# A NON-JUDICIAL DISPUTE RESOLUTION METHODS*

My association with ISDLS Executive Director, Mr. Stephen Mayo, Mr. Charles Breyer, U.S. District Court Judge and others relates back to about three years. Our friendship was renewed and we had a unique experience of gaining a first hand account and witnessing the live show of ADR systems at work in California, during my visit to the United States as a member of the Indo-U.S. Exchange Programme under the leadership of Hon'ble Shri B.N. Kirpal, the former Chief Justice of India. The experience and memories of that visit are unforgettable. Ever since then, the idea of introducing mediation and conciliation in a big way, as a method for non-judicial dispute resolution, has been working in my mind. However, the day for its implementation and taking a concrete step in that direction has come only today. Yesterday, I shared a few of my thoughts on mediation and conciliation with you. Today, we have to brain-storm and take concrete decisions.

The first thing that matters in implementation is acceptance by the stakeholders concerned – the litigating public, the lawyers and the judges. It would be important to pacify their misplaced fears and convey that judges would still continue to play an important role in dispute settlement and resolution; that by playing creative roles, lawyers will not altogether lose their cases and that the litigating public will have a better but responsible system to turn to.

For all this to happen, a massive and *continuous* public awareness campaign, addressing the concerns of all stakeholders has to be launched immediately. This, shall be the joint responsibility of the government, the judges, the lawyers and the members of the public who have benefited. The broad objective of the public awareness programme and the attitudes of the court functionaries, etc. must be to create a general atmosphere where, resort to alternatives should be the first option.

Before programmes are started, it is important to appreciate the critical value of local culture and concerns, and develop appropriate regulations and policies within the framework of law. A broad consensus must be achieved before implementing any such scheme. Otherwise, delays, failures and the like can lead to disappointment.

**Referral procedure and case management skills**

Not all categories of cases can be referred for mediation. Where there are power imbalances, chances of continued spousal or child abuse, meagre chances of settlement, concerns of public policy or interest, unwillingness to come with clean hands and the like, cases may not be referred for mediation. Here the case management skills of the judge become very crucial, which also bring in issues like setting a proper time frame for settlement of cases, monitoring the progress of the case at the alternative forum, finalising the settlement arrived at, etc. Therefore, capacity-enhancement of judges for case management goes hand in hand with their ability to correctly identify and commit matters to be processed by alternative methods. Given the training being imparted by the National and State Judicial Academies on case and court management, they can play a worthwhile role here. This is also necessary to have some semblance of orderliness and court control and to prevent the programmes from developing in a haphazard way. The legal-

judicial fraternity and the Government have to keep this point in mind while introducing alternative programmes.

**Mediators and Training**

Next are the mediators themselves and the standards of competency, expected of them. There is no doubt that well begun is half done. Training turns out to be undoubtedly one of the most crucial points on which the success of the whole programme would depend. Let it be made clear that proper training and capacity building of mediators is a non-negotiable issue. We have to have a cadre of qualified and competent mediators who know their job and overall responsibility thoroughly well to make the mediation programme a success, with an accreditation and monitoring body to ensure standards of competency and fair practices.

Any person, capable of appreciating the science and practice of dispute-resolution with – a non-judgemental attitude, commitment to impartiality and confidentiality, an ability to look beyond the problem and identify the underlying reasons, good listening and communication skills, can be a mediator. Training programmes should, in addition to the competencies just mentioned, also cover issues such as risk analysis, deadlock, developing settlements and ethics.

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 expertise would be indispensable in complex civil and commercial disputes where lawyers or judges do not have the requisite technical expertise. But the important point, is that, more than subject expertise, it is the capacity to mediate, that matters and this crucial issue has to be borne in mind while selecting, training and appointing mediators.

At times, there is an apprehension expressed by the legal fraternity that mediation and conciliation would have an adverse effect on the litigative practice of lawyers. To say the least, this is a misapprehension, a misconception and, if I have your permission to say so, a negative way of thinking. The profession is already overcrowded. There is need for specialization and diversification to absorb entry in profession, which till this day continues to be unplanned and unregulated. A separate Bar can develop which would specialize only in ADR systems. In America, there is already such a Bar and the members of the Bar who deal exclusively in mediation and conciliation proceedings are highly respected, much more than their counterparts in litigation because they are more service-minded, more creative and observe very high standards of morality and ethics.

A point has to be mentioned here about the suitability of retired judges as mediators. It is said the world over that, while judges do make good judges but their experience of working as an authoritative figure between persons, has to be modified with due training to drive home the point that the role of a mediator is not to adjudicate the correctness and justness of claims, but to facilitate the parties to develop a solution to their problems.

Initiation of dispute resolution and mediation training programmes under the aegis of judicial training academies, courts and otherwise, in Orissa, Delhi, Maharashtra, Gujarat and Tamil Nadu is a welcome step. At the same time, it is important to have uniformity in training, accreditation and evaluation standards across the country.

**Finance**

Finance is one of the major issues involved in implementation. So far as budgetary issues are concerned, a combination of strategies needs to be adopted. The Government has to certainly fund the media campaigns for creating awareness among the people and finance the programme to a certain extent to begin with. In so far as private mediation is concerned, the parties may be asked to

bear their own costs, subject to rules framed to curb likely malpractices. Provisions have to be made to generate revenue, through varied sources for mediation under the supervision of the court.

Parliament's contribution, by bringing in the much-needed legislative reforms, is very positive and it can go further by sanctioning the money needed to develop this programme and establishing the basic infrastructure.

In keeping with the professed objectives of multi-lateral organisations like the Asian Development Bank, the World Bank, the United Nations Development Programme [UNDP], the British Council as well as in furtherance to their current aid, with regard to projects on access to justice in the country, Non-Governmental Organisations (NGOs) may negotiate for support and funding for programmes, addressing alternative dispute resolution.

**Coordination**

There must be a body working at the centre with its branches or regional offices in states to coordinate, monitor, develop and implement the programmes and exchange information on good practices between states. This body may also take over the function of training the mediators, providing them with accreditation, evaluating their work, processing complaints of malpractice against mediators and other irritants, negotiating with the Government for funds and other requirements. This body must not be a closed shop; but must have composition from the Bench, the Bar, the Government and the civil society. It will be advisable to have a broad-based body other than the Legal Services Authorities. This is necessary to avoid any confusion about the traditional and new role of the legal services authorities as understood in India. The Law Commission also has accepted this proposition and, taking it a step further, states that for the same reason and for the fact that given the heavy weight of literature available on the subject, the task of preparing a Manual on ADR should be given to a broad based Committee of judges, academicians and mediation lawyers. The Bar and the Bench have to work together with the Government and the civil society to make this programme a success.

Ladies and gentlemen, it can be said that this is an idea whose time is overdue and it is high time since we all started acting responsibly. And for those who still have their doubts or feel that there are difficulties and limitations, I would simply quote Richard Bach from *Illusions: The Adventures of a Reluctant Messiah*. He says, "Argue for your own limitations and sure enough they are yours."

I am confident of the success of this Seminar. We are sure to benefit from the presence and participation of our friends from USA – the ADR Ambassadors. I hope this Seminar will be a beginning of bondage, for a common purpose, between them and us.

Every new concept is accompanied by a dilemma. But as a philosopher has said – "You can lament because roses have thorns, or, you can rejoice because thorns have roses".

* Speech delivered on the occasion of the Inauguration of Seminar on ADR on 21st November, 2004, at Mumbai.