

**NATIONAL MEET ON MEDIATION AND  
CONFLICT RESOLUTION**

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PLENARY HALL, VIGYAN BHAWAN, NEW DELHI**

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Alternative Disputes Resolution (ADR) has now been considered as an integral part of our judicial system. Our laws have been suitably amended to incorporate this method as a form of efficient settlement of cases. Our Mediation Centres in Delhi, Bangalore and Chennai are doing commendable work and producing excellent results. Every High Court has also taken the initiative to start Mediation Centres. The Centres would also be extended to District Courts. Previously, we were concentrating our efforts to settle cases by Lok Adalats. However, the Lok Adalat system was efficient for settling only certain types of cases. Moreover, total discussion of the

disputes with the concerned parties and suggestion of any decision would be possible only when more facilities are available and with the involvement of retired judges in the adjudication process.

ADR has now become a world phenomenon whether it be adversarial, inquisitive or other forms of judicial systems. It is now well recognized that ADR has an important role to play within the justice delivery mechanism and it gives increasing satisfaction to litigants and inculcates a cooperative culture within courts as well as helping them to deal with their caseloads. The view that mediation should be used more readily by courts and tribunals has attracted considerable support in India and all over the world. Recently, Australian courts have indicated that some ADR processes are of central importance in the court function. The Chief Justice of the Supreme Court of New South Wales has noted that :

*“Mediation is an integral part of the Courts adjudicative processes and the ‘shadow of the Courts’ promotes resolution.”*

The differing relationship between Courts, policy makers and ADR and the variation in the philosophical approach to ADR varies greatly and produces a range of integration strategies in some courts and tribunals, such as

- (1) Pre litigation ADR – either supervised or unsupervised by Courts and Tribunals and falling within the ‘shadow of the court’ and often involving mandatory strategies;
- (2) Self referred litigation related ADR – where courts and tribunals are not involved and may be unaware that parties are using external ADR processes;
- (3) Court connected ADR – involving referral to ADR processes – such processes might be conducted by external or internal practitioners;
- (4) Courts integrated ADR – involving judicial and quasi judicial officers within Courts and Tribunals using ADR processes to resolve and manage disputes (processes may vary from settlement conferences,

mediation or concurrent evidence approaches) – this integration may involve facilitative judging as well.

There are some conflicting views on whether judges ought to participate actively in the mediation and conciliation process. In this regard, it would be interesting to note that judicial activism in the settlement process appears to be more acceptable in the United States than in other countries. It is not considered so radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous processes within the judicial system. Noted academic Marc Galanter has observed that :

*“Most American judges participate to some extent in the settlement of some cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work.”*

However, there has been some discomfort within academicians, practitioners and others involved in ADR work about the notion of judges acting as mediators. This discomfort may not arise when judges adopt a 'facilitative role'. Even in India, ADR is an integral part of our judicial system. But, for the time being, I am of the opinion that judges should act more in a 'facilitative role' rather than actively participate in the mediation process. If the judges actively participate in the mediation process, problems may arise because the mediator sometimes has to meet privately with the parties in the dispute and this may lead to controversy. However, the judges can still act as "evaluators" or chairing conventional settlement or conciliation conferences. Frank appraisal by a judge can assist in prompt settlement in some disputes. In cases where judges have acted as mediators and mediation fails, it may be embarrassing for the judges to proceed to hear the case or related disputes at a later stage. The parties may get an attitude bias and the judges should be free from such

bias. In considering issues relating to bias, Justice DeBelle of the Supreme Court of South Australia recently noted :

*“...When a judge acts as a mediator, the judge sheds, as it were, the judicial mantle for the duration of the mediation and acts in a manner inconsistent with the role of a judge by seeing the parties in private. In doing so, the judge acts in a manner contrary to the fundamental principle of natural justice that a judge must not hear representations from one party in the absence of the other. It is for that reason that the judge will not in any respect adjudicate in that action except with the consent of the parties.”*

Regarding perception of the role and integrity of the Court, he went on to add :

*“In the result, I believe that what is at stake is the integrity of the Court engaging in two forms of*

*dispute resolution and the public interest in upholding the integrity of the Court and public confidence in the Court. It is necessary to uphold public confidence in the integrity of the mediation process. It is equally important to uphold the public confidence in the integrity of the process of adjudication by the Court. It is important that nothing should occur which would suggest any breach of the obligation of confidence attaching to a mediation. Those who engage in mediation should be entirely confident that in no respect will anything said in confidence be revealed. Secondly, the public should have confidence in its judges knowing that, when they adjudicate issues, they are not influenced by anything which might have occurred in a mediation.”*

Of course, judges would be good mediators as they have the benefit of long years of experience in adjudicating a large number of cases throughout their career in the courts. But are our judges mature ? And, will it be acceptable to litigants if

judges participate in the mediation process ? These are the questions which may come up at a later stage. At present, however, we have to improve our quality and content of mediation and conflict resolution as we are the only country which has got a large number of cases but relatively less number of courts.

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