

## Review

# Court-administered mediation in Jammu and Kashmir: A problem-solving machine with an adversarial search engine

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**Alternate dispute resolution (ADR) is assuming significance worldwide and the adversarial system of justice delivery is embracing it and substantially incorporating its features. Mediation as an ADR is not a rehearsal trial in front of a judge but a dialogue process to capture parties' insights and ideas in a dispute that help them to identify and shape their preferred outcomes. ADR procedures need to retain their distinctive features in order to gain and maintain faith and confidence of stake holders. The local legal history of Jammu and Kashmir demonstrates that mediation as an alternative to litigation has been tested a century earlier and has shown remarkable results. Integrating these local historical lessons with the modern scholarly research of some adversarial jurisdictions, this paper examines the legal framework of court-administrated mediation in Jammu and Kashmir to scan its potential adversarial features. The Article focuses on suggesting measures so that mediation as a viable dispute resolution mechanism does not fully integrate with traditional adversarial paradigm, assume problems similar to litigation and gradually loose features that make it appealing. Doctrinal research tools have been adopted in the study with the objective of reforming the existing court-administered mediation mechanism in Jammu and Kashmir, and to achieve it, the relevant literature available from the pages of local history and current legal research on mediation have been discussed to analyse the existing legal framework and draw the conclusions.**

**Key words:** Alternate dispute resolution (ADR), mediation, adversarial system, building blocks, procedural mechanism, Lok Adalat, problem solving strategy, settlement, ethical standards, immunity, arbitration.

## INTRODUCTION

The growing evidence of failing faith in adversarial system as an adequate basis for fair adjudication<sup>1</sup> has brought the task of search for alternatives to litigation to the forefront. 'Litigation Explosion' is said to be both cause and effect of a court system incapable of providing timely, affordable and effective outcomes<sup>2</sup>. The court

system that intends to provide a just, principled, practical and economically rational solutions is largely perceived to do just the opposite. Some even argue that courts decide cases on political and ideological grounds rather than purely legal grounds<sup>3</sup>. In advanced adversarial systems lawyers as the primary players of litigation are also accused of promoting needless complexity, fomenting strife, manipulating legal technicalities, selfishly taking advantage of opponents and clients, advancing the interests of the rich and powerful against the poor and weak and undermining the health of the economy by acting as unproductive parasites<sup>4</sup>.

<sup>1</sup> Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U.Chi.L.Rev. 494,505 (1986); see also Justice R.V. Raveendaran, Mediation-An Introduction in 'Mediation-Need of the Hour-Annual Report of the Mediation Monitoring Committee and Action Plan 2011-2012', High Court of Jammu and Kashmir- Main Mediation Centre, Srinagar at 14, observing that delay that has become a part of the adjudicatory process 'leads to frustration and dissatisfaction among litigant public and erosion of trust and faith of common man in the justice delivery system'.

<sup>2</sup> Marc Galanter, Reading the Landscape of Disputes: What We Know and Do not Know (and think We Know) About Our Allegedly Contentious and Litigious Society, 31UCLA L. Rev. 4, 6-11, 61-69 (1983).

<sup>3</sup> Robert Kagan, Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry, 19 L & Soc. Inquiry 1, 10-11, 23-27 (1994).

<sup>4</sup> See Marc Galanter, Predators and Parasites: Lawyer-Bashing and Civil Justice, 28 GA L. Rev. 633 (1994); see also Marc Galanter, Real World Torts:

Managing activities in a confusing legal system that can be a source of power and prestige within an organization and it is, therefore, argued that the repeat players<sup>5</sup> in an adversarial system have a great interest in its operation as it provides them not only living but also powerful and prestigious identity<sup>6</sup>.

Given this scenario, a review of the literature of jurisdictions with advanced adversarial system demonstrates that if alternate dispute resolution (hereafter ADR) becomes sufficiently integrated into litigation or substantially incorporates features of litigation, many people are likely to believe that ADR does not provide distinctive advantages and key constituencies may lose faith in both ADR as well as litigation<sup>7</sup>.

ADR procedures need to retain their distinctive features in order to gain and maintain faith and confidence of constituencies. While the need for a formal regulatory scheme cannot be undermined in order to protect against common abuses normally difficult to prevent, correct or detect, too much bureaucratic regulation and routinization, which may develop over a period of time, may strip away the beneficial aspects which makes ADR desirable. Proper regulation requires a tricky balance<sup>8</sup> but adding more adversarial procedures would be like reinventing the wheel<sup>9</sup>.

This paper attempts to analyse the provisions of the J and K Civil Procedure Mediation Rules, 2009 on the basis of above perspectives. It is argued here that mediation procedures in order to be successful in the state need to consider local historical legal lessons for the public preference of mediation over litigation and, promote procedures that confer optimum autonomy in handling dispute resolutions instead of pumping more adversarial procedures into ADR systems which may make it to resemble presentations in court, focus closely on legal issues and reflect the dynamics of traditional adversarial bargaining in litigation.

## ADR SYSTEMS: DESIGNING AND BUILDING BLOCKS

ADR programmes are successfully, improving the lives of individuals and meeting broad societal goals in the

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An Antidote to Anecdote, 55 MD. L. Rev. 1093, 1154 (1996), while reviewing the charges against the legal system the author argues that the "system has spun out of control and America, or its substantial productive citizens, has been brought down by law". See also William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29.

<sup>5</sup> Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95, 97-104 (1974), a repeat player has been defined as a person or entity which has "had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests", *id.* at 98.

<sup>6</sup> *Id.* at 97-107.

<sup>7</sup> John Lande, Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions, 3Harv.Negot. L. Rev. 1-70 at 64 (1998).

<sup>8</sup> *Id.*

<sup>9</sup> See Judith Resnik, *supra note* 1 at 554.

programmes are instruments for the application of equity, rather than the rule of law and are not a substitute for a formal judicial system. Such programmes can increase access to justice for social groups as are not adequately or fairly served by the judicial system. These programmes also reduce cost and time to resolve disputes and increase disputant's satisfaction with outcomes. These programs can accelerate not only rule of law objectives but development objectives such as economic development, development of a civil society, and support for disadvantaged groups, by facilitating the resolution of disputes that are impeding progress towards these objectives<sup>10</sup>.

Before developing an ADR programme it has been stressed that programme designers must assess background conditions to ensure that ADR will be feasible in practice. Amongst these background conditions, the following aspects need to be given due consideration:

1. Political support;
2. Institutional and cultural fit;
3. Human and financial resources and
4. Power parity among potential users.

Once ADR appears feasible, programme designers should ensure that the ADR programme meets key preparation criteria. This includes assessment and identification of goals, participatory design process, adequate legal foundation and effective local partner. Lastly programme designers should ensure programme implementation criteria. This includes effective selection, training and supervision of ADR providers, financial support, outreach, effective case selection and management, and programme evaluation procedure<sup>11</sup>.

## MEDIATION VERSUS ADVERSARIAL STRATEGIES

As its rich and widespread history reveals mediation is not a process designed for having an expert apply some external criteria to assess the strengths and weaknesses of the parties' cases<sup>12</sup>. It is also not a process to marshal evidence leading to an advisory opinion by a third party, nor a rehearsal trial in front of a judge. Instead, it is a dialogue process to capture the parties' insights, imagination and ideas that help them to participate in identifying and shaping their preferred outcomes<sup>13</sup>. In an adversarial system of negotiation the respective parties, as research reveals, adopt the following strategies to maximize their gains<sup>14</sup>:

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<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

<sup>12</sup> Joseph B Stulberg, Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock, 24 Fla.St.U.L.Rev. 986 (1997).

<sup>13</sup> *Id.*

<sup>14</sup> See Donald G. Gifford, Context- Based Theory of Strategy Selection in Legal Negotiation, 46 Ohio St. L.J. 41, 48-49 (1985).

1. A high initial demand;
2. Limited disclosure of information about facts;
3. Threats and arguments, and
4. Apparent commitment to positions.

In contrast to adversarial strategies the researchers have stressed upon the following problem solving strategies in mediation which they call as principled negotiation<sup>15</sup>:

1. Separate the people from the problem;
2. Focus on interests, not positions;
3. Invent options for mutual gain, and
4. Insist on objective criteria.

### **Adversarial versus mediatory-dispute resolution: A century and odd old historical lesson from “the valley of Kashmir”**

The local history of Jammu and Kashmir is replete with instances which amply demonstrate that ADR methods have been used in the state even after the introduction of adversarial system of justice delivery. Use of ADR techniques have shown remarkable results in the past and people have well taken it as part of their indigenous culture. Walter R. Lawrence - the settlement Commissioner of Kashmir during the years 1890 to 1895 (A.D.), while giving an account of his unique mediatory method of dispute resolution in Kashmir prefers ADR methods against court litigation for the following reasons<sup>16</sup>:

“Since 1890, all suits connected with land, saving land situated within Srinagar and a few adjoining villages, have been removed from the ordinary courts and have been made over to me for decision. *My procedure has been to hear and decide such suits in the village where the claim has arisen. Under a chinar tree in the presence of the assembled villagers, the claimant prefers his suit and the defendant makes his reply. Then the old men of the village and the headmen of the neighborhood give their opinion on the case, and a brief entry is made by me which finally settles the claim.* This may seem a very rough and ready way of disposing of land suits, but *so far no one has ever appealed against my decision.* If a claimant went to the courts in Srinagar, the dark side of his character would appear. *Pleaders and court attendants would adulterate his simple claim and in the same way the defendant would throw of the candour and truthfulness inspired by the presence of his neighbours in the village and would lie in the most ingenious and surprising manner.* For five years this procedure has gone on, and I attribute much of the quiet prosperity which is now growing in the villages, to the fact that money is not spent and bad blood is not engendered by litigation. My system is the old system of the village

<sup>15</sup> See Roger Fisher, et al., *Getting to Yes*, 2nd ed. 1991 (Penguin Books) at 15-81.

<sup>16</sup> Walter R. Lawrence, *The Valley of Kashmir*, 2<sup>nd</sup> ed. 2005 (Gulshan Books-Srinagar) at 5-6.

*panchayat. The commonest intellect can tell from the faces of the villagers whether the claim is just, and the ‘genius loci’ seems to keep both claimant and defendant to the point and to the truth.* The system is easy and possible in Kashmir, for one can reach any village in the valley in a day’s ride.

My object in alluding to this procedure is to add further testimony to the fact that Kashmiri peasants are not dishonest. If they had been the hopeless liars they are reputed to be, I could never have disposed of the many suits which have arisen. *A Kashmiri will rarely lie when he is confronted in his village by his fellow villagers; he will invariably lie when he enters the murky atmosphere of the Law courts....If litigation is fostered in Kashmir prosperity in the villages will be checked*<sup>17</sup>.

The current research related to mediation reveals that the traditional adversarial system, in which lawyers both litigate and negotiate, tends to promote stalemate instead of creative dispute resolution. Consciously or otherwise, lawyers may prolong their clients’ conflict for financial or reputational reasons. Litigation itself sometimes results in deterioration in communication, in-formation distortion, lack of creativity and reinforcement of psychological biases. These factors may delay resolution of the dispute or result in settlements that are deficit in elements that can maximize parties’ interests<sup>18</sup>.

In court-ordered mediation, disputants may be coerced or ordered to attend. They may attend not because they want to settle but because they may be afraid of being sanctioned if they fail to attend. This requires a mediator not to continue with court like practices at the initial stage but to work to dispel any feelings of coercion and obtain a commitment of parties’ to put forth a good faith effort towards settlement<sup>19</sup>. It is the dynamics of mediation and not the court oriented practices that can help to dispel the coercive feelings of the disputants. To quote Ibrahim Lincoln<sup>20</sup>:

“If I had six hours to chop down a tree,  
I’d spend the first hour in sharpening the tools”.

Obviously mediators have a tree to chop down in limited hours, ‘while the best axe is only as good as the human muscle behind it, even those with well-honed guts can sharpen their results with analytical tools and psychological debiasing. With planning, they also improve the odds of dropping the tree in the yard rather than on the house’<sup>21</sup>.

<sup>17</sup> Id. words put in italics show emphasis supplied by the present author.

<sup>18</sup> See Mendelsohn Gary, *Lawyers as Negotiators*, 1 Harv. Negot. L. Rev. 139-167 (1996).

<sup>19</sup> Jack G. Marcil and Nicholas D. Thornton, *Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success*, 84 North Dakota Law Review 866 (2008).

<sup>20</sup> Joshua N. Weiss, *You Didn’t Just Say That! Quotes, Quips and Proverbs for Dealing in the World of Conflict and Negotiation*, 19 (2005), available at [http://www.pon.org/downloads/quote\\_book.pdf](http://www.pon.org/downloads/quote_book.pdf), last visited on Feb.20, 2012.

<sup>21</sup> Donald R. Philbin Jr., *The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation* 13 Harv. Negot. L. Rev. 249-50 (2008).

## RESOLUTION OF DISPUTES OUTSIDE COURTS IN JAMMU AND KASHMIR: JOURNEY FROM 1890 (A.D.) TO SECTION 89 CIVIL PROCEDURE CODE

Section 89 was inserted in the J and K Code of Civil Procedure, 1977 by an amendment in 2009<sup>22</sup>, pursuant to which J and K Civil Procedure Mediation Rules, 2009 were framed by the J and K High Court. Section 89 C.P.C. confers wide powers upon civil courts to utilize variety of ADR techniques for reaching a settlement or compromise in a pending litigation, mediation is one of such forms of alternative dispute resolution. Independent of Civil Procedure Code, the Jammu and Kashmir Legal Services Authorities Act, 1997 also provides for utilization of mediation as an alternative dispute settlement mechanism and to achieve these objectives, the Mediation Conciliation Project Committee (MCPC) Supreme Court of India instructed the state chief justice to establish mediation centres in the state<sup>23</sup>.

The set of rules adopted under the C.P.C. for court administered mediation is by and large the copy of the rules proposed by the Committee appointed pursuant to the decision of the Supreme Court of India in the case of Salem Advocate Bar Association versus Union of India.<sup>24</sup>

### The J and K Civil Procedure Mediation Rules, 2009

Framed by the J and K High Court pursuant to power conferred under section 89 Civil Procedure Code the Rules have been enforced from the year 2009<sup>25</sup>. For the purpose of this study the rules are classified into two

<sup>22</sup> See the Jammu and Kashmir Code of Civil Procedure (Amendment) Act, 2009.

<sup>23</sup> Vide Notification No.558 issued by the J&K High Court on 05-10-2009 fourteen Mediation Centres have been established at the District level with a Mediation and Conciliation Monitoring Committee attached to each centre, two Mediation Centres, one each at Srinagar and Jammu, have been established at the High Court level. A State Level Mediation Monitoring Committee has been constituted by the Hon'ble Chief Justice vide order No. 1198, dated 22-03-2010 with Hon'ble Mr. Justice Mansoor Ahmad Mir as its Chairman and Hon'ble Mr. Justice Sunil Hali and Hon'ble Mr. Justice Muzaffar Hussain Attar as members of the Committee, see *supra* note 1 'Mediation-Need of the Hour-Annual Report of the Mediation Monitoring Committee and Action Plan 2011-2012', High Court of Jammu and Kashmir at 34,44-50. See also section 4(f) of the J&K Legal Services Authorities Act, 1997 which imposes a duty upon the State Authority to 'encourage the settlement of disputes by way of negotiation, arbitration and conciliation'.

<sup>24</sup> (2003) 1 SCC 49; see also Code of Civil Procedure (Central), section 89 [Settlement of Disputes Outside Court] and Ord. X rule 1(a)-(c) as amended in 2002 by the Code of Civil Procedure (Amendment) Act, 1999 at 36-37, 90; Law Commission of India Consultation Paper on ADR and Mediation Rules (2003a) 1 [Calling for a section 89 proceeding after recording admissions and denials at the first hearing of a civil suit under Ord. X] and Law Commission Consultation Paper on Case Management (2003b), Rule 4 at 9. For recent judicial guidelines in this behalf see *Afcons Infrastructure Limited and Another vs. Cheria Varkey Construction Company Limited and Others*, (2010) 8 SCC 24.

\* *Adversarial features are as highlighted in italics in the text.*

<sup>25</sup> The J&K Civil Procedure Mediation Rules, 2009, Rule 1 (2) published in 'Mediation-Need of the Hour-Annual Report of the Mediation Monitoring Committee & Action Plan 2011-2012', High Court of Jammu and Kashmir at 87-100, *supra* note 1.

divisions on the basis of their potential problem-solving and adversarial features.

### AN ANALYSIS OF THE RULES: FINDING PROBLEM-SOLVING AND ADVERSARIAL FEATURES\*

Parties to a suit may all agree to nominate sole mediator for mediating between them. In case of disagreement between two sets of parties to agree on a sole mediator, each set of parties can nominate a mediator. Where, however, there are more than two sets of parties with diverse interests, each set is to nominate a person on its behalf and the said nominees are to appoint a sole mediator<sup>26</sup>. Where parties agree on a sole mediator or agree on more than one mediator of their own, such mediators need not be from amongst the list of empanelled mediators, such mediators of parties need not possess the qualifications prescribed under the rules but must not be having any of the disqualifications prescribed in Rule 5<sup>27</sup>.

Persons interested in or connected with the subject-matter of dispute or related to any of the parties or those who represent them, unless parties waive off such objections in writing, and legal practitioners representing parties in the suit or in any other suit or proceedings are deemed to be disqualified for being empanelled as mediators<sup>28</sup>. A mediator who displays or exhibits conduct which is unbecoming of a mediator can be removed from the panel on the said ground or any other ground such as justifiable doubt as to mediator's independence or impartiality which is falling within the prescribed disqualifications under Rule 5 and Rule 9<sup>29</sup>. Persons disqualified to be mediators under the rules include those as have been declared as insolvent or of unsound mind or against whom criminal charges involving moral turpitude are framed and pending before criminal courts, persons convicted by courts for any offence involving moral turpitude or against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in punishment<sup>30</sup>. While selecting mediators courts are however mandated to give preference to such of the empanelled mediators who are suitable to the particular class of dispute keeping in view their special qualification or experience or who have proven record of success in mediation<sup>31</sup>. A mediator who is approached for his possible appointment as mediator is duty bound to disclose to the parties in writing, any circumstance likely to give rise to justifiable doubt as to his independence or impartiality and this duty continues

<sup>26</sup> Id. Rule 2.

<sup>27</sup> Id. Rule 2(c).

<sup>28</sup> Id. Rule 5 (v) and (vi).

<sup>29</sup> Id. Rule 5, 9 and 10, a hearing to the mediator is permitted before removal or cancellation of appointment by the court that empanels the said mediator.

<sup>30</sup> Id. Rule 5 (i) to (iv).

<sup>31</sup> Id. Rule 7.

throughout the continuance of mediation proceedings<sup>32</sup>

The rules require courts to prepare panels of mediators. *The High Court for proceedings filed on its original side and each of the courts of Principal District and Sessions Judge or the courts of the Principal Judge of the city civil courts or courts of equal status, for suits filed on their original side are to prepare panels of mediators after obtaining consent of empanelled mediators and approval of the High Court to the names included in the panels*<sup>33</sup>. The panels of names containing details of the qualifications of mediators, their professional or technical experience in different fields shall receive due publicity in the Notice Boards of respective courts, courts subordinate thereto as well as Bar Associations attached to each of the courts. *Retired Judges from the Supreme Court of India down to the level of District and Sessions Courts or of the city Civil courts or courts of equivalent status, legal practitioners with at least 15 years standing at the Bar in such courts, experts or other professionals with at least 15 years standing and institutions with expertise in mediation and whose members are approved by the High Court are to be treated as qualified and eligible for being enlisted in the panel of mediators.*<sup>34</sup> *Clearly therefore, out of a total of six categories qualified to be mediators, four categories are from the legal profession presumably adversarial experts.*

### Mediation: The procedural mechanism

The mediator is to fix a time schedule, the dates and the time of each mediation session after due consultation of the parties where all parties have to be present<sup>35</sup>. *Parties may also be represented by their counsel or power of attorney holders at the meetings or sessions notified by the mediator*<sup>36</sup>. In the case of parties who are not residents in J and K, personal presence is dispensed with and *they can be represented by counsel or power of attorney holders*. Where a party fails to attend a session without a sufficient cause, *the other parties or the mediator can apply to the court in which the suit is filed to issue appropriate directions to attend before the mediator*. Such a court can impose costs for unjustifiable absence.<sup>37</sup>

Parties may themselves agree upon any place as the venue for the conduct of mediation *subject to the approval of the court concerned*<sup>38</sup>. Mediation can also be conducted at the mediation centres established by the High Court or at the venue of a Lok Adalat/permanent Lok Adalat or a place identified by the High Court or as the case may be by the Principal District judge within the

court precincts or a place identified by a Bar Association or the State Bar Council within their respective premises<sup>39</sup>.

Ten days before a session, each party is to furnish to the mediator a brief memorandum setting forth the issues needing resolution, *its position in respect of those issues* and all information reasonably required for the mediator to understand the issues. These memoranda shall also be mutually exchanged between the parties<sup>40</sup>.

Each party is also to furnish to the mediator, *copies of pleadings or documents or such other information as may be required to resolve the issues*. Where the mediator intends to look into any original document, *the court may permit it before such officer of the court and on such date and time as the court may fix*<sup>41</sup>. In order to ensure smooth conduct of mediation proceedings, parties themselves or the mediator with their consent can arrange for administrative assistance by a suitable institution or person<sup>42</sup>.

### Settlement

A party to the suit may offer a settlement to the other party at any stage of the proceedings with notice to the mediator<sup>43</sup>.

The mediator is neither to impose any decision nor any terms of settlement on the parties. He is to emphasize upon the responsibility of the parties to take decision which affect them and to facilitate a voluntary resolution of the dispute, ensure their communication of views to each other, assist in identifying issues, reduce misunderstandings and tensions, clarify priorities, explore areas of compromise and generate options for resolution of the dispute<sup>44</sup>. Parties are to demonstrate their utmost good faith to settle the dispute and shall commit to participate in the proceedings with an intention to settle it, as far as possible<sup>45</sup>.

Mediation is to stand terminated on the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator. Extension of time up to a maximum period of thirty days is permissible by the court, either on its own motion or on request by the mediator or any of the parties and upon due hearing of all the parties<sup>46</sup>.

Agreements reached between the parties, whether on all or some of the issues in the suit are to be reduced to writing, signed by parties or their power of attorney holders and where they have been represented by counsel, they shall attest the signatures of their

<sup>32</sup> Id. Rule 8.

<sup>33</sup> Id. Rule 3.

<sup>34</sup> Id. Rule 4.

<sup>35</sup> Id. Rule 11.

<sup>36</sup> Id. Rule 13.

<sup>37</sup> Id.

<sup>38</sup> Id. Rule 6 (5).

<sup>39</sup> Id. Rule 6 (1) to (4).

<sup>40</sup> Id. Rule 11 (iii).

<sup>41</sup> Id. Rule 11 (iv).

<sup>42</sup> Id. Rule 14.

<sup>43</sup> Id. Rule 15.

<sup>44</sup> Id. Rule 16 and 17.

<sup>45</sup> Id. Rule 19.

<sup>46</sup> Id. Rule 18.

respective clients. The agreement so signed and attested and submitted to the mediator shall be forwarded by the mediator along with a covering letter signed by him to the court in which the suit is pending. Where no agreement is reached within the time limit or the mediator is of the view that no settlement is possible, he shall report it in writing to said court. He shall also fix the date when parties shall appear before the court for further instructions from the court and within that period he shall report the result of his efforts in settling the dispute including submitting of the agreement, if any, arrived at between the parties<sup>47</sup>. If the parties appear, before the court on the day fixed by the mediator or on such other day, not being beyond a further period of fourteen days, the court shall record settlement, *if it is lawful*<sup>48</sup>. If the settlement disposes of all the issues in the suit, the court shall pass a decree in accordance with the settlement. If, however, the settlement disposes of only some of the issues which are severable from other issues and a decree can be passed to the extent of the settlement covered by those issues, the court may without waiting for a decision of the court on unsettled issues, pass a decree straightway in accordance with the settlement. But if the issues are not so severable the court is to wait for decision of the court on unsettled issues<sup>49</sup>.

### Mediator: The ethical standards

A mediator is to follow the rules strictly and with due diligence and is to avoid any activity or conduct which is reasonably considered unbecoming of a mediator<sup>50</sup>. The mediator is to uphold the integrity and fairness of the mediation process ensure that parties are fairly informed and have an adequate understanding of the procedural aspects of the mediation process<sup>51</sup>. He /she is to disclose any interest or relationship which may affect impartiality or which might seek an appearance of impartiality or bias. The assignment is to be undertaken and completed in a professional manner. While communicating with the parties, every impropriety or appearance of impropriety is to be avoided and the mediator is to be faithful to the relationship of trust and confidentiality imposed in the office of mediator. *The mediator is to conduct the proceedings related to the resolution of dispute in accordance with the applicable law* and at the same time he/she is to recognize that mediation is based on the principle of self determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement<sup>52</sup>. As part of the mediation ethics the mediator is to maintain the reasonable expectations of the parties

<sup>47</sup> Id. Rule 24.

<sup>48</sup> Id. Rule 25(1).

<sup>49</sup> Id. Rule 25(3).

<sup>50</sup> Id. Rule 27(i) and (ii).

<sup>51</sup> Id. Rule 27(iii) and (iv).

<sup>52</sup> Id. Rule 27(ix) and (x).

as to confidentiality and refrain from making promises or extending guarantees of results<sup>53</sup>. The parties and the mediator are duty bound to maintain confidentiality in respect of the information, disclosures and cannot use any information, admissions made, and views expressed in the course of mediation proceedings in any subsequent proceedings in a court of law<sup>54</sup>. Even the communication in between the mediator and the court that ordered mediation is limited to failure of party/ies to attend or mediators assessment that the case is not suited to settlement or that the parties have settled the dispute<sup>55</sup>. The mediation sessions and meetings are to be private, without any stenographic or audio or video recording where only the parties concerned, their counsel or power of attorney holders and such other persons as are permitted by the mediator can attend<sup>56</sup>.

### Mediator's fee and immunity

The mediator enjoys immunity from any civil or criminal action for anything done bonafide or omitted to be done by him/her during the mediation proceedings and cannot even be summoned by any court to testify in regard to information received, action in respect of drafts or records prepared by him/her or shown to him/her during the mediation process<sup>57</sup>.

The fee of the mediator is to be fixed by the court after due consultation with the parties and the mediator. The fee and other administrative assistance costs and incidental expenses are to be borne and equally shared by the contesting parties or as may be directed by the court. Each party is to bear the expenses incurred on account of production of witnesses or experts or for production of documents. The 40% of the mediation fee and costs are to be deposited with the mediator at the commencement of mediation while the balance is to be deposited after the conclusion of mediation. The mediator is to render accounts of the amount received and disbursed, to the court. The court can order recovery of the fee and costs by way of a decree where mediator experiences difficulty in this behalf. Where, however, a party is entitled to legal aid under section 12 of the J and K Legal Services Authorities Act, 1997, the amount of fee payable to the mediator and the costs are to be paid by the concerned Legal Services Authority under the said Act<sup>58</sup>.

## CONCLUSION AND SUGGESTIONS

It is a hard fact that disagreements at the root of legal

<sup>53</sup> Id. Rule 27(xi) and (xii).

<sup>54</sup> Id. Rule 20.

<sup>55</sup> Id. Rule 23.

<sup>56</sup> Id. Rule 20 (5) and Rule 21.

<sup>57</sup> Id. Rule 22.

<sup>58</sup> Id. Rule 26.

disputes are governed by law, and it is usually not possible to resolve those disputes without examining the merits of the parties' competing claims, but how far-beyond this limited examination, legal professionals as mediators would be in a position to minimize, if not eliminate the role of substantive arguments in the settlement process is to guess in anticipation. The evolutionary aspect of arbitration is an example how a dispute resolution process can begin as a true alternative to litigation and then gradually migrate towards the prevailing norm. Arbitration today has assumed problems similar to those of litigation and in the process, has lost many features that made it appealing initially<sup>59</sup>.

It has been observed that maintaining the integrity of the alternatives to adjudication ensures 'process pluralism' in the dispute resolution system<sup>60</sup>. Mediation has been named as the sleeping giant of ADR because it is a totally different process than trial and arbitration adjudication. "If mediation becomes drawn into the adversarial paradigm this independent 'sleeping giant' may be transformed into an overshadowed dwarf"<sup>61</sup>.

In mediation parties control the outcomes of the dispute. Resolution emanates from the parties'- not the court's or society's sense of fairness, propriety, principle, and right conduct. In adjudication, on the other hand, decision-maker hands down justice by applying societal rules and standards to the particular dispute. Though both of these paradigms of resolving disputes have compelling rationales, they differ sharply<sup>62</sup>. The above analysis of the rules amply demonstrates that many provisions therein have potential adversarial tendencies. One of the fundamental questions for the success of court -sponsored mediation in J and K is as to whether ex- judges or lawyers as mediators can ignore their traditional adjudicative role and proceed without the

litigant input or legal criteria to which they are accustomed? Answer to this question may arguably generate intense controversy and therefore suffice to suggest that they need to specialize in mediation, if they want to achieve success as repeat players who possess enough of expertise in adversarial system and it in turn necessitates extensive training to be imparted in the sphere of ADR systems to lawyers as well as judges and other stake holders by the Judiciary, the Legal Services Authorities as well as Bar Associations in the state. Such a course, once adopted successfully, would ultimately help in rebuilding the faith in the present justice system as it would lead to a court system with multiple doors - some leading to litigation while others to ADR processes.

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<sup>59</sup> Thomas J. St. Panowich, Punitive Damages and the Consumerization of Arbitration, 92 NW.U. L. Rev. 1-2 (1997) , arguing that as lawyers have become more integrated into arbitration proceedings and transactions have become more complicated, the process has become more complex, lengthy and rule-driven.

<sup>60</sup>See Richard C. Reuben, (1994). The Lawyer Turns Peacemaker, American Bar Association Journal, Aug.1986 at 54-55 (the author attributes the term 'process pluralism' to Professor Marc Galanter).

<sup>61</sup> Kimberlee K Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin's Grid, 3 Harv. Negot. L.Rev. 71-110 at 89 (1998).

<sup>62</sup> See Owen M. Fiss, Against Settlement, Yale L.J. 1073 (1984).