



COMMUNITY MEDIATION AND JUSTICE: A DISCONNECT?

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INTRODUCTION

Dispute resolution through community mediation exists as a quasi-judicial practice in many societies around the world including Sri Lanka. The primary function of community mediation is to resolve minor disputes with the use of third-party mediation techniques by a member of the local community as the mediator. These mediation sessions are based on the idea that minor disputes are better resolved within the local community rather than the formal courts of law so that the disputing parties can settle their issues in a non-adversarial and non-adjudicatory manner. Theoretically, community mediation is recognized as a form of Alternative Dispute Resolution (ADR), and based on the principles of popular justice that is often contrasted against the formal state law in both structure and function.

In Sri Lanka, the practice of community mediation has a long history. From the pre-colonial Village Councils (*Gamsabha*) to the institutions set up by the British administrators such as the Village Tribunals and Rural Courts, and the post-independence establishment of Conciliation Boards and the Mediation Boards that exist today, local-level dispute resolution in different forms has been in existence at various socio-political contexts. The Mediation Boards (MBs) that function currently, were established in 1988¹ and exist within the purview of the Mediation Boards Commission of the Ministry of Justice. The MBs can be found in all parts of the Island², facilitating mediation sessions with volunteer mediators from the local communities. The number of disputes that are brought before the MBs have been increasing over the years, with more than 200,000 disputes in 2016. The types of disputes that can be brought to MBs are defined by the Mediation Boards Act and distinguished between mandatory mediation and non-mandatory/ voluntary mediation. Under mandatory mediation the Act specifies the disputes that are required to be referred for mediation prior to proceeding to the courts of law. These referrals are of three types; civil matters relating to movable or immovable property, debt and damage up to the value of Rs. 500,000³, criminal offences such as assault, trespass, defamation etc, and court referrals where disputes are legally required to go for mediation before seeking court intervention. Though a settlement is not required, these disputes need to have a “non-settlement certificate” in order to proceed to the courts. The disputes that are categorized as non-mandatory/ voluntary mediation are those brought to Mediation Boards voluntarily by the disputants. For all disputes there is no legal obligation to appear before Mediation Boards thus enforcement has been a challenge with many absentees. The Act also defines the disputes that cannot be mediated such as divorce, those involving people of unsound mind, testamentary cases, and fundamental rights petitions⁴.

Advocates of MBs emphasize the effectiveness of mediation and the easy access to dispute resolution it offers as the reason for its success (Gunawardana 2011; The Asia Foundation 2012; Wijayatilake 2002). Yet statistically, the settlement rate of MBs was 41.7%⁵ in 2016 indicates that not all disputes are resolved through mediation. Moreover, critics of mediation argue that the efficiency claims are often misrepresented, and that institutionalized mediation is a myth that is sustained through political propaganda and special interests (Silby 2002). On the other hand, the process of negotiation that underpin mediation has also been criticized as a form of compromise, bargaining and haggling (Adler 1993) where power differentials also come into play within community settings (Nader 1993). In this context, questions arise as to how disputants themselves conceptualize mediation and in extension what

¹ Mediation Boards Act No. 72 of 1988

² There are over 300 MBs in operation with more than 8000 mediators

³ Increased from the original value of Rs. 25,000 through Mediation Boards Act (Amendment) Act No.9 of 2016

⁴ Schedule 3 of the Act

⁵ According to data from the Mediation Boards Commission, Ministry of Justice



their idea of justice is within the framework of an “alternative” mode of dispute resolution. This study therefore sought to explore how disputants perceive mediation and justice through a questionnaire survey conducted at a MB sitting. While the study was preliminary and primarily descriptive, it provided insights on which further research is planned for a more in-depth analysis of community mediation and dispute resolution.

METHODOLOGY

The study used the grounded theory methodology that allows thematic analysis and interpretation to emerge from the information gathered through a questionnaire survey. As the primary objective of this research is to explore the ideas of mediation and justice from the perspective of the disputants who are called to the MB, the research questions to be explored included the following; What is the local perception of the MB and their function? What does mediation represent? Does mediation relate to justice?

The study conducted a self-administered questionnaire survey among the disputants at a Mediation Board⁶ in a town classified as urban in the Western Province. The questionnaires were distributed during the MB sitting which takes place regularly on Saturdays at a school. While the initial plan was to administer 100 questionnaires over multiple MB sittings as the average number of disputes at this MB was 30 per sitting with at least 60 disputants, due to security concerns in the aftermath of the 2019 Easter attacks in Colombo, it was only possible to collect a total of 56 questionnaires during one sitting. The respondents were selected as a convenient sample, taking into consideration their willingness. The study and its purpose was announced by the Chairperson during his introductory speech and thereafter the questionnaires were distributed among those who consented.

The questionnaire included demographic information of the respondents, followed by both close-ended and open-ended questions on disputes in the area, experience with MB, and ideas about mediation and justice. The responses were coded, tabulated and analysed to examine emerging themes using a grounded theory approach.

RESULTS AND DISCUSSION

The MB is located in a predominantly Sinhala Buddhist geographic area, and this was reflected in the respondents as well. Of the 56 respondents who were present at the MB in relation to a dispute, 61% were males. The age distribution shows an equal number in the categories of 20-29 and 40-49 (23%) age groups, while there were 17% in the age group of 30-39, and 14% in 50-59. Most of the respondents were either working in the private sector (34%) or self-employed (32%) with a few from the public sector (16%). The educational level of the respondents indicates that 39% were O/L qualified, 30% were A/L qualified with 7% having a university degree. Moreover, 73% of respondents claimed to be married. The social status and the demographic profile of the respondents is an important factor to consider since there is a general perception in society that those who appear in MBs are of a particular social class, and this was claimed in a previous study conducted during the early years of the MBs in Sri Lanka, where it was observed that most disputants were “the poor and those who occupy low positions in society” (Hettiarachchy et al 1994, p.37). In contrast, the respondent of this study can be classified as middle class even though the most common type of disputes remains the same. This perhaps is an indication of the evolution of MBs in Sri Lanka, and therefore influence the perceptions of community mediation.

Although this is a preliminary study, the thematic analysis of information gathered from the questionnaires show three main areas of emerging ideas about community mediation and justice.

⁶ Research site was selected based on a previous study conducted at the same MB.

Mediation as a mechanism for dispute resolution

The majority of respondents in the study indicated that the dispute for which they have appeared before the MB relate to financial issues (46%) which resonates with the statistics of Mediation Boards Commission where nationally, the number of referrals is highest from banks and financial institutions. Even though these are categorized as “disputes” they actually relate to payment defaults, and the disputing parties include the officers from banks/ financial institutions/ businesses, and the individual defaulters. During mediation, parties negotiate for a new payment schedule which is a cost-effective mechanism for both parties as against expensive and often time-consuming court cases. Hence it is not a surprise that many respondents indicated (87%) that they feel MB is a useful mechanism for dispute resolution. Of these, “the ability to discuss”, “save money” and “resolve issues” appear to be the dominant themes for the reasons given for mediation’s usefulness.

Mediation as an alternative to courts

In addition, 78% of the respondents indicated that they feel the MB is an alternative to the courts. While 66% stated that mediators are better than lawyers, 70% of the respondents also indicated that mediators maintain fairness. This indicates a huge optimism and support towards mediation as an alternative to the formal legal system. As ADR was developed in response to the delays and over-crowding of the formal legal system, community mediation is necessarily located in the lay/professional dichotomy. Responses also show that disputants understand community mediation as an alternative mechanism for dispute resolution. This also indicates an acceptance of non-judicial processes as a viable option that stands in contrast to legal centralism. Interestingly, 32% of respondents stated that they would seek the help of the *Grama Niladhari* when faced with a dispute rather than a lawyer (14%).

Mediation and justice

Mediation as a form of ADR is based on the idea of popular justice which is characterized by the informality and contextual reasoning based on local values and norms that defines the just relationships that exist in particular communities (Merry 1993). To understand the local people’s perception of justice in society, the respondents were asked if they thought mediation would deliver justice. Of the respondents, 64% answered in the affirmative while a further 13% indicated that it does so “to an extent”. The lower number of respondents who see mediation as justice (64%) in comparison to the positive perception of MB (87%) could suggest that not everyone associates mediation with delivery of justice. Moreover, a thematic analysis of the respondents’ positive perception of mediation shows that they are primarily focused on the methodology of mediation that includes discussions and negotiation with both parties in trying to resolve disputes. In contrast, the word “fair” did not appear as much as words such as “discuss”, “both parties” and “solve”. It can be argued therefore that even though mediation is looked upon favourably as a form of dispute resolution, it does not translate into justice and fairness for some. In addition, the responses to the questions on the weaknesses and ways of improve the MB, mostly refer to the lack of physical facilities for the MB and highlight the need to improve the capacity of the mediators. The focus of the respondents seems to be on the mediators, their capacity and the facilities of the MB.

On the other hand, there is a mixed sense of negativity and positivity vis-à-vis justice and fairness in society. Of the respondents 16% indicated that there is justice and fairness and on the contrary 36% stated there is no justice and fairness, while 30% indicated that there is justice and fairness “somewhat”. Further elaborations to the same question revealed that the negativity revolves around “politics”, “money” and “disappointment with humanity”. Given this backdrop, and the primary function of the MB becoming more and more to settle financial disputes, it is imperative that people see mediation more from a utilitarian perspective than a way to obtain justice.



CONCLUSION

The thematic analysis of the survey conducted among disputants at a MB highlighted three emerging themes - mediation is seen as a useful mechanism of dispute resolution, an alternative to the formal courts yet perceived more from a utilitarian perspective than the delivery of justice. The positive aspects of mediation are considered from a pragmatic perspective which corresponds to its main function as resolving disputes related to financial transactions between individuals and institutions. In this context, the ideology of popular justice that underpin the ADR movement and community mediation seems to be misplaced in the way MBs are practiced in Sri Lanka.

Although this study does not provide an in-depth analysis of community mediation and MBs, it can be considered significant for two main reasons; firstly, as an alternative to the state legal system, MBs have proliferated throughout Sri Lanka with the objective of delivering justice and improving the quality of dispute resolution for local-level minor disputes. There are various reports on the efficacy of MBs, and their contribution to dispute resolution at the community level, yet there is a lacuna in the understanding of how people at the local level interpret and engage with the idea of mediated settlements as practised in their own sociocultural settings. This study contributes to the preliminary understanding of the local perception of mediation from a sociological perspective. Secondly, at the macro level, ADR mechanisms are being promoted in the context of legal reforms by the state. As this study provides an understanding of mediation, and in extension the ideas of justice at the local level, further research in this area will be of benefit to policy planners in formulating appropriate reforms to dispute resolution processes.

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