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THE indian arbitrator

THE INDIAN ARBITRATOR

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In this Issue.....

Editor's Note

Greetings from IIAM!

There has been lot of news about ADR in the last 2 months in India. In mediation, there were contradictory judgments from the High Court and Supreme Court as to whether grave criminal offences can be settled by mediation. The government ratified amendments to the Arbitration Act, providing time limits and fee capping for arbitrations. There is also a proposal to give foreign law firms permission to practice arbitration in India. But the real question is - Are these steps sufficient? Are the changes good enough to bring the envisaged changes? I feel no. May be only time will tell. I hope the ADR practitioners will come out with their comments…

Thank you.

PRACTICING WHAT WE PREACH MATTERS

TONY WHATLING

To what extent do we as mediators apply the expertise of our professional craft to managing conflict in our daily lives? As mediators we open our doors to the public as experts in conflict management and dispute resolution and should therefore be expected to manage it when it involves us personally. What happens when conflicts in some aspect of mediation arise between mediators? Commonly such disputes are often "dissolved" – for example by one side stepping down or leaving – rather than "resolved", a consequence of which is that the unresolved feelings involved frequently get added to any future conflict. The author raises the issue about the extent to which mediators are able to apply their bread and butter skills and strategies to conflicts that arise in their daily lives.

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"The cobblers children have no shoes" - the essence of this maxim is to describe the phenomenon whereby certain professionals in any given activity are so busy with work for their customers, that they neglect to use their professional skills to help themselves or those closest to them. For example - the painter & decorator who never decorates his own house, the web designer that hasn't finished their website, or the accountant who is late in submitting their own tax return.

In this article I aim to raise issues about the extent to which mediators, as experts in conflict resolution, are able to apply their bread and butter skills and strategies to conflicts that arise in their daily lives - with particular reference to conflict in the workplace and mediation organisations.

In particular I aim to:

- Name the 'elephant in the room' - to identify the problems that we all know exist to a greater or lesser degree, in that in all organisations, conflict is inevitable - and is just as common within mediation organisations.
- Raise awareness as to the extent of the problem.
- Identify some common characteristics of the problem.
- Remind readers of the everyday 'bread and butter' professional methods of dispute resolution management.

- Offer some ideas for how such disputes might be managed.

For some three decades of the development of mediation in the UK, I have witnessed conflicts between professional mediation colleagues that have been perplexing and at times seriously worrying.

The conflicts arising from these disputes have had all of the ingredients of potentially destructive conflict - the early history, the trigger, the spark, the fanning of the flames and finally, in some cases, the destructive conflagration. Such processes are all too familiar to mediators in their daily work with parties in dispute.

Over a period of a few weeks or months conflict narratives are written, line by line and paragraph by paragraph, into metaphorical chapters that are to become the history books, or so called 'truths' of the facts and details. Sadly, as always, each person's history book relates substantially different accounts of what had led up to the rifts.

All too familiarly sides are taken, friends duly stand by friends in support, as the voices of the 'Greek chorus' swell to amplify and embroider the histories, each time the latest chapter is narrated within each of the camps.

As specialists in the field of dispute resolution know only too well, conflict in social and organisational environments is axiomatic. It is not a question of if conflict exists but how it is managed that matters. We also know that without conflict there would be very little change for the better, or improvement in most walks of life. *'Conflict can signal constructive ways of bringing about change and of re-ordering lives. At least the potential for positive change is greater when there is anger than where there is the helplessness and hopelessness of depression.'* (Roberts 2008, p.108).

We can of course be involved in many very constructive disputes, without the process necessarily having to escalate into conflict.

So why this article and why now?

What has prompted me to write this article, is that from my observations, such conflicts continue to occur in mediation organisations, despite the professions many years of developing understanding about how to manage them.

These conflicts can have potentially very serious consequences to individuals, the organisations concerned, and potentially to innocent bystanders, within the wider professional orbit.

Nothing by comparison would cause such high levels of concern for me if for example we compared this issue to other professional groups, such as accountants, lawyers, engineers, doctors, or polititions.

We might hope that they could manage disputes and coflicts wisely, but we would also recognise that, by comparison with mediators, it was not a matter that was so crucial to their core business and professional specialism.

And so it has been that over the past 30 years of association with mediation I can hardly recall a year when I was not witnessing such conflicts in some aspect of mediation, between mediators, staff and managers/trustees, including up to the highest eschalons of our professional structures.

Those of us connected all knew about it, were variously worried and frustrated by it, wrung our hands as witnesses to the fray, and yet often seemed powerless to do anything about it.

Commonly such disputes are often ‘dissolved‘ - for example by one side stepping down or leaving – rather than ‘resolved‘, a consequence of which is that the unresolved feelings involved frequently get added to any future conflict in the organisation.

‘But its different when its us that are directly involved isn’t it?‘

I can understand what people mean when they say that, but no, it should not be different. As mediators we open our doors to the public as experts in conflict management and dispute resolution and should therefore be expected to manage it when it involves us personally.

In fact it is all the more imperative that as mediators we ‘practice what we preach’ and ‘put our money where our mouth is’. Not only must mediation and dispute resolution within our profession be done – it must be seen to be done.

I do want at this point to emphasise that, whilst my practice and training is primarily in family mediation I have also practised and/or delivered training in other contexts including community/neighbour, health care complaints, victim offender and workplace contexts and consequently have had significant contact with their associated organisations. My training activity over the past 12 years has also included delivering training programmes in some 15 different countries including Asia, Africa, the Middle East, Europe and North America. From that experience I can say that the issues covered in this article are by no means just a UK phenomenon – it would appear that they are both universal and multi-cultural.

I also appreciate that experience in one mediation context, for example family, may make it difficult for a practitioner to apply understanding and skills to a different context such as their own workplace disputes. However my wide ranging experience suggests that most of the issues, conflict dynamics,

skills and strategies are universal across all mediation contexts and therefore, arguably should be transferrable, both in our comprehension and understanding.

So what then can be done? - some ideas for managing the conflicts.

It is very difficult to think of new ways to recommend for managing such disputes, so what follows is more of a reminder and a checklist of ideas, many of which will be very familiar to experienced mediators. Indeed I hesitate to offer recommendations, given how 'daily bread and butter' like they are to those us involved in the dispute resolution field.

At one level I risk accusations of sounding patronising, 'holier than thou' or 'teaching granny to suck eggs' – and yet challenge and change has to start somewhere so here goes.

Perhaps this would be a good point to remind readers of some of the core tenets of our everyday practice in the business of dispute resolution. I refer here to the principles, values, knowledge, skills and strategies that mediators deliver routinely to their customers, and yet often seem so unable to apply consistently when it involves ourselves.

- Search for interests and needs that underpin positions.

  Mediators know well how the magic moments of mediation happen, when through the skillful and strategic use of questions, they uncover layers of shared interests and values - and more important still, shared fears and mutual needs.

Many practitioners will recal the 'Positions Interests and Needs' [PIN], commonly used in training and referred to by Andrew Floyer Acland. The three levels of the pyramid diagram show how, at the peak are the positions that disputants take and typically bring to mediation. The second level relates to values and interests and the third level to the deeper needs of all parties to the dispute. Like the iceberg, the tip, or peak, is often all that is observable above the surface in the initial stages of mediation. (Acland 1990, p.152)

PROMOTING STUDENT AUTHORS

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.

If we envisage the pyramid for each party printed on a separate clear acetate sheet laid side by side, there is no connection between each parties interests and needs. Through needs-led questions the mediator, as it were, superimposes one sheet over the other and gradually draws them closer together, so that the common areas of interest and need are gradually exposed. The closer they are drawn together, the greater these new sub-pyramids emerge in the centre as joint areas of common values and interests - and more important still at the lower level, an area of joint needs.

So for example, when directors and managers attempt to impose new contracts of employment terms and conditions, often without prior consultation with those who are directly affected by the changes, both sides tend to quickly assume 'positions'.

Typically these positions include positional statements by employers such as 'Sign the new contracts now or face dismissal' - perhaps adding some moral pressure by citing the potentially serious financial consequences for the organisation unless the contracts are accepted.

On the staff side the responses are commonly along the lines of 'Impose those contracts and we will have no option but to withdraw our labour'. Before very long, such opening position statements tend to degenerate into even greater threats.

The 'needs-led' analysis employed by mediators, as referred to above, gradually moves people off their positions and uncovers such mutual needs and fears as, the need to maintain employment, income, productivity and customer services.

Overall there is usually, almost in every case, also a need for a reduction in stress, distress and dis-ease, together with a need to avoid the potential loss of financial and time resources, by resorting to more formal procedures such as tribunals, arbitration and litigation.

When listening to parties in dispute, it is commonplace to hear each party to the conflict speak of the other as being a 'control freak', of 'refusing to step down or let go of control`, of 'adopting rigid positions' - and of threatening very serious actions unless the other side backs down.

Commonly, each side speaks of how they personally are 'only interested in the best interests of the organisation, productivity and customer services'. This is akin to the separating parent who, whilst going all out to disempower the other parent, will commonly claim to be, 'Only concerned with the best interests and safety of the child'.

Both sides tend to state that, try as they might, they simply cannot understand the others issues, grievance or complaint and that it is the other side that refuses to engage in seeking a resolution.

Despite knowing as much as I do about dispute resolution, I own to being as capable as any of us imperfect human beings, of getting into interpersonal conflict.

This occurs through a natural inclination – often by a fear of loss - towards adopting a rigid position, making threats, and writing my own ideosyncratic narrative of the what, who, and how of the dispute. Alas, if I was just half as good a person as I know how to be, I would be truly amazing.

What has changed for me over the years of involvement in dispute resolution, is that after a few days or weeks of such behaviour I now hear a little inner voice that goes something like - *'Hang on, you know very well what is going on here and what you are you doing – you are stoking the fire and fanning the flames. What this situation needs instead is for you to initiate a dialogue in which you ask the significant others to talk about their wants, needs and fears, and ask in return that they will listen to yours'.*

- Resist at all costs the temptation to make threats. When we do that it is usually a signal of desperation and we are frequently not in a position to carry them through – not least with any less cost to us than the other side. *'Threats are made out of weakness; promises are made out of strength'* (Haynes 1989, p.42) Or as John puts it so succinctly in his video '*Powerful people act, powerless people threaten'*. (John Haynes video of Debbie and Michael – 'Haynes on Haynes').

- Try to avoid the natural human temptation to engage in the psychological defense mechanism of 'displacement'. We are all bound to want to protect our own private, (internal), and public, (external), self image or 'face'. When they hear a client say 'I know I wasn't always the ideal spouse/boss/ business partner, the mediator knows only too well that the next word will be a resounding 'BUT' - usually followed by a long list of the sins and failings of the other. To resist doing so is hard, since if we accept even 50% of the blame or reponsibility for what is going wrong, we will still find that hard to live with and with its negative impact on our self image.

- *'Why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?'* [Matthew 7:3].

  'Conflict provides opportunities for people to express aspects of their personality which are normally kept hidden. More than this, people project on to others their own personality or behaviour: they accuse other people of doing things or behaving in ways in which they themselves are behaving, or want to behave'. (Acland 1990, p.105).

- Ask for help from trusted colleagues, who are known to both sides to be capable of being objective and impartial.

- Don't react or retaliate - A friend of mine going through divorce used to read me the latest inflammatory and goading letter from his wife's solicitor - and then his own equally adversarial response. Several times I pointed out that by far the best way to end this war of words was not to react. His response was inevitably that he just could not resist it. In effect he was enjoying the adrenalin rush and ritual of this 'game' despite the inevitable damaging side-effect it was having on his relationship with his children.

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- Remember that win/win is not just the absence of win/lose or lose/lose, but an outcome where the 'total result of the outcome is greater than the sum of it's parts'. In other words, by engaging in constructive option development, we may well uncover outcomes that are better for all concerned, including organisations, than either side had previously identified.

But what if they won't play?

Mediator colleagues in dispute frequently tell of how, despite doing everything to engage the other side in dialogue, they won't respond.

- Try some 'negotiation jujitsu' as so well defined by Fisher & Ury in their all time classic negotiation skills text 'Getting to Yes' - *'If the other side anounces a firm position, you may be tempted to critisise and reject it. If they critisise your proposal you may be tempted to defend it and dig yourself in'. In short, if they push you hard, you will tend to push back. Do not push back. When they assert their positions, do not reject them. When they attack your ideas, don't defend them. As in the Oriental martial arts of judo and jujitsu, avoid pitting your strength against them directly; instead use your skill to step aside and turn their strength to your ends. Rather than resisting their force, channel it into exploring issues, inventing options for mutual gain, and searching for independent standards.*` See their book for a more detailed account of how to do this. (Fisher & Ury 1981, pp.113-114).

In conclusion, I often recall the wise words often spoken at training events by the late John Haynes, who described the mission of the mediator as *'searching for the good in people'* to which he would usually add – *'and you can choose ATTRIBUTION DETAIL »whether you spell 'good' with two o's or one'*.

My hope is that mediators everywhere will consider and reflect on this paper in the spirit that it is written. Despite my continued doubts about the wisdom of offering it for publication I keep coming back to the essential conundrum that is – what is it that, as experts in our field and craft, makes it so difficult for us to routinely practice what we preach?

ADR & CRIMINAL JUSTICE SYSTEM: FOCUSING ON RESTORATIVE JUSTICE

SHANU JAIN & APALA CHATURVEDI

The slow transformation in the attitude of the criminal legal system, from retributive to reformatory, has led to the expansion of the scope of ADR. The authors analyse the scope of Restorative justice as a new way of looking at criminal justice that focuses on repairing the harm done to people and relationships rather than punishing offenders. Mediation, as a way of restorative justice, offers the parties to come on terms with the crime. It has the potential to transform the victim-offender relationships in a manner that cannot be predicted by alternative dispute resolution or legal theory.

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People have increased awareness about their rights and litigation has become an inescapable part of their lives and is a primary means of resolving disputes. This has led to a mounting pressure of cases, thereby increasing the workload of judiciary manifolds and has created a backlog of cases of inconceivable magnitude, where cases remain undecided for years.[1]

The failure of litigation to meet the growing needs of the citizens has given rise to the need for an alternate mechanism for resolution of disputes and it is in this context that the Alternate Dispute Resolution (ADR) has gained primacy in the present millennium. The development of ADR in India, though still in a nascent stage, has taken a major burden of civil litigation, where the final disposal of a case takes years altogether due to pendency caused by adjournments, revisions, appeals, cross appeals etc. But the slow transformation in the attitude of the criminal legal system, from retributive to reformatory, has led to the expansion of the scope of ADR.

In a criminal justice system, where it has been traditionally believed that "justice equals punishment", in the recent years, the question has begun to rise that "justice for whom?" It is because the society deems that punishment is the only mode of justice, the victim seeks the most severe punishment for their offenders. However, punishment often leaves them unsatisfied and fails to address the other important needs of the victim,

(Footnotes)

[1] P.C. Rao and William Sheffield,*"Alternative dispute resolution,"*Delhi, Universal Law Publishing, 1997, p.6

such as, consolation for their loss, easing their trauma or mending their wounds.[2] This failure of the criminal justice system to cater for the complete needs of the victims has, over the past years, seen the emergence of alternate methods of criminal justice, the prominent one being the theory and practice of restorative justice.

Restorative justice is a new way of looking at criminal justice that focuses on repairing the harm done to people and relationships rather than punishing offenders.[3] It represents the shift that the society has undergone towards criminal behaviour and focuses on the interrelatedness of human experience and offers an alternative framework of resolving conflict and the resulting harm.[4] It focuses on "how to make things right" rather than focusing on "punishing the wrong". The theory is not to punish the defendant but to lead him to concur to his crime, work towards mending the harm done by him and reintegrate him into the community.

According to Braithwaite (2004), restorative justice is:

"A process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process."[5]

The foundation of the theory lies on the concept that crime is not just the violation of the law and state but also the violation of people and relationships. This violation creates an obligation rather than a guilt and justice, in its true sense, can be attained only when there is involvement of all the stakeholders of a crime, i.e., the victims, the offenders and the community members, in an effort to put things right. The central focus is, not on the offenders getting what they deserve, but on attending to the needs of the victim and offender, for repairing the injury caused in the best possible manner. It is assumed that an offense is often a symptom of a larger problem and dysfunction and the key to curb the crime is to address and solve the problem. It is the crime which has to be eradicated, not the criminal.[6]

(Footnotes)

[2] Price, Marty, "*Personalizing Crime*",Dispute Resolution Magazine, 2000,visit at - http:/ / www. vorp. com/ articles/ justice. Html (Last visited - 19th May 2014)

[3] B. Benson, "*Crime: Restitution and Retribution*", Florida State University, Visited at - http:/ / mailer. fsu. edu/ ~bbenson/ ELibCrime. pdf, (Last visited - 10th May 2014)

[4] Leo Zaibert, "*Punishment And Retribution",* Ashgate Publishing, 2006.

[5] J. Braithwaite and H. Strang ,"*Restorative Justice in Civil Society",* New York: Cambridge University Press, 2010.

[6] Zehr, H. "*Changing Lenses: A New Focus for Crime and Justice*", Scottdale, PA: Herald Press, 1990.

Mediation is a way of resolving disputes which assists the people involved to reach an agreement with the help of an impartial mediator.[7] It is a process, a facilitation, wherein the parties are provided with an opportunity to negotiate, converse and explore options aided by a neutral third party, the mediator, to exhaustively determine if a settlement is possible.[8] Mediation, as a method of alternate criminal dispute resolution, personalises crime wherein the wrongdoer is taught the human consequences of their acts, made to take responsibility for those acts and the victims are given the opportunity to speak their minds and their feelings to the people who are stakeholders to the crime, thereby, contributing to the victims healing.[9]

As a part of Restorative Justice, mediation takes the form of Victim-Offender Mediation (VOM), which provides an interested victim the opportunity to meet his offender in a safe and structured environment and engage in a discussion about the crime, in the presence and with the assistance of a trained mediator. The primary aim of the VOM is to provide the parties to the crime the opportunity to develop a plan that addresses the harm.

In this model, the offenders, upon taking a meaningful liability, enter into a restitution agreement with the victim. The intention is to restore the victim's losses, in a monetary or symbolic manner. Restitution compliance is where the difference between the traditional criminal justice system and Restorative justice system arises, in the sense that, there is hardly any sense of moral obligation to fulfil a court-ordered restitution, whereas, when restitution is reached on a voluntary basis, a sense of morality is created.[10]

In VOM, a mediator arranges an appointment with the victim and the offender for individual meetings first, where the program is explained to the parties, questions are answered, a notification of confidentiality is made and the appropriateness of the case for mediation is checked. If the case falls within the scope of mediation and the parties are willing to participate, a mediation session is prepared, which could include home assignments and preliminary meetings.[11]

The focus of these sessions is upon helping the parties by offering sympathy, facilitating empathy and teaching to accepting liability rather than on reaching an agreement. The outcome will reflect justice which is significant to them, rather than being limited by the constraints of procedures of law. This process, in most cases, offers a just and satisfying result.[12]

The Victim-Mediation programs have been mediating meaningful justice crime victims and offenders for over twenty years; there are now over 300 such programs in the U.S and Canada and about 500 in England, Germany, Scandinavia, Eastern Europe, Australia and New Zealand.[13]

The first recognized case of Restorative Justice in Canada was documented in Elmira, Ontario, in 1974. When two young offenders vandalized 22 properties in a small Ontario town, the assigned probation officer, Mark Yantzi and a Mennonite prison support worker, Dave Worth, asked the judge

(Footnotes)

[7] Bush, R. and J. Folger..*The Promise of Mediation*. San Francisco University, 1994.

[8] Madabhushi Sridhar, "*ADR Methods",* ICADR Press, 2004, p.9

[9] Price, Marty, "*Crime and Punishment",* Dispute Resolution Magazine, 2000Visited at - http:/ / www. vorp. com/ articles/ justice. Html, (Last visited on – 24th May 2014)

[10] Price, Marty, "*Personalizing Crime*", Dispute Resolution Magazine, 2000, Visit at - http:/ / www. vorp. com/ articles/ justice. Html, (Last visited on15th May, 2014)

[11] Zehr, H "*Mediating the victim-offender conflict.*" New Perspectives on Crime and Justice (Issue-2). Mennonite Central Committee Office of Criminal Justice, Akron, PA, 1980.

[12] Umbreit, "*Victim Meets Offender: The Impact of Restorative Justice and Mediation"*. Monsey, New York: Willow Tree Press, Inc.,1985

[13] Price, Marty, "*Crime and Punishment",* Dispute Resolution Magazine, 2000,Visit at- http:/ / www. vorp. com/ articles/ justice. html), Last visited on- 10th June 2014.

for permission to arrange for the two offenders to meet with the victims of the vandalism in order to see if reparations could be made. News of the success of this new (yet centuries old) approach quickly spread. Soon, Victim Offender Reconciliation Programs, using approaches based on concepts of responsibility, healing and reconciliation, were being created across Canada, in the United States and in Europe.[14]

In 1982, a US survey reported 200 mediation centres across the country all accepting criminal cases primarily where there was a relationship between the victim and the offender (quasi criminal in nature like section 25 CrPC cases under Indian law).[15] In 1981, the community mediation model was exported from the United States to several countries including Australia (three experimental community centres in New South Wales), UK (the Newham Conflict and Change Project) and Norway (Child Welfare Conflict Councils). Since the very beginning, community mediation was largely professionalized- only half the mediators are volunteers.[16]

Mediation is essentially one of the foremost practices of restorative justice and in India especially with the burgeoning Mediation and Conciliation centres, people are gradually being familiarized with the concept of ADRs. However, as of now, the approach still remains limited to quasi criminal cases which involve family matters such as divorce settlements, domestic violence and harassment for dowry. Another aspect of such proceedings encompasses property disputes and civil cases.

This is opposed to the international emergence of restorative justice where most of the activity has occurred within the criminal justice field, where the restorative justice movement has become the most concerted and significant attempt to informalize the criminal justice systems, the movement has spread far beyond this field as well, influencing the treatment of bullying in schools and handling of child welfare cases.[17] Whereas in India, a common link throughout all cases is that they are limited to civil disputes or cases where there is a "relationship" between the parties involved. Art. 39-A of the Constitution of India provides for ensuring equal access to justice. Administration of Justice involves protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.

The Law Commission of India in its 142nd report suggested reforms, which included implementation of plea bargaining in India[18]. Further, to reduce the delay in disposing criminal cases, the 154th Report of the Law Commission recommended the introduction of *'plea bargaining'* as an alternative method to deal with huge arrears of criminal cases, which found a support in the Malimath Committee report 1990.[19]

To give effect to the recommendations, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament[20]. The amendment was accepted and with the effect of same, Chapter XXIA was added in the Code of Criminal Procedure, 1973. The said chapter contains Sections 265 A to 265L, which deal with plea bargaining. It allows plea bargaining for cases in which the maximum punishment is imprisonment for 7 years; *however, offenses affecting the socio-economic condition of the country*

(Footnotes)

[14] The Conflict Resolution Network Canada, from "Perspectives on Restorative Justice", based at the Institute of Peace and Conflict Studies at Conrad Grebel University College, University of Waterloo, Waterloo, Ontario, N2L 3G6, See: www.crnetwork.ca, Last visited on- 10th June 2014.

[15] L. Ray, "*Alternative dispute resolution movement*", Peace and change, 1983

[16] American Bar Association, Dispute Resolution Program Directory, 1990

[17] G. Burford and J. Pennell, "*Family group decision making: An Innovation in Child and family welfare*",Willow Tree Press, 1994

[18] Law commission of India Report no. 142,*Concessional treatment for offenders who on their own initiative choose to plead guilty without any Bargaining*,Visit at: http://lawcommissionofindia.nic.in/101-169/index101-169.htm, (Last visited on- 19th June 2014).

[19] The Malimath Committee report on *Reforms in the Criminal Justice System*, August, 1990.

[20] *State of Uttar Pradesh v. Chandrika*, 2000 Cr.L.J. 384(386).

and offenses committed against a woman or a child below 14 are excluded. The bill attracted enormous public debate. Critics said it is not recognized and against public policy under our criminal justice system. The Supreme Court has also time and again blasted the concept of plea bargaining saying that negotiation in criminal cases is not permissible. More recently in *State of Uttar Pradesh V. Chandrika*[21], the Apex Court held that "*it is settled law that on the basis of plea bargaining court cannot dispose of the criminal cases. The court has to decide it on merits. If the accused confesses its guilt, appropriate sentence is required to be implemented.*" The court further held in the same case that, *"mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced."*

In India, the system of plea bargaining is still at its experimental stage. It is afflicted by many drawbacks and is not readily accepted as many argue it is more like a bargain system which tarnishes the idea of justice.

We are still light years away from the mediation system as practiced in countries like the US and Canada where the practice of restorative justice has evolved significantly. The restorative justice in the Indian criminal jurisprudence is almost non-existent. This is mainly due to the fact that the system of criminal justice in this country is hardly a victim-oriented one.[22] The progress made in the spheres of victimology is yet to reach to the criminal justice practices in this country. There is no separate law in this country enabling the victim to have their say in the criminal justice process. The compensation, restitution and restoration are still not very common here. The main reason is perhaps that the procedural law in the country does not provide much scope for these practices.

An ADR process aims to assist victims in recovering from crime but this may be impossible for some victims, they might simply refuse to go through the process. However, it is innovative in as much that it opens up new pathways for communications and interactions and all of this is possible because restorative justice focuses on a dialogic approach to responding to crime. This is opposed to the traditional criminal justice systems where the victim is often a silent spectator[23].

Moreover, various institutes have evolved a systematic course of ADR implementation beginning with a victim-offender reconciliation program in Ontario, Canada in 1974. The National Organization for Victim Assistance (NOVA) has contributed excellent efforts in the area of victim assistance in the US. In fact, various policy changes in the area of victim justice are directly attributable to its formation. The search for some effective and viable alternatives for the criminal justice process in India is no longer a matter of choice, given the multitude of reports from bodies like the Law Commission, National Police Commission and several studies by the organizations and individuals, which are testimony to the fact that the system of criminal justice in the country is facing a dire crisis. If implemented systematically, the restorative model of justice in India can offer great results.

Mediation, as a way of restorative justice, offers the parties to come on terms with the crime. It has the potential to transform the victim-offender relationships in a manner that cannot be predicted by alternative dispute resolution or legal theory. It touches, as has been exhaustively discussed, upon the emotions and gives a human angle to crime, which is important because as Mr. Earl Warren, rightly, quotes: "It is the spirit and not the form of law that keeps justice alive."

(Footnotes)

[21] Supra 23

[22] G.S. Bajpai, *Victim in the Criminal Justice Process: Perspectives on Police and Judiciary*, 1997

[23] D. Garland, *The Culture of Control; Crime and social order in Contemporary Society*, 2001

OUT OF THE BOX

THINK About It

A Different Perspective?

A teacher teaching Maths to six-year-old Brian asked him, “If I give you one apple and one apple and one apple, how many apples will you have?”

With a few seconds Brian replied confidently, “Four!”

The dismayed teacher was expecting an effortless correct answer (three). She was disappointed. “May be the child did not listen properly,” she thought. She repeated, “Brian, listen carefully. It is very simple. You will be able to do it right if you listen carefully. If I give you one apple and one apple and one apple, how many apples will you have?”

Brian had seen the disappointment on his teacher’s face. He calculated again on his fingers. But within him he was also searching for the answer that will make his teacher happy. This time hesitatingly he replied, “Four...”

The disappointment stayed on teacher’s face. She remembered Brian loves strawberries. She thought maybe he doesn’t like apples and that is making him lose focus. This time with exaggerated excitement and twinkling eyes she asked, “If I give you one strawberry and one strawberry and one strawberry, then how many will Brian have?”

Seeing the teacher happy, young Brian calculated on his fingers again. There was no pressure on him, but a little on the teacher. She wanted her new approach to succeed. With a hesitating smile young Brian enquired, “Three?” The teacher now had a victorious smile. Her approach had succeeded. She wanted to congratulate herself. But one last thing remained. Once again she asked him, “Now if I give you one apple and one apple and one more apple how many will you have?” Promptly Brian answered, “Four!”

The teacher was aghast. “How Brian, How?” she demanded in a little stern and irritated voice. In a voice that was low and hesitating young Brian replied, “Because I already have one apple in my bag.”

Lessons to Learn: When someone gives you an answer that is different from what you are expecting, it is not necessarily they are wrong. There may be an angle that we may not have understood at all. We need to learn to appreciate and understand different perspectives. Quite often we try and impose our perspectives on others and then wonder what went wrong.

The next time someone gives you a different perspective than yours, sit down and gently ask “ can you please help me understand”?..... I believe you will truly get a different perspective !

Brain Teasers

It's 6:00 AM in the morning.
You are sleeping.
The doorbell rings.
It's your family, they want to have breakfast.
They have got strawberry jam bottle, bread packet, honey bottle, juice bottle and milk bottle with them.
So, what do you open first?
Most of the people guess it wrong!

[Answer at Page 20]

Written by a lady.....

After a meeting I was coming out of a hotel and I was looking for my car keys. They were not in my pockets. A quick search in the meeting room, it wasn't there too. Suddenly I realized I must have left them in the car. My husband has shouted many times for leaving the keys in the ignition. My theory is the ignition is the best place not to lose them. His theory is the car will be stolen.

Immediately I rushed to the parking lot, I came to a terrifying conclusion. His theory was right. The parking lot was empty.

I immediately called the police. I gave them my location, Description of the car, Place I parked etc, I equally confessed that I had left my keys in the car, and that the car had been stolen.

Then I made the most difficult call of all, to my husband, "Honey", I stammered; (I always call him "honey" in times like these.) "I left my keys in the car, and it has been stolen."

There was a period of silence. I thought the call had been dropped, but then I heard his voice. "Idiot", he shouted, "I dropped you at the hotel !"

Now it was my time to be silent. Embarrassed, I said, "Well, then pls come and get me."

He shouted again, "I will, as soon as I convince this policeman I have not stolen your car."...

NEWS & EVENTS

FOREIGN LAW FIRMS TO OPERATE IN INDIA FOR NON-LITIGIOUS SERVICES

The Department of Industrial Policy and Promotion (DIPP), India is working on a proposal that would permit foreign legal firms to operate in India through a proprietary concern and only for non-litigious and arbitration services. It is likely to be taken up to the Union Cabinet in a month's time. Views of the Bar Council of India are being taken into consideration. As per reports, the permission will not be in the form of direct foreign direct investment. Instead, it is likely to be granted under regulation 24 of the Foreign Exchange Management Act that permits investments in firms of proprietary concern.

The issue of functioning of foreign law firms in India has also reached the doorsteps of the Supreme Court of India. The High Court had earlier ruled that 'there is no bar under the Advocates Act, 1961 or the Bar Council of India Rules for foreign lawyers or law firms to visit India for temporary periods on a "fly in and fly out" basis to advise their clients on foreign law and diverse international legal issues. They are however not permitted to practice Indian law, either in relation to litigation or advisory matters, unless they qualify and enroll as advocates and fulfill the requirements of the Act and Rules. Bar Council of India filed an appeal before the Supreme Court.

MAHARASHTRA GOVERNMENT DEFENDS BAN ON MEDIATION IN DOMESTIC VIOLENCE CASES

The Maharashtra state government defended before the Bombay High Court (India) its circular banning counselling or mediation in domestic violence cases without the order of a court. A bench headed by the Chief Justice heard a suo motu PIL converted out of a letter which said the July 24, 2014 circular is "inconsistent" with the Protection of Women from Domestic Violence Act, which does not prohibit parties from resolving their dispute outside court.

The Women and Child Development Department's view is that when agencies such as registered service providers, special cell for women attached to police stations and protection officers and hospitals, appointed as stakeholders under the Act, engage in pre-litigation counselling and mediation, it can be dangerous as consent terms are not binding on the parties and cannot protect the aggrieved woman and it may increase the risk of domestic violence further.

INDIAN CABINET CLEARS AMENDMENTS TO ARBITRATION ACT

Seeking to ensure faster settlement of commercial disputes, the Union Cabinet has cleared a proposal to amend the Arbitration Act which sets a fixed timeline for arbitrators to resolve cases. Under the amendments to the Arbitration and Conciliation Act, 1996, an arbitrator will have to settle the case within 18 months. After the completion of 12 months, certain restrictions have been put in place to ensure that the arbitration case does not linger on. Another amendment puts a cap on the fees of an arbitrator.

PARTY CONTESTS COURT'S AUTHORITY IN SOLVING DISPUTE

Refusing to try 'settlement' as suggested by Madras High Court (India), the Chennai Metro Rail Limited (CMRL) submitted that it was beyond the power of the court to suggest settlement in connection with the suspension of contract of the Russia-based company for the ongoing metro work in the city. However the Court adjourned the matter observing that CMRL had made the submission without understanding the role and responsibility of the court and the scope of ADR.

SUPREME COURT OF INDIA PROHIBITS MEDIATION IN RAPE CASE

After a Madras High Court judge granted bail to a rape accused so that he can meet the victim for a possible "mediation", the Supreme Court held that any compromise promising wedlock between a rape accused and the victim compromises the dignity of the woman. The court said that such a compromise lacks sensitivity on the part of those promoting a settlement.

COMMERCIAL MEDIATION TRAINING PROGRAM

Are you interested to become a Commercial Mediator or a specialist Dispute Resolution Practitioner or Advocate? Effective conflict resolution skills is the key to prevent destructive conflict, enabling lawyers and consultants to better assist their clients in business deals and disputes. Mediation has become a truly global profession, earning international recognition. IIAM Mediation Training Program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation. The training offers the opportunity to become an effective negotiator, skillful mediator and a talented mediation representative. As per IIAM Mediator Accreditation System, a candidate having successfully completed Mediation Training Program is categorised as Grade B Mediator. The program will be for 40 hours conducted in 5 days, during September 21-25, 2015 (Monday to Friday) at Cochin, Kerala, India.

Partner Organisation for this training program is Indian National Bar Association, New Delhi.
For further details log on to http://www.arbitrationindia.org/htm/events.html.

Upcoming Training Programs from

INDIAN INSTITUTE OF ARBITRATION & MEDIATION
institution for dispute resolution & management

CERTIFICATE IN ARBITRATION LAW

The course offers the participants to know the underlying theory of arbitration law and practice, with emphasis on drafting of arbitration clauses and agreements, awards, procedure of arbitration, important case laws, ethical issues and institutional arbitration methods. The program will also look at the art of drafting dispute resolution clauses appropriate to the parties' business needs and dispute resolution desires. The program will provide a solid foundation in ADR processes and to serve as ADR practitioners and neutrals. After successful completion, the participant will be eligible for empanelment as an IIAM Arbitrator, subject to the norms of enlistment.

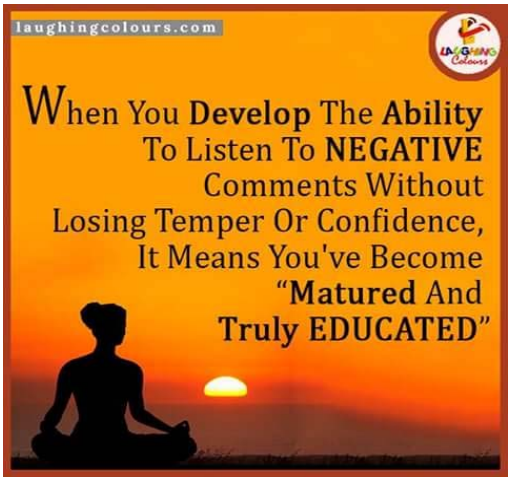
The program will be for 15 hours conducted in 2 days, during November 2015 at Cochin, Kerala, India.

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is an ongoing distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment. You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.

For more details see http://www.arbitrationindia.org/htm/events.html or mail to training@arbitrationindia.com

Quotes of the month.....



Brain Teaser: Your eyes! You were asleep and the first thing that you will open will be your eyes.