Resolving the Issues of Tribal Community via Mediation

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Abstract

The conflicts between states and Indian tribes have existed since the existence of the states. Daily we can see the reports and articles published in newspapers about the dispute and conflicts that occurs between the states and the tribal communities. If we look in to history, the efforts made to resolve the dispute by Centre or State government has not resulted to be fruitful. The effort to reach on mutual consensus has always failed. Effort to resolve the dispute between state and tribes has traditionally been argumentative, discouraging co-operation between the governments and deepening their mutual dislike and mistrust. There has been delay in achieving result and trial is carried for long duration, which is not only frustrating but is the main cause of unrest among the tribal community. This frustration and anguish amongst trial community has led to Naxal attacks, attack on government bodies. State governments not only have drained their resources in battle, but also, ironically, have missed numerous opportunities to reach on mutual consensus. These disputes have resulted loss of time and money, the ultimate and attainable goals are unmet, and many innocent people suffer the inefficiencies and ineffectiveness of the adversarial relationship. The purpose of this paper is to describe the parameters of several recent tribal-state negotiations, some successful, some not, and some still unresolved. While, there are very less common similarities in the issues and ultimate results, between state and tribal community, both have shown the emerging trend that sees the tribes and states reluctantly but increasingly coming to the table to work jointly on more efficient and effective resolutions of their disputes.

Introduction

Mediation by third party for solving the disputes is considered as better way to resolve it. In our society, organisation or day-to-day life we can find several occasions and incidents where a third persons playing significant role to resolve any dispute. It leads to the solution to the disputes and maintain the harmony amongst the parties. Mediation is a dynamically structured voluntary dispute resolution process where a neutral third party helps the disputing parties in resolving a conflict between them by using specialized communication and negotiation techniques. In our social system, we can easily find fine examples of mediation system such as “Gram Panchayats” and “Nyaya Panchayats”. These systems is very popular and widely prevalent in ancient rural India. This is so because these Panchayats are prone to influence from the influential and powerful people residing in these areas. These influential people often use these systems to influence justice depending on their own authority. This has played a hugely negative role in the decreasing of the popularity of the Panchayat systems. In the process of addressing these concerns, the Indian government is making efforts to revive and upgrade justice delivery methods by allocating funds and trying to make better rules for their reinvigorated and unbiased functioning

Mediation through the Years.

The Arbitration and Conciliation Act, 1996 was the first statute to introduce the Indian legal system to mediation. Introducing Sub-section (1) of Section 30 of the Arbitration and Conciliation Act, 1996, it encourages the parties involved to explore the option of mediation and conciliation despite arbitral proceedings having started and thereby empowers the arbitral tribunal to use mediation as a means of dispute resolution. However, due to lack of proper enforcement of mediation at initial level, this provision promoting mediation has almost been rendered obsolete. This, however, was rectified to a certain extent by the introduction of Section 89 of the Code of Civil Procedure, 1908 (introduced first in Section 30 of the Arbitration and Conciliation Act, 1996), which was concerned with exploration of the different methods of dispute resolution. Also, the notion of "judicial mediation" was first introduced by this section.

The Process of mediation aims to facilitate the development of a consensual solution by the disputing parties. Both the parties to appoint a mediator obtain approval. Recently, The Apex court of India has offered to resolve the very well-known case of "Ram Janam Bhoomi" issue through mediation. Like conciliation, the parties are not bonded to accept the award, but they are free to accept or reject the recommendations. Mediation proves to be beneficial in resolving the case outside the court. Sometimes people become involved in disputes, which, although very important and worrying to those concerned, are better resolved outside the comparatively expensive court system. Some disputes do not have a legal solution, while others may be made worse by court action

BACKGROUND

Mediation is not something new to India. Centuries before in rural India, the disputes were resolved through Panchayat system. In this system, the elders of the village assisted in resolving the dispute by mutual consent. This system was very effective to maintain the harmony amongst the community. Such traditional mediation continues to be utilized even today in villages. Also, in pre-British India, mediation was popular among businessmen. Impartial and respected businessmen called Mahajans were requested by business association members to resolve disputes using an informal procedure, which combined mediation and arbitration. Under this system, the panchas or the wise persons of tribal community played the role of mediator and resolved the disputes. Here, disputing members of a tribe meet with a pancha to present their grievances and to attempt to work out a settlement. If that is unsuccessful, the dispute is submitted to a public forum attended by all interested members of the tribe. After considering the claims, defences, and interests of the tribe in detail, the pancha again attempts to settle the dispute. If settlement is not possible, the pancha renders a decision that is binding upon the parties. The pancha's decision is made in accordance with the tribal law as well as the long-range interests of the tribe in maintaining harmony and prosperity. They ensured the decision should maintain the harmony of the community. All proceedings are oral; no record is made of the proceedings or the outcome. Despite the lack of legal authority or sanctions, such mediation processes were regularly used and commonly accepted by Indian disputants. In mediation, the parties are encouraged to participate directly in the process. The expanded framework of discussion in mediation consists of both the applicable law and the underlying interests of the parties. The mediator, an expert in the process of dispute resolution, controls the proceedings, much like a tribal chief serving in the role of peacemaker. But under the ancient methods if

mediation failed, the same person was authorized to render a binding decision. After the British adversarial system of litigation was followed in India, arbitration was accepted as the legalized ADR method and is still the most often utilized ADR method. Mediation (as is now understood globally and unlike the ancient methods, which is by definition non-binding, and encourages the parties to voluntarily reach an agreement that meets all the parties' needs) has only in the past few years begun to become familiar to lawyers and judges generally, except in traditional community settings and except where mediation has been court-directed or statutorily-prescribed, such as in the intra-governmental disputes between government agencies and undertakings, in labour disputes and in public utility services disputes. So when we compare the US and Indian system, over the last twenty 20 years, American lawyers and judges have warmly embraced mediation as a primary tool for resolving conflicts in court and out of court, while Indian lawyers and judges are still warily examining mediation, discussing whether and in which types of cases mediation should be used – similar to what was happening in the US in the 1980's. Mediation is no panacea, no magic solution to overcome the institutional challenges of national court systems. Similar to other alternative dispute resolution techniques, however, it does offer a cluster of features that differ from the formal judicial systems of Europe that have had global influence over the primary ways in which legal conflicts are resolved. In this regard, mediation both builds and diversifies the capacity for resolving conflicts in society. With many qualifications and exceptions, European-style courts are state institutions, conducting public, formal proceedings, that presuppose literacy, posture the parties in a conflictual, legal position-based, backward-looking fact finding processes that result in binary, win-lose remedies, subsequently enforced through social control over the losing party. In contrast, mediation and other clusters of consensual dispute resolution techniques, except for arbitration are private, informal, oral, more collaborative, facilitative, future-looking, interest-based processes that bring parties to a calibrated, multi-dimensional, win-win remedy that is more durable because of the parties consent in the outcome. Because of these basic contrasting features, for many non-European legal cultures, mediation bears a comforting alternative and similarity to traditional forms of dispute resolution that predate colonial influence. Reformers have grown increasingly interested in reviving or extending traditional forms of dispute resolution (such as the methods used by the traditional panchayats in India) and integrating them into the formal litigation system. Another dispute resolution process, lok adalat, has received more favourable attention since its re-introduction in the 1980s. Originally, lok adalat was an ancient method for dispute resolution used by tribal people. The Legal Services Authority Act (1987) promoted the resurgence of lok adalat to provide litigants with the means to resolve their disputes early and affordably. In essence, lok adalat may be compared to settlement conferences as they are traditionally conducted in the United States, except that the neutrals in lok adalat are senior members of the Bar. These lok adalat "judges" preside in panels over a lengthy calendar of cases that are set on a single day and are usually heard in open court (in the presence of other parties and attorneys). Customarily, lok adalat judges are highly evaluative from the outset of each hearing. Represented parties do not play an active role in presenting or negotiating their dispute. Instead, attorneys advocate on their behalf. Importantly, litigants may participate in lok adalat without paying a fee, thereby making it accessible to parties with limited financial resources. Historically, lok adalat has been used primarily in personal injury cases and other injury claims

involving insurance companies. Parties have the right to decide whether to submit their dispute to lok adalat. Because lok adalat has resulted in the disposition of a measurable number of disputes and is considered to be an effective and affordable alternative to trial, it will continue to be an important dispute resolution tool.

PRESENT SCENARIO

After the enactment of the Arbitration & Conciliation Act, 1996, even though conciliation was given statutory recognition for the first time in India, the awareness of such an option was very limited to lawyers and litigants. They were not familiar with the process and proceeding of the mediation or ADR system. The term “conciliation” even though considered synonymous and used interchangeably with “mediation” in most countries, was given a slight difference in the statute. The concept of mediation and conciliation was made familiar or given official court recognition only in 1996 and by the amendment of the Civil Procedure Code (CPC) in1999 by inserting Section 89. The statutory language of the Arbitration and Conciliation Act, 1996 and of Section 89 of the Civil Procedure Code, demonstrates clearly the existence of differing definitions and meanings for "conciliation" and "mediation". Generally, both mediation and conciliation means resolving the dispute by an impartial third party on mutual agreement. However, a mediator can be a pro-active and interventionist, because of his statutory power "to make proposals for settlement of the dispute" and to formulate and reformulate the terms of the settlement agreement. The definition of "conciliator" in the statute is consistent with Rules for Conciliation promulgated by the United Nations Commission on International Trade Law (UNCITRAL) also conciliation is a process by which resolution of disputes is achieved by compromise or voluntary agreement. A conciliator offers solution to disputes through mollification.

COURTS

In 1994-95, the Indian Supreme Court initiated an Indo-US exchange of information between high-ranking members of the judiciary. As part of this effort, former Indian Supreme Court Chief Justice A.M. Ahmadi met with US Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia. Another integral member of the US team was then Chief Judge J. Clifford Wallace, of the 9th US Circuit Court of Appeals. In 1996, Ahmadi formed a national study team to examine case management and dispute resolution as part of a joint project with the United States. This Indo-US study group suggested procedural reforms, including legislative changes that authorized the use of mediation. The new provisions were brought in existence in 2002, providing for case management and the mandatory reference of cases to alternative dispute resolution, including mediation (Code of Civil Procedure Section 89). Even though the Arbitration & Conciliation Act, 1996 was enacted to give motivation to conciliation and mediation, it was drafted with an aim to speedy resolution of the disputes and to resolve the case outside the court, despite of giving statutory recognition to conciliated settlements, giving the same status of a court decree for its execution, no real effort was taken by the courts or by the lawyers to utilize the provisions and encourage the litigants to choose the method. The lawyers are hesitant to suggest to their client that mediation is another tool resolve the dispute. Though some mediation training and familiarization programs were conducted, it did not create the real effect. A group of lawyers did not welcome the amendment of the CPC referring pending court matters to ADR and the amendment was challenged. They generally not welcomed the process of arbitration. The modalities to be

formulated for effective implementation of Sec. 89 also came under scrutiny. For this purpose, a Committee headed by former Judge of the Supreme Court and Chairman of the Law Commission of India, Justice M. Jagannadha Rao, was constituted to ensure that the amendments become effective and result in quick dispensation of justice. The Committee filed its report and it was accepted and the Hon'ble Supreme Court of India has pronounced a landmark decision "Salem Advocate Bar Association, Tamil Nadu v. Union of India" (2005), where it held that reference to mediation, conciliation and arbitration are mandatory for court matters. This judgment of the Supreme Court of India will be the real turning point for the development of mediation in India. But the growth of mediation should be carefully moulded so that the system gains the faith and recognition of the litigants.

CASE STUDY: THE PUYALLUP TRIBE IN TACOMA,

A good way to illustrate both the strengths and weaknesses of ADR is to examine an actual land dispute in Tacoma, Washington. It involved the Puyallup tribe of Indians in the Tacoma area and does not possess unique facts; rather, it is a dispute similar to those faced by tribes across the country. 3 The Puyallup tribe had received vast portions of land in the Tacoma area, including a large part of the city itself through a treaty in the pasty9 This treaty was ignored and much of the tribe's land was taken and used by the city and state governments.10 o The tribe was forced to sue in federal courts to have their rights to the land in question determined judicially.10 After a lengthy court battle, the tribe was determined to have rights to the land in that are at 2 The next step was to create a workable solution through negotiations because many residential areas and industrial areas were included.'03 Thus the use of ADR was particularly apropos in this instance because litigation would have been nearly impossible to manage, if feasible at all Instituting more of a peace-making mind-set could be even more beneficial. This would allow the parties to approach the situation not in a give and take mind-set but in a problem solving mindset.104 ideally, the parties would focus on the problem and the factors to be considered and come out with the best solution for all involved. In Tacoma, the negotiations resulted in the tribe receiving $162 million dollars for giving up claims to land in addition to receiving hundreds of acres in prime industrial areas to help them develop an economic base for the tribe to gain self-sufficiency. 0 5 this appears to validate the positive aspects of using an ADR method to deal with these issues. However, it also illustrates that the tribe first had to fight a court battle just to get its land rights approved in the first place.106 Perhaps all sides could have been better served if a mediator had stepped in at first rather than litigating over the initial rights. We will never know. Would peace-making have better resolved this dispute? The fact is that several tribe members were unhappy with this settlement for a variety of reasons. 1 0 7 Perhaps the use of peace-making would have been beneficial here. It appears unquestioned that incorporating peace-making ideas and mind-sets into conventional ADR holds large potential benefits. This example is one case where conventional ADR was used with some success.

CONCLUSION & SUGGESTION

As the Indian courts are over loaded long pending cases, mediation has proved to be a very useful and efficient tool to resolve the matter outside the court. Parties don not have to run around the court, and it reduced the expense. The mediator appointed by the court is experienced and has competency, which leads to easy resolution to the case. Now the lawyers and judges, the local and state bar associations are

enthusiastic in their promotion and utilization of mediation. It is understood that the legal system was overloaded and on the point of collapse from the courts, being wrongly utilized for disputes that could be better and more efficiently handled by mediation and other ADR procedures. Trained lawyer mediators made mediation a substantial part of their law practice. They are now responding positively and emphatically to incorporate mediation as a welcome and useful ADR tool in the Judiciary system, lawyers have not lost business to mediation, but have rather become shielded as mediators and as the gatekeepers for mediation. Initially the lawyers felt threatened by mediation and resisted it as an unwanted change in the status. They do not like change and are reluctant to expose their clients to the uncertain risks of an unknown ADR process. Also, understandably, Indian lawyers view mediation as potentially depriving them of income by settling cases prematurely and thereby obviating legal fees that would otherwise be earned The same has been true for American lawyers during the growth of mediation in the US over the last twenty years. In the first place, by their early acceptance and use of mediation, lawyers became not only the best trained and most qualified mediators by incorporating their mediator work into their law practices, but the lawyers who did not become mediators became the gatekeepers for mediation, selecting over 80% of the cases that are mediated and choosing the mediators for such cases. Fearful of exploitation, distrustful of private proceedings, comforted by the familiarity of the court system, insecure about making decisions about their own interests, or interested in vexatious litigation or in delaying the case for economic reasons, some litigants may prefer the lawyer-dominated, public, formal, and evaluative judicial process. These impressions are inaccurate for a variety of reasons as mediation is a best provision to resolve the dispute outside the court in an efficient way. The provision for meditation is an interesting feature of the Indian legal system Mediation leads to peaceful resolution of the dispute. As the conclusion is achieved through the mutual consent of, the parties both feel happy and satisfied. The relationship and harmony is maintained Mediation saves cost and time. A mediator can offer a fast-track mediation option. A short timeframe will be set, and if the problem is not resolved within that set time the mediator will make a final decision. It does not frustrate the preferences of such litigants; indeed, their right to trial will be preserved. An effective mediation process can quickly allay these fears. Litigants involved in the process are much less likely to be exploited. They will quickly understand that the mediator has no power or social control over them or their resolution of the dispute. Second, effective facilitators will gain their trust over time. If the parties still feel the need for an evaluation of the legal issues, the mediation can be accordingly designed to deliver that service. . Later the lawyers quickly realized that mediation was just another tool in their lawyer tool bag.At the first annual European Business Mediation Congress convened October In India increased use of mediation as a helpful mechanism for reducing case backlogs and delays 21-23, 2004 by CPR Institute of Dispute Resolution, 140 attendees including representatives from most of the world's largest law firms responded to a Survey on European Business Mediation indicating that 60% viewed MNC's as necessarily leading the charge in globalization of mediation, while, 25% viewed lawyers as the leaders, and only 7% viewed courts as the leaders in mediation on the international commercial scene.. Once it is understood that mediation is intended to complement (not replace) the judicial process, that it is highly adaptable to different contexts, and that expertise in India is already growing rapidly, the apprehensions may quickly dissipate.

This article has examined the traditional ways and use of arbitration to resolve the disputes, which have arisen consistently between the government and various tribal governments in recent years. In many instances, those rights were ignored over the years until the tribes could begin to contest them; usually in a court battle. The mediation has led to resolve the dispute in most efficient and peaceful manner. it is apparent that any method of dispute resolution that may help repair those relationships would be beneficial. The Puyallup example shows how negotiation can be effective in allocating pre-litigated rights. The use of ADR before litigation, and the incorporation of aspects of the traditional peace-making process into the resolution of these issues could save time and money, as well as positively change the attitudes of the parties to aid in the resolution of issues that arise in the future.

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