ADR – CONCILIATION AND MEDIATION*

Nothing could have been more pleasant for me, during my tenure as the head of the Indian Judiciary, than to have been associated with this Conference on Alternate Dispute Resolution System with special reference to Conciliation and Mediation, organized under the aegis of the International Centre for Alternate Dispute Resolution headed by Hon'ble Dr. H.R. Bhardwaj, who incidentally happens to enjoy the potential and capacity of two in one *i.e.* Chairman, ICADR and Union Minister for Law and Justice.

At the very outset, I wish to congratulate Dr. Bhardwaj for taking this initiative and taking advantage of the availability of Mr. Justice Dalveer Bhandari Chief Justice, Bombay High Court, who is one of the most dynamic and enthusiastic Judges genuinely interested in judicial reforms, solving the problems of arrears and having a knack for innovation. Apart from these two leaders in the field of Justice and Law coming together, there are more reasons than one to be counted in justification of the timing and venue of this Conference, that is, now and in Mumbai.

It is often said that the Indian Judiciary is crumbling under its own weight and is incapable of solving the problem of arrears and coping with the torrential influx of litigation. I am one of the strongest defenders of the Indian Judiciary and the Indian Judicial System and take pride in being a part of it. The quantity and quality of justice, dispensed by the Indian Judicial System is invariably a matter of applause in other countries of the world. Unfortunately, the critics are our own people, misinformed or uninformed, who take pleasure in being critical of the Indian Judicial System and its capacity. Let me share with you some dry statistics to give you an idea of the uphill task being performed by the Indian Judiciary.

(*See* Annexure – A)

We cannot stop the inflow of cases nor should we. The doors of justice cannot be closed. However, we have to increase the outflow. There are two methods of increasing the outflow, either we strengthen, both qualitatively and quantitatively, the capacity of the existing system or we find out some additional outlets.

A Chinese proverb says: "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a law suit."[1]

While this Chinese proverb takes an extreme view of the matter, it is a common refrain that even after a protracted litigation, while the loser has certainly and obviously lost, the winner is also a loser in terms of money, time and health. Even the success in litigation brings with it, frustration, suspicion and animosity. These things add further fuel to the annihilating fire named litigation.

One is free to innovate unique solutions for his own problems. It is equally beneficial to learn from the experience of others and to imitate and emulate the practices successfully tried and tested by others.

Experience, the world over, tells us that adversarial litigation is not the only means of resolving disputes. What Gandhiji wrote over a hundred years ago, still rings true. He said, "I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer, was to unite parties riven as under. The lesson was so indelibly burnt into me that a large part of my time, during the twenty years of my practice

as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."[2]

Congestion in courts, lack of adequate manpower and resources and the consequent delay, cost, rigidity of procedure and lack of participatory roles, also spawning the need to look at better options, approaches and avenues. Alternative dispute resolution methodologies, with a positive framework, point to one such option.

The globalisation of economy and the complexities of modern commercial transactions demand speedy and effective mechanism for resolving domestic as well as international disputes in the interest of smooth flow of trade and commerce and consequently, the progress of peace and prosperity in society. The thought prevailing around the world is for the development of alternative dispute resolution systems, also called as non-judicial ways of dispute resolution, such as arbitration, mediation, conciliation, negotiation and so on.

Mumbai is the commercial capital of the country. Judiciary and the Bar here – both are known for high standards of professionalism. They are also flexible and more adaptable to changes. I have been informed by your Chief Justice that even before the holding of this Conference, the High Court here, has taken initiative in introducing mediation and conciliation, intertwined with the traditional justice delivery system, in a big way. The members of the Bar, including some of the very eminent senior counsel, have agreed to give time for mediation and conciliation on voluntary basis and also for acting as arbitrators at a very reasonable compensation for their services, catering to the requirements of middle and lower level income groups. Lok Adalats and Legal Aid Services Authority have done a wonderful job in the direction of settlement of disputes by effecting compromises in cases, both at the pre-litigative stage and in pending cases. Lok Adalat movement has gained ground and spread in every nook and corner of the country. Ever since 1996, conciliation has been given a statutory recognition along with arbitration through a private forum, voluntarily chosen by the parties where the disputes are settled, dispensing with the technical rules of evidence and procedure. International arbitration has gained popularity, coupled with success. However, without being critical, I have my own reservations about the success, efficacy and credibility of domestic arbitration. I do not think that domestic arbitration as an ADR has been able to deliver cheaper and such speedy justice as was desired. Primarily this is attributable, in my opinion, to the fact that arbitration as a profession is neither institutionalized nor regulated nor subjected to any code of conduct or ethics; it is practised more by way of freelancing. There is hardly any institution to my knowledge, imparting training to arbitrators. We shall have to learn from our experiences, while innovating and designing the structure of mediation and conciliation as ADRs in our country.

There are no rigid definitions about mediation and conciliation and in common parlance, these terms are often used interchangeably.

Mediation can be defined as a process to resolve a dispute between two or more parties, in the presence of a mutually accepted third party who through confidential discussions and the like, attempts to help the parties in reaching a commonly agreed solution to their problem. There is no compulsion on the parties and the mediator, at best, facilitates the process of mutual understanding by eliminating ignorance and misplaced fears, scaling down unreasonable stands and searching common grounds for resolution. The mediator has no authority to give any decisions for the parties; the parties themselves have to arrive at the solution with only assistance from the mediator.

But the conciliator goes a step further and seeks a more interventionist role, with authority to formulate and reformulate the terms of a possible settlement. It is an assertive rights-based process

that attempts to help a claimant to exercise his rights. The difference does not matter much in the United States where the term conciliation is on its way out and is understood to be a more pro-active form of mediation itself. But in India, England and Wales and as per the UNCITRAL law, mediation and conciliation are two different concepts.

The biggest advantage of mediation is that the entire process is strictly confidential. The parties can open their heart to the mediators, without running the risk of the information, shared by them with the mediator, being disclosed to anyone else. The mediator resolves the dispute in a way which is mutually satisfactory and acceptable to both the parties. Mediation aims at the meeting of minds of the parties. Mediation seeks to understand the underlying interests and causes behind each party's stand. It is non-threatening; provides greater participation to parties themselves; and is relatively inexpensive, with most sessions lasting not more than a few days to a maximum of a couple of months. The mediator plays the role of a facilitator. Dispensing with the requirement of investigation into facts, mediation moves faster. Mediation saves time and the financial and emotional cost of resolving a dispute; leads to re-establishment of trust and respect and arrests further damage to relationships. A conciliator attempts at unrevealing the underlying causes for the dispute and then motivating the parties to arrive at an agreeable position. Mediation and conciliation both provide ample scope for creativity.

While voluntary mediation works best; several courts across the world are sending parties for judicial/ court-directed mediation as it has been found useful. The usefulness of resolving disputes by way of mediation has not only been experienced in resolving simple cases, having minimum discovery requirements and maximum settlement elements such as money recovery, loan default, small claims, motor vehicle accidents, family disputes, labour and industrial disputes and petty offences, but also in complex matters such as environmental, intellectual property, civil rights laws and litigation involving the government.

Since 1995, after the intervention of the then Attorney General, Janet Reno, except where the law has to be clarified by the courts or where a mandatory injunction is sought and the like, the US Government itself prefers to go for mediation and other alternatives. The rate of settlement in such cases, involving the Federal Government, is 60 percent. This is a lesson which the Indian Government and its various bodies can adopt, given that the Government and its functionaries are the largest disputants before courts. Instead of vexing the issues forever and being obstinate, the Government can actually achieve a lot by being pragmatic and open-minded to accept reasonable court orders and negotiated settlements than going in appeals mindlessly.

Mediation and court supervised mediation in particular, has become more commonplace in the US and, in many states, the procedure is becoming an increasingly standard practice. Court ordered mediation has proved to be a very good way to involve and commit lawyers and participants to the mediation process because, in essence, they have no other choice. The theory is that if you make the people sit down with authority, they will make good use of the time and atleast talk. And most mediators report 80 – 90 percent success. About 60 percent of the mediations, involving the Federal Government result in settlement.[3]

Throughout Europe, mediation is seen as a potentially promising mechanism for the resolution of both simple and complex disputes. Norway's Conciliation Boards provide a model of extensive comparative interest and international study. In 1995, France expanded the legislative basis for judicial conciliation and mediation.[4]

In England and Wales, penalties in terms of cost can be imposed on parties that refuse to mediate on unreasonable or unsatisfactory grounds. In *Hurst* v. *Leeming*, (2002) EWHC 1051 Lightman, J. held that—

1. While mediation was not compulsory under law but the spirit of alternative dispute resolution permeates the civil justice system and any unjustifiable refusal to try it out, must attract adverse consequences.
2. Where the courts find that refusal to mediate was in the face of there being real prospects of mediation succeeding, the party refusing must be severely penalised.
3. There should be no obstinate refusal to mediate merely on the ground that there are no chances of a successful mediation or that they have better chances of winning the litigation because "What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later", he said.

The last mentioned point is pertinent where parties have ulterior agendas or unreasonable expectations, which, get rationalised through mediation. People who seem entrenched in their stands may often soften up on hearing the true and unadulterated position of the opposite party and the causes thereof.

The question now being asked in England is not whether a case is suitable for mediation but why is it not? If as good a result, if not better, is possible with mediation, cases must not be litigated.[5]

The success rate of mediation, is put at above 80%, with comparatively low cost since most of the sessions are concluded within a day or two.

The situation is slightly different in India where the Law Commission has drafted Rule 13[b] providing for the award of costs for non-appearance, once the mediation programme starts and has refused to accept the suggestion that heavy costs should be imposed on parties who refuse to go for mediation in the first place.

Two pieces of legislation have opened the doors for introduction of mediation and conciliation in the Indian Judicial System. One is the Legal Services Act, 1987, as amended from time to time, and the other is the introduction of section 89 in the Code of Civil Procedure w.e.f. 1.7.2002. The National Legal Services Authority is empowered to encourage the settlement of disputes by way of negotiations, arbitration and conciliation. It has authority to frame schemes and implement them. Under section 89 of CPC, the Court is empowered to formulate the terms of settlement and give them to the parties, and, subject to their observations, refer the same for arbitration, conciliation, settlement including settlement through Lok Adalat or Mediation. The purpose of bringing section 89 in the body of the Code has been so stated in the object clause – "with view to implement the 129th report of Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternative dispute resolution methods that the suit shall proceed further in the court in which it was filed". Thus the statutory carpet has been laid for introduction of mediation and conciliation as cost and time effective methods of non-judicial settlement of dispute either as a part of the judicial process or away from it.

Yet the question of questions is, how do we make a beginning? Several issues raise their heads and call for consideration and resolution.

The first is the need for creating awareness and popularizing mediation and conciliation. The litigants ought to be told and persuaded to believe that mediation and conciliation are to be preferred to judicial pronouncement or an involuntary settlement. This can best be done by the members of the Bar and non-governmental voluntary organizations (NGOs). The media can play a significant role in popularizing the concepts.

Second is the question of finance. For the purpose of court-annexed mediation and conciliation, necessary personnel and infrastructure shall be needed, for which funding by Government would be necessary.

Thirdly, the mediators and conciliators shall have to be trained in the art. Educational institutions including universities and, in particular, the National Law Schools can initiate diploma or degree courses in mediation and conciliation. The state level Judicial Academies can assume a vital role by conducting training programmes. Every law professional is not necessarily a good mediator or conciliator. Apart from lawyers willing to come out of the adversarial box; in appropriate cases, well-trained financial advisers, accountants, doctors and other healthcare service providers, computer experts, architects, surveyors, insurance advisors, psychologists and family therapists, etc. can also prove to be good mediators. Such experts would be indispensable in complex civil and commercial disputes where lawyers or judges do not have requisite technical expertise. But the important point is that, more than subject expertise, it is the capacity to mediate that matters and this crucial point has to be borne in mind while selecting, training and appointing mediators.

Fourthly, our experience, in India, dictates the need for institutionalizing mediation and conciliation from its very inception. We cannot take the risk of leaving them to freelancing. Apart from training, the profession of mediators and conciliators shall have to be subjected to a code of conduct and ethics and rigorously regulated for achievement. A system of continuing evaluation of the performance of mediators and conciliators needs to be introduced and implemented. There is a need to establish a central body with regional branches or offices, entrusted with the responsibility of training, accreditation and regulating those undertaking mediation and conciliation as a profession or job. The same body can also coordinate with the central and state governments for the purpose of funding and expanding mediation and conciliation programmes, consistently with their responsibility and needs.

I am more than happy to witness the overwhelming attendance, participation and enthusiasm in this Conference. A look at the theme of various working sessions today in this Conference and tomorrow, during the one-day seminar on ADRs jointly organized by the Bombay High Court and the Institute for Study and Development of Legal Systems, reveals that almost every aspect of mediation and conciliation has been kept in view and included. I am very confident that this Conference shall be a success in the commencement of a revolution in the Indian Justice Delivery System for the times to come. Victor Hugo, the great thinker, once said – "There is one thing stronger than that of the armies of the world; and that is an idea whose time has come".

No one can predict to what heights he can soar! He will not realize it until he has spread his wings!! This Conference is an opportunity for the legal profession to spread its wings!!!

* Speech delivered on the occasion of the Inauguration of the Conference on "ADR-Conciliation and Mediation" at Mumbai, on 20th November, 2004.

1. J.A. Cohen, *Chinese Mediation on the Eve of Modernisation,* 54 Cal Law Rev (1966) 1201.
2. M.K. Gandhi, *The Law and the Lawyers*, 258.
3. Hiram E. Chodosh, Robert A. Goodin, Dr. Don Peters and Peter R. Steenland Jr., *Mediation and the Courts in Issues in Democracy,* (December 1999), Department of Public Affairs, U.S. Embassy, New Delhi.
4. Hiram E. Chodosh, *Judicial Mediation & Legal Culture* in *Issues of Democracy,* (December 1999).

5. http://www.disputes-resolved.co.uk/stoppress/whether.html.