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COURT-ANNEXED MEDIATION: REASONS FOR CONCERNS

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Abstract: *Mediation movement has been adopted both by the States and the Judiciary, across the world. States have helped by spreading awareness among the masses through enacting legislation mandating mediation in some categories of disputes and also by financing court-annexed mediation programs. Courts have shown an increasing willingness to encourage parties to explore mediation and other ADR methods before or even after going to trial. The principal objective of court-annexed ADR has been to achieve settlements, or failing that, to streamline litigation at both first instance and on appeal. However, this enthusiasm of the State and the judiciary also raises serious causes of concerns. The court-annexed mediation programs present serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its core values are lost. Sadly, mediation offered at court-annexed programs become patriarchal paradigm of law it is supposed to provide an alternative to. Though, court - annexed mediation programs have their own benefits but there is a need to do more research on how to regulate these efforts at institutionalization of mediation without losing its core values.*

Key Words: *Court-annexed mediation, core values of mediation, core values of court system.*

1. Introduction

Mediation practice over the last 30-40 years has grown like a silent revolution across the globe. The mediation movement has changed and is changing the structure of the grievances, negotiations, dispute resolution and concept of justice as well as leading to a reappraisal of its own strengths, vulnerabilities and dangerous under currents. Mediation is more than a passing phenomenon and what we are witnessing and participating in stems from a deeper social impulse to fill a gap in society's needs and carries the potential of radically transforming our institutions of and attitudes to conflict management. The magic of mediation works on at least two levels, first in its ability to transform individual cases and second as an expression of potential for social transformation. Even within the limited framework of discourse on mediation as a procedure, training and scholarship we sometimes neglect the wider aspects of mediation practice.

2. Court – Annexed Mediation

In one of his lectures, Roscoe Pound presented a very sharp critique of the civil justice system.[1] Pound's speech was denounced as a disparagement of the judiciary and the Bar and was considered as an attack on the entire remedial jurisprudence of America. However, in 1976 another conference titled Causes of Popular Disaffection with the Administration of Justice was held at Minnesota. This conference is also known as the Pound Conference. This conference was sponsored by the Conference of Chief Justices and the Bar, with Warren Burger, the then Chief Justice of the Supreme Court of the USA, playing a leading role. The central theme of the conference was how interest of justice can be served with the processes which are speedier and less expensive. This drew attention as to what types of disputes were best resolved by judicial action, and which alternatives were superior for other types of disputes[2].

Professor Frank Sander of the Harvard Law School suggested for the opening out of the dispute resolution process to new forms of redressal. Certain

criteria were considered by Professor Frank E.A. Sander, to be important for determining the effectiveness of a dispute resolution system, namely: "cost, speed, accuracy, credibility to the public and the parties, and workability. In some cases, but not all, predictability may also be important."[3]

Professor Sander identified two questions as important:[4]

1. "What are the significant characteristics of various alternative dispute resolution mechanisms?
2. How can these characteristics to be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes."

He proposed the principle of appropriateness in the field of dispute resolution which can increase the efficiency of these methods. He advocated screening and evaluation of cases with flexible and diverse panoply of dispute resolution processes. He is also known as the founder of the concept of Multi-Door Court House which is running successfully in many States of US[5].

The Pound Conference was followed by enactment of the Civil Justice Reforms Act, 1990, which required each federal judicial district to set up an advisory committee to develop a plan dealing with congestion and delay, including appropriate consideration of alternatives to adjudication. Following this, many US federal agencies expanded ADR use, appointed dispute resolution specialists and settled number of complicated multi party disputes[6]. Thousands of separate statutes have authorized or mandated the use of ADR methods[7]. Numerous other countries too have incorporated ADR in their legal systems.

The United Kingdom introduced its Civil Procedure Reforms in 1999 based on Lord Woolf Committee Report[8] to enable the courts to deal with cases efficiently through active case management, partly defined as encouraging the use of alternative dispute resolution procedures. ADR thus came squarely within the ambit of official court action. Later courts started refusing to grant costs even to the successful parties where they had unreasonably refused to try ADR methods[9]. The Lord Chancellor's Department announced in March 2001 that all government departments would seek to avoid litigation by using mediation and other neutral-assisted dispute resolution procedures wherever possible.

Around the same time, reforms were introduced in Civil Justice System in India. In India, court-annexed mediation started with the amendment of Code of Civil Procedure (CPC) 1908 in 1999 when Section 89[10] was incorporated in it. Section 89, CPC 1908 mandates the court to refer matters to any of the five methods of ADR, if in the opinion of the court there exists elements of settlements. To implement Section 89, Mediation Centres were established throughout the country and Mediation Rules were framed by all the High Courts. These Rules are based on the draft Mediation Rules framed by the Justice Jagannadha Rao Committee which were approved by the Supreme Court[11].

Under Section 89 CPC, when the court refers the matter to mediation, the matter is referred to the Mediation Centre of that Court which has a roster of trained mediators. In case a settlement is reached, the matter is sent to the referral court so that the court can pass a decree in conformity with the agreement. If no settlement is reached between the parties, then the case is sent back to the court for future course of action in the court.

3. Reasons for Concern with Court - Annexed Mediation

The institutionalization of mediation in the courts has led to far greater use of mediation, throughout the world. Other benefits of institutionalization include increased public awareness of alternative to litigation and growing sophistication regarding appropriate alternative process among lawyers and judges. Parties can choose the dispute resolution process that best meets their interests. ADR options can lead to more

efficient use of resources by the courts, saving of time and money by litigants, and reduced level of subsequent litigation[12]. There is also evidence that ADR options have increased the public trust and confidence in the courts[13].

But while the growth in the court's use of ADR appeals to have roots in the past, serious concerns are being raised, chiefly around courts use of mediation. The concerns stem from the court's robust and rapid embrace of mediation without sufficient attention to and clarity about the goals and quality of the mediation process adopted. While designing any court-annexed mediation program, one has to be very careful about the core values and goals of mediation. Firstly, the core value that mediation as an alternative, offer litigants is the opportunity to have an experience with conflict that is only not alienating, but actually enhances human connections. This core value of mediation comes from the alternative it promises: voice and choice of all participants[14]. Secondly, mediation as an alternative does not lose sight of settlement; it is not, however, the core value.

3.1. Mediation's Core Values and Goals

Mediation was originally intended by many of its proponents as an alternative process to the otherwise alienating experience of adversarial, bitter, expensive, drawn out litigation and the posturing by representatives that often accompanies such legal disputing. It was intended as a process to bring together people who are affected by a dispute or conflict, to have a conversation about the events or circumstances that have come between them, and to explore possible solutions. Mediation offers participants the opportunity to explore the underlying or consequential aspects of the ongoing conflict, what the implications are, and how it might be changed or resolved within the unique context of each situation.[15] In mediation, settlement is just one of the many valuable outcomes. Other positive outcomes include; the ability to speak, to be heard, and to talk about what may be irrelevant in the litigation process, but very important to parties, narrowing of important issues; as clarity about what is most important to the participants; freer more unfettered conversation between the participants; better understanding of those involved and their situations; good faith restored; reputation and stature strengthened; and agreements based on genuine terms created by the participants. The core values of mediation would be fulfilled even without complete or total settlement, if in fact that is what the parties genuinely decided was the best course to take.[16]

In case of the courts, the original goal of atleast some of the court mediation program was to increase the number of people exposed to or at least provided the opportunity to access, this core value of mediation. Though settlement is often important what is most important is the quality of the interaction at the mediation, including being respected, being understood, being able to face the other person and talk or to have questions addressed, and the responsiveness of the other person(s).[17]

However, as more and more courts have embraced mediation, they have done so primarily based on the promise of increased efficiency: the promise that mediation would reduce court dockets, increase settlement rates, and speed up case processing. As with other settlement processes, the courts have relied primarily on advocates to judge the relative values of settlement processes and outcomes. In part because of this hands-off approach, in part because of the elevation of settlement as the primary desired outcome, in part because of differences in values between mediators and lawyers and judges, and perhaps due to lack of sufficient resources, mediation in a significant number of court-annexed programs has begun to look more like the traditional pre-trial settlement conference.[18]

Getting one or both sides to compromise on their perceived positions or on their perceived amount of damages is what mediation has come to mean and the way mediation has come to be practiced in many court settings. Instead of providing the litigants the originally intended alternative process of mediation, the courts'

mediations have capitulated to a watered-down version of the alternative - a process that is merely not a trial and which is focused at best on a compromise and at worst on a non-productive posturing sessions for the advocates without a genuine interest in attemptingto settle the case.

Now, the question whether this is the result of an irresolvable clash of core values between mediation's core values and the court's core value; or is it that mediation as practiced in the court-setting is actually a different process, intended to fulfill a different set of core values, requires to be answered.

3.2. Court System's Core Values and Goals

The role of courts in most of the judicial systems is to resolve disputes and interpret the law. Some of the core values the courts rely on in carrying out this role include: the importance of due process, consistency of outcomes, and legally just results. The law, and courts in interpreting the law, may be concerned with the effect particular interpretations have on relations between people in general, but the legal system is not concerned with enhancing the relationship between parties in front of them. The legal system relies on reason, not emotion; on people cast in roles (such as plaintiff, defendant, counsel), not as individuals; on authority, not consensus; on speedy resolution, not ongoing process; on dispassionate distance, not intimate connection[19]. Thus, we can say that the values of legal system are quite different from the values of mediation as an alternative.

3.3. Submission to Court System's Core Values and Goals

The question whether court-ordered mediation has lost sight of its core value and simply become absorbed into the court's traditional methods of adversarial dispute resolution without providing a genuine alternative, require deliberation. Sign of capitulation to the routine include: fixed time allotted for mediations; lawyers and insurance companies or other representatives appearing at the mediation without their clients or vice-versa; lawyers dominating the mediation discussions to the exclusion of clients; advocates requesting their clients not to speak or participate in the mediations; advocates and advocate-mediator asking litigants to leave the mediation room while the mediator and lawyer confer with each other; and advocates, judges and former judges conducting mediations with the adversarial bent of mind, to name a few.Such signs of capitulation may be unintended and may be related to lack of confidence in the capabilities of litigants, or to lack of understanding of the differences between mediation and settlement conference, or to lack of understanding the alternative that mediation can provide.

Such signs of capitulation may be related to the rapid growth of mediation within the court-context that has left court administrators over-burdened and without resources to develop internal and external mediation quality controls. Such sign of capitulation may further be related to the assumptions that people makes about the judicial process and thus by inferences attaches to court mediation. While these assumptions differ, they include assumptions that others speak for you, that others decide for you, and the courts safeguard individual's legal rights. These assumptions carry over to the expectations that many lawyers and parties have about their court-ordered mediation. And these assumptions about the litigation experience are often fulfilled in the mediation experience as it is currently practiced in many court settings.[20]

4. Way Forward

A primary goal for courts in offering mediation and supporting mediation programs is efficiency. Related to that goal of efficiency is how the courts can best utilize their limited resources to most expeditiously and fairly dispose off cases from their docket. Efficiency is a strong motivation for promoting processes that increase the number of settlement before trial. But an unbridled focus on short-term efficiency can have harmful results for litigants and for the society. Most notably, short term efficiency can breed lack of quality and the use of various coercive tactics to effectuate settlement. Coercion in social institutions leads to disrespect of such institution and erosion of democratic ideals.Efficiency as a long-term goal is consistent with both court and mediation values. Long-term efficiency requires the need for court supported interventions that impact positively on the quality of dispute resolution such that the litigants do

not repeatedly return to use the court's resources. Litigants engaged in conversation with each other and deciding how best to resolve a dispute in their own unique context can lead to greatest long-term efficiency.

Mediation is a process that may or may not always produce settlements. But whenever a settlement is reached in mediation while following its core values, such settlement will be more genuine and personally satisfying and hence long testing. Such settlements are long-term goals of efficiency in mediation as well as court. Mediation when practiced not as a settlement conference but rather as a conversation inviting litigants and attorneys to make decision about not only settlement but also other aspects of the conflict has a better chance of bringing these types of result. However, mediation when practiced as settlement conference may only achieve short-term efficiency - settlement on paper. This can be avoided by taking following measures:

1. There is a need to differentiate mediation into at least two categories: transactional approach and transformative approach[21]; with settlement as one of the possible outcomes in both - for the former approach settlement is the goal but for the later approach settlement is a likely by-product of a meaningful conversation. With clarified terms, the definition of a successful mediation would reflect the core values of the mediation process: connection, voice and choice by all participants. Transactional approach would merely focus on settlement as the primary goal.
2. There is a need to change the definition of success in court-annexed mediation. Presently, a mediator is paid only for the cases that he could successfully settle.[22] There is a need to reconsider the entire criteria of payment of honorarium to the advocate mediators in the District Courts. Regardless of whether a case has been settled or not, mediator is required to put in his efforts. The reasons as to why a particular case could not be settled may be many and mediator's incompetence may or may not be a reason. As settlement is not the only goal of mediation. So, there may be cases, where though no settlement is reached but parties went home satisfied with the efforts of the mediator. So, either the mediators should be paid a sitting fee[23] or it be a *pro bono*work. Apart from this, a mediator should be treated at par with any other professional like lawyers, doctors, etc. who are paid by their clients irrespective of the result of their efforts.
3. There is a need to eliminate possibility of coercion in mediation process. This can be accomplished by various methods like restricting court staff and judges with decision-making authority in a case from engaging with litigants regarding any issue in mediation in that case; maintaining confidentiality of the process; disclosure to the parties that they do not have to agree to settle their case, if they do not want; eliminating any "good faith" reporting requirement from the mediator/Mediation Centres; and establishing disciplinary procedure for mediators who put pressure on parties to settle based an express or implied threats.
4. There is also a need to reconsider the allotment of time for mediation in India. Allotment of time should be case specific instead of the present uniform time period of 90 days which can be extended upto 30 days. There is a need for the mediators to let parties speak instead of telling them to keep quite (because according to the mediators if they start speaking they will take lot of time and process can go out of control).
5. All these strategies can be implemented only when there is more thorough mediation education given to the litigants and their counsel. Parties should be very clear about the goals of mediation, core values of mediation, role of mediator and their own role in mediation. There is a need to create more awareness among the mediators as to their role in mediation, ethical duties of mediator, and its difference from court procedures.
6. There is a need to improve the Program through Quality Control. There is a need for further research on issues like the impact of court-annexed mediation on court's work-load and the long-term effect of settlements reached in mediation.

Footnote:

1. Roscoe Pound, speaking at the Annual Meeting of the American Bar Association, reading a paper entitled "The Causes of Popular Disaffection with the Administration of Justice", 1906. available at http://www.encyclopedia.com/doc/1G2-3437704909.html
2. Sriram Panchu, SETTLE FOR MORE: THE WHY, HOW AND WHEN OF MEDIATION, 2007, East West Books (Madras) Pvt. Ltd.
3. Frank E. A. Sander, "Varieties of Dispute Processing", an address before the National Conference on the causes of Popular Dissatisfaction with the Administration of Justice, 1976, 70 Federal Rules Decisions 79, p.126-127
4. Id, p.130-132
5. James Podgers, Maine Route: Multi-door proposals reflects growing roles of ADR, 79 A.B.A. J. (Sept. 1993)
6. As required under Administrative Dispute Resolution Act, 1996 (US)
7. Ibid, supra note 2
8. Henry J. Brown and Arthur L. Marriott Q.C., ADR PRINCIPLES AND PRACTICE, 2nd ed, 1999, Sweet & Maxwell, London
9. Dame Hazel Genn, "ADR in Civil Justice: What's Justice got to do with it?", Judging Civil Justice, Hamlyn Lectures 2008, delivered on 2 December 2008
10. Section 89, CPC: Settlement of disputes outside the Court- (1)Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court mayreformulate the terms of a possible settlement and refer the same for - a) arbitration; b) conciliation; c) judicial settlement including settlement through Lok Adalat; or d) mediation
11. *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, AIR 2005 SC 3353
12. Roselle L. Wissler, The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts, 33 Williamette L. Rev. 565 (1997)
13. Campbell C. Hutchinson, The Case for Mandatory Mediation, 42 Loy. L. Rev. 85 (1996)
14. Transforming Relationships through Participatory Justice, Report of Law Commission of Canada, available at https://dalspace.library.dal.ca.
15. Robert A. Baruch Bush & Joseph P. Folger, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT, THROUGH EMPOWERMENT AND RECOGNITION, 1994, Jossey-Bass Publication, San Francisco
16. Robert A. B. Bush and Sally G. Pope, "Transformative Mediation: New Dimensions in Practice, Theory and Research", 3 Pepp. Disp. Resol. L. J. 1 (2002)
17. Id.
18. Leonard Riskin, "Mediation and Lawyers", 43 Ohio St. L. J. 29, 43 (1982).
19. Transforming Relationships through Participatory Justice, Report of Law Commission of Canada, available at https://dalspace.library.dal.ca.
20. Kimberlee K. Kovach and Lela P. Love, "Mapping Mediation: The Risks of Riskin's Grid", 3 Harv. Negot. L. Rev. 71 (1998).
21. The goal in Transformative Mediation is "empowerment" and "recognition." According to Bush and Folger, this approach is best for inter-personal disputes. (Folger & Baruch Bush, THE PROMISE OF MEDIAITON: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION, 1994, Jossey-Bass Publishers, San Fransisco)
22. This is an unwritten rule followed in Mediation Centres in District Courts, as observed by the author in her field study on working of Mediation Centres in India as part of her Ph.D. thesis.
23. In Mediation Centres established by the Delhi Dispute Resolution Society, mediators are paid sitting fee irrespective of their settlement rates.