Key Note Address delivered by
Justice R.C. Lahoti, Judge, Supreme Court of India,
at Valedictory Session of two days Conference on
ADR, Conciliation, Mediation and Case Management
organised by
the Law Commission of India
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As a young over-enthusiastic district judge, having developed a mania for disposal of cases, a sane advice was given to me by an elderly senior counsel 25 years back from today. Affectionately he told me – "My dear young judge! Take it easy. During my 50 years of practice, I have seen many judges being finished, but I have never seen the Court work being finished". In retrospect, I realize how correct he was. Henry G. Miller, President, NY State Bar Association once said, "The legal system is often a mystery, and we, its priests, preside over rituals baffling to everyday citizens". The phenomenon of docket explosion and ever-mounting arrears in law courts are attributable broadly to a few causes : (i) the increasing faith of people in justice delivery system in spite of the delay involved; (ii) working with $1/10^{th}$ manpower, in the opinion of Law Commission, OR $1/6^{th}$ in the assessment of Hon'ble the Chief Justice of India (iii) lack of finances and consequent failure of essential infrastructure, and (iv) lack of research, innovation and modernization in the field of court management.

We cannot prevent the influx of cases; nor should we. But we can certainly enhance the speed of outflow or find out new outlets. The human ingenuity in law has given birth to various alternative dispute resolution systems in departure from the traditional time-tested and well-established system and procedure of courts. Mediation and conciliation though not new to our country their recent statutory recognition has given them a shot in the arm. Interestingly,

Arbitration and Conciliation Act, 1996 speaks of arbitration and conciliation but does not speak of mediation. Section 89 of the Code of Civil Procedure engrafted into the body of the Code in 1999 and brought into force after a waiting of about 3 years provides for four systems of settlement other than trial, namely, arbitration, conciliation, judicial settlement and mediation.

Conciliation and mediation are not defined. Jurists are not one in their opinion on the content of the concept of mediation and conciliation. The terms are often used interchangeably but their separate mention in clauses (b) and (d) in Section 89 cannot be without significance. Broadly speaking mediation is a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent. Conciliation is a form of an assisted negotiation between two or more parties in which an additional person, the conciliator, intervenes in various ways with the object of facilitating a settlement between the parties. To some extent in practice there may be overlapping arisen between the two. The essential distinction lies in the fact that the role of conciliator is more 'interventionist' than that of a mediator. Mediation may result in resolution of dispute; conciliation emphasizes more on dissolution of dispute. The fact remains that the two processes are distinct from the methods of early neutral evaluation, fact-finding facilitation and family counselling (see Laurence Boulle and Miryana Nesic, Mediation Principles, Process Practice).

Section 89 in the CPC and the model rules framed and circulated by the committee headed by Justice Jagannadha Rao, constituted under the directions of the Supreme Court, aim at shifting the role of a judge in a civil trial. In traditional litigation system the judge occupies the back seat and the litigation is steered by the parties led by their respective lawyers. The message and philosophy of Section 89, if rightly appreciated and purposefully utilized, would shift the judge from back seat to the driving seat holding the steering from day one.

In this Conference the top-brass of judicial system in this country has come together, thanks to the efforts made by Law Commission of India and its dynamic Chief – Justice Jagannadha Rao and enthusiastic Member-Secretary, Mr. Vishwanathan, the motivation of Institute for Studies in Development of Legal System, San Francisco led by its Director-Stephens Mayo and the mobilizing resources made available by the Ministry of Law and Justice. We also find encouraging participation by members of judiciary, members of Bar and experts from India and abroad specially United States. We hope that the two days deliberations and intensive churning of the thoughts in this Conference would not be a time-spent but a time-invested. The Chief Justices of the High Courts would be returning to their respective States with host of ideas and determination for implementation.

A witty lawyer once remarked – an incompetent lawyer can delay a trial for years and months; a competent lawyer can delay it for decades. Happily this Conference has opened with very positive notes. Mr. D.V. Subba Rao, the Chairman of the Bar Council of India and accredited spokesman of lawyers fraternity has conveyed to the Conference that the legal fraternity is not opposed to the legal reforms and is rather, as a whole, all-set and prepared to welcome the reforms by cooperating and contributing its best. The Hon'ble Minister for Law and Justice too is positive and has assured an unstinted and continued co-operation from the Government in this direction. The approach of the Supreme Court of India, as the apex judicial institution of the country, towards this movement is writ large. My Lord the CJI has inaugurated the Conference. And Hon. Mr. Justice Rajendra Babu is delivering the Valedictory Address and his next senior colleague is presiding over this session.

A few months before as a member of Indo- U.S. Exchange Progamme I had an opportunity of witnessing the actual implementation of mediation and conciliation programmes in San Francisco and the State of Ohio. Stephens Mayo and Professor Chodosh gave practical demonstration of how these concepts are working there. They have developed a floating calendar system for processing the cases. 94% cases are referred to mediation and conciliation of which 46% are settled. If at all a case has to go for trial, the trial concludes in 14 months

calculated from the date of institution of case. The nature of litigation and other relevant circumstances in our country may not be the same as they are there but we can certainly borrow upon their experience which is almost 30 years rich by this time and suitably adapt the system to suit our requirements. In America also the mediation and conciliation were the gifts of judicial activism. The members of Bar were initially reluctant and showed their disinclination. The congress then passed a legislation giving statutory recognition to mediation and conciliation. The American society including lawyers being law-abiding, once there was a legislation, they gave up their opposition. The new order soon earned popularity and now a separate and sizable mediation bar has developed, the members whereof practise exclusively mediation alone. They participate in mediation proceedings and also act as mediators.

The mediation and conciliation can be court annexed or court referred. In the former the proceedings are conducted by an officer of the court and in the latter by independent agencies which are not part of the court system.

The members of the mediation Bar enjoy high respect and regards of the society because of their service to society and the standards they maintain. The work of mediators and conciliators is regularly evaluated and if anybody is found to be undeserving or indulging into unethical activities or breaching the confidentiality, he is de-listed. The mediation and conciliation are not just freelancing. They are institutionalized and rigorous standards of discipline and ethics are maintained. A mere knowledge of law does not make a good mediator or conciliator. Mediation and Conciliation need tact, skill, art of persuasion and instructions in sociology, human behaviour and psychology. About 2000 books, already available in American market, deal with theory and practise of mediation and conciliation, the role of judges and lawyers, and techniques in dealing with disputes ranging from disputes between neighbours to cross-border disputes. I am mentioning these things specially for the reason that these are similar shortcomings in the system of domestic arbitration as it is shaping in India and an

opinion has already started gaining ground, which is not without justification, that domestic arbitration in India has reached a stage where either it should be controlled and regulated by the courts or some other supervisory body or else be done away with lest it should cause more harm than good.

I would like to share a few thoughts on court management. Three concepts are developing in the judicial world specially in America and Australia. They are: (i) court management, (ii) case management, and (iii) judge management. The concept of management in court as a subject is hitherto unknown in our country. Devi Ahhilya University in Indore in Madhya Pradesh is conducting a 5-years degree course in Hospital Management, probably the only University in the country with such a faculty, and its graduates have relieved the doctors from all botheration relating to administration and management of the hospitals, nursing homes and diagnostic centers. A medical professional can then keep himself confined and concentrated on his professional activity. A curriculum in Court management and administration needs to be devised and commenced for those who are desirous of joining court services. Even class III and class IV employees, to be eligible for entry into services of the courts must have undergone a course of study whether a degree or diploma. This is necessary to upgrade the efficiency of court administration and rationalize the working of the courts. We the judges too need to be educated and trained in the art of Court Management. Else we must have qualified Court Managers to take care of managerial and administrative responsibilities.

In this context, National Judicial Academy of Bhopal provides immense potential and possibilities for working in this direction. It is expected to become functional in the month of coming September when the Director would be in place. It will be able to conduct courses for different levels of services designed for trial and appellate judges, members of tribunals, lawyers, bureaucrats and court staff.

Three things can revolutionalise the justice delivery system in our country. They are, (i) the introduction of court annexed and court referred alternate dispute resolution systems, (ii) the blending of information technology in justice administration, and (iii) the National Judicial Academy of Bhopal becoming functional. I may mention, with pleasure and gratitude, that my learned senior colleagues Justice Rajendra Babu and Justice M.B. Shah are taking keen interest in all these three and are quite enthusiastic about these.

Before I part I would like to invite your kind attention to three very important documents. Report on judicial reforms titled as 'Access to Justice' by Lord Woolf, the Chief Justice of England and Wales, Justice Michael Kirley on Judicial Reforms in Australia and our own Shetty Commission's Report of the year 1999. Though called a report of pay commission it contains many useful chapters on subjects other than pay and perks of judges. In Volume 3, Chapter 13, pages 744 to 758 – nineteen beautifully well written pages deal with Judicial Education and Training, Function of the Judges – with emphasis on management and functional skills, ADR systems, judicial education and training around the world, evaluation methods, continuing education and training needs for judges in India, organization and structure of model judicial academies, socialization of judges and what a judge of future is needed to be. This and few other chapters should receive the attention of all state level judicial academies and training programmes.

I am very happy to note and to share with you a few good omens. Ahmedabad of course is a pioneer in the field of mediation and conciliation in India. Chennai and Bombay have also commenced mediation and conciliation centres and successfully dealt with thousands of cases already. Mr. Niranjan Bhat of Ahmedabad, Mr. Shriram Panchoo of Chennai and Mr. Sardosh of Bombay have already lit the torches. I congratulate them and offer my compliments. Delhi and Andhra Pradesh have availed the opportunity of this conference and last evening held meeting with Stephens Mayo, taken decision and chalked out

programmes for their respective States. Others have to emulate. I appeal to Chief Justices, Bar Associations and others present here – You have to jump and take a plunge. Do not remain standing on the diving board.

Friends ! People have high hopes from Indian judiciary. We have to equip and update ourselves to respond. The whole world is marching ahead with a beat of drum in the new millennium. Let us not lag behind. We should keep pace with the tune of the times and be prepared to accept a new outfit in the new millennium. Our incoming generation will inherit the system which we shall be passing on to them. Let us realize our obligation towards them.

Wish you all the best. Thank you.

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