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EDITOR'S NOTE

What is the reason for the present unrest and uprising happening all over the world? Occupy Wall Street or the Anna Hazare movement in India – Are financial crisis or corruption the only reasons? It could be the venting out of constant hurt feeling and subsided emotion of people meted out with illegality and illogical high handed decisions. Whatever advantages a nation gets through financial or trade growth could be wiped off in just one rebellious movement. We come back to square one. Only with basic communal harmony coupled with trade and commerce, can any nation aspire for growth. This can be addressed not by imposing rule of law by force, but by voluntary acceptance of rule of law, which is possible only through popularizing ADR.

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VIEW POINT

Is Mediation a Governance matter?

A concise clarification

: JOSEPH W.W. CHAN

There are different explanations as to the nature of mediation which is arguably an element of national governance, or territorial governance. Governance is a matter of politics and ethics. In addition, governance generally connotes the meaning of a high standard. The introduction of mediation to solve civil dispute is one aspect of judicial governance. According to the author Governance is a system ensuring people's needs are served efficiently and fairly, and it is also one of the core factors of economic growth and prosperity and mediation will promote better governance.

Mediation[1], along with other alternative dispute resolution (ADR) approaches, such as negotiation and arbitration[2], is a mechanism to solve disputes. Mediation is related to governance in some way or another. There are different explanations as to the nature of mediation which is arguably an element of national governance, or territorial governance if the entity is not recognised as a nation-state (i.e. a country). Governance is power[3] and accountability. Power is politics and accountability is ethics. Therefore governance is a matter of politics and ethics. In addition, governance generally connotes the meaning of a high standard.

Advent of equalitarianism

With the advent of European equalitarianism, access to justice is a part of judicial governance. However, the cost of running a court system for civil justice is high and the spending in legal aid for civil cases is growing. All these are provided for out of public funds. The standard of the judicial system should be high, but the cost of maintaining it would preferably be kept within an affordable limit. As for governance, power is the right to rule and accountability is to be responsible to certain people. In the old days, when there was a monarch with absolute power, the right to rule was given by god or heaven, so the monarch was accountable to God or heaven. Now without a monarch who actually rules, a person chosen by the people or

(Footnotes)

[1] Mediation is assisted negotiation. A neutral third party, the mediator, is engaged by the disputing parties to facilitate the negotiation and to assist them to reach a settlement agreement themselves. In international relations, a mediator who is usually a diplomat, helps disputing parties to compromise and possibly have a peace agreement. Peace is a matter of global governance.

[2] In arbitration, the arbitrator who is appointed by the disputing parties will decide on the dispute.

[3] See the definition of governance at the website of the Institute on Governance, Canada: 'Governance determines who has power, who makes decisions, how other players make their voice heard and how account is rendered'. http://iog.ca.

supposed to be chosen by the people has the right to rule. He/she gets the mandate from the people. Thus this person who rules is accountable to the people.

The research of Governance

The study of governance is broad and can include global governance, inter-nation regional[5] governance, national governance, and corporate governance. Within the ambit of national governance, there is at the local level a sub-system of governance called local governance or 'public governance' because there are local legislatures, executives and judiciaries. As there are things like 'national policies, local implementations', the meaning of the term 'public governance' can be interpreted wide enough to mean national governance if it is not defined clearly. In global governance, one may ask why global, not international. The reason is that there are in the world entities which are not considered as nation-states in one sense or another due to conflicting arguments as to the status. Also, there are territories that are not ruled by any nation-state, like the South Pole. Global governance is about peace, order, reasonable sharing of prosperity and the sensible use of global resources, e.g. energy, water, minerals, the oceans and environmental protection measures.

Inter-nation regional governance is about the governance of a region covering several countries, like the European Union, the Association of South East Asian Nations (ASEAN), and others[6]. For national governance, there are three areas of study, i.e. legislative governance, executive governance, and judicial governance. Legislative governance is concentrated on the fair process of electing persons to serve in the legislature. There are discussions about the advantages and disadvantages between the first-past-the-post method and a proportional representation system. For executive governance, there seems to be a hidden trend in the minds of the people around the world about the number of terms a person who is elected should serve. Whether it is just one term of 4-5 years without the second term, or the elected person is allowed to run for a second term. The contention is policies initiated during the first term are thought to be mostly designed to get re-elected for the second term and not really in the best national interests. Judicial governance[7] nowadays is mainly dealing with the optimal use of resources allocated to the judiciary. The introduction of mediation to solve civil dispute is one aspect of judicial governance. At the local level of a unitary state, local government is set up to serve the needs of the public, but public governance is essentially concerned with the competency of the local executive, not much is touched upon relating to local laws and the local judiciary, except a few

(Footnotes)

[5] 'Inter-nation (or inter-country) regional' is about a region that is across nations. The term is used to differentiate it from a region within a nation. A nation is a nation-state or a country.

[6] There are other inter-nation regional groupings in Africa and South America. Also, one may think of a Russia-led regional bloc and the possibility of a loose tie-up of the UK, Australia and New Zealand. A loose tie-up can be in any form, for example, a trade pact or a freely associated common market etc.

[7] Judicial governance is perhaps a modern term. If one has a look at page 43-53 of *Landmarks in the Law*, the work written by the late Lord Denning, one will realise judicial governance in England has come from a long way.

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exceptions, e.g. procedural reforms and the introduction of ADR. As to corporate governance, it is a high standard of management covering the suitability of the directors and top managers, transparency and social responsibility to various stakeholders.

Conclusion

In modern government, it is the concept of 'the people who hired us to work for them'.[8] Governance is a system ensuring people's needs are served efficiently and fairly, and it is also one of the core factors of economic growth and prosperity. However, in a democracy, no matter how good a system is in theory and practice, it has to have legitimacy, that is, the general acceptance of the people. With the continual growth of popularity of ADR because of its privacy, speed and lower costs, parties to civil cases in some jurisdictions now have to seek the help of mediators in order to solve their disputes. The court may penalise a party that has unreasonably refused to mediate by cost sanctions. This is the optimisation of the civil procedure and an improvement to judicial governance which is an integral part of national governance or territorial governance. Optimisation or rationalisation of the use of resources is in fact a matter of governance. Furthermore, mediation is in a way about better communications which will promote better governance.

(Footnotes)

[8] Said by US President Obama when he spoke in the US Congress on 8 September, 2011 urging the lawmakers to approve a US$447 billion mix of tax cuts and spending he called vital to help people in the US back to work.

(Author: Joseph WW Chan is a part-time lecturer in law, Hong Kong Shue Yan University.)

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A linguistics professor was lecturing to his class one day.

"In English," he said, "A double negative forms a positive. In some languages, though, such as Russian, a double negative is still a negative. However, there is no language wherein a double positive can form a negative."

A voice from the back of the room piped up, "Yeah, right."

Courts and ADR - For a Harmonious Co-habitation!

: DR. CHANDANA JAYALATH

As permeated the judicial system from relatively small claims to complex social and technical issues, it is probably not possible to totally eliminate the component of compulsion in ADR. Albeit the judicial pressure to participate, negotiate and even to accept settlements, it seems rational to opt for voluntary measures when there is some choice. These would ease out the issue of compulsion and question of duty to participate in good faith. The author analyses the balance of options of voluntary and court annexed mediations.

INTRODUCTION

Courts resolve disputes via a binding process by applying legal and equitable principles to findings of fact. Any Court system is governed by strict rules of pleading and of evidence. With a backward-looking approach, the outcome of Court efforts depends largely upon discovering the truth about something that occurred in the past. Subject to rigid procedural and evidentiary rules, Courts provide legal answers to questions of entitlements and of rights. A ha-ho is that Court's focus on deciding questions of fact and law often leaves other interests, options, and solutions unexplored. As a result, the needs that are satisfied by the Court model may not necessarily be the needs of the parties. In nutshell, the issue revolves around whether Courts "resolve" or do they really "solve". With a spectrum of mechanisms on the other hand, ADR – Alternative Dispute Resolution – may mean different things to different people such as in mediation with an evaluative orientation; be it social, legal or technical. An arbitrator may also make his own interpretation based on whatever *bonafide* facts and evidence available to him as befits the situation. Obviously, the flexibility in what a mediator or an arbitrator can do is much more than what the Courts can do because of the theory of ADR that indeed posits that the parties own both the dispute and outcome enduring a better solution than an imposed one. Disputants may eventually "tailor" a solution to the problems they consider important and relevant. However, the ways a mediator may adopt in evaluating a case may be different to that of another mediator and similarly the outcome. There are instances also those arbitrators sometimes act in *ultravires* making awards incompatible with the established rules of law. This purported 'tailoring' should not however prejudice the accepted public norms, social values as well as the legal, ethical and equity principles existing for years. However much we debate, the alternative ways of resolving disputes have made an impact on the legal arena, both positive and negative.

THE ELEMENT OF PUBLIC POLICY

Being the fuelling element, it is public policy that underpins the operation of a legal system which encompasses the social, moral and economic values that tie a society together. In performing this function – adhering to and preserving public policies - Courts observe critical values that are reflected in authoritative texts such as the Constitution and various statutes. A judge perhaps considers them to determine whether a rule should be applied to a specific dispute apparently because if laws are applied too mechanically, the law cannot keep pace with social innovation. Over time, these policies evolve, and more deeply embedded in any legal system. On the other hand, if ADR is extended to resolve difficult issues of constitutional or public law, there is real concern over the tendency to use non legal values to resolve important social issues, thus allowing private parties to regulate or delimit public rights[1].

In lining out the margins (how to preserve what law has so far accomplished and to what extent the Court should 'finger' into private settlement efforts), it is the public judiciary function of the Court that takes forefront. Accordingly, the 'hard cases' should be reserved for the Court and the Court should review the results of informal alternatives including the errors of law[2]. Strictly speaking, hard cases are those requiring construction of new law or definition and interpretation of an existing law that involves public rights, values and norms. Misteravich (2001)[3] argues that keeping hard cases for Courts will only avoid the danger of creating two tiered system of public justice, one for the rich and another for the poor. This is again because of the fact that Courts do not search for conflicts but is the dispute that pursues the Court - an inherent barrier that leads to having public law cases decided in informal private means. Thus, some legal orders exclude or restrict the possibility of arbitration for the protection of weaker members of the public such as consumers and commuters. Therefore, hard cases that have no settled rules to dictate the outcome must be heard in Courts since they may require either the construction or interpretation of law. Of course, cases that require judgments binding the general public are not arbitrable, for instance, matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters are at least restricted.

ADR will again be an inferior brand of justice in highly contested crimes, for instance when a female employee becomes a victim of a sexual assault committed by his co-worker, a mediator might only help parties develop terms to avoid occurring again. In some disputes, certain parts of a claim may be arbitrable and other parts not, for example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by a tribunal, but the validity of a patent could not. In nutshell, the disputes which are incapable of private or informal determination should be reserved for Courts. But how to segregate cases from hard to soft is a matter of principle, apart from a limited legal guideline such as the landmark Halsey case[4] that offers at least two key guidance on how Courts should approach ADR:

- Courts cannot compel parties to use ADR, as this would be contrary to article 6 of the European Convention on Human Rights.

- Courts can deprive a winning party of the costs of the case, if they have unreasonably refused to consider ADR. The losing party should show that the winning party was unreasonable.

The whole issue is "Will ADR replace the rule of law with non legal values?" For example, any subsequent negotiation that compromise strict standards in a given industry with weaker standards result into the application of values that are simply inconsistent with the rule of law. Another danger is that these standards set by private groups without the democratic review by concerned public institutions is likely to prejudice public interests unlike in a traditional Court approach where the citizens are given the opportunity to make their voices heard in public hearings. The more significant aspect of this rationale is that justice must not

(Footnotes)

[1] Edwards, (1986) "Alternative Dispute Resolution: Panacea or Anathema?" 99 Harv. L. Rev. 668

[2] Daniel Misteravich, "Limits of Alternative Dispute Resolution: Preserving Judicial Function", 70 U. Det. Mercy L. Rev. 46 (1992-1993)

[3] Daniel Misteravich, "Limits of Alternative Dispute Resolution: Preserving Judicial Function", 70 U. Det. Mercy L. Rev. 46 (1992-1993)

[4] Halsey v Milton Keynes General NHS Trust [2004] EWCA (Civ) 576

only be done but to be seen to be done. Assuming that ADR can satisfy the public need and facilitate early dispute resolution, then another opinion is that the relationship between the Courts and ADR must be properly 'tuned up'. To some extent, this is possible by a pre-action protocol the purpose of which is to encourage and streamline the exchange of information before issuing proceedings.

COURTS AND ADR LINKAGE

ADR is often touted as a panacea for the system's perceived ills, functioning like 'panadol for all illnesses'. As a movement, ADR has grown out of a general concern that Courts are burdened with too many cases almost with the question of fair results. For instance, Court annexed mediation can internalize lawsuit and change the litigation panorama in many ways. On the positive side, parties get a chance to settle their cases more creatively in cost-effective, time-efficient, and less hostile manner that is not available at trial. It allows parties to be personally involved in shaping their own remedy, rather than having one imposed on them by a Court. It also gives attorneys and their clients more latitude in terms of options and much more a combined control over the process that result in a new judicial landscape. Some proponents, however, seek merely to reduce the number of lawsuits and citizens' access to the jury. Indeed, ADR dogmatists are in view that if a dispute ends up before a jury in a Courtroom, the ADR as a movement must fail.

In between these two extremes, ADR, especially Court annexed mediation, holds the potential to clear Court dockets so that matters more deserving of trial are able to reach resolution, beyond mere the legalistic framework. Douglas (2005)[5] arguing with a medical issue says that instead of surgeries and drugs to address heart diseases, more holistic views have caused physicians to look beyond mere surgical approach. Patients are now screened for lifestyle, diet, exercises etc and this approach is feasible. Analogously, Court annexed dispute resolution approaches have been found healthy in both societal and legal point of view since it gives a chance for the litigants to look at both legal and social aspects in a balanced manner so that the concern of public values and to bring reality in accord with the authority seems possible.

Also, the Court's role in giving force to social values can also help deal with some negative aspects associated with ADR processes. Since arbitration is final and binding, except under very rare circumstances, the parties are bound to comply with the decision rendered no matter how arbitrary or legally incorrect it may be. If a legal decision varies with established legal precedent or is unsupported by evidence, it can be reversed upon appeal. With the reputation for "splitting the baby," arbitrators sometimes return discharged employees to work with no back pay. Finally, there are cases of pressing legal or economic importance where litigation is still the best way to fully resolve a clash of legal rights. Examples include the continuing struggle with the propriety of using affirmative action to remedy any discrimination and by nature such issues warrant the full scale advocacy. With this supervisory jurisdiction, *interalia*, the Courts shall rule on preliminary points of law that preserves public judiciary. In addition, the Court can adopt a supervisory role to safeguard quality and fairness. In pursuit of this, it may revoke the authority of the arbitrator, eg. for misconduct or delay, or

(Footnotes)

[5] Douglas A Van Epps, "The Impact of Mediation on State Courts", 17 Ohio St.JDisp.Reso 629 (2001-2002)

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With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

it may set aside or remit the award (prior to its enforcement) for fraud or bias; improper procurement of the award; if the dispute falls outside the scope of the arbitration agreement or if the arbitration agreement is void or unenforceable; if there are patent defects in the award; a mistake admitted by the arbitrator; or substantial fresh evidence comes to light. When a Court declares a rule by means of a judgment, it asserts public values and when the rule is not subject to controversy, the parties themselves affirm its social values. This law declaring function which enforces public values should not therefore be delegated because of the core governing function enforced with the coercive power of the State.

A classic example is found in construction contracts where any disputed matter is first referred to the engineer as an initial step to amicably resolve. Such a decision shall remain final if either party does not claim for reference to arbitration usually within 90 days. A call for arbitration will be made if the parties are not satisfied with the engineer's decision. However, it is likely that parties in a breach of contract expect some kind of outside legal protection apart from the contract itself. Some litigants may pursue the Courts by a desire to vindicate their rights and elicit recompense. As such, an enactment of an arbitration law (for instance the Arbitration Act No 17 of 1999 in Sri Lanka with a wide coverage in commercial matters) enhances the opportunity to implement the legal requirements needed to fully integrate arbitration into Court's procedures. Without prejudice to the final and binding nature of the arbitrator's award, the Courts can intercede in review on the award including errors of law, in order to affirm public norms and safeguard third party rights. However, the opinion of Gladwell[6] who says a Court order amounts to the strongest form of encouragement may no longer be valid as it becomes a pressure on the parties that eventually harm relationships to be intact for a voluntary settlement.

The next point is whether the Courts have jurisdiction to order litigants to use an ADR procedure, even when either of the parties objects. It is yes in many jurisdictions, that Courts can order mediation, impose deadlines and even terminate the process. A worse case eventuality is where the Court sometimes requires the third party neutral to get the disputed parties agreed upon a solution already instituted by the Court, leaving no room for customized solutions. Indeed, compelling parties would mean an unacceptable obstruction on their right of access to Court. In the meantime, Sander[7] argues "mandatory ADR does not really happen by statute but by practice". For instance, his term 'categorical reference' in child issues is a 'practice' rather than 'discretion' and it does not literally mean voluntary. Consequently the Courts should not direct such methods be used but may merely encourage and facilitate. If the Courts were to compel parties to enter into an ADR to which they objected, it would achieve almost nothing but waste of time.

Would these settlement processes result in diminished protection of parties not at the table? Or a, frustration of laws designed to create social change? And loss of the Court's voice on public values through precedent? Constitutional scholar Owen Fiss[8] asserted, "To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying." Fiss considers that ADR approach reduces the social function of civil justice in resolving private disputes. Although Hoet[9] argues that the "potential for ADR will be lost if Courts do not start acting as driving forces", the author contends that lawyers to mediate is almost 'lawyering' unless they really change their attitude and orientation to fit the circumstances. Mediation within the Court premises makes no difference in the Court mentality so that free choice on the venue is important. Further, a Court sponsored and party preferred mediator will better work out strategies than the disputants alone. Such an approach, yet with the disputants' involvement, will streamline the process of bargaining thus faster deal making and win-win conclusion. Finally, with the racial prejudice being a potential liability of ADR, Delgado[10] suggests ADR can be reserved for disputes in which parties of "comparable status and power confront each other". This kind of arrangement will not only protect minorities but satisfy disputants who deserve something more than facilitation.

(Footnotes)

[6] David Gladwell, "Alternative Dispute Resolution and the Courts" Civil Court News 1 (27) (2004)

[7] Sander, F. (1983) "Family Mediation: Problems and Prospects", Successful Techniques for Mediating Family Breakup. (Ed) Lemmon, J.A. 2 Mediation Quarterly 3-14

[8] Fiss, Against Settlement, 93, Yale L.J. 1073, 1085 (1984)

[9] Hoet and Duque, Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model. HG Org, 2006, pg 5

[10] Richard Delgado et al, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute resolution" Wis L. Rev. 1359 (1985)

CONCLUSION

The trend towards ADR lies in the overall efficiency in terms of cost and time thus clearing Court dockets and increased access to justice out of Courtrooms. Parties prefer ADR *interalia* because of the parties' autonomy, choice, and self-determination. With the political pressure on the other hand to promote the use of ADR in civil disputes, Courts sometimes exercise its jurisdiction in mandating ADR at varying degrees. However, if a judge takes the view that the case is suitable for ADR, then the judge should explore the reasons for any resistance to ADR. But if the parties (or even one of them) remain persistently opposed to ADR, then it would be wrong for the Court to compel them to embrace it. The success depends ultimately on the will power of the litigants on the reasons such as relationship, least cost, compromise, confidentiality and so on. The author is of view that Courts must give due regard to all the circumstances involved in the case including 'willingness' of the parties before a decision is taken otherwise in order to enhance participation in good faith. Courts can for instance maintain pools of experts from different disciplines to offer advice on special issues and supervise the proceedings at an arm's length, not to regulate the conduct but to preserve public interests and evade any second class justice due to private settlement efforts.

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Think ... This is Good

The story is told of a king in Africa who had a close friend with whom he grew up. The friend had a habit of looking at every situation that ever occurred in his life (positive or negative) and remarking, "This is good!"

One day the king and his friend were out on a hunting expedition. The friend would load and prepare the guns for the king. The friend had apparently done something wrong in preparing one of the guns, for after taking the gun from his friend, the king fired it and his thumb was blown off. Examining the situation, the friend remarked as usual, "This is good!". To which the king replied, "No, this is not good!" and proceeded to send his friend to jail.

About a year later, the king was hunting in an area that he should have known to stay clear of. Cannibals captured him and took him to their village. They tied his hands, stacked some wood, set up a stake and bound him to the stake. As they came near to set fire to the wood, they noticed that the king was missing a thumb. Being superstitious, they never ate anyone who was less than whole. So untying the king, they sent him on his way.

As he returned home, he was reminded of the event that had taken his thumb and felt remorse for his treatment of his friend. He went immediately to the jail to speak with his friend.

"You were right," he said, "it was good that my thumb was blown off." And he proceeded to tell the friend all that had just happened. "And so, I am very sorry for sending you to jail for so long. It was bad for me to do this."

"No," his friend replied, "This is good!"

"What do you mean, 'This is good'? How could it be good that I sent my friend to jail for a year?"

"If I had not been in jail, I would have been with you."

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Portuguese Supreme Court on Multi-Contract Arbitration

A recent case arose from a relationship between contractual parties and the disputed connection between three contracts, of which only the first included an arbitration clause. The Supreme Court held that the temporal, functional and economic connection between the contracts made clear that despite the autonomy of the contracts, the arbitration clause in the first contract applied to the third. This reasoning was based on a close analysis of the dispute and was particularly influenced by a provision of the third contract which generally incorporating the first.

JAMS Launches International Branch

JAMS, the U.S. arbitration and mediation provider, has launched its international arm and unveiled a panel of more than 40 arbitrators and mediators to handle cross-border disputes. JAMS International is headquartered in London, with additional hearing locations in Amsterdam, Milan, New York, and Rome.

Supreme Court of Germany changes position on enforcement of Foreign Awards

Federal Supreme Court of Germany changed its jurisdiction on preclusion in enforcement proceedings relating to international arbitral awards. The court has decided that a debtor is not required to exhaust all available remedies against the award at the (foreign) seat of arbitration to preserve its right to argue in enforcement proceedings in Germany that there is no valid arbitration agreement. Now the debtor is not precluded from raising this objection in German enforcement proceedings even though it has not challenged the award at the seat of arbitration. This decision is highly significant for parties facing the enforcement of an international arbitral award in Germany. It settles a long-lasting controversy that arose in connection with the legislative change in 1998. A considerable number of courts and scholars continued thereafter to hold that the debtor of an international arbitral award that had failed to challenge the award in the country of origin was precluded from raising objections at the enforcement stage in Germany.

ICC releases new Arbitration Rules

The International Chamber of Commerce (ICC) released its new Arbitration and ADR Rules on September 12, 2011, in Paris. The Rules, effective on January 1, 2012, address developing issues in international arbitration, such as multiparty contracts and causes of delay and excessive costs.

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