PEACEABLE MEDIATION: A CHALLENGE TO JUDICIAL SKILL SET

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Abstract

Alternate Dispute Resolution (ADR) is an important tool to strengthen positive peace and it got cover in Pakistan through Alternate Dispute Resolution Act, 2017. 36 ADR Centres established by Lahore High Court at District headquarters have shown success rate of about 45%, successfully mediating 12943 references out of 28845, sent between June, 2017 and October, 2018. However, such performance of the judges appointed on mediation centres has not been considered up to the mark. This paper makes a comparison between the skill set of a mediator with that of a judge, an arbitrator or a panch and explores whether the skill set of judges suffices them to carry out successful mediation. This qualitative study has used two methods for triangulation of the findings; namely, focus group discussion and one-on-one interviews. The paper concludes with a recommendation to develop a permanent pool of mediators, comprising judicial officers trained in mediator's skill set and non-judicial experts, who could contribute positively and diversely to make mediation as successful in Pakistan as in other parts of the world.

Key Words: Judicial, Alternate Dispute Resolution, Sociological, Economic

Introduction

A well-functioning government is one of the positive peace factors, whose performance is measured through three indicators i.e. democratic political culture, effective governance and rule of law. The description of rule of law, as given in positive peace report 2017, is: "Rule of law reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence."[1] Alternate Dispute Resolution Act, 2017 is an effort to contribute positively in the peace index by resolution of disputes through peaceful means of mediation.

Mediation is a technique of dispute resolution with the help of a neutral intervening party, possessing the capacity to guide and help the parties reach a settlement agreement.[2] In its essence, mediation is different from the rest of the

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ADR methods.[3] Although, other methods are distinct inter se, but the distinction of mediation stands out on two accounts; firstly, the skill set of mediator and secondly, the process of mediation.[4] In other ADR techniques, including arbitration and *panchayat*, they settle the dispute somewhat similarly to court.[5] For example, like court, they hear to the parties, evaluate their stance in the light of customs etc. and then pronounce the so-called settlement. The parties are required to follow the settlement pronounced by the arbitrators or *panchayat*.

In these ADR techniques, parties themselves enter a settlement process without any aid or facilitation of the third party.[6] In international disputes, the third party sometimes plays its role to uphold the negotiation process, but settlement is primarily carried out by the parties themselves.[7] However, in mediation, the settlement is reached by parties, but with the help and guidance of the mediator.[8] The mediator does not pronounce a verdict, but only suggests and guides the parties towards settlement.[9]

This paper begins by making a comparison between the skill set of a mediator with those of an arbitrator, a *panch* (member of a *panchayat*), and a judge. The comparison of a mediator with a negotiator or conciliator is not made, as these methods belong to another branch of ADR without an intervening party, hence, not in the ambit of this paper. The later part of the paper comprises the findings collected through focus group and interviews and their analysis. The paper concludes with a suggestion to develop a permanent pool of mediators, comprising judicial officers trained in mediation skill set and non-judicial experts, who could contribute positively and diversely to make mediation as successful in Pakistan, as in the other parts of the world.

Comparison of the Skill Set of a Mediator with a Judge, Arbitrator or a *Panch*

Comparison between the skill set of a mediator with the mindset of a judge, arbitrator or *panch* is made on the basis of five basic beliefs, which amount to articles of faith for a mediator:-

- The belief regarding nature of human being.
- The belief regarding disputes.
- The belief regarding solutions to the settlement.
- The belief regarding party's control during settlement process.

- The belief regarding nature of the settlement.

The Belief Regarding Human Nature

A mediator builds the premise of human nature beyond the limited expression of being quarrelsome (Hobbes), miserable (Rousseau) or a ward of law. To a mediator, the nature of human being is not constant; rather it is a mix of several traits in various combinations. A mediator believes that human nature is neither good nor bad, it is only a change of perception and circumstances, which tags them so.[10]

For instance, one party claims that her neighbor should not raise construction of his house to such a height that the plants sown in her lawn die due to lack of light and warmth of sun. The other party says that raising the house is inevitable, because the house adjacent to his is multistoried and, hence, invades the privacy of his single storied home. The third party in her right says that she bought the house as such and construction has not been done by her. All parties are justified in their claims, but are fighting and hating each other. For a mediator, it is not only a good exercise of problem-solving and negotiation skills, but ultimately a good chance of creating peace in the surroundings through mediation.[11]

The mediator assumes that neither party is good or bad.[12] Every party has a valid interest to protect, but it is only the positions which are different and parties take them firmly to fight from, for the protection of their interests.[13] A mediator's first job is to know the parties and to understand their positions. A mediator has the skill to separate interest from position. For that purpose, the mediator takes two steps. First, he engages parties in negotiation to know their positions and interests. Second, he prepares himself for further negotiations by separating the interests of the parties from their positions, because interest of the parties is the runway to take the flight of mediation off.[14]

For instance, a court may declare that the proceedings of the political cases should not to be shared with media. The media, on the other hand, suspects shady dealings in the proceedings, prompting the court to conceal them. In order to understand the positions, the mediator would hold separate meetings with the parties. The mediator would find out that the interest of court is political stability of the country, while the media wants the political figures to be questioned before the law, as the leaders of community.

The position of the court is not to make proceedings public, while the position of the media is to make everything public. The interest of court is the political stability and security, while the interest of media is to exercise the right to know, a fundamental right of the public. Now, a mediator would separate positions from interests. The collective interest of both the parties is political stability of people and the conservation of their fundamental rights. The mediator would then start building on the basis of collective interests of the parties instead of their positions. There could be a resolve in this situation that the technicalities, which may create misunderstanding, may be kept reserved unless some authentic interpretation is released by the court itself, but the rest of the proceedings may be made public. There may be other resolves too depending on the ingenuity of the mediator. The resolve is then put before the parties for further negotiation.

Figure 1: Positions and Interests of court and media

	Court	**Media**
Positions	No circulation of proceedings in political cases.	Must be hiding something devious.
Interests	Political stability and protection of people from unwarranted misconceptions.	Right to access to information must be protected.

Source: Authors

Contrary to this, an arbitrator or a *panch*, in this case, would not be able to separate positions from interests. First, take the situation of an arbitrator and a *panch*. In the light of two versions of the parties, even if the arbitrator or *panch* is very considerate, there would be no chance for the parties to negotiate the settlement. They need to follow the award drawn by the arbitrator or order given by *panchayat*. The position of judge is entirely different. The assumption of an adversarial system for the resolution of disputes is that one party is right and the other is wrong. The judge starts with an assumption that court is to decide between right and wrong. Keeping in view the positions of the parties, issues are framed by the court. On these issues, evidence is recorded and in the light of evidence, the issues are decided. There is always an authoritative order in the form of judgment and the decree is given by the court in favor of one

party and against the other, generally.[15] The decree has the backing of legal machinery to be executed.

The Belief Regarding Nature of Dispute

Conflict is intrinsic to human nature. Dispute is neither good nor bad. It is good in a sense that it releases the pent-up energy in the form of anger and envy.[16] It is bad in the sense that it actually exposes the person from inside out, with all the weaknesses and viciousness, but all good or evil neutralizes, when dispute is resolved by settlement agreement between the parties. The mediator sees dispute through the lens of mediation, as an opportunity, to bring the conflicting interests of the parties on the table.[17] For a mediator, a dispute is only a difference in the perceptions of goals between parties and could be re-adjusted with better outcomes.[18]

For example, a dispute arises between an aged couple over sitting on the aisle seat during a seven-hour flight.[19] Both want to sit together to enjoy each other's company, but at the same time, they want to sit on aisle. Both have their separate positions of not crossing the partner, if they need to use the toilet during a long flight. The mediator, after identifying interests and positions, fetches an opportunity that could make the dispute an opportunity for even better relationship after the resolve.

If same proposition is encountered by an arbitrator or a *panch*, the solution would be given as an order to which the parties must submit.[20] In adjudication by a judge, the resolve would be even easy, matter of fact and straight. The judge would look into the reservation record. The seat would be held by one to whom the seat was reserved, on the aisle or otherwise. Even in that case the judge would comfortably decide that the making of choice is the prerogative of the one, who booked the seats. Parties follow the verdict under compulsion, but there remains a gulf of disapproval between them.

The Belief Regarding Solutions to Settlement

The third article of faith of an arbitrator suggests that there is more than one solution to any dispute. The mediator values the dispute as an opportunity not only for the parties, but also for himself to act more creatively and imaginatively.[21] For parties, the opportunity is to test their degree of tolerance, endurance and capacity to take stress. Neither the mediator is bound by the

previously made settlements on similar issues, nor has he to follow strict rules to reach a settlement.

A peace scholar, John Galtung, conducted a training in which he placed an orange on each participant's table. There were seven tables in the room and each table was occupied by a pair. The class was culturally and ethnically diverse, consisting of participants from over ten countries. The professor asked the participants to share the orange and write down the scheme for sharing it. The solutions ranged from very innocent division of sharing by making two halves of the orange, then counting the bites and dividing them equally, if they were in even number and if not, then dividing the even shares and then cutting the last bite into two, to make equal shares. Some very creative solutions were suggested, including squeezing juice from orange and then dividing it equally, or extracting juice from orange then after following a complete recipe for orange pie, prepare and sell the orange pie in the market, so that the dividend multiplies in value.[22] Thus, the sharing of one orange ended up into multiple proposals.

It is the mediator's skill and art to be inventive, imaginative and creative each time to come up with different resolve to motivate parties to consider and adopt it. In comparison to this, arbitrator and *panch* work in their allotted domains of rules. For arbitration, these rules are framed by the legislature or authorized bodies. They navigate and bring out solution in accordance with the rules. The position of a judge is entirely different. A judge needs to be very formal and authoritative, because main force underpinning the solution is the authority of law. Along with the law, the judge is also bound by the supplications of the parties and their prayers and cannot grant what has not been prayed by the parties.

The adjudicator, arbitrator or a *panch* believes that they are to divide the available pie justly and equitably between the parties. Laws and rules are their tools to make this division. Conversely, the mediator believes to expand the pie and then divide it between the parties, so that everybody could have enough share, happily.

The basic diagram for dispute resolution by mediator, as suggested by Johan Galtung, comprises two incompatible goals and five outcomes.[23]

Figure 2: Transcend and Transform by Johan Galtung

No	Position	Outcome	Process	Sum	Job
1	1,0	Either, nor	Victory	1	1
2	0,1	Either, nor	Victory	1	1
3	0,0	Neither, nor	Withdrawal	0	2
4	1/2,1/2	Half, half	Compromise	1	1
5	1,1	Both, and	Transcend	2	0

Source: Johan Galtung

According to Galtung, every dispute prima facie is the contest between two opposing outcomes, but when the conflict worker handles a dispute, generally there are five outcomes. The two extremes are the ones, which initially each party wants i.e. either/nor. Every party wants to win the claim at every cost. This resolve may satisfy the party with victory, but the victory has a great cost attached with it. The relationship between the parties is ruined for all the times to come and the defeated party starts planning to revenge the victorious.

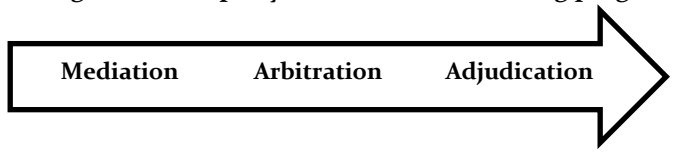
The third resolve is withdrawal. In this situation, the parties don't talk to resolve the issue nor do they urge for resolution. It leaves the wound open and the relationship between parties further deteriorates. The second last is the lay man resolve to divide the pie equally between the parties. Like in the previous example, the couple share half and half the flight time to sit by the aisle. But the more lasting is the last one, the transcendence, this is the resolve where the creative mind of mediator first expands the pie and then divides it within parties, so everybody wins, but not at the cost of the defeat of the other.

The Belief Regarding Party's Control during Settlement Process

Mediation assures the control of parties over resolve. The conflict continuum starts on one hand from negotiation to reconciliation, from reconciliation to mediation, from mediation to arbitration and finally ends up with adjudication. The graph of party's control falls down, as the continuum progresses from start to end.[24] (Left to right in the diagram). In mediation, the

option lies with the party whether to exercise more control or less control over outcome, whereas, arbitration or adjudication enforces the order by authority.[25]

Figure 3: Showing Control of party over decision lessening progressively



Mediation	Arbitration	Adjudication
Discussion with the help of neutral third party, who facilitates settlement.	Decision by neutral third party out of court.	Decision by a judge in the court of law.

Source: Authors

Though the arbitrator works in a less formal setting, as compared to a judge, yet the skill of the arbitrator is bound by the rules and cannot be ignored.[26] The arbitrator cannot ignore the intent of legislature, while applying the law. The standard to apply the law in letter and spirit becomes more stringent, when it comes to a judge, who is bound by predetermined discretion for the application of rules, not to talk of the control of parties in the process.

On the other hand, at every step during mediation, the parties not only weigh their interest but need to bargain their interest like the contracting parties exercise, while entering agreements. Though the contracting parties are being protected by the supporting laws for bargaining of their contracts, yet the focus of parties remains on getting the best deal for them.[27] The parties think that they are bargaining on their interest in the light of option created by the mediator. The mediator works as an insulator between the parties, because the mediator shows the parties the pros and cons of the solution on their respective interest as a neutral third party.[28] However, neutrality is not the only qualification, which adds to the credit of a mediator.[29] The real credit of a mediator is the wisdom, vision, and exposure regarding the proposed option to make a right choice.

Despite all expertise and experience of the mediator, the final word is of the parties that is boiled down as a settlement agreement between them. Parties could freely choose options keeping in view their respective interest.[30] The

settlement agreement is drafted by the mediator in accordance with the terms agreed between the parties. The best aspect of a settlement agreement is that it is owned by both the parties.[31]

The Belief Regarding Nature of the Settlement

The last article of faith for the mediator is the pinnacle of the process of dispute resolution. A mediator believes that a mediated agreement between parties leaves a better, sustaining effect on peace.[32] It is a long-lasting resolve leaving a lasting peace at all levels of human existence, i.e. personal, societal, national, international and global.[33]

All the above-mentioned examples make use of the principle of mediation to give rise to a sustained resolve. In the orange sharing example, there are lots of resolves. The contesting parties actually establish long-lasting partnership businesses; the one who proposed squeezing orange juice and then making a pie to sell in the market. The idea is not less than a start-up business based on partnership of the two. The lesser resolve at least satisfies parties that they have had proportionate shares in orange. Similarly, the resolve for the case of flying couple leaves parties in a cordial relation rather than separating them by the stiletto of a judge declaring the right and the wrong.

So far, it was a short comparison of the skill set of mediator and other adjudicators, especially a judge. Now the temperament of the trainee judges and mediation judges is going to be explored. The discussion shows that adjudication and arbitration are two different types of dispute resolution. That does not mean that both are competing, because both have their own pros and cons. For example, for heinous offences generally, the resolve needs punishment to the convict. It is not possible for any civilized society to give the execution of punishment in the hands of victim party;[34] there has to be a legal machinery for that. Likewise, though mediation looks very desirable, yet it needs the consent of both the parties given freely. If that consent is not shared between parties, mediation won't be possible. Similarly, if mediation is done between parties living in a culture of lawlessness, where breaking promises is considered a trivial matter, who would be responsible to keep the settlement intact? The question is not to prioritize the processes of dispute resolution. The question is to explore whether judges who are responsible for mediation at ADR centers are ready and prepared for carrying out mediation or not.

Findings from the Focus Group

The focus group was comprised of 21 recently recruited Civil Judges cum Judicial Magistrates Class-I undergoing their six months pre-service training at Punjab Judicial Academy. As they did not have any previous experience either of holding the court or of the mediation process, their responses were more assumptive. Nonetheless, they were being attached to various courts for their on-job trainings as part of pre-service training, hence, they had seen the conduct of courts. They also had minimum two years exposure to courts as advocates, because it is a precondition for appearing in the competitive examination for judges. Nobody amongst them had experience of mediation at mediation centers.

The discussion with this focus group revolved around five points. The first point was regarding qualities of a judge e.g. neutrality, impartiality, sobriety, poise, patience and grace of judicial office, while conducting the court. The second point was about the comparison of the position of judge with that of a mediator. The participants were of the view that a judge holds a position of authority in the court, because parties as well as lawyers assume that whatever a judge utters becomes the law. On the position of a mediator, one commented, "Mediator is like a property dealer or a car broker .... He brokers deal between the parties and gives them impression that it is the best deal. Each one feels satisfied and winning."

While comparing a judge with a mediator, they said "A mediator should have the ability to convey to parties that he is equal to them and can, hence, understand their problems the way they feel them." They almost unanimously agreed that a judge, for the sake of mediation, must step down from his chair of poise and authority to mediate amongst people.

Commenting on the qualities of a mediator, they said that he must be considerate, compassionate, visionary, open-minded and experienced. "The mediator has to be creative and dynamic in order to come up with multiple choices for the parties", commented one of the participants. A female participant stressed that "dispute resolution through mediation is different from judging because the way of resolution is entirely different." She commented, "Mediation is like dispute resolution by mother and the judging is closer to resolution by father." She elaborated her point, "Because mother cares more for

all the children and their relationship with each other, whereas father, decides more on the merit of dispute." When last question was asked regarding what they preferred to be after training, a judge or a mediator, majority of them without hesitation took pride in performing the judicial work. Only four of them preferred mediation and declared it a better and lasting way of resolution of the disputes. They supported the idea that mediation should be adopted more to make society more tolerant and resilient, but everyone agreed that a different skill set was required to train the future mediators.

Findings from One-on-One Interviews

One-on-one interviews were conducted with those judges who had been or were acting as mediators at mediation centers. A total of nine judges cum mediators were interviewed telephonically. There were fifteen open-ended questions. A different set of seven judges was also interviewed to confirm the findings of mediation judges, who had never mediated any case in their career. Majority of these judges never liked the idea of judicial mediation. They declared it a 'gaming tactic' and flirtation of those judicial officers, who do not want to indulge in the ordeal of trial and conduct of court. Though some liked it as well, but the ratio was low. Many of these judges called it an 'absconding tactic' and pointed fingers on the judges, who are sent to mediating centers, "They are the blue-eyed babies and have contacts and approaches at higher levels." "They manage to enjoy the leisure of mediation instead of the tedious and laborious court work", commented a few of them.

On the question whether mediation judges were satisfied with the outcomes of arbitrations, the ones who had done or doing mediation, admired and appreciated the method. They were of the view that this way of dispute resolution is more satisfying than the court orders. In this regard, one of the interviewees recalled the satisfaction he had felt after mediating a civil case, which had been pending since 1985. "It took me 28 days, which is my maximum time for any mediation." He explained, "It was a multi-round litigation in various courts from trial to Supreme Court and now back." Another interviewee shared his memorable mediation experience. "It was a case of a daughter against her father. She was claiming specific performance of a sale agreement between her and her father." According to the interviewee, "when I talked to the parties separately, the daughter told me that her father was avoiding performance due to the influence of her step mother and her cunning children from previous

husband. She also suggested that if those (step mother and her children) were called and warned by me, the matter could be resolved easily." The interviewee narrated further, "I called them all and warned them about the legal consequences they could face, if they forbad the father from performance." The dispute was settled within three days.

Regarding the training of mediation judges, the participants told that a six-days training session was held at Judicial Academy, which was conducted by some association formed by a group of lawyers for mediation. After training, they got posted to respective ADR centers. On asking whether they were given any refresher training too, they replied in negative. On question regarding comparison between judges and mediators, one of the interviewees said that "the judge's most valued skill is impartiality and neutrality, but the skill of mediator is better communication, because mediator has to motivate parties, but the judge gives order in accordance with the law."

There is no fixed procedure for mediation. The mediation judges have freedom to adopt any procedure to get to the settlement. Oath on Quran, involving village headman (lumberdar) or elder of the family may be practiced to settle the matter by the parties. Comparing mediation with court's decree, one of the interviewees commented, "Though the decree decides the matter, but leaves the Pandora's Box of execution opened behind, which is a real misery for parties." Another interviewee compared, "Parties are rarely given proper hearing by the courts due to overload of work. During mediation, the parties are fully heard, so they feel more satisfied." Another interviewee added, "The lawyers don't let the parties explain their stance, so the parties in courts remain under an impression that they are not entitled to speak before the judge, which implants fear of the court in their hearts. The situation at mediation center is totally opposite."

The skill set of the judge is the knowledge, application and implementation through coercive state machinery. He also maintains a graceful distance from the people around him to maintain dignity of his position. On the other hand, "The mediator has to be communicative and flexible." A mediator must know whom, he is handling. One interviewee commented, "To handle a landlord is different from handling a businessman, so a mediator must be adaptable to the parties". The prime skill of a mediator is effective communication. A mediator must know how to communicate, what to communicate and what not to

communicate. "Because all dealings of mediator could end up in success or failure, based on how the mediator communicates with parties."

Analysis of the Data

This research argues that the judicial skill set is different from the skill set of a mediator. The paper does not criticize the judicial mediation, but proposes that a different skill set must be inculcated in the mediation judges. For instance, in a glance on the code of conduct for judicial officers from the subordinate judiciary, the skill set of a judge is unique and carries with it an aura of long tradition of judicial history. There are rules of procedures to be followed strictly by the court, parties and the lawyers. Judges are required to maintain a special kind of decorum and poise in conducting their courts. They are required to avoid mixing up with public, unless there is a dire need to do so. Judges speak through their pens and usually do not express their views before public. Judges are required to conduct court proceedings and pronounce judgment in open court. Though one of the qualities as written in the code of conduct is '*Musleh'*, but even that is within the confines of the code.

During the interviews, it was observed that the mediation judges also make use of the authority of their office to bring people to settlement. The judges, while warning the parties about the repercussions of a failed mediation also make use of judicial mediation clandestinely. Similarly, settling a dispute by involving an elder, a religious leader or a village head (lamberdaar) to make a settlement is also an example of the use of the office of a judge.

While interviewing the mediation judges, who are now performing the judicial functions as judges, it transpired that the mediation judges don't adjust quickly in the seat of a judge, when they are transferred back to courts. One of the interviewees opened up, "Changing the nature of job from mediator to judge takes time to re-adjust. It's not equal to changing the cap and start doing the other job." One of the mediation judges said, "Mediating, while you are a judge gives double pleasure, because you play justice and compassion at the same time, but reshuffling the same person between two poles lessens the confidence of person as a judge as well as a mediator."

Conclusion

The research concludes that a distinct skill set is required to be taught to mediators to hold mediation in its true sense. This skill set is different from judicial skillset. Hence, the judicial officers, who are trained as mediators, should specialize in this area along with other mediators from society, who are skilled in the knowledge and experience of dealing and resolving disputes between people; adapted from Galtung, the 'dispute workers'. This paper also asserts that mediation needs a continuous, regular and tenacious mediation skills development, which is different from the skill of judging. Because a judge is judged from the quality of judgment, but a mediator is judged from the extent of peace he brings in a society. The culmination of judgment is the execution by law enforcing and coercive agencies, but the execution of mediation agreement is done by parties' own volition. The judgment breeds a short or long-lasting hatred and a feeling of revenge to the defeated party, but mediation may sprout new and better dimensions in the existing relationship. A judge must be strict and indifferent to the criticism of the party, who was defeated in the legal brawl, but a mediator must share the same warm heart with both parties not only to thaw the ice of dispute but to create a spring of hope, peace and love among them.

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