complex and indeterminable procedure. *Second*, legal cases often fail to identify or address the real issues involved in the dispute. Its practitioners are more concerned with winning than finding the truth or solutions or reaching a just result. *Third*, legal processes actually increase conflict between the parties who had come to have their conflict resolved. Conflict is treated with increased doses of conflict to hammer out a legal result.[2] Hence, there is a pressing need to institutionalize other methods of dispute resolution, which are quicker, less, expensive, more respectful of relationships, and more focused on solutions.

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[1] ROSCOE POUND, JURISPRUDENCE 131 (1959).

[2] *See* Harry T Edwards, *Alternate Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 672 (1986).

II. The Failure of Different Modes of ADR

A. Arbitration

Arbitration, once thought to be the answer, has turned out to be a clone of court-based litigation. It is less formal but still maddeningly procedural, as adversarial, and more expensive. There are also large time-gaps between sittings of arbitrators, who are not subject to regulation. Furthermore, awards are plagued by prolonged delays, and in many jurisdictions, arbitral awards are open to challenge in a court of law.[3] In rather strong words, the Indian Supreme Court remarked in the case of *M/s. Guru Nanak Foundation* v. *M/s. Rattan Singh & Sons*[4] that the way in which the proceedings under the Arbitration Act are conducted, and without exception challenged in Courts, has made "lawyers laugh and legal philosophers weep".[5]

B. Lok Adalats

Moving on to Lok Adalats, we are once again confronted with seemingly intractable problems. A Lok Adalat dispute settlement panel comprises a retired Judge and lawyers, social workers, retired government servants, etc. This panel attempts to see if the parties are willing to settle at a figure somewhere between what the claimant asks for and what the respondent has offered. Thus, a standard "why don't you split the difference" or "take some and give some up" approach is adhered to. The merits of the cases are not gone into, and each case is disposed off in a few minutes. The basic difficulty with the Lok Adalat process appears to be that it does not examine the factual and legal aspects of the dispute between the parties, nor addresses underlying interests while grappling for a settlement. The main reason put forth to a party to yield on his stand is that it is going to take her/him several years in court, and the attendant wastage of time and money, to secure it.[6] Splitting the difference is often a euphemism for distributing the pain of losing. The presiding officer is a retired judge who is perceived as a person of authority, and often behaves as one. Lok Adalats have seen success in cases relating to claims for compensation arising out of motor accidents and compulsory acquisition of land.[7] It is submitted that these are capable of easy quantification and resolution by applying formulae and multipliers. Several such cases can be

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3 *See* Gustavo Sampaio Valverde, *Potential Advantages and Disadvantages of Arbitration* v. *Litigation in Brazil: Costs and Duration of the Procedures*, 12 Fall Law & Bus. Rev. Am. 515, 520 (2006).

4 A.I.R. 1981 S.C. 2075.

5 *Ibid*, at 2076.

6 Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 Hastings L. J. 789, 799 (2004).

7 *Id*.

disposed of in one sitting. This speed of resolution has been taken as automatic in the Lok Adalat process, and it is mistakenly thought by judges that the same can be repeated in other types of cases that are completely different in nature.

III. The Use of Mediation as a Dispute Settlement Mechanism

A. The Nature of Mediation

The status of mediation in the country deserves singular attention. A notable event heralding the beginning of Court use of ADR processes was the 1976 Pound Conference held in the USA, so called because it followed the title and theme of Roscoe Pound's rather direct attack in 1910 on the problems with the legal system – an Inquiry into the Popular Causes of Disaffection with the Judicial System. It is now the fastest growing remedy from the ADR stable. In India, it is only in the last couple of years that we have seen it progress, but that progress has been fast.

Mediation is a voluntary and confidential process in which the mediator, a neutral third party, helps parties in arriving at a solution that is acceptable to all of them. This is designed to be risk-free since the outcome of the mediation is in the hands of the parties. The mediator guides the process, but cannot impose any decision on the parties. Parties are also entitled to terminate the mediation any time if they feel it is not serving their interests. However, once agreement is reached, it becomes binding and can be enforced by the legal process.[8] In essence, mediation involves moving parties from a "me versus you" approach and an "I am right and you are wrong" attitude to a joint search for solutions to the dispute. This is done by making parties focus on their long-term interests, distinct from the positions they take in conflict. As an illustration, a separating husband and wife will take positions in terms of what they seek in custodial and financial arrangements; a switch to long-term interests of the feuding parties and their children reveals the need to arrive at amicable solutions. Labour and managements conflict can get bogged down in demands and lower counter offers, making settlement difficult; a longer perspective will underscore the virtual necessity of harmonious settlement for productivity, profits and wages and shift attention to the modalities of achieving agreement. Doses of realism show parties that their assumptions about the strength of their case and expectations of the legal process may be excessive.[9] It is also useful to make parties confront the

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[8] E. D. Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation-Introduction,* 15 B.U. Int. L.J. 175 (1997).

[9] J. Folberg and A. Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation (1988).

often-unpleasant alternatives open to them if a settlement is not reached. The law here plays an important role in these processes and in working out a sustainable solution.

B. Mediation as a Non-Adversarial System

Mediation, it is submitted, has many advantages. The flexibility of the process enables it to be tailored to suit the demands of the individual case. Joint meetings enable parties to give their versions of the dispute, and opportunity to listen to the other side's take on the case. Disputed facts can be ascertained with joint fact-finding exercises or with the help of experts. Indeed, experts function better as neutrals, free from the impositions, subtle or stated, of partisan evidence discovery. Confidential information can be shared with the mediator with express request to avoid disclosure. Separate meetings with the mediator enable parties to speak openly, look at strengths and weaknesses, voice fears and concerns – all of which enables forward movement towards exploring options for settlement. These options for settlement get discussed, modified and refined; they are matched with criteria that parties devise for a fair and workable settlement.[10] As the process moves forward, a shift in attitudes takes place and there is lesser blame and recrimination, as parties direct their energies towards jointly searching for a solution. The mediation process thus focuses on the parties, tries to uncover the reasons for their dispute, and makes them participants in the search for equitable and sustainable solutions to the conflict. There is an empowering aspect here, in showing people that they are not disabled in dealing with the conflict that occurs in their lives. Further, the best suggestions for resolution often come from parties to the dispute. They know what is most important to them and where they can afford to give room. Conflict places blocks on communication and the freedom to explore options for settlement; when these are released, creative problem solving is often the result.[11]

Advocating mediation is not to trash the adversarial system, which has been built up over centuries, and is premised on logic, argument, impartiality, consistency and corrective opportunity through the appeals mechanism. For a large body of cases, we need the standard format of litigation lawyering with its substantive laws and procedural rules and the final decisional authority vested in its judges. Those cases, which need constitutional law development, legal interpretation, declaration of rights, can and must only go to our courts. Severe imbalance in the power equation between parties, lack of *bona fides*, presence of

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[10] T. Arnold, *Mediation Outline,* in ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, at 210 (P.C. Rao et al., eds., 1997).

[11] P.C. Rao, *Alternatives to Litigation in India*, in ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, at 24 (P.C. Rao et al., eds., 1997).

fraud, misuse of authority, arbitrary and unreasonable official action call for the adjudicatory mechanisms of the law.[12] Judicial review is the business of courts and judges. Social change through the law, dealing with egregious behaviour and gross negligence is for the Courts. The same holds for statutory violation and enforcement. But many cases are neither about rights nor about injustice, though we dress them up in these terms so that a court may take cognizance of them. They are about parties who have fallen into conflict - as common a phenomenon for the human race as falling ill. The wear and tear of daily existence, occupational strain, friction in relationships, problems in transactions, heedless words are contributories and causes.[13] What parties need is to be brought out of conflict – speedily and with less cost, and no further damage. The best result is a mutual agreement that ends the conflict.

Where can mediation be used? It works well in cases where parties stand in some relationship to each other – whether contractual, commercial or personal. That takes in corporate disputes – between shareholders, companies, suppliers and consumers. Partnerships, employer–employee conflict, partition suits, property matters, general civil disputes are other heads. Personal matters incorporate another wide range – matrimonial, custody, sibling and parental fighting. Insurance and banking, medical and tenancies form another sizeable bulk. Mediation is also a useful first-try remedy in other disputes, which are transactional. Its use ranges from local and neighborhood conflict to the most complex commercial and transnational and multi-party disputes.

It must be stated that cases are of many hues and bear different elements. The above is a general formulation based on the main attributes of the common types of disputes. In sum, mediation is indicated in relationship and transactional disputes and is an attractive first-try method. The law courts are the indicated remedy in a range of cases involving statutory interpretation and enforcement, and are available as a last resort when consensual methods do not succeed. Mediation has the advantage of being applicable at any stage of the dispute – latent, full-blown, during Court pendency and even after.

Clearly, all cases cannot be marked for the adversarial route. To apply the adversarial process as the only method of resolution is somewhat like a general hospital sending all arrivals to its surgical ward.

Yet, this is close to what our system has been doing all along. Every service provider looks to the needs of its constituents and develops responses suitable to

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[12] G.R. Clarke and I.T. Davies, *Mediation - When is it Not an Appropriate Dispute Resolution Process?* 3 AUSTL. DISP. RESOL. J. 70 (1992).

[13] *Supra* note 11, at 25.

those requirements. The failure to discriminate between the different types of conflict and suitable remedies is one of the chief deficiencies of the conventional legal system. We need, therefore, to invoke the concept of appropriateness, which dictates that conflict comes in different shapes, types, genesis and characteristics. As they vary in their basic nature, they need different remedies.[14] We do damage to parties when we fail to classify and provide differential remedy; that damage is clear on all counts – straining litigants, limiting lawyers and overloading Courts. We have been cutting the cause to fit the sole resolution system; instead we should tailor the resolution method to suit the type of conflict.

Choosing the appropriate form of dispute resolution method thus becomes a key element, and may well spell the difference between smooth resolution and protracted conflict. An understanding of the different resolution methods and processes, accompanied by objectivity and discernment helps to choose and design a resolution method appropriate to the dispute on hand. For the legal profession, mediation and allied processes brings the opportunity to use legal knowledge and skills to achieve resolution and fashion creative solutions. And that is the language most clients want to hear. It offers a new avenue for legal practice – as mediators and appearing as lawyers representing parties in mediations. What is on offer is an enlargement of the dimensions of the legal profession, and thus the prospect is more benefit than risk.

C. Mediation and Lawyering

There are several reasons why lawyers will take to mediation. It is something that their clients will demand of them. As the litigating public perceives a process that gives them benefits in cost and time and solutions, they will ask their legal advisors for this facility. Demand will dictate supply. Lawyers can add to their practice by representing parties before a mediator. In many disputes, and certainly in the complex and weighty ones, parties are better off with the assistance of counsel at the mediation sessions. A shift in approach is needed here. The effort is not to win at the expense of the other or to demolish the other side's arguments, but to look at the facts, law and the key needs of parties to get mutual advantage solutions. Versatile lawyers who can perform this attitudinal change will produce success stories for their clients. Satisfied clients, and a reputation for good settlements, will bring in more work, practice and income.

I believe that clients are far more willing to pay these fees than litigative ones because they participate and see progress in resolution and appreciate the service the lawyer renders by bringing the dispute to an early end. Lawyers can

[14] T. Sourdin, *Matching Disputes to Dispute Resolution Processes - The Australian Context*, in ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, at 143 (P.C. Rao et al., eds., 1997).

dispose of cases faster, earn an income from them now rather than postpone them to an uncertain future.[15]

Lawyers make good mediators with their legal knowledge, their ability to analyze a case and focus on the essentials, persuasive powers, and skill in crafting legally sound settlements. In the Western world, retired judges and lawyers are becoming full time mediators, earning substantial incomes and the satisfaction of bringing disputes to a close. Judges have quit lifetime tenure posts to become mediators.[16] Once mediation arrives on the scene corporations, other organizations and individuals will look for mediators.

D. The Relationship Between Courts and Mediation

A method of resolution outside the courts was unlikely to make much impact because of doubts over its legitimacy and enforcement. Now that the judiciary sponsors mediation, it is gaining acceptance in the legal profession and the public. Perhaps, this is the way it develops in the countries where out of court settlement is infrequent and people are used to looking exclusively to the courts for redressal. This is in contrast to the USA and UK, where mediation started outside the court campus, and, inspired by its success, judges started referring cases to private mediators and ultimately moved to create court centres for mediation.[17] The difference in origin has important consequences. A court led initiative moves the Bench, Bar and litigants to the mediation table in large numbers and does so quicker than private mediation efforts. It can place mediation on the legal landscape in a short period. It can signal to the community that this is under the umbrella of the judicial system and hence trustworthy. The official backing makes it easier (though not easy *per se*) to get governments, public sector organizations, banks and insurance companies to come to mediation. Kick- start funding may become available. State and court resources can be used for training, housing and staffing mediation centers.

However, the flip side is that mediation can then become court-controlled. An indifferent Chief Justice can cause projects to run aground. Advocate mediators and organizers can feel stifled by the bureaucracy and hierarchy that accompany officialdom. A Court initiative that hogs the headlines and captures public attention may lessen the attractiveness of private initiative.

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[15] As a lawyer friend spelt it out rather practically – Fifteen years later who knows if the cause will still exist? Who knows if the client will exist? Who knows if I will? Who knows if the client will still be mine?

[16] H. T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

[17] D.H. Freyer, *The American Experience in the Field of ADR*, in ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, at 108 (P.C. Rao et al., eds., 1997).

IV. The Special Cases of Family and Business Disputes

Mediation is strongly indicated as the first and primary method for resolving family and personal disputes.[18] Fathers and sons, brothers and sisters, branches of a family, are all bound in a relationship which will last their lives. Divorcing couples, too, if they have children, are bound in a long-term involvement. These relationships generate strong emotions, which can take over the lives of the parties. Blame, regret, disappointment and anger are manifested in great measure, sometimes one to cover the other. Legal and emotional issues get intertwined. One must also be aware of the consequences on those who are not at the disputing table, children foremost. Others in the family are also affected by bitter feuding between husband and wife heading for a divorce, siblings contesting inheritance, partitions of family property, disputes between one generation and another, and the like. One theme becoming fairly common in our society and courts is the breakdown of marriages and separating parents battling it out. The issues cover the cause of the failure of the marriage, alimony, division of property, child custody and visitation rights. Prolonged litigation and delayed resolution increases acrimony between the parties, and tension for children caught in the cross-fire.[19] Mediation ought to be tried as early as possible in these cases. Arriving at an agreement soon is not just beneficial, but indeed vital, for children and their parents.

With its focus on the future and its ability to salvage and better relationships, mediation is an appropriate technique for these disputes. Litigation has enormous destructive capacity precisely because of the high voltage emotions unleashed during family conflict. Another good reason for family mediations is the compliance rates — many more agreements reached by mediation are complied with, when compared to other processes.[20] Studies done on issues such as child support payments, visitation rights and child custody, indicated greater satisfaction with results and better observance rates with the use of mediation. The same holds good for the divorcing process and financial arrangements arising from it, and for disputes of property and money arising within a family.

However, some concerns must be stressed. Family conflicts can be characterized by severe power imbalances, especially gender disparity. A psychologically weakened or traumatized wife cannot be expected to negotiate

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[18] *See* § 9 of the Family Courts Act.

[19] T. Arnold, *Twenty Common Errors in Mediation Advocacy,* in Alternative Dispute Resolution: What it is and How it Works, at 266-267 (P.C. Rao et al., eds., 1997).

[20] *Id.*

her interests at a mediation table. If one party has suffered much in a marriage, the inclination may be to get out at all costs, even if that means accepting a paltry settlement. Sometimes one parent may give up rights for fear that continuing friction may be damaging for the children. Ignorance of rights is another problem. While there are views that mediation can also work despite an imbalance of power (indeed, power imbalances are also reflected in the adversarial line-up in court with the powerful party hiring up top-notch legal representation), family mediations call for caution.[21] Attention should be paid to the differences in power and influence, aspects of control and domination, fear and ignorance of rights.

Mediation is ideally suited for the particularistic needs of business and commercial disputes as well.[22] Several Fortune 500 companies have pledged to consider the use of mediation before commencing adversarial arbitration or litigation. Commercial disputes need quick resolution, businessmen (and women) are not in the business of disputing – they need to resolve matters efficiently and move on. Participation, respect for relationships, savings in cost and time is music to the business ear. Contractual agreements now have a clause stipulating mediation, before providing for arbitration.[23] A phenomenon now seen is that disputes which involve very high stakes – putting the loser to serious setback or ruin – invariably head for, and stay at, the mediation table, since parties want to do all they can to avoid that risk. In an era where globalized business is becoming the norm, mediation becomes all the more relevant. Its speed and solution-based approach means that on-going contracts need not be terminated. It circumvents the negotiating obstacle that invariably crops up – that of choice of law and choice of jurisdiction. And there is great flexibility in choice of mediators, with options of drawing from law and business.

When businesses are owned and run by families, it follows that the case for resort to mediation is that much stronger. Family-run business conflict is a vile concoction that has money and property, position and power, relationship and standing, dominance and chafing, superiority and inferiority complexes, childhood insecurity and ageing irrelevance as its potent ingredients. Inflamed, it can visit contestants, families and business units with irreparable damage. Mediation is an invaluable aid – it addresses concerns, it is confidential, it can devise complex and sensitive solutions, it provides face-saving, it focuses attention

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[21] P.M. Bakshi, *The Obligation of Secrecy in Mediation,* in ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, at 292 (P.C. Rao et al., eds., 1997).

[22] MAXWELL FULTON, COMMERCIAL ALTERNATIVE DISPUTE RESOLUTION (1989).

[23] T.B. Carver, *ADR — A Competitive Imperative For Business,* 59 DISP. RESOL. J. 67, 68 (2004).

on relationships, and can pay attention to the substantive and the human factors underlying the dispute.[24]

V. Legislative Attempts to Inculcate and Institutionalize the Mediation Culture

Earlier statutes like the Industrial Disputes Act and the Family Courts Act envisaged conciliators intervening at an early stage. Neither evidenced much success. The conciliators were not trained, the process was not given importance and came to be merely as a necessary stopping point before launching into adversarial action.

The first serious attempt to bring mediation into the general legal system was made in 1996.[25] The Arbitration and Conciliation Act, 1996, replaced the Arbitration Act of 1940. One part of the Act was devoted entirely to conciliation and it provided for the method of appointment by parties, failing which the court, the role and duties of conciliators, safeguards as regards confidentiality, decrees of courts confirming agreements etc. Judicial referral of pending cases to mediation came through the amendment to section 89 of the Code of Civil Procedure, 1908. Though enacted in 1996, this was brought into force only in 2002 because of protests by lawyers against other amendments to the Code. Incidentally, the protest flared into a countrywide agitation; mediation would have been an ideal remedy if used then.

A. The Effect of Section 89 of the Code of Civil Procedure

Section 89 provides that where the Court is of the view that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, Lok Adalat, conciliation or mediation. This is a case of blatantly lackadaisical draftsmanship. Its prescription that the judge should frame the terms of settlement amounts to a negation of the ADR processes. If the judge is to frame substantive terms, he can do so only after examining the case in depth and hearing parties.

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[24] The history of major dispute among business families in India (for instance, the Pais of Manipal, the Chhabria brothers, the heirs of Ramnath Goenka, and the Ambani brothers) shows that settlement by formal or informal mediation has been the most efficacious method of resolution. Unfortunately, however, in many cases it came after protracted litigation so that much damage was done before a negotiated result could be put in place.

[25] P.C. Rao, The Arbitration and Conciliation Act, 1996: A Commentary 165 (1999).

Why then refer the matter to ADR at all? Furthermore, parties and mediators are going to feel bound by them and will not be able to engage in the creative processes enabling parties to come up with options for settlement. This provision applies to arbitration as well; so the result is that the judge is to frame the terms of settlement for a matter to be referred to an arbitrator. The sheer impracticality of this part of section 89 has resulted in judges ignoring it altogether. It would however be better to suitably amend it.

The section does yet another injudicious thing. It casts conciliation and mediation as separate processes. There is little difference between the two expressions; they are used interchangeably the world over. Some countries use the expression "conciliation" and others use the term "mediation". Both words refer to the processes of leading parties from conflict to solution by informal and consensual methods, which focus on shared interests and stress the benefits of harmonious solutions.[26] The Law Commission of India strained every nerve of its considerable acumen to create some difference between these terms so as to justify their existence in the statute – it suggested that the conciliator plays a more active role than a mediator and that the former can make suggestions for settlement to the parties, which the latter cannot. Those in the field of practice know that no such distinction exists. We await the fateful day when a party will challenge a mediation agreement on the ground that the mediator played an active role and made suggestions for settlement. Rather than struggling to make out a non-existent difference, speedy remedial amendment should be undertaken. Or else we need purposive judicial interpretation to say the difference between these expressions in non-existent or minimal and that no proceeding can be faulted on this ground

Since section 89 of the CPC, several High Courts in India have advanced with court referrals to mediation. Ahmedabad was the first off the block with an enthusiastic group of lawyers led by my esteemed colleague Mr. Niranjan Bhat. They trained under experts and were well on their way – until they ran into a wall of judicial reluctance. The High Court at Bombay picked a seasoned batch of lawyers, sent them abroad for training, created a panel and commenced referrals. It also undertook programmes to create awareness in District Courts. Mr. Justice A P Shah played a stellar role in these efforts. The High Court at Madras went the institutional route – then Chief Justice Markandey Katju (now on the Supreme Court) created the Tamil Nadu Mediation and Conciliation Centre as an official organ of the Court. Its Charter has a Supervising Committee of Judges and an Organizing Committee from the Bar. The Centre's mandate is to train mediators

[26] S. Chandra, *ADR: Is Conciliation the Best Choice?*, in ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, at 82-84 (P.C. Rao et al., eds., 1997).

and administer the Scheme for referral of cases. Senior lawyers make up a significant portion of the mediator list, judges readily refer cases to what they term as "our Centre", there is an even distribution on the roster of mediators. Even though it is yet a *pro bono* scheme a few hundred lawyers have signed up to be mediators.

One might think that a completely voluntary process with the interested parties in the driving seat would meet with little success, but one would have to be painfully naïve to do so. Nearly half the cases where the parties engage in mediation are successfully resolved, wholly or partially. These cases present an interesting variety. In a company winding-up, 430 workers who waited 16 years in Court for their dues got an enhanced amount in mediation in 3 months. In a partition cases pending for 13 years, mother and sons litigated over 10 crores of properties; when this was resolved they commenced talking. Not only that, they prostrated before the mediator, a 75 year old senior lawyer. Eight parties from different countries settle their claims over the sale proceeds of a ship running into lakhs of dollars. Matrimonial cases see resumption of relationships or a more amicable separation; custody of children is better handled in a non-aggressive mode. A dispute between temple and neighbour on the route taken by the idol gets parties talking about resolution, far better than religious friction spilling into the streets. Moreover, to illustrate the extent of litigation, a dispute over a passage two feet wide has two residents of lower income group development spending time and money in twelve years of litigation.

It appears that an institutionalized scheme has the advantages of official support; readier acceptance among judges, lawyers and litigants; accountability and continuity. On these lines the Delhi High Court has created its Mediation Centre and about 60 lawyers have already undergone training. The High Court at Calcutta too has resolved to set up a Centre there. It seems that the mediation movement is gaining ground in our Courts. In all this, public pronouncements of its efficacy and need by present and past Chief Justices of India has provided tremendous encouragement.

B. Mediation as the Future

(i) Legal Education

Mediation is now very much part of the national legal landscape and it is time now to see how it can take root and spread. Action is needed on several fronts. Law schools should move from their preoccupation with the adversarial process and begin to expose students to the broad range of dispute resolution.[27]

[27] Civil & criminal procedures will teach the student how to conduct adversarial litigation in the courts; instruction in mediation must be given to understand how

As part of continuing legal education for the Bar, a mediation course can teach lawyers to mediate and represent clients in mediation, and can also emphasize the duty of lawyers to recommend and aid mediation. Training in mediation is necessary, even for the senior lawyer or retired Judge. It is a mistake to think that because one is an expert on the law, one can automatically be a good mediator. There are skills that need to be learnt and learning them will save the mediator and his parties much time and failed mediations.[28] Given legal experience, a training program of a few days would be sufficient to impart basic mediation skills. After the initial discussion on the need for mediation and its theoretical aspects, the training would focus on how to conduct mediation. Role-plays and simulated exercises enable participants to get the feel of the actual, and receive corrections and suggestions. Issues of confidentiality and applicable legal provisions can be delved into. The basic course should be followed by observation of mediations and mentored sessions and an advanced course. For those without legal experience, a longer, more comprehensive course would be necessary. While we may use training material from abroad, that must be integrated with our legal, social and institutional culture.

(ii) A Comprehensive Programme for Referral of Cases to Mediation

With the orientation and training in place, the courts can create a program for referral of cases under section 89 CPC. This is best done under a Scheme that involves the judges and members of the Bar. The Scheme should provide the mechanism for referrals, for appointment of mediators, conduct of proceedings and reporting to the court. Referral systems, formats, feedback and reporting should be standardized and placed in a manual of procedures. It is also advisable that courts allot an appropriate place for mediation within the court premises. This sends a powerful signal to the litigant that mediation is part of the established system and has the express mandate of the court. Such a scheme draws the elements of energy and support from the Bar and judicial overseeing and backing. Our plan should be to have a mediation room as part of every court complex.

Judges will therefore need orientation on evaluating cases and marking them to the alternative routes possible. The National Judicial Academy, Bhopal and the State Judicial Academies are good training grounds. Superior Courts can

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consensual resolution is conducted, and when each can be tried. Some will prefer to be traditional litigators. Even for them, a knowledge of mediation helps. They will be able to realize when a case may be better mediated than fought, and send it on to a colleague who practices mediation. Some may prefer to focus on mediation. Others may undertake both. For those whose career paths takes them to institutions and corporates, a knowledge of mediation will form an essential part of their skills.

[28] *See* Nancy H. Rogers and Craig A. McEwen, Mediation: Law, Policy, Practice (1989).

run programmes for their judges. Every judge is a potential referee under section 89 and must keep this possibility in mind. An additional option is for the Court to assign a Judge or other officer to perform this function, especially for cases, which are buried in the docket heap and will not surface for some time.

Certification or accreditation of mediators will also be necessary. Successful completion of training may be linked to serving on a volunteer panel of mediators for a period. Provision should also be made for withdrawal of the certification for proven bad behaviour. The success of the mediation movement will depend on the trust that the public reposes in mediators; therefore the need for certification and its withdrawal. A Code of Ethics and Conduct is necessary.

Attention should be paid to laws that already have provisions for mediators. The Family Courts and the Labour Courts are prime examples. We also need to see which other statutes need to be amended to enable or encourage mediation. The Court Fees Act should be amended to provide for the full refund of the fee to the litigant. The creation of a National Plan for mediation and setting up of a National Mediation Institute for training, overall co-ordination and development will go a long way.

(iii) An Overall Appraisal of Institutionalizing Mediation – Some Potential Impediments

A word of caution may be apposite here. With all this talk of court-annexed mediation, we should be wary about mediation being annexed *by* the court. Mediation is essentially an informal process and has much application outside the court arena.[29] Resident associations can use it to settle local conflict. Communal clashes cannot be resolved by any method other than dialogue and the focus on a larger perspective. Schools can use it to handle disputes amongst children; to learn that conflict can be resolved well, and by the disputants themselves, is an invaluable social lesson. Any organization will see that it helps in handling disputes internally and externally. Companies, firms, manufacturing and service sectors, banks and insurance outfits will use this for disputes with employees, for structuring and salvaging contracts, dealing with complaints, customer issues, supplier disputes and so on. Mediating claims helps to resolve them, keep litigation down, and improve satisfaction of those dealing with the organization. At an institutional level, a mediation process signals a willingness to look at the other point of view and a desire to reach an amicable solution and retain the relationship. Religious bodies, which are unfortunately routinely enmeshed in conflict, will find the underlying harmony appealing. The Church

[29] P.L. Tractenberg, *Court-appointed Mediators and Special Masters: A Commentary*, 12 SETON HALL LEGIS. J. 81 (1988).

has already shown an interest in using mediation to handle disputes with and among parishioners and the diocese. Industry federations are important mediums to sensitize their members. They can create cells to push for awareness, to educate, to handle disputes. They can also stress the importance of introducing mediation clauses in agreements. Mediation can often quell differences before they spin out of control.

Moreover, though judges undoubtedly play an important role, especially in the statutory referrals to mediation, sitting judges should not be mediators.[30] The essence of mediation is voluntary party participation under conditions of full autonomy. Can we really expect parties and counsel not to be influenced by a judge who is held in awe by the first, and will be hearing the cases argued by the latter on a daily basis? Can we really expect the Judge to cast off his authoritative cloak and be the facilitator on an on-off basis? Mediators coax, plead, warn and interact actively with parties; do we want judges to do that? One important reason for mediation is that existing component of judges is woefully inadequate for the docket load. Do we want to deplete this contingent when mediator material is available in the form of retired judges and lawyers?

Funds are needed for training, for administering Court schemes and for paying mediators. Parsimony will result in low quality schemes. Certainly, we will have service-oriented and *pro bono* efforts but the system cannot be dependent on these. Since mediation is cost-effective for running a legal system, the judicial and executive leadership should respond to this need. Delay in the Courts is one reason why a party will refuse to mediate. Realistic compensatory costs that factor in the benefit obtained by delayed resolution will help to remedy this. Another measure is to identify the cases where one side is taking advantage of the system's delays, and mark them out for early hearing. An impending trial is an excellent inducement to come to the mediating table.

Mechanisms for mediation are sorely needed where government and public sector units are involved. Mediation often involves giving up some to gain more. Discretionary decision making of bureaucrats is limited by fears of audit and police enquiries, and political witch hunts. So even where a settlement is possible, and would benefit Government, most officials take the safer recourse of leaving the dispute to be resolved by a Court through litigation. It would a great pity if the cases involving the State stayed out of the mediatory circle. *First*, in terms of sheer numbers, they are huge, and courts dockets are clogged largely because of litigation in which the State is a party. *Second*, many of these do not involve dispute on a point of law or require a precedent to be applied; they arise from acts

[30] *See generally* DEBORAH R. HENSLER, COURT ORDERED ARBITRATION: AN ALTERNATIVE VIEW (1992).

or omissions of a purely administrative nature. There is no need to spend the precious hours of a superior Court Judge to resolve matters, which can be sorted out across the table. *Third*, public sector organizations are present in different economic fields. They are large entities, and their disputes reflect their size. Litigation ties up their money, contracts, economic potential and commercial possibility. The stakes involved are enormous in terms of contracts, property, licences and rights. When locked up in litigation they represent unproductive public assets.

VI. Conclusion

Till now, mediation and like processes were put in a category called ADR, which meant Alternative Dispute Resolution. The term 'Alternative' bore the connotation of these processes being outside the legal framework.[31] Resort to them was not in the first instance, but only in exceptional cases. Practitioners of the mainstream litigation system saw the alternatives as different, lower in status, and in competition with it. With Courts and lawyers now taking to mediation, we are on our way to an enlargement of the legal system so that it houses both adversarial and consensual methods. We are increasing access to justice without decreasing the quality of justice. We are used to the Courts rendering just verdicts. The participation of parties in resolving their conflict offers a level playing field that also encourages a just result. We should now use term Appropriate Dispute Remedy and apply it to the entire legal system, indicating thus that it is premised on offering the best possible solution to the malady of dispute. That will mark one of the most significant changes in legal development.

If we can invoke the concept of appropriateness, we can tailor the resolution method to suit the nature of the conflict. That may well spell the difference between smooth resolution and protracted conflict. Till now, the 'A' in ADR stood for Alternative. Now, the embracing of mediation enables us to have an expanded system of dispute resolution. Our Courts can then house practitioners and practices of adversarial litigation and consensual peacemaking. Such a unified legal system would then be one based on the basic criteria of Appropriate Dispute Resolution. This is a powerful new way of looking at our legal system – one which harmonizes the values of the law, the needs of the public and the ethics of legal practice.

A new paradigm of dispute resolution is being created. It adds another dimension to legal practice. It enables parties to participate in the resolution of

[31] H.E. Chodosh et al., *Indian Civil Justice System Reform: Limitation and Preservation of The Adversarial Process*, 30 N. Y. U. J. Int'l. L. & Pol. 1, (1997).

their conflict with substantial benefits. It harnesses the positive energies of litigants and lawyers aided by mediators to attack the problem instead attacking each other. It offers multiple benefits for all involved. It not only eases the pressure on the Courts but also makes it the provider of consensus. Through judicial initiative and involvement of the Bar, mediation is an idea whose time has arrived. In an age of escalating conflict amongst individuals, societies and nations, it offers a vision of settling disputes amicably and for mutual benefit.

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