M E D I A T I O N – realizing the potential and designing implementation strategies.

Dr. Justice Dhananjaya Y. Chandrachud
Judge High Court at Bombay

Instrumental and Intrinsic Functions

The present day discourse on the need to evolve Alternative Dispute Resolution mechanisms tends to focus upon the large, and almost unmanageable, docket of litigation before Courts. The rationale for ADR is perceived in terms of reducing the arrears of cases in Courts. The premise that is articulated in the advocacy of ADR is the inability of Courts to handle the existing file of cases. Alleviating the burden of arrears is undoubtedly one of the important objectives. Yet, particularly in the context of mediation, it needs emphasis that this is only **one** of the important objectives. Mediation as a processual intervention in the legal system fulfills other instrumental and intrinsic functions which are of an equal, if not greater importance. In its instrumental function, mediation is a means to fulfilling stated objectives. The intrinsic function of mediation emphasizes the value of mediation as an end in itself.

While the problem of arrears has assumed serious proportions, necessitating a search for alternates and supplements to litigation which is the traditional mode for the resolution of disputes, there is, equally, a need to focus upon the hallmarks of the judicial process. The foundation of the judicial process in India is the establishment, over the last century, of a strong convention of independence and impartiality. Objective dispensation of justice by

Archived

the application of defined legal principles to factual problems which arise before the Courts is the basic premise of the judicial function. A vibrant judicial system is the basis of a flourishing democratic tradition. Rarely, if ever do democratic institutions thrive in the absence of judicial independence. However, there is now also a realisation that the **efficiency** of judicial functioning plays a critical role in democratic societies. Courts have a vital role to play in fostering conditions of economic growth. The legal system must create conditions in which trade, business and industry can visualise solutions that are arrived at with dispatch, predictability and certainty.

In the search for alternates to litigation, it would be necessary to dwell upon those facets of the judicial process which promote the ability of the system to discharge the expectation that Courts and Judges render justice impartially and objectively. In developing mediation as an alternate to the more traditional litigative avenues to resolving disputes, emphasis must be placed on two distinct issues. The first is to assess the extent to which mediation as a technique can seek to avoid those problems which beset the litigative system. The second is, the overbearing public interest in ensuring that the basic premise underlying the functioning of the judicial system, on which is founded the commitment of our system to the rule of law, is not obliterated in the search for alternates.

The first issue relates to designing an appropriate procedural framework for mediation that would obviate the problems which

Archived

confront litigation in India. That issue can essentially be conceived as a problem of

(i) creating an appropriate regulatory framework within the law;

(ii) developing capacities; and

(iii) implementing strategies which would enable the Bar and the Bench to undertake a co-operative venture in promoting expeditious and inexpensive justice: Justice which is flexible enough to meet the interests of disputing parties and to create remedies which may not normally be available in a traditional litigative set up.

The second issue which has been outlined earlier, is equally if not more fundamental because, it raises basic questions of ethics and of the probity and integrity of any alternative framework. While existing judicial institutions have to meet the serious challenges of the day, the alternates which are created should not be at the expense of sacrificing those very precepts and principles that have contributed to generating faith in the system of administering justice.

Archived

Finding solutions to the pitfalls of Litigation

Mediation at one level of perception is a means of avoiding the pitfalls of litigation. The problems which arise in the resolution of disputes through litigation are well known. These are, broadly

(i) delay;

(ii) expense;

(iii) rigidity of procedures; and

(iv) a reduction in the participatory role of parties.

Procedural rigidity

Courts as institutional mechanisms for the dispensation of justice have traditionally placed a great deal of emphasis on the application of defined procedures for, procedure subserves the object of dispensing even handed justice. Every litigant before the Court can expect to be treated by the Court as indeed would any other litigant and every litigant can have an expectation that he can seek access to justice in accordance with the same procedural formulation as any other litigant. Yet, over time procedural law has grown to be rigid. Some part of that rigidity is necessary in order to ensure the preservation of the basic probity of the judicial process. Natural justice demands that the Judge hear parties and that the Judge hears them in the presence of each other. A Judge hearing a party in the absence of the other would be an anathema, fundamentally at odds with judicial propriety. Mediation law recognises on the other hand that a mediator is **not** a judge and must possess at his command a procedure which is flexible enough to hear parties separately, at some stage of the proceeding should he consider it necessary.

Participatory roles

Besides the rigidity of procedure, Courts allow for a limited participatory role for parties. The judicial system is essentially based upon a presentation of submissions of parties before the Court through lawyers whom the parties appoint. The legal profession performs a significant role in the dispensation of justice.

Archived

The adversarial system conceives of the presentation of rival submissions of lawyers, involving conflicting view points, as a necessary adjunct to the effort of the Court to investigate facts, determine law and arrive at outcomes which are in consonance with justice.

The individual client for whom the litigative system provides a remedy may however perceive a sense of being marginalised in the presentation of his viewpoints and interests before the Court. Going by the experience of lawyers and Judges, parties in person pose special problems to justice dispensation. Bereft of legal advice, litigants who appear before the Court in person require the discharge of special duties and obligations in order to ensure that justice is done. Litigants who contest their cases in person are often times seen to give vent to their emotions, opinions, perceptions and interests. The Court is not necessarily concerned with all of these since the primary duty of the Court is to dispense justice according to law.

The example of the party in person is, however, significant to the discourse on mediation because it emphasises the expectation of the lay person that the judicial process should be simple, that it should be a process in which his emotions, interests and concerns receive empathy and that the process should be one in which there would be a **practical** as opposed to a formal legal resolution of the controversy. Accepted judicial remedies are not necessarily geared towards accommodating all the interests of litigating parties. Mediation provides a real alternative to litigation. At an

Archived

instrumental level, mediation has the potential to relieve the system of problems such as delay and expense. At a more intrinsic level, it would result in a process which is less rigid, provide for a distinct participatory role for disputants and allow solutions which go beyond formal legal remedies.

The Role of the Mediator : Facilitation not adjudication.

The essence of mediation lies in the role of the mediator as a facilitator. The mediator is not an adjudicator. Unlike the Judge in a traditional Court setting or for that matter even an arbitrator, the mediator is neither a trier of fact nor an arbiter of disputes. The role of the mediator is to create an environment in which parties before him are facilitated towards resolving the dispute in a purely voluntary settlement or agreement. The mediator is a neutral. The neutrality of the mediator is akin to the neutrality of a Judge but the role of the mediator is completely different from that of a Judge. The mediator does not either deliver judgment or dictate to the parties the terms of the agreement. As a neutral, the function of the mediator is to enable the parties to arrive at a mutual and voluntary agreement. This, the mediator can achieve if he understands and perceives the nature of his function correctly. As a facilitator, the mediator has to understand the underlying issues between the parties. In order to do so, the mediator has to open up communication between the parties and between the parties and himself. The mediator has to enable the parties to understand their own interests and to understand the interests of the disputing party. The mediator must enable parties to distinguish between their positions and interests. In the process of dialogue before him

Archived

the mediator enables parties to appreciate and evaluate their own interests and those of each other. All along, as he facilitates communication between the parties, the mediator controls the process ensuring on the one hand that he is not judgmental or on the other, an advisor. The effort of the mediator is to ensure that through the mediation dialogue parties arrive at a solution which is in their best interest. Like many other branches of law, acronyms are not unknown to mediation and it has been stated that in enabling parties to move towards a settlement, the mediator has to reflect on the precepts of BATNA, WATNA and MLATNA.

- BATNA stands for the **'Best Alternative to a Negotiated Agreement**";
- WATNA for the **'Worst Alternative to a Negotiated Agreement'** and
- MLATNA for the **'Most Likely Alternative to a Negotiated Agreement**.**'**

The essence of mediation is that it (i) focuses upon the parties' own needs and interests, (ii) provides for a full disclosure of competing interests and positions (iii) confers upon the parties a right of self determination, (v) allows for procedural flexibility and (vi) maintains privacy and confidentiality. The mediator, it is well settled, is the guardian of the process and it is the mediator who has to ensure that parties maintain complete confidence in the proceedings.

Archived

Stages in Mediation

A typical mediation involves several stages. These stages are neither rigid nor inflexible and can be modulated to achieve the desired outcome.

- Mediation begins with an **opening statement** in which the mediator establishes his own neutrality, explains the process to the parties and informs them that all that is said in the course of the proceedings is confidential and will not be utilised if either of the parties takes recourse to a Court of law for resolving the dispute. The mediator has to engender the confidence of parties by creating an environment that would promote constructive negotiation.
- The opening statement of the mediator is followed by the **opening statement of the parties** themselves in which parties would explain their case as each of them views it and their own perceptions and interests.
- The statements by parties are followed by the stage of **summarising and agenda setting**.
- The next stage is the **exploration of issues**. The mediator helps parties in focusing upon the issues which arise and in exploring those issues further.
- This is followed by **private sessions or caucuses** between the mediator and each of the parties separately. During the course of these private sessions, the parties may exchange information with the mediator so as to enable a candid and frank assessment to be made of the interest of each party. A party in a private session may require the mediator not to

Archived

disclose to the other party information which has been provided in the course of the session.

- The private sessions are then typically followed by a **joint negotiation session**. Private sessions may again be resorted to by the mediator to dislodge a situation of an impasse.
- Finally, the mediator will facilitate parties to move to an **agreement** which is a voluntary settlement arrived at between the parties for resolving the issues between them.

Structured informality

Mediation is a process which is structured but, which at the same time does not involve the rigidity inherent in conventional litigation settings. The mediator conducts the proceedings in an informal manner bearing in mind the fundamental principle that his role is neither to advise nor to adjudicate. Rules of evidence do not apply to the conduct of a mediation proceeding. Parties are at liberty to place whatever information that they consider relevant. Information which cannot legally be received in evidence in a Court of law may yet be relevant to a practical resolution of the issues between parties. Hence, all such information can be received. Parties to a mediation can be represented by legal advisors but they are invited to directly participate by speaking in the course of mediation. A direct interface with the mediator is encouraged.

Creating broad based remedies

Significantly, parties to mediation proceedings are not confined to judicial remedies. For instance, the true interests of parties may lie in supporting a previous relationship by ironing out

Archived

outstanding problems. Mediation enables parties to look beyond the formal confines of a legal dispute by creating arrangements between them that would provide practical solutions which are mutually beneficial. These outcomes stand the greatest chance of successful enforcement because all the parties concerned have perceived them to be in their mutual interest. The role and function of the mediator extends to facilitating an appreciation on the part of the parties of the full range of their interests and positions. The remedies which the mediator assists the parties in devising are relevant not merely to the narrow confines of the dispute between them but are appropriate to the background of the relationship between the parties and the relationship which they wish to create for themselves in the future. This is a matter of great importance because in a typical situation where there is an on going relationship between the parties, whether business or personal, mediation enables parties to explore and implement options that will strengthen a future relationship.

Litigative remedies which parties apply for in a conventional judicial set up may often result in the rupturing of a relationship. Declarative or injunctive remedies, and remedies by way of damages that Courts provide for in a judicial setting may in certain cases lead to a cessation of relationships. Mediation has the potential to obviate this by enabling the mediator to allow parties to perceive the immediate dispute between them in the wider context of an overall business, professional or personal relationship and to resolve their problems by fashioning solutions that would protect their long term interests.

Archived

Providing enforceable outcomes.

The entire process of mediation is in that sense not adversarial in nature. The outcome of the mediation is not a win for one party and a loss for the other. Both parties agree in the course of the mediation to a solution which is mutually beneficial. Agreements which are entered into in the course of mediation are acceptable and stand the greatest chance of being implemented because the outcome of mediation is not imposed by a third party adjudicator but represents a solution which has been voluntarily agreed to by mutual agreement. The law protects the sanctity of negotiated settlements and recognizes their enforceability in India by placing them at par with an arbitral award on agreed terms. Such an award is enforceable as if it were a decree of a Court. The travails of a litigant, it is said, begin after a decree is passed. This problem is sought to be obviated since a settlement arrived at in the course of mediation is conceived by the parties to be in their own interests. Mediated outcomes are less likely to be evaded by parties because they represent an assessment by parties of what is in their best interest.

Archived

The importance of mediation lies in the fact that it has the potential to provide an expeditious, economical and private resolution of the problems that have arisen between the parties. Most importantly, the process emphasises the participatory role of parties. The resolution of the dispute depends upon the parties themselves. Ultimately, each party knows best its needs and interests. Mediation enables each party to give expression to its perceptions and view points in a confidential and private

surrounding. Every party is facilitated by a mediator to appreciate the perception of the disputing party to the problem at hand. Parties can explore all the facets of the relationship between them. Some of them cannot be dealt with in a conventional Court setting where reception of evidence is governed by strict rules. In matters relating to business and personal relationships, confidentiality is an important value for disputing parties. The negative publicity attendant upon a Court case can well be obviated when the parties deal with each other in a mediation proceeding which is private and the confidentiality of which is protected by the law. The scheduling of mediation can typically be arranged to suit the convenience of the parties so as to facilitate an early completion.

The Arbitration and Conciliation Act, 1996.

The Arbitration and Conciliation Act, 1996 has laid down in the provisions of Chapter III a basic framework for the conduct of conciliation proceedings. The salient features of the process codified in the Act are briefly thus:

(i) The Act postulates that there must be a written invitation to conciliate by one party to another and Conciliation begins only when both parties are agreed;

(ii) The process involves the submission of written briefs by parties to the conciliator; briefs which outline the general nature of the dispute and the points at issue. The conciliator may call for further documents and information whenever he thinks fit;

Archived

(iii) The conciliator is neither bound by the provisions of the Code of Civil Procedure, 1908 or by the Evidence Act;

(iv) The function of the conciliator is to assist parties in an independent and impartial manner in an attempt to reach an amicable settlement of their dispute;

(v) The norms which guide the conciliator are those of objectivity, fairness and justice. In doing so, the conciliator has to have regard to the rights and obligations of parties, the usages of the trade, the circumstances surrounding the dispute and to previous business practices;

(vi) The conciliator may suggest to the parties proposals for settlement at any stage and these need not be either in writing or accompanied by reasons;

(vii) Communications between the conciliator and the parties may be oral or in writing and the conciliator may meet parties either jointly or separately. The law provides that a party may require that the information furnished to the conciliator may be kept confidential;

(viii) The process of settlement may commence with the formulation of a possible settlement when it appears that there exist terms of a settlement. Consistent with the flexibility of the process, the terms of a proposed settlement can be reformulated;

Archived

(ix) The settlement is final and binding after parties have signed it. Thereupon, the settlement has the same force and effect as an arbitral award on agreed terms and it can be enforced as if it were a decree of the Court;

(x) The law protects the confidentiality of all matters relating to conciliation proceedings and even of settlement agreements;

(xi) The process is purely voluntary and can be terminated even at the behest of one party who desires not to conciliate;

(xii) No arbitral or judicial proceedings can take place during the pendency of conciliation except to preserve the rights of parties;

(xiii) A conciliator shall not act as an arbitrator or Counsel in the dispute and there is an embargo on the presentation of a conciliator as a witness for any of the parties; and

(xiv) Proceedings in conciliation, admissions by parties and the terms of a proposed settlement are not admissible in evidence in any other proceeding.

The need to modify Section 89 of the CPC.

Section 89 of the Code of Civil Procedure, 1908 as amended by the Code of Civil Procedure (Amendment) Act, 1999 enunciates provisions for the settlement of disputes outside Court. The

Archived

difficulty with the provisions of Section 89 lies in the fact that it mandates that where it appears to the Court that there exists an element of settlement which may be acceptable to the parties, **the Court shall formulate the terms of settlement** and after receiving comments of the parties may reformulate the terms of **possible settlement** after which parties may be referred to arbitration, conciliation, judicial settlement or mediation. The requirement that the Court must formulate the terms of possible settlement places a significant burden on the Court even before referring the parties to mediation. The Court in such a case may be required to spend a considerable degree of time and effort in imploring parties to settle their dispute and to draw up the terms of a possible settlement. The very object of conciliation or mediation is to place the parties under the facilitative function of a mediator who will then enable them to explore their interests and to consider various options for negotiating settlements. Placing the burden of formulating the terms of a possible settlement on the Court even before the parties are referred to mediation is thus not appropriate because it is only when parties have taken recourse to mediation that the full range of option can be explored by them.

Archived

Strategies for implementation.

The development of mediation as a viable alternative to litigation is still in the incipient stages in India. Mediation centres have recently been set up by a few industry and trade associations. Similarly, professional lawyers have in certain isolated instances attempted to develop into fullfledged professionals with expertise in

mediation. These instances are, however, sporadic and the overall potential of mediation still remains to be explored.

Strategies for successful implementation of mediation must, be carefully assessed and a conscious effort has to be made towards the evolution of a process that will be acceptable to the society at large. In achieving a high level of acceptability for the mediation process, several issues need be focused upon and these include:

(i) Developing awareness;
(ii) Advocacy;
(iii) Building capacities;
(iv) The creation of an institutional framework; and
(v) Actual implementation.

With the large backlog of cases in India, mediation has been regarded as a means of reducing arrears by inviting parties to agree to facilitative solutions. Besides regarding mediation as a strategy for the control of litigation, its intrinsic value is of equal, if not greater importance. Mediation must be inculcated as an intrinsic element of the prevailing legal culture so that it is perceived by a party which may be involved in a possible dispute as the first or the most preferred option. Mediation in that sense must evolve in the long run under the aegis of a regulatory framework that is not necessarily dependent upon Courts or judicial institutions. However, at the present stage there can be no gainsaying the fact that the Bench and the Bar have to fulfill important responsibilities towards achieving the goal of creating a viable mediation strategy.

Awareness and advocacy

Archived

The first and foremost step is the creation of awareness and the need for advocacy towards mediation and conciliation. Litigation is an entrenched form of dispute redressal. In order to generate confidence in mediation and to encourage recourse to it, a widespread awareness needs to be created amongst consumers of justice. A heightened awareness is necessary within the legal profession as well. In this context, it would be interesting to note that two of the most sought after topics for discussion in Lawyers' conferences in the State of Maharashtra have been, to use acronyms again, I.T. and ADR. There is a considerable degree of curiosity, if not enthusiasm on the possibilities of mediation. An awareness of mediation techniques, of the contents of mediation and of the mechanism which has been devised by the law must be sufficiently created so as to promote a greater degree of acceptability.

Overcoming Resistance to change

There may well be, not quite surprisingly, resistance on the part of the legal profession towards the acceptance of mediation because of the fear that a reduction of litigation may ultimately result in a dilution of the work that is available to lawyers. In order to secure the co-operation of the members of the legal profession, it would be necessary to allay those apprehensions by spreading the message that mediation does not postulate the destruction of the traditional sources of work for the legal profession. On the contrary, what it does postulate is an assumption of additional roles by the legal profession, roles which can be assumed by imparting knowledge and training. Conciliation can be promoted only if all segments of the legal profession including the Bar Councils and

Archived

other professional bodies spread awareness amongst lawyers of the potential for and the benefits of mediation. Above all, there has to be a realization that the service which is rendered by the legal profession is in the cause of justice to the common man. The needs of litigants must occupy a position pre-eminence. Any method of ADR which ensures expeditious and inexpensive justice to the ordinary litigant must, therefore, be supported.

A shift in the focus of the legal profession.

Traditionally, the role of the lawyer in our legal system is associated with the functioning of Courts. Mediation does not postulate the displacement of the lawyer. Mediation does, however, contemplate a shift in the focus of the legal profession. The role play in mediation would require lawyers to be effective participants in dispute settlement outside the Court. More importantly, the role and function of the lawyer has to be radically modified from being a participant in formal legal resolution of disputes to being an important functionary who will guide parties in the true realization of their interests and towards achieving negotiated settlements. The most fundamental change in perception has to be that mediation must provide effective intervention **before** disputes assume the formal legal character of a Court case. The vital role of the legal profession is being associated through the mediatory process of being willing participants in dispute settlement.

This sense of awareness has to be created in the legal profession on an urgent basis by promoting a dialogue within the profession and between the professional and non-professional

Archived

bodies. A determined effort has to be made to acquaint members of the Bar of the importance of mediation and of the special obligation which the mediatory process casts upon them. Professional bodies (such as the Bar Council in the State of Maharashtra) conduct refresher courses for lawyers and it would be appropriate if knowledge and awareness in mediation is imparted through such bodies. The Bar Council performs an important role in relation to legal education and it is, therefore, only legitimate to expect that formal changes in the curriculum for legal education are brought about. Legal education centered on precedents and cases must now accommodate practical training in negotiation, conciliation and mediation. Some of the premier law schools in the country have incorporated ADR techniques as a part of the curriculum but this development has largely been isolated and sporadic. The programme of awareness and advocacy must extend to students of law who will be lawyers of the morrow. The success of the movement towards the mediation will depend in a large measure upon the co-operation of the legal profession. Awareness, advocacy and the need for positioning senior members of the Bar in positions of leadership is the sine qua non in order that mediation is able to develop into a viable system.

Archived

Creating capacities.

A strategy for the effective development of mediation techniques has to be informed by the need to create capacities within the system. Mediation is a structured discipline containing as it does, elements of science as well as of an art. Before society accepts mediation as a viable alternative, a high degree of

confidence has to be generated. Imparting formal training for mediators is a necessary step towards generating that confidence. Selecting women and men of integrity for imparting training needs emphasis. The flexibility and informality of mediation has the potential for benefit but, it ought not to be misused. Trust, confidence and acceptance of the mediator is a critical concern.

The mediator has to be trained to develop effective communication skills. Training in mediation has to allow the mediator to develop job specific skills such as the skill of **active listening**. Active listening is the process by which a mediator decodes a verbal or non-verbal message, identifies the basis for the message being expressed and then restates the message using positive non-adversarial language. Sometimes the mediator has to carry out a **neutral reframing** of a party's positions in a manner which would be inoffensive to the other. The mediator has to be trained to **summarise** the essence of statements by parties regarding issues, positions and terms of agreement. The mediator has to learn to **acknowledge**, which is an act by which he communicates having accurately understood the statement of a party and its importance. The mediator has to **set the agenda** or the order in which issues, claims and settlement terms will be discussed. There are stages in the mediation when the mediator has to **defer** or postpone in response to a question raised by one of the parties. Often times the mediator has to **redirect the process** by which he shifts the focus from one subject to another. The **choice of words** by a mediator is extremely significant because his language must be suggestive of collaboration. The mediator has to

Archived

eschew adversarial terms. Language which polarises the parties has to be avoided. An astute mediator would similarly avoid recourse to formal legal terminology such as 'liability', 'damages', 'faults' and 'rights'. The language of the mediator must promote the object of achieving self determination, identifying solutions, an open examination of alternatives and the exploration of alternative settlement proposals.

The role play of the mediator is a key ingredient in the qualitative success of mediation. A band of trained mediators is thus critical if mediation is to acquire a high degree of acceptability. The importance of training being imparted to fairly senior members of the Bar has to be emphasised. The training that would be required to be imparted must be both for the Bench and the Bar. In the State of Maharashtra a beginning has been made by holding in recent months a week long session of mediation for Judges drawn from diverse courts in the City of Mumbai. An effort was made recently at a two day colloquium for imparting basic training in mediation techniques to a group of about 30 lawyers who had volunteered for training. These are only the first steps which have been taken. A systemic strategy has to be developed for imparting training. Parties are most likely to trust a fairly senior professional to be a mediator. Training must ideally be imparted by inviting the participation of those members of the Bar who have at least 15 years' of experience. The association of senior members of the Bar will enable the process of mediation to have the benefit of not merely their experience and knowledge, but of a practical and common

Archived

sense approach to problems which lawyers by their proximity to society can utilise.

Courts and Mediation.

Mediation does not **necessarily** require the association of Courts and judicial institutions. Yet, particularly in the incipient stages Courts would have to discharge important functions in relation to ADR techniques. This is quite apart from the position that as a matter of law, Section 89 of the Code of Civil Procedure, 1908 does postulate an affirmative role for the Courts in promoting ADR techniques. A significant part of the focus of mediation in India is on the functional relationship between ADR techniques and a reduction of arrears. Mediation in order to be successful has to be supplemented by Court evolved techniques of case management that would enable the Court to oversee the process of settling disputes through mediation. The Court has to be aloof from the contents of the actual mediation process because, parties must be free to discuss issues in dispute between them with a high degree of candor and without being affected by any possible judicial proceedings. Yet, on the other hand, it is necessary for the Court to undertake the process of inculcating a habit of seeking recourse to mediation as a preferred option to litigation.

Pilot projects and Case Management.

No strategy of the kind can succeed if an effort is made to apply it initially in all cases and to all Courts. Instead, it would be appropriate for Courts to select particular types of cases which may be amenable to mediation. Mediation is flexible enough to be

Archived

successfully applied to a whole range of cases. At one end of he spectrum are commercial disputes which require solutions that are practical. At the other end of the spectrum are elementary private disputes which do not involve complex questions in all cases. The success of mediation will depend upon the initial application of the process on an experimental basis to small pilot projects developed in specified Courts in selected cases. The experience which has been gained and the lessons which have been learnt can then be extrapolated on a larger canvass. In Courts having Original Jurisdiction, including those High Courts which have such jurisdiction, it would be most appropriate if a few cases are listed out every day for case management directions. In the course of the case management hearing, the Presiding Judge may best explore together with Counsel whether a recourse to mediation would be appropriate in the facts of each case. The intervention of the Court will facilitate a regulation of the process of mediation in terms of fixing time schedules within which the process should be carried out, the fees of mediators and the resolution of the disputes in terms of settlement agreements. The Courts, as indeed the Bar, have thus a vital role to play in the success of any implementation plan for mediation. Judicial supervision, particularly by the Superior Courts is essential to ensure that ethical concerns are duly observed by mediators. The setting up of Centres for Mediation by the High Courts themselves will be a desirable first step. A panel of trained mediators can be set up, to whom cases can be referred for mediation. The requirement of compulsory recourse to mediation in certain categories of cases, before the Court is moved can be considered.

Archived

Mediation has significant potential not merely for reducing the burden of arrears, but more fundamentally for bringing about a qualitative change in the focus of the legal system from adjudication to the settlement of disputes. The success of mediation will depend not merely upon the evolution of an appropriate legal and regulatory framework, but upon addressing basic issues of human resource development. Inducing a system to evolve from a litigation oriented approach to a more curative or preventive approach involves much more than the development of law. The development of law is an important step, but the effort in this paper has been to suggest that various other key factors are involved. Meeting the resistance to change, creating awareness in society as well as amongst other participants of the benefits of the mediation process, developing capacities and involving the Bench and the Bar in a co-operative effort are critical elements in the success of the process. Above all, confidence in the mediation process will be fostered only if the mediator discharges in positive terms the ethical concerns of a process to which the role of the mediator is central.

Archived