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Professor Dr. Gowher Rizvi handing over International Mediation Award (Approved by AAMA) to Mr. Justice M. Imman Ali

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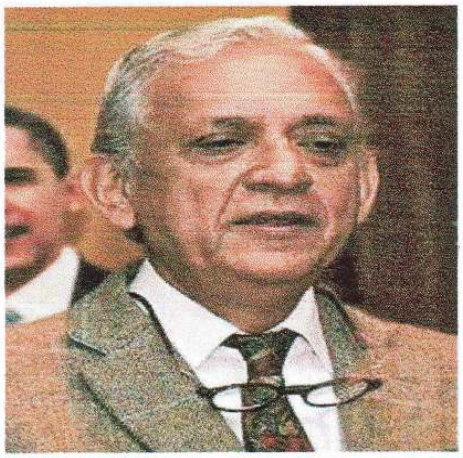

Profile of Professor Dr. Gowher Rizvi

Professor Dr. Gowher Rizvi, born on 28 April 1948, is a Bangladeshi Historian, Scholar and Academic. Currently he is the International Affairs Advisor to the Hon'ble Prime Minister of Bangladesh And the unit Chief of the GIU. Before that he was MacArthur Fellow in International Relations at Nuffield College, Oxford University. He was an Editor of Contemporary South Asia and a Fellow of the Royal Historical Society. He held various appointments at Oxford University, the University of Warwick, the University of Canterbury, Harvard Kennedy School, and the University of Virginia. His publications cover the disciplines of history, international relations, and public policy. Professor Rizvi is married to Agnese Barlo. They are blessed with one daughter, Maya, a Graduate of Vassar.

Early life

Gowher Rizvi spent the early part of his student life in Faujdarhat Cadet College, Chittagong. He passed both BA and MA in the first class from the University of Dhaka. In 1972 he went to Trinity College, Oxford as a Rhodes Scholar and obtained a D. Phil., in History.

Academic Career

Gowher Rizvi was St. Antony's College, Oxford as the Alfred Beit Junior Lecturer and Senior Associate Member of from 1976 to 1978. From 1979 to 1981 he taught History at Balliol College, Oxford. He was MacArther Scholar and Fellow in politics and International Relations at Nuffield College, Oxford from 1988 to 1994. In 1992, he collaborated with the Royal Institute of International Affairs to organize a high-level Anglo-Iranian Roundtable in order to facilitate direct dialogue between senior officials of the two countries. In the same year he taught as Arnold Bernhard Visiting Professor of History at Williams College, Massachusetts. From 1994 to 1995 Professor Rizvi served as the Director of Contemporary Affairs at the Asia Society in New York. In 1995 he joined the Ford Foundation as the Deputy Director for governance and civil society. In 1998 to 2002 he was appointed te Ford Foudation Representative to New Delhi with responsibilities for directing the foundation's activities inSouth Asia. From 2002to 2008 he was a lecturer of Public Policy at Harvard Kennedy School. He was Director of the Ash Center for Democratic Governance and Innovation. In 2008 he was appointed Vice Provost for international programs at the University of Virginia. In 2009 he became the International Affairs Advisor to Hon'ble Prime Minister of Bangladesh Sheikh Hasina.

His selected publications :

- Democracy & Development: Restoring Social Justice at the Core of Good Governance; published by Colombo International Center for Ethnic Studies, 2008.
- The States of Access: Success & Failure of Democracies to Create Equal Opportunities; published by Washington DC, Brookings Institution Press, 2008 (Co-edited with J. de Jong).
- "Innovations in Government: Serving Citizens & Strengthening Democracy" in S. Borin(ed.)'s Innovations in Government: Research, Recognition, and Replication; published by Washington DC, Brookings Institution Press, 2007.
- Making Democracy Work for the Poor in India, Man & Development; published in September 2007.
- "Reinventing Government: Putting Democracy & Social Justice back into the Discourse" in Public Administration & Democratic Governance: Governments Serving Citizens; published by United Nations, 2007.
- "Building Trust in Government", seminar, August 2007.
- "Democracy and Constitutionalism in South Asia: the Bangladesh Experience" in E. Venizelos and A. Pantelis (eds.), Civilization and Public Law, London, Esperia Publications, 2005.
- "First Thing First – Making Democratic Government Work" In G. Krishnan, The Variety of India (Chandigarh, 2004).
- Beyond Boundaries: A Report on the State of Non-Official Dialogue on Peace, Security and Cooperation in South Asia, Ontario, University of Toronto-York University, 1997 (with N. C. Behra and P. M. Evans).
- South Asia in a Changing International Order, SAGE, New Delhi, 1993.
- South Asia Insecurity and the Great Powers, London, Macmillan, 1986 (with B. Buzan).
- Papers on India: Vol. 1 Part 1, Oxford, Oxford University Press, 1986 (coedited with N. J. Allen, R.F. Gombrich, and T. Raychaudhuri).
- Bangladesh: The Struggle for the Restoration of Democracy, London, Bangabandhu Parishad, 1985.
- Indo-British Relations in Retrospect, Indo-British Historical Society, Madras, 1984 (co-edited with A. Copley).
- Perspective of Imperialism and Decolonization, London, Frank Cass, 1984 (co-edited with R. Holland).
- Lord Linlithgow and India, 1936 – 43, London, Royal Historical Society, 1978.

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MADELINE KIMEI

CHAIRMAN

Ms. Madeline Kimei is the Founder & CEO of iResolve™, a boutique Arbitration and corporate dispute resolution firm established in 2014. She is a commercial lawyer, qualified arbitrator and accredited civil and commercial mediator by the Chartered Institute of Arbitrators (UK) since 2012. She offers a wealth of experience in identifying and mediating suitable resolutions for complex disputes in a variety of sectors. Ms. Kimei holds an LLB from Coventry University and LLM in Law & Finance from Bournemouth University (UK) also holds a certificate in Dispute Management from the Indian Institute of Arbitrators and Mediators (IIAM) & International Mediation Institute (IMI) Accredited (Ireland).

She currently serves on the panels of Shanghai International Arbitration Centre (SHIAC), Tanzania Institute of Arbitrators (TIArb), National Construction Council (NCC) of Tanzania. She also acts as an arbitral secretary in complex arbitrations. She is the current President of Tanzania Institute of Arbitrators and as an ADR enthusiast dedicated to international and social activities. Ms. Kimei writes and publishes in the area of dispute resolution.

She is an experienced trainer in ADR having had tailored trainings for organization including public bodies; delivered public seminars, courses and has presented in ADR-related conferences both locally and internationally. She is the first appointed member of the ICC International Court of Arbitration for Tanzania, the ICC Africa Commission, the ICC Commission on Arbitration & ADR; a member of the IBA Africa Arbitration Network and a faculty member of the Bangladesh International Mediation Society.

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SAMARENDRA NATH GOSWAMI

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Advocate Samarendra Nath Goswami was born in 1st January, 1953 at Naogaon, Bangladesh in a respectable Hindu family. He obtained his MA(Edn) from the university of Dhaka and LLB., BEd, LLM degree from the universityof Rajshahi.

He enrolled as an advocate in the year 1975 and now practicing advocacy in both the division (High Court and Appellate) of Supreme Court of Bangladesh. Advocate Goswami is the author of Bahai' Personal Law and Editor of Monthly Law Journal 'Bangladesh Law Times'. He is the Life member of (i) ISCON, (ii) Bangla Academy, (iii) Bangladesh Red Crescent Society, (iv)Rajshahi University Registered Graduate, (v) Liberation war Museum Bangladesh. He is the founder of Naogaon Law College, Naogaon Bangladesh. Advocate Goswami is the founder of Bangladesh International Mediation Society BIMS and BIMS is the corporate member of IIAM.

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PRIYANKA CHANKRABORTY

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Ms Priyanka Chakraborty is an accredited mediator, negotiator and arbitrator from Indian Institute of arbitration and Mediation, India. Apart from being the Executive Secretary, she is also a faculty member at the Bangladesh International Mediation Society. She has also worked with Online Consumer Mediation Centre at National Law School of India and has been attached to academia. Presently, she is pursuing her PhD degree from NLSIU, Bangalore after pursuing her L.L.M. from the University of Auckland, New Zealand with the specialization of Dispute Resolution in 2018. Recently, she has started practising as an advocate in Kolkata, mainly dealing with Family Disputes and Relationship Counselling. She has her mediation practice in Kolkata and travels around the world to share and learn her subject.

She is intensively into research, with multiple publications and speaks at various conferences and seminars. She is also establishing her private dispute resolution centre at Kolkata, India from October 2019 by the name of "The Resolution Hub" which will practice all forms of ADR majorly mediation. She aims at establishing and spreading awareness regarding the process and power of mediation and negotiation across all professions so that the disputes can be tackled in the best possible way or majorly be avoided at its very beginning.at its very beginning.

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MERCY OKIRO

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Mercy Okiro, MCIArb is the Chairperson of the Young Members Group of the Chartered Institute of Arbitrators (Kenya), where she was a member of the Branch Committee since 2015. She also sits on the Global Steering Committee of the Young Members Group of the Chartered Institute of Arbitrators, London.

Ms. Okiro is an Advocate of the High Court of Kenya having been admitted to the Bar in 2014. Her main areas of legal practice are international dispute resolution, arbitration, mediation, legal aid, women's rights, sports law and legal research.

As the youngest mediator in Kenya by the Chartered Institute of Arbitrators (UK) and the youngest accredited mediator of the Judiciary of Kenya, Mercy has successfully handled mediation in the Family, Employment and Commercial Divisions of the High Court with an over 80% success rate. She also handles mediations for The Federation of Women Lawyers (FIDA), Kenya. Further, she practices arbitration and construction adjudication.

Mercy is an African Ambassador for the Alliance in Dispute Resolution, an organization which strives to ensure diversity and inclusion in alternative dispute resolution. She has been involved in planning various conferences and workshops in Alternative Dispute Resolution regionally and globally. She has presented papers at conferences and has published articles in alternative dispute resolution, access to justice, sports law and women's rights.

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He is a Retired Judge of the High of Tanzania and a Non-practicing Advocate. He was a Lecturer at the Faculty of Law (now School of Law) of the University of Dar es Salaam and a Commissioner at the Commission for Human Rights and Good Governance (CHRAGG). As a sitting High Court Judge he first served at the Dar es Salaam Zone, before being appointed Judge-in-Charge for the Commercial Division of the High Court of Tanzania and High Court Zones of Mwanza and Mbeya respectively. He retired in late April, 2019 upon attaining the compulsory retirement age for a High Court Judge in Tanzania.

He is an ardent researcher and has published on various areas of the law including Children's Rights, Environmental Law, Constitutional Rights, Islamic and Customary Law and Arbitration and Mediation to mention but a few. He has participated in a number of local and international conferences as a Resource person. He is currently a Judge Arbitrator of the East African Development Bank (EADB) and facilitator at trainings conducted by the Judiciary of Tanzania for judicial officers and administrative staff. He has a passion for Mediation and Arbitration as mechanisms for conflict/dispute resolution, conducting trainings for judicial officers, lawyers and non-lawyers on negotiation, conciliation, mediation and arbitration. During his tenure at the Bench he handled a number of petitions on enforcement of arbitral awards.

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Ms. Asha Paresh Mahant is the founding partners of Rajani Associates with avalued experience of more than 23 years.She has been inclined towards non litigation work and thus chose to be a commercial lawyer. In her career span of over 20 years, she has strong experience in acquisitions and mergers, transfer of businesses / undertakings to domestic and international companies, private equity placement, foreign investments, acquisition of businesses in the USA, Singapore, Oman, Qatar and Dubai.

Ms. Paresh has experience in restructuring of business, Asset & Share Purchase deals, Joint Ventures and Strategic alliances, Private Equity and general Corporate advisory, ability to handle multiple cases simultaneously, ability to negotiate contracts and agreements, handling litigation, drafting court proceedings, briefing counsels, superior written and verbal communication skills, strong negotiating and advising skills. Ms. Paresh has a strong experience in alternative dispute resolution as well.

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MUTANDZI A. MATOVELO

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Mutandzi is an Advocate of the High Court of the United Republic of Tanzania and an Associate Director at iResolveTM versed with appreciable skill and experience in Corporate Management and Governance; Labour and Commercial Alternative Dispute Resolution; and Civil Litigation.

Mutandzi is an Associate of the Chartered Institute of Arbitrators (UK); Tanzania Institute of Arbitrators; and a practicing member of the Tanganyika Law Society where he sits as a member of the Young Lawyers Committee 2019/2020. He has acted as party counsel in various labour mediation and commercial arbitration. He has been engaged as Judge during the Orate Africa Schools Moot Court Competition held in March, 2019; as a moderator during the 1st ICC Arbitration day held on 18th July, 2019 in Dar es Salaam; as a facilitator during the ADR Academy Training on ADR in the Aviation Industry offered to members of the Consumer Complaints Unit of the Tanzania Civil Aviation Authority held in July, 2019; and as a moderator during the 1st inaugural Africa-Asian Mediation Conference held on 5th and 6th September, 2019 in Dar es Salaam.

Prior to joining iResolveTM Mutandzi worked with Joachim and Jacobs Attorneys and CRB Africa Legal, law firms based in Dar es Salaam.

AFRICA ASIA MEDIATION ASSOCIATION

AARTI GOYAL

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Ms. Aarti is a Legal Associate in the Chambers of Mr. Praveen Chander Goyal, Senior Panel Counsel, Government of India, Punjab and Haryana High Court, Chandigarh (July 1, 2018 – Till date). She had done Judicial Internship – Justice Rajiv Raina, Punjab and Haryana High Court, Chandigarh (July 1, 2017– July 14, 2017), Judicial Internship – Justice Jagdish Singh Khehar, Supreme Court of India, New Delhi (June 29, 2016 – July 8, 2016), Reliance Capital Ltd - Commercial & Home Finance, Mumbai (June 6, 2016 – June 25, 2016). Internship at the Reliance Capital Ltd - Commercial & Home Finance, Mumbai (June 6, 2016 – June 25, 2016), Chambers of Mr. KTS Tulsi, Senior Advocate, Supreme Court of India, New Delhi (January 4, 2016 – January 23, 2016), T&T Law, New Delhi (June 3, 2015–July 15, 2015), Shardul Amarchand Mangaldas & Co., New Delhi (January 5, 2015–January 16, 2015 and June 23, 2014 – July 11, 2014) and at the UNUC Legal, New Delhi (January 1, 2014 - January 13, 2014).

Ms. Aarti has completed the "40 hours Mediation Training" conducted jointly by Online Consumer mediation Centre (OCMC), National Law School of India University, Bengaluru and The International Centre for Alternative Dispute Resolution (ICADR), New Delhi from 01.06.2019 to 05.06.2019 at NLSIU, Bengaluru.

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Accredited Counselling Psychologist-KCPA & Certified Professional Mediator CPM- MTI. His background dates back to more than 15 years of practical experiences in various setups and fields.

Through his trainings he believes in practical and effective approaches in the line of Mental Health and Conflict managements. A self-motivated Individual who enjoys being challenged. From self- employed business acumen to working for and with people, communities, correction facilities, health sectors, he has a variety of experiences and a keen eye for detail, with a passion to learn and work with various levels of individuals in various fields within the society.

As a Patriotic Kenyan he believes and says "When Heart and Mind are Sick, Body is Sick, Family is sick, Society is sick, and we keep on ailing as a Nation" It only takes one person to change your life, You.

AFRICA ASIA MEDIATION ASSOCIATION

THE IMPORTANCE OF MEDIATION

Lady Justice Joyce Aluoch, EBS,CBS (Rtd) Judge
International Criminal Court, Hague, The Netherlands

The topic calls upon me to discuss or talk about the importance of Mediation, but before I do that, we all need to understand what mediation is.

Very simply put, Mediation is a "tool" for resolving disputes. Other such tools are negotiation, arbitration, conciliation, adjudication only to mention a few. These "tools" are part of the process known as "Alternative Dispute Resolution Mechanisms." They are alternative to court litigation. The three most commonly used are negotiation, mediation and arbitration.

I will very briefly explain what these ADR mechanisms are, beginning with negotiation, which can be described simply as a process by which people settle differences. It can also be referred to as "a discussion aimed at reaching a settlement." Usually people negotiate when they are still able to talk to each other, without the assistance of a 3rd party and each party tries to persuade the other to agree with his or her point of view.

Talking about negotiation, we must always remember the words of President J.F. Kennedy's famous inaugural address on January 20th, 1961 when he said, "Let us never negotiate out of fear," but he then added, "Let us never fear to negotiate."

After negotiation, I will explain what mediation is by saying that it is a confidential, voluntary, non-binding process conducted by a mediator who is a trained, neutral third party, who does not make findings or issue any rulings or judgements because mediation is a formalized negotiation process, and not an adjudicatory process.

If mediation succeeds, the parties execute a settlement agreement and sign it thus making it formal. However, if mediation fails, parties may revert to arbitration (Med/Arb procedure) or at the very extreme, proceed to court to be heard by a Judge as if mediation never happened, and no one is permitted to divulge anything, which occurred during mediation because of the confidentiality of the process.

Arbitration on the other hand is a "private litigation process" which the parties involved in normally agree that it would substitute the court process or litigation. An arbitration clause is usually provided for in a contract. An arbitrator is a decision maker who makes rulings and awards, after listening to evidence, like a Judge. The rulings and awards are enforceable by courts, and can only be set aside on grounds provided for in law.

Having explained the difference between negotiation, mediation and arbitration, I will now discuss briefly the importance of mediation.

- Cost – The mediation process generally takes much less time than moving a case through the "standard" court process. Whilst a case in the hands of a lawyer or court may take months or years to resolve, mediation usually achieves a resolution in a matter of hours or days. Taking less time means expending less money on fees and costs.

- Confidentiality:Whilst court hearings are public, mediation remains strictly confidential. No one but the parties to the dispute and the mediator get to know what happens at the mediation session or sessions.

- Not only is mediation confidential, it is also "without prejudice," as the mediator cannot be summoned to court to divulge what happened should the mediation fail and the parties go to court.

- Control: Mediation increases the control the parties have over dispute. In court, the control of the dispute or case rests with the judge or jury. Thus, mediation is more likely to produce a result that is mutually agreeable to the parties.

- Compliance: Because the result is attained by the parties working together and is mutually agreeable, compliance with the mediated agreement is usually high. This further reduces costs because the parties do not have to engage a lawyer to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law, if it is a court annexed mediation, referred by the court.
- Mutuality: Parties to a mediation are usually ready to work towards a resolution. In most cases, the mere fact that parties are willing to mediate means that they are ready to "move," their positions.The parties are therefore more amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute.

- Support: Mediators are trained in working in difficult situations. The mediator works as a neutral facilitator and guides the parties through the process. The mediator assists the parties to think "outside the box," for possible solutions to the dispute, thus broadening the range of solutions.

- Closure and certainty: Anegotiated settlement brings closure and certainty to a dispute, because the settlement agreement will have been discussed and agreed upon by the parties.

The importance and or advantages of mediation I have discussed above shows how equally important a mediator is to the whole process. This calls for the examination of the skills a mediator should have?

Speaking as a mediator, I would say that mediators need a range of skills acquired through training, practice and experience. Training is key and all mediators must undergo proper training so as to understand the mediation process. I believe strongly that in mediation, the fairness is in the process, which must be followed strictly.

The skills a mediator requires include, but not limited to:

- Active listening.
- Empathy – the ability to the show the parties that you understand their interests and concerns through exploration and body language or facial expressions which are the oldest and most natural forms of communication between human beings.

  Body language is a form of significant and complex interaction of non-verbal communication which involves various emotional states such as love, fear, hostility, hatred etc.

- Patience and tactfulness
- Credibility
- Alertness throughout the mediation process.
- Rapport building
- Patience
- Perseverance

As I conclude, I would like to clarify that not all matters can be mediated.

- Most non-criminal matters can be mediated, though some non-violent criminal cases like those involving verbal harassment often result in successful resolution during mediation.

- Commercial disputes, laborunion and management disputes, child support and custody, succession cases, family disputes, etc., can all be mediated.

Some critics fault mediation as not being able to give the option of receiving as much information as they do in court litigation. This is the legal principle of "discovery". However, here the answer lies in the "good faith" of the parties, who agreed to mediate voluntarily, to begin with. They would normally disclose as

much information as possible during the mediation process so as to reach a resolution of their own. The mediator can also do 'realty testing or risk assessment,' should need arise.

- Mediation will also not work where a party is bent on causing the delay, insisting on court litigation, and again where the parties need public resolution(e.g. if a party wants to set a legal precedent)

And finally is the most important criticismagainst mediation, mostly by some members of the legal fraternity who question the validity of mediated settlement agreements, questioning how to enforce such settlements, unless referred by the courts, under the court annexed program, like the one in Kenya.

This matter of the difficulty of enforcing mediated settlements was addressed by the United Nations Convention on International Settlement Agreement Resulting from Mediation, which is also referred to as the, "Singapore Convention." The Convention marks a key point in international mediation, as it offers a new leg for cross-border disputes. It was signed by 46 states on 7/8/2019 at an official signing ceremony in Singapore It is intended to facilitate enforcement of settlement agreements that have been entered into with the assistance of mediation. The convention will enter into force six months after being ratified by at least three contracting states. As at 30thSeptember, 2019, 51 countries including the world's two largest economies, the U.S and China, had signed the Convention. This is a great achievement in Mediation, moving forward. We have to wait and see how things develop after the many countries having signed the Convention.

THE FUTURE OF MEDIATION IN INDIA

Justice Kurian Joseph

Introduction:

The Government of India has been proactively taking steps to improve the ease of doing business in India. One remarkable step taken in this direction is to provide measures for expeditious resolution of disputes. Several steps have already been taken and many more are in the pipeline. Amongst them (i) the Government is establishing the New Delhi International Arbitration Centre as a statutory body; (ii) The Commercial Courts Act, 2015, has been further amended; and (iii) further amendments the Arbitration and Conciliation Act, 1996, are currently underway. Each of these initiatives is designed with a view to resolving disputes through alternative dispute resolution (ADR) mechanisms in the place of the traditional court system, which is overloaded and where delays abound.

The most popular ADR mechanism has been Arbitration given that the litigation route is sure to be a lengthy process. It permitted the parties to bypass the corridors of the court, to a large extent. It took several decades for arbitration to evolve in India. Parties, lawyers and the Courts themselves, are yet to fully appreciate its efficacy in the overall scheme of dispute resolution. Mediation and Conciliation, whilst available, traditionally operated majorly only in a smaller sphere e.g. in marital and family disputes. With the extensive adoption and growth of arbitration, it has now become far more complex and consequently expensive, than parties initially expected. While this is offset by the overall speed and benefits that it brings to the table, that has not stopped parties from exploring cheaper alternatives.

Enter mediation:

Mediation is not an adversarial process. Parties to a mediation approach a dispute scenario differently i.e. they focus upon the needs, rights, and interests of the parties. It is voluntary and non-binding. It is faster and non-adversarial means that it is significantly cheaper than arbitration or court litigation. Given the increasing sensitivity around costs, especially in the times of Covid-19, it is not surprising to see parties consider this option more seriously.

The role of a mediator is mainly facilitative and sparingly evaluative. It can be said that mediation is an interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. Even though mediation is extremely useful and is an excellent dispute resolution mechanism, the fact that it is non-binding (and consequently dependent on the volition of the disputing parties) makes it vulnerable to misuse. But in pending cases, it is always open to the parties to opt out for an out-of-court mediated settlement and get the case decreed in terms of the settlement, subject to the legitimacy of the settlement, which is a factor to be vetted by the Mediator.

While informal mediation in India is prevalent since time immemorial, Indian law does not, till date, recognize a settlement arrived at in mediation proceedings. It is for this reason that most parties prefer to have a mediated settlement recorded as a consent decree or award. This grants it enforceability.

While amending the Code of Civil Procedure in 2002, Mediation was specifically introduced as an effective alternative dispute resolution mode, for settlement of all pending civil disputes.[1] Several other statutes have recognised and endorsed the principle of Mediation for settlement of disputes out-of-court. Looking at the huge pendency of cases in the Indian Courts, Mediation appears to be the best effective, viable and affordable way forward.

To boost the utilization of mediation in commercial disputes, the Commercial Courts Act provides[2] parties with an alternative means to resolve disputes through

[1] Section 89 of the Code of Civil Procedure, 1908
[2] Section 12A of the Commercial Courts Act

discussions and negotiations with the help of a mediator, popularly known as pre-litigation mediation. A plaintiff must initiate a time-bound mediation process before instituting a suit, with a limited exception made for suits filed with applications for urgent interim relief. The intent was clear; to encourage parties to explore whether mediation could resolve their issues prior to the dispute entering the corridors of court.

Some benefits of pre-litigation mediation:

1. Time and cost-effective: Pre-institution mediation initiated under the Commercial Courts Act must be completed within a period of three months from the date of application made by the plaintiff. A short extension of two months is permissible, with the consent of the parties. This could mean a very quick resolution when compared with the alternative.

2. Avoid lengthy proceedings: A party invoking pre-litigation mediation is one who has perhaps come to the end of the rope and is ready to enter the corridors of adjudication process. Mediation permits such a party to at least explore the option to avoid lengthy court proceedings. When one realizes that court proceedings in India sometimes can stretch to more than 20 years, mediation becomes far more attractive.

3. Confidentiality: The rules ensure confidentiality by providing that the mediator, the parties, and their counsels must maintain confidentiality about the mediation. This is important for the parties.

4. Assessing the strength of the opponent's case: Through negotiations in a mediation proceeding, a party may get a flavour of the counter party's strengths and weaknesses. This can be useful from a strategy perspective.

The power of mediation lies in the mediator. A professional, trained mediator has the ability to alleviate years of bad mouthing and baggage carried by the parties, and focus on their own interests and preferred solution. Such a mediator can, effectively, allow warring parties to see through the dust clouds of dispute and show them the route to the land of peace. There are numerous examples where years of litigation have been unsuccessful but just a few sessions of mediation, with an open mind, before a professional mediator, were enough to bring parties to an amicable settlement.

A new dawn for mediation in India:

On July 31, 2019, the Union Cabinet, chaired by the Hon'ble Prime Minister Shri. Narendra Modi, approved the signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation (popularly referred to as the "Singapore Convention") by the Republic of India. This landmark decision led to the signing of the Singapore Convention by India on August 07, 2019 and puts the future of mediation and mediated settlements in India on a strong pedestal. The Singapore Convention provides a framework for the enforcement of mediated settlement in international commercial disputes. Putting it simply, it aims to do for international mediation what the New York Convention did for international arbitration. Upon its ratification and coming into effect, the Singapore Convention is expected to provide more impetus to mediation as a method of resolving commercial disputes.

The objective of the Arbitration and Conciliation Act, 1996, is "…to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto." Under Section 30 of the Act, the arbitral tribunal is encouraged to use mediation, subject to the agreement of the parties and to pass an award in terms of the mediated settlement. Mediation can be tried at any stage of the arbitral proceedings. Nothing stops the parties to even settle their disputes, through Mediation, even after the arbitral award is passed so that further rounds of litigation can be avoided and thus the execution becomes expeditious.

One can also expect the Government to roll out a detailed framework within which mediation in India and mediated settlements will operate. Once a mediated settlement is able to stand on its own legs, this should ensure that one no longer needs to couch a mediated settlement as a decree of a court or a consent award/settlement agreement under the Arbitration & Conciliation Act, 1996. Going forward, one can expect encouragement to the adoption of tiered dispute resolution clauses; first providing for mediation and then proving for arbitration. The upside of a dispute quickly resolved by mediation is too alluring to ignore.

In addition to the obvious benefits, for India, signing of the Singapore Convention is expected to boost the confidence of investors and also provide a positive signal

to foreign investors about India's commitment to adhere to international practice on alternative dispute resolution.

- Justice (Retd.) Kurian Joseph

Special Acknowledgement: Mr. Sahil Kanuga, who co-heads the International Dispute Resolution and Investigations Practice at Nishith Desai Associates, for the research assistance.

About the author:

Justice Kurian Joseph is a former judge of the Supreme Court of India. He was designated as Senior Advocate in 1996. In 2000, Kurian was appointed as Judge of the Kerala High Court. In February 2010, he was elevated as Chief Justice of the Himachal Pradesh High Court and in 2013 to the Supreme Court of India. He is based in New Delhi as an avid Mediator and Arbitrator in domestic as well as international. He is on the panel of Singapore International Mediation Centre, Singapore International Arbitration Centre and the Indian Council of Arbitration. Speaking on his retirement, Justice Joseph publicly vowed to not accept any post-retirement offices, citing the importance of maintaining the independence of the judiciary.

MEDIATION: A POPULAR TOOL WORLDWIDE, RARELY USED IN BANGLADESH

Mr. Justice SM Kuddus Zaman

Mediation is a voluntary and civilized method of dispute resolution outside of the court system. It is the only dispute settlement process that provides complete confidentiality and encourages the parties to be actively involved to come to a solution. Parties are supported by the specialized communication and negotiation techniques provided by an impartial facilitator, namely, the mediator. Informed consent of the parties are the basis of the settlement and the decision is made by the parties to the dispute not the mediator makes the decision.

Above techniques focus on the needs, rights, and interests of the parties. This method is helpful to retain good relationship between the parties for continued dealing which is not available in the adversarial system of the Courts.

The ideology of mediation revolves around the key aspects: of costs, time, efficiency, retention of relation between the parties, management, confidentiality, breaking of deadlock and enforceability.

Mediation tends to work best if the parties have a certain cultural standard and the dispute is a genuine one. There has to be a common goal and the parties have to strive to reach a solution of a dispute that genuinely exists. As such mediation becomes difficult if the dispute is an outcome of a false claim or an ill design to harass, demean or take undue advantage. Mediation provides a harmonious way of reaching a solution and is not compatible with the mindset of "winning" a dispute.

In a successful mediation both the parties win and the outcome reaches finality immediately, while a Court juggles between several cases a day, mediation is exclusive to the parties involved. After a preliminary meeting with the parties, the mediator can sketch up a timeline and follow it or make adjustments as per the needs of the parties.

The mediator is not only bound by a confidentiality clause over the whole process but also to each party respectively. Whereas a court proceeding invariably takes place in the public purview, unless the case involves a matrimonial dispute and the parties ask for camera trial. This privacy towards each of the parties individually provides an opportunity to break the deadlocks if any, using various processes such as reality testing. The mediator can perform shuttle diplomacy, that is, hold private meetings with each of the parties to unify their final needs and provide a mutually acceptable solution.

At the end of a successful mediation, the outcome is recorded on paper and signed by the parties and in many countries this document caries legal value and legally enforceable. But in Bangladesh no law has yet been promulgated recognizing the settlement of dispute by mediation and giving its essential enforceability.

Over the time, mediation has developed numerous methods to cope with the unique requirements of different types of disputes. Evaluative mediation focuses on the predicament the parties are facing. The mediator will opine on what would be the outcome if the parties were to go to court and on the other hand, the settlement options he can offer which the parties can explore.In facilitative mediation, the mediator does not provide options for settlement to the parties but encourages them to converse, ensuring a safe environment to discuss issues without reaching a deadlock and encourages the parties to steadily find a middle ground. When communication and relation between the parties breakdown, they can opt for transformative mediation. This method provides for continued interaction between parties and the outcome is measured by "the parties feeling good about themselves". This method has seen success in removing the stalemate in commercial or family disputes. Narrative mediation takes a creative approach in dispute resolution as it diverts the parties away from the problem and focuses on a

narrative (story telling) to solve the underlying problem. This method is used when relations between the parties reach a boiling point and usual communication methods become ineffective. This method helps the parties to understand human reaction and behaviour towards certain situations and encourages empathy around the table.

A recently popular mode of mediation is mediation with arbitration. The method uses mediation and if that fails, moves on to arbitration, with either the mediator now taking the role of an arbitrator, or someone else performing that role.The mediator,now in possession of critical confidential information of each party if, sits as an arbitrator will be bound by the impartiality and confidentiality clausesof the mediation.

In Bangladesh, from the initiation of a suit to obtaining final remedy is an extensive procedure involving uncertain number of dates for hearing, witness examination, judgement and drawing of decree. It is difficult to get finality of the decision since there are several forums to challenge the verdict of the court of first instance. If the law prohibits an appeal,a revision is available for the interested party and even a judgement of a Small Causes Court gets finality after reviewed by the apex court. As far as the execution of a decree is concerned, it is more time consuming and expensive. It is said that the real plight of a litigant starts when he seeks the execution of a decree. Bangladeshi courts of every class are overburdened with cases. At present the number is 3.6 million and the number is ever increasing.

Bangladesh faces unique roadblocks to the path of useful utilization of mediation as a mode of dispute resolution. In the countries where mediation has succeeded the legal practitioners undertook a very important role to popularize the method and enhance its use and a section of lawyers became professional mediators. Unfortunately, in Bangladesh the first obstacle to mediation comes from a section of lawyers who erroneously perceive that mediation will impact negatively on their profession. But experience from other countries point exactly opposite.

It has been found that mediation paved the way for speedy settlement of disputes not involving complicated legal questions in an inexpensive and cordial

manner. This has saved the courts from the burden of unnecessary cases enabling the judges to concentrate more with the disposal of legally complicated cases. It minimizes both the cost and time of adjudication of cases by the courts which in tuen encourages people to bring their disputes to courts.It is to be noted that in every society there are millions of disputes which people are hesitant to bring to court due to uncertainty as to time and costs to get a final decision.Speedy and inexpensive settlement of dispute shall discourage people to take law into own hands and encourage them towards pacific settlement of the same through court or mediation.

Thus, successful mediation shall enhance the number of cases in Courts and disputes for mediation benefiting legal practitioners as well as the society. This shall ensure peace and tranquility in the society which are pre-conditions for economic prosperity and social parity. Dissemination of information and appropriate motivation programs need to be initiated for dispelling misconceptions of the lawyers about mediation and facilitate their effective participation in the same.

It is to be mentioned that sincere legislative initiatives have been taken for settlement of pending civil, artha rin and family cases through mediation but those legislative provisions are not comprehensive and there are rooms for further improvement.

Section 89A of the Code of Civil Procedure provides for settlement of civil suits cases through mediation. The parties are at liberty to select the procedure to be followed, the fees and the mediator.The Code could instead make a provision for a compulsory endeavor for mediation before the parties come to the court and institute a case.Many countries have adopted mediation as the first resort for settlement of a dispute and a failure to do so would attract cost penalties. Above mechanism has prevented many cases from ever reaching the Court thereby easing the strain on the judicial sector. Another deficiency is, the Code does not provide any mechanism for raising professional mediators which is a pre-condition for making mediation a success.

Section 22 of the Artha Rin Adalat Ain 2003 provided for mediation in the Artha Rin cases subject to the Section 24 of above Ain. Section 24 provides for authorization by the financial institution of an officer to participate in the

mediation process. The Adalat cannot proceed with the mediationof the case unless it receives above authorization. Most financial institutions are yet to authorize their officers and communicate the order to the Artha Rin Adalats.There are literally no success stories of settlement of Artha Rin cases through mediation mainly due to unwillingness of the financial institutions.

The utilization of mediation in family cases has seen encouraging successesas about 40% of the cases are resolved through mediation. However, the mediation under theFamily Courts Ordinance1985 can only beperformed by the concerned Judge of the court and this has deprived the process from the specialized services of professional mediator.

As mentioned above, In Bangladesh there is no legal framework nor any organizational setup for settlement of disputes through mediation, or any benchmark for monitoring, certifying, evaluating and regulating the performance of individual mediators or non-government organizations working for settlement of disputes through mediation. All laws have been made for settlement of court cases, not disputes.If a dispute can be settled before the same goes to a court of law in the form of a case then much time, money and animosity can be minimized. As such to make mediation a success Bangladesh should make appropriate legislation for dispute settlement through mediation and establish necessary infrastructure and raise skilled human resources for the same. Mediation is a unique tool which has been successfully used worldwide for pacific settlement of disputes as well as for reduction of case backlogs in the courts of law. But unfortunately, the tool remains unused in Bangladesh. It is hoped that the scenario will be changed, and mediation will also relieve our courts from unnecessary caseloads.

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EARLY NEUTRAL EVALUATION (ENE) AND ITS IMPORTANCE FOR THE CIVIL JUSTICE SYSTEM IN TANZANIA

Madeline Kimei[3]

Introduction

Increasingly, courts are setting new behavioral standards for litigants, potential litigants and their representatives. The Tanzania Arbitration Act 2020, has amended provisions of the Civil Procedure Code, R.E 2002 Cap 33 (CPC) by adding a new section 10A to require litigants in civil actions to take *"bona fide steps to resolve disputes "* and consider the use of, an Alternative Dispute Resolution (ADR) process *"at an appropriate stage in the litigation"*. The pertinent options are negotiation, conciliation, mediation or arbitration or similar alternative procedure, before proceeding for trial.[4] In addition, the legislation has coincided with significant shifts in terms of judicial understanding to act in a *"reasonable manner "* that have been imposed upon those engaged in litigation.

The use of Early Neutral Evaluation ("ENE") option is not expressly reflected in writing in any codes and rules of procedure however, the wording of section 96 of the AA is broad and allows for parties to explore all available alternatives to the

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[4] Section 24 of the Civil Procedure Code (Amendment of the First Schedule) Rules 2019 -GN 381

courts, thus ENE is a viable option to consider. It is noteworthy that there has been no ENE reported cases in Tanzania. This paper aims to encourage the judiciary to develop and offer its own forms of ADR such as judicial and non-judicial Early Neutral Evaluation ("ENE").

Definition of ENE

The term Early Neutral Evaluation ("ENE") is used when a neutral third party is asked to evaluate the facts, evidence and law in relation to the issue or case between disputing parties and provide an opinion on the merits, the preliminary assessment and evaluation. Some elements in ENE are common with mini trials, but substantially less elaborative.

The term "ENE" has been used to describe the process of giving an expert (non-determinative) opinion, whilst "expert determination" has been the description used for a process that may be identical but which produces an outcome that the parties agree will be determinative and binding upon them.

ENE is usually employed in the early stages of a dispute, but in fact it can be used at any stage. Neutral evaluation employed at early stages of a case can assist settlement by mediation; and can be carried out before or during a mediation and before or at any time during the process of litigation.

It is usually undertaken by the parties jointly, although in some cases it can be taken at the request of one party only in relation to their own case. The goal of ENE is to improve communication a dispute, without themselves becoming involved in any way in the negotiations between the parties.

Key features of ENE

ENE is a voluntary procedure, the evaluator's recommendation (the "evaluation") is non-binding and the process, including the submissions to the evaluator and the evaluation, are confidential. The process differs from mediation which is essentially a facilitative process. ENE is an advisory and evaluative process. It is this disengagement from the negotiations process that distinguishes ENE from evaluative mediation.[5]

[5] Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases and predicting what a judge or jury would be likely to do. John Wade "Evaluative Mediation, the Elephant in the Room, available here: https://www.mediate.com/articles/wade-evaluative-mediation.cfm

Like mediation, it is a private and confidential process, and the evaluator must be impartial. If the evaluator is appointed using an ADR provider, he will operate under a code of conduct that may be the same or similar to the conduct that governs the conduct of mediators. However, Tanzania has no organizations that currently facilitate the appointment of an evaluator and administer the process.[6]

The success of ENE lies within its utility to help define the legal and factual disputes and identity both risks and likely outcome before vast sums of costs are spent chasing a dispute. Due to its nonbinding effect, ENE is ideally suited to forming part of an overall settlement strategy. An evaluator can not only address single issues of fact or law from within a dispute, but he or she may also be asked to recommend a settlement value.

An attractive aspect of ENE is that it does not have the preconceptions sometimes associated with mediation, namely that a suggestion of mediation might appear to be an admission of weakness or a willingness to split the difference. A proposal for ENE indicates confidence in the case because of the willingness to subject it to 3rd Party scrutiny.

What does it hope to achieve?

The purpose of ENE is to clarify the issues in dispute and to give an indication of the likely outcome should the dispute proceed to litigation or arbitration. During this process, a neutral expert assesses the merits of the case and works with each party involved to come to a clear understanding of the central issues in the dispute.

ENE assists a party in identifying and clarifying the key legal and factual issues in dispute, both in respect of their own position and that of the other side. It encourages and promotes direct communication between the parties about their claim and supporting evidence. At an early stage, this can quite often be the key to unlocking the dispute.

The evaluation itself provides a "reality check" for both clients and their lawyers and advisors and, of course, it informs the decision-makers of the parties of the relative strengths and weaknesses of their positions.

However, it is important for the efficacy of the ENE process that the parties respect the chosen evaluator. Where one or more of the parties to the dispute

[6] The following are internationally recognized organizations providing for evaluators: Academy of Experts, Chartered Institute of Arbitrators, London Court of International Arbitrators, CEDR and the ADR Group, to mention a few.

perceives the evaluator not to be sufficiently independent and impartial, they will be less likely to respect the evaluation that is handed down at the end of the process. For this reason, the parties may wish to consider conducting ENE through the courts in the first instance.

The Evaluator's Role

An evaluator, depending on the particular ENE agreement, sets a procedure for the parties to follow, studies materials provided by the parties, performs independent research into relevant case law (or relies on his or her own expertise), considers presentations which can be written or oral and can clarify the facts and the positions of the parties through written or oral questioning.

When discussing procedural matters, it should be borne in mind by the parties that the aim of ENE, as with ADR mechanisms generally, is to resolve disputes in a timely and cost-effective manner.

Accordingly, when determining the ENE procedure, the parties should consider the need to balance these ADR aims with the requirement to put the evaluator in a broadly equivalent position to that of a trial judge. While excessive preparation time and costs would de-value the ENE process, insufficient materials being placed before the evaluator may lead to a lack of confidence in the final evaluation properly reflecting the position between the parties.

When the evaluator has reviewed the parties' positions and the information they have provided against his or her own research he or she produces a written evaluation of the relative strengths and weaknesses each party's position. If asked to do so, the evaluator may provide reasons for the evaluation.

The Cost of ENE

Where ENE takes place by appointment of an evaluator directly or through an organisation, the evaluator will charge for their services, applying an hourly rate (as the case may be). In other jurisdictions, with ENE through the courts, these fees will usually be shared equally between the parties and parties will typically bear their own costs. However, the parties retain the ability to agree to an alternative arrangement in the ENE agreement.

Position in Tanzania

Notably, Rule 18 (2) of the Civil Procedure Code (Amendments to the First Schedule) Rules 2019 include provisions for referring the parties to ENE. It reads:

"(2) The court may, at the pre-trial conference, consider any matter including the possibility of settlement of all or any of the issues in the suit or proceedings and require the parties to furnish the court with any such information as it considers fit, and may give all such directions as it appears necessary or desirable for securing a just, expeditious and economical disposal of the suit or proceedings.

The Rule 18 (2) embodies the legislative mandate to the court to refer sub judice disputes to various ADR mechanisms enunciated therein where it finds it appropriate to do so, in order to enable the parties to finally resolve their pending cases through well-established dispute. The Rule is a reflection of Section 89 of the India Civil Procedure Code, 1908.[7]

Rule 24 of the CPC (AFS) Rules 2019 also offer avenue to the use of ADR methods and states:

"Subject to the provisions of any written law, the court shall refer every civil action for negotiation, conciliation, mediation or arbitration or similar alternative procedure before proceeding to trial."

Thus, the court can refer the parties to arbitration, conciliation, mediation, or similar alternative procedure in terms of Rule 24 of the Civil Procedure Code (Amendments to the First Schedule) Rules 2019 for resolution of their disputes at the post litigative stage.

In the example of India, the Courts have gone one step forward and held that there is no reason why ENE, which is a different form of ADR though similar to mediation, cannot be resorted to towards the object of a negotiated settlement in pursuance of Rule 18 and 24 of the Civil Procedure Code (Amendments to the First Schedule) Rules 2019 specially when the parties volunteer for the same.[8]

ENE is thus, a different form of alternative dispute resolution and I see no reason why this process cannot be resorted to towards the object of a negotiated

[7] https://shodhganga.inflibnet.ac.in/bitstream/10603/26666/12/12_chapter%206.pdf
[8] Bawa Masala Co. v. Bawa Masala Co. Pvt. Ltd, AIR 2007 Delhi 284.

settlement in pursuance to Rule 18 (2) especially when the parties volunteer for the same. The provisions of the said section inter alia provide for ADR mechanism, which inter alia includes mediation. ENE also broadly follows the same process as a mediation, though the concept is not a negotiated settlement, but a neutral assessment.

In the word of Robert A. Goodin, *"Early neutral evaluation is a technique used in American litigation to provide early focus to complex commercial litigation, and based on that focus, to provide a basis for sensible case management or offer resolution of the entire case, in the very early stages"*[9]

Rule 18 (2)[10] was introduced to empower different forums and was more practically applicable than any other option of reducing judicial lag, such as increasing number of judges or infrastructure.

The language of the new Rule clearly states that there are 4 alternate resolution forums (nonexhaustive), including arbitration and all the 4 forums are treated identically and as such there is no distinction mentioned in the Section. In arbitration, the decision binding on parties is taking by a private judge (Arbitrator) while in the other 3 mediums party autonomy in final decision is still maintained. Amongst the four specified alternate forums, (arbitration, conciliation, negotiation and mediation), the most sought after is arbitration while at the all five are at the same footing in the eyes of the law. Arbitration is a process only available at the consent of the parties.

In the UK, ENE has only recently, been recognized by the courts in the UK, the Civil Procedure (Amendment No.4) Rules 2015, from 1 October 2015, codifies Norris J.'s statement from Seals v Williams.[11] It amends r.3.1(2)(m) to make explicit reference to the power to order an ENE. The power to do so is not constrained by the need to secure party consent.[12] It has been encouraged by the English courts[13] and is now expressly provided for in the Civil Procedure Rules ("CPR")[14], with ENE being offered in the Chancery Division, Commercial Court and the Technology and Construction Court.

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[9] Christine E. Hart, Alternative Dispute Resolution Practice Manual, North York: CCH Canadian Ltd., 1996, p. 4498

[10] Civil Procedure Code (Amendments to the First Schedule) Rules 2019

[11] Seals v Williams [2015] EWHC 1829 (Ch), 15 May 2015, ChD, unrep

[12] Chancery Modernisation Review: Final Report (2013) available here: https://www.judiciary.uk/wpcontent/ uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf

[13] Seals and another -v- Williams [2015] EWHC 1829 (Ch).

[14] CPR 3.1(2)(m).

Conclusion

Arguably in other jurisdictional text, concern has been expressed about the risk that a failed ENE may leave the parties more at loggerheads than previously, making the case even harder to settle. It has been pointed out that there is no shortage of privately available ENE, so that its widespread use by judges may risk diluting a scarce resource. There is no doubt that, in terms of actual use as an ADR method, ENE is very much the poor sister of mediation.[15]

ENE is a relatively recent, introduction into the ADR spectrum and, in part due to the success of other ADR mechanisms, it has not retained the profile it deserves. For now Rule 18 (2)[16] has therefore recognized the need and importance of ADR even at the pre litigation stage.

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[15] Page 71 - Chancery Modernization Review: Final Report (2013) available here: https://www.judiciary.uk/wpcontent/ uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf

[16] Civil Procedure Code (Amendments to the First Schedule) Rules 2019

DEVELOPMENT OF MEDIATION IN TURKEY

Ferda Canözer Paksoy

Chapter 1 Introduction

Either we accept or not we all have to be mediators in this expeditious century. The sources are becoming more limited and the time is more valuable nowadays. As many courts in different jurisdictions around the world, the civil courts in Turkey have essential problems regarding managing the caseload. Currently, there are too many lawsuits in these civil courts in Turkey. Besides, these lawsuits have high expenses and it requires a long time to have a final judgement. Further, the quality of the legal services provided by Turkish courts is also questionable due to the excessive workload. Not only for Turkish citizens and investors but also for the foreigners, foreign investors, there was a need to have new, effective and cost efficient dispute resolution mechanisms for more accessible justice and global economic competition. Turkish legislators, following the significant rise in the use of alternative dispute resolution ("**ADR**") methods around the world decided to introduce voluntary mediation into Turkish Law as another ADR method after arbitration. Even at the first step of mediation history of Turkey, the enforcement of the settlement was guaranteed by Law. The enforcement was the most important aspect of the mediation practice.

Chapter 2 General Information on the Development of Mediation in Turkey

Many of the countries had the same efforts to improve and use ADR methods to serve less complicated resolutions for civil disputes without competing with their

judicial systems. The mediation, as one of the distinguished option where the parties find their solutions for disputes with their intention and negotiations with the guidance and support of a neutral third person, became a popular formula for the legislators. Under these circumstances, The Model Law on International Commercial Conciliation was prepared by UNCITRAL in 2002, subsequently Green Book/Paper on Alternative Dispute Resolution in Civil and Commercial Law was published at the same year by EU.[1] During these processes many of the EU member states adopted new laws or articles concerning ADR and especially mediation.

When Turkish government as a candidate state for EU organised a committee which began to work on a new Draft Civil Procedure Law in 2004, they included the implementation of ADR methods in their draft work. Subsequently, in 2007 another commission was formed by Ministry of Justice to prepare a Draft Law for Turkish Mediation Law on Civil Disputes. The commission worked on different countries' legislations and Model Laws, searched about their experiences in the field. "The Green Book about Alternative Procedures Concerning Resolution of Disputes in Private Law and Austrian Federal Law Concerning Mediation in Legal Disputes, Germany's Baden Würtenberg Reconciliation Law effected in 1999 and Bavaria's Law on Compulsory Alternative Dispute Resolution in Private Law adopted in 2000, Hungary's Law of Mediation, and Bulgaria's and Slovakia's Laws of Mediation adopted in recent years were considered in the preparation of the draft, as well as UNCITRAL's Model Law and European Union's Proposal for Directive. Besides, these documentary sources, meetings were held at various occasions with specialists from countries such as the United States of America, the United Kingdom, Italy, Spain and Canada; and convening with specialists and practitioners from countries such as Germany, the Netherlands and Austria, the developments in comparative law were monitored. Access to justice is a fundamental right secured under article 36 of Constitution of Republic of Turkey and under article 6 of European Convention on Human Rights. By means of the alternative dispute resolution methods, the parties are included in the reconciliation process and reach a conclusion depending on their intention. Thus, the alternative dispute resolution is a mechanism provided by the state to the individuals for the resolution of the disputes apart from judicial power. Although it may be considered that the parties may resolve disputes by reaching an agreement

1 Document 52002DC0196

at any time and by benefiting from the mediation of the third parties, the state is required to make regulations on this matter as well.[2]

In 2007, while the commission was working for draft law, an important EU project with a wide perspective which aims to introduce ADR methods to Turkey commenced under the provision of Ministry of Justice. The author herself also worked as a key manager in this project[3] that aims a better access to justice in Turkey by not only highlighting and developing the legal aid system to ensure that all citizens may have the opportunity to access the judicial system but also introducing ADR processes as a significant mechanism for the same purpose. Turkish legal system and stakeholders met with mediation for the first time by means of the ADR component of this project.

The commission working on the draft law had a long way until the announcement of Law on Mediation in Civil Disputes in Turkey.[4] Lawyers, some politicians, NGOs and some members of the judicial system were against the practice of Mediation. Some political parties strongly objected to the possibility that an ADR law enters into force. "Two most populated bar associations of Turkey stood up against mediation, even before it became a part of the legal system"[5]. **"**...the Ankara Bar Association also released a press statement indicating that this mediation mechanism collects the executive and judiciary powers of the state in the same hand; the statement also claimed that the mediation mechanism ignores lawyers and harms the justice."[6] Despite the reluctance of some parties and especially lawyers and judges, Turkish Mediation Law on Civil Disputes ("**Law**") adopted on 22 June 2012 and came into force on 22 June 2013, after one year since the announcement. With this development, for the first time in the country's legislative history mediation has officially became another option for the resolution of civil disputes between parties. Following the enactment of the Law,

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2 Law On Mediation In Civil Disputes No. 6325 With Comparisons, 22 January 2014, by Assoc. Prof. Mustafa Serdar Özbek, Turkish ADR Legislation

3 Technical Assistance to Better Access to Justice in Turkey, 2007-2009

4 Act No. 6325, Official Gazette 22 June 2012, No. 28331, enacted 7 June 2012

5 Gizem HalisKasap, LLM, "A Comparative Overview of Mediation Practice In Turkey In Light of The U.S Experience" Legal Law Journal, 2018, No. 192

6 The Ankara Bar Association, Activity Report of 2010-2011, p.48

the Regulation Regarding the Law on Mediation for Civil Disputes[7] (the "**Regulation**") also came into force on the same date with the Law.

The adoption of the Mediation Law in Turkey may be regarded as a positive progress in Turkish Law. The advantages such as being confidential, time efficiency and cost efficiency make the mediation highly preferable for certain types of cases. At the beginning Turkish legislators preferred "voluntary basis mediation" with motivating rules and a detailed procedure in order to enable and motivate the community to prefer Mediation. One of the important aspects of the Law was the possibility of having Mediation process before or during the court procedure. "The lack of awareness on ADR systems, the above mentioned provisions do not create a suitable environment where ADR can play a central role in all fields of civil dispute resolution. In fact, the Civil Procedural Law does not provide necessary authority to use ADR. Thus, it is widely accepted that the Civil Procedural Law should be amended to provide a broad authority for using ADR processes in all civil cases."[8] This requirement brought another milestone to the development process of mediation in Turkey during judicial reform movements.

Since Ministry of Justice has adopted a strategy for judicial reform in line with the EU acquis at that time, the old Civil Procedure Law also has been replaced with a new form including certain amendments to promote and facilitate the practice of mediation.[9] The Article 137 in this new form of Civil Procedure Law provided that the judges are required to ask to the parties about having voluntary mediation process before court procedure at a preliminary hearing. This step was before than the announcement of the Law of Mediation in Civil Disputes. All these reforms and preparations brought a new era for the resolution of civil disputes in Turkey. Ministry of Justice formed a Mediation Board as it was announced in Act 6325 with the representatives of various institutions and agencies to keep the objectivity for the implementation and the development of mediation.[10] Model Ethics and Rules for Mediators and Mediation System announced by this board as another important step.

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7 The Regulation, Official Gazette, 26 January 2013, No. 28540, then updated in 2017

8 BünyaminAlperEkşi, "Better Access to Justice in Turkey", Turkish Ministry of Justice DG for EU Affairs, 19 April 2007

9 Code of Civil Procedure, Act No. 6100, Official Gazette, No. 27836, 04 February 2011

10 Model Ethics and Rules for Mediators and Mediation System, Ministry of Justice Mediation Board, March 2013

Before the Law came into force, Ministry of Justice established a separate department that is responsible to General Directorate of Legal Affairs. In the beginning, Main role of Mediation Department was to monitor the implementation of the Law and suggest the necessary amendments. Other assignments of the department were promoting the positive aspects of mediation, organising international meetings, conducting exams, permissions for mediation training courses, mediator registration process and records, auditing the system and mediators, technical researches and keeping the statistics under the control of the department.

From June 2013 to November 2017 the Mediation Department organised many trainings, seminars, campaigns to raise the awareness about mediation. In these years the high settlement rates in labour disputes through mediation encouraged the Turkish government for providing mandatory mediation for labour disputes. The disputes regarding labour law took an important place in the agenda of jurisdiction. In this term, voluntary mediation process of cases provided amicable settlements without any need to judicial procedure in courts. Statistics demonstrated that 89% of the civil disputes brought to mediators were labour law originated where 90% of them concluded with a settlement.[11] These statistics encouraged the government to promote "mandatory mediation" in labour disputes through mediation awareness campaigns, mediation skills trainings, seminars, international conferences and symposiums.

The new Labour Courts Code ("**LLC**") including mandatory mediation arrangements in its Article 3 was announced at October 2017[12] with the enforcement date of 1 January 2018. Pursuant to Article 3, mediation is a pre-condition to a lawsuit where the parties should apply for mediation in order to solve their labour disputes before filing a lawsuit. It is better for parties to attend to the first meeting. Because parties are not responsible with extra court fees, if the dispute solved by mediation. The claimant also obliged to add final written records of this procedure to petition under the condition of non-agreement.

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11 Project on Developing Mediation Practises in Civil Disputes in Turkey, Endline Research/Survey Report 2017, p.35-36. (hereinafter "the Survey")

12 Labour Courts Code, Act No. 7036, Official Gazette 25 October 2017, No. 30221

Starting from January 2018 and as of 24 April 2019[13] approximately 312,645 out of 487,075 Labour Law cases were resolved through mandatory mediation. The mediators who had an extra "LLC expert mediator" trainings reached the settlement with the rate of 68%. The significant change was especially on caseload as the number of cases decreased 70% this year comparing the last couple of years. The recent changes in the field with mandatory mediation experience increased the demands to extend the scope of mandatory mediationthis time for commercial disputes. Reducing caseload of commercial lawsuits also motivated legislators to establish the Law on Legal Procedures to Initiate Proceedings for Monetary Receivables Arising out of Subscription Agreements[14] ("**Law No. 7155**") with new articles being added to the Turkish Commercial Code and the Law on Mediation in Legal Disputes.

With this establishment not only the civil commercial disputes became the new subject of mandatory mediation but also the facilitative mediation arranged in Act 6325 now turned to evaluative with the new articles. Thus, only four years voluntary based mediation experience brought Turkey an expanded mandatory pre-litigation mediation system by including commercial disputes with a remarkable momentum. Adopting Act 7155 was the third major step in Turkey to underline the role of mediation in civil disputes resolution. The date of commencement for Act 7155 was 01 January 2019. In practice the same methods and the official system with LLC were set eligible and in the experience of six months 88,876 commercial dispute cases were forwarded to registered mediators. Mediation Department announced that in 68% of these cases parties reached a settlement.[15] Even though there are some concerns about the practice, quality of the skills of the mediators, some ethical issues and the enforcement pending difficulties the lawyers, mediators, entrepreneurs are mostly on the positive sides of this ADR option.

According to the recent statistics of Ministry of Justice, currently, the number of registered mediators number is approximately 16,500 in Turkey. In the past two years, nearly 33.000 more lawyers completed 84 hours of mediation basic training certificate program and waiting for the exam of Mediation Department of Ministry

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13 Statistics of the Department of Mediation at 24.04.2019

14 Act No. 7155, Article 20-23, Official Gazette, 19 December 2018, No. 30630

15 Statistics of Department of Mediation, 01 July 2019, announced by Mr. Hakan Öztatar, Head of Mediation Department, Ministry of Justice

of Justice. Furthermore, the bars and remarkable number of the lawyers, judges, academicians made half a turn in their approaches to mediation. "With the shrinking legal market and inflation in the number of lawyers in Turkey, mediation has undoubtedly come to be seen as a new market that offers lawyers a chance to have a bigger piece of the pie. To secure position of lawyers in this mandatory mediation new market, the Turkish Bar Association has also revived the long dormant provision of Article 35/A of the Attorneyship Law, which entitles Turkish lawyers to conduct negotiations and conciliation. The Istanbul Bar Association as well as other bar associations have offered half-price discounts on mediation training programs for members. As such, the range of options available and the motivation to embrace mediation in general has expanded significantly. Nevertheless, Turkish mediators had limited time to develop their expertise in mediation and mediation advocacy -specifically for commercial disputes- given the Act became effective on January 1, 2019."[16]

Currently, Mediation Department plans to announce the requirement of "expertise trainings" not only for commercial disputes but also for family/custody, consumer, insurance, banking and finance, construction, energy disputes that are pending for the mandatory mediation for 2020. Another important issue for this area is to increase the quality and the number of the trainings for basic, advanced mediation skills and mediation advocacy. Mediation advocacy trainings only took place in some renewal trainings in limited courses in recent years. That was not in the first establishment plan, the focus point was mediation but the field experience proved that the lack of mediation advocacy expertise would be a noticeable handicap for future developments.

Legislation, Rules, Centralized Accreditation Mechanism

Act 6325[17] that came in to force on 22 July 2013 is the first and the leading part of the legislation that regulates the terms and conditions for mediators and mediation. It is an important step of the harmonization of Turkish laws with the EU legislation.

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16 Silver Bullet of Mediation? Turkey Implements Mandatory Pre-Litigation Mediation in Commercial Disputes, Turkish Law Blog, 11 January 2019, Gizem HalisDepartmeneKasap - Wake Forest University

17 The Code on Mediation In Civil Disputes

The following national laws and regulations govern the conduct of mediation in Turkey since 2012:

- Code on Mediation in Civil Disputes numbered 6325 dated 7 June 2012.
- Civil Procedural Code numbered 6100 dated 12 January 2011.
- Regulation on the Code on Mediation in Civil Disputes dated 26 January 2013.
- Model Ethics and Rules for Mediators and Mediation System announced by the Ministry of Justice, Mediation Board in March 2013.
- Mediation Fee Schedule annually regulated by the Mediation Department, Ministry of Justice
- Final Decision of Constitutional Court of Turkey, 11 July 2018, 2017/178
- Labour Courts Code numbered 7036 dated 12 October 2017 (LLC)
- Code on Legal Procedures to Initiate Proceedings for Monetary Receivables Arising out of Subscription Agreements (Law No. 7155)
- Regulation on the Code on Mediation in Civil Disputes dated 02 June 2018 (updated)

In Turkish legal system, mainly the use of this alternative dispute resolution may be decided by the parties freely (voluntarily) and they are subject to equal terms and conditions during the mediation process ("equality principle"). Moreover, mediation may be used only for civil cases, whereas the cases which include the claims regarding family violence are not subject to the mediation. In accordance with the above mentioned EU-Directive, this Law is applicable also to the civil cases involving a foreign element. Between 2013-2018 application to mediation option in civil disputes with governmental agencies was prohibited. In the Labour Courts Code, legislator allowed mediation option between governmental agencies and public. This is another milestone in the practice field. Some of the main principles concerning the mediation in Act 6325 are:

Ban on advertising of mediators: Pursuant to the Law, mediators' advertising authorities have been limited such that they are not entitled to use other titles than mediator, lawyer and academic titles.[18]

[18] Act 6325, Article 10

Confidentiality: Mediators and parties are obliged to keep all documents, information which have been submitted or obtained with respect to scope of the mediation confidential.[19]

Obligation to exercise diligence and principle of objectivity and independency: Pursuant to the Law, mediators are obliged to fulfil their duties objectively, personally and carefully. In case of a court case in the same subject in which they were appointed as mediator they are not entitled to be appointed as lawyer, judge or expert.

Duty to provide clarification of parties about the mediation period, its legal principles and legal conclusions: Mediator is obliged to inform the parties about the mediation procedures, legal principles and conclusions and about the document that will be issued after the mediation procedures at beginning of mediation processes.[20]

Duty to keep the documents: The aim of introducing the register of mediators is to establish a certain order for the use of the title 'mediator' and the authorities granted by this title, and to make the supervision of mediators possible.

Equality: The mediator shall be liable to maintain equality between the parties.[21]

Voluntariness: The parties shall be free to resort to a mediator, to continue or to cease such process.[22] In mandatory pre-litigation mediation cases the mediators also can be chosen by the parties and then the name will be registered to National Judicial System (UYAP) or the portal UYAP may directly appoint one of the registered mediators under the eligible requirements.[23]

Impartiality: The mediator shall personally carry out his/her duty in a careful and impartial manner.[24] This situation is clearly stated for the preservation of the confidence of both parties.

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19 Act 6325, Article 4
20 Act 6325, Article 11
21 Act 6325, Article 9/3
22 Act 6325, Article 13/1-2
23 Act 7036, Article 4-6
24 Act 6325, Article 9

Using the title: The mediators entered in the register of mediators are entitled to use the title "mediator" and to enjoy the authorities granted by this title. The mediator is obliged to indicate this title during the mediation activity.[25]

"The duty of keeping and updating the register of mediators is given to the Ministry of Justice. Thus, the records concerning all the mediators will be compiled together with a single register to be kept Turkey-wide. In addition, by providing public access to this register and the information – covered in the frame of the principles to be specified in the regulations to be issued in accordance with this article - via Internet, the people willing to access mediator information will easily access such information."[26] After the mandatory pre-litigation mediation came in to force for labour law in 2018, the mediators who had the specified training for this procedures were appointed here as the expert mediator for LLC. Only these expert mediators can take place in these cases. There is not such an extra training enforcement for the mandatory pre-litigation mediation in commercial disputes yet.

The main conditions for the registration of mediators list of Ministry of Justice are;

- Being a Turkish citizen,
- Having at least five years business experience and undergraduate law degree,
- Being fully competent,
- Having no criminal record except intentional offences,
- Completing the 84 hours mediation basic skills training from a Ministry of Justice granted institution, having the approved certificate from there and passing the written exam carried out by the Ministry.

The mediator may commence his/her activities as of the date of registry in the register of mediators. Being registered to this list is extremely important for the mediators, benefited parties and the other parties since the enforcement of settlements could only be possible with a registered mediator's documents. The only centralized accreditation mechanism is this registry and kept under the control of Ministry of Justice .

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25 Act 6325, Article 6

26 Law On Mediation In Civil Disputes No. 6325 With Comparisions, 22 January 2014, by Assoc. Prof. Mustafa Serdar Özbek, Turkish ADR Legislation)

The model of mediation services have similarities in both in voluntarily or mandatory options. Parties have right to choose their mediator from the registered list and sign a nominating paper for mediator in mandatory cases.[27] If they do not agree about the mediator, they can apply to the court related to Mediation Bureaus for them to appoint one from the registered list by National Judiciary System (UYAP). The mediator should check the eligibility of the civil dispute if it is available for mediation or not under the conditions of Act 6325.[28] UYAP is the main source to connect with the mediation system in the country. All the registered mediators have to be connected with UYAP to obtain the applications, documents about parties, other necessary papers, information details of the applicants and to contact with the Mediation Department to send the results of each procedure and send copy of final papers to the department.

"Turkish law regulates both ad-hoc and institutional mediation. The Hacettepe University Arbitration Practice and Research Centre and the Istanbul Arbitration Centre, İstanbul Chamber of Industry, İstanbul Chamber of Commerce provide institutional mediation services. There are also other organisations set up by groups of individual mediators, which serve as institutional mediation centres. Mediation has not yet become a widespread practice in commercial and civil disputes, although it is expected that institutional mediation shall increase the confidence of commercial parties in the process. The centres providing institutional mediation services, despite some similarities, usually have their own rules and use only Turkish legislation for the mediation process. They also provide secretarial services during the mediation process. There are no separate official statistics on whether commercial parties opt for institutional mediation or ad-hoc mediations."[29]

"the position of the government in the mediation field is reasonably ruling that ADR process sometimes is under the risk of being overregulated. The government oversight body, the Mediation Division ("**the Division**"), established at the Ministry of Justice, keeps the registry of mediators, conducts exams, provides permission for training and certification, and promotes and monitors the overall mediation policy."[30]

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27 Act 6325, Article 14

28 Act 6325, Article 15

29 Mediation Q&A: Turkey, Practical Law Country Q&A w-006-5969, 31 May 2018, by EfeKınıkoğlu and YiğitParmaksız, Moral & Partners

30 Turkey: Mandatory Mediation is The New Game In Town, Dr. İdil Elveriş, Kluwer Mediation Blog, 3 March 2018

Enforcement of the Settlements

"Under Turkish law, executing a settlement agreement is not sufficient to make it enforceable. To enforce a settlement agreement, the parties should obtain an annotation on the enforceability of the agreement from the competent court. Drafting a settlement agreement in an accurate manner which will be approved by a court is crucial in order not to spend time or give rise to any further costs. An annotation on the enforceability of the agreement is similar to a decision given by a court. A settlement agreement concluded by mediation does not differ from a settlement agreement concluded apart from mediation. Both proceedings are implemented in the same way before a court, and the settlement agreement drawn up at the end of both proceedings resembles a court decision."[31] For the enforcement court be able to issue such a commentary it has to determine that the dispute resolved by means of agreement arose from an affair on which the parties may freely have a disposal and that is suitable for compulsory execution with respect to its contents.

During ongoing lawsuit proceedings, if the parties bring a settlement agreement reached through mediation or through any other alternative dispute resolution method before the court decision, the court shall decide according to the agreement between the parties. The court decision will be the natural enforcement.

"By virtue of the provisions of the Code of Mediation in Civil Disputes the legal nature of the agreement document -which is drafted as a result of the mediation- and its enforceability before foreign courts raise some questions. Indeed, as per Article 18 of Code of Mediation in Civil Disputes with the heading of "agreement by the parties" envisages that if the parties come to an agreement as a result of the mediation, a document reflecting this agreement is to be signed by the parties and the mediator. For the agreement document to be enforceable, the parties must apply to civil court of peace in order to obtain enforceability decision. Thus, the parties may enforce the decision reached as a result of the mediation as if it is a court decision.

It is to be noted that the same provision also regulates that if the agreement document that is signed by the parties is also signed by the parties' authorized lawyers, the agreement document is considered to be a document bearing the same

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31 Same footnote w.29

enforceability power that court decisions have without the parties having to obtain a decision from the civil court of peace in the first place.

In both cases, it is uncertain how this agreement document is to be enforced if one of the parties is a foreigner who does not abide by the terms of the agreement document and who does not have any assets in Turkey either. Because a recognition action before foreign courts would be needed under these circumstances for the enforcement of the agreement document in foreign countries and considering that the agreement document is neither a court decision nor an arbitral award, there might arise problems during the recognition of the agreement document."[32] The figures and official statistics are all above on the page. There were two different sides for the promotion of mediation; public and legal community such as lawyers, academicians, judges etc.

"In Turkey, the promotion of mediation has been relatively more formal and dull, yet promising. The Turkish Mediation Department of the Directorate General of Legal Affairs, established under the Turkish Ministry of Justice, has been the main supporter and promoter of the use of mediation. The Department has sent text messages regarding the mediation process to court users registered on UYAP (National Judiciary Informatics System) and has distributed posters, brochures, and leaflets to courts, chambers of commerce, and guilds. It has also launched a website and hotline to provide information about mediation.[33] The department has aired several public service announcements (PSAs) that emphasize the advantages of mediation in terms of time and cost.[34] Three mainstream Turkish TV shows have also been commissioned by the department to introduce mediation as an alternative mechanism in their story lines.[35] A recent survey indicates that PSAs and lawyers are court users' main information and encouragement source to use mediation. The hard work of introducing mediation should not be undermined, and these attempts are heading, to be sure, on the right track. However, there is more

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32 Turkey:Mandatory Mediation For Commercial Receivables, Mondaq, 07 January 2019, RızaGümüşoğlu, AsenaAytuğKeser, Pınar Ece Bişkin

33 The Turkish Mediation Department of the DG for Legal Affairs, Promotional Activities, https://webcache.googleusercontent.com/search?q=cache:SFIpaT-0CtAJ:https://www.coe.int/t/dghl/cooperation/cepej/source/MoJ%2520Presentation_Turkey_Mediation_TR.ppt+&cd=10&hl=tr&ct=clnk&gl=us&client=safari

34 Ibid

35 Ibid

to do. The Turkish audience needs to absorb mediation by identifying themselves with the lead characters in mass media who experience mediation or with plots that will provide see the involvement of ordinary people in mediation practice."[36]

The other side of the promotion for public and future beneficiaries of mediation was to provide some unusual advantages like enforcement of the settlement agreement, time efficiency, cost efficiency with settled tariffs, flexibility, settlement agreements are being subject to fixed stamp duty and fees.

For the legal community, especially for lawyers the most important two promotions were to keep the mediation profession privileged for law undergraduates and to guarantee the payment of the first two hours of mediators' fee by the government if there would be no agreement. Also Mediation Department organised many conferences, seminars, communication groups and training materials for the stakeholders of this community. Mediation department also supported two exclusive international project for promotion.

Commercial Mediation Istanbul Pilot Project at Grand Bazaar. 2015-2016 Commercial Mediation Istanbul Pilot Project has a large scale public awareness campaign and improved the implementation of Turkey's Law on Mediation for the resolution of disputes over 3,500 shops.

Improving Better Access to Justice in Turkey through ADR mechanisms. I- II Project 2016-2017: During the terms of Improving Access to Justice Turkey through the ADR Mechanisms I-II projects, over 250 seminars, TOT programs, workshops, conferences, and trainings, study tours conducted for lawyers/legal professionals, judges, prosecutors, civil sector, and business community in more than 45 cities throughout Turkey.

Chapter 3 Professional Mediation Institutions and Professional Standards

There are approximately 65 Mediation Associations and 200 private mediation centres in Turkey for now. These entities i.e here defined as Mediaton Centres are waiting for the accreditation of their cridentials after legal framework about these

[36] Ibid 5, p.2

cridentials will be defined and announced by the government where the MOJ's councils are working on. Nominated Arbitration Institutions in the ADR arena organised mediation services under their umbrellas. İstanbul Chambers of Commerce, Ankara, Mersin, Bursa and Kayseri Chambers of Commerce have Mediation and Arbitration Centres. Some of the professional institutions designed mediation services for the need of their members. Istanbul Chambers of Industry has a Mediation Centre, The Turkish Employers Association of Construction Industries (INTES) and Istanbul Apparel Exporters' Association (IHKIB) have a mediation centre as in that concept.

Since the setting up of institutional mediation centres is currently not regulated by law so the service criteria of the mediation sections in these Centres are formed only due to the present Turkish Law and Conducts. There are also other organisations set up by groups of individual mediators, which serve as institutional mediation centres as the same manner.

Mediation Department is also responsible for the performance of mediation services and for supporting academic work on mediation institutions. The Registry of Mediator records are kept by the Mediation Department.Accreditation mechanism is regulated by Act 6325 and only these accredited mediators are able to prepare official documents for enforcement.

Mediation practice is very young in Turkey and still expanding with new practices, institutional mediation will expand in the near future, followingthe enactment of the relevant legislation.

ADR-İstanbul, a new entity, started to constitute a platform to design an international institution in Istanbul to cooperate with universities and foreign mediation centres to establish trainings and cross border dispute resolution in international professional standards.

The main independent mediation institute owned by the government is the Board under the Legal Affairs Mediation Department, this board includes members from judges, bar associations, universities, chambers of commerce and mediators, and has special duties. By providing for the appointment of representatives from the professional organizations and public bodies - which are

directly or indirectly involved in different fields of justice - to the Board of Mediation, it is aimed to provide objectivity by establishing a balance in the fulfilment of the duties specified in the law. The duties of the Board are as follows:[37]

- Determining the basic principles concerning the mediation services and the codes of practice of mediation,
- Establishing the basic principles and standards concerning the mediation training and the examination to be held at the end of such training,
- Determining the rules concerning the supervision of the mediators,
- Amending, if necessary, and finalizing the draft regulation which should be issued in accordance with this Law and is prepared by the Directorate General,
- Cancelling the training licenses of the training institutions,
- Deciding to delete a mediator from the register within the scope of the second paragraph of Article 21,
- Setting the admission fee and yearly dues to be paid by mediators to the register,
- Approving the Minimum Wage Tariff, by making amendments if necessary,
- Making recommendations to increase the efficiency of the activities to be carried out by the Department,
- Delivering opinions about the annual activity report and plan of the Department,
- Determining the contributions that may be provided by the institutions and organizations in relation with the matters included in the activity plan of the Department.

Any mediator annexed to the court or other institutes.

In Turkey mediation is not court-annexed for now, judge should offer a mediation session to the parties at the preliminary hearing but court procedure and mediation proceedings are strictly independent from each other. Mediation proceedings are not conducted under the shadow, control or safeguard of the courts in Turkey. Thus, courthouses do not have annexed mediators.

The mediation bureaus are established in most of the courthouses in Turkey and to take the application and appoint a mediator (through UYAP). The personnel of the mediation bureaus have administrative duties and most of them had mediation

37 Act 6325, Article 32

training by the provision of Justice Academy. They are the official personnel of the Government; they are not court-annexed mediators.

The requirements-qualification of mediators in these organizations

The Mediation Department, under the Ministry of Justice shall keep the register of the persons who have attained the authority to mediate in private law disputes. The information pertaining to the persons included in this register shall also be announced electronically by the Department. The procedure and principles concerning the keeping of the register of mediators shall be designated in the regulations to be prepared by the Ministry.

The training model of mediators

In order to be qualified as a mediator it is required to complete 84 hours long essential training and pass the written exam. I have explained the other conditions above. Additionally, 24 hours long certified training is mandatory for labour law expertise. A mediator is required to tae at least 8 hours long refreshment training in every three years. Legal regulations are in this respect. Currently, Mediation Department manages on further mandatory expertise trainings for mediation in the areas of energy, insurance, healthcare, banking and finance and construction. It is mandatory in the essential training to apply the modules that are in the training book published by Mediation Department. These modules are Mediation Skills, Negotiation Techniques, Legislation, Ethical Principles, Case Studies, Theory of Conflict, Processes of Mediation. Mediation training is permitted to conduct only by universities and bar associations permitted by Mediation Department. The certificate, which is required to be able to attend to the written exam, can only be taken by these institutions and by completing trainings that have attendance requirement. By the year 2019 there are a coordinator and instructors approved by Ministry of Justice for each institution permitted to conduct training. The main purpose is to increase the quality of training. Mediation Department closely oversights all stages of the training. In addition, there are many feeless or limited fee workshops that do not have independent centre certification.

The assessment mechanism

Oversight of mediators is regulated with legislation and is executed by Mediation Department and Mediation Board. The aspect regarding which criteria will be

effective for efficient oversight, assessment is limited with compliance with acts, regulations and ethics codes.

There are no centres yet which are different from others with their qualifications. Since the main criteria are designed for more local systems, there could be less cases in institutions which have mediation cases completed in accordance with the ethics codes. However, this information should not be misleading regarding performing the qualified processes.

Any development focus on the continuous development on the professional mediator.

While mostly legal regulations and legal principles are to be found in the refreshment trainings or expertise trainings, it is also encouraged that the experts in sector be an instructor. Besides, there are practice studies. Bilgi University and ADR İstanbul concentrate mostly on "Improving Mediation Skills", "Mediation Advocacy" and "Mediation Ethics" in the refreshment trainings. After being a signatory for Singapore Mediation Convention that team will begin to establish new programmes to support the development of mediators as an international cross/border dispute resolution experts.

The natures of disputes frequently use mediation

Any private law matter subject to parties discretion can be subject to mediation regardless of such matter having a foreign element. It is currently mostly used in employment disputes, separation of assets disputes, real estate, insurance and commercial disputes.

Number of mediators/accredited mediators in the organization and in all of the area.

According to the Ministry's recent statistics, the registered mediators is approximately 16,500, nearly 33,000 lawyers completed 84 hours of mediation certificate program and waiting for another exam in order to be registered as mediators. The examination shall be held by the Ministry, and in a written format. The exam format was different, the practical examination was cancelled due to high volume of applications.

Starting from January 2018 and as of today (12.08.2019), approximately 299,668 labour cases resolved through mediation. The settlement rate is 68% and the number of cases that has been appointed mediators is 127,845. The significant change is seen especially on the caseload as the number of cases decreased 70% this year comparing the last couple of years. As a result, the recent changes in LLC has tremendously increased the demands for mediation trainings, especially mediators would like to have more practical skills in order to respond the high amount of request from the parties. Mandatory mediation is extended for commercial disputes in the beginning of 2019. Since January 2019, 88,876 commercial cases resolved through mediation. Family disputes and consumer disputes are pending for the mandatory mediation for 2020.

Finally, the effective use of mediation and conciliation is listed in recently published the Government of Turkey 100 Days of Action Plan.

Chapter 5 Comprehensive Development in Integration with Other Professions

Is there any mediation advocate training and accreditation for advocates

Mediation advocacy training has not been taken into consideration at the beginning of the practice at 2013 by the government; the focus was about only mediation. Due to the advocacy problems in mediation sessions during 18 months field practice period, İstanbul Bilgi University for the first time began to prepare Refreshment Mediation programmes with mediation advocacy.

As mentioned above only law school undergraduates are allowed to be mediators by fulfilling also the other credentials by law so the main issue is ninety percent of registered mediators are also active lawyers. Thus, that situation caused an important problem for mediators to realize the differentiation between two practices. By the time there were some limited programmes at one or two more universities and some workshops were took place about mediation advocacy until 2016.

Within the framework of "Improving Access to Justice Turkey through the ADR Mechanisms I-II" project sponsored by the British Embassy (2016-2017)[38] in association with Ministry of Justice, Mediation Department, the importance of Mediation Advocacy trainings were strongly underlined by the government and over 250 lawyers were trained in 3 days mediation advocacy trainings as an important step before mandatory mediation process. "Mediation Advocacy and Preparation for Mediation" book which were written by Mr. Andrew Goodman[39] were translated into Turkish by the Ministry of Justice and 5000 copies were of them circulated at the court houses .

Where only the law graduates are taking roles in this procedures the need of much and advanced mediation advocacy training is still so high. For now, there is no extra accreditation for mediation advocacy. The legislators are now working about this matter with also about international accreditations for the mediators.

The practice in electing mediation advocate and mediation.

The mediation models are limited in Turkey for now and the system is developing day by day so with an increasing demand for quality and success for better dispute resolution these practices will also improve here. Singapore Convention will be another motivation for all parties to upgrade themselves and the system to the international standards.

Chapter 6 Participation in International Market

The experience of resolution international cross border disputes are limited for now. The main reason is the lack of international institutional standards of mediation services and the international accreditation of mediators. To establish and expand the mediation policy of the government has been planned through country-wide at the beginning. In six years of practice huge steps were taken in local system but since Turkey was not a signatory to any binding international treaties or bilateral agreements on mediation, only local law standards are in charge so international dispute resolution is very limited only with individual case

[38] Improving Access to Justice Through ADR Mechanisms I-II, Mediation Advocacy Trainings, Samsun-Antalya, 2017

[39] Andrew Goodman, Mediator, Mediation Advocate and Mediation Trainer, Author and Consultant; Convenor, SCMA; Director. AMATI by LinkedIn

proceedings.

Turkey now is a signatory of Singapore Mediation Convention, that move brought new targets and standards to Turkish legislation to compete globally in international cross border dispute resolution. The target is to be one of the important and reputative Dispute Resolution Location for the Greater Region (Africa, İslamic World, Caucusus & Central Asia) Especially in İstanbul there are new presentations of entities as ISTAC (İstanbul Arbitration Centre) about mediation-arbitration, med-arb rules and some other platforms like ADrİstanbul are working on international cridentials for dispute resolution tools, ethics and quality standarts of the prosedures. Number of the mediators that accredited international are also increasing. MoJ boards, councils and bureaucrats are focused on the updates and the new configuration of Law 6325 and the ratification of Singapore Mediation Convention.

When mandatory mediation was introduced for labour law disputes on 1 January 2019, there have been many mediation cases regarding construction disputes or employer-employee disputes whose majority is disputes regarding Turkish employees working at consortiums abroad and foreign employees working at consortiums in Turkey. It is declared by Mediation Department that more than 45,000 cases are resolved by this procedure. The major concern in this regard is the possibility of not been conducted in accordance with the mediation ethics. Lastly, in June 2019 Turkish Court of Appeal ruled a decision[40] that affirms the mediation ethics is not complied regarding these mediation cases taken to the courts. Thus, it is essential to comply with ethics rules. Increasing the number of training, providing control on this issue and providing mediation practice in international standards may solve these problems.

Practice studies, case studies and ethical codes are required mostly for mediation professional. Besides, there are too less Mediation Advocacy trainings, whose number should be increased. Enhancing the mediation skills is highly important. It is also important to improve the ability to perform the accurate mediation because of the fact that most of the mediatorsperform advocacy simultaneously. New training models should be prepared by accepting the fact that

[40] 9th Court of Appeal, Decision No.2019/13040

specialization is to be with sector experience rather than improving the theoretical legal knowledge in this area. Currently, international dispute resolution experience is very limited in mediation. The number of mediators who are experienced in this area and can be registered to Mediation Registry is also considerable low. Practice trainings and shadowing exercises contribute in these issues.

Chapter 7 Conclusion

Whereas Turkey lost some time while taking the road, latter considerably proceeded with fast steps in order to provide acknowledgment for mediation as a dispute resolution mechanism. Planning the process, selection of models to apply, establishing criteria have been a polemical process. However, the government is ready to take more conscious steps at all stages, after the mediation practice was commenced in 2013. The fact that only law graduates are allowed to be a mediator, regulations on everything from education to control, size of the signboards, selection of educational institutions and the fact that the government monitors everything with legislation contribute to this process as much as these cause to decrease on speed of development. Everything regarding mediation that mostly performed in national law issues is still evaluated according to the legislation and this inconveniences enhancing the quality of mediation practice itself, increasing the number of mediators accredited in international platforms or use of mediation mechanism in a broader scope.

Now, Turkey is one of the signatory state of Singapore Mediation Convention and getting ready to be a part of an international convention in Mediation area for the first time. It is clear that this move will generate new opportunities for the mediation practice in Turkey. However, most importantly, it is required to enhance the quality of trainings, improve not only the written exams but also internship-shadowing practices as in advocacy, increase the number of centres which have international standards, accredited Turkish mediators that have international mediation certificate, support cooperation with international mediation centres and promotion of seminars and workshops. It is important to apply international criteria in Turkey by permitting mediation trainings held in

foreign language, appoint certified mediators trained in Turkey for the disputes subject to Singapore Mediation Convention and provide accreditation for them.

ADRİstanbul, which the author is among its founders, operates actively and cooperates with different local and international Universities and Mediation centers for improving the international mediation opportunities in Turkey.

Author: FerdaCanözer Paksoy, IMI Certified Mediator,Founder of AdrİstanbuI

POTENTIAL DEVELOPMENTS ON MEDIATION IN THAILAND

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Mediation is arguably becoming a preferred method of dispute resolution in Asia, driven primarily by China and the Belt and Road Initiative (BRI). The vast scale of China's infrastructure programme, which extends also in South-East Asia, including Thailand, means that disputes are likely to be cross-border and must be settled as efficiently as possible. To promote infrastructure and other projects in Asia, there is a need to put in place a business-friendly legal and regulatory framework for public-private partnerships.

Mediation is an integral part of the Thai dispute resolution program. In olden times, young or inexperienced Thais would seek the wisdom of their elders in resolving community issues, this was an informal mediation that is practised until today. Most court cases in Thai courts are encouraged to participate in mediation before a final court trial. The public and private sectors now utilize mediation more to resolve differences at the earliest stage of the conflict. There are three areas where mediation is concerned in Thailand: Culture, Training and Legislation.

- **Culture**: it is important to note that mediation is only effective if both parties have a genuine desire to engage in a good faith attempt to resolve a dispute. Developing a culture of consensus-based dispute resolution methods, i.e.

mediation, not only in legal professionals but also within companies, allows for more efficient, less expensive resolution and, above all, to preserve business relationships for longer.

• **Training**: the legal sector is constantly evolving, more and more legislative and procedural innovations are introduced, the only way to ensure a first-class service is continuous training to update legal skills and knowledge. The establishment of mediation centres, i.e. THAC, the increase in mediation training programs, the introduction of institutional rules to be more aligned with international standards and the recruitment of many new mediators ensure an efficient approach to provide high-quality specialists.

• **Legislation**: credibility and efficiency in resolving disputes are the keys to the proliferation of contracts, especially international ones linked to the BRI. Improving the legal framework and becoming part of the Singapore Convention on Mediation will boost investor confidence. Besides, incentivising the inclusion of mandatory mediation provisions in their contracts would avoid parties lengthy and costly trials.

At present, Thailand has already enacted the Dispute Mediation Act B.E. 2562 (2019), which is the first mediation act of Thailand. This Act is intended to set up the standards of mediation procedure conducted by state agencies in civil cases with certain amount of claims. By the effect of this Act, it is foreseeable that state officials need to be trained. Also, raising awareness is what the government needs to do in order to promoted the use of mediation under the Act.

However, some issues are still not addressed by this Act, for example, the privilege of mediators, the protection of confidentiality, i.e. Those are the things, that the government must consider so as to develop mediation in Thailand.

PEACE IS THE MEANS AND THE GOAL!

Raazia Siddiqui

Martin Luther King Jr. (1929-1968), the American leader who led the Civil Rights Movement once said, "Peace is not merely a distant goal that we seek, but a means by which we arrive at that goal!"

Peace is of the essence for the development and progress of human civilization. Yet our history chronicles how violent means have been used to jeopardize this peace. Everyone wants a peaceful society, a peaceful world. Yet, peace continues to elude a greater part of humanity! Worldwide, organizations have been making intensive efforts to foster a peaceful atmosphere and lay it as a bedrock of future opportunities.

The Islamic spiritual scholar, Maulana Wahiduddin Khan, has made an in-depth study of peace from both historical as well as the Islamic point of view. According to his study, there are two viewpoints in this matter: the concept of peace as defined by academicians and the concept of peace as defined by the ideologists. The scientists' concept of peace is based on realities while the idealists' concept of peace is based on utopianism.

Academicians define peace as an absence of war. But the idealists hold this definition of peace to be inadequate. They say that justice should accompany peace; that peace devoid of justice is no peace. Setting a precondition that peace should be accompanied by justice is impractical. This is because peace on its own does not bring justice. When people become tolerant and accept peace for the sake of peace, it allows opportunities to flourish. When man strives to avail these

opportunities, it enables him to strive for justice and other constructive ends. Peace is therefore always desirable for its own sake. Everything else comes after peace, not along with peace.

Unfortunately, a key reason for lack of peace around the globe is because peace is often bracketed with an ideal – be it justice or anything. Doing so only prolongs conflict and misery making peace an impossibility.

Peace and war reflect two different positions adopted by mankind. One who pursues the path of peace uplifts the level of humanity, while one who follows the path of violence plunges to the deaths of darkness. It is undoubtedly a fact that the power of peace is far greater than the power of violence. Peace is the way of the wise and that is why efforts are made worldwide in conflict-ridden areas to come to a mutual solution. The mediated process of conflict resolution is an effective alternate dispute resolution strategy to peacefully bring the parties to a discussion table for reconciling differences instead of taking it up on the battlefront and losing lives and damaging the economies.

Reconciliation is Best

Human beings have been endowed with wisdom, which allows them to process events and give a well-considered response. When provoked, each party has two options. One is to jump to confrontation, which is like a boomerang and not only does it damage the opposite party but also the one launching the confrontation. The second option is to adopt a conciliatory approach for resolving disputes. This approach allows the parties to create a safe buffer zone so that they can deliberate on the interests and find the best way forward.

The Quran says As-sulh Khair, which means 'reconciliation is best' (4:128). This statement of the Quran is an endorsement of the method of reconciliation. In light of this principle and Islamic teachings, there are a few ground rules that the parties engaging in conciliatory efforts must observe to ensure the best possible outcome. I shall now enumerate four Ground Rules that are of essence in any conciliatory proceedings.

1) Start from the Possible and Establish a Common Ground.

It is very important that a common ground is established between the concerned parties in their attempt to reconcile. In order to do so, they must start from the possible. Prophet of Islam was an undeterred advocate of peace. Throughout his

life, he faced sever circumstances where his adversaries attempted to jeopardize the prevailing peace. But he continued his unflinching efforts to explore all avenues to establish peace. According to a tradition recorded in Al-Bukhari, "Whenever the Prophet had to choose between two options, he always opted for the easier choice." To choose the easiest option means to begin from the possible, and one who begins from the possible will surely reach his goal.

Unfortunately, a key reason why the conciliatory efforts fail is when the parties do not start from the possible ground. Establishing peace should be foremost. Instead, they club it with 'other' preconditions and insist that peace can prevail only when there is no injustice, no violation of human rights and no violence of any kind. What they do not realize is that human world does not transform overnight. It is a gradual process, one where we have to remain invested. Peace is what kick starts this process and as we stay the course, we bring about conditions that would lead to the fulfillment of other desirable outcomes.

2) Feed the Opportunities. Starve the Issues.

Peace is the product of a positive mental attitude, while violence is the result of negative thinking. According to a German psychologist, Alfred Adler, a unique quality possessed by human beings is 'their power to turn a minus into a plus'.

This means that when the discussion is seemingly not in favour, there still always exists an opportunity. But in order to see that opportunity, man must be striving with peace as the end-goal. If those in the process of discussion engage in feeding the issues, they will never be able to obtain a peaceful and constructive outcome.

In the early days of Mecca, there were many problems and difficulties. At that time, a guiding verse in the Qur'an was revealed. It said: "With every hardship there is ease, with every hardship there is ease" (94:5-6). The way to success as described in this verse is to ignore the problems and avail the opportunities. When an individual or a nation is able to do so, infinite possibilities open up. This is when minus can be turned into plus.

The driving force for this is to realize at all times that violence shuts the doors of all positive activities, while peace opens the doors to them. It creates an atmosphere of positive living for the individual, society and the nation at large. All kinds of achievements are possible in an environment of peace. If violent situations hamper opportunities, peace helps favourable situations to flourish, where man's creative abilities can be nurtured and developed.

3) Be Ready to Embrace Change.

It rarely happens that any reconciliation can exactly reflect the fulfillment of the desires of both the parties involved. Being geared up to embrace changes is therefore of quintessence in the process. In the life of the Prophet of Islam, we have this example when he migrated from Mecca (his homeland) to Medina in order to maintain peace in the region. This change of approach greatly benefited his mission as now it found a peace to flourish.

We also have the example of Japan in this context. Post Second World War, Japan's industrial cities, Hiroshima and Nagasaki, were destroyed and Japan had suffered a severe defeat by Allied Powers. In the aftermath, Japan signed the Treaty of San Francisco and shifted its focus from war and militarization to build itself. As a result of its hard work, Japan soon came to be recognized as an industrial and economic superpower in the world.

4) The Power of Unilateral Peace

Peace can be attained only on a unilateral basis and not by adopting violent means or by negotiating through activism-based confrontational methods. In Islam, peace is the Summum Bonum or the highest good and the life of the Prophet of Islam is a complete manifestation of this approach.

Since the early period of Islam, the Prophet of Islam was repeatedly challenged by his opponents in ancient Arabia. Instead of first accepting peace, some of the companions of the Prophet wanted to first 'solve' the problems at hand. The Prophet however did not agree with this approach. There were several instances of wars and violence in those tribal days but Prophet of Islam wanted to put an end to this.

The Prophet took it on himself to establish peace and unilaterally accepted the conditions of the opposite party in what became the landmark Al-Hudaibiya Peace Treaty. The conditions of this treaty were clearly weighed heavily in favour of the opposite party. Yet, the Prophet of Islam accepted this peace treaty because he wanted to usher in an era of peace where constructive activities could be accomplished.

Historical records show that this peace treaty finalized, apparently giving no justice to the Prophet of Islam, but the Prophet concluded this treaty by delinking the question of justice from the question of peace. This delinking of the two issues

gave him the success which is described in the Qur'an as a clear victory. (48:1) The Qur'an called this a victory because, although the peace treaty itself was devoid of justice, it instantly normalized the situation, thus enabling the Prophet to avail of the opportunities present at the time.

In the majority of cases, reconciliation is possible only on a unilateral basis. That is, one party has to suppress its own inclinations and show a willingness to put an end to the dispute in accordance with other party's wishes. The main benefit of such an approach is that without wasting anymore energy or time, one is able to embark on the constructive course of action.

Peace Initiatives - Quo Vadis

Peace is essential for a better way of living—peace of mind, peace in society and peace in the world. It is the duty of all those who are engaged in conciliatory efforts to ensure that we do not let crisis take the better of our morality. In moments of crisis, when the individual opts for the way of peace, he cultivates positive thinking. On the contrary, when a man opts for the path of violence to solve his problems, he stoops to moral perdition.

The American philosopher Ralph Waldo Emerson (1803-1882) said, "Peace cannot be achieved through violence, it can be only attained through understanding." History shows that any success on the part of an individual or a community has been achieved by adopting peaceful and conciliatory approach. Adopting such an approach gives man the opportunity to utilize available opportunities to the fullest extent, whereas confrontation only leads to channelization of efforts into planning the destruction of others. The latter is inherently programmed to reach a destructive outcome.

It is therefore imperative that we let diverse thoughts and views thrive and build a society where peace is the bedrock. Such a society will become a catalyst for taking the human civilization to the next level of intellectual progress and development!

MANDATORY MEDIATION?

PRIYANKA CHAKRABORTY

WHAT IS MEDIATION?

In lay man's term, mediation is a process where two parties in conflict sit together with an intermediary, who is neither involved nor related to the problem but helps in having a meaningful conversation between the two sides and reach a middle ground for both. The middleman is required so that the parties can have a discussion and clear view of what needs to be sorted, defocusing on their grievances and emotional barriers and highlighting their issues, creating a solution which is acceptable to both. The middleman is not supposed to interfere by advising or suggesting anything or taking up sides. He is the neutral lens between the two conflicting parties which helps each of them to focus and thus solve the issue. Also, this entire process is voluntary, and individuals are free to take this up as per their will, and even the outcome is not binding.[41]

Mediation is based on the principles of voluntariness, confidentiality, impartiality, and self-empowerment."[42]

This definition stands with the former description of CEDR which is "Mediation is a voluntary, non-binding, private dispute resolution process in which a neutral person helps the parties try to reach a negotiated settlement." But, this has been revised based on the present-day practice trends of mediation. The overemphasis on voluntary and non-binding nature has become quite flexible in today's practice, and

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[41] SriramPanchu*Mediation Practice & Law – The path to Successful Dispute Resolution (*2nded, Lexis Nexis, Haryana, 2015) at 26

[42] "Glossary" (7 November 2017) Ministry of Business Innovation and Employment <http://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/government-centre-dispute-resolution/tools-and-resources/glossary#M [M].

therefore, these terms have been brought down.[43]It is their over-emphasis which is criticised and hence being mellowed down by avoiding these words in the definition.

As the primary idea is to have a self-empowering but fundamentally flexible process. CEDR has recognised it and thereby upheld the today's definition of mediation as "a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

ESSENTIALS OF MEDIATION

As per CEDR's definition, the essential elements of the process of mediation are:

1. The process is flexible -

The description of the word flexible is "system can change in a range and time frame."[44]

This means that the process does not have a strict procedure to adhere to as it can vary as per time or situation.

2. conducted confidentially -

The definition of the word confidential is "entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret."

This means that the process is not to be disclosed to any outsider who is not involved in the process. Expressed opinions and offers cannot be used in any proceeding as confidentiality is vital.

3. neutral person actively assists parties -

This refers to the mediator being a non-partial entity who helps the individuals in disputes by being an unbiased person who helps them resolve the conflict.

4. parties in ultimate control of the decision to settle -

This final command emphasises the self-empowering structure of the process of mediation. The veracity of the setting is that the mediator cannot enforce any resolution and it is in the hands of the disputed parties to decide. Mediator governs the procedure, but the consequence is in the hands of the individuals. This brings

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[43] Eileen Carroll "Redefining Mediation" (1 Nov 2004) Centre for Effective Dispute Resolution https://www.cedr.com/articles/?item=Redefining-mediation.

[44] *Black's Law Dictionary* (2nded, 1910, online ed) http://thelawdictionary.org at F.

in the composition of voluntariness throughout the process as it accentuates the fact that the parties have the final say in the process and that it is on them to even leave the process at any stage if they find fit.

Hence, these four essentials of the process cannot be hurt as that will shift the process from the boundaries of being mediation.

It is surprising to observe that the definition does not cover the very initiation of the process and leaves it open-ended. It neither supports nor opposes forcing parties to enter the process of mediation. This leaves us with an open range for defining how individuals can be brought down to the mediation table.

What is mandatory mediation?

The process of mediation is widely accepted throughout the world, but its implementation, interference and scope depend from one jurisdiction to another. Common law, Civil law and even various fields of law have different viewpoints and implementations around it.[45]

Thereby, it is not possible to define mandatory mediation with a single definition as its area of practice is subjective to each jurisdiction and therefore, leads to variety in its implementation and definition modifies accordingly.

But, in a general manner, Gary Smith outlines that

Mandatory mediation is when "Mediation is mandated through legislative, regulatory, or judicial power, removing the choice not to engage in mediation and replacing it with a requirement to do so."[46]

And, Nancy Welsh has defined as, "Mandatory mediation is the process in which parties are required, by procedural rule, to attend mediation as a precondition to having their case heard in court."[47]

Understanding both the definition and indulging in the essential extract from both, one can state that mandatory mediation stands for compulsory mediation, wherein the parties are forced to enter the process of mediation. This force can be applied

[45]Dorcas Quek "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) 11 Cardozo Journal of Conflict Resolution 479 at 483 [2].

[46] Gary Smith "Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not" (1998) 36.4 Osgoode Hall Law Journal 847 at 873 [4].

[47] Nancy Welsh "Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?" (2001) 79 Washington University L Rev 787 at 797.

in many forms, which we will discuss further. In simple terms, mandatory means compulsory and the full expression then stands for compulsory mediation.

Hence, it is safe to say that legally forcing parties to mediate is mandatory mediation. The legal force used to do so needs to be measured and examined. The nature, extent and strength of the power are all under scrutiny throughout the paper.

To understand the nature and extent of this force, it is essential to understand the need for this compulsion.

One can claim that though mediation is a much successful practice, we still lack the confidence and faith in such processes outside the court as its sanctity gets challenged in our minds over the long-established and respected process of litigation.[48] We have the age-old history of court procedures which has molded our thinking that a wrong must be punished and judgements must set examples, the very essence of the adversarial system resides on that. With such perceptions, having a self-empowering, highly confidential and compromising process questions our long established moral and legal faith in our law.
Or, just unawareness can be only one of the many reasons.

Hence, forcing parties to mediate has been proved helpful. England's Central London County Court system recorded 160/4,500 cases entering mediation when left to party's consent.[49] But when England encouraged ADR through cost sanctions that courts were empowered to provide as per Civil Procedure Rules, there was 141% hike in mediation cases. It can be presumed that stimulation for mediation makes the process much demanding.[50]

But, in any case, one must understand that making this process mandatory must not hamper the essential elements of the process. On the other hand, leaving it to choose has led us to today's overburdened and elitist court system as when not mandated people tend to approach the court than ADR due to their historical faith upon the process.

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[48] Paul Randolph "Compulsory Mediation" (January 2013) Mediate.com http://www.mediate.com/articles/RandolphP1.cfm.
[49] The Lord Chancellor Department "Further Findings-A continuing evaluation of the Civil Justice Reforms" (August 2002) The National Archives http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/reform/ffireform.htm at [Annex B].
[50] The essence is taken from the discussions in the following lecture:
RoydenHindle "LAW 721: Mediation" (Room G 326, Building 810, Faculty of Law, University of Auckland, Auckland, 11 August 2017).

As commonly understood, Mandatory mediation is projected as an oxymoron, as we perceive that the process loses its fundamental self-driving nature, where parties are in ultimate control, when mandated. But the extent, kind and way this prescribing is done affects the success of the process.

HOW TO MANDATORILY MEDIATE?

Like every ADR process, mediation is also a private settlement process where parties can willingly take part and settle their dispute without the need to litigate. This helps them save time, money and all the hassle apart from being extremely convenient as the process is all in their control. But, unfortunately, due to lack of faith or unawareness or some other reason has held back parties in dispute and they have always overlooked this process. This leads to overburdened courts and a long list of pending cases which can otherwise be resolved quite quickly.

So, the way is either to force them or incentivise them or punish them to mediate. But this intervention can be done either by courts or legislation or through a prior agreement as a part of a contract clause between the parties. The critical factor is the level of such intervention which can be done to force the parties to mediate without harming the process itself.

To understand this, it is essential to ascertain how these disputed parties can be brought to the mediation table.
As distinguished by Melissa Hanks, there are three categories in which mandatory mediation arrangement can be divided into:

1. Automatic and compulsory referral
2. Court-referred mediation
3. Quasi-compulsory

Automatic and compulsory referral

This is the mandatory mediation scheme where the parties in dispute, based on their nature of the conflict or area of the argument are required to undertake mediation. It is in a way automatically referred to mediation without any choice or as a part of the law.
Professor Frank Sander termed this as 'categorical' approach which means that a category of the dispute is mandated to undergo mediation process for settlement.[51]

[51] Frank Sander "Another View of Mandatory Mediation" (2007) 13(2) Dispute Resolution Magazine 16 at 16.

This is a legislative process, where it is mandated in the legislation or statues, defining parties in dispute to compulsorily adhere to mediation process before they can approach the court for any settlement. This acts as a procedural step for such cases, as a precondition to originate proceedings. Few jurisdictions have an exception clause in the legislation where parties can opt out of such mandatory mediation by approaching and requesting the court upon fulfilling specific condition or upon the refusal of the other side to mediate.

Court-referred mediation

In this approach, the judges have the power to designate cases to mediation based on their merits or demerits. Professor Sander has termed this as 'discretionary,' Where judges individually and not categorically like legislation refer parties in dispute to mediation.

This allows judges to even send in cases arbitrarily to mediation. The consent of the parties is immaterial in such an order. This power to the court is also given by the legislation of the land.

Therefore, this is the scheme where judges have the power, and thereby they refer individual cases either upon much analysis or arbitrarily to mediation. The choice of parties is not considered. Court either stays the case for the mediation process to take place or dismisses it, as per the legislative power assigned and the facts of the dispute.

Quasi-compulsory

This is the approach where courts neither mandate mediation nor do they order it but they expect mediation to have taken place with an honest approach. The courts charge adversarial costs against parties if they have not undertaken mediation before approaching the court.

It is through legislation that courts enjoy such authority to levy costs against parties. The courts, in this case, take retrospective account of the participation of individuals in mediation and thereby charge them upon non-participation or unsatisfactory participation. Mediation in these cases are neither categorically nor discretionarily mandated, but they show more emphasis on the process than others by cost punishment.

Therefore, this is a punitive approach to enforce mandatory mediation. It neither orders one to mediate nor mandates one directly but punishes if not undertaken upon factual scrutiny.

CONCLUSION

Mandatory mediation, implemented in any form or scheme, expects or demands few things from the disputed parties sent for mediation. Few plans push them to have honest and ethical faith participation; few require a reasonable explanation of not reaching a solution, etc.

However, each of them has one common objective, which is making the disputed parties sit in a mediation space. Well, it does include, forcing them, penalising them or incentivising them but some of the other schemes are being used to do so. The question is to understand how much intervention can be made under a scheme for forcing parties to participate in mediation? Also, this must not overstep the boundaries of mediation itself.

Henceforth, the point of discussion is whether the first push to attend the process (which is not surpassing the definition) will also mean compulsion throughout the process (which overrides the description) or not. If the pressure to attend does not seep into the process further then mandatory mediation to initiate remains within the domain of mediation and is, therefore, can be declared as being the ideal intervention level.

As the old proverb says, "You can lead a horse to water but not make it drink."[52]

As identified by DorkasQuek, the "coercion into" and "coercion within" the process are important aspects to understand. They are also referred as "front-end or entry-level consent" and "back-end or outcome consent."

Critics of mandatory mediation state that these cannot be demarcated and thus one seeps down to the other, thereby hijacking the mediation process. it is also commented that "the expectation of an imposed settlement will inevitably alter the meaning of the [mediation] event for all the actors."[53]

Mediation is a self-empowering and essential process until the time it is within its designated limits. Once, the process contravenes its essentials, the process of mediation and its outcome becomes questionable. Therefore, mandatory mediation is a risky affair and needs much understanding and analysis before its implementation. There is no uniform, right or wrong way to do it but there are limits to it.

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[52] Donald Swanson "Mandatory Mediation & Good Faith: "You can lead a horse to water, but . . . " MEDIATBANKRY-On Bankruptcy and Mediation https://mediatbankry.com/2016/07/12/mandatory-mediation-good-faith-you-can-lead-a-horse-to-water-but/.

[53] Sally Engle Merry "Book Review" (1987) 100 Harvard Law Review 2057 at 2066.

THE ETHICS OF NEUTRALITY IN MEDIATION

Asha Paresh Mahannt

The principle of neutrality has traditionally been regarded as an indispensable ethical requirement for mediators to demonstrate, and is manifested through the distinction between process and content in mediation. Over the years, considerable academic debate on the subject has recognized the inherent problems presented by the principle, and acknowledged its artificiality and absence in mediation practice. The literal approach to neutrality based on a process and content distinction does not allow mediators to realize the primary purpose of mediation, which is the promotion of party self-determination.

What is Neutrality in Mediation?

Impartiality and neutrality have traditionally been conceived as the 'critical defining characteristics' of an independent mediator. Neutrality is a product of the Western ideology of positivism.The principle of neutrality takes for granted that interventions can take place 'without having one's own experiences or values permeate the process'.Neutral mediators are formulated as unbiased, impartial, disinterested in content and outcome, and focused solely on process. In the context of mediation, neutrality is regarded as an indicator of what is 'good' for mediators to do, and practicing neutrality is said to help the parties in achieving self-determination. This quality of self-determination, and fair and voluntary process is regarded as the hallmark of mediation.While it is generally easy to present a mediator's role as incorporating a commitment to neutrality, issues arise when attempts are made to discuss what neutrality really means, and how much mediators can commit to this principle in day-to-day practice.Hillary Astor defines neutrality as comprising of three elements whereby neutrality requires:(i) the mediator torefrain from influencing content or outcome, and to play a purely procedural role in the process, (ii) facilitating consensual decision-making *by* the parties, and (iii) equal treatment of the parties by not favoring one party at the cost

of the other. (*Hillary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) Social and Legal Studies 221, 223-225 ('Astor')*

How Important is Neutrality for Clients?

One of the primary objectives of ensuring confidentiality in the mediation process is to develop trust and confidence in the parties regarding the process and make them more willing to not only share information, but also to actively discuss options and reach a settlement and hence neutrality is essential in the mediation process. In most cases, parties enter mediation because alternative pathways are undesirable for the parties in terms of factors such as cost and time, and what they expect is to be heard in a meaningful forum, and have their issues resolved in a legitimate and safe setting.Often the mediator is called a third party neutral, however, it is argued that parties to mediation are often suspicious of the idea of mediator neutrality, and they question whether mediators can genuinely adhere to their claims of being neutral, impartial and unbiased.Parties in conflict often require 'assistance, advocacy, power, resources, connections or wisdom', and that neutrality is not a primary concern for them. Even though mediators should not in principle be unfair, mediators are largely expected to assist people to engage in constructive interactions and to help them communicate and understand each other, analyze the conflict, articulate concerns, assist in developing options and assist in evaluating those options. Mediators are expected not to intervene and make judgments for the parties and even if there is a case in which the mediator feels that he will not be able to produce a fair or unbiased result, he or she is not expected to intervene in the mediation process. The mediator is required to only attempt to facilitate the voluntary resolution of the dispute and not to impose any settlement on the parties. However, it must be remembered that the role of a mediator is different in that he is supposed to guarantee an agreement which is not one which a court would refuse to enforce on grounds of fraud, duress, unconscionability or overreaching imbalance in bargaining leverage. Though it might ordinarily seem to be outside the scope and powers of the mediator, in cases where the proposed settlement is against the provisions of any law, a mediator may have to intervene and declare suggestions to be unacceptable.

Can Mediators Remain Neutral?

It has been argued that absolute mediator neutrality is unattainable in practice, even if mediators restrict their interventions only to process related issues.This is because 'mediators will inevitable impact upon content and outcomes due to their very presence in mediation and their personal, cultural and professional

situatedness'.Chalkey and Green reject the idea that mediators can facilitate problem-solving without any of their own ideological predispositions impacting upon the content and outcome of disputes. According to them, even subtle actions of the mediator have an impact on the outcome of the dispute and the nature of any agreement reached. The example of narratives in mediation offers a demonstration of why the process and content distinction is unattainable in practice.Impartiality understood on the basis of a distinction between process and content assumes that all parties in mediation have equal access to narration.There is an assumption that the parties will be comfortable to raise any topics, that mediators will treat all narratives in the same manner, and that all narratives have an equal chance of being addressed.The ability to tell a story, to describe events and have the other party respond and build on to the story is a key unit of power in mediation.If a story is not presented in its entirety, there is a risk that the party will not get a chance to engage in the process meaningfully, and that the final outcome may not represent the needs and interests of the party. Some argue that mediator control over the process, such as summarizing styles, influence story development to a great degree. In a study conducted by Cobb and Rifkin in 1991, in approximately 75% of the mediations, the party that told their story first had the agreement framed according to their terms.The sequence in which the narrative folds is influenced by the order in which stories are presented. For instance, mediator turn-taking may reinforce the story of the first speaker and put the second speaker in a defensive position, thereby creating a pattern that interferes with the ability of the second speaker to present a narrative from his/her own perspective. It may therefore be necessary to make interventions to ensure that narratives are balanced, and that attention is not focused on facilitation of story-tellingalone.

Should Mediators remain Neutral?

Despite its stronghold in mediation literature, the principle of neutrality is not without its critics. Some argue that the principle of neutrality in practice 'perpetuates a hegemony that serves some better than others'. Roger Fisher describes a neutral mediator as a 'eunuch from Mars, totally powerless and totally neutral'. Hin Hung raises some important issues that call into question the principle of neutrality in mediation ethics.How should mediatorsdeal with situations where bias is necessary to be truly neutral in the ethical sense? Should the mediator prioritize the principle of neutrality where the self-determination of one of both of the parties appears to be compromised? If an agreement appears to be unfair or unethical and not a product of self-determination, should the mediator continue to be this estranged eunuch from Mars?Even in mediation, mediators are

under an obligation to implement the rules of justice, have regard to their ethical responsibilities, guarantee the self-determination of parties and compensate for the lack of procedural safeguards.

In an empirical study carried out on New Zealand mediators, it was found that 50% of the mediators would adhere to the principle of neutrality even if it compromised achieving a fair and just outcome for the parties.In a study it appeared that when mediators perceived power imbalances as a result of communication, mediators were in favor of assisting the parties by using techniques such as paraphrasing to making sure that there was a clear understanding of all the points being exchanged. However, the mediators considered it unethical to intervene where doing so would interfere with a substantive aspect of the dispute, for instance, where one party was negotiating at a clear disadvantage.Yet, the mediators in the study also expressed discomfort in remaining even-handed when parties in private sessions were being very unrealistic. Where clear power imbalances were perceived between the parties, mediators found it difficult to limit themselves to process interventions.Unsuprisingly, some of the mediators admitted to influencing the content of the disputes in private sessions in favor of the weaker party. This is reflective of the difficulty and the artificiality associated with the process and content distinction.Over time, it has been recognized that mediator neutrality seems to be absent in practice. In some jurisdictions, neutrality has now been replaced with the ethic of 'impartiality'.

Neutrality v Impartiality

The Oxford English dictionary defines neutrality as 'the state of not supporting or helping either side in a conflict, disagreement, etc.; *impartiality* (emphasis added).' The same dictionary defines impartiality as 'equal treatment of all rivals or disputants; fairness.' It is argued that mediators often associate impartiality with the ethic of neutrality. For instance, in a study by Cobb and Rifkin, 14 out of the 15 mediators interviewed defined neutrality using the word impartiality.Some argue that a neutral mediator, if he or if any of the parties feel, will be biased towards one side, will recuse himself from the entire process, whereas, an impartial mediator will actively assist both parties in reaching an agreement, and not support any particular individual. Laurence Boulle argues that while neutrality is associated with a disinterest in outcome of the dispute, impartiality is relevant to objectivity and fairness towards the parties whereas neutrality can be waived without prejudice to the integrity of the mediation process. Boulle argues that

impartiality cannot be dispensed with because it embraces the concept of fairness towards the parties and he has extended the meaning of impartiality to 'even-handedness',a meaning often attributed toneutrality.

Conclusion

The principles of neutrality and impartiality have been regarded as indispensable for ethical mediation, yet they have proven to be 'troublesome, contentious and even unhelpful' for mediation practice.While neutrality appears to imply removal of any possibility of a biased mediation process, impartiality implies actual involvement in the course of the mediation process to help both parties reach a favorable settlement. However in practice, both terms are in essence intertwined 'linguistically, conceptually and practically'.Critics have called for a complete abandonment of neutrality, or a reconceptualization of it in light of other principles of mediation ethics especially the right of self determination. Basically there appears to be an overlap between neutrality and impartiality. Like neutrality, impartiality is often understood in light of the process and content distinction. An application of impartiality on the basis of this distinction is inconsistent with the core principle of self-determination, and therefore, a reconceptualization of neutrality/ impartiality is required.

This article is compiled by Ms. Asha Paresh Mahannt, Solicitor (India & England), Mediator-Bombay High Court, Bangladesh International Mediation Society, IIAM; Member-Africa Asia Mediation Association.

Role of mediation in international disputes:

Manisha T. Karia (Deshmukh)

"Peace is not absence of conflict, it is the ability to handle conflict by peaceful means" – RinaldRegaon

The social, cultural, religious and economic differences lead to international disputes and there is data which shows that only 270 years in past have been without wars.In current scenario it has become imperative for the UN, the Security Council, and private organizations to reduce potential risk to absorb peaceful methods like mediation at very initial level of conflict.

The history has evidences ofmediation used to resolve international disputes. However, mainly International Law was looked upon as resource to safeguard world peace and security. There exist a plethora of examples of mediation, ranging from its usage in the Greek culture and their diplomatic efforts by states to settle disputes between the Aetolian League and Macedonia during the First Macedonian War in 209 BC, in ancient Vedic literature in India, and has its mention in the earliest known treatise- 'The Bhradarnayaka Upanishad', by Pope Alexander VI to establish spheres of influence for Portugal and Spain in the New World in 1493, and to as recent as President Jimmy Carter using it in the year 1978 that produced the Camp David Accords and a long-standing peace between Egypt and Israel. Over the years Mediation has evolved as flexible and consensual mechanism for settlement of complex cross-border disputes. Mediation has been accepted by the governments and political groups around the world and has been great benefit to resolve disputes at many levels.

Mediation does not only help infostering communication and trust between the parties, but also helps in transforming a destructive conflict by a constructive resolution of the problem. It is accepted norm that Mediation is not standardized and it is carried out in unique ways, as per the gravity of the issue and the

temperament of the parties involved, and parties come up with innovative resolutions, with sanction. International mediation is generally conducted by local organisations, individuals/experts,scholars, bureaucrats / government representatives and international organizations.

Types of International Disputes

It is significant to differentiate between interstate conflicts (between two or more states) and civil conflicts (known as intrastate conflicts).

Border Disputes

A dispute in the context of sharing borders is the most extensive sort of dispute in the international community. The Algiers Agreement was one of the much discussed border disputes between Iran and Iraq, by way of signing a bipartite treaty to resolve their border disputes of the Shattal-Arab river (border between Iran and Iraq). This agreement was important to both the countries, as Iraq wanted to end the Kurdish conflictand the violence near shatt al-Arab with Iran.In 2019, the two countries have announced a re-implementation of the Algiers agreement toresolve the long-standing border dispute that led to several clash between two states. Another important case of successful mediation was intervention of The Acta de Brasilia to help resolve the territorial dispute between Peru and Ecuador by promoting diplomacyacross borders and initiating cooperation and strengthening of relations, which has not only helped the local communities, but also the other countries involved, and its success has inspired and motivated countries like Israel and Syria, North Korea and South Korea to discuss similar establishments of parks to resolve disputes over border areas by turning those areas into trans-boundary conservation zones.

Resource issues

Resources of the nation are seldom a matter of concern for many countries, as itaffects financial development and profitability of a nation, thus birthing rivalries. This may include fighting for oil, coal, mineral ore, timber, marine/sea disputes (access to fishing), etc.

There have been disputes between countries over natural resources, more common on water world's rivers and underground aquifers cross national boundaries.

As per the Environmental Literacy Council 'In African nations, lucrative mineral resources – oil, diamonds, and other strategically important minerals – have fueled ongoing conflict. Sierra Leone, Congo, Liberia, and Angola have all experienced horrific civil wars in recent decades, and a major factor in those wars has been

over diamonds. All four countries have been devastated by warfare due primarily to predatory governing elites using their control over the resources to enrich themselves and outfit armies used to maintain their command.Despite considerable interest worldwide in developing new energy technologies, oil will remain a critical natural resource for the forseeable future. A massive investment in research and development will be needed to develop those alternatives, and currently no country is willing to sacrifice its economic stability to escape reliance on relatively inexpensive oil. However, while oil is now the most affordable source of energy for many needs, the major known reserves are found in regions with unstable political environments.' (https://enviroliteracy.org/land-use/conflict-natural-resources)

Refugee Issues

Many people across the world have left their homes to get away from civil war and other violence. The United Nations figures report 22.5 million refugees and 38 million internally displaced persons. More than 50 percent of the world's refugees are mainly from Syria (5.5 million), Somalia (1.4 million), and Afghanistan (2.5 million). There are 70 million refugees in the world as per the recent data. Thus, treatment of refugees, and humans in general, is often the source of grave international disputes. Several sensitive refugee issues have arisen like the arrival of millions of refugees in Europe since the outbreak situation in Syria.

Instances where mediation was used to resolve international disputes

There are many disputes which were attempted for resolution through mediation e.g. dispute between Greece and turkey, Acta de Brasilia Negotiations between Peru and Ecuador, Agacher Strip Mediation between Burkina Faso and Mali, the Middle East Climate Change Assessment, **the Tashkent Declaration,**Naivasha agreement or comprehensive peace agreement, Algerian mediation between the USA and Iran in 1979 with regards the American Hostages, India's attempt in 1950 to mediate between USA, Soviet Union and China, Libya's attempt to mediate War of Zairean Succession in Congo from 1998-2000, Kenya and Zimbabwe to mediate the Mozambique Conflict, Norway as mediatior in the Israeli-Palestenain Conflict, Saudi Arabia as mediator between Yemen and Lebenon etc.

Currently proposals of mediations are offered by countries including India to mediate between Israel and Palestine, US asking to mediate between India and china and India and Pakistan.

Important treaties supporting peaceful settlement:

The United Nations Convention on International Settlement Agreements Resulting from Mediation known as the Singapore Convention on Mediation – was open for signature in Singapore on 7 August 2019 and 46 countries, including the United States, China, India and Singapore have signed the Convention.

In the UN context, since early 1950s there has been a significant development in practice of the peaceful settlement of disputes. The peaceful settlement of disputes is dealt with in Part One, which traces the development of pacific dispute settlement and examines the provisions under Article 2 (3) and Article 33 of the UN Charter. There are many international treaties which support peaceful settlement including

There are important multilateral treaties which recommend peaceful settlement of disputes including the Hague Convention for the Pacific Settlement of International Disputes 1899, Revised by the Second Hague Peace Conference in 1907,The 1928 General Act for the Pacific Settlement of Disputes which was concluded under the auspices of the League of Nations, Regional agreements, such as the 1948 American Treaty on Pacific Settlement (Bogotá Pact),the 1957 European Convention for the Peaceful Settlement of Disputes,the 1964 Protocol of the Commission of Mediation and Arbitration of the Organization of African Unity etc.

There are many other treaties for dispute resolution, inasmuch as there are multiple bilateral and multilateral agreements having precise clauses for dispute settlement.

Best practices followed in international mediations:

As stated earlier each situation is only one of its kinds in every dispute, and the following norms are largely advised to be followed in international conflict resolutions:

- To have a lead mediator. The appointment of lead mediator has to be conclusive decision arrived by relevant authorities by the parties.
- Confidentiality,transparency and confidence of the parties and maintaining conducive environment and reliability and acceptance by the all the parties.
- Fair resources for indentifying issues and balance of neutral political analysis of the conflict and fact finding for fruitful negotiations between the parties.
- Drafting of Peace agreements shall cover implication for all the parties and segment of society involved and uphold peace, justice and security and

mutual understanding. The agreement must be within ambit of human rights, refugee laws and other prevailing laws.

Challenges for Mediation in international conflicts:

After cold war, there has been pike of increase in number of international conflicts around the globe. Each conflict being diverse, it's challenging to develop and adopt certain specific method of resolution. The intricacy in the situations and socio–economic conditions, regional unidentified issues and position of the countriesat international level, control by media are playing vital roles in present situation and many a time hampering the way forward to mediate. Further the poor implementation of the peace agreements has also caused hurdle.

The studies show that despite, mediation being recognised as one of the effective method for the peaceful settlement of inter-State and/or intra-State conflicts, there are several challenges and requires strengthening of the mechanism. It is important mention noting in the United Nations Guidance for Effective Mediation 'General Assembly resolution 65/283, entitled "Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution", which was adopted by consensus, recognized the increased use of mediation, reflected on current challenges facing the international community in such mediation efforts, and called on key actors to develop their mediation capacities. The General Assembly also requested the Secretary-General, in consultation with Member States and other relevant actors, to develop guidance for more effective mediation, taking into account, inter alia, lessons learned from past and ongoing mediation processes.*(https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf)*

Conclusion:

In an international mediation, it is important for warring parties to either voluntarily seek third party intervention, or accept the offer of an outside partyto mediate.Mediation as a tool not only helps inresolving international disputes, but also saves a great deal of financial and other resources, thus making it a win-win situation for the disputing states, however, the political cost associated with accepting international mediation be substantially higher in civil wars as compared to international conflicts. The Takshent declaration between India and Pakistan with the help of the Soviet Union, the Naivasha Agreement by the Sudan people's Liberation movement, the Geneva Conference (Rhodasia Agreement) mediated by the British, the Algiers Accord etc. have been glorifying examples of successful mediations in the International parlance. Conflict management is now being

tackled by a lot of international organizations as part of their mandates, which is why States now deflect from offering to play mediator, unless they seem to benefit from the situation. Thus, the relationship between the third party and the government might impact the decision to offer and accept mediation, as a third party is less likely to offer mediation if they have an ongoing relationship with any party, and the disputing States, after duly scrutinizing all their options, accept mediation as a method in the most serious disputes, or after running a cost benefit analysis of the dispute resolution by way of mediation.

Mediation has developed as a practice over the years, as the previous studies of mediation lacked the precision and information necessary for developing a systematic understanding of the process; however, the third-party mediation of disputes has developed drastically, in terms of the quality as well as the quantity over the past few decades. To bring peace and harmony at the international level, there is a need to focus on alertnessand understand that "an ounce of mediation is worth a pound of arbitration and a ton of litigation" Joseph Grynbaum.

CHALLENGES AND OBSTACLES FACING MEDIATORS IN KENYA

Dr. Phelista Marura Musili
Certified Professional Mediator, Accredited by Judiciary, TOT (MTI-EA), Psychologist

I always hold out hope. Mediation is an opportunity for each side to present their case, and for us to get back to the table again … Ron Weber

Introduction:
The world is generally becoming more competitive today, and most of us have been socialized to engage in a win-lose interaction. Mediation in a way encourages disputing parties to cultivate the skills needed to engage with each other meaningfully with the help of a neutral third-party. Many authorities agree that mediation results in a joint decision by the parties which helps to restore a win-win1, 4 relationship. As a mode of alternative dispute resolution (ADR), it should be regarded as an essential part of the entire judicial system. Like any other profession, mediation can pose some challenges. It is important to note that challenges present us with great opportunities too.

Some Common Challenges Facing Mediators
One of the challenges is that the concept of mediation is not very well understood in Kenya. There is lack of awareness and sensitization among the public as well the judges, advocates and litigants. Majority of the people view it as a court process while others confuse it with arbitration. Many disputants are not aware that they can seek mediation directly and they do not know that mediation gives them the power to resolve their own issues2.

Mediators in the court annexed program sometimes face some 'resistance'5 from the key players. This may be attributed to kind of training and job culture they have been used to. The judges are basically the decision makers while advocates are used to the tag of war kind of tradition, whereby, there is a winner and a loser, so to speak. In some cases mediation has been regarded as a threat with the view that it may lower income.

Another challenge is lack of goodwill among the main participants. The nature of Mediation process is basically voluntary. When the concerned parties are not willing to negotiate, it becomes difficult to get them to the table. This problem is sometimes aggravated by the unwillingness of the disputants' advocates to participate in the process. Other times it is even challenging to trace the disputants since most times the contacts provided by the courts are those of the advocates.

There is the issue of inadequate number of trained mediators and/or lack of proper training with a number of mediators emerging from unrecognized institutions. This may be attributed to the fact that currently, there are very few qualified trainers in the country. In addition, there no regulating bodies with regards to training in the country. This is likely to interfere with professionalism in the practice of mediation. When there is failure, wrong signals may be sent which may portray mediation as a failing process, thus leading to loss of confidence in the whole process. However, some progress has been made. Currently, the Mediation Accreditation Committee (MAC, 2019) is the main institution that accredits mediators working in the court annexed mediation program in Kenya.

Scarcity of literature on contemporary mediation poses another major challenge among mediators practicing in Kenya. Most of the materials available and the mediation styles are from the West. Some of these may not be applicable within the African (Kenyan) context.

Shortage of funds and inadequate infrastructure5 also make it difficult for Mediators to practice effectively. Although there are spaces provided within the courts, there is still a lot of work and finances required in order to provide mediation centers with adequate rooms and the necessary facilities that go with such a center. For some parties, carrying out mediation within the court premises may give an impression that it is a court proceeding, which waters down the merits of mediation as a voluntary and non-adversarial process. Lack of funding may imply low or delayed payments for the mediators which may result in low morale.

Challenges revolving around referrals of cases are mainly associated with the need for more training for the staff who screen and distribute matters to the judiciary accredited mediators. Some matters brought to mediation are not suitable for mediation therefore when no settlement is reached; parties may claim that mediation does not work.

There are challenges arising from the mediation process itself5. The process requires a mediator to be neutral during the process. Although many well trained Mediators may be able to maintain neutrality, there may be an aspect of unconscious bias which may interfere with the process to a certain degree. There may be instances where the disputants misinterpret the non-verbal behavior of the mediator which could jeopardize the whole process. At times the parties may lack commitment to resolve the issue which puts the process at risk of failing. Some mediators may get frustrated when no settlement is reached and disputants have to go back to court particularly after conducting several sessions without success. On some occasions they may face difficulties ensuring that the settlement reached is fair to both parties Challenges that arise from family related cases can be unique. Emotional issues3 related to bitterness, anger, trauma and other painful experiences are common. In many cases couples do not trust each other and the children are caught in the middle of all that. Since humans are relational beings, some of these experiences may have adverse effects on the mediator. Some of the mediation sessions take long before the issues are resolved; this may take a toll on the mediator. From a Psychologist point of view, there may be need to engage more regarding issues of stress, burnout and trauma among mediators. Practice of self-care could therefore be critical among mediators. This can take among others: the physical, emotional, mental, social and spiritual perspectives which encompass the holistic approach.

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Mediation - During and After Covid- 19

Harendra Patel (Mombasa, Kenya)

Introduction:

Many at times, many people confuse the words MEDITATION with MEDIATION and others relate Mediations with Laws, court and legal issues. So what is Mediation?

Mediation is a process where a **Trained** person empowered with **Skills**,**Tools** and **Techniques** helps people who are challenged and don't know how to deal with their disputes. The Mediator uses his or her expertise and procedures to help the party/parties in coming to a settlement agreement once they can make their own decisions on how they could possibly solve the disputes they own or are entangled into.

Mediation is one of the **Alternative** ways to **Resolvingdisputes** which not only engages the individual/s disputants to talk to each other but also helps in rebuilding healthier relationships towards each other in future. This is because the Trained Mediator aims to achieve a win-win situation unlike the Legislative approach.

In Mediation, The trained mediator does not make any decisions on behalf of the disputants but only assists them.

Ethical Principles followed by professional Mediators is of utmost importance and these are:

a) Competence, integrity and accountability
b) Professional conduct
c) Self-determination
d) Informed consent

e) Safety, procedural fairness and equity in mediation including withdrawing from or terminating the mediation process
f) Impartiality including the avoidance of conflicts of interest
g) Confidentiality privacy and reporting obligations
h) Honesty in the marketing

Effects during and after The Pandemic:

During this Trying times many people are affected and will be affected even after the pandemic is over since every person is so much into fighting physically the unseen identified virus. Here are some few questions to ask ourselves:

- Do we give attention towards our own**Mental,Emotional,** and **Psychological** status and wellbeing and do we do the same towards others?
- Do we see this in others - giving attention towards their own Mental, Emotional and Psychological wellbeing?
- There will be so many underlying **challenges and negative effects** which will resurface and cause **mental stress and disorders**. This will result in Disputes which might arise consciously or unconsciously. Who will be able to help in such circumstances? Can the individuals help themselves?

COVID -19 might end up causing many disruption and uneasiness in our daily life's and many might face different types of challenges and possibly might end up having **Relationship issues,Family issues, Business related issues**, **Health related issues**, **Job Related issues**, **Education Related issues**, **Financial related issues**, to mention a few. During this disrupted periods, as Individuals most of the times we fail to understand the limitations to our own negative Thoughts, Words and Actions and possibly end up with disputes which might hinder our progress in life. We therefore require to Self- Mediate before going out to help others with their disputes.

Due to the nature of the circumstances and Health related situation, many disputes will arise out of a failure by either party or both parties to communicate, understand or consider the needs and interests of the other. **People might end up fixing their attention on the question, "Who is right and who is wrong?"** and become blind to the possibility that both may have a legitimate point of view.

Civic Education and Encouragement – The Approach:

Mediation skills can be learnt and practiced by **anybody** and **everybody**. Some of the ways to sensitize I opted to put in actionin Mombasa, Kenya are as follows:

- Chatting and talking to Individualson social media platforms about Importance of Mental Health and Mediation.
- Empowering Artists who are into entertainment and music Industry to talk about Mediations and Mental Health in general as they dance and Play Music live on social media.
- Encouraging and Inviting existing mediators for **Refresher E-Training** organized by various institutions one of them being Mediation Training Institute East Africa (MTI EA).
- Conducting open Seminars for Various professionals like Security Forces, Managers, Village elders, Psychologists, Counsellors, Criminologists, Legal Advisors and many other interested individuals: Earlier this year I collaborated with Founding Director Mr. Samuel Gona Nguma of Glory Mediation Centre in Mombasa to host 2 speakers:
    - Rtr. Lady Justice Joyce Aluoch, EBS,CBS (RTD)JUDGE, Arbitrator, Mediator Hon. Lady Justice Joyce Aluoch (Retired) is the immediate past First Vice-President of the International Criminal Court at The Hague, The Netherlands.She is also advisory committee of AAMA.
    - Dr. Phelista Marura MusiliCertified Professional Mediator, Accredited by Judiciary, TOT (MTI-EA), Psychologist. She is a Lecturer at Kenyatta University in Kenya.

      (Presentations attached)
- Future Strategy is to partner with Institutions and have E-Learning short sessions to empower individuals with some basic approach towards mediations.
- Collaboratively working with Kenyan courts on Adopting New ways to solve Disputes using Virtual setups.

Harendra Patel (Mombasa, Kenya)
Accredited Professional Counselling Psychologists – KCPA
Accredited Certified Professional Mediator CPM- MTI
Committee Member of Africa Asia Mediation Committee - AAMA

COURT-ANNEXED MEDIATION IN TANZANIA: A REFLECTION

Dr. Zakayo N. Lukumay

1.0 Introduction

Article 107A of the Constitution of the United Republic of Tanzania provides for principles of civil justice.These include, first, delivery of justice without regard to the litigants' social or economic status, second, delivery of justice on a timely manner or without undue delay, third, provision of adequate compensation in case of injuries caused by others, fourth, facilitating and encouraging amicable settlement and dispute resolutions, and lastly, delivery of justice without undue technicalities.[1]

This paper revolves around the fourth principle in respect of amicable settlement and dispute resolution. The aim of introducing Alternative Dispute Resolution (ADR) in Tanzania was to enhance the second principle that is delivery of justice on a timely manner or without delays. This work is an attempt to evaluate how court-annexed mediation in Tanzania has been able to achieve this purpose since it was introduced in 1994. It will be argued in this paper that in order to improve performance of the court-annexed mediation, major reforms have to be initiated for its better efficiency and effectiveness.

2.0 History of Court-Annexed Mediation

Before colonization of Africa, including Tanzania, African societies had their own ways of resolving disputes using African traditional mechanisms of conflict

[1] See Article 107A of the Constitution of the United Republic of Tanzania, 1977.

prevention, management and resolution which were largely effective and respected.[2]***Kapasyu s/o Mwaipinga v. Mwendilemo s/o Mwakyusa***[3]The dispute between the two relatives involved a parcel of land, each claming it by inheritance. The assessors in the district court suggested that as the parties are related the dispute could be brought to an amicable solution by dividing the land equally between the two claimants. Such a verdict is consistent with Nyakyusa customary law, and the magistrate accepted the advice of the assessors, and held accordingly. Unfortunate for the African ways of dissolving disputes amicably, this decision was overturned on an appeal on the ground that Solomon Rule is not applicable in our legal system.

In ***R v PalambaFundikira***[4] a trial by ordeal was conducted to discover who has by witch craft caused the death of 11 children of the first appellant. Four women were accused as causatives of the death of thechildren and to prove their innocence they were subjected to a traditional test of drinking a traditional medicine called MWAVI. By itself "mwavi" is not a poison but when taken with evilmind it turns to poison. Upon taking two women died and other two vomited.

In the case of ***Torgindi v Mutsweni***the accusedMutseni as a causative of his marriage breakdown and as a result adispute arose and the drumming arose. Each part was ordered to compose and sang a song asloud as he could so that the whole village could hear. Mutsweni was not a good song composer but he hired a person to compose for him. The drumming started and went on for more than 3weeks everyday. The village elders then opine that if the drumming continues it would end up infighting so the parties were called to prepare and sing their songs before the elders. The elders here act as judges and at the end they would decide who wins a case basing on the song composed.

Mediation, for example, is as old as mankind[5]. It is found in all of man's activities. In everyday life we witness the intervention of so-called neutral third party facilitators to resolve disputes between neighbours, parents mediating between

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[2]Waindim, N. J., "Traditional Methods of Conflicts Resolution: The Kom Experience" accessed at https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/ on 03/09/2019.

[3][1968] HCD 88.

[4][1947] 4 EACA 96

[5] See United Nations Department of Economics and Social Affairs, accessed at https://www.un.org/waterforlifedecade/water_cooperation_2013/mediation_and_dispute_resolution.shtml on 02/09/2019.

their young children and in closely-knit societies and tribal communities, where the mediation culture is particularly strong, persons held in high regard by the societies as tribal elders, chiefs or people's representatives mediating in all sorts of civil cases.[6]

Unfortunately, as these countries became colonized, the government controlled dispute resolution mechanisms replaced the old customary law systems. Some of the traditional dispute resolution mechanisms survived only as informal systems and as lower courts in the judicial hierarchy. In the traditional setting, (village, hamlets, settlements, and towns), dispute resolution is almost as old as the traditions and customs of the people. Customary law is generally known to be the accepted norm in a community; it is unwritten and one of its most commendable characteristics is its flexibility.[7]

What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes.[8]The modern ADR traces its origin from America. It finds its roots in the collective negotiations of the labor-management area during the 1960s, and, perhaps surprisingly, in the urban turmoil and civil unrest of the late 1960s, when riots broke out in places such as Watts (in Los Angeles), Detroit and Boston.[9]

Essentially, mediation methods were used by community activists to intervene in interracial conflicts in the labor area. In turn, these community mediators realized that mediation could also be useful for handling interpersonal conflicts rather than letting these conflicts escalate while waiting to be handled in court. In the early 1970s, the first community mediation centers were established.One of the first was in Rochester, New York, but also in places such as Philadelphia, Columbus, Boston and Manhattan, as an alternative to the courts.[10]

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[6] See Haider, N., "Dispute Settlement Mechanisms in International Contracts", accessed at http://www.biliabd.org/article%20law/Vol-07/Naima%20Haider.pdf on 30/03/2014.

[7] D. Kohlhagin, "Alternative Dispute Resolution and Mediation: The Experience of French Speaking Countries" Presentation at EACC Conference: How to Make ADR Work, in Addis Ababa, Ethiopia, p.6.

[8]Alternative Dispute Resolution, Practitioners' Guide, Centre for Democracy and Governance, Washington, 1998, accessed at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf.

[9]Ginkel,E., "Court-Annexed ADR in Los Angeles County", accessed at http://www.businessadr.com/EvG/Publications_files/Court-Annexed%20ADR%20in%20LA%20County.pdf on 26/03/2014.

[10] *Ibid.*

Courts first became interested in mediation in divorce cases, as since the 1970s more states were adopting laws in favor of "no-fault" divorce, while in "fault-based" states the courts began to favor "divorce by consent" for "irreconcilable differences." Not wanting to conduct adversary proceedings surrounding child custody issues, courts became open to the mediation process as a way to help parents resolve those disputes.[11]

On January 24, 1982, Chief Justice Warren Burger addressed the American Bar Association at its midyear meeting in Chicago. In his speech, Burger called for an increased focus on mediation and arbitration.[12] Although he spoke more about arbitration than mediation, many trace the rapid increase in popularity of alternative dispute resolution programs in the 1980s and 1990s to his "call to action."[13]

A few years before Burger's call to action, as one of the first in California that had instituted an ambitious court-based alternative dispute-resolution program involving arbitration. Pursuant to a 1978 amendment to the Code of Civil Procedure, this program required litigants to submit their cases to non-binding or "judicial" arbitration. Currently, all cases involving money damages of $50,000 or less (except so-called small claims of up to $7,500) that are filed in the state's 16 largest court jurisdictions must attempt arbitration before they will be allowed to proceed to trial.[14]

In the 1980s, demand for ADR in the commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation. Since this time, the use of private arbitration, mediation and other forms of ADR in the business setting has risen dramatically, accompanied by an explosion in the number of private firms offering ADR services.[15]

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[11]*Ibid.*

[12]Warren Burger, "Isn't there a Better Way?'accessed at http://www.jstor.org/page/info/about/policies/terms.jsp

[13]*Ibid.*

[14]*Ibid.*

[15]See Maiyaki, T, B., "ADR: An Appropriate Substitute to Litigation in the 21 St Century" accessed at https://www.academia.edu/34551870/ADR_AN_APPROPRIATE_SUBSTITUTE_TO_LITIGATION_IN_THE_21_ST_CENTURYOn 30/08/2019.

4.0 Meaning of Mediation

Generally, mediation is the most important dispute resolution mechanism within the collective term known as ADR (Alternative Dispute Resolution) which encompasses innovative modes of dispute resolution as an 'alternative' to traditional litigation.[16]Boulle and Rycoft[17] defines mediation as a decision-making process in which the parties are assisted by a third party – the mediator, who attempts to improve the process of decision making and to assist parties reach an outcome to which each of them can assent.[18] In Foberg and Taylor[19] a statutory definition of mediation is given by the Australian Family Law Rules. Mediation is considered as a decision-making process in which the approved mediator assists the parties by facilitating discussions between them so that they may communicate with each other regarding the matters in dispute. The aim is to find satisfactory solutions which are fair to each of the parties and reach agreement on matters in dispute.

Mediation is commonly described as a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute[20]

5.0 Private and Court Annexed Mediation

There are two common types of mediation, namely; private mediation and court-annexed mediation.[21] Firstly, private mediation services are those offered on a fee-paying basis by mediators independently of courts, government agencies or community organization whose fees are generally determined by market forces.[22] In private mediation, the parties choose their own mediator. In some countries like South Africa, some organizations such as the Alternative Dispute Resolution Association of South Africa (ADRASSA), Africa Centre for the Constructive of Disputes (ACCORD), Community Conflict Resolution Services (CCRS) and Mediation and Conciliation Center (MCC) provide mediation services and some have their own contract clauses, mediation agreements and codes of conduct.[23] They assist parties to get to the mediation table by arranging premises and offer a panel of mediators.

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[16]*Ibid.*

[17]Boulle, L. &Rycoft, A., *Mediation Principles, Processes, Practice,* London: Butterworths, 1997. P. 3.

[18] Ibid.

[19]Foberg J. & Taylor A., *A Comprehensive Guide to Resolving Conflict Without Litigation,* 1984, p. 7.

[20]**The Dilemmas of Mediation Practice: A study of Ethical Dilemmas and Policy Implications;** National Institute for Dispute Resolution, USA, 1992, Page 1

[21]Boulle, L. &Rycoft, A., *op.cit.*p. 56.

[22] Ibid.

[23] Ibid.

Secondly, Court-Annexed mediation is that is specifically ordered by the Court.[24]It can also mean mediation which is directed, encouraged orpromoted by the courts in the context ofanticipated or ongoing litigation.[25]In court-annexed mediation, the parties to a pending case are directed by the court to submit their dispute to a neutral third party (the Mediator), who works with them to reach a settlement of their controversy. The Mediator acts as a facilitator for the parties to arrive at a mutually acceptable arrangement, which will be the basis for the court to render a judgment based on a compromise.[26]Tanzania has preferred court-annexed mediation in which a mediator is appointed by the Judge in-charge or the Magistrate in-charge of the court in which the suit has been filed.[27]This article focuses on the court-annexed mediation. In the Court-annexed mediation, the court as a part and parcel of the same judicial system provides services.

3.0 Adoption of Court-Annexed Mediation in Tanzania

During his many visits to the United States of America, the late Chief Justice Nyalali learnt about the practice of ADR Mechanisms in the Superior Court of Washington D.C. The idea appealed to him; and so in 1993, he invited two Judges from the Superior Court of Washington D.C. to attend a Judges' Conference held at Arusha from 19th to 23rd April, 1993. At that Conference, the two American Judges presented papers on the operation of Alternative Dispute Resolution Mechanisms as practiced in the United States of America and in their Court in particular. At the end of that Conference, it was resolved that efforts should be made to find out form of ADR that would suit Tanzanian circumstances.[28]

In 1994, ADR in the form of mediation, negotiation and arbitration was adopted and incorporated into the Civil Procedure Code (CPC)[29] through the Government Gazette[30].

6.0 Court-Annexed Mediation Rules of 2019

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[24] See http://adrr.com/adr2/essayq.htm, accessed on 30/03/2014.

[25]Meggit, G., "The Case For (and Against) Compulsory Court-Annexed Mediation in Hong Kong", Asian Law Institute (ASLI) Conference, Singapore, May 2008, accessed at **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290134** on 29/03/2014

[26] See http://attylaserna.blogspot.com/2008/07/court-annexed-mediation.html accessed on 29/03/2014.

[27] The Author of this Article was a Resident Magistrate from 1999 to 2011 and in that capacity he participated in a series of ADR trainings organized by the Judiciary of Tanzania.

[28] See the Training Manual, the Judiciary of Tanzania, at p. 3.

[29]Order VIIIC of the Civil Procedure Code Act, CAP .. [R. E. 2002]

[30]*GN.No.422 of 1994*

6.1 Introduction

In this year, 2019, the Civil Procedure Code was amended by introducing the Civil Procedure Code (Amendment of the First Schedule) Rules, 2019, GN 38. 10/5/2019. The rules came in force on 10th May 2019.

6.2.1 Overview of the new rules

(a) Procedures leading to Mediation

Rule 17 (1) provides for scheduling conference as follows:

> 17.-(1) The court shall, within fourteen days from the date of completion of the pleadings, on its own motion direct any party or parties to the proceedings to appear before it, for orders or directions in relation to any interim applications or other preliminary matters which the parties have raised or intend to raise as it deems fit, for the just, expeditious and economical disposal of the suit.
>
> (2) Upon hearing the parties on an interim application, the court shall deliver its ruling within a period of fourteen days and make such order as to costs as it considers just.
>
> (3) Where any party fails to appear under sub rule (1), the court may dismiss the suit, strike out the defence or counterclaim as the case may be or make such other order as it considers just.
>
> (4) Any order or direction given or made against any party who does not appear before the court when directed to do so under sub-rule (1), may be set aside or varied by the court on such terms as it considers just upon an application within thirty days.on such terms as it considers just upon an application within thirty days.

Rule 18 provides for pre-trial conference as follows:

> 18.-(1) Without prejudice to rule 17 of Order VIII, at any time before any case is tried, the court may direct parties to attend a pre-trial conference relating to the matters arising in the suit or proceedings.
>
> (2) The court may, at the pre-trial conference, consider any matter including the possibility of settlement of all or any of the issues in the suit or proceedings and require the parties to furnish the court with any such information as it considers fit, and may give all such directions as it appears necessary or desirable for securing a just, expeditious and economical disposal of the suit or proceedings.
>
> (3) The court may, at any time during the pre-trial conference where the parties are agreeable to a settlement of some or all of the matters in dispute in the suit or proceedings, enter judgment in the suit or proceedings or make such order to give effect to the settlement.

Rule 19 provides for notice to parties to attend a pre-trial conference and R. 20 details consequences of non-appearance as follows:

> 20.-(1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may-
>
> (a) dismiss the suit or proceedings if a defaulting party is the plaintiff;
>
> (b) strike out the defence or courter-claim if a defaulting party is a defendant;
>
> (c) enter judgment; or
>
> (d) make such other order as it considers fit.
>
> (2) An order made by the court in the absence of a party concerned or affected by the order may be set aside by the court, on the application of that party within fourteen days from the date of the order, on such terms as it considers just.
>
> (3) Subsequent to the first adjournment, if all parties fail to attend the pre-trial conference, the court shall dismiss the suit.

Rule 22 provides for ADR and speed tracks. Rule 22(1) provides that:

> A judge or a magistrate to whom a case has been assigned shall, of case within a period of twenty-one days after conclusion of the pleadings, hold and preside over a first pre-trial settlement and scheduling conference, attended by the parties or their recognised agents or advocates, for the purpose of ascertaining the speed track of the case, resolving the case through the use of procedures for alternative dispute resolution such as negotiation, conciliation, mediation, arbitration or such other procedures not involving a trial.

Rule 22(3) provides for four speed tracks. According to Rule 22 (2) it is the presiding judge or magistrate that determines the speed track in consultations with the parties. He or she has to make a scheduling order, setting out the dates or time for future events or steps in the case including the use of procedures for alternative dispute resolution.

Speed track one is 10 months, speed track two 12 months, speed track three 14 months and speed track four is 24 months. Speed tracks two to fourstart to run from the date when mediation has failed. 08 r. 22 (3) (b) (c) (d).Speed track one starts to run from the date of the 1st pre-trial conference. Mediation is within speed track one.

If mediation fails, full trial begins. During the final pretrial settlement and scheduling conference, the trial court shall be guided by speed track to which a specific case was allocated in determining future events and steps such as framing issues, conducting trial, etc.

(b) Reference to mediation

R. 24 continues to make mediation mandatory. It compels the court to refer every civil case for negotiation, conciliation, mediation or arbitration or similar alternative procedure, before proceeding for trial.

(c) Other Mechanisms for ADR

Despite mentioning other modes of ADR, the rules make provisions for mediation only. The rule envisages the possibility of having a multi-door ADR system in which a party would have freedom to choose any of the mechanisms in settling the dispute.

(d) Qualifications of Mediators

Rule 25 (6) provides for persons that qualify to be mediators. There are judges, registrars, deputy registrars, magistrates, persons with the relevant qualifications and experience in mediation appointed by the Chief Justice, a retired judge or magistrate or a person with the relevant qualifications and experience in mediation and chosen by the parties. Mediation can be conducted by a judge (sitting or retired), by a Registrar and Deputy Registrar at High Court level.

(e) Remuneration of mediators

Rule 25(7) provides for remuneration of mediators who are not judges, magistrates, registrars and deputy registrars. Mediators appointed by the Chief Justice are to be remenurated in a manner to be determined by the Chief Justice and published in the Gazzete. So far, such manner has not been determined.

Under rule 25 (8), a person who choses a mediator is responsible to pay his fees. This has the effect of adding costs to a litigant who might have paid the lawyer who prepared pleadings and who has filed the same and paid court fees. One of the benefits of mediation is to reduce costs.

(f) Purpose and Nature of Mediation

Rule 26.-(1) provides that:

In conducting any mediation session under these Rules-

(a) the parties shall strive to reduce costs and delays in dispute resolution, and facilitate an early and fair resolution of disputes; and

(b) the mediator shall facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.

(g) Role of mediators

Rule 26(2) and (3) provides for the role of mediators as follows:

(2) Without derogating from the generality of sub rule (1), the mediator-

(a) shall, in an independent and impartial manner, do everything to facilitate parties to resolve their dispute;

(b) may, where necessary, conduct joint or separate meetings withthe parties and may make a proposal for a settlement;

(c) may, where services of an expert may be obtained at no cost or where such services may be obtained at a cost, and if parties agree to pay such costs, obtain expert advice on a technical aspect of the dispute, which advice shall be given in an independent and impartial manner and shall have advisory effect;

(d) shall be guided by principles of objectivity, fairness and natural justice, and shall give consideration to, among other things:

(i) the rights and obligations of the parties;

(ii) the usages of the trade concerned; and

(iii) the circumstances surrounding the dispute, including any previous business practices between the parties;

(e) may, at any stage of the mediation proceedings and in a manner that the mediator considers appropriate, take into account the wishes of the parties, including any request by either of the parties that the mediator shall hear oral statements for a speedy settlement of the dispute; and

(f) may, at any stage of the mediation proceedings, make proposals for the settlement of the dispute.

(3) A request for the services of an expert under this rule may be made by the mediator with the consent of parties or by any party with the consent of the other party.

Rule 26 needs a further amendment to provide for the purpose of mediation as pointed out above.

(h) Attendance to Mediation

Under rule 27, mediation must be attended by the party or his advocate or both, where the parties are represented. The rule requires that the parties be notified of the date for mediation. Other persons that may attend to a mediation are those that are likely to be liable to satisfy al or part of ajudgement in the suit or to indminify or reimburse a part for money paid in satisfaction of all or part of a judgement the suit.

(i) Authority to Settle

Rule 28 requires that a party who attends to a mediation should have the authority to settle or if he or she requires the approval of another person he should arrange to have ready means of communication with that person throughout the session.

(j) Consequences of Non-appearance

Rule 29 provides for consequences of non-appearance.

> 29. Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may-
>
> (a) dismiss the suit, if the noncomplying party is a plaintiff, or strike out the defence, if the noncomplying party is a defendant;
>
> (b) order a party to pay costs; or
>
> (c) make any other order he deems just.

(k) Restoration of the Suit Dismissed for Non-Appearance to Mediation

Rule 30 provides for restoration of the suit dismissed for non-appearance to mediation.

> 30.-(1) Any party aggrieved by an order made under the above rule shall, within seven days from the date of the order, file in court an application for restoration of a suit or a written statement of defence.
>
> (2) The court shall hear and determine such application within fourteen (14) days from the date of lodging the application.
>
> (3) Upon the applicant showing good cause the court shall set aside orders made under rule 29 of this Order and restore the suit or the defence and remit the case to the mediator who shall issue a notice for mediation.

(m) The Principle of Confidentiality

Rule 31 provides for confidentiality.

> All communications at a mediation session and the mediation notes and records of the mediator shall be confidential and a party to a mediation may not rely on the record of statement made at or any information obtained

during the mediation as evidence in court proceedings or any other subsequent settlement initiatives, except in relation to proceedings brought by either party to vitiate the settlement agreement on the grounds of fraud.

(n) Duration of Mediation

Rule 32 provides for duration of mediation

> The mediation period shall not exceed a period of thirty days from the date of the first session of mediation.

Rule 33 provides for the end of mediation.

> A mediation shall come to an end when-
> (a) the parties execute a settlement agreement;
> (b) the mediator, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile; or
> (c) thirty days expire from the date of the first session of mediation. Duty to remit the case to the trial court

Rule 34 provides for a duty to remit the case to the trial judge for second scheduling conference in the event mediation fails.

> At the conclusion of the mediation the mediator shall remit the record to the trial court immediately or within forty eight hours.

(p) A Word on the Rules

Having rules to govern the conduct of mediation in my view is a good approach. They may influence the way that key actors of mediation think. However, this is not enough. A culture of settling disputes amicably should be encouraged. This can be by way of public awareness on the benefits of mediation.

7.0 Mediation Center

There is now in existence a Centre of Mediation. It was established in June 2015 by Hon. Othman Mohamed Chande, the then Chief Justice of Tanzania. It was given the mandate to conduct mediation sessions in respect of civil cases filed in the Registry of the High Court, Dar es Salaam Registrar. Later in 2019, the Centre began to mediate cases filed in the Land Division of the High Court.

However, the center faces a number of challenges. First, it is currently manned by only one Judge and two Deputy Registrars. Second, there is lack of public awareness on mediation and the existence of the Centre. Second, some persons appearing before the Centre lack authority to settle disputes and it takes a long time before approval to do so is granted. Third, there is poor attendance of parties

to a mediation session and if they attend the become unwilling to cooperate. A mediator has to spend more time in persuading a party to settle by explaining the benefits of mediation. Fourth, there is reluctance of some advocates to cooperate in assisting the clients to settle disputes through mediation. Some advocates tend to appear before the mediator without their clients.

8:0 General Observations

8.1: The Civil Procedure Code (Amendment of the First Schedule) Rules, 2019.

The new rules lack the following:

- Definitions
- Purpose of mediation.
- Referral to mediation prior to commencement of proceedings
- Functions of clerks
- Functions and roles of mediators
- Elaborate rules in regards to settlement agreements
- Role of advocates
- Statutory forms
- Other ADR Mechanisms. No other doors open for litigants.
- Remuneration of mediators
- Co-mediators
- Removal of mediators
- Procedures for the conduct of mediation
- Procedures for certification of mediators
- Agencies that can also conduct mediation- Court-Referred mediation
- Roster of mediators

There is need to amend the rules to provide for the above areas as it is the case in other jurisdictions. The good example is the South Africa Court-Annexed mediation rules and the Nepal Mediation Act, Act Number 2 of the Year 2068 (2011).

The purpose of mediation, for example, is not explicit in the new rules. The main purposes of mediation are to: promote access to justice, promote restorative justice, preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation. It also facilitates an expeditious and cost-effective resolution of a dispute between litigants or potential litigants and assist litigants or potential litigants to determine at an early stage of the litigation or prior to commencement of litigation. It also dispenses with litigation procedure and rules of evidence; andprovides litigants or

potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers.[31]

8:2 Mandatory Nature of the Court-Annexed Mediation

The practice shows that parties who have found themselves in the process without their free will tend to avoid mediation by not attending the court. After several adjournments, the mediator is forced to record that mediation has failed. Accordingto the Law Reform Commission paper,[32] mandatory mediation has been pointed out as a contributory factor to delay of cases when parties grant it half-hearted support and thus attend mediation just as a matter of procedure.

In a similar manner and for the sake of assuring voluntariness in the mediation process, the South African Draft Rules of Mediation provide that a party desiring to submit a dispute to mediation prior to commencement of litigation must make a request in writing in accordance with Form 1, to the dispute resolution officer of the court which would ordinarily have jurisdiction to hear the matter if litigation was instituted.

In Lesotho, for example, once a case file is opened and in the pleadings arecompleted each party includes a brief statement indicating whether that party consents to or opposes a referral of the dispute to mediation under the Court-Annexed Mediationprogramme. If a party opposes the referral to mediation, then upon proper cause being shown by that party the Mediation Administrator makes a recommendation on that party's motion for exemption from mediation under the Court-Annexed Mediation Rules.[33]

8.3Judges and Magistrates Acting as Mediators

The court-annexed mediation programme in Tanzania still makes use of judges and magistrates as mediators. This practice has highly been criticized as being one of the causes of ineffectiveness of ADR in Tanzania. On of such critics is Cross who[34]advances two reasons for not proposing judges to be mediators. First, Judges

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[31]Boulle, L. &Rycoft, A., *Mediation Principles, Processes, Practice,* London: Butterworths, 1997. P. 6.

[32] Law Reform Commission Paper on Civil Justice Review

[33] See http://www.lesotholii.org/content/part-i-introduction-court-annexed-mediation-high-court-and-commercial-court-lesotho accessed on 30/08/2019.

[34] See Cross, A., "Mediation – A Solution for the Legal Sector Crisis" Lecture given to Strathmore University: 2004. (Accessed at http://www.disputeresolutionkenya.org/pdf/Mediation_A%20solution%20for%20the%20Legal%20Sect

make poor mediators, so used to decision making and adjudication they have great difficulty patiently watching a non-interventionist process unfold. Secondly, they are already grossly overburdened.[35] In agreement with the second reason, Malata, G.,[36]poise that "magistrates and judges have a lot of judicial responsibilities falling under civil and criminal matters.'

The Global Justice recommended amendments to the Civil Procedure Code Order VIIIA to give powers to the Presiding Judge or Magistrate to refer the matter for settlement after consultation with the parties or their recognized agents or advocates before an ADR practitioner not being a serving judicial officer.

The Law Reform Commission of Tanzania puts it that the unpopularity of mediation in Tanzania is attributed to the fact that the same is court-annexed and that the dual functions of judges and magistrates as mediators and adjudicators is not easily distinguishable in the eyes of litigants. According to the Judge in Charge of the Commercial Division of the High Court (Judge Robert Makaramba), while it's difficult to demonstrate any definitive results of the court-annexed mediation, some tentative conclusions can be drawn include the fact that judges don't necessarily make good mediations - their approach tends to be 'rights-based' and although there is no reliable data so far anecdotal evidence show that their failure rate (in the sense of not getting settlement) is rather high.[37]

The rules added retired judges and magistrates, registrars and deputy registrars, a person to be appointed by the Chief Justice and the person to be appointed by the parties.

It is recommended that the ADR mechanism in Tanzania should remain court-annexed. However,judges, magistrates, registrars and deputy registrars should not act as mediators. It is appreciated that this initiative would have cost implications and if adopted, this model should still require the court to determine if a case is amenable for mediation, refer cases to the mediators and make enforcement determinations if required.
The role of judges should be to refer parties to the Centre, which would have many doors – arbitration, conciliation, mediation, negotiation and early-neutral

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or%20Crisis.pdf, on 2/09/2019).One of such critique is Cross, A., who pointed categorically that "let us not make the mistake of Tanzania by thinking it is the Judges who should become the Mediators."

[35]*Ibid.*

[36] See Malata, G., "Is it Possible for Alternative Dispute Resolution to Take Lead over Litigation in Tanzania?", A Thesis submitted for partial fulfillment of the requirement of an LL.M Degree of the University of Bagamoyo, 2013, p.25.

[37] Global Justice Report on ADR, P. 30.

evaluation depending on the choice of the parties and the nature of the dispute or to a person chosen by the parties whose name is in the role to be kept in the Registry of the Court.

8.4Lack of a Statutory Institution to Provide Mediation Services which is Separate from Courts

Apart from the Commission of Mediation and Arbitration which has jurisdiction on labour matters only, the Mediation Centre is not a statutory creature despites rules being promulgated after it was established. It does not mediate cases from District courts and Resident Magistrates courts in Dar es Salaam. The Centre is not available in other parts of the Country.

8.5Conducting Mediation while Pleadings and Interlocutory Hearings are Completed

Court annexed mediation as practiced in Tanzania cannot be accessed without adhering to normal court procedures such as filing pleadings, paying court fees, presentation and hearing of preliminary applications. This practice is not conducive because by the time a litigant is required to mediate, he/she has spent a considerable amount of money. It is recommended that litigants should not be forced to prepare pleadings prior to mediation. The proposed Centre should receive requests for either, arbitration, mediation, conciliation and proceed to handle the requests by issuing notice to the other party to appear before the mediator who the parties will choose. In the event ADR fails, the Centre should prepare a report and the same is used to receive a dispute in court.

In England for instance, Lord Woolf asserted in his Interim Reportthat:

> Where there exists an appropriate dispute resolution mechanism which is capable of resolving a dispute more economicallyand efficientlythan court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they had made use of that mechanism.

It is important however to point out an important feature which is now reflected in the CPR rules R1.4(2) and R26.4 - the stay of Court proceedings in favour of settlements proposed *motuproprio,* i.e. at the court's own initiative. Post-reforms Courts have now to further the 'overriding objective' by active case management, which includes the taking of initiatives in proposing ADRs. Rule 26.4 is a very effective rule and clearly reflects the reasoning outlined in the Final Report of 1996 in the following passage:

> The Courts will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.

This Rule found recent application by the English Courts in two landmark judgements *Cowl v. Plymouth City Council.*[38]The issue in this was whether Alternative dispute resolution, including complaints procedures and mediation, should be attempted before litigation.

In this case, the local council had decided to close down a residential care home for the elderly, and the residents were unhappy with the decision. They applied for permission for a Judicial Review of the council's decision-making process, and it was refused. They then appealed against this refusal, and the case was heard by Lord Woolf.The appeal was dismissed, meaning that permission for a Judicial Review of the local council's decision was refused again. A significant factor in Lord Woolf's decision was the applicants' failure to take up the council's offer to set up a complaints review panel. Lord Woolf also suggested that rather than commit themsleves to the costs involved in litigation, both parties should have considered the possibility of mediation.

Lord Woolf made the point that the residents who were complaining about the council's decision had not paid enough attention to what he called the "paramount importance of avoiding litigation wherever possible". He suggested that in similar cases, courts might need to hold hearings "at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the court." He went on to say:

> Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and the public, and saved time, expense and stress . . . . Today, sufficient should be known about Alternative Dispute Resolution to make the failure to adopt it, in particular when public money was involved, indefensible.

Another case which highlighted the necessity for lawyers and parties to consider Alternative Dispute Resolution (ADR), failing which a party may be penalised in costsis *Dunnett v Railtrack Plc.* [39]

9.0 Conclusion

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[38] [2002] 1 WLR 803

[39] [2002] 2 All ER 850

This paper was an attempt to give a brief reflection of the Court-annexed mediation in Tanzania. It can generally be concluded that court-annexed mediation has not given Tanzanians the benefits it was supposed to give when it was first contemplated. It was supposed to have increased access to justice for the most vulnerable members of society, reduced the costs of such access, and increased user satisfaction with the justice system. Due to low popularity and acceptance of ADR, the judicial process has continued to be characterized by technicalities and complex rules of evidence and procedure, excessive delays, unethical behaviors, substantial expenses to litigants and unnecessary costs on part of the judiciary, hence a total defeat of justice. Consequently, people are continuing to lose faith in the judicial process and the rate of taking recourse to extra legal remedies is likely to be a common phenomenon.

In order to make court-annexed mediation in Tanzania more effective, few recommendations have been advanced. First, mediation should shift from being court-annexed to court-connected or court-referred. Referral of cases to mediation should be made to mediation centers, both public and private. Second, it is recommended that parties should not be forced to mediate. The process should seek to encourage parties to resolve their disputes on voluntary basis. Examples from some jurisdictions discussed above should be emulated in Tanzania. Second, the new rules should be amended as discussed in this paper. Third, judges and magistrates should not act as mediators, for the good reasons stated above. Fourth, a separate center to provide mediation services should be established as a Government agency with rules to guide its operations. The Centre proposed should have various ADR mechanisms from which litigants should choose depending on the nature and complexity of their matter. It is also this Centre that will be charged with the task of training mediators and maintain a register of professional mediators. Lastly, Mediation should be conducted before institution of suits. The current practice which causes parties to waste a lot of time and resources before they are referred to mediation should be discouraged. It is only after this adoption of this recommendation that ADR will become less costly and less time-consuming.

A Paper presented at the 1st Africa – Asian Mediation Conference held in Dar es Salaam, Tanzania on 5-6 September, 2019 by Dr. Zakayo N. Lukumay[40]

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MEDIATION: A CULTURALIST PERSPECTIVE

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Introduction

In culture lies the soul of a society, giving an identity to all that reside within. Harboring the intrinsic value of culture, allows one to lead more fulfilling moral, spiritual, intellectual and emotional lives.

Honing cultural diversity also propels development by creating conducive channels for dialogue and collaboration. Yet, if statistics are to be believed, majority of the world's conflicts have underlying cultural dimensions, which has brought culture to the forefront of conflict analysis. In the following article, I have attempted to highlight the role of culture in the dispute resolution process, particularly in the context of mediation. The article begins by studying the dynamics of culture and conflict.

Thereafter it examines the effect of cultural factors on mediation while delineating certain classifications to study the same. Particular stress has been given to problems caused by differences in priorities, interests, attitudes and communication styles which are culturally determined. Furthermore, an intercultural approach has been encouraged on part of the mediator which entails development of a particular skill set soaked with cultural sensitivity. Finally, this analysis has been briefly applied to the Indian context to illustrate the relevance of the cultural model of conflict resolution. For, as Audre Lorde puts it, 'It is not our differences that divide us. It is our inability to recognize, accept and celebrate those differences.

Culture, Conflict and Dispute Resolution

The ever dynamic and evolving definition of culture has been studied and explained across generations. The cultural iceberg encompasses a spectrum of actors characterizing a particular group of persons. This includes having shared values, patterns of behavior, notions of morality, language, religion, cuisine, traditions, social skills and world views among other verticals. It is said that the most significant distinctions among peoples are not economic or political but cultural. And it is these exclusive distinctions, not amenable to compromise, which often become the cause of conflict as well an impediment to their resolution. An increasingly globalized world order has allowed a multiplicity of opportunities in all spheres but has also exacerbated the possibility of inter cultural conflicts.

There has thus been an increasing interest in the cultural dimension of conflict prevention and resolution in recent years. Cultural vocabulary dictates how we understand different identities, roles and frame our interactions. In many cross-cultural conflicts, people and their problems are deeply intertwined, and engulf within them the prejudices and biases of their cultural group. Culture unifies by allowing a group of people to develop a sense of common belonging and collective consciousness but also divides by creating avenues of 'othering.' However, it not only shapes the course of conflicts but also the possibilities for resolution. Thus, culture, as an integral part of human existence, can be resorted to as a significant resource in transforming conflict management.

Culture and Mediation

Culture is particularly relevant to mediation practice because it shapes the way people deal with disputes within the justice system. While cultural differences may make resolution more difficult, however diverging priorities can also facilitate the emergence of solutions. Cross-cultural win-win strategies can be exploited, a prerequisite to which would be an in depth understanding of the culturally determined objectives of the parties. This therefore entails constant endeavors towards achieving cultural civility in mediation.

Cross Cultural Mediation: Categorizing Cultures

An understanding of different cultural dimensions is essential to create an environment of cultural civility. This can be augmented by developing certain criteria to examine the same. Literature has provided us with various objective ways of categorizing cultures and examining their influence on cross cultural mediation. These include classifications of: Power- Distance, Masculinity-

Femininity, Uncertainty Avoidance, Long/ Short-Term Orientation, Individualism-Collectivism, among others.

The Power Distance Index measures social hierarchy in a culture. People from high power distance cultures normalize inequalities from prestige, wealth and power as a functional aspect of society. Low power distance cultures on the other hand, stress on the importance of equality. The Masculinity-Femininity dimension focuses on the dichotomy between traditional 'male' values such as control, recognition, dominance, ambition and independence and the more 'feminine' values like those of cooperation, care, solidarity, modesty, security among others. For the former, 'winning' is of utmost importance while the latter may be more inclined to compromise. Though, I disagree with the socially constructed generalization of gendered traits, they have nevertheless been used as parameters to categorize cultural traits.

The third classification of 'Uncertainty Avoidance' focuses on the level of tolerance to risk. High uncertainty avoidance cultures institute laws and controls in order to create a rule oriented society. People from these cultures prefer structured circumstances, precision and punctuality. Low uncertainty avoidance cultures show more acceptance for multiplicity of opinions, are less rule-oriented and tolerate risks. Furthermore, the former make commitments respecting tradition whereas the latter may allow for rapid change with a focus on efficient ways to achieve quick results.

All the classifications provide a unique lens of understanding cultural dimensions, however, it is the distinction between individualist and collectivist cultures ie. low context and high context cultures, which I would like to highlight to facilitate a discussion of cross-cultural factors.

In individualist cultures, primacy of the autonomous individual is of paramount importance. As a consequence, emphasis is on personal freedom and individual rights. Personal achievement is central, people are encouraged to form independent opinions and are free to challenge authoritative norms. Competition is encouraged and conflicts are usually settled with reference to legal procedures. Collectivist societies on the other hand emphasize the well-being of the community. The social organization is rigid and hierarchical, and customs and obligations are believed to nurture group solidarity. Conflicts, seen as a threat to social harmony, are encouraged to be settled in respect of tradition and group interest.

Some generalizations can be drawn while reflecting on these cultural binaries in the everyday context of negotiation. For instance, it is more likely for high power distance cultures to use senior people as negotiators with an expectation of having the opposing negotiator to be of equal or higher status. Parties from low power distance cultures may however attempt to treat everyone equally. A party from a 'masculine' culture may dominate through power tactics while one from a 'feminine' culture may be more willing to offer concessions and incorporate other's interests. Low uncertainty cultures may choose strategies that offer lower rewards, but have a higher probability of success whereas high uncertainty cultures may go for riskier options. People from long term orientation cultures may view the other as reckless whereas those from short term orientation cultures may assume the former to be rigid. Furthermore, in some cultures, disputing parties are accustomed to relying on third parties guiding 'right solutions', while others depend on neutral facilitators.

Culture is complex and multidimensional. Attempts have been made to give cultural diversity a structural interpretation but no amount of categorization would be able to do justice to its entirety. In the following paragraph, I will attempt to highlight the role of culture in molding dispute processes by focusing on styles characteristic of individualistic and collectivist societies.

Culture, Communication & Interests

Parties to mediation approach disputes with different mindsets, informed by underlying cultural forces. Although an individual's culture does not necessarily determine the attitude and behavior she may bring to the table, it can nevertheless provide valuable insights into the communication styles and negotiation priorities likely to affect the mediation process. One may agree that if culture consists of shared concepts and values, then interaction between similar cultures may lead to successful communication. But culture can also be a decisive factor in provoking miscommunication and misunderstanding which may be exacerbated during cross cultural communication.

Communication methods vary across the world, depending on historical developments, legal systems, and ethno-cultural backgrounds. Often, application of subjective culturally bound assumptions to similar words, may lead to different interpretations. So would differences in styles of communication. For instance the confrontational style prevalent in individualist societies, can easily be understood as lack of respect by those from collectivist societies. Low-context societies value

a straightforward approach to talks where there is no hesitation in contradicting others and refusing proposals. A business-like, result oriented attitude and language with high informational content is preferred. On the other hand, high context societies may prefer a more indirect approach to discussions, including nonverbal communication, language with high social content and a reluctance to contradict. Face saving constraints may also lead to evasive responses or avoidance of certain topics. Rather than interpreting this as an attempt to procrastinate and delay, such conduct derives from the desire to avoid embarrassment and keep relationships intact.

Hence, it is evident how similar types of words, nuances, body language and phonetics may trigger different responses across cultures. These culturally-determined assumptions may prevent successful communication and, as a consequence, pose a risk to the successful conclusion of the mediation. For this reason mediators have to understand and adapt to cross-cultural communication differences of the parties.

A person's cultural background also shapes interests, which may prove irreconcilable during a mediation. Cultural subjectivity often sets certain expectations from possible solutions such as those which are determined by values and notions of morality. This can often lead to opposing interests which can influence both the process as well as the outcome of mediation. Acknowledging and acting proactively on differing interests may provide opportunities for cross-cultural win-win strategies. However, problems caused by culturally derived miscommunication must be differentiated from those having roots in culturally determined interests. The success and effectiveness of mediation thus depends on the ability of parties to develop intercultural understanding of interests and the capacity of the mediator to guide this understanding.

The Intercultural Approach to Mediation: Importance of Cultural Sensitivity

In a world in which multicultural problem solving is becoming increasingly significant, mediations involving intercultural exploration through a less presumptive and more empathetic approach, are seen to be better suited. Cross-cultural differences often result in labeling behavior creating biased classifications. This often leads to misunderstandings and is counter productive to any cooperative resolution process. Thus, acknowledging cultural plurality and engaging in interpersonal understanding may help unearth underlying motivations and facilitate the process of dispute resolution. This necessitates the need for more

culturally sensitive mediators who are able to minimize cultural differences between the parties, wherein lies the importance of cultural awareness.

For this identity based, intercultural approach to be successful, mediators require special training and experience. However, cultural ignorance must not be replaced by excessive justification of all acts as endorsed by culture. That is, while a mediator will have to show cultural awareness and sensitivities, this must not be confused with accepting all opinions and acts as culturally determined. It will be difficult for the mediator to determine when culture is used as an excuse and if hidden interests are being served in the name of cultural sovereignty. Aware of the problem, it is up to the mediator to strike a balance and decide if cultural diversity is a legitimate justification for certain demands. Thus, cultural differences can also be cultural opportunities. Acknowledging the power of cultural diversity not only enables better conflict resolution but also paves way for a higher level of human civility.

Mediator's Role in a Cross Cultural Mediation

The first step towards attaining cultural awareness for a mediator is to be cognizant of the degree to which her behavior is culturally determined. Because it is through this personal lens that she observes and assesses the negotiating behavior of others. To reduce distortions, the mediator must detach herself from her own cultural assumptions and pre conceived notions and appreciate the extent to which her view of other people's behavior may not necessarily reflect a universal view. The mediators' culture may also play a significant role in the evolution of the mediation, given that different cultures may assign different roles to mediation including expecting specific skills/ interventions on part of themediator.

The process of mediation should be democratic providing equal opportunities for all. To achieve this, a mediator must approach the process by keeping preferences and customs of all involved parties in mind. Thus the next step would be to attain knowledge about diverse cultural views by identifying and researching the culture(s) of the clients and the attorneys that will be participating in the mediation. Pre-mediation assessments can also be instrumental in this process. Furthermore, the mediator should learn as much as possible about the personalities of the participants and ways their negotiating behavior may vary from practices of their culture(s). While doing so, it is important to maintain an objective outlook and harmonize with a diversity of cultural views. This must also be supplemented

with equipping oneself to formulate working models and communication techniques to transcend limitations posed by cultural intersectionalities. This would entail brainstorming interventions for impasses formed on cultural foundations and aiding mutual understanding, all while being a neutral facilitator.

Thus, in order to transcend problems caused by stratified party demographics, the mediator must attempt to foster integration of every single individual to obtain the best outcome. An efficacious process may then be the one where the mediator's approach comports with the other participants' cultural upbringing.

The Culture of Mediation in India and the Role of Culture in Indian Mediation

India is one of the most multicultural countries in the world. With an area of 3.3 million km2 and a population of 135 crore people, it has a rich historical legacy influenced by numerous cultural groups. Today, as the largest democracy of the world, each state within India has its own unique identity be it in terms of language, dress, cuisine, traditions or way of life and yet they are united in diversity. Indian history and literature have reflected the cultural co-existence of people for many centuries. At the same time it would not be fair to generalize them into a homogeneous cultural identity. In a nation engulfing stratification of caste, class, religion and ethnicity, conflicts are likely to be multilayered, traversing a spectrum of intersectionalities.

The Indian legal system has grown and evolved with the lives and aspirations of its diverse populace. The cultural dimensions of Indian jurisprudence are especially important for marginalized groups, providing protection from discrimination and instituting barriers to social exclusion. The collectivist mindset of viewing family as the unit of society is also reflected in its matrimonial laws. There are numerous other examples of how cultural factors have shaped legal discourse in India. Imbibing the ethos of alternate dispute resolution, particularly mediation is still in its nascent stages in India. While court annexed mediation practices have been established in various parts of the country but both private mediation and the general awareness about mediation is yet to develop among the masses. History has demonstrated the existence of some informal forms of mediatory practices such as those through the panchayat system. And while recent developments at the national and international level may have propelled and accelerated development of a culture of mediation in India, there is still a long way to go.

Mediation, as a voluntary, confidential and flexible process, gives agency to people to come to mutually agreeable resolutions. For conflicts with dynamics of underlying cultural contexts, mediation can thus be one of the best dispute resolution tools to further the cause of peace through multiculturalism. Furthermore, it is also known to traverse lapses, delays and biases of other formal processes. The growth of mediation is thus essential to a country like India which is ripe in social stratification and cultural diversity and also has a terribly overburdened justice dispensation system. Therefore, it is pertinent that we harbor every opportunity for developing a culture of mediation in India.

However, the success of mediation in a country laden with deep cultural and ethnic heterogeneity largely lies on the shoulders of mediators who need to have an inclusive mindset. In such cases process expertise should entail skills to understand diversity, privilege and context and integrate these elements in their process design. For this to become a reality, developing cultural sensitivity must be an essential part of the professional practice standards. This will thus enable leveraging the power of context specific variables to foster meaningful mediation processes.

Conclusion

This article has discussed implications of culture in mediation through a culturalist interpretation of conflict resolution. As mediation finds rooting in different parts of the world, the need of an intercultural approach becomes even more significant. Mahatma Gandhi once said, 'No culture can live if it attempts to be exclusive.' Thus the beauty of this world lies in the diversity of its people. We mustn't allow cultural differences to divide us rather leverage the strength of cultural diversity to uplift all mankind. Appreciation of cultural diversity is pertinent for our symbiotic existence where intercultural dialogue facilitates a more peaceful and just world. For there lies a greater truth behind the veil of social difference and that is our connection as one human race.

Mediation Process, Scope of Its Practice in Bangladesh: Challenges and Opportunities

- Pankaj Kumar Kundu

Mediation Process:

Mediation is nothing new. Mediation and civilization are of the same age. In every civilization there was usage of mediation. In Vedic era, Purahits Priests) and Brahmins played major roles in resolving conflicts and people obeyed their verdicts to maintain discipline, peace and tranquility in the society. Various instances of mediation are found in Hindu mythology. Similarly in Greek and Roman civilizations there are recognitions of mediation. Apart from that some legendary stories of mediation are familiar in the society. King Solomon's story is famous one regarding detection of the real mother for a single baby out of two disputing women. At the beginning of Islam there arose a serious disagreement in setting the Hajr-e-Aswad (black stone) in the Kaaba Mosque, where Prophet Hazrat Muhammad made an amicable settlement most intelligently and satisfactorily among the people of four tribes, otherwise any severe bloodshed might occur instantly. This is one of the best examples of mediation.

It is perceptible that human life comprises of several differences between and among people, groups, communities and nations. There are cultural differences, situational differences, personality differences, differences of opinion etc. Difference leads to disagreement. Disagreement causes problem. Disagreement unresolved becomes a dispute. So dispute is not bad, it is inevitable, a life cannot be imagined without disputes. It is significant to know procedure how to resolve, manage, regulate, prevent, reduce, or avoid the disputes.

Disputes can be resolved in two methods: 1. Conventional judicial process i.e., through litigation in the courts of law, which is an adversarial system; and 2. ADR (Alternative Dispute Resolution) mechanism, which is a participatory system. There are so far four forms of ADR mechanism: Negotiation, Mediation, Conciliation, and Arbitration. Mediation, in view of the researchers, is the best form of ADR mechanism. On comparison between the two processes, it appears that the conventional judicial process has some disadvantages, for example, it is time consuming, expensive, procedurally inflexible, and it shrinks participatory role of the parties.

By contrast, the ADR mechanism, particularly the process of mediation has a lot of advantages. It saves time and money, it is flexible, informal, and confidential. It puts the parties in control, helps parties deal with emotions, helps parties maintain good relationship, helps parties avoid embarrassment, takes into account long term and underlying interest of the parties, focuses on resolving dispute in a mutually beneficial settlement, leads to resolving related cases between the parties, and expedites finality. Time is well and properly spent here and both parties win.

What does mediation (negotiated agreement) mean? Mediation means assisted negotiation. Negotiation means communications for agreement. Therefore mediation is assisted communications for agreement. In the current time mediation has been defined by the researchers very precisely, "Mediation is a dynamic, structured and interactive process where an impartial third party assists the disputing parties in resolving disputes out of court through the use of specialized communication and negotiation techniques". The expression 'impartial third party' denotes here 'Mediator or Mediators', who uses/ use the specialized techniques in resolving conflicts between the parties. As music is not possible without instruments, so is mediation without Mediator/ Mediators.

Anybody from any profession or academic background having qualifications and qualities can be a Mediator. Mediator must be: i) neutral, ii) impartial, iii) honest, iv) intelligent, v) knowledgeable, vi) patient, vii) respected in the community, viii) articulate, ix) forceful and persuasive, x) empathetic, xi) effective as a listener, xii) imaginative, xiii) sceptical, xiv) having a sense of humour, xv) objective, xvi) flexible.

Usually there are three stages in a mediation process - introduction stage, opening

statement stage, and concluding stage. But practically the total process of mediation comprises of six subtle parts, namely – begin the discussion, accumulate information, develop the agenda and discussion strategies, generate movement, escape to separate sessions, and resolve the dispute.

A mediator plays the key role in the mediation process. He has particular duties and functions in every stage of mediation. His main duties and functions are: i) setting the procedural framework (date of meeting, time, length and place of meeting, number of participants, separate and equal spot of room of parties, role of observers or interested groups, room of observers or interested groups, rules of protocol i.e., order of speaking, formality of discussions, record keeping, status of outcomes, mediator's position, equidistant from them, closest to the exit door etc.); ii) before the discussion begins Mediator will describe some important issues, like – relevant background and experience of the parties; the mediation process, whether the parties have consent to the process; the code of conduct the Mediator will observe; the process that will apply in the unlikely event of a party believing that the Mediator has not met the standards of the stated code of conduct; the party or any representative who represents the party has the full authority to settle before the Mediator; iii) acting as Chairperson, Communicator, Translator, Resource expander, Guardian of durable solutions, Protector of process; iv) managing emotions, dealing with power inequalities, breaking impasse; v) preparing settlement agreement.

A Mediator must follow the ethical guidelines and code of conduct for him. He should i) avoid conflict of interest, ii) ensure information, iii) protect voluntary participation, iv) be competent to mediate, v) maintain confidentiality of the process, vi) conduct the process impartially, vii) refrain from providing legal advice, viii) should not mislead or guarantee, ix) should treat every party as unique and avoid making assumption; x) should not undermine seriousness of the problems faced by the parties; xi) should not accuse any of the parties as the reason for the problem or for not cooperating in the process or for not settling the problem; xii) should not act as a legal representative for any of the parties; xiii) should not guarantee any of the parties that a mediation session will result in a settlement; xiv) should not suggest to the parties that their remuneration should be based on or related to the outcome of the mediation; xv) should not disclose any information acquired in the course of serving as a Mediator in a mediation process.

There are various types of mediation: i) facilitative, ii) evaluative, iii) directive, iv) transformative, and v) narrative mediation. Differently, mediations are of two types: a) court-annexed, and b) non-court-annexed.

Scope of Practice of Mediation in Bangladesh:

In a number of enactments of Bangladesh, there are provisions of court annexed mediation.

In the Code of Civil Procedure, 1908, section 89A has inserted in 2003 by way of amendment. In this section as many as 13 sub-sections have been added. Here the total procedure of mediation has been illustrated starting from appointment of Mediator to the making of settlement agreement. Though in section 89B of this Code a provision of arbitration has been preserved, but again in section 89C the provision of mediation in appeal stage has been retained.

In the Family Courts Ordinance, 1985, section 10 relates to mediation. Although there is no specific provision of appointment of any Mediator to resolve the dispute between the parties, but the presiding Judge of the concerned court has been empowered to facilitate compromise or reconciliation between the parties.

Section 22 of the Arbitration Act, 2001 deals with mediation and here both the parties have been given a scope to mediate their disputes at any stage of the arbitration process. If the parties come to a settlement on compromise, that will be noted in the award clearly.

In section 22 Artha Rin Adalat Ain, 2003 (law relating to recovery of loan money lent by banks or other financial institutions) the provision of mediation with detailed procedure has been articulated.

Similar provision has been made in section 6 of the Village Court Act, 2006. Apart from that there are other laws including Labour Law, the Real Estate Development and Management Act, 2010 etc., where provisions of mediation have been endorsed expressly or impliedly to avoid the intricacy of procedure. So there are scopes, though not in broad spectrum, to practise mediation under the aforementioned laws.

Challenges in practising mediation in Bangladesh:

Despite scopes, available in the aforesaid laws, practice of mediation in Bangladesh is

still challenging for various reasons. Some crucial factors are liable for this, namely - people's perception about mediation, Lawyers' outlook, indifferent attitudes of Judges, lack of training of Judges and Mediators, and inaction of the government etc.

People do not choose the course of mediation for many reasons, for example, i) they and their lawyers are not familiar with the process, ii) they do not think their Mediators are sufficiently qualified to deal with the intractable issues in their case, iii) they believe their lawyers have promised to bring them win through trial, iv) they think litigation is the only way to resolve the dispute, v) due to egotism they do not want to lose their weight to other party.

Perception of most of the lawyers is like that of the general people. Moreover, they think they will lose their source of income if the case is ended in mediation speedily. Lack of training and motivation of judges and mediators are barriers in promoting mediation.

Government's role is very important in making mediation effective in Bangladesh. Compared to other countries, Bangladesh is lagging behind in promoting and establishing mediation. In India, mediation process is dealt with under the Arbitration and Conciliation Act, 1996, whereas in Bangladesh though there is the Arbitration Act, 2001, but no particular law has yet been enacted for mediation. As a result, on one hand, scope of mediation is not expanding beyond some certain parameters and professional mediators are not coming out, on the other. It has been discussed before that dispute may arise on several issues. But in the present context all disputes are not resolvable through mediation process. For instance, commercial disputes, international trade disputes, cross-border disputes, cross-cultural disputes etc., are not amenable to mediation process under the prevailing laws of Bangladesh.

In this context it is it is pertinent to talk about the United Nations Commission on International Trade Law (UNCITRAL), which is a subsidiary body of the General Assembly of the United Nations. UNCITRAL was established by the General Assembly of United Nations in 1966. In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the

vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.

Having recognized the value of arbitration as a method of settling disputes arising in international commercial relations, UNCITRAL adopted a model law titled, "UNCITRAL Model Law on International Commercial Arbitration, 1985", which has been amended in 2006. The Commission is composed of sixty Member States elected by the General Assembly. Membership is structured so as to be representative of the world's various regions and its principal economic and legal system. Members of the Commission are elected for terms of six years, the terms of half the Members expiring every three years. Though UNCITRAL was established in 1966, but Bangladesh could not be its Member as yet. Except making a law on arbitration i.e., the Arbitration Act, 2001 in the light of the UNCITRAL Model Law, no much effort is evident on part of the government of Bangladesh to keep in touch with UNCITRAL.

Consequently the Member States of UNCITRAL have travelled a long way in the field of mediation leaving Bangladesh behind.

The latest contribution of UNCITRAL is "The United Nations Convention on International Settlement Agreements Resulting from Mediation" which was adopted on 20 December 2018 and opened for signature on 7 August 2019 when it was signed by 46 States. This Convention will come into force on 12 September 2020 i.e., six months after the deposit of third ratification instrument. This Convention is recognized as The Singapore Convention on Mediation. This Convention will facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across the borders. Business will benefit from mediation as an additional dispute resolution option to litigation and arbitration in settling cross-border disputes. Bangladesh has not yet ratified this Convention. As long as Bangladesh would ratify the Convention, no substantial change would take place in the arena of non-court-annexed as well and cross-borders mediation.

Opportunities to practise mediation in Bangladesh

From the above discussions it is apparent that there is an opportunity to practice court-annexed mediation in Bangladesh as of now. To upgrade the practice of mediation from domestic level to international level, some realistic initiatives are indispensable. Firstly, the hurdles, that are liable for making the practice of mediation challenging, need to be removed. Stakeholders must play proactive role in this respect. Secondly, the government has to take initiative to be a Member of UNCITRAL and has to ratify the Singapore Convention on Mediation as soon as possible. Thirdly, in the light of that Convention it has to enact a unique and independent law like Arbitration Act, 2001 facilitating practice of mediation. These are not daunting tasks for the government at all.

Conclusion:

The judiciary of Bangladesh is about to drown in the tidal wave of litigations. It is overburdened with about 3.6 millions of cases; Judges are struggling to reduce the case backlog, litigant people are moving on from one court to another seeking quick justice, but everyone knows how far they are getting it. The procedural rigidity may be considered as one of the main reasons behind it. So it has become very urgent to enact an independent and complete law on mediation. Against the given backdrop, an International Mediation Institute (IMI) affiliated organisation "Bangladesh International Mediation Society (BIMS)" is persisting endeavour in promoting mediation in Bangladesh since 2017. BIMS has been creating Mediators through training rendered by IMI certified Mediators, Faculties and Trainers. But it is not possible for a private organisation to change the scenario overnight. Government's sincerity, good intention and prompt initiatives may transform the current deadlock situation to better one following the nations who already made unprecedented progression in the world of mediation going beyond the traditional legal process.

Pankaj Kumar Kundu is an Advocate, Appellate Division, Supreme Court of Bangladesh, Accredited Mediator of IIAM & BIMS, and Chairman of AAMA Bangladesh Chapter.

Primary Sources of Mediation in Bangladesh

- S.N. Goswami, Advocate
Supreme Court of Bangladesh

The History of Mediation goes back to Ancient India, where elders used to mediate local disputes between the villagers.

In short till 1947, the name of Bangladesh was East Pakistan. It was larger part of the State of Bengal of the then India. After the independence from Pakistan, on 16th December, 1971 the newly formed country was named as Bangladesh. Bangabandhu Sheikh Mujibur Rahman is called "Father of Nation" in Bangladesh.

The constitution of the Bangladesh is the constitutional documents of Bangladesh. It was adopted on 4th November, 1972 and effective from 16th December, 1972. It may be noted that the provisional Government of Bangladesh issued the Proclamation of independence on 10th April, 1971 which served as the interim first constitution of Bangladesh. After the war, the constitution of drafting committee formed including 34 members, Dr. Kamal Hossain as its Chairman.

We know Bangladesh is a small country but thickly populated. Peoples are Muslim, Hindu, Buddhist, Christian, Tribal and Bahai'. Their Holy Books are the important Primary Source of Mediation.

1. Four Holy Books :

i) The Tawrat (Torah)
ii) The Zabur (Dawud)

iii) The Injil
iv) The Quran

2. Four Holy Vedes : There are four vedic Samhitas"
i) The Ragveda
ii) The Yajurveda
iii) Sama Veda
iv) Atharva Veda

3. Ramayana, Mahabharat, Purans.

4. The Holy Book of Buddhism is called the Tripitaka. Noted that the first Buddhist texts were initially passed on orally by Buddhist monastics.

5. Mahua : A Holy three of Tribal people.

6. Bahai's Holy Book is the Kitab-E-Aqdus.

7. Bangabandhu's speech:

Bangabandhu was born on 17th March, 1920 at Tungipara village under the then Gopalgonj Sub-division of Faridpur district. He spent his childhood at Tungipara.

Bangabandhu's speech to public, to diplomats, to party workers are the most important in the history of Mediation. On 7th March, 1971 Bangabandhu addressed a public rally at the then Race Course ground which is as follows;

"My brothers,

I have come before you today with a heart laden with sadness. You are aware of everything and know all. We have tried with our lives. And yet the sadness remains that today, in Dhaka, Chittagong, Khulna, Rajshahi and Rangpur the streets are soaked in the blood of my brothers. Today the people of Bengal desire emancipation, the people of Bengal wish to live, the people of Bengal demand that their rights be acknowledged. What wrong have we committed ? Following the elections, the people of Bangladesh entrusted me and the Awami League with the totality of their electoral support. It was our expectation that the Parliament would meet, there we would frame our Constitution, that we would develop this land, that the people of this country would achieve their

economic, political and cultural freedom. But it is a matter of grief that today we are constrained to say in all sadness that the history of the past twenty three years has been the history of a persecution of the people of Bengal, a history of the blood of the people of Bengal. This history of the past twenty three years has been one of the agonizing cries of men and women. The history of Bengal has been a history where the people of this land have made crimson the streets and highways of this land with their blood.

We gave blood in 1952 : In 1954, we won the elections and yet were not permitted to exercise power. In 1958, Ayub Khan imposed Martial Law and kept the nation in a state of slavery for ten long years. On 7 June 1966, as they rose in support of the Six-Point movement, the sons of my land were mown down in gunfire. When Yahya Khan took over once Ayub Khan fell in fury on the moment of 1969, he promised that he would give us a Constitution, give us democracy. We put our faith on him. And then history moved a long way, the elections took place, I have meet President Yahya Khan.

I appealed to him, not just as the majority leader in Bengal but also as the majority leader in Pakistan, to convene the National Assembly on 15 February. He did not pay heed to my appeal. He paid heed to Mr. Bhutto. And he said that the assembly would be convened in the first week of March. I went with him and said we would sit in the Parliament. I said that we would discuss matters in the Assembly. I even went to the extent of suggesting that despite our being in a majority, if anyone proposes anything that is legitimate and right, we would accept his proposal.

Mr. Bhutto come here. He held negotiations with us, and when he left, he said that the door to talk had not closed, that more discussions would take place. After that, I spoke to other political leaders, I told them to join me in deliberations so that we could give shape to a Constitution for the country. But Mr. Bhutto said that if members elected from West Pakistan came here, the Assembly would turn into a slaughter house, as abattoir. He warned that anyone who went to the Assembly would end up losing his life. He issued dire warnings of closing down all the shops from Peshawar to Karachi if the Assembly Session went ahead. I said that the

Assembly Session would go ahead. And then, suddenly, on the first of March the Assembly Session was put off.

Mr. Yahya Khan, in exercise of his powers as President, had called the National Assembly into Session; and I had said that I would go to the Assembly. Mr. Bhutto said he would not go. Thirty five members came here from West Pakistan. And suddenly the Assembly was put off. The blame was placed squarely of Bengal, the blame was put at my door. Once the Assembly meeting was postponed, the people of this land decided to put up resistance to the act.

I enjoined upon them to observe a peaceful general strike. I instructed them to close down all factories and industrial installations. The people responded positively to my directives. Through sheer spontaneity they emerged on to the streets. They were determined to pursue their struggle through peaceful means. What have we attained ? The weapons we have bought with our money to defend the country against foreign aggression are being used against the poor and down trodden of my country today. It is their hearts the bullets piece today. We are the majority in Pakistan. Whenever we Bangalees have attempted to ascend to the heights of power, they have swooped upon us.

I have spoken to him over telephone. I told him, "Mr. Yahya Khan, you are the President of Pakistan. Come, be witness to the inhuman manner in which the people of my Bengal are being murdered, to the way in which the mothers of my land are being deprived of their sons." I told him, "come, see and dispense justice." But he construqusly said that I had agreed to participate in a Round Table Conference to be held on 10 March.

I have already said a long time ago, what RTC ? With whom do I sit down to talk ? Do I fratemise with those who have taken the blood of my people ? All of sudden, without discussing matters with me and after a secret meeting lasting five hours, he had delivered a speech in which he has placed all responsibility for the impasses on me, on the people of Bengal.

My brothers,

They have called the Assembly for the twenty-fifth. The marks of blood have not yet dried up. I said on the tenth that Mujibur Rahman would not walk across that blood to take part in a Round Table Conference. You have called the Assembly. But my demands must be met first. Martial Law must be withdrawn. All military personnel must be taken back to the barracks. An inquiry must be conducted into the manner in which the killings have been caused. And power must be transferred to the elected representatives of the people. And only then shall we consider the question of whether or not to sit in the National Assembly. Prior to the fulfillment of our demands, we cannot take part in the Assembly.

I do not desire the offence of Prime Minister. I wish to see the rights of the people of this country established. Let me make it clear, without ambiguity, that beginning today, in Bangladesh, all courts, magistracies, government officers and educational institutions will remain closed for an indefinite period. In order that the poor do not suffer, in order that my people do not go through pain, all other activities will continue, will not come within the ambit of the general strike from tomorrow. Rickshaws, horse carriage, trains and river vessels will ply. The Supreme Court, High Court, Judge's Court, semi-government officers, WAPDA nothing will work. Employees will collect their salaries on the twenty-eighth. But if the salaries are not paid, if another bullet is fired, if any more of the people are murdered, it is my directive to all of you; turn every house into a fortress, resist the enemy with everything you have. And for the sake of life, even if I am not around to guide you, direct you, close off all roads and pathways. We will strive them into submission. We will submerge them in water. You are our brothers. Return to your barracks and no harm will come to you. But do not try to pour bullets into my heart again. You cannot keep seventy five million people in bondage. Now that we have learnt to die, no power on earth can keep us in subjugation.

For those who have embraced martyrdom, and for those who have sustained injuries we in the Awami League will do all we can to relieve their tragedy. Those among you who can please lend a helping hand through contributing to our relief committee. The owners of industries will

make certain that the wages of workers who have taken path in the strike for the past week are duly paid to them. I shall tell employees of the government, my word must be heard, and my instructions followed. Until freedom comes to my land, all taxes will be held back from payment. No one will pay them. Bear in mind that the enemy has infiltrated our ranks to cause confusion and sow discord among us. In our Bengal, everyone, be he Hindu or Muslim, Bangalee or Non-Bangalee, is our brother. It is our responsibility to ensure their security. Our good name must not be sullied.

And remember, employees as radio and television, if radio does not get our message across, no Bangalee will go to the radio station. If television does not put forth our point of view, no Bangalee will go to television. Banks will remain open for two hours to enable people to engage in transactions. But there will be no transfer of even a single penny from East Pakistan to West Pakistan. Telephone and telegram services will continue in East Bengal and news can be dispatched overseas.

But if moves are made to exterminate the people of this country, Bangalees must act with caution. In every village, every neighborhood, set up Sangram Parishad under the leadership of the Awami League. And be prepared with whatever you have. Remember: Having mastered the lesson of sacrifice, we shall give more blood. God willing, we shall free the people of this land. The struggle this time is a struggle for emancipation. The struggle this time is a struggle for independence. Joi Bangla !"

We know Mediation is a form of ADR resolving disputes between two or more parties with concrete effects. In short Mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences. There are essentially five (5) steps to a successful Mediation. They are comprised of the introduction, statement of the problem, information gathering, identification of the problems, bargaining and finally settlement.

It may be noted here on 7th March, 1971 Bangabandhu advised the people to prepare themselves for a resistance movement against the enemy. The entire nation carried out Bangabandhu's instructions. Every organizations including

government office, courts, banks, insurance companies, schools, colleges, mills and factories obeyed his orders. In reality, as a good Mediator through Mediation he ruled an independent Bangladesh from 7th March to 25th March, 1971. Moments after the crack down begun Bangabandhu declared independence on 26th March, 1971. The liberation war was ended on 16th December, 1971 when the Pakistani occupation forces surrendered at the historic Race Course ground. So we proudly believe that Bangabandhu through Mediation formed independent Bangladesh.

Bangabandhu's speech is one of the main source of Mediation.

S. N. Goswami is an Advocate, Appellate Division, Supreme Court of Bangladesh, and Co-Chairman of AAMA.

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Professor Dr. Gowher Rizvi greeting Mr. Justice M. Imman Ali with flower bouquet

Professor Dr. Gowher Rizvi with Mr. Justice M. Imman Ali

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