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EDITOR'S NOTE

ADR has been recently referred in many areas as "Appropriate Dispute Resolution" and not as "Alternative". In fact litigation is being referred as "Judicial Dispute Resolution" or JDR. ADR is also being referred as a global system as it is not restricted by territorial jurisdiction, which is a major hurdle in litigation process. Dispute management and resolution is really growing global and changing to meet the consumer or user requirements. We welcome you to the 2-day International Master Conference at Bangalore on the 1st and 2nd of March 2012, which would explore the growth of ADR by top international academics and professionals. Hope to see you at Bangalore.

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Compulsory Mediation?

: PAUL RANDOLPH

Protracted litigation can be one of the most destructive elements in society: it destroys businesses, breaks up marriages, and damages health. But still mediation has not been accepted by the legal system in the way most would have hoped. There is therefore an urgent social need to dissuade people from unnecessarily entering into prolonged disputes. Surely it must be time to oblige parties to mediate without necessarily compelling them to settle? The author looks at the reasons why litigation is so often preferred to mediation.

Imagine for a moment that mediation is a product – a stain remover – that can be purchased from any supermarket. Almost all who have used it praise it highly. The product "does what it says on the tin": it is cheap, quick, is easy to use, and saves time, cost and energy. On the adjacent shelf is another stain remover called litigation. Almost all who have used it are highly critical of it: it frequently fails to deliver its promise of success: it is extremely costly, very slow, and takes up huge amounts of time, money and energy. Yet people queue up to purchase litigation, and leave mediation on the shelf. Why?

This bizarre situation, which defies all market trends, was confirmed by Professor Dame Hazel Genn in her research into the Automatic Referral to Mediation Pilot Scheme at Central London County Court, where in approximately 80% of cases, one or both parties objected to mediation. Other research also shows that people are not as enthusiastic about mediation as the government, the judges, and the mediation community think they ought to be.

So what is it that drives the public to purchase in droves a product they know is costly, lengthy and risky to use, in preference to one that is cheaper, faster and has little or no risk?

HISTORY OF THE PROBLEM

Many will argue that it is a matter of education: that there are still too many who remain ignorant about mediation, and who merely need to be informed. Indeed, in his Final Report on Civil Costs, Sir Rupert Jackson recommends that there should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring.

However, the sad fact is that UK mediators have spent the last 20 years in just such a campaign – educating firstly solicitors and barristers, then judges, the public, financial institutions, insurers and large and small corporations. Can any of these people remain truly uninformed about mediation, in this age

of IT, where Google can fully define any concept, and explain every variant of its use, in nano seconds? Or is it a case of the public, for some reason, not wishing to know?

Throughout history, Christian clergy, Rabbinical teachers, Muslim clerics, Buddhist monks, and Confucian philosophers have sought to teach the essence of mediation. Abraham Lincoln's 1850 notes for a lecture to his law students contained the following: "Discourage litigation. Persuade your neighbors to compromise whenever they can…As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

Why have all these teachings fallen upon deaf ears?

It is true that many law firms, corporations and insurance companies have been converted to mediation. Some judges have found that by referring, for example boundary disputes to mediation, they relieve themselves of having to hear the most tiresome and futile cases in their lists.

But still mediation has not been accepted by the legal system in the way most would have hoped.

THE PROBLEM EXPLAINED – PSYCHOLOGICALLY

As a species, we are not programmed to compromise, we are programmed to win – and in winning we want to see blood on the walls! We have an innate aggression, which, when we are in dispute, transforms itself from a mere instinct to "survive" into an acute need to crush the opposition. We no longer act rationally or think commercially; instead we are driven by an emotional craving to triumph over our opponent.

Such emotions are not confined to squabbles over property boundaries or family assets. A survey in October 2007 by the Field Fisher Waterhouse, found that 47% of the respondents (chief executives and in-house lawyers) involved in commercial litigation, admitted that a personal dislike of the other side had driven them into costly and lengthy litigation.

THE AMYGDALA – A BIOLOGICAL RATIONALISATION

There is a biological explanation for such behaviour: it is the Amygdala, a part of our brain that controls our "automatic" emotional responses. From an evolutionary perspective, it governed the "fight or flight" reflex, associated with fear of attack. The amygdala reacts to the threat of attack by initiating a reaction within the brain which overrides the neo-cortex (the "rational" thinking part) and physically precludes any reliance upon intelligence or application of reasoning.

In present day terms of course, the attack which can trigger such a reaction is not necessarily a physical attack, but rather a personal attack upon our values and integrity. In a legal context, few attacks can be more deeply penetrating than an allegation of individual or corporate negligence or breach of contract.

It is for this reason that parties in dispute find themselves unable to approach the matter rationally – particularly in the initial stages of the dispute, when the emotions are raw, self esteem has suffered a battering, and the parties are driven by feelings of anger, frustration, humiliation, and betrayal. It is at this stage that the lure of litigation is at its most powerful, offering everything a litigant yearns for: complete vindication, outright success, public defeat and humiliation of the other side, and vast sums of money!

Mediation cannot compete with such promises, and so little wonder that litigation is the disputant's preferred choice of a resolution process. It is not until the stress of protracted litigation begins to bite, that litigants start to consider alternative forms of resolution. Is it time for some form of compulsion to be introduced, to protect litigants from their own folly?

THE ARGUMENTS

Purist mediators have an intelligible aversion to compulsion: a cornerstone of mediation is that it is a voluntary consensual process. Mediators further argue that mandatory mediation would:

- create another strata of costly procedure;
- unfairly impede the public's right of free access to the courts;
- achieve statistically lower success rates.

Lord Phillips, the former lord chief justice, refuted these contentions at a Delhi Conference in 2008, stating "court ordered mediation merely delays briefly the progress to trial and does not deprive a party of any right to trial"…"Mediation is ordered in many jurisdictions without materially affecting the prospects of success". He described it as "madness" to incur "the considerable expense of litigation….without making a determined attempt to reach an amicable settlement".

Mediation may not be appropriate in all cases, for instance where a definitive ruling on the law is required, or an injunction is sought; or the visibility of litigation may be desirable (as in some copyright cases). Yet it remains commercially indefensible to continue in dispute with another, where there is an alternative possibility of early resolution. Lord Clarke, then master of the rolls, in his speech at Grays Inn in June 2009, stated: "only a fool does not want to settle".

THE ANSWER

Surely it must be time to oblige parties to mediate without necessarily compelling them to settle? Mandatory ADR is accepted globally, from the US, through Scandinavia and China, to Australia and New Zealand. Furthermore, there is no constitutional bar in the UK to mandatory mediation. Article 5(2) of the EU Directive in effect permits our national legislation to make mediation compulsory, providing it does not deny the parties a right of access to the courts.

Positive sentiments upon mandatory mediation have been echoed by other senior members of the judiciary, pointing to the fact that the courts have existing powers under the case management provisions in the CPR to direct mediation. Even where the judiciary are not entirely convinced of compulsory mediation, they are virtually unanimous in agreeing that there must be "robust encouragement" to mediate.

Sir Rupert Jackson's Final Report concludes that despite the considerable benefits of mediation, parties should never be compelled to mediate. He recommends that courts can and should in appropriate cases:

- encourage mediation and point out its benefits;
- direct the parties to meet and/or discuss mediation;
- require an explanation from the party which declines to mediate; and
- penalise in costs parties which have unreasonably refused to mediate.

A "direction to meet and/or to discuss mediation" may amount to "robust encouragement", but is it sufficient? If not, then there will be an inevitable temptation to ever raise levels of robustness – and the line between encouragement and compulsion will gradually erode.

Protracted litigation can be one of the most destructive elements in society: it destroys businesses, breaks up marriages, and damages health. There is therefore an urgent social need to dissuade our neighbours from unnecessarily entering into prolonged disputes.

Baroness Scotland, when Attorney General, announced the government's aspiration of making ADR the mainstream dispute resolution process, and litigation the alternative. If persuasion through commercial logic cannot achieve this, then some form of compulsion is likely to be the obvious and most effective answer.

(Author: Paul Randolph is a Mediator in London and Chair of LADR (Lamb Building ADR - www.ladr.co.uk). The article was first published in the New Law Journal, April 2010)

Think ... The Secret of Success

"Sir, What is the secret of your success?" a reporter asked a bank president.
"Two words"
"And, Sir, what are they?"
"Right decisions."
"And how do you make right decisions?"
"One word."
"And, sir, What is that?"
"Experience."
"And how do you get Experience?"
"Two words"
"And, Sir, what are they?"
"Wrong decisions"

Article

Challenges Faced by ADR System in India

: DR. UJWALA SHINDE

It is apparent that those who are economically and socially disadvantaged find that the entire legal system is irrelevant to them as a tool of empowerment and survival. ADR may not be able to overcome power imbalances or fundamental disagreements over norms among disputants. On the other hand, in situations where there is no established legal process for dispute resolution, ADR may be the best possible alternative to violence. According to the author, an audit of the existing ADR mechanisms from the point of view of 'customer satisfaction' would help to shape the programme for the future in order to maximize the successes.

INTRODUCTION:

In the Indian context, Alternative Dispute Resolution "ADR" as a method of dispute resolution may trace its evolution to certain drawbacks in the judicial system of the country. To overcome the shortcomings of the judicial process the aggrieved parties now days tend to go for ADR process. ADR process may generally be categorized as negotiation, conciliation/mediation or arbitration systems. Most of the systems look and feels very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the area of ADR.

It is apparent that those who are economically and socially disadvantaged find that the entire legal system is irrelevant to them as a tool of empowerment and survival. Though there are legal aid programmes and many other facilities are said to be available to economically disadvantaged litigants, it is a fact there is no easy access to the legal system and it is not easy to get justice. The economically disadvantaged litigant is, notwithstanding the present concerted moves to reach legal aid through a geographically wide network of legal aid institutions unable to effectively access the system as they encounter barriers in the form of expenses, lawyers and delays. The formal system, as presently ordered, tends to operate to the greater disadvantage of this class of society which then looks to devising ways of avoiding it rather than engaging with it. Without fundamental systemic changes, any alternative system, however promising the results may seem, is bound to be viewed with suspicion. The participatory nature of an ADR mechanism, which offers a level-playing field that encourages a just result and where the control of the result is in the hands of the parties, and not the lawyers or the judges, would act as a definite incentive to get parties to embrace it.

Since the legitimacy of the ADR mechanism is premised on parties consenting to the process, the costs of engaging with either the parallel system or benefiting from the ills of the formal system have to be raised considerably high to drive the parties to consent to the ADR processes.

MERITS OF ADR:

Like any other system, ADR system also has its own merits and demerits. Though it has demerits, its merits are stronger. That is why ADR is always recommendable. Following are the merits of the system.

- ADR is not a mere mechanical process of dispute resolution
- ADR is not just legal aid philosophy
- ADR promotes rule of law in the society
- ADR encourages the participation of people in the process of dispute resolution
- ADR creates legal awareness and respect for rights of others
- ADR promotes self-reliant development

The philosophy of ADR is to motivate people to resolve their disputes amicably and for this purpose it is necessary to examine ADR's main trends and underlying objectives. One of the motivations of ADR is the principle of "Cooperative problem solving" which bring within its fold theories and strategies of negotiation, including in particular problems – solving theories of negotiation.

Another benefit of ADR is reduction of costs apart from avoidance of delay in litigation. In short, it allows the parties greater control over resolving the issues between them encourage problem-solving approaches and provides for more effective settlements covering substance and nuance. It also tends to enhance cooperation and preservation of relationship.

The experience abroad shows that it has found increasing favour in many countries and particularly in U.S.A.

CHALLENGES FACED BY ADR:

Although ADR programs can play an important role in many development efforts, they are ineffective, and perhaps even counterproductive, in serving some goals related to rule of law initiatives. In particular, ADR is not an effective means to:

- Define, refine, establish and promote a legal framework.
- Redress pervasive injustice, discrimination, or human rights problems.
- Resolve disputes between parties who possess greatly different levels of power or authority.
- Resolve cases that require public sanction.
- Resolve disputes involving disputants or interested parties who refuse to participate, or cannot participate, in the ADR process.

Traditional informal systems, on the other hand, cannot be relied upon to dispense justice – recently, a woman was commanded by her village "panchayat", to abandon her husband and "return" to her first husband without having had any say in the matter. Part of the problem stems from the lack of clarity regarding traditional systems and their functions – as admitted by the Minister for Panchayati Raj, caste groups often masquerade as panchayats and intervene in social issues. A comprehensive audit of such systems is long overdue, and must precede any major investment of time or resources in ADR.

One of the models popular in India is mediation. The system faces many hindrances, which block the path to mediation. Exposure to mediation technique remains limited. Judges and lawyers harbour understandable apprehensions about the relationship between mediation and the formal judicial process and deep skepticism over the application of mediation to a wide variety of Indian legal disputes particularly outside the commercial area. The courts are still in search of an operational case management trigger under sec.89 or Order X of the CPC for referring cases to mediation. The explicit terms of sec.89 calling for a form of judicial conciliation by the trial judge may be incompatible with subsequent referrals to mediation under that provision. Putting aside the rapid development of mediation training in Ahmedabad, Chennai and Mumbai, trained mediators in most courts are not yet available.

Another challenge is the issue of professionalism and what constitutes credible education of professionals. In this issue about credentialing and specialization, many of the issues involved. There is a growing problem with training large numbers of lawyers and non-lawyers in skills and processes, who approach the field as entrepreneurs in a new industry. Many of them are finding it hard to find sufficient opportunities to practice their newfound skills.

It is observed that concepts such as pure mediation may in this century become less significant than a range of approaches that are woven into society and practiced by people who are not professionals. Various eminent lawyers, High Court and Supreme Court judges stress the importance of community ADR. The real question is how professionals will respond if conflict resolution becomes a part of everything rather than something separate.

It can be said that good lawyers bring more to bear on a problem than legal knowledge and language skills. They bring creativity, practical wisdom and good judgment. A real challenge for the law schools is to help law students to develop broader problem-solving skills. The curriculum should not end with doctrinal analysis, but should include other skills such as counseling, planning and negotiation. In the l970s when the Ford Foundation granted more than $10 million to laws school through its Council on Legal Education for Professional Responsibility to promote clinical programs, a number of elite law schools joined the many others that created and integrated those programs into their curricula.

ADR programs do not set precedent, refine legal norms, or establish broad community or national standards, nor do they promote a consistent application of legal rules.

As noted earlier, ADR programs are tools of equity rather than tools of law. They seek to resolve individual disputes on a case-by-case basis, and may resolve similar cases in different ways if the surrounding conditions suggest that different results are fair or reasonable according to local norms. Furthermore, ADR results are private and rarely published. As long as some other judicial mechanism exists to define, codify, and protect reasonable standards of justice, ADR programs can function well to resolve relatively minor, routine, and local disputes for which equity is a large measure of justice, and for which local and cultural norms may be more appropriate than national legal standards. These types of disputes may include family disputes, neighbor disputes, and small claims, among others. In disputes for which no clear legal or normative standard has been established, ADR may not be able to overcome power imbalances or fundamental disagreements over norms among disputants. On the other hand, in situations where there is no established legal process for dispute resolution, ADR may be the best possible alternative to violence. For example, in South Africa, a variety of ADR processes used before and during the transition appear to have prevented violence to some degree and helped set the foundation for peaceful political change.

ADR programs cannot correct systemic injustice, discrimination, or violations of human rights.

As noted above, ADR systems often reflect the accepted norms of society. These norms may include discrimination against certain groups and populations. When this is true, ADR systems may hinder efforts to change the discriminatory norms and establish new standards of group or individual rights. In India, for example, the Lok Adalats were generally credited with resolving large numbers of cases efficiently and cheaply in the mid-1980s before the system was taken over by the government judiciary. Women, however, did not like the system, especially for family disputes, because resolution of disputes was based on local norms, which were often discriminatory towards women, rather than on more recently defined legal rights. The same was true for members of lower castes.

ADR programs do not work well in the context of extreme power imbalance between parties.

These power imbalances are often the result of discriminatory norms in society, and may be reflected in ADR program results. Even when the imbalance is not a reflection of discriminatory social norms, most ADR systems do not include legal or procedural protections for weaker parties. A more powerful or wealthy party may press the weaker into accepting an unfair result, so that the settlement may appear consensual, but in fact result from coercion. For the same reason, ADR programs may not work well when one party is the government. When the program design has been able to enhance the power or status of the weaker party, ADR has been effective in conditions of discrimination or power imbalance. In Bangladesh, for example, women who have submitted cases of spousal abuse to mediation have found that the village mediation system, which includes women mediators, provides better results than the court system, which is even more biased against women in these cases. In general, however, ADR programs cannot substitute for stronger formal protections of group and class rights.

ADR settlements do not have any educational, punitive, or deterrent effect on the population.

The Lighter Side

A young college student had stayed up all night studying for his zoology test the next day. As he entered the classroom, he saw ten stands with ten pairs of legs on them. Each bird had a sack over its head; only the legs were showing.

He sat in the front row because he wanted to do the best job possible. The professor announced that the test would be to look at each of the birds' legs and give the common name, habitat, genus and species.

The student looked at each of the birds' legs. They all looked the same to him. He began to get upset. He had stayed up all night studying and now had to identify birds by their legs.

The more he thought about it the madder he got. Finally he could stand it no longer. He went up to the professor's desk and said, "What a stupid test! How could anyone tell the difference between birds by looking at their legs?" With that, the student threw his test on the professor's desk and walked to the door.

The professor was surprised. The class was so big that he didn't know every student's name so as the student reached the door the professor called, "Mister, what's your name?"

The enraged student pulled up his pant legs and said, "You tell me buddy! You tell me!"

Since the results of ADR programs are not public, ADR programs are not appropriate for cases, which ought to result in some form of public sanction or punishment. This is particularly true for cases involving violent and repeat offenders, such as in many cases of domestic violence. Societal and individual interests may be better served by court-sanctioned punishment, such as imprisonment. It is important to note, however, that victim-offender mediation or conciliation may be useful in some cases to deal with issues unresolved by criminal process.

It is inappropriate to use ADR to resolve multi-party cases in which some of the parties or stakeholders do not participate.

This is true because the results of most ADR programs are not subject to standards of fairness other than the acceptance of all the participants. When this happens, the absent stakeholders often bear an unfair burden when the participants shift responsibility and cost to them. ADR is more able than courts to include all interested stakeholders in disputes involving issues that affect many groups, such as environmental disputes. When all interested parties cannot be brought into the process, however, ADR may not be appropriate for multi-stakeholder public or private disputes.

ADR may undermine other judicial reform efforts.

There is a concern that support for ADR may siphon money from needed court reforms, draw management and political attention from court reform efforts, or treat the symptoms rather than the underlying causes of problems. While these concerns are valid, they will rarely materialize if ADR programs are not designed to substitute for legal reform. In most cases, ADR programs will be far less expensive to start and operate than broad-scale judicial reform efforts. In other countries, like Ukraine, for example, the USAID mission considers the mediation program to be very inexpensive compared with other programs. And, in Sri Lanka, the Mediation Boards resolve cases at a fraction of the cost the government would incur through the ordinary court system. In general, ADR programs reduce costs for the state, and therefore for donors, at least as much as they reduce costs for disputants. In sum, ADR programs do not necessarily draw attention away from problems that can only be addressed through formal justice processes, as long as both development officers and government officials keep in mind the limitations of ADR programs.

CONCLUSION:

In the present day context development of law must begin from development in legal education. Only those who had a good legal education would be good lawyers and consequently good Judges. Having regard to the docket explosion it is incumbent that all the three wings of the State come forward and see to it that justice is dispensed to the litigating public within a reasonable time by adopting various dispute resolution mechanisms.

It is a fact that a large number of civil disputes pending in the courts, and to a small extent petty criminal matters, have been 'disposed of' through the Lok Adalats that are a permanent 'embedded' feature of the functioning of legal services authorities. While one point of view sees this as a success, another questions whether the Lok Adalat as presently institutionalized is really a tool of 'case management' which essentially addresses the problems of an over-burdened judiciary and not so much as an instrument of justice delivery for the litigant. If the 'success' of the Lok Adalat stems from negative reasons attributable to the failures of the formal legal system, the utility of this mechanism may also be short-lived. In other words if the incentive for litigants to accept Lok Adalat decisions is that if they didn't they would be faced with the prospect of further delays, uncertainties and costs, it constitutes a confirmation for them that the formal legal system is unable to provide an acceptable quality of legal services or justice. This in turn would not promise well for the legitimacy of the system in the long run.

What this then means is that there has to be a gradual but conscious effort to offering positive reasons, and not negative ones, for litigants to be willing consumers of the ADR processes. An audit of the existing ADR mechanisms from the point of view of 'customer satisfaction' would help to shape the programme for the future in order to maximize the 'successes.

(Author: Dr. Ujwala Shinde is the Principal I/C of SSMS Law College, Pune, India)

Indian State seeks for ADR framework in PPP Rules

The Orissa government has advocated inclusion of a framework for alternate dispute resolution and arbitration for PPP (public private partnership) projects in the draft PPP Rules of Government of India to avoid cumbersome and lengthy litigation processes.

In a letter issued by the Joint Director (PPP), Orissa to the Additional Secretary, Department of Economic Affairs under Union Ministry of Finance, they have urged that suitable changes have to be made to include dispute resolution mechanism to avoid court cases at the start of the tendering procedure.

Venezuela not to Recognize Arbitration Body

Venezuelan President Hugo Chavez said that his government would pull out of a World Bank-affiliated arbitration body and won't recognize its decisions.

Exxon Mobil Corp. is one of more than a dozen companies with arbitration cases against Venezuela pending before the Washington-based International Centre for Settlement of Investment Disputes (ICSID). Chavez announced his decision while referring to a more than $900 million award that Exxon Mobil recently won in another arbitration case before the International Chamber of Commerce.

Mediation Costs not Recoverable under FDCP Act, USA

A consumer who prevails in a lawsuit under the Fair Debt Collection Practices Act, USA, cannot recover the expenses of a court-ordered mediation. The January 10 decision by the 11th Circuit Court of Appeals in Nicholas v. Allianceone Receivables Management, Inc. held that mediation fees cannot be included in an award of costs because they are not listed as a "taxable" cost in the federal statute that governs such awards.

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