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Interview

'Mediation Finding Favour in Dispute Settlement'



S. RAJENDRAN



Karnataka High Court Justice Ravi Malimath interacting with judges and officials after inaugurating the Alternative Dispute Resolution (ADR) building at the Court Complex in Mandya on February 09, 2020. Also seen are Mandya Deputy Commissioner M.V. Venkatesh and others. Photo: Special Arrangements

Mediation as an alternative way to settle disputes is now fast catching up in the country with even some senior members of the judiciary in the Supreme Court and the High Courts of several States expressing their favour. Given the pendency of cases in courts of law, it is obvious that parties to a dispute do not want justice to be delayed since it is as good as being denied. Structured mediation is a non-adversarial Alternative Dispute Resolution (ADR) mechanism and is completely voluntary.

***B.C. Thiruvengadam**, co-founder and Director of the Bangalore International Mediation, Arbitration and Conciliation Centre (BIMACC) is a lawyer with four decades of standing at the Bar, with rich experience in litigation as well as non-litigation practice and a specialist in the area for corporate minority actions. He is an accredited mediator of the High Court of Karnataka, trained by ISDLC, California, U.S., and the High Court, and was involved in establishing the High Court's Bangalore Mediation Centre. As a master trainer in Mediation he has trained more than 4,000 lawyers, judges, and other professionals in India and abroad.*

*In this interview with **S. Rajendran**, Senior Fellow, **The Hindu Centre for Politics and Public Policy**, Thiruvengadam speaks on the scope for mediation and the underlying factors particularly on the need for adequate encouragement from the members of the judiciary. Excerpts:*

How is mediation finding favour for dispute settlement among the litigant public, more so, given the long delays and cumbersome procedures in the traditional justice system? How does mediation compare with the other alternative dispute resolution methods including the panchayats which have been in existence in India for several centuries?

I must say that there is not enough awareness of mediation. When I say "mediation" I am referring to "Structured Mediation", which is different from what people perceive as mediation, involving an intervener who may be a friend, relative, spiritual guru or even a politician who tries to resolve a dispute. They erroneously compare it to a Panchayat. Even judges make this mistake.

A panchayat is an adversarial adjudicative practice which has prevailed since the time of Rig Veda. It involves five respected members of a village/community or trade group, called *Panchayatdars*, who adjudicated disputes and passed an award based on majority decision which was binding not only on the

Panchayat is the earliest adversarial and adjudicative form of dispute resolution.

parties to the dispute, but also the society that had appointed them. The panchayat is the earliest adversarial and adjudicative form of dispute resolution. Similar practices prevailed in various parts of the world such as the guilds in Europe to resolve trade disputes. Such practices still prevail to a very large extent.



B.C. Thiruvengadam

Structured mediation is a non-adversarial Alternative Dispute Resolution (ADR) mechanism and is completely voluntary. Unlike conciliation or other forms of ADR where the adjudicator may not be trained, the mediator undergoes rigorous training and has to function as an independent and neutral facilitator who has no direct or indirect interest in any of the parties to the dispute or the subject matter of the dispute. The mediator does not evaluate the merits of the dispute or the parties to the dispute. As a facilitator, the mediator deploys special communication and negotiation skills to help the disputants arrive at a mutually acceptable resolution. Unlike a conciliator, the mediator does not give options or proposals for settlement.

Enforcement of the mediation resolution is an important factor. How can it be made binding on the parties to a dispute apart from the written undertaking given before seeking mediation? Further, there is no statute governing mediation although it can be used as a tool to arrive at an amicable solution between litigants unlike arbitration.

Enforcement of settlements arrived at a mediation is not an issue at all. There are three kinds of mediation in India. One is the court referred mediation under Section 89 of the Code of Civil Procedure, where the court refers a case to the court-annexed mediation centre and if the parties sign the settlement agreement it is for the court to confirm such a settlement by the parties. The court draws up the decree which will be final, binding and non-appealable. The decree is enforceable.

Next is the Commercial Court Mediation under Section 12A of the Commercial Courts Act 2015 which provides for mandatory mediation before the filing of the suit. The mediation is provided by the Legal Services Authority. The settlement reached is drawn upon as a decree by the Commercial Court and can be enforced.

Private mediation is offered by institutional mediation centres. Mediation is conducted as a Conciliation as per Section 73 of the Arbitration and Conciliation Act 1996 (ACT), however, while the Act permits an untrained conciliator and also allows conciliators' proposals for settlement, the mediator who functions as a conciliator is trained and qualified and under no circumstances is allowed to give a proposal or option to the parties. It is interesting to note the Model Law on International Commercial Conciliation (2002)¹ of the United Nation Commission on International Trade Law (UNCITRAL) defines conciliation as mediation and states that the conciliator cannot propose a settlement option. The settlement is deemed to be an award, final and binding as per Sections 30 and 35 of the Act and is enforceable as a decree.

After the advent of the Singapore Convention for Enforcement of Cross Border Mediation Settlements, there is a sudden unjustified clamour for a specific mediation law. Mediation is not the only ADR option, there are other options like panchayat settlements, *pallu patti panchayati*, Med-Arb, Arb-Med, Med-Arb-Med, Arb-Med-Arb, Judicial Settlement, Plea Bargaining, Neutral Evaluation and Collaborative Settlement, Mentoring, Lok Adalats, apart from Arbitration and Conciliation. We cannot have stand-alone legislations for each of these options.

Instead, the Arbitration & Conciliation Act can be suitably amended, distinguishing between mediation and conciliation and ensure that the settlement arrived in meditation is enforceable as an award under Section 30 of the Act. I need to point out that in the U.S. and most other countries there are no specific law for mediation.

There are multiple varieties of mediation. How can a disputant pick the right method and also ensure that it is at a low cost?

Mediation can be divided broadly into two categories (i) Facilitative and (ii) Evaluative. Evaluative mediation is frowned upon by puritans and in my opinion, it cannot be termed as a neutral process for the reason that the moment the mediator gives a proposal for settlement, there is a high possibility that a party may feel that the mediator is partial towards the opposing party. That is why we would prefer to call this evaluative process as conciliation and not evaluative "Mediation". In an evaluative process, the mediator evaluates the merits and demerits of the claims of the parties and negotiates with them and helps with proposals for settlement.

Facilitative mediation is party-centric wherein the mediator maintains neutrality throughout and neither indulges in evaluating the merits and demerits of the disputes nor gives a proposal for settlement. A settlement is still brought out because the mediator is trained well in communication skills, psychological behaviours of disputants, negotiating behaviours of parties and above all earns the trust and confidence of the parties.

In my opinion, if disputants want to choose mediation, it has to be facilitative mediation and not evaluative mediation or conciliation. When we talk of costs, meditation would win hands down. Mediation costs only a fraction of the costs of litigation or arbitration as it is a time-bound process. Most of the mediation sessions get settled in less than three sessions. At BIMACC, the mediation fee structure is transparent and free mediation clinics are being conducted biannually for the economically weaker sections of the society.

What are the fundamental differences between mediation and arbitration and which renders a better resolution and is to the expectation of the litigants?

Arbitration is an adversarial process and mediation is a non-adversarial process. Arbitration stems out of a contract and is mandatory while mediation is voluntary. Even if a court compels the parties to go for mediation, the party can walk out of the mediation process at any point of time after visiting the mediation centre. Arbitration is an adjudicative process and mediation is not.

Arbitration involves the filing of pleading and documents, appreciation evidence and more often oral evidence. There are no pleadings or documents involved in mediation and the appreciation of evidence does not arise. Arbitration is lawyer-centric while mediation is party-centric where the parties relate their facts and problems and the lawyers assist their clients in stating the legal aspects of the case. The mediator does not hear a case based on the material facts like an arbitrator or judge but is an active listener.

Arbitration, especially ad hoc arbitration, can be expensive; mediation is very affordable.

Conflicts manifest into disputes. Arbitration attempts to resolve disputes, and the conflict may remain unresolved. Mediation addresses the conflict. The outcome of the arbitration is determined by the arbitrator/s, and there is a winner and a loser, but in mediation, the outcome is determined by the parties and it is a win-win for all. An arbitration award can be challenged in the civil court, on the contrary, a mediation settlement is final and binding. Arbitration can drag on for months or years while mediation gets over within 60 days with a few exceptions, certainly not more than 90 days. Arbitration, especially *ad hoc* arbitration, can be expensive whereas mediation is very affordable.

Apart from the basic law degrees, will it not be appropriate to have a specialised course in mediation. How can such education be a part of the law courses?

Mediation is a profession by itself. It is a myth that only lawyers can qualify as mediators. Globally, a majority of the trained mediators are non-lawyers. Hence, it doesn't need to be part of law courses alone although it will be beneficial if it is included in the legal curriculum. In Europe, there are institutes which impart courses which involves a minimum of 200 hours of theory and practicals. Strangely, there are no fixed standards in the U.S. Courses vary from eight hours to 40 hours and there is no law regulating it. Universities like Harvard offer certificate programmes.

In India, the courts prescribe 40 hours of training. In my opinion, the 40-hour training is inadequate. I strongly recommend that mediators join Continuing Mediation Education programmes to improve their skills.

How does mediation find favour in India in comparison with the other countries? Do courts and the presiding officers therein appreciate mediation as a way forward?

It is too early to compare as mediation in India is in its nascent stages. It is important to note that although structured mediation was propounded by the eminent Jurist Roscoe Pound, who preached social justice to the American Bar Association way back in 1906, it took almost 70 years for mediation to make a footprint in the U.S.

Today 95 per cent of the disputes in the U.S. are referred for mediation and the success rates are almost 90 per cent. Most of the civil cases are referred by the

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courts for mediation. Since litigation is expensive and there is a risk of a heavy cost to be paid by the loser, parties opt for private mediation.

Court annexed mediation is popular in the UK and Europe and there are several

private mediation centres too. The courts and the judges abroad are pro-active in supporting mediation.

When the Communist party came to power in China, it replaced courts and judges, with "People Mediation". The mediators there are not trained in the manner a structured mediator is trained, but it has become a fairly effective method to resolve disputes. Although Singapore is a small country, mediation enjoys the support of the government and the judiciary. Mediation is encouraged in Malaysia, Indonesia, Australia, Lebanon, Tunisia, Jordan, and Bangladesh. Court Mediation is not as prevalent in Sri Lanka. BIMACC has helped lawyers in Colombo to set up a Mediation Centre and is imparting training to Sri Lankan Lawyers.

Will mediation help in reducing the huge number of pending cases in the country. What are the total number of pending cases in the various courts in the country and what are the total cases handled by the various mediation centres.

Mediation cannot reduce the huge pendency in courts. About five crore cases are filed every year and about 4.8 crores are disposed of, (excluding millions of interlocutory applications filed and disposed of by the courts). As on June 1, 2020, about 4.27 crore cases were pending in all the courts out of which approximately two-third are Criminal Cases, which are not normally referred for mediation. Between April 1, 2018 and March 31, 2019, a total of 98,966 cases have been settled via mediation: a mere 1.08 per cent of the total pending civil cases during that period.

The judge-population ratio in India is a dismal 17 judges for every million people. The burden on the judiciary is the worst in the world. Many are not aware that only 9 per cent of disputants come to courts. 91 per cent of the disputants are excluded from the justice dispensation system, around

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51 per cent of the disputants prefer to give up their disputes for various reasons and 31 per cent of the disputants seek the intervention of untrained community or religious leaders, etc. Sadly 9 per cent of the disputants seek the help of anti-social elements to resolve their disputes. It's a case of docket exclusion and not docket explosion.

Pre-litigation mediation would cater to the need of those who have been excluded. India needs at least 200,000 mediators. According to NALSA, there are 15,692 trained mediators in India; this includes 5,126 judges. There may not be more than 300 mediators trained by all the recognised ADR institutes in India.

Given the increasing legal awareness among the people, is mediation a way out to resolve a majority of the disputes, particularly in family matters and related divorce cases, to reduce the workload of the courts?

Mediation is a wonderful mechanism to resolve almost all types of disputes. A majority of the cases that are referred for mediation are by the family courts involving matrimonial disputes like restitution of conjugal rights, divorce, annulment of marriages, maintenance and child custody. Unfortunately, when such proceedings are initiated by a party against his or her spouse, the pleadings are perceived to be very harsh, at times exaggerated, this deepens the wedge between the parties. It is not very easy to tackle the emotions of the disputants who have come to wash their dirty linen in public.

The mediator cannot advise a party. Mediators function as a non-evaluative facilitator and listens to the parties most often in private sessions, understands

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the cause of conflicts and enables the parties to empathise with the other party and helps them to come out with their own option to resolve the

conflict. In such cases, the mediators function without any pre-determined goal of either uniting a separated couple or making them accept a divorce. Mediation helps the parties in self-realisation with respect to the pros and cons of reuniting

or divorce. Mediation has worked well in family disputes like partition and succession. The parties share confidential information with the mediator which they never could have done in the court.

What types of disputes are most suitable for mediation and what types are not?

I will first address the kind of cases that cannot be mediated. Firstly, cases that would result in a judgment *in rem* cannot be mediated, i.e. a judgment that binds the world at large. For example, the probate of wills, winding up of companies, declaration of insolvency, divorce, annulment of marriage etc. Even if the parties agree for divorce during mediation, only the court has the power to grant the decree of divorce.

Further, when the civil case discloses any *prima facie* serious allegation of criminal activities such as fraud, forgery and where the rights of a third party or the government are affected, cases cannot be mediated.

Criminal cases are not normally referred for mediation. At times cases that are quasi-criminal in nature like dishonour of cheques or the offences that are compoundable in law and those wherein no heinous crime is committed can be sent for mediation.

All other types of disputes whether, commercial, corporate, banking, finance, trusts or relating to intellectual property rights, can be mediated. Community disputes involving members of disputes among members of a society, neighbourhood, intra-state and international states disputes can be mediated. BIMACC has also resolved several international cross border commercial disputes.

What is the attitude of judges and lawyers towards mediation? Are they favourably inclined?

Honestly, the attitude of judges and lawyers towards mediation can be a lot better. There is reluctance to opt for mediation. Most of the judges prefer Lok

Adalats over mediation. Let me explain this phenomenon. In addition to the High Courts and the Supreme Court there are 19,854 courts and 17,113 judges spread over 612 districts and 5,650 taluks in India. If the one crore pending cases are to be divided among 10 lakh actively practising lawyers, each will have just 10 cases. In reality, a senior counsel will have more number of cases and a junior lawyer may have much less than five cases.

There is resistance from the bar and the presiding officers, especially in rural areas who are reluctant to refer cases for mediation. Of course, there are more referrals in big metros and district headquarters. Bengaluru and Delhi have done exceptionally well, but overall Lok Adalats appear to be the most favoured option for the judges, be it in the urban or the rural areas.

Mediation can bring in a small segment of the 91 per cent of the people who have been excluded.

Even though participation in Lok Adalats is said to be voluntary, persuasion by the presiding members results in a high rate of settlement, and such a persuasion can never happen in a party-centric voluntary process such as mediation. Let us take the settlement that happened during the National Lok Adalat held on November 14, 2019: 14.12 lakh cases were disposed of in one single day, compared with less than one lakh cases settled in mediation during one year.

When lawyers know that most of their cases are referred to Lok Adalats, they oppose mediation as they apprehend that mediation will deprive them of cases. They should realise that they will not be losers if mediation can bring in at least a small segment of the 91 per cent of the people who have been excluded from the justice dispensation system. It is private mediation that needs to be promoted, which will benefit not only the disputants but also the lawyers.

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In a journalistic career of nearly 40 years with The Hindu in Karnataka, he has extensively reported on and analysed various facets of life in the State. He holds a Master's degree from the Bangalore University. The Government of Karnataka, in recognition of his services, presented him the Rajyotsava Award - the highest honour in the State - in 2010. He can be contacted at srajendran.thehindu@gmail.com].

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