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# Kluwer Mediation Blog

## Are we Missing the Point? – A Young Mediator’s Perspective about Mediation in India

Gracious Timothy Dunna · Tuesday, April 12th, 2016

We have quite a heavy topic before us, but before we get into the weightiness of it, I’d like to begin with something more light-hearted. There is a TV commercial going around which begins with flashes of hard-hitting questions such as: what is the age of the universe? What is the meaning of life? Etc. It then moves on to simpler questions like: What is your favourite colour? Do you like pizza...? Then, suddenly, the screen blacks out. You see a silhouette of a motorbike appearing from the dark with a deep voice in the background saying, “Yamaha! It may not be the answer, but at least, it’s not another question!”

Something about this commercial rings the truth about mediation. It may not be the answer to everything but, at least, it’s not another daunting question. While many problems plunge over our litigation structures, mediation comes to us as a saviour. Serving expeditious and inexpensive justice, while being flexible enough to meet the interests of disputing parties, it provides for remedies which may not be available in traditional litigation.

The motorbike commercial is relevant in the context of mediations because it cannot be that mediation, as a dispute resolution mechanism, would exclude every other form of dispute resolution, and be an answer to every dispute or conflict. It is rather appropriate; a necessary prerequisite before calling on the forces of arbitration or litigation. In India, however, the vibes are at odds.

Someone once questioned me, “What exactly is your problem with the adversarial system?” I thought I would answer the question with a question because when you question the questioner, you force the questioner to open up within his own assumptions, realising the entry point of the discussion. I asked, “Is it your apprehension that mediation is not the right way to resolve disputes, or, is this question coming from your concern that mediation could resolve disputes even before it got anywhere close to litigation?” A bit of laughter, and after two shakes of awkwardness, we moved on, guessing the rhetoric spoke for itself. It seems to me that those who want to bring up an issue to oppose mediation are often confused about what their issue really is, therefore making their arguments blindsided.

But, that’s not why mediation in India isn’t where it should be. Frankly, if I was asked, “What then is the cause of mediation’s unpopularity and disfavour? I would perhaps not have a fair answer. Because the issue, I think, is unclear and a lot more complicated than it seems.

That being the case, here's what we're absolutely clear about: Settlement of disputes in an amicable way is the hallmark of our civilization. History tells us that in India, the mediation system has been prevalent in one form or other. It continues in our villages, preserved in its customary form. We also know that the problem of arrears in courts has assumed serious proportions, necessitating a search for alternates and supplements to litigation, which has been the traditional mode for resolution of disputes. We then had mediation statutorily recognized by the Civil Procedure Code (Amendment) Act, 1999. We know that the immense value that mediation imbibes in itself is utterly unique. Its benefits have been preached for some time, and they have been widely acknowledged, at least principally.

This brings me to the very root of my concern. If the institution of mediation is as unique and suitable as it claims to be; if it really is that good with all these benefits that it boasts to have; and if mediation is really the answer, then "what is the question?" At one level, we have known that mediation is a means of avoiding the pitfalls of adversarial modes of dispute resolution, but, on the other hand, the status of mediation in India leaves much to be desired.

Why are there countless walls hindering its progressive use? Some say that it just might be a cultural issue and that we've generally been a litigating society. Mixing ego with economic reasoning is perhaps ingrained in us. Whatever be the reason, my encounters have taught me that mediation is not yet ingrained in the present-day Indian psyche. It is like a new graft, like a new heart or a new kidney. And as with the human body, it looks for an opening to reject it.

While the body takes its time to accept the change, I believe that the present-day discourse on the need to evolve mediation in India should focus on the objective reasons for its lack of momentum. There is a need to change the stereotypical ideology that mediation is generally branded with. Take for instance the clichéd name calling like "Dalal" (meaning a broker in Hindi), who convinces two parties to meet half-way; or a Dalal, who is too soft for something as hard core as litigation.

Consider the rationale for ADR in India. ADR has been perceived only in terms of reducing the arrears of cases in courts. The advocacy of ADR is motivated on the inability of our courts to handle the existing load of cases. But, the point is this: although easing the burden of courts is undoubtedly an important objective, it needs to be emphasised that this is only one of the primary goals. Mediation fulfils other instrumental and intrinsic functions which are of an equal, if not greater importance, and the most significant of them all is that ADR provides access to justice.

When we talk about the judicial system in India (or, anywhere in the world), we picture the establishment as a strong convergence of independence, impartiality, esteem and sanctity. A vibrant judicial system is often the basis of a flourishing democratic culture. There's no other reason why, in search of mediation in India, it would be necessary to deliberate over these traits of the judicial system which meets the expectation of it being sovereign, unprejudiced, honoured and sanctified. For that reason, developing the ethics, probity and integrity of an alternative framework like mediation becomes absolutely necessary.

Mediation cannot be preached to the masses without paying attention to these very precepts that have been the reason for securing faith in a system that delivers justice to the people. It needs an appropriate framework to obviate the negativity and distrust that hovers around it. Besides, though mediation gives the parties the sacred right to self-determine, perhaps the hesitation comes from the absence of any legislation to back a mediation process (in addition to the paucity of awareness). These concerns touch upon the need of the hour – institutionalizing mediation in India.

It is desirable, especially from the Law Commission of India, to deliberate upon various other issues connected with effective implementation of mediation throughout the country, so that it can be accepted as an effective tool of dispute resolution, and be the flagship of the ADR movement in India. I am optimistic that solutions can be found by asking the right questions, the answers to which will surely follow.

Having said that, being a young law practitioner and mediator, I believe that the younger generation in India is a potential force in the race to further the cause of developing mediation as a viable option to litigation or arbitration. The young generation of lawyers and students are far more acquainted with mediation tools, better equipped and aware of the nuances of consensual dispute resolution. This is a good sign! Dispute resolution competitions in India and abroad have been a great impetus in driving young minds to try, experience, and take forward the idea of mediation as an utterly unique method of resolving disputes.

Giant strides are being taken by competitions such as the 'CDRC-Vienna'. Its [Young Global Ambassador Programme](#) aims to reach out to diverse regions of the world through its Young Ambassadors, to spread the word about consensual dispute resolution, encouraging them to bring the necessary awareness about the commercial usage and realities of mediation. This has been my privilege as a Young Ambassador of CDRC in India. Likewise, 'Lex Infinitum', an International mediation event held in Goa, took big leaps in creating an environment to promote ADR in India by providing law students with a platform to network, learn and experience mediation through the competition, workshops and active interactions with ADR experts. Competitions such as these are big influencers, creating next generation front-runners in the field of ADR. I believe in the principle that change can come through education, and though mediation may still be at its incipient stages, young enthusiasts are ever increasing. This is best thing that India has today, and this is what will lead India tomorrow!

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