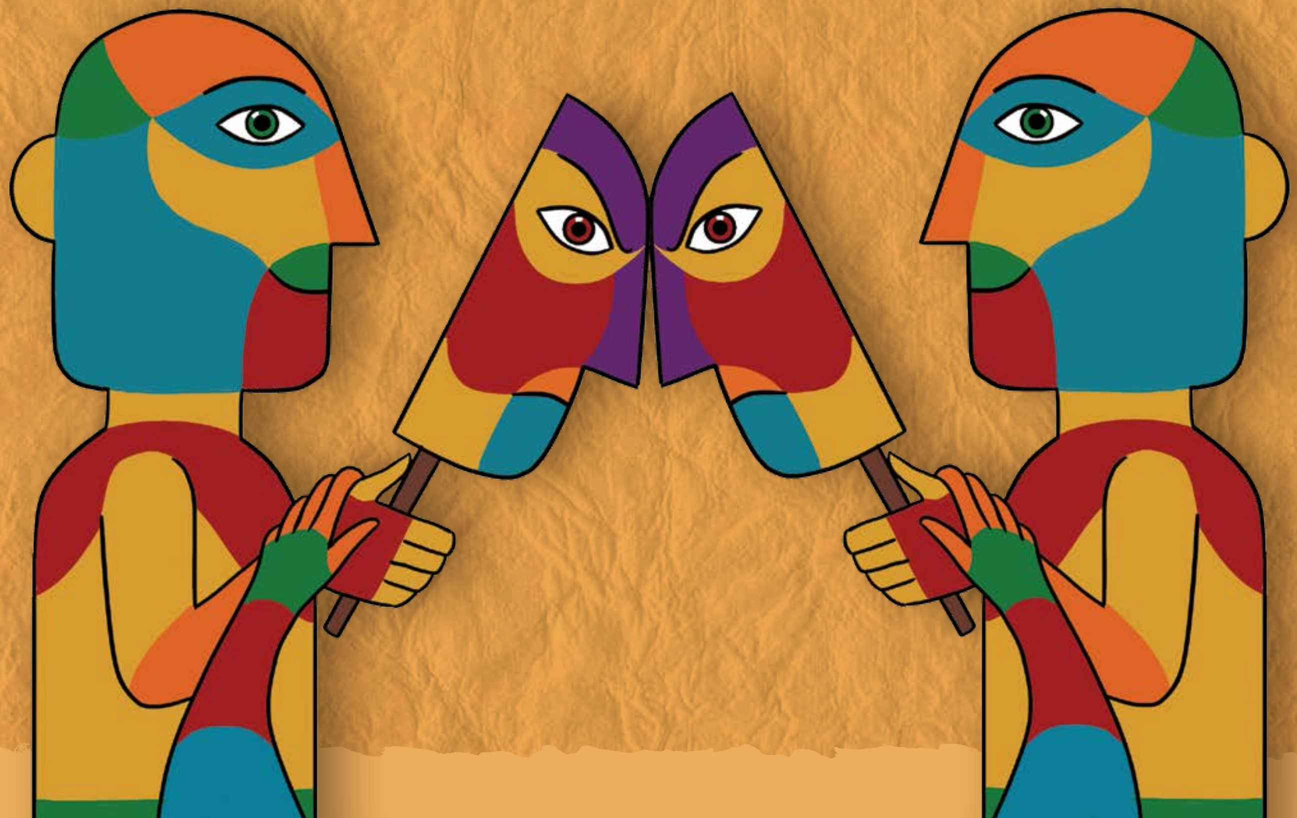
MEDIATION
AND ITS PROMISE



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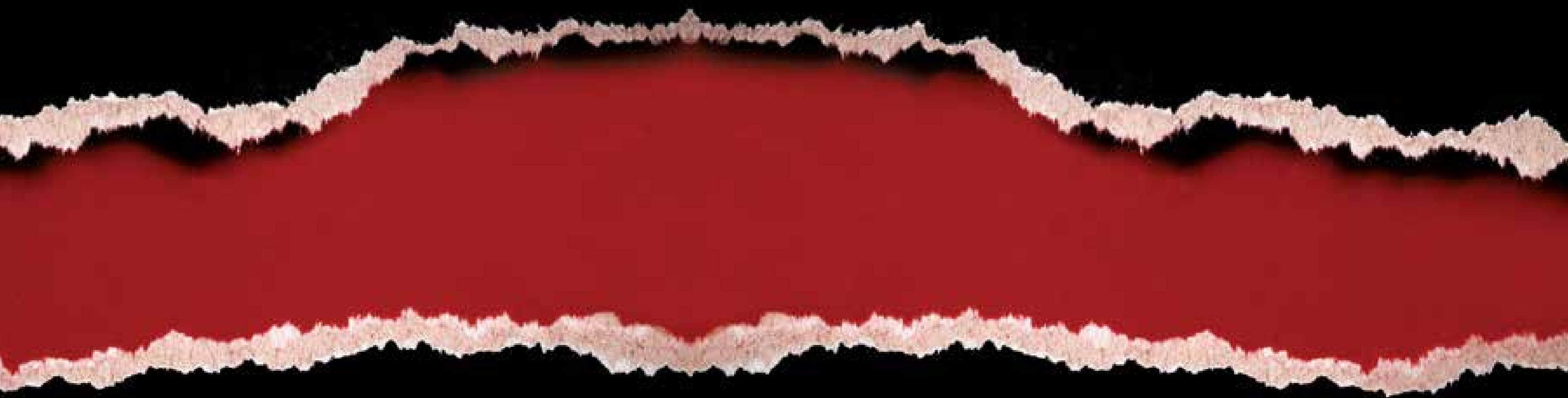

MEDIATION
AND ITS PROMISE

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From the Editors

This commemorative volume titled 'Mediation and its Promise,' brings together the wisdom, knowledge and experience of experts on the occasion of the National Mediation Conference being held on 14th and 15th of April 2023, organised by *Samadhan*, the Delhi High Court Mediation and Conciliation Centre under the aegis of the National Legal Services Authority (NALSA) and the Mediation and Conciliation Project Committee (MCPC) of the Supreme Court of India.

The format of this volume includes a theme article on its title written by Professor Joel Lee, Chairman of the Singapore International Mediation Institute (SIMI) and Professor at the Faculty of Law, National University of Singapore. It further includes other equally valuable articles on several aspects of mediation and its promise, written by distinguished experts who have invested greatly and engaged deeply in the journey of mediation in India and around the world. We believe this format has enhanced the value of the theme of this volume.

This National Conference is as much about 'mediation at the dawn of a golden age', the theme of the plenary session chosen by our distinguished guest Justice Sundaresh Menon, Chief Justice

of Singapore, as it is about the evolution of *Samadhan*, over the last sixteen years. *Samadhan* is honoured to have Dr. Justice D.Y.Chandrachud, Chief Justice of India, who has been a torch bearer for mediation in India, inaugurating the National Conference and flagging off our new hope and new dreams.

Aptly named *Samadhan*, meaning 'resolution', the Mediation Centre has grown from 2 rooms to 31 rooms spread over three floors with a state-of-the-art infrastructure. It presently has 258 active mediators on its panel with an average of 130 mediations being conducted every day as we write this. *Samadhan* was launched with a belief in the goodness of the human spirit and its commitment to peace. Today that belief has transformed into a unique success story of what the synergy between the Bench and the Bar can do to empower self-determination among disputants in finding collaborative justice. It has truly been a journey of love and peace!

Team *Samadhan* has put together our journey with great pride and it finds place in this volume, titled 'The Story of Samadhan.' This volume also contains important 'essentials of mediation' that are inserted in-between the articles as independent thoughts in the form of illustrations, unrelated to the articles, yet indispensable to mediation. The two complement each other.

As the mediation movement in India awaits a new law that will determine its future, *Samadhan* awaits the new promise that this will bring. We take this opportunity to express our deepest gratitude to all fellow travellers who have made our challenging journey possible and given it the strength to withstand the inevitable road blocks and diversions that have come our way.

Our special and sincere thanks and gratitude to all the distinguished authors of the articles published here, for sparing their time and sharing their perspectives on mediation and its promise.

Sadhana Ramachandran
Sudhanshu Batra

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Dr Justice D Y Chandrachud
Chief Justice of India

Message

Mediation is a voluntary and collaborative method of dispute resolution where a third party, the mediator, assists the disputing parties to arrive at a mutually satisfactory outcome. Mediation seeks to provide redressal and settlement of disputes in a manner which is free *from* the formalistic procedural practices of law. In India, widespread adoption of alternative dispute resolutions such as mediation is necessary to provide access to justice to the vast population.

The role of the mediator is to create a conducive environment for parties to resolve their disputes. This allows the parties to curate their own remedies that fit their socio-economic and cultural context through exchange of ideas and information. Mediation effectively provides a platform to the parties to bring their social norms in consonance with constitutional values and principles. Thus, the promise of mediation lies in its ability to effect social change by endeavoring to secure justice for individuals and groups.

This commemorative volume brings together the knowledge and experience of experts on the theme which is aptly titled: 'Mediation and its Promise'. The volume comprehensively encapsulates the journey of mediation in India and around the world. This volume will add to the discourse on the importance of mediation and help in bridging the gap between theory and practice. I would like to congratulate Team Samadhan for putting together this volume, which will serve as an important source material on mediation for years to come.

Dhananjaya Y Chandrachud

Dhananjaya Y Chandrachud

किरेन रीजीजू
KIREN RIJIJU

मंत्री
विधि एवं न्याय
भारत सरकार
MINISTER
LAW AND JUSTICE
GOVERNMENT OF INDIA

MESSAGE

I am pleased to learn that Samadhan: The Delhi High Court Mediation and Conciliation Centre is organizing a National Conference on the 14th and 15th of April 2023 in collaboration with NALSA and Mediation & Conciliation Project Committee of the Supreme Court. The conference aims to raise awareness about the benefits of mediation as a dispute resolution mechanism. It has been informed that a book titled 'Mediation And Its Promise' will also be published which will feature numerous articles written by national and international experts discussing the modalities of mediation.

The Samadhan Centre is playing a vital role in advancing the vision of Prime Minister Shri Narendra Modi Ji to promote Mediation as a key pillar of alternative dispute resolution. The Government on its part has also been making sincere efforts to promote recourse to Mediation by ushering in a standalone legislative framework, which is presently placed before the Parliament. The success of such mediation Centres would inspire parties to resolve their disputes through recourse to mediation and would help containing the docket explosion.

Ever since the integration of mediation into the legal system, the task of educating people about its benefits from resolving minor conflicts to addressing major contentious issues is an important concern. It is my earnest belief that this conference will prove to be a milestone in establishing mediation as a preferred mode of dispute resolution in the country.

I congratulate the entire team of Samadhan on this special endeavour and extend my best wishes for a very successful and fruitful conference.

(Kiren Rijiju)

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MEDIATION AND ITS PROMISE

Message

Mediation is a form of art. This alternative to litigation, with its interpersonal format, has tremendous potential to resolve disputes. Currently, we are experiencing a burgeoning case load due to disruptions in the legal redressal framework as well as due to the chaos and commotion caused by the COVID-19 pandemic, which has also led to more disputes. Mediation is one such efficient and effective way to address our existing case load and settle disputes as it brings harmony not only between the parties but also in the society at large.

It is delightful to see such illustrious and experienced legal practitioners coming together, resulting in this book. I would like to extend my heartiest congratulations to the team for its seminal effort which will not just spread awareness and knowledge about Mediation but also provide a credible resource of material and information. I am sanguine that this book would prove to be of significant help not just to Mediators, lawyers and Judges but also to teachers and upcoming young minds in this field.

Best Wishes.

Sanjay Kishan Kaul

Justice Satish Chandra Sharma
CHIEF JUSTICE

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MESSAGE

In our living memory, mediation has moved from those days when a Judge would call parties to the chamber and make them see sense in amicably resolving the dispute. Today, we have structured mediations where trained mediators help parties close their disputes. Mediation has not only gained recognition but also momentum as an effective method of dispute resolution.

The book, **MEDIATION AND ITS PROMISE**, is being released on the occasion of the National Mediation Conference being held on April 14 and 15, 2023 in the High Court of Delhi under the auspices of NALSA, MCPC of the Hon'ble Supreme Court and Samadhan.

The book is a compilation of knowledge, experience and wisdom of eminent academicians, Judges and mediators from different jurisdictions in the field of mediation. I congratulate the team at Samadhan for their efforts in putting together this volume. The book would be a useful tool for all the stakeholders in the field.

I convey my best wishes to all.

(Satish Chandra Sharma)

MANMOHAN
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29th March, 2023

Message

Conflict is a part of life and to find a resolution to the conflict is the most appropriate way forward.

Mediation fosters a problem-solving approach for anyone in conflict. It helps to get to the root of conflict and teaches to manage and resolve it. Mediation is now considered as the most appropriate method of resolving conflict and a tool to ensure a harmonious Society.

Mediation is a Science as well as an Art. A trained Mediator is nothing short of a Scientist or a Doctor who applies a tried and tested process and technique. Consequently, Mediation requires dissemination of knowledge and creation of a conducive ecosystem.

Today Samadhan (Delhi High Court Mediation and Conciliation Centre) is not only creating a pool of competent Mediators but is performing a yeoman service to the public by reducing acrimony in society. It is heartening to see the evolution and growth of the Samadhan, since its inception in 2006.

At the Dawn of the Golden Age, it is a privilege to host the National Conference on Mediation on 14th and 15th April, 2023 under the aegis of NALSA and the Mediation and Conciliation Project Committee.

Experts from all over the world have been kind enough to share their knowledge and experience through this volume. I am sure that invaluable insights penned by the experts will be of great asset not only for the trainers but also for the mediators, lawyers, students and all other stakeholders.

Happy reading

Manmohan, J

The Promise of Mediation

Prof. Joel Lee

Once Upon a Time...

There has been a lot of excitement in recent years about mediation. Certainly, part of this excitement can be attributed to the signing of the Singapore Convention on Mediation[1] in August 2019. With 55 signatories and 11 ratifications[2] at time of writing[3] and the anticipation of the United Kingdom signing the convention[4], this excitement is understandable.

Of course, the signing of the Singapore Convention on Mediation was not the origin story of mediation. It was simply an, albeit significant, tipping point. The mediation movement, which started with the Pound Conference[5] in 1976, had taken root in many jurisdictions around the world. In Singapore (where the writer is from), the modern mediation movement was planted in the mid-1990s with

1 United Nations Convention on International Settlement Agreements Resulting from Mediation.

2 See https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

3 26 March 2023.

4 See https://questions-statements.parliament.uk/written-statements/detail/2023-03-02/HCWS592.

5 Formally entitled the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.

mediation being introduced for court disputes, community disputes and domestic commercial disputes. It has since grown from strength to strength, with Singapore leading the way in promoting mediation.

It is not intended for this paper to look at the minutiae of mediation or how it is practiced or developed in various jurisdictions. The purpose of this paper is to take a bird's-eye view of what mediation promises moving forward, and what might get in the way of those promises being fulfilled. This paper is intended to be a thought piece and is by nature speculative[6]. There will be as many views as to the promise of mediation as the number of people asked.

Before moving on, it is important to acknowledge the seminal book titled "The Promise of Mediation: The Transformative Approach to Conflict"[7]. While this paper will not be looking at Transformative Mediation[8], it will however make reference to mediation's potential to transform disputes, parties and hopefully the world.

An elephant is a what?!!

As a trainer and practitioner of mediation, we often highlight the importance of checking the meaning of the words that people use, and the assumptions underlying them. Therefore, before going any further, it is important to ensure that we are on the same page in relation to what we mean by mediation.

It seems apropos that we should make reference to a story that is said to originate in India. There are many versions to this story but one telling of it is[9]:

A group of blind men heard that a strange animal, called an elephant, had been brought to the town, but none of them were aware of its shape and form. Out of curiosity, they said: "We must inspect and know it by touch, of which we are capable". So, they sought it out, and when they found it they groped about it.

The first person, whose hand landed on the trunk, said, "This being is like a thick snake".

For another one whose hand reached its ear, it seemed like a kind of fan.

As for another person, whose hand was upon its leg, said, the elephant is a pillar like a tree-trunk.

The blind man who placed his hand upon its side said the elephant, "is a wall".

Another who felt its tail, described it as a rope.

The last felt its tusk, stating the elephant is that which is hard, smooth and like a spear.

[They began to argue about the elephant and every one of them insisted that he was right.][10]

6 As such, it should not be taken to be accurately predictive. If the writer had that particular superpower, he would not still be in academia.

7 By Robert A. Baruch Bush and Joseph P. Folger (2004, Jossey-Bass).

8 Readers may be interested in Jonathan Rodrigues "Transformative Mediation – Is the "Promise" Still Relevant to the Practice?" [2022] Asian Journal on Mediation 22-36.

9 https://en.wikipedia.org/wiki/Blind_men_and_an_elephant.

10 Added by the writer.

Readers will of course be familiar with this story. It has been used to illustrate many different things including the limits of perception, the importance of context, and notions of relativity and multiple perspectives. For our purposes, it is sufficient to illustrate that when we refer to mediation, we may not speak with the same voice.

Some may refer to a process as mediation when it, in effect, is not. For example, many mistake some form of adjudication for mediation. In other situations, different terms may be applied to a process by which parties seek some form of self-determined outcome. For example, the terms "mediation" and "conciliation" are sometimes used interchangeably in some contexts, whereas in other contexts, they are used to mean different things.

It is therefore helpful to revisit what the touchstones of mediation are:

1. Neutrality: The third party mediator must remain impartial and neutral throughout the process, without taking sides or advocating for any particular outcome. Their job is simply to design or engage in a process that assists the parties to define the problem and to explore solutions to the problem.

To be clear, neutrality is not unique to mediation. In arbitration and litigation, the third party (arbitrator and judge respectively) is also expected to be impartial and neutral. They too engage in a process that does not take sides or advocates for any particular outcome. The difference is in how the third party assists the parties in resolving their dispute. In arbitration and litigation, the outcome is determined based on a rights-based paradigm and imposed by the arbitrator or judge on the parties. We will return to this point when discussing Agency.

2. Confidentiality: The mediation process is confidential, and all information shared during the process is kept private unless otherwise agreed by the parties. Confidentiality is important in mediation so as to encourage parties to be open about their concerns and needs, and in exploring solutions.

As with neutrality, confidentiality is not unique to mediation. The arbitration process (unlike litigation) is confidential as well. However, the purpose of the confidentiality in arbitration differs from mediation. For arbitration, confidentiality seeks to protect the parties' matter from prying eyes by keeping it private. It is not crucial to the process. For mediation however, in addition to keeping the matter private, confidentiality is critical to the process itself as it ensures that the right information is shared so as to facilitate resolution.

3. Voluntariness: It is often said that participation in the mediation process is voluntary. This is by and large true. However, it is important to acknowledge there are instances in which the entry point into mediation is not voluntary. For example, parties may be obligated to engage in mediation because they have agreed to it via a contractual mediation clause. Another increasing common example is the mandating of mediation in certain jurisdictions, or in certain contexts within that jurisdiction. In these situations, there are "greater good" considerations that justify mandating mediation.[11]

11 Examples of these are family and community disputes where the needs of the many may outweigh the needs of the one or the few in terms of voluntariness.

In these situations, it is important to note that mediation does not stop being mediation simply because the entry way is no longer voluntary. The parties' continued engagement in the process remains voluntary and can withdraw from the process at any time.

This notion of voluntariness is common to arbitration. One must voluntarily choose to engage in arbitration (unless compelled contractually). Unlike mediation, the difference is that once the choice is made, parties are compelled to follow through on the process as an outcome will be imposed on them.

Both mediation and arbitration can be contrasted with litigation, where voluntariness does not feature. If you are sued, you are compelled to engage. Lack of engagement will still see a judgment handed down which will bind the parties.

4. Agency: Also referred to as self-determination, means that parties are in firm control of the outcome. The mediator's role is to facilitate communication and negotiation between them and they have no power to impose a solution. To be clear, and it is often surprising how many make this mistake[12], this does not mean that the outcome of a mediation is not binding. While a mediation does not guarantee a settlement, when parties agree, the outcome *is* binding.

As a contract, subject to the requirements of contract law, it is certainly binding. In some jurisdictions, the settlement agreement can be registered as a consent judgment and enforceable accordingly. And of course, the Singapore Convention on Mediation allows for the recognition and enforcement of international mediated settlement agreements across borders.

Relative to arbitration or litigation, agency is a characteristic unique to mediation. In both arbitration and litigation parties do not have any control over the substance of the outcome. Once the machinery begins, the parties are really along for the ride, and not a very pleasant one at that.

5. Mindset: This is closely connected with the next point relating to the Dispute Resolution Paradigm. In terms of mindset, mediation ideally encourages collaboration and problem-solving. It emphasizes the importance of respectful communication and behaviour between the parties (and their counsel), and between them and the mediator. Interactions should be amicable and constructive in a positive way.

This is to be contrasted with the mindset that parties and counsel adopt in litigation and arbitration. This is generally adversarial rather than collaborative. The lines of communication are generally between them and the third party neutral, and in instances where they do directly address one another, it is antagonistic albeit still professionally respectful.

6. Dispute Resolution Paradigm: As mentioned, this is closely connected with mindset. Much ink[13] has been spilt on this question. Some believe that mediation should resolve disputes by adopting a forward looking interests-based paradigm i.e. looking at the needs and concerns behind parties'

12 Often expressed as the sentiment "Mediation is not binding".

13 And hopefully not blood.

positions and finding an integrative solution to meet those interests. Those that adopt this practice will unconsciously encourage collaboration and problem-solving.

Others believe that mediation should resolve disputes by adopting a backward looking rights-based paradigm i.e. looking at rights and obligations and finding a legalistic solution that best approximates those rights and obligations. Those that adopt this practice will unconsciously encourage adversarial, zero-sum behaviour.

Depending on which viewpoint one adopts, this also affects where they might stand in the facilitative/evaluative divide[14]. Stated simply, the former group believe that mediators should adopt a facilitative role whereas the latter group consider it appropriate for mediators to provide an evaluation of the matter. Of course, it is a continuum between these two extremes and many mediators will fall somewhere in the middle.

To be clear, even where a rights-based paradigm and an evaluative mediator role is adopted, agency is not affected. An evaluative mediator does not have the power to impose an outcome on the parties. While such an evaluation may be quite influential, the parties still hold the power to decide on the outcome.

By way of contrast, litigation and arbitration adopt a strict rights-based paradigm that generally searches for a legalistic solution to the problem.

The Promise of Mediation

Now that we have examined the touchstones of mediation, let's consider the promise of mediation. This question can be considered at a number of different levels.

At its most fundamental level, mediation promises a cost-effective and time-efficient way to resolve a dispute. And this is a promise that has been fulfilled in the past, and will hopefully continue to be fulfilled.

Detractors will of course point out that, unlike litigation or arbitration, mediation does not achieve a settlement at every instance. They will also say that since parties have tried to resolve their dispute privately and have failed to do so, and are now acting in an adversarial fashion, there is no point referring to the matter to mediation because it is bound to fail.

At first blush, this view seems persuasive and explains why not everyone considers the possibility of mediation. The analysis however often stops there and is sadly shallow. To be fair, it is correct to say that mediation does not always achieve settlement. Considering that parties have the power of self-determination and that not all conflict matrices have a zone of possible agreement, it would be worrying if mediation did always achieve settlement!

It is not a magic pill.

What the detractors leave out is that, anecdotally, the settlement rate internationally is around 70%. Put another way, 7 out of 10 cases that go to

14 This writer's view is that the facilitative/evaluative divide is a false dichotomy. See Javier Yeo *The Facilitative-Evaluative Divide: Have We Lost Sight of What Is Important?* Contemporary Issues in Mediation Volume 1, 35 (2016, World Scientific).

mediation conclude with a settlement agreement. These are pretty good odds.

To illustrate, consider this hypothetical. Let's say you had an illness, and your doctor gives you two options treat it. First, you could take a particular medicine. This medicine is taken orally, is relatively cheap and you will know if it works within a short period of time. There are side effects for some patients, but this can be managed by the patient choosing when to eat the medication and with foods that ameliorate those side effects. The medicine is efficacious in 70% of the cases, giving the patient varying degrees of relief. In 30% of the cases, there is no effect whatsoever, in which case the patient can try the second option.

The second option is for the patient to undergo a series of invasive treatments over a period of two years. These treatments are expensive and have to be administered by a doctor. Each bout of treatment will take three hours where the patient will be bed bound. Side effects are common place and can be severe, arguably often worse than the presenting problem. The treatment is efficacious in 50% of the cases, giving the patient varying degrees of relief. In the remainder of 50% of the cases, there is no effect whatsoever.

Which option would you select as a treatment? Rationally, most would first select option one. Not only are the odds in your favour, it is also logical to adopt the treatment that is likely to present the least problems. And if it does not work, one can still escalate and move to the second option.

Of course, the parallel between this hypothetical on one hand, and mediation and litigation/arbitration on the other should be immediately obvious. If it makes sense in the medical context to take the first option, then it should make sense in the legal context to take the equivalent of the first option, mediation. For anyone to suggest that one should not attempt mediation because it only results in settlement 70% of the time is being disingenuous.

Equally disingenuous is the argument that there is no point going to mediation because parties (and presumably their counsel) have not succeeded in settling and are adversarial. This stated condition must certainly be true in 10 out of 10 cases that go to mediation. Yet, out of those 10 cases, 7 settle. Put another way, just because attempts to settle have failed in the past and that parties are fighting does not necessarily mean that mediation will not lead to a settlement.

Mediation as a process is designed to allow parties to define their problem and to explore solutions that meet their needs. It gives parties the opportunity to speak, to emote and to talk about the important matters that form, not necessarily the legality, but the reality of their situation. It helps the parties keep their focus on the big picture of their outcome and future, and prevents them from being lost in the trees of past hurts and pettiness.

The mediator is a catalyst, contributing to and accelerating the chemical reaction of the parties' problem-solving, without it itself being changed or consumed. The mediator provides perspectives that parties and their counsel may not have been able to see, simply because they were habituated into thinking about the situation in a particular way.

In the hands of a skilful mediator guiding the mediation process, the parties will often move from a position of thinking that settlement is not possible, to being open to the possibility of settlement, to realising that solutions to their problem do exist, and that it might make more sense practically to settle.

At this point, it is useful to point out that settlement has many layers. On the "Continuum of Settlement"[15], settlement can be:

1. Resolving the Dispute
2. Solving a Problem
3. Creating Value
4. Restoring Relationships
5. Enhancing Relationships

At its most basic level, resolving the dispute is what arbitration, litigation and sometimes mediation do. The parties have a dispute and the process brings a resolution to that dispute. In many cases however, resolving the dispute does not actually solve the problem facing the parties. How often does a party find itself with a paper judgment with no real joy to be found against a bankrupt party?

Solving the problem then is the next layer. This is where the interests-based framework comes in. A solution can be designed that meets the interests of the parties. Defective tiles can be returned for a credit note. Damaged reputations can be repaired with a well-placed apology.

15 No reference exists for this because this term was created especially for this paper. It is a work in progress and will transform over time. It should also be noted that each layer is not separate and may overlap with the layers immediately preceding or succeeding.

Solving the problem will often overlap with value being created. Sometimes, moved by the spirit of Vilfredo Pareto[16], the mediator can assist the parties in making the pie bigger resulting in more value for them.

Most commercial mediations stop at this point. It is already more than satisfactory for value to be created. Restoring and Enhancing Relationships represent the aspirational potential of mediation. These is the realm of the narrative and transformative mediation models where mediation wants to do more than fixing something. It is seeking to achieve generative change by affecting how parties communicate and relate with one another.

It should be obvious by now that the promise of mediation as it relates to any particular dispute is nuanced. How far that promise goes will depend on the conflict matrix, the inclination of the parties, the helpfulness of the counsel (or not), and the skill of the mediator.

What happens to the 3 out of 10 cases which are not settled? Is the promise of mediation unfulfilled? Not necessarily. Many mediators have completed a mediation without settlement only to be informed by counsel at a later point that the matter was subsequently settled, and in large part because of the exploration of issues and solutions during mediation. Even if settlement did not subsequently

16 Vilfredo Pareto was an Italian polymath who is credited with introducing the concept of Pareto Optimality. Pareto Optimality is a situation where no action or allocation is available that makes one individual better off without making another worse off. See https://en.wikipedia.org/wiki/Vilfredo_Pareto and https://en.wikipedia.org/wiki/Pareto_efficiency.

occur, counsel have reported that the mediation process had helped clarify the issues such that it sharpened their focus when the matter went for litigation, thereby saving the courts and parties time and cost.

This leads us to a related but different promise that mediation makes. Mediation promotes access to justice in a number of ways.

First, many jurisdictions have a significant waiting time before a matter can be heard in court. In some jurisdictions, this can be measured in decades. The reality is that there are more cases in the docket than the court has the resources to cope with. With mediation's settlement rate, and even when the matter does not get settled, mediation can help free the courts up to hear the matters that mediation cannot help.

As a proposition, this is undeniable. In order for this to happen, there must be processes in place that shift appropriate cases to mediation. If a case does not get to mediation, mediation does not get a chance to work. How this happens will of course vary from jurisdiction to jurisdiction and can happen at different levels.

At the institutional level, processes can be changed to encourage mediation or even mandate it. For example, in Singapore, there have been various developments over the years that have nudged parties and their counsel towards mediation[17]. The latest iteration of the Singapore Rules of Court 2021 imposes a duty on parties to consider amicable resolution of the dispute before commencing action, and during the course of the action or appeal[18]. The court is also empowered to order parties to attempt resolving their dispute via amicable resolution[19]. Family disputes with any child under 21 have to undergo mediation first and there are movements to make it mandatory for certain community disputes to undergo mediation[20].

At the level of education, steps can be taken to educate both lawyers and law students about mediation and mediation advocacy. Too many know too little about mediation; some nothing at all. Yet, these Dunning-Krugers[21] are not aware of their paucity of information and either direct matters away from mediation or bring the wrong mindset to the mediation table. Education, as a long term intervention, will help shift the traditional adversarial mindset of legal training to one where one can view mediation as another tool, alongside negotiation, litigation or arbitration, by which a lawyer can assist a client in addressing their problem.

Second, there are many people that have disputes that eventually do not seek legal redress. This can be for a number of reasons. They may decide that the matter is not important enough to seek legal redress. They may not know how to seek

17 These are, inter alia, the ADR Form and the Presumption of ADR. See J Lee "Court-Based Initiatives for Mediation in Singapore" [2011] Asian Journal on Mediation, 60.

18 Singapore Rules of Court 2021, Order 5 Rule 1(1).

19 Singapore Rules of Court 2021, Order 5 Rule 3(1).

20 See https://www.channelnewsasia.com/singapore/ministry-law-neighbour-dispute-mandatory-mediation-penalties-no-shows-edwin-tong-3310676.

21 Referring to the Dunning-Kruger effect where people with low ability, expertise, or experience regarding a certain type of task or area of knowledge tend to overestimate their ability or knowledge. See https://en.wikipedia.org/wiki/Dunning–Kruger_effect.

legal redress. Or they may not have the ability or resources to do so. Even if they do speak to a lawyer, the anticipated ordeal of having to go through the court system and the time it would take is daunting. Some might live in remote areas of large jurisdictions where there is simply no easy access to justice.

While it is not suggested that mediation is the panacea for all these problems, mediation is certainly less cumbersome than arbitration and litigation. In its most basic form and for certain disputes, there may be no real need for the involvement of counsel. As such, mediation can assist parties with their dispute in a way that is more accessible to the lay person and provide them both participation and justice.

Third, mediation provides access to different types of justice. In days of yore, justice was something that was dispensed by a judge. You had to go through the court system to access this form of adversarial justice, and generations of lawyers had been subjected to this sort of thinking. When the Woolf Reforms in England and Wales introduced mediation into its civil justice system, legal practitioners were, to put it mildly, unhappy. Mediation was criticised for denying (adversarial) justice to parties or at the very least for providing a lower class of justice to parties.

Fortunately, in these more enlightened times, we no longer accept that justice is the one size-fits-all behemoth. We now accept that justice can appear in different ways and that mediation is associated with procedural and restorative justice.

Lord Justice Ward considers mediation "as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice."[22] Chief Justice Menon considers that mediation has proven its "great value in helping to address access to justice considerations."[23] In Singapore, the Family Justice system is looking to Therapeutic Justice as a lens for guiding its practices, process and reform[24]. While not exactly the same thing as restorative justice, they share similar goals of addressing the root causes of problems and therapeutic justice can very comfortably fit within the umbrella of restorative justice.

Looking now to the next promise of mediation, mediation can promote international trade by helping resolving cross-border disputes. It is trite that international trade is the lifeblood of the global economy. It facilitates the exchange of goods, services, and ideas across borders, drives economic growth, creates jobs, and supports the development of industries and businesses around the world.

Of course, with international trade comes the inevitable conflicts and disputes. Resolving these disputes via litigation or arbitration is a long and costly affair; having to engage experts and witnesses across jurisdictions, preparing for the trial or hearing, flying parties and witnesses to the jurisdiction in which the trial is being held, and

22 Burchell v Bullard [2005] EWCA Civ 358.

23 He also identifies 5 ways in which mediation does so; affordability, efficiency, accessibility, flexibility and effectiveness. S Menon "Mediation and the Rule of Law" [2017] Asian Journal on Mediation 1, 6-8.

24 See "Therapeutic justice in the Family Justice Courts", https://www.judiciary.gov.sg/who-we-are/therapeutic-justice.

enforcing the judgment or award internationally. And while large multi-nationals may have large enough war-chests to fund their litigation or arbitration, many smaller companies run out of funds and are unable to vindicate their rights.

Mediation, of course, offers a viable solution to this problem. But if one were to be honest, the take-up for mediation in the past for cross-border disputes had been less than enthusiastic. Part of the reason is because many were labouring under the assumption that "mediation was not binding". Others were concerned that, unlike arbitration, there did not exist an internationally accepted way to enforce mediation settlement across borders[25].

Of course, all this changed in August 2019 with the signing of the Singapore Convention on Mediation. This Convention introduced a framework for the cross-border recognition and enforcement of international mediation settlement agreements and signalled that mediation was no longer the poorer cousin to arbitration. Instead, it stood next to arbitration as an internationally acknowledged method of resolving international disputes. While it may take a little time for the Singapore Convention on Mediation to reach a tipping point in terms of international buy-in, it is undeniable that the game has changed.

The use of mediation also received a boost during the COVID pandemic. This colossal disruption to life meant that there were disruptions to supply chain arrangements, trade and business. Commercial disputes were inevitable and travel and other restrictions made it difficult for businesses to resort to traditional methods of dispute resolution. In any event, litigation and arbitration would have taken too long during a time where swift and decisive resolution was needed.

It was therefore not surprising that many companies turned to mediation to resolve their cross-border disputes. The promise of cost effectiveness, efficiency, agency and practicality appealed to the pragmatic business-minded who were concerned about staying viable in that constantly shifting landscape.

This shift to mediation was also aided by technology. While Online Dispute Resolution (ODR) and the use of technology had been around for some time, the take-up rate was underwhelming because most mediators felt that mediation needed to be face-to-face and required a "personal touch". The pandemic made face-to-face sessions difficult but mediation quickly pivoted to conducting mediations online. And while it must be acknowledged that arbitration and litigation also leveraged on technology during the pandemic, the flexibility of the mediation process gave it a nimbleness that allowed a faster and easier transition.

Mediators found it easier to set up sessions with parties, and parties found it easier to appoint international mediators without the attendant cost of international travel. Of course, this is not to say that there a no down sides. Interacting with parties via an online platform clearly has limitations. For example, one is unable to observe and respond to certain non-verbal cues. Further, there needs to be

25 In arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as "The New York Convention") provides a framework for the cross-border recognition and enforcement of arbitral awards.

some reimagining of the process, pre-, during and post-, to account for the needs of confidentiality. However, in the circumstances, it has more than stepped up.

To the surprise of many, the response to the combination of technology and mediation has been so well-received that, anecdotally, mediators have indicated a willingness to continue conducting mediations online, even as the pandemic fades into the mists of time.

So far, the promises of mediation that have been discussed all relate to what has happened or is happening in the world. For this last promise, I would like to indulge in something more aspirational. We presently live in a troubled world. From armed conflict to sky-rocketing inflation to organised disinformation, the future does not look good. There seem to be more people wanting to foment conflict than there are those wanting to or capable of resolving it.

This writer believes that much of this can be attributed to many having a scarcity mindset. This is the worldview that resources and opportunities are limited, and that there will never be enough to go around. Those with a scarcity mindset tend to compare themselves with others and focus on what they do not have. As such, they may feel anxious, fearful, or stressed about their ability to meet their basic needs or achieve their goals. This in turn results in win-lose thinking, and consequently unhelpful and negative competitive behaviours.

Contrast the scarcity mindset with its opposite number, the abundance mindset. This is the worldview that that there are plenty of resources and opportunities available, and that more can always be created. Those with an abundance mindset tend to focus on what they have, and they feel grateful and optimistic about the future. This can then promote win-win thinking and collaborative/cooperative behaviours which in turn lead to outcomes which benefit everyone involved.

It should be obvious that mediation, especially those practices that promote problem solving, value-creation and transformation, tap into the abundance mindset. By promoting problem-solving behaviours in search of mutually beneficial solutions, mediation can shift the focus away from zero-sum thinking towards collaboration. This shift can lead to more constructive dialogue and a greater willingness to work together towards common goals.

This general shift in culture can lead to more respectful and constructive conversations about the meaningful longer term problems and issues that may not have an immediate solution but require ongoing dialogue. These problems and issues may include the environment, sustainable use and development, religious or racial issues, and peace-making.

Put simply and aspirationally, mediation can contribute to building a more peaceful world. While the writer acknowledges that this view may be considered a pipedream and naïve by some, one can take inspiration from the idiom "Shoot for the moon. Even if you miss, you'll land among the stars."[26]

26 While it is difficult to be certain in the age of the internet, this can be attributed to Norman Vincent Peale.

The Space between Promise and Fulfilment

In every good story, there is a space between promise and fulfilment. It is in that space where the journey to fulfilment is made, or where those promises may end up laying barren on the vine. Mediation is therefore at a bifurcation point. In order to ensure that the promise of mediation is fulfilled, this section explores two trends in mediation, the threats that those trends present, and some possible solutions.

First, because of the excitement and enthusiasm around mediation, many people are jumping on the mediation bandwagon. There is of course nothing wrong with this. Interested persons should get themselves the proper training and credentials as a mediator or a mediation advocate, so that they can be part of effort in fulfilling the promise of mediation. And this is happening.

Unfortunately, there are also many who are ill-equipped or ill-prepared to engage in mediation. Many lawyers, simply on the basis that they have dispute resolution experience i.e. arbitration and litigation, feel that they are qualified to mediate or represent their clients in mediation. It should be obvious that the mindset and skillsets needed in mediation are quite different from those in a more adversarial form of dispute resolution. An adversarially minded lawyer might give the client unrealistic expectations of possible mediation outcomes, incorrect information about the mediation process and the roles they should play, and set the incorrect frames in the client's mind about mediation. This can hurt and derail a mediation process, even if it were conducted by the most skilled mediator.

This has also led to a disturbing expectation by some parties and counsel of some form of evaluation by the mediator. As indicated earlier, while there is nothing fundamentally wrong with a mediator making an evaluation as long as the agency of the parties is maintained, it does undermine mediation's potential somewhat. Further, from a process perspective, it seems odd for a mediator to make some kind of (presumably) legal evaluation without adequate documentation and argumentation. Put another way, taking into account the mediation process, is a mediator actually in any kind of adequate position to make any kind of evaluation?

Be that as it may, many mediators have shown an increasing willingness to make an evaluation. Part of it may be that these mediators may be adversarial dispute resolution lawyers who do not have proper training in mediation. They are simply doing what they think is mediation. Others may have had training but simply be unconsciously defaulting to what feels most comfortable and is most habitual to them. Yet others believe that since the "customer" wants it, and that they are always "right", we should give the customer what they want.

On this last point, this writer has great difficulty with the concept that we should always give the customer what they want. Sometimes, what the customer thinks they want is not what they actually need. It would be strange for us to go to a medical specialist for an operation and to tell the surgeon how exactly to carry out the operation. It would be even stranger for the surgeon to carry out the operation in *that* way because "we should give the customer what they want"! The reason why we go to

professionals is for their expertise. Expertise that we do not have. Let the professionals do their job.

If left unchecked, this will see mediation being created (intentionally or otherwise) in litigation or arbitration's image. At the risk of tipping over into the realm of purple prose, not many realise that we are presently in a battle for the soul of mediation and that we must resist the call of the dark side[27].

The second trend relates to the frontier mentality in the industry. As more jump onto the mediation bandwagon, there is a proliferation of mediation related bodies and organisations. These range from mediation service to training provision. This is not a bad thing in and of itself. it is a natural progression from the growth in the industry.

There are however downsides to this. As the number of mediation related bodies and organisations grow, this seems to be accompanied by a certain amount of unhealthy wall building. They seem to be creating silos, doing their own thing, often pulling in opposite directions. Turf wars are happening, ironically in an industry where we should be in the business of collaboration and cooperation. To be clear, I am not suggesting that we should promote homogeneity. We can be stronger for our differences. But that strength can only come if we focus on building bridges and working together.

Further, with this growth, there seems to be little assurance of consistency in mediation practice or quality of trainings. Service and training providers all claim to have high standards and hold empanelment with them as a badge of quality. This is problematic. Put simply, providers who train mediators, empanel them and then cite their empanelment as an objective sign of their quality create a classical bootstrap problem. In addition, there are private individuals, whether with or sans qualifications, who operate as mediators. What this means is that the quality of training and practice is variable, without any consensus as to what is good practice.

When users of mediation are subject to variable quality and do not have an objective reference point, this can hurt the credibility of mediation. In the long run, this can turn users away from mediation. Further, as the Singapore Convention on Mediation gains traction and recognition and enforcement of settlement agreements are being sought internationally, the standards applicable to mediation will be thrown into stark relief. A state may refuse to recognise or enforce a settlement agreement If there was a serious breach by the mediator of applicable mediator standards[28]. This must then beg the question of what are these applicable mediator standards.

There is therefore a strong case to be made for some kind of benchmark to represent quality and for the professionalization of mediation. This can be done via independent bodies who establish and regulate standards, and run credentialing schemes. More importantly, these must not provide mediation services, nor should they run accreditation trainings which lead to their own accreditation. It is their being a part of, and apart from the industry that gives them credibility as standard bearers.

27 With thanks to George Lucas for the Star Wars reference, and apologies to litigation and arbitration lawyers for casting them as Sith Lords. It was for dramatic effect.

28 Article 5(1)(e).

In the present global landscape, there are at least two such organisations; the International Mediation Institute (IMI) and the Singapore International Mediation Institute (SIMI). The problem is that these are private organisations and require buy-in from the international community. In the current climate and mentality of turf protection, this buy-in is less likely than not.

Happily Ever After?

It is not intended for this paper to end on a pessimistic note. Mediation's promises are great but it would be foolish to think that fulfilment of these promises will happen automatically. We who believe in the promises of mediation must also acknowledge its threats, both intentional and accidental, and work in unison to ensure that those promises are fulfilled.

It seems appropriate to end with this quote:

"Peace is not the absence of conflict. We must wage Peace as much as others would wage War."[29]

Fulfilling mediation's promise depends on all of us.

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29 This is an amalgamation of a quote by former US President Ronald Reagan and the 14th Dalai Lama.

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MEDIATION ESSENTIALS

UNDERSTANDING CONFLICT

Understanding the nature of conflict and managing it to achieve solutions effectively and efficiently

Justice Arjan K. Sikri

Introduction
Conflicts and the Need for their Resolution

In the case of all things which have several parts, the whole is beside the parts.
– Aristotle

These words of the great philosopher and polymath of ancient Greece portrays a very interesting paradox of human behavior: *Conflict and its Resolution*. The urge of getting close to the worldly *whole* has been a principal attribute of human psyche. It is this urge which leads to conflict or what we refer to as irreconcilable differences as everyone wants it – wholly forgetting that things don't exist in whole and the whole itself is made up of several parts. As a part of this whole in society, conflict exists in every sphere of human life.

Conflicts take place between individuals and organizations or groups, between distinct organizations and groups, between one organization and one or more of its components or between component parts of a single organization or group. A conflict emerges whenever two or more persons seek to possess the same object, occupy the same space or same exclusive position,

play incompatible roles or undertake mutually incompatible means for achieving their purposes.

On a realistic note, we cannot say that society will be fully free from conflicts as it is a *by-product* of communication between people. However, we can aim at their early resolution. The sooner a dispute is resolved the better it is for the parties concerned in particular and society in general. As for parties, any dispute not only strains their relationship but also destroys it and so far as society is concerned, it affects its peace. Therefore, the way out is the resolution of disputes at the earliest possible opportunity, via such a mechanism where the relationship between individuals goes on in a cordial manner.

Another important factor which necessitates early resolution of disputes is the growth of the nation. A society with excessive conflicts cannot achieve its goal as conflicts adversely affect the productive psyche of the people. The gross productive outcome of the men and women working in various turfs is significantly reduced not only because of the reason that they are wasting time in fighting but also because they are doing their respective work under a lot of pressures and insecurities. Growth of the country has two facets, the *first* is the economic and the *second* is the social facet. While discussing the social aspect, though we talk of orderly and peaceful society, what is often missed is the happiness quotient of the people.

The *Gross National Happiness* (GNH) index is more important in any society than any other thing. The term was coined by Bhutan's fourth Monarch, King Jigme Singye Wangchuck, in 1972, when he said, "Gross National Happiness is more significant than Gross Domestic Product.[1]" The concept suggests that sustainable development should adopt a comprehensive approach to conceptions of progress and give equal weight to non-economic components of human welfare. In addition to typical socio-economic concerns such as living conditions, health and education, the GNH Index also measures cultural and psychological well-being. Rather than a subjective psychological assessment of being *happy*, it is a comprehensive representation of the general well-being of the community.[2] One of the important requisites to achieve gross national happiness is the presence of effective method(s) of dispute resolution as the occurrence of conflict, which is its biggest hindrance, is inevitable.

Whenever we talk about resolution of disputes, the words *access to justice*, immediately stirs up in our mind. Normally it involves the notion of lawyers arguing the case of the parties for adjudication before a Court of Law. This is what we call the adversarial method of justice delivery. But this is not the only medium of *access to justice*. Achieving optimal and just results of a dispute is *access to justice* in the real sense. It is here that mediation plays a pivotal role.

So, my hypothesis is that for achieving a *near* ideal or utopian society (as it is impossible to have a

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1 Oxford Poverty and Human Development Initiative (OPHI), *Bhutan's Gross National Happiness Index*. Available at: https://ophi.org.uk/policy/gross-national-happiness-index/.

2 Asian Development Bank (ADB), Gross National Happiness in Bhutan: 12 Things to Know. Available at: https://www.adb.org/news/features/gross-national-happiness-bhutan-12-things-know.

perfect utopian world), one important requirement is to have early and effective system of dispute resolution, which, at the same time, also ensures just and proper resolution in order to achieve *access to justice*. This leads to attainment of peace and happiness of individuals and society as well as economic progress of the Nation. It is mediation which gives such a *Promise* to accomplish the aforesaid objective. Working on this hypothesis, the attempt of the author here is to eulogise the power and qualities of mediation as a tool of dispute resolution and thus, it is not an empty *Promise* of mediation as mediation is a potent tool, capable of bringing about miraculous results and fulfil its *Promise.*

The present essay is divided into four parts to facilitate the above analysis. ***Part I*** starts by taking *access to justice* to a higher platform, conceptually and then deliberating upon how the mediation process leads to *access to justice* in a more subtle manner. ***Part II*** discusses the various qualities of the mediation process. Thereafter in ***Part III*** the correlation between mediation and spirituality is discussed. We then deliberate upon the synergy of mediation and its interconnect with spirituality. In ***Part IV*** I shall elucidate upon the achievements of mediation through real life stories.

This analysis demonstrates that the solemn promise of mediation is:

a) Early and peaceful resolution of disputes in achieving *access to justice.*

b) Bringing about just and fair outcomes.

c) To provide the best form of dispute resolution, where parties in conflict find their own solution acceptable to them.

d) Achieving a *win-win* position, which is not possible in any other system of dispute resolution.

e) Peace in society including GNH.

f) Economic progress.

g) Rehabilitating broken relationship and fostering new alliances.

h) Qualities of mediation which are spiritual in nature make the stakeholders better human beings.

i) In the process, judges become better judges and lawyers become better lawyers.

Part I
Mediation: Expansion of Access to Justice

Many times, having regard to the limitation of the adversarial system of adjudication that prevails in the courts, even with best intentions and best efforts, just results are not necessarily achieved. Apart from the shortcomings of the adversarial system of justice, in adjudication of disputes, the courts are concerned with the past events whereby one party was wronged by the other. As a result, those events are resurrected in the Court and the judge is required to find out as to who was the wrong doer and to what extent. Based on such findings, relief is given to the person who suffered at the hands of the wrong doer. Even when the person who is wronged is compensated, it may not necessarily lead to a perfect resolution of the conflict. The adversarial system does not look into the future nor does it attempt at rehabilitating the torn relationship, which was the result of a dispute between the parties. It is not concerned with mending the broken relations between the two parties litigating before it. On the other hand, all this is achieved through mediation which brings about a *'win-win'* situation.

The concept of justice in mediation is advanced in the oeuvres of Professors *Stulberg, Love, Hyman,* and *Menkel-Meadow* (Self-Determination Theorists). Their definition of justice is drawn primarily from the exercise of party self-determination. They are hopeful about the magic that can occur when people open up honestly and empathetically about their needs and fears in uninhibited private discussions. As thinkers, these jurists are optimistic that the magnanimity of the human spirit can conquer structural imbalances and resource constraints.

Professor *Stulberg*, in his masterful comment on the drafting of the uniform Model Mediation Act, *Fairness and Mediation*[3], begins with the understated predicate that *"the meaning of fairness is not exhausted by the concept of legal justice."* In truth, the more pointed argument advanced in the article is that legal norms often diverge quite dramatically from our notion of fairness and the notion of their rigidity and inflexibility. Professors *Lela, Love* and *Jonathan M. Hyman* argue that mediation is successful because it provides a model for future collaborations. The author states that the process of mediation entails the lesson that when people are put together in the same room and made to understand each other's goal, they will together reach a fair resolution. They cite Abraham Lincoln's inaugural address which proposed that in a democracy, "a patient confidence in the ultimate justice of the people to do justice among themselves...is a pillar of our social order."[4] Professor *Carrie Menkel-Meadow*[5] presents a related point of view in making out a case that settlement has a political and ethical economy of its own and writes:

> *"Justice, it is often claimed, emerges only when lawyers and their clients argue over its meaning, and, in turn, some authoritative figure or body pronounces on its meaning, such as in the canonical cases of the late-twentieth century... For many years now, I have suggested that*

3 Fairness and Mediation (1998) 13 Ohio State Journal on Dispute Resolution 909 (Issue 3).

4 If Portia Were a Mediator: An Inquiry Into Justice in Mediation (2002) 9 Clinical Law Review 157.

5 Practicing in the Interests of Justice (2002) 70 Fordham Law Review 1761.

> *there are other components to the achievement of justice. Most notably, I refer to the process by which we seek justice (party participation and empowerment, consensus rather than compromise or command) and the particular types of outcomes that might help to achieve it (not binary win-lose solutions, but creative, pie-expanding or even shared solutions)."*

Accordingly, if *justice as fairness* with *distributive justice* is to be achieved in a society, resulting in producing maximum happiness or net satisfaction, it can be through mediation whereby entailing the *concept of justice in mediation of fairness beyond legal justice.* It thus becomes manifest that not only mediation ensures real justice, the very process of mediation carries with it the values of mediation. It is recognized that all major religions state that *it is best to get along with one another, compromise, work things out*. Mediation works exactly on this principle.

Part II
Qualities of the Mediation Process

How and why mediation assumes the character of a dynamic method of dispute resolution, which leads to conciliation of both *dispute* and *relationship* ? It is because of its unique and unmatched qualities, which no other system possesses, some of which are captured herein below.

I. Mediation aims to resolve the dispute in a confidential, quick and cost-effective manner. It is a procedure in which a neutral intervener facilitates two or more negotiating parties in identifying issues of concern, developing a better knowledge of their situation and developing mutually acceptable suggestions to address those problems. It adheres to the democratic decision-making ideology.[6]

II. Mediation represents a departure from adversarial litigation. When the parties want to maintain their relationship, mediation might help them do so. Some of the fundamental benefits of mediation include the ability to preserve, develop, and improve communication, build bridges of understanding, identify options for mutual gain settlement, search the unobvious from the obvious, dive beneath a problem and uncover underlying interests of disputing parties, preserve and maintain relationships and collaborate in problem solving.

III. In the mediation process, the parties are trusted to act in their own best interests or in the interests of people they care about, such as their children as in the case of family disputes. Rational and

6 Alfin, et al., Mediation theory & Practice, (2nd Ed. 2006) Lexis Nexis.

meaningful dialogues, therefore results in rational and thoughtful agreements that maximises the *parties' interests*.[7] Since the process relies on this rationalist paradigm, we aim at an *interest-based* model of resolution rather than the *position-based.* Many negotiation specialists believe that this is the most effective technique for shifting the focus of conflict from personal hostility to *the problem*[8].

IV. In mediation, questions and decisions are as much about people as they are about problems. Decisions about how much money a spouse should receive in alimony, whether a boss should pay settlement to an employee about to be fired due to a disagreement over company policy or how to divide the assets and liabilities of a business among its three partners, after a falling out, are as much about the people involved as they are about the problems. Conversations during mediation frequently centre on financial figures or settlement terms, making them look reasoned and objective. However, successful mediation necessitates an understanding of psychodynamics of all these aspects.[9]

V. There is always a distinction to be made between winning a case and pursuing a solution. In mediation, the parties become partners in the solution rather than collaborators in the problem. The beauty of resolving disputes through mediation is that it can produce a solution that is not only satisfactory to the parties but also creates a *win-win* situation, which cannot be reached through court adjudication.

VI. Also, a unique feature of mediation is that while facilitating the negotiations between the disputants, the mediator supports them in exploring each other's points of view, allowing for a collaborative conclusion. The mediator just serves as a facilitator or catalyst, not taking part in the negotiating process or giving options for dispute resolution. His function is limited to allowing the disputing parties to publicly communicate their grievances in his presence so that the areas of difference can be readily identified and narrowed to acceptable limits. Of course, the mediator also elicits the necessary facts from the disputing parties and reformulate them succinctly so that the parties can focus on the truly contentious issues.

VII. Mediation allows for creativity that would not be feasible in a *third party* imposed legal settlement. A mediator can confer with disputing parties separately or in their presence to help them see clearly the areas of disagreement and agreement. This process is often described as *shuttle diplomacy*, since the mediator just serves as a conduit or sounding board for the parties to express their separate issues and that in turn leads to their divulging the bottom line to the mediator in private. This allows the mediator to distinguish between areas of genuine disagreement and areas of ego-driven scoring or sparring for effect.

7 *See*, Robert Mnookin, Scorr Peppet & Andrew S. Tulumello, Beyond Winning: Negotiating to Create Value in Deals and Disputes (2004).

8 The pioneering text espousing this view of interest-based bargaining, first published in 1981, is Roger Fisher, William Ury & Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In, 2nd Edn. (1991).

9 The dictionary defines psychodynamics as the "systematized study and theory of the psychological forces that underlie human behavior, emphasizing the interplay between unconscious and conscious motivation and the functional significance of emotion." *See*, Medical Dictionary, WEBMD. Available at: http://dictionary.webmd.com/terms/psychodynamics.

VIII. The candid and open discussion of clashing issues allows the parties to develop face-saving devices to terminate what appeared to be an impasse. Thus, life and relationships continue with mediation for all parties involved, resulting in peace and harmony in society. While satisfying the litigants, it also overcomes the problem of delay in our system and adds to the country's economic, commercial, and financial growth and development.

These eight qualities of mediation make it the most powerful medium of Dispute Resolution which shall be amplified by giving examples thereof. Further, these, and many other, qualities of mediation make the entire process an exercise in spirituality.

Part III
The Correlation Between Mediation and Spirituality

At first blush, it may appear to be somewhat strange that spirituality is being correlated with mediation. However, as I proceed to discuss these aspects, the readers will find it to be an interesting idea rather than a strange phenomenon. To put it simply, mediation has all the attributes of spirituality. It may be emphasized that the essence of spirituality is distinct from religion and traditions. Spirituality is being true to oneself. It is a quest for ascertaining the truth. By increased touch with oneself, spirituality helps us to rise above our basic instincts, prejudices and stereotypes. When we are true to ourselves, and we are constantly in touch with ourselves and it becomes easy for us to locate where the false inputs come from. Spirituality then, is what mends the breach within ourselves.

Law & Spirituality are bound together at a fundamental level. Although law focuses on our separate bodies and spirituality focuses on that unseen which unites us, they are interactive and mutually dependent entities. Accordingly, one tends to find peace and happiness flourishing where law supports spirituality and where law, although carefully defined to protect the individual, is infused with an awareness of the individual's concomitant spirituality (*unity, oneness*). On the other hand, one tends to find strife and warfare where law denies or is in conflict with spirituality, or where spirituality has lost its legal support.

Indian Values

The traditional value system of our nation is in fact

protecting the structure of Justice. According to the *Vedas*, Justice is the means or instrument of securing ultimate happiness to all. The *Vedas*, the *Upanishads* and the *Bhagvad Gita* proclaim the *oneness of all*. We have been brought up on the ideals of *Vasudhaika Kutumbhakam* which means *the world is one family* and *Sarvey Jana Sukhino Bhavantu* which means *prosperity for all*. The central idea of our philosophy is that a Spirit, supreme and unchanging, pervades the entire universe and the material world is merely a manifestation of that Spirit. Our sages have extolled and preached the virtues of truth, non-violence, tolerance, compassion, non-attachment and renunciation.

This meaning of spirituality itself is an indicator of its correlation with mediation, particularly to those who know the mechanism and process of mediation. I have already emphasized that mediation is the best form of access to justice in *Part I* of this essay. It thus becomes manifest that mediation not only ensures real justice, but the process of mediation carries with it the values of spirituality. It is recognized that all major religions state that *it is best to get along with one another, compromise, work things out* and Alternative Dispute Resolution works exactly on this principle.

In fact, a study conducted by a group of Self-Determination theorists[10] in the United States takes this further and goes on to say that a survey of contributions pulled out from the religious traditions of Buddhism, Hinduism, Judaism, Christianity and Islam show that they are built into the framework of our four stages of mediation *viz*., (1) establishing rapport (2) fostering creativity in a cooperative atmosphere (3) inviting receptivity and (4) inspiring fairness and fidelity.

10 See, *supra note(s)* 4 and 5.

Justice Prabha Sridevan[11], while concurring with the above view, says that Spirituality teaches us the following:

a) Detachment which translated to mediation means impartiality i.e. not being involved with the cause;
b) It teaches us that you are not in control and the outcome is out of your hands, which translated to mediation means, you guide parties. The mediator is only a cog in effecting what the parties want. So the self is actually effaced in spirituality and the mediator effaces himself in the mediation process;
c) It teaches calmness i.e. temperament of patience and
d) It teaches the realization that every one is the same underneath, that circumstances, genetic or social conditions make the difference. There is no villain of peace. This realization also helps the mediator.

The Synergy of Mediation

There is another fundamental principle of spiritualism which is inherent in the mediation process. Mediation goes to the root cause of a conflict and tries to find a solution which subserves the interest of the parties. Why do conflicts arise? Normally, it happens when the two parties take their respective positions and think in terms of *I* versus *You*. In this mind set, their thinking is narrowed and selfish. In this manner the parties only see *half-truths*

11 *See*, Justice A.K. Sikri, *"Mediation: Means of Achieving Real Justice in Consumer Disputes,"* International Journal on Consumer Law and Practice: Vol. 5, Article 1 (2017). Available at: https://repository.nls.ac.in/ijclp/vol5/iss1/1.

and are unable to comprehend the complete picture as they do not want to see the *other side*, as D.H. Lawrence said, *every half-truth had length produced the contradiction of itself in the opposite half-truth*[12].

Mediation brings us from the position of *I* versus *You* to the position of *We*' where two warring parties instead of confronting, sit together and understand each other and try to find out a mutually discussed solution[13]. This process can be called *The Principle of Synergy*. Synergy is what happens when one plus one equals ten or a hundred or even a thousand! It's the mighty result when two or more respectful human beings determine together to go beyond their preconceived ideas to meet a great challenge. It's about the passion, the energy, the ingenuity, the excitement of creating a new reality that is far better than the old reality.

This principle clearly depicts elements of spirituality in it whereby our adversarial mind set changes to the synergy of two overriding principles: *Justice* and the *Hindu* tradition of *Ahimsa*, doing no harm to any living creature. This principle of *non-violence* is pragmatic with justice was discovered by Mahatma Gandhi and in the context of litigation it assumes the role of the peacemaker rather than the role of an adversary. Let me reiterate what the great Father of our Nation, wrote in his autobiography about the *Role of Law* and that of a *Lawyer* as under:

> *"I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."*[14]

Robert Frost had famously observed that, *A successful lawsuit is the one worn by a policeman*[15]. Stephen R. Covey and Larry M. Boyle add to this observation in their essay *The 3rd Alternative and the Law*[16] by posing a question that, *Is it possible that 3rd Alternative thinking could revolutionise the practise of law, even if the client is powerful and demanding ?* The answer is yes. Time has come when we must shift from an adversarial mindset to an empathetic one which is the core value of spiritualism embed in the process of mediation. In fact, many justice systems rely on empathy rather than the adversarial mind set. Many nations resolve disputes without the *win-lose* mentality. In Japan, the goal of the *Chotei* Courts is not retribution but the restoration of *peace and tranquility*' which makes Japan perhaps the least litigious society on Earth. It hardly needs to be emphasized that these spiritual attributes of mediation further add strength to the dispute resolution process.

12 D.H. Lawrence Quotes. (n.d.). Goodreads.com. Retrieved March 15, 2023, from Goodreads.com Web site: https://www.goodreads.com/author/quotes/17623.D_H_Lawrence?page=34

13 Martin Buber, *I and Thou* (New York: Simon & Schuster, 2000), at 23, 28, 54.

14 Mahatma Gandhi, *The Story Of My Experiments With Truth*, Rajpal Publication, 2015.

15 Robert Frost Quotes. (n.d.). BrainyQuote.com. Retrieved March 15, 2023, from BrainyQuote.com website: https://www.brainyquote.com/quotes/robert_frost_151815.

16 Stephen R. Covey, *The 3rd Alternative: Solving Life's Most Difficult Problems*, Simon & Schuster, 2013.

Part IV
Achievements of Mediation

Up to now, we have theoretically discussed the entire process of mediation depicting its effectiveness thereof. In this part, my endeavour is to demonstrate the same with a few real-life illustrations. These examples show how Mediation helps the parties in overcoming negative human values and fosters peace and harmony among them.

1) Rehabilitating broken relationships

Before Delhi High Court a dispute arose in relation to the immersion of ashes of a well-known poet OJ Vijayan. He was survived by his widow and a son who was living abroad. Since the son of the deceased was not in a position to go to cremation in India, the cousin brother of the deceased was requested to perform the last rites which he did. Thereafter, the cousin brother claimed that under Hindu Law it is he who had the right to immerse the ashes of the deceased as he had performed the last rites at the time of cremation. On the other hand, the widow and the son claimed their exclusive right to perform this ceremony on the ground of being the widow and natural son of the deceased. The widow was a Christian and her sentiment was to perform the ceremonies in accordance with Christian rites.

The Single Judge of the High Court decided the legal issue and held that as per the *Hindu Law*, the person who performs the last rites has the right to immerse the ashes also. However, influenced by the fact that on the other hand were the son and widow of the deceased who also could not be deprived of their rights in that capacity, a direction was given that both the parties shall jointly immerse the ashes of the deceased in the *Ganges*. Not satisfied with the decision, the son filed an appeal before the Division Bench of this Court. The Division Bench referred the matter to the Delhi High Court Mediation and Conciliation Centre.

The mediation process was able to persuade the son to travel to India through his counsel who played a very pro-active role. During the course of litigation, the widow had also passed away. Before the mediator when the son and the cousin brother appeared, who were uncle and nephew, the mediator facilitated them to interact with each other for some time. The ice melted and there was thaw in the relationship. After all, blood is thicker than water. It was clear that until then they were fighting with each other only because of lack of communication between them. This opportunity to restore communication was provided through the process of mediation.

The strain in their relations vanished. Both uncle and nephew wept and hugged each other and the old affinity in their relationship was restored. They also agreed that ashes of the deceased would be immersed by them together. Before immersing the ashes, the uncle agreed to join the son to perform some Christian ceremonies. Thus, virtually the direction given in the judgment of the Single Judge was mutually accepted and the parties acted thereupon it. What was achieved was the reunion and restoration of the relationship, which the judicial adjudication process could not achieve.

2) Coming out with a unique solution

Here is another story, which demonstrates the benefits of the mediation to the hilt: an industrial

establishment was facing some financial crunch and it decided to retrench some of its employees. The axe fell on a manager, whom we would refer to as 'A'. He challenged his termination as illegal and approached the Court of Law. 'A's' contention was that proper notice terminating his services was not given and therefore, his termination was illegal. The company, on the other hand, contended that due to depletion in the business activity it had the right to reduce its work force and there was no requirement of 'A' under such compelling circumstances. Parties were referred to mediation.

In the mediation proceedings, the company offered to pay some compensation, but 'A' refused to agree to this proposal and was adamant that he should be taken back in the job. The mediator was somewhat intrigued by the stubbornness of the terminated employee and tried to reason that even in case the termination is held as illegal by the Court, as a manager in a private company he had no right to get the reinstatement and could only be given damages/ compensation. He thus tried to probe as to why 'A' was not agreeing for anything but reinstatement.

In a private session, 'A' revealed that he had no other family member. He was all alone and after working in the company for a number of years, he had started treating his colleagues as *family members*. Therefore, his main concern was not the termination but the fact that because of the termination his links with his family members would also get snapped. He was feeling depressed and wanted to go back to his family members. After coming to know of these facts the mediator held separate session with the management and during the discussion, he was informed that the management was otherwise satisfied with the services of 'A', but termination was only because of the reason that there was no requirement of a manager in the company.

Since 'A' wanted to come back to the company, since it was important for him to reunite with his *family* and agreed to get reinstated even at a lower post which was available. The management agreed to reinstate him as it had otherwise no grievance against 'A'. A settlement took place in accordance with which 'A' was taken back in service though on a lower post. Most importantly, 'A's emotions and sentiments were addressed in mediation. Such a solution could be found only by the process of mediation. Even if 'A' had succeeded in the Court and got the compensation/damages, it would not have satisfied him. The satisfaction which he got in the aforesaid settlement could not have been achieved through adjudication.

3) Establishing new relationships

The following case yet exemplifies another novel solution to a dispute settled through mediation, which course of action was impossible to adopt in a Court of Law. A clothing company with a famous brand filed a suit for infringement of its trademark and passing off. The allegation against the defendant company was that it was producing garments in his factory and selling the same under the trade name of the plaintiff. *Ex-parte* injunction was granted as it was the clear case of counterfeiting. After notice, the defendant appeared. The scope of the dispute, insofar as decision of the case on the basis of adjudication is concerned, seemed to be only with reference to damages/compensation.

Parties agreed for attempting an amicable solution of their disputes and they were referred for mediation. Had the case been decided by the Court, it would have resulted in permanent injunction against the defendant and some damages/compensation. But, do you know, even a case like this had a strange and pleasant outcome through the mediation proceedings? During mediation proceedings, it transpired that the defendant had a state-of-the-art garment manufacturing unit with modern machines and highly skilled manpower. The plaintiff company with a celebrated and highly acknowledged brand was outsourcing the manufacturing of those garments, of course, with strict quality standard. Lo and behold ! The plaintiff which was otherwise satisfied with the quality produce of the defendant agreed to place orders on the defendant company for the same garments to the plaintiff ! With this, the issue of counterfeiting was given a go-bye.

The defendant could continue with the manufacturing of the same garments under the same brand name but now duly authorized by the plaintiff. The only change was that the defendant had now started producing these garments on the basis of orders placed by the plaintiff and was delivering to the plaintiff rather than selling in the market on its own. Both were satisfied. There cannot be a better example of a *win-win* situation. This case also illustrates that even those cases which may be good on merits for one party can be sent for mediation as the ultimate settlement can bring about more pleasant outcomes and a final closure to the disputes of the parties.

All these examples demonstrate that mediation brings out positive qualities, hidden inside every human being, and make them better human beings. This is the most valuable promise which m mediation holds.

Conclusion

There's an old African proverb that goes: *When spiderwebs unite, they can halt even the lion.* If we are able to unite for *access to justice* through mediation, we can even halt the lion of war and overcome all the challenges that come in the development of mediation. The essence of mediation lies in free and fair negotiation between the parties, where the mediator acts as the educator of law and patience and facilitator of the process keeping the dialogues less bitter and settlement fairer. With mutual empathy and understanding of each other's situations, there is the maximization of the choices available for settlements for both sides.

That is the honest and genuine promise of mediation. Conflicts dissolve and consensus emerges as a natural result of participation together through the conflicts. Tricks and traps do not play a role. Conduct becomes ethical and perception assumes the status of reality. The result is solidarity, peace, and a new culture conducive to the ordered social change. Mediation never allows an individual to build up his success by humbling his adversary. When each individual's thinking is anchored in cooperation, society's psychological orientation towards harmony is ensured.

Therefore, for the reason that mediation is a tool for individual development and social change, it must

be understood as a *first step* in the evolution and empowerment of the individual and society's ability to resolve conflict. The *next step* would logically be the development of sensibilities in individuals and societies to an extent where they negotiate on their own without a neutral third party or the mediator i.e., negotiation ability. In this context, *how* in the proposition, may need to follow *when* and/or *why* (interchangeable) to see it in perspective. It is necessary to travel the *when* and *why* to reach the *how* in the proposition – just like it is necessary to look at mediation as a better alternative to litigation and negotiation (which eliminates the neutral third) as a better alternative to mediation. Let us reinforce faith in mediation and spread its fragrance as it is sufficiently empowered to fulfil the promises which it professes.

JUSTICE ARJAN K. SIKRI

Justice Arjan K. Sikri did his B.Com. Honours from University of Delhi in 1974 and two Post Graduate Diplomas in Company Law and Administrative Law from the Indian Law Institute in 1975 and 76, getting first position in both. He topped in LL.B. from the Delhi Law Faculty in 1977 and completed his LL.M. in 1980. He was conferred LL.D Honoris Causa by Ram Manohar Lohia Law University, Lucknow in 2013.

Justice Sikri started his practice at the Delhi High Court in 1977 and handled all types of cases, with specialisation in Arbitration, Commercial, Labour and Constitutional matters. In 1997, he was designated as a Senior Advocate by the Delhi High Court and. In 1999, he became a judge of Delhi High Court and in 2011, its Acting Chief Justice. In September 2012, he was elevated as the Chief Justice of the Punjab & Haryana High Court and in April 2013, he was appointed judge of the Supreme Court. He superannuated in March 2019 as the senior most puisne judge.

Justice Sikri was chosen as one of the 50 most influential persons in the world who impacted the growth of Intellectual Property Laws for the year 2007 by MIPA. He has written several articles in various journals and presented learned papers in various national and international conferences.

Currently, he is Judge of Singapore International Commercial Court (SICC). He is also Chairman of National Court Management Systems Committee (NCMS), Chairperson of the Committee for Formulating an Action Plan for Online Dispute Resolution under NITI Aayog, Government of India, Chairman of News Broadcasting Standards Authority (NBSA), Chairperson, Interim Advisory Council, Delhi School of Public Policy and Governance (DSP&G), University of Delhi and Ombudsman of Federation of Indian Fantasy Sports (FIFS). He is also visiting Professor at various Law Universities.

In writing this article Justice Sikri was assisted by Mr. Balram Pandey, his Associate-cum-Law Clerk

Mediation as ‘Appropriate’ Dispute Resolution

Justice Hima Kohli

Introduction

It is often stated that conflict is a constant in life. Just as humility, pride, ego, greed, compassion and courage, are universal in nature, so is conflict. It is a ground reality that conflicts exist in all aspects of human life and that no society can ever be free of them. Just as societies continue to evolve over a period of time through industrial growth, economic advancement, social and cultural advancement, conflict also continues to erupt and escalate simultaneously. The foundation of a well-regulated society is based on strong legal principles. At the same time, differences in viewpoints and perceptions among cross-sections of society are acknowledged as an essential component of a mature society. It is equally understood and accepted that conflicts must be resolved in a timely manner. The sooner members of society resolve their disputes, the better it is for both the disputing parties and the community as a whole.

Conflict resolution has been institutionalized in ancient civilizations all over the world. The justice delivery system may have varied from Continent to Continent and State to State, but it has been an accepted norm in most civilizations that disputes are to be resolved through the Court adjudicatory system. Closer to home, India has a proud tradition

of conflict resolution through consensus and conciliation. Panchayats are well-recognized institutions in our culture. The Panchayat, which was made up of well-known and respected community leaders, was the favoured dispute-resolution forum. Orders issued by Panchayats were respected, accepted and implemented by disputing parties, whether the disputes were personal or commercial in nature. When it comes to commercial disputes, we must also be aware of Trader's Guilds, which are fora established by members of a specific trade to resolve *inter se* disputes as also disputes with their customers. They work towards settlement of disputes through peers in the same trade. Such mechanisms are, therefore, well-entrenched in our social setup.

Justice delivery system has traditionally been adversarial in nature. The ever-increasing number of litigations and the complexities of the disputes have resulted in a situation in which the adjudicatory process of courts in India is overburdened. Stakeholders have questioned the delay in adjudication as well as the methodology of the adversarial justice system. A skewed judge-population ratio, large number of vacancies, high inflow of cases, increased citizen awareness of their rights, and the enactment of new laws are all contributing factors to the docket explosion.

Alternative Dispute Resolution [ADR]

The term 'Alternative Dispute Resolution' takes in its fold several models that include Lok Adalats, arbitration, mediation, conciliation, negotiation and hybrid modes like med-arb, and arb-med-arb. Why is the word 'Alternative' used as a prefix to the phrase 'Dispute Resolution?' The reason is simple. All of these dispute resolution methods have been labelled as 'Alternative' because litigation has been and will continue to be the primary mode of dispute resolution. However, litigation is a time-consuming and costly process. The other aspects that discourage citizens from knocking at the door of the courts are the prohibitively expensive fee of lawyers, the complexities of the working of the judicial system and the span of civil litigation that can range from 5 years to 10 years and even beyond. This is where ADR can play a critical role. In the 1980s when the United States of America was faced with a similar situation that India is facing today, they had started looking for options to reduce the burden of courts and that is how the ADR mechanism had evolved and gained strength.

Formal adjudicatory systems will always exist because there are some matters involving complex legal issues that can only be resolved through court adjudication. But many other disputes can be resolved through ADR without overburdening the court system. That is why, in the last decade, there has been a paradigm shift in the approach. Young lawyers, General Counsels, Micro, Small and Medium Enterprises (MSMEs) and companies have been moving away from protracted court litigation towards ADR as a primary mode of dispute resolution, knowing that it can be a quicker and more economical mode of dispute resolution for their clients.

Our justice delivery system also requires a transformation with additional mechanisms incorporated to strengthen the current court system. Frank Sanders, a Harvard Professor had proposed the idea of a 'Multi-Door Court House',

which emphasizes the need to have several fora for disputant parties to amicably settle their disputes without adopting the process of adjudicatory mechanism.

The Lok Adalats that are organized by the National Legal Services Authority (NALSA) and the State Legal Services Authorities from time to time under the Legal Services Authorities Act, 1987, are also a part of the ADR system. They are conducted regularly by the High Courts and the District Courts with the idea of reducing the pendency and referring parties for a resolution through an informal mechanism. Lok Adalats are organized for settling traffic challans, pension and service matters, family disputes, complaints under the Negotiable Instruments Act, electricity disputes and a host of other minor low stake disputes where parties can be assisted in arriving at a negotiated settlement. Once an order is passed by the Lok Adalat, it has the characteristic of a decree that can be executed in a Court of Law.

In addition to dispute resolution, ADR now includes client counselling, conflict avoidance, conflict management and conflict resolution. It addresses the issue of 'Access to Justice,' providing meaningful justice to those who are financially strained or unable to access the courts due to other barriers like geographical constraints. ADR provides a fair resolution to any conflicts that may arise. This broader concept of 'Access to Justice' without confining it to 'Access to Courts' provides a meaningful access to justice, and it is not limited to legal aid for the underprivileged or those who are unable to afford engaging a lawyer by paying hefty litigation fees and court fees. To put it another way, 'Access to Justice' does not imply access to the judicial system. Rather, it means access to a platform that can aid in dispute resolution, with the goal of providing an effective mechanism for alternative dispute resolution.

Mediation

One of the most popular ADR tools is mediation, which has often been described as an 'Appropriate Dispute Resolution Method.' Simply stated, mediation is an amicable settlement of disputes with the involvement of a neutral third party who acts as a facilitator and is called a 'Mediator'.

Mediation is one of the methods of ADR that resolves disputes expeditiously, economically and in a congenial atmosphere. In this process, a neutral intervenor assists the negotiating parties to identify their disputes, facilitates them to arrive at a better understanding of their situation and, thereafter, helps them in working out mutually acceptable solutions to resolve their problems. Quite clearly, mediation is a shift from the adversarial litigation system and has a host of advantages; for example, in a situation where parties wish to continue their relationship, mediation helps to build bridges and strengthen the bonds. It helps in preserving, developing and improving communication for finding out viable options to arrive at a settlement for mutual gains; developing better communication; in going deep into the problem to come out with the real underlying interests of the disputing parties that may not be apparent on the surface; in preserving and maintaining relationships and collaborating to resolve the problems. For all these reasons, it has been said that mediation embraces the philosophy of a democratic decision-making

process. The reasons for this are not far to see: through mediation, parties become partners in the solution rather than the problem. It is a collaborative process. In courts, one party is bound to lose and the other win, but that is not so in mediation. It creates a win-win situation for all concerned.

Mediation also contributes towards the economic, financial and commercial growth of the country. It is a positive step towards 'Access to Justice.' One of the biggest advantages of mediation is that the parties are not only permitted to resolve a dispute which may be pending in a court, but they can club all disputes pending between them in different courts, and additionally, try and resolve such disputes that may have arisen later and have yet to be litigated. In other words, mediation provides an umbrella whereunder parties can resolve pending disputes and anticipated disputes through negotiation, and assisted conversations by the mediator who enables them to tool out a settlement agreement which once presented in Court and accepted, can be executed like a decree of the Court.

The cost-effectiveness of the mediation process can be gauged from the fact that when parties are referred to court-annexed mediation centers under Section 89 of the CPC, no fee is payable by them to the mediator. The expenses are borne by the courts. It is generally offered free of cost to promote out-of-court settlement. Another benefit is that if the parties do arrive at a settlement, then a large part of the court fee is refundable, depending on the stage of the court proceedings. Even in mediations that are conducted by centers that are independent and unattached to courts, though parties may have to pay the mediator's fee or the charges for the venue, it would be nominal compared to the prohibitive fee payable in courts. Once parties arrive at a settlement the multi-tiered process of appeals and revisions right up to the Supreme Court, is brought to a closure.

Mediation is no longer confined to family disputes and disputes between the spouses. All kinds of matters are referred to mediation and can be resolved successfully. This includes commercial disputes, disputes on trademarks, labour disputes, employer-employee disputes, property disputes, etc. Seeing the potential of mediation, corporate law practices are rapidly evolving with growing emphasis on ADR methods and the willingness to take on board, trained mediators as part of the legal team to resolve at least some part of complicated commercial disputes, if not the entire dispute. That is why the hybrid mode Med-Arb-Med is gaining traction. As the demand for mediation services rises, so would the need for highly skilled professionals who can facilitate these processes. This presents an exciting new career opportunity to law graduates and advocates alike who can choose to specialize in the stream of mediation.

Yet another interesting development in the field of mediation took place during the Covid-19 pandemic when most of us were home-bound due to lockdowns and even after the lockdown was lifted, the fear of infection kept people home-bound. During that challenging time, Online Dispute Resolution (ODR) kept the doors open for litigants and several virtual platforms were used to keep the process going. The net result was that parties could log into the mediation process sitting in the comfort of their homes and continue exploring options

till they could arrive at a settlement facilitated by the mediator who could be sitting at an entirely different location. This process has worked very well and is being used even now in matters where parties cannot travel from far-off places to be physically present at the Centre to participate in the mediation process and would rather opt for the virtual platform. It is a matter of time that the mediation process will be formalized with the enactment of the Mediation Act, which is on the anvil. This will give a structure and a legal framework to the entire process.

Blue Ocean Opportunity

Mediation in respect of cases pending in Court can serve as a 'Blue Ocean' opportunity for start-ups to exploit. The concept of 'Blue Ocean' strategy revolves around creation of new, untapped markets where competition is minimal and non-existent. In the context of mediation, this strategy can be applied to the use of Artificial Intelligence (AI) by start-ups to offer innovative digital mediation services that may not be widely available so far. Start-ups that enter this untapped market with innovative digital mediation services, can potentially gain a competitive advantage over traditional mediation services. They can use these services to attract new customers and expand their business in a relatively unexplored market. Some Banks and Financial Institutions are already going that way.

However, this comes with a rider. It must be remembered that the digital divide can create a disadvantage for litigants who cannot afford the technology or the services offered by such start-ups. For ensuring an equitable outcome, which is not skewed in favour of the affluent, it is imperative for start-ups and such like organizations who use AI to work on mediation platforms, to address this issue and ensure that their services are accessible to all. This means offering *pro bono* services to those who cannot afford the expenses or to partner with the community organizations and provide mediation services to the under-privileged population. To sum up, 'Blue Ocean' potential for start-ups in the mediation space, will be a significant development and entities that can leverage technology and offer innovative services, have the potential to spin the traditional mediation driven market into another dimension by creating new opportunities for growth.

How Can one Promote Mediation as an ADR

Since the faith of litigants in India in the traditional court system runs deep, it is important for the public to be informed of the advantages of mediation and its capacity to produce amicable solutions. Court-monitored mediations are found to be more effective as this acts as a confidence building measure for litigants who are referred to Court-annexed mediation centers as they know that they can always go back to the court for orders and there is an assurance that the process is being monitored by the Court at every stage.

To promote mediation culture, it is also important to inform people about the advantages of mediation and recognize institutions that offer services of mediation.

- Workshops must be organized to train mediators and impart education in understanding the mediation process.

- All stakeholders must be informed that mediation is a part of the Court case management system, so that the trust that they repose in the traditional court system, can be carried on to this platform.
- Institutions that offer such services should be recognized and encouraged.
- Infrastructure and resources must be made available to create mediation centers and man them with trained mediators.
- Lawyers must be encouraged to include mediation in their repertoire as a beneficial tool.
- The subject of ADR should be made a part of the curriculum in Law Schools.

Mediation and the Student Community

It is initiatives in the aforesaid directions that will spread the good word and assist the formal mediation mechanism to gain legitimacy and credibility. Incidentally, mediation has worked very well amongst the student community. In my opinion, they have to be taught during the course of their studies as to how mediation can be used to encourage parties to go in for a settlement through a speedy and cost-efficient process. It is being promoted in schools and colleges to resolve disputes between peers and has been giving tremendous results. Educational Institutions ought to consider establishing a Mediation Desk on a permanent basis in all Colleges. The students ought to be imparted trained for conducting mediation. This will be a living example of promoting the sprit of mediation in the student community.

Conclusion

A civilized society's foundation is laid on its capacity to protect and uphold the rights of its citizens, to advance their well-being and at the same time, focus on the socio-economic development of the country. No doubt, courts will continue to play a critical role in the justice dispensation system, but it is becoming increasingly clear that there are several other cost-effective and time efficient ways to settle disputes. The efforts should not just be to create and expand an efficient legal system. One should strive to create an integrated justice system where courts should be the last resort and ADR, the first one.

As a step forward in this direction, it is heartening to note that several Law universities and colleges are making special efforts to familiarize their student with the ADR procedures by introducing diploma courses in the subject. Besides organizing moot courts, several efforts are being made to promote 'Appropriate Dispute Resolution' by organizing workshops on mediation to familiarize students of its benefits, so that when they step out into the real world, they are fully equipped and trained to assist in dispute resolution, not just by accessing institutions like courts for justice, but by approaching appropriate fora that are recognized under the alternative dispute resolution modes in securing access to individualized justice.

JUSTICE HIMA KOHLI

Justice Hima Kohli was a practicing Advocate in the High Court of Delhi till her elevation as a Judge in the same Court in the year 2006. During her practice as a Standing Counsel and Legal Advisor to the New Delhi Municipal Council and as an Additional Standing Counsel, Government of Delhi [1999-2004], she appeared in a number of important matters and issues of public importance.

Justice Kohli was sworn-in as the Chief Justice of the High Court for the State of Telangana at Hyderabad on 07.01.2021 and was appointed Chancellor of the National Academy of Legal Studies and Research (NALSAR), Hyderabad. She was appointed as a Judge of the Supreme Court of India on 31.08.2021. She has been appointed as the Chairperson of the Gender Sensitization Internal Complaints Committee as well as the Family Courts Committee. She is the first lady judge to be elevated to the Supreme Court from her parent Court i.e., Delhi High Court and senior most woman judge in the country.

She is a member of the International Law Association (Regional Branch: India); International Association of Women Judges (IAWJ) and the Indian Law Institute. She is the Founder Patron of "WILL," (Women in Law and Litigation), a society of women judges and lawyers based in Delhi as also the Founder Term Trustee of the International Arbitration and Mediation Centre, Hyderabad.

Besides performing her official duties as a Judge, Justice Kohli takes keen interest in environmental jurisprudence, mediation, Family Courts and legislation relating to women.

EMPOWERMENT AND SELF-DETERMINATION

Empowering the parties and leading them to
self-determine solutions to their dispute

Prof. Upendra Baxi

Introductory

I am honoured to contribute to this publication for the Delhi High Court's National Mediation Conference under the aegis of the National Legal Service Authority (NALSA) and the Mediation and Conciliation Project Committee (MCPC) of the Supreme Court of India. Senior advocate Sudhanshu Batra would not take a 'no' for an answer; his persistence now results in a melange of narratives that must eventually find a more systemic exposition.

I salute the presence at this National Conference, of the two learned Chief Justices of Singapore and India, the Hon'ble Mr. Justice Sundaresh Menon and the Hon'ble Dr. Justice D.Y. Chandrachud, who will no doubt make versatile contributions to the field.

Everyone concerned with mediation knows well how much the United Nations has done by laying treaty foundations by an agreement - United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (known also as the Singapore Convention). Article 1 of the Convention is clear in stipulating the scope. It applies to an agreement, "resulting from mediation and concluded in writing by parties

to resolve a commercial dispute ("settlement agreement") which, "at the time of its conclusion" is international in character; that is to say: (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected." It does not apply to judicial settlements nor would it resolve a "dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;" or dispute "relating to family, inheritance or employment law". Its jurisdiction is thus vast but does not include what lawpersons know as *res extra commercium*.[1] India, although a signatory, has yet to ratify this treaty.[2] The Singapore Convention need not be summarised here but its preambulatory enunciation clearly speaks of mediation as "increasingly used in international and domestic commercial practice as an *alternative to litigation*" (emphasis added) and its benefits "such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States".

At the outset then, mediation stands reduced to a measure of court decongestion, as an ADR measure which is subject to the economic theory of cost-benefit analysis. What should be counted as a cost and what as benefit is a matter of ideology, and more often a matter of political interests and trade-offs.[3] The issue whether, and how, these outcomes may affect law, public policy, and justice are rarely discussed. It is assumed that whatever is agreed in mediation is fair and just. And this holds true even when, in some countries, constitutions so provide or if judiciary so wills, [4]fundamental rights may not be waived.[5]

Lawpersons in India (primarily legislators, justices, lawyers, academics, law reformers, court and secondarily political parties and actors, news and views case correspondents and opinion writers), are of course concerned with alternate dispute resolution as furnishing ways out of ligation. The ways in which mediation actually serves as an 'alternative to law' varies according to each culture and country but it is only comparative law and jurisprudence that may guide us here.

All lawpersons and citizens remain concerned that India is perhaps among the leading nations to have widespread case backlog and pendency rate. As of August 2, 2022, the total number of pending cases in the Supreme Court of India is 71,411, out of which 56,365 are civil matters and 15,076 are criminal matters. 59,55,907 cases are pending in 25 High

1 But see, Aditya Karla, "With Roman Law Doctrine, India Moves to Stub out Tobacco Industry Rights", *The Wire, 31*/01/2018.

2 See, Iram Majid, "The Singapore Mediation Convention: A Long Pending Catharsis for Mediation and an Urgent Need for India to Ratify". https://www.scconline.com/blog/post/2021/09/13/the-singapore-mediation-convention/ (2018).

3 See, Upendra Baxi,Rehabilitation and Resettlement: Some Human Rights Perspectives,' in Social Developemnt Report: Development and Displacement (Delhi, Oxford University Press, 2008.) See also, Baxi, 'What Happens Next is Up to You: Human Rights at Risk in Dams and Development,' *Am U. Int'l L. Rev. 16*: 1507-1529 (2001).

4 That is where there is provision for constitutional judicial review, and allied powers of judicial activism, see Justice A. K. Sikri, *Rule of Law and Constitutionalism* and my *Epilogue* (Lucknow, Eastern Book Company, 2023).

5 Upendra Baxi,"The Doctrine of Waiver of Rights: Fundamental Rights As Absolute Duties?", RGNUL Student Research Review (RSRR): rsrr.in/2021/01/17/waiver-of-fundamental-rights/(2021).

Courts. The corresponding figure for backlogs in district courts is 4.13 crores. Unfortunately, very few analytical and comparative studies identifying the causes, consequences[6] and types[7] of delays are available. In any event, we know now that the Indian case is not exceptional, though the docket implosion raises Kafkaesque apprehensions about the future of Indian law.

However, court delays remain a major spur for law reform.[8] The 129th Report of the Law Commission of India, suggested it obligatory for the Court to refer to mediation for the settlement of disputes[9] and it was endorsed in *Afcons Infrastructure Ltd. v. M/s Cherian Verkay Construction and others,* 2010. One of the most renowned cases settled through mediation was between Mukesh and Anil Dhirubhai Ambani over the takeover of the South African Telecom Major MTN.

6 See, however, Jeffrey Falt, "Congestion and Delay In Asia's Courts", *UCLA Pacific Basin Law Journal*, 4:1-2, 90-145 (1985). He urges further research; and wisely observes that "while a regional sharing of ideas and experience is of obvious benefit, solutions must fit the causes and circumstances particular to each country. ...Given the fact that those charged with the design of improved systems of dispute management must consider "social and political factors which influence the types and numbers of cases entering the courts and determine available options, a multi-disciplinary study of the causes of delay is essential" (at 145).

7 Upendra Baxi, *The Crisis of Indian Legal System*, Chapter 3 (New Delhi, Vikas Publications, 1982.)

8 Hiram E.Chodosh, Stephen Mayo, A.M. Ahmadi and Abhishek M. Singhvi, "Indian Civil Justice System Reform" *New York Journal of International Law and Politics* 30: 1-78 (1998); Abhishek M. Singhvi" Reforms in The Administration of Justice: Beating The Backlog", *Journal of the Indian Law Institute*, 58:1, 115-126 (2016).

9 See, *Afcons Infrastructure Ltd. v. M/s Cherian Verkay Construction*, (2010(6)ALD155(SC),2010). The renowned case settled through mediation was, of course, between Mukesh and Anil Dhirubhai Ambani over the takeover of MTN, the South African telecom giant.

India is now poised to enact the *Mediation Act*, backed by a thoughtful report, on July 13, 2022, by the Joint Parliamentary Committee. Almost everyone applauds several noteworthy aspects – the recognition of a mediated settlement agreement under the Indian Civil Procedure Code 1908 ("CPC"), the right to seek urgent interim relief in courts before the commencement of, or during the continuation of mediation proceedings, provisions for timely completion of mediation proceedings, community mediation and the establishment of a Mediation Council of India to institutionalize mediation. But there is considerable concern about many other aspects, especially obligatory mediation.[10] The only silver lining is that parties can withdraw from such mediation after two sittings. How this provision works out is a matter of future history, but it must be said here that any compulsion vitiates the essential feature of mediation which is consensual and voluntary in nature.[11]

Court Annexed Mediation [CAM]

Leaving aside the question whether the Supreme Court may do what Parliament ought not to do, the Court has often decreed mediation, the latest example of which is furnished by the Ayodhya Case. Chief Justice of India Ranjan Gogoi, setting up a mediation committee comprising Justice FM Ibrahim Kalifulla, senior advocate Sriram Panchu and Sri Sri Ravi Shankar, observed that the case was not about property, but about "mind, heart and healing - if possible." Additionally, the committee was empowered to induct more members, but it did not do so.

10 See, Rangon Chaudhry, "A Critical Analysis of the Indian Mediation Bill, 2021", *Kluwer Mediation Blog*, November 28, 2002.

11 See, Rangon Chaudhry, "A Critical Analysis of the Indian Mediation Bill, 2021", *Kluwer Mediation Blog*, November 28, 2002.

"Mediation will take place. We don't see any legal obstruction to it," said Chief Justice Ranjan Gogoi while delivering the order. "Mediation proceedings will remain confidential. There would be no reporting in any media," he added. It is worth noting that while most of the Hindu petitioners had shown reluctance towards mediation, the Sunni Waqf Board who had expressed certain anxieties about privacy during negotiations, and the Nirmohi Akhara, had agreed for mediation.

The Constitution Bench said mediation may help in "healing relations". The principle seems to be that Parties should go for mediation even if there is "one per cent chance" of settling the dispute amicably.

Many aspects of this narrative must be noted here. First, the court has ample powers to order mediation. Second, mediation can be judicially ordered if the parties to suit concur. Third, it may nominate as Chair any person but usually a superannuated Justice, and it seems not necessary to have always a person having the experience of mediation. Fourth, like all attempts at mediation the proceedings here too are and remain confidential. No citizen, except for the Justices and some privileged others may know the reasons for not arriving at the resolution of the dispute. Fifth, no one, excepting those so far mentioned, may ever know the ways adopted by mediators to provide 'a healing touch'. Sixth, no one, excepting the above, would ever know why parties which agreed to have judicial committee on mediation declined it in the result. Seventh, the public would never know what elements in the failed mediation were finally used by the Court in this case. In essence, it eventually transpired that "the solution the top court promulgated in November 2019 to finally end the dispute was along the same exact blueprint that the Sri Sri Ravi Shankar-led mediation panel had offered."[12] If so, the CAM succeeded, rather than failed!

It will take this essay far afield to considerable aspects of this particular CAM. All one may say here is that it is important that the Supreme Court has captured the therapeutic (the 'healing touch'), an aspect of the ancient Indian tradition of mediation.

The Traditions of Mediation in which Lawpersons Ought to be Interested?

The Indian traditions of mediation pervade Indian culture and society, dwarfing all lawpersons' ADR talk, are now celebrated in an elaborate judicial discourse of the Supreme Court in *Salem Advocate Bar v. Union of India* (as late as 2 August 2005). Some of these traditions are well surveyed on the burgeoning discourse on Nyaya Panchayats.[13] But, in a forthcoming book, *Krishna and Mediation* Professor Virendra Ahuja tantalizingly reminds us about the epochal mediation done "by Angada between Rama and Ravana in Treta Yuga; by Lord Krishna between Kauravas and Pandavas in Dwapar Yuga; and by Supreme Court in the Rama Janam Bhoomi case". Although "all the three mediations failed," he reminds us that these were grand failures which convey to us its "potential as a... dispute settlement mode," and now stands invoked in an "endless

12 Speaking to Arnab Goswami on 'Nation Wants To Know', Sri Sri Ravi Shankar also revealed why he underplays his role in the mediation process in the Ayodhya verdict: see, republic world.com 2nd September, 2021 .

13 Upendra Baxi, "Access, Development and Distributive Justice: Access Problems of the "Rural" Population, *Journal of the Indian Law Institute*, 18:3, 375-430 (1976).

number of cases in the informal manner". However, the learned author says finally that "law and justice also emanates from Lord Krishna as … stated … in the Mahabharata: " यतः कृष्णस्ततोधर्मोयतोधर्मस्ततोजयः"

However, he stresses that "Krishna, being Lord of the Universe, knew it well that mediation would be a failed attempt", he still gave "mediation a chance to teach humanity that every possible effort should be made till the last minute to resolve disputes". Giving mediation a chance is of the essence of ancient mediation traditions because common law /colonial heritage presents a legal fate in its winner-take-it-all approach. The quest between a God and Avatar may well continue to haunt any discourse on the celestial origins of mediation. A different perspective on Dharma emphasises a much needed recourse to – both the normative and the narrative – the epic's *Apad dharma purna*, where a legitimate operation of an *Apad dharma* is "strictly circumscribed according to the contingencies of time and place" and entails conduct "sanctioned as morally and ethically justifiable if the circumstances merit".[14]

In the context of people's dispute settlement at Rangpur, Gujarat, I have tried to show how and why disputes and even conflicts move from *takrar* to *karar* and truly participative democratic results are achieved by mediation.[15]Not even a nod in the direction of the rich traditions of mediation is found in legal treatises and judicial decisions!

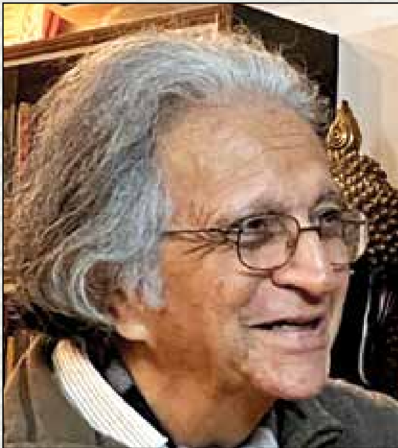
It is time to realize further that mediation is not always a matter of decongestion, or a matter of judicial statecraft but of a vast literature which demonstrates many societal domains.[16] The message of this discourse is that legal mediation is necessary but not *all* – perhaps a difficult one for lawpersons in a hyper globalizing, post-liberal world. But is mediation not far too important to be left only, or primarily, to lawpersons?

14 See, Adam Bowles, *Dharma, Disorder and the Political in Ancient India: The Apaddharmaparvan of the Mahabharata*, 2, 10 (Boston, Leiden, 2007).

15 See, Upendra Baxi, "From *Takrar* to *Karar*: The Lok Adalat at Rangpur: A Preliminary Study", *J. of Const. & Parliamentary Studies* 53 (1916); see further Epilogue of Upendra Baxi in *The Crisis of Indian Legal System* (Delhi: Vikas, 1982). It is interesting to note that neo-Gandhian leaders of the Lok Adalat (the two others were Shri Thakkar in Nagaland and Prembhai in Mizrzapur) recourse to forms of mediation through customs of the Indigenous peoples and from Mahatma Gandhi rather than Lord Krishna.

16 See ,for example, Jason Cons, "Mediation, Addiction and Anxious Fieldwork at the India-Bangladesh Border", *Ethnography*,5-3,375–393 (2014); Hyokjin Kwak Anupaan Jaju, Trina Larsen "Consumer Ethnocentrism Offline and Online: The Mediating Role of Marketing Efforts and Personality Traits the United States, South Korea, and India", *Journal of the Academy Of Marketing Science* 367-3824,(2006);Gregory L. Simon, "Geographies of Mediation: Market Development and the Rural Broker in Maharashtra, India", *Political Geography* 28 : 197–207(2009); Thomas Chambers, "Lean on me: *Sifarish*, Mediation & the Digitisation of State Bureaucracies in India."

PROF. UPENDRA BAXI



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Managing Conflict at Samadhan*

Justice Prathiba M. Singh

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The Background

Mediation as a means of alternative dispute resolution is now well-entrenched in the Indian judicial system. The first seeds of alternative dispute resolution were sown in the 1980s, through the introduction of *Lok Adalats* by the *Legal Services Authorities Act, 1980* and the establishment of the Delhi State Legal Services Authority in 1980s. In 1999, Section 89 was introduced in the *Civil Procedure Code, 1908* (CPC), pursuant to the recommendations of the Justice Malimath Committee, for recognizing "mediation" i.e., settlement of disputes outside the Court by referral from the Court, as a means of dispute resolution. Simultaneously, Section 16 was also added to the *Court Fees Act, 1870*, to provide for refund of full Court fee, if parties settled their disputes pursuant to mediation under Section 89 CPC. This also led to the need for an institutionalized mechanism for mediation.

In 2005, Late Justice R.C. Lahoti as the Chief Justice of India, constituted the Mediation and Conciliation Project Committee, after which mediation became institutionalized and training of judicial officers and lawyers as mediators became a permanent feature. In Delhi, the Tis Hazari Courts saw the establishment of a permanent mediation centre in 2005 and the same was followed with mediation

centres being established across the District Courts in Delhi.

The Success of Samadhan

Samadhan, the Delhi High Court Mediation and Conciliation Centre, one of the flagship mediation centres in India, was established in May, 2006. It is administered jointly by a committee of lawyers and judges.

The Centre is annexed to the Delhi High Court and a large variety of disputes including civil disputes, matrimonial disputes and family disputes, as also high value commercial disputes and intellectual property disputes are referred to it. Case references to *Samadhan* are also made from various Governmental institutions and bodies who deal with contested disputes. *Samadhan* also conducts mediation and mediation training for various institutions such as the Telecom Regulatory Authority of India, Indian Institute for Corporate Affairs, National Company Law Tribunal, erstwhile Company Law Board, Registrar of Cooperative Societies, etc.

Maintaining Quality of Mediation

To facilitate the smooth and comfortable conduct of mediation proceedings, the Centre has been equipped with excellent infrastructure with several rooms, conference rooms, a library, children's play room and waiting rooms. It has an advanced video conferencing centre, which was established in 2017, to ensure that the mediation proceedings are not stalled due to the physical absence of either of the parties. The video conferencing facilities have enabled quick and efficient mediation proceedings to be held, especially during the pandemic.

The Centre is governed by well-drafted rules, namely the *Mediation and Conciliation Rules, 2004*. The panel of Mediators at the Centre includes designated Senior Advocates and advocates at all levels of seniority. Experts from various fields such as matrimonial, real estate transactions, construction, employment and services, industry, intellectual property rights, banking and insurance and commercial disputes are also on the panel of the Centre. For imparting training to its mediators, the Centre has a robust training program with basic, practical and advanced levels of training. During these three levels of the training program, the trainees are attached to an experienced mediator and only once the trainee has the requisite number of settled mediations, is he/she qualifies as a mediator. Thus, the process of empanelment of mediators as trained mediators is a long and grueling one, thereby ensuring high quality mediation.

The Centre also organizes several seminars and skill training workshops by foreign mediators.

Some of the other salient features of the proceedings of the Centre are:

- Maintenance of utmost confidentiality in the mediation process;
- Arrangements with various other institutions and government bodies so as to enable active participation of the organizations in the mediation proceedings;
- Provision of video conferencing facility;
- Circulation of the draft settlement agreements through email; and

• Holding of joint sessions and caucus sessions so as to increase the confidence of parties in the mediators.

Over the years, *Samadhan* has become one of the most bustling mediation centres in Delhi, which has thousands of disputes referred to it and it has an extremely high success rate.

Successful Pre-Litigation and Conciliation Mechanisms

Samadhan also has a robust pre-litigation mediation/ conciliation[1] mechanism wherein a party who may not even be in Court as yet, is permitted to avail the services of the Centre for issuing a notice to the opposite side to explore mediation. This form of mediation ensures that a notice for pre-litigation is not perceived as a sign of adversarial challenge, but as a message of truce. Such pre-litigation mediation/conciliation notices are issued even in high value intellectual property cases, including patent litigations.

Impetus was also given to pre-litigation mediation by Section 12A of the *Commercial Courts Act, 2015*, which mandated pre-institution mediation in for cases falling under that statute. Section 12A (1) provides that no suit, except one that necessitates an urgent interim relief shall be instituted for 'commercial' disputes, unless the plaintiff exhausts the remedy of 'pre-litigation' mediation. The Supreme Court in the case of *Patil Automation Pvt. Ltd. v. Rakheja Engineers AIR 2022 SC 3848* has declared Section 12A to be mandatory. It was further held that any suit filed without following the mandate of Section 12A is liable to be rejected under Order VII Rule 11 CPC.

Trends of Settlement (2017-2021)

At *Samadhan*, the figures between 2006-2023 (January- February) show that around 33406 cases were referred by the Court to the Centre and out of those, 10690 cases were settled. In addition, around 3642 cases were also referred to the Centre as pre-litigation/conciliation cases out of which 1012 cases were settled. Thus, the total number of cases referred were around 37,048 and the total number of cases settled were around 11,702. Apart from the cases which were actually settled, an added bonus was that the said settlements entailed disposal of a large number of matters connected to the matters in which reference was made. Such connected matters were to the tune of almost 7797 cases. In terms of percentages:

• The total cases settled which were referred by courts, across all disciplines, range between 33% to 127%.

• In this data what is most striking was the number and percentage of matrimonial cases, which are settled. From 1st January, 2017 to 28th February, 2023, a total of 1082 cases were referred to *Samadhan*, out of which 411 cases were settled. However, along with these cases, 967 connected cases pending in various courts and fora in different states, were also settled . Thus, the settlement percentage was a whopping 127%.

• In Intellectual Property Rights (IPR) disputes the average percentage of settlements arrived at was 73.54%.

1 'Conciliation' as contemplated under the Arbitration & Conciliation Act, 1996

The Pandemic and After

Notably, 2017 was a rare year for the Centre which saw 100% of all IPR matters referred, being settled. Even thereafter the percentages of settlement in IPR matters are around 85% to 95% in the pre-pandemic years. Compared to IPR matters, the percentage of commercial disputes that are settled is comparatively lesser. However, this figure increased considerably in 2021 to 31.5%. This data proves that during the pandemic, litigants in commercial disputes were more welcoming towards amicable resolution of their disputes rather than to have matters contested in Court.

As would have been expected, the pandemic showed a reduction in the number of cases referred to the Centre. In 2020 and 2021, the total number of cases referred to the Centre was almost 50% less than the earlier figures. However, with the opening of physical Courts, the number of cases referred to mediation has touched the pre-pandemic level with 2453 cases in 2022. In January-February, 2023 alone, 618 cases have been referred by Courts for mediation, which is roughly 2/3rd of the total cases referred to mediation in 2020. An important feature of the pandemic period is that both in 2020 and 2021, out of the referred cases through Court, which were around 2900, around 700 cases were settled, which amounts to a settlement percentage of around 25%. If the connected matters settled through the mediation process are added, the percentage of settled cases would go up to around 43%. In the year 2022, a total of 1,246 cases were settled, including connected cases. Thus, the settlement percentage is 50.79%.

The data in respect of the pandemic period shows that the utilization of video conferencing facilities for the purpose of keeping the Centre working even during the pandemic did bear fruit for parties who were able to participate through online platforms, even during times when the Courts might not have been as easily accessible. This was supported by the Centre's near seamless transition into paperless dispute resolution from 27th June, 2020. It is important to ensure that the infrastructure developed and the practices adopted during the pandemic are not forgotten and discarded in the post-pandemic era. Mediation must be 'party centric', and steps taken to ensure effective participation of parties should not be reversed.

Effect of Refund of Court Fees

Another feature that has strengthened the mediation process is the fact that if matters are settled through mediation, the Court fee can be refunded. It is noticed that in most commercial matters such as recovery suits, IPR disputes, etc. when the disputes are resolved through mediation, the settled legal position in the Delhi High Court in terms of the judgment of a Division Bench in *Nutan Batra v. M/s. Buniyaad Associates, 2019 (173) DRJ 178*, as also reiterated in *Munish Kalra v. Kiran Madan & Ors. [CS(OS)2940/2014, decision dated 8th April, 2019], is that the entire Court fees can be refun*ded by the Court. It is noticed that at the initial stages of the litigation, the fact that the entire Court fee can be refunded if the matter is resolved gives impetus to the parties to resolve the disputes at a nascent stage itself. Generally, when matters are settled through mediation in the first two years after filing, either the complete Court fee or at least 50% of the Court fee is refunded to litigants. This has boosted the

settlement figures to a large extent in all matters, especially IPR and commercial matters.

Real World Impact of Mediation

The above data has been captured in order to highlight the fact that mediation is not merely a method which contributes to statistics of dispute resolution on paper, but it in fact effectuates peace, healing and harmony among litigants. While numbers and percentages of settlements may be important, the settlement of even one case through mediation is a win-win. Thus, settlements that are effected through mediation ought to be multiplied by the number of families/ professionals/entrepreneurs whose lives have been changed after the mediation process. It is a process through which parties are saved from litigating for generations, from high costs, and from expending energy and man hours, bringing peace within families and in commercial disputes. If approximately 2 lakh cases have been resolved since 2005 in the District Courts in Delhi, the same would have resulted in peace and harmony for at least 10 times the number of people. When viewed in such terms, the large-scale impact of mediation can actually be felt.

Judges Mediate Too!

On this note, it is also important to remember that while mediation through mediation centres has a positive impact, mediation conducted by a Judge in Chambers or in Court has an equal or much greater impact. A number of cases which cannot be resolved with the intervention of mediators, can be resolved through some counselling by the Court as well. In fact, the introduction of Order XXXIIA in the CPC in the year 1977, was a clear indication of the legislative intent for Judges to also explore mediation, especially in family disputes.

My personal experience has been that extremely complex commercial matters, IPR matters or even complex family disputes if resolved through mediation by the Court in a timely manner, can not only lead to disposal of the litigation but also give a great sense of satisfaction to the Judge. One case that comes to my mind when I reflect upon the cases resolved in Court, is a case involving an old lady whose children were fighting amongst themselves for a property left behind by her husband. She had married daughters and sons, as also grand-children. A first appeal from the order of the Court of the Learned Additional District Judge was listed before me and after seeing the nature of the dispute, I had directed the parties to appear in person. A total of 17 members of the family including her children, their spouses, her grandchildren and some of their spouses, attended the hearing on a particular day. On that day, when I took up the matter in Chambers, some discussions were held. It took two more hearings but the dispute got resolved amongst the brothers and sisters. On the day when the matter was listed for recording of settlement, the order was dictated in Court and the terms of settlement were incorporated. When most of the parties had left the courtroom and the next item was being called, I saw an old lady moving from the last row, towards the front. On reaching the first line of seating next to the podium, she folded both her hands towards the Court. The beaming sense of gratitude was clearly visible in her eyes. Such a gesture means more to a judge than any decision in a high value commercial dispute.

The effectiveness of mediation is even more apparent in Intellectual Property (IP) disputes. One interesting matter that comes to my mind is a dispute between two well-known bakeries in the country. A suit was filed by one of the bakeries operating in Delhi NCR Region against a bakery based out of Mumbai alleging trademark infringement, passing off, unfair competition *etc.* A prior suit between the same parties, which was filed by the Defendant in the case before me, was also pending before the Bombay High Court since 2015. Both the parties were claiming goodwill in marks in question. Upon realizing the possibility of amicable settlement of disputes between the parties, the matter was taken up by the Court in chamber. The parties agreed to a solution that would have been improbable to reach in an adversarial litigation. While the Plaintiff agreed to restrict its business activities under the marks in question to the Delhi-NCR Region, the Defendant agreed to not use the impugned marks in online menu cards.

Mediation in IPR

A suit involving two *chai* cafes is yet another matter that come to my mind when I think about the role played by mediation in IPR matters. While on the one hand, the Plaintiff had more than 200 outlets across the country, the Defendant was a small startup looking to make it big, having 37 outlets at the time of filing of the suit. A long-drawn litigation would have put undue stress on the resources of the Defendant, and endangered the goodwill of the Plaintiff in its mark. On the very first day the Court directed the parties to explore amicable settlement of disputes. Thereafter, the Defendant consented to use a different mark for its *chai* cafes and the Plaintiff agreed to let the Defendant continue with mark in respect of which the suit was filed for six more months.

This is the magic of mediation. There is a sense of peace, harmony and gratitude towards the Court when cases are resolved to everyone's happiness!

JUSTICE PRATHIBA M. SINGH

Justice Prathiba M. Singh graduated in Law as the 1st rank holder from Bangalore University and represented India at the Philip C. Jessup Moot Court competition in Chicago, USA. After her graduation, she was offered the ODASSS scholarship by the Cambridge Commonwealth Trust to study LL.M. at the University of Cambridge (U.K.). She enrolled with the Bar in 1991.

Before being elevated to the Bench, she was a leading Intellectual Property lawyer in India. She had the distinction of handling landmark matters in all areas of IPR laws including patents, trademarks, designs, copyright, plant varieties, internet laws, etc. Justice Singh was designated as a Senior Advocate by the Delhi High Court in December 2013. She was a member of the IPR Think Tank which was entrusted with the momentous task of drafting India's first 'National IPR Policy' which was released in May, 2015. Various awards have been conferred to her for her excellent work in the field of IPR laws.

She was elevated as a Permanent Judge of the High Court of Delhi on 15th May 2017.

Recognizing her contribution to the development of IP law, Managing IP, a leading global publication, has rated Justice Singh amongst the '50 Most Influential People in IP' for two consecutive years, i.e., 2021, and 2022. Justice Singh is a Member of the Advisory Board of the Centre for Research in Intellectual Property, MNLU, Mumbai. In the year 2022, Justice Singh became the first Indian judge to be elected as an Honorary Fellow of Hughes Hall, University of Cambridge.

MAINTAINING CONFIDENTIALITY, NEUTRALITY AND TRUST

This sustains the integrity of the dispute resolution process

The Promise of Mediation Begins with ME

Bruce A. Edwards

Promise is defined in the Oxford dictionary as "the quality of potential excellence". The question then becomes, what must we do to unlock this quality of potential excellence in the mediation process for the benefit of India and beyond? The answer, in part, lies in developing a generation of skilled mediators who have been trained in conflict resolution of all types and therefore able to unlock the full potential of the mediation process.

India has a rich tradition of conflict resolution at a local level administered by village elders, the Panchayats. For centuries, this historical approach to conflict resolution has served India well, and there remains much which can be learned from the Panchayats. However, the combination of mass migration to large cities and the onset of complex societal problems over the past century have left time-honored approaches to conflict resolution ill equipped to address the needs of those in modern conflict.

Even the court system and its traditional promise of dispute resolution through litigation has found itself strained to the breaking post by the crush of pending cases. The sheer volume of disputes in need of adjudication threatens the need for millions of Indians to access timely and quality justice.

Against this backdrop, we have witnessed in recent years the introduction of mediation, a process defined as a facilitated negotiation and one that attempts to return disputants to the roots of conflict resolution modalities. Mediation works because it seeks to bring parties together to communicate directly with each other, at times with emotion, but also to break bread and hopefully realize different perspectives. Above all else, it's a process that addresses basic human needs beginning with the need to be heard, respected and participate in a process that seeks solutions responsive to the needs and interests of all involved.

Mediation is a process that works across a broad range of disputes. It's a process that I know well, having conducted over 8,000 mediations in the past thirty-five years in matters involving construction disputes, employment claims, business disputes, personal injury, and wrongful death. Yet it is a process that works because of the skill of the facilitator, and therefore the promise of mediation is dependent on high-quality mediation training. Without proper skill development, the full promise of mediation cannot be realized.

What then should we know about mediation training to better understand how to develop mediation competency in the growing profession of those who would choose to intervene in the conflicts of others? I've taught mediation skills to judges, attorneys, government officials and others for more than three decades, travelling to over twenty-five countries, including India, during my teaching journeys. Additionally, I am the co-creator of an online mediation training academy that has made mediation skill development available throughout the world. This experience has bought me a front-row seat to the development of our nascent profession and, at the same time, provided me with a unique perspective on what is required to develop true mediation competency.

I often begin my teaching to aspiring mediators by telling them that true mediation competency begins with Me. For those who enter the profession focused on helping others, this statement is often met with disbelief. I continue to explain that while mediation skill development remains essential to those seeking to deliver the highest quality of mediation, the key to developing mediation competency begins with self-reflection and self-management.

My educational background was in psychology years ago before entering law school, so it's only natural that I tend to view the mediation process, and therefore mediation training, through a psychological lens. Viewed from this perspective, it's easy to understand that *before* we can effectively assist those in conflict, we must first look inward to better understand our own emotional competency and the impact we will have on others around the mediation table. Mahatma Gandhi once observed, "if you want to change the world, start with yourself". That wisdom remains true today. If we hope to realize the promise of mediation, we must aspire to the highest level of mediative competency in our profession, a journey that begins by looking inward.

All aspiring mediators must understand that as facilitators of the negotiation process, we introduce ourselves into the conflict. This means that from the time we begin our convening activities, including

process design and continuing throughout all phases of the negotiation, we are the third party in the room. And as the third party in the room, we introduce our own unique personalities, emotions, and life experiences, including our biases. This constellation of individual characteristics and skills makes each of us unique and explains why mediation, at its core, is truly an exercise in personal service.

During my years of mediation and mediation training, I have lamented that most mediators looking to improve their mediation competency, and therefore many training courses, are quick to focus on specific skill development, ignoring completely the critical need for self-reflection and self-management as essential first steps toward effectively assisting those in conflict. Whether this reflects the fact that many trainers are not experienced mediators themselves or simply an oversight by those in a rush to skill development, I will leave to others to determine. All that matters is that self- management remains a professional blind spot for many mediators who eschew the need for and the effort required to effectively manage themselves as an integral part of the mediation process. Again, I can't stress enough that it's incumbent on those seeking to develop mediation competencies to begin by looking inward and committing to a journey of self-development. True mediation competency is a lifelong journey, but one that fundamentally begins with Me.

What do I mean by self-management, and what do mediators need to understand about themselves before effectively engaging with others? Before answering the question of what self-management is, it's important to distinguish what it is not. Often self-management training in the business world focuses on time management and how to increase productivity. In contrast, the discussion of self-management by mediators is less about efficiency and more about effectiveness. It's less about acquiring specific skills and more about developing social competencies. In fact, describing the process as self-management training does an injustice to the level of commitment and lifelong journey required for self-development.

What, then, is self-management, and why is it an essential first step in developing mediation competency? Ancient Greeks emphasized three aspects of the human experience: the mind, the body, and the spirit. This time-honoured perspective provides a valuable template for examining self-management and its goal of developing mediation competency. Specifically, we should envision a triangle with each side reflecting a different focus of self-management: self-management of the mind, self-management of the body and self-management of the spirit (emotions). A deeper understanding and self-mastery of these focuses of self-management should become the taproot of all future learning.

Self-Management of the Mind

Over the course of my teaching career, I've coined the term Mediator's Mind™ to describe the mental model we create for ourselves that defines our approach to mediation and shapes our every intervention in the conflict environment. Self-management of the mind begins with self-reflection and developing a strong vision of how we see our

role in mediation. This mental model will become a mediator's North Star that can be returned to time and again during difficult moments in mediation.

I've also described our journey through life as an exercise in focused attention. Yet we know from brain research that at any given moment, we only commit a fraction of our available attention to the task at hand. Similarly, we know from our own everyday experience that the constant white noise of our internal conversation, at best, distracts us from devoting full attention to communicating effectively with others. Self-management of the mind thus begins with sharpening our ability to focus and using our internal voice productively while engaging others in conversation.

More recently, we have developed a deeper appreciation for the role that cognitive and emotional biases play in our ability to perceive the environment clearly and communicate effectively with others. Effective self-management of the mind begins with understanding our own biases and how to account for them as we intervene with others in mediation.

Self-Management of the Body

As mediators, we know the importance of nonverbal communication and pay as much attention to physical cues as we do to the spoken word. Yet, how many mediators take the time to hold up the mirror of self-reflection and examine their own body's cues

and role in mediation? How many are aware of their own internal signals? There is a term in psychology, somatic markers, which refers to our physical responses to external stimuli, often stressors in our environment. An example is when you open your email server and just seeing a sender's name causes your stomach to turn or your jaw to clench. In mediation, how many times have you paused before walking into a private conversation with one party, only to observe a tightness in your chest or some other physical manifestation of stress? Learning to pay attention to these important signals our bodies send us, is the first step to self-management of the body.

Equally important is mastering our own body language. The recent trend toward online dispute resolution and the forced marriage between mediation and technology has offered an unparalleled opportunity for self-management of the body. Spending eight hours a day on a computer screen provides the opportunity to observe yourself in the moment. We have never had a better chance to witness and become aware of our body language, including subtle facial expressions, as we communicate with others.

Finally, the physical demands of mediation remain a blind spot for many. Preparing for and navigating the physical needs of full-time conflict resolution mirrors the training required of a high-level athlete. Rest, nutrition, and stamina are all part of the self-management conversation.

Self-Management of the Spirit (Emotions)

Self-management of the spirit entails developing emotional intelligence, defined as the ability to perceive, understand, and manage emotions. The journey toward expanding one's emotional intelligence has been, metaphorically speaking, equated to exercising and strengthening one's emotional muscle. And the first step toward developing one's emotional muscle is self-assessment, evaluating what shape you are in and acknowledging your baseline for expanding your emotional capacity. To assist this capacity building, we begin our training by encouraging students to engage in reflective exercises to understand and appreciate how one's immediate family members influenced their emotional development. We also train them to use positive and negative scales to rate their current feelings. These exercises help mediators learn to attend to their own emotional state while better understanding the opportunity for developing a higher level of emotional competency.

Self-management of one's emotional well-being also includes self-care and self-compassion. It's paradoxical that many of us are drawn to this profession by a profound need to assist others, and doing so effectively requires extraordinary amounts of empathy and compassion. Yet when the mirror is reflected inward, we find an industry-wide epidemic of compassion fatigue and burnout caused by an inability to access the same degree of self-compassion as one has available for others. Simply put, one cannot continuously work close to the flame of high emotions without giving equal attention to one's own well-being.

The journey towards delivering on the promise of mediation begins with the need to develop the highest levels of mediation competency in those who intervene in conflict. The professional acumen required to effortlessly deliver valuable skills and techniques in the presence of discord and high emotions begins with a commitment to honest self-reflection and thoughtful self-management focused on mind, body, and emotions. Yet it must be emphasized that the noble goals of achieving these levels of emotional intelligence and social competency will not come from books, blogs, or webinars. Instead, they will evolve only from a lifelong commitment to self-reflection and personal development. These lessons, not surprisingly, return us to the words of Mahatma Gandhi, "be the change you wish to see in the world". If the goal is to realize the full potential of mediation, it must begin with a personal journey, one devoted to high-quality education, including personal development. Without this commitment, the promise of mediation will remain aspirational, a promise unfulfilled and a missed opportunity set against the urgent needs of a nation.

That said, I know the promise of mediation lies within our grasp. I know first-hand that there exists a commitment to the quality of potential excellence in India. Most important, I know the mediation process works. I've been a first-party witness to agreements and moments of reconciliation that no one thought possible. And therefore, I am a true believer in the power of mediation to address a wide range of human conflicts and suffering. For aspiring mediators who may feel daunted by the challenges that lie ahead, I will leave you with one of the most rewarding lessons from my career in mediation: it's impossible to become a better mediator without also becoming a better person. Fulfilling the promise of mediation will require us all to become a better version of ourselves.

BRUCE EDWARDS

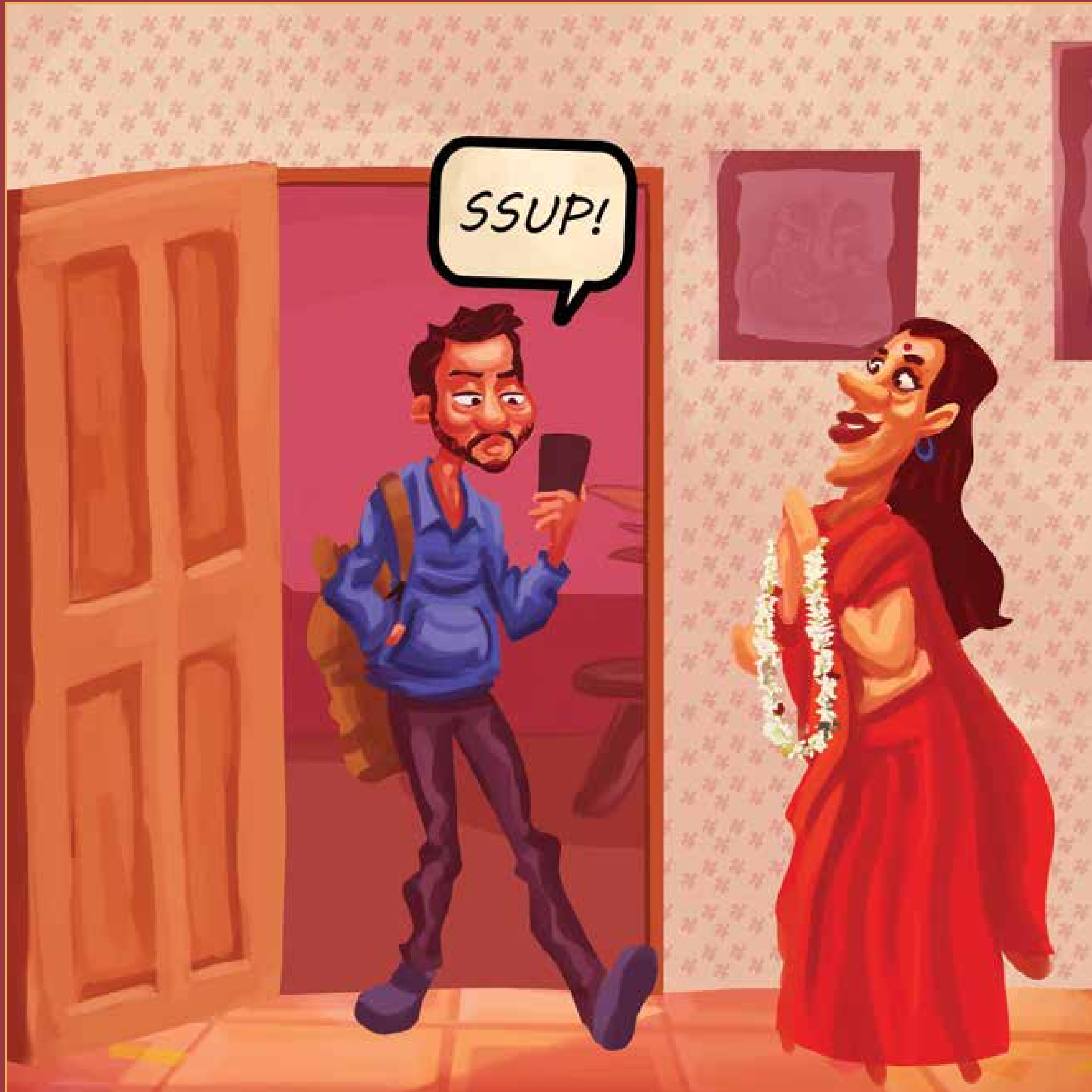
Bruce Edwards was one of the pioneers in developing mediation as a tool for resolving commercial disputes in the United States.

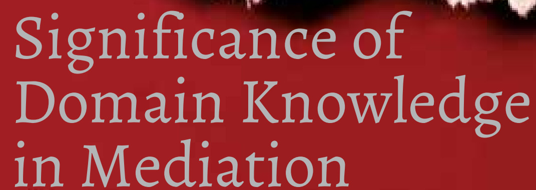
A professional mediator since 1985, he has mediated over 8,000 disputes throughout the United States, focusing on large, complex disputes often involving high emotions. He has played a central role in establishing the largest and most successful dispute resolution company in the country, JAMS, where he served as Chairman of the Board while supporting the career development of hundreds of commercial mediators. In addition to his full-time mediation practice, Bruce has devoted a substantial amount of time sharing his practical knowledge with others. Since 1995, he has taught Advanced Mediation at the Strauss Institute for Dispute Resolution of Pepperdine University. More recently, he has trained hundreds of aspiring mediators in Europe, Asia, South America, and Africa. His international work continues, working with government leaders and institutions to find ways to implement mediation in justice systems around the world.

Bruce Edwards co-founded Edwards Mediation Academy in 2014 with his wife, Susan Franson Edwards, with the goal of delivering the highest quality skill development through online learning to all corners of the globe.

ESTABLISHING EFFECTIVE COMMUNICATION

Hearing not only what is being said but also what is not being said





Significance of Domain Knowledge in Mediation

A.S. Chandhiok

Introduction

Whenever one comes across 'mediation' in judicial parlance, what crosses one's mind, is the inability of courts to decide the existing pile of cases. Unburdening the courts is certainly one objective of Alternative Dispute Resolution (ADR) and an alibi for mediation. Whatever it may be described or termed as, mediation is certainly one of the most democratic processes of dispute resolution, for none of the parties is unequal in the process and participation. The process upholds the philosophy 'not to injure another' (*alterum non laedere*) in its true sense. Here, mediators have a vital role. The process is confidential, structured and smooth. It is meant to bring justice through cooperative behaviour, negotiation with a resolve to end the dispute. In the adversarial scheme, litigation is considered to be a 'legal battle.' In mediation, 'relationships and interests' occupy the field. Mediation is free from the differing temperaments and approaches of Judges! The parties themselves are their own Judges.

With the advent of amendment to Section 89 of the Civil Procedure Code in 2002, mediation gained entry as a mode of settlement supervised by the Court. Through this section the Court is empowered to, "effect a compromise between the parties and

shall follow such procedure as may be prescribed." But, the real power of mediation remained opaque and unexplored. However, time showed the difference.

Mediation provides the disputants with a wide range of solutions compared to those available in an adjudicatory process, e.g., an apology, an explanation; addressing existing personal, professional or past relationships on new terms; or an agreement by one party to do something without any legal obligation to do so. Mediation in other words promotes renewal and reconciliation, for it is designed to restore relationship. Mediation has emerged as an effective alternative to litigation, offering disputing parties an opportunity to resolve their conflicts and disputes amicably, cost-effectively, and efficiently.

Domain and Domain Knowledge

Domain and domain knowledge are inextricably intertwined, the latter being more dependent on the former. For every action or business, there is a domain. Domain literally means the territory over which sovereignty is exercised. It is a different matter as to who exercises sovereignty over the territory. Domain gains a different meaning in information technology. Yet domain is domain, and it is dominant for mediation.

For mediation, domain means the complete causal area and all other things associated with it. For different causes, the category of knowledge will vary. For example, a matrimonial dispute cannot be treated the same way a medical negligence dispute has to be. Similar is the difference between a commercial dispute and a land property dispute. The facts are different, the causes are different, the applicable laws are different. The clear application of facts to laws and *vice versa*, will emerge from the domain, where the sense and sensibility rest, and are never to be meant dormant. The plains of mediation or the field from where it plays, is its domain – the domain of the mediator as well. Anything and everything related to the plot and performance takes shape here. It could be facilitation, transformation, advisory, wise counsel, tradition based procedures and settlements.

In short, 'domain' is filled with a range of concepts, operational definitions etc. It is here that the voluntary, non-binding process called mediation, in which a neutral third party, the mediator, assists the parties in arriving at a settlement, operates.

Knowledge and Role of the Mediator

There are many possible ways in which mediation could be defined and modelled. In this voluntary, non-binding process, it is not possible, and not necessary, to lay down strict procedures. It is better to restrain the procedural commitments to the minimum. The knowledge needed in the domain is to provide the disputing parties with the path to explore the realities and legalities of their stated positions during negotiations and assist them in resolving the dispute collaboratively within legal parameters.

The mediating parties are not supposed to be familiar with the process of mediation. The mediator being a neutral third party, the disputants are likely to perceive the mediator as an authoritative figure in the process and take his inputs earnestly. The mediator has to have the

procedural knowledge or ability to persuade the parties that the success of mediation ultimately depends on their willingness to work towards a solution. To highlight the importance of being flexible and open-minded. To emphasize the power of self-determination. To explain the advantages of mediation as a consensual, confidential and voluntary process. This ability to create collaboration is part of the mediator's domain knowledge. This is the initial stage of building trust and confidence – something like building the confidence of a patient before a major surgery!

The role of the mediator is crucial. He must possess a combination of interpersonal and problem-solving skills to achieve successful outcomes. Domain knowledge is one of them, that strengthens the mediator's credibility, understanding, and decision-making abilities, ultimately contributing to more successful conflict resolution outcomes. However, domain knowledge also includes another crucial aspect. It includes the mediator's understanding of a specific field or subject matter. In the context of mediation, this involves knowledge of the industry, laws, regulations, and cultural norms related to the dispute. One of the most significant benefits of domain knowledge of the subject matter of the dispute is that it bolsters the credibility of mediators. When mediators have knowledge of the fundamental principles in the subject matter of dispute, they are perceived as more legitimate and trustworthy by the disputing parties.

Inadequate domain knowledge can pose several risks. The mediator may struggle to understand the underlying issues driving the dispute, which can make it difficult to facilitate productive communication and negotiation. This can result in a breakdown of the mediation process and may force the parties to seek other methods of resolving their conflict. Experience has shown that a mediator need not be an expert in the law which is the subject matter of dispute, but must have knowledge of the fundamental principles thereof and the legal position as it exists on the date when a dispute is being mediated. This helps the mediator to bring not only the dispute between the parties to a settlement, but also ensures that nothing is agreed in the mediated settlement which is contrary to any statutory provisions, principles of law or fundamental policy of law.

A few examples in the above context while respecting the confidentiality of the actual terms of settlement:

If a dispute is with respect to an immovable property, the mediator must know how a transfer of immovable property can be effected. It can be a distinct instrument if the settlement is within the family as compared to an instrument which may be between two strangers. Distinction between the principles of restitution, relinquishment and transfer would have to be understood by the mediator. In the absence of the same, even if the parties arrive at a settlement, the same may not be an enforceable settlement, or may result in further disputes between the parties.

In a matrimonial litigation, especially in relation to custody of a child, the mediation settlement must include the right of the child regarding visitation and how parental alienation has to be avoided.

In a commercial matter for recovery of money, where property is to be transferred for payment of a debt, a mediated settlement will have to describe how a party to the settlement would transfer his/her property unto the claimant. If the property had been purchased only a year prior to the mediated settlement, how it would result in short-term capital gain would be relevant. The property may go to the creditor, but the person giving the property may have to pay short-term capital gain tax. This can result in paying more than the amount of debt owed to the creditor.

The Finance Ministry has made an amendment in the Finance Bill to do away with long-term capital gains taxation benefits for investments in debt mutual funds made after April 1, 2023. If a dispute arises between the parties with respect to investments made in the debt mutual fund, the mediator should have knowledge about debt mutual fund investment. Only then would it be possible to arrive at a mediated settlement in accordance with law. The Micro, Small and Medium Enterprises Development Act (MSME Act) provides that bank guarantees have to be given to avail exemptions in the stamp duty. The same has a direct link with the commercial production in the unit.

In the absence of domain knowledge pertaining to infrastructure projects or contracts relating to supply, erection and commissioning of plant and machinery, it might be difficult for a mediator to understand nuances of the dispute with respect to such projects.

Thus, domain knowledge in the mediation process becomes extremely significant. It enables the mediator to ask the right questions of the parties at every stage of the process for effective communication. This is also essential for drawing up the mediation settlement, for in the absence of knowledge of basic principles of law relating to the subject matter, mediation settlement may be impractical or unfeasible.

There have been instances where a mediator having domain knowledge, has been able to empower the parties to resolve their disputes and draw a fine settlement. In the National Green Tribunal, the case entitled 'Vedanta Aluminium Ltd. v. Orissa State Pollution Control Board,' the mediator appointed by the Tribunal had knowledge of environmental laws and also pollution control measures, and could therefore assist parties effectively in arriving at solutions acceptable to them and drafted a comprehensive mediation settlement. Similarly, in the case of Board of Cricket Control in India, a dispute over termination of franchise came about. The Hon'ble Bombay High Court appointed a mediator (a former Judge) who had domain knowledge both of substantive and regulatory aspects of the dispute, resulting in an effective mediation settlement. The Punjab & Haryana High Court in the case of DLF v. Kunal Bakshi appointed a mediator. He had the requisite domain knowledge of real estate development and construction. This too resulted in a meaningful, practical and feasible settlement between the parties.

Domain knowledge is unavoidable when legal reasoning is required to analyse the compliance of parties' positions in intellectual property and trademark disputes.

The above examples clearly manifest that the mediation process could be incomplete and the result ineffective if the mediators do not possess the complete domain knowledge. The mediator is not expected to be an expert, but must possess the basic knowledge of principles of law, rules and regulations to effectively understand the dispute and then enable the parties to support the same on a win-win basis.

Therefore, it is imperative that the training of mediators should necessarily include acquiring process expertise and domain knowledge as well. This will make the mediation process more dynamic and satisfactory. These elements are as essential as communication, negotiation and other communication or interpersonal skills.

The Promise

Mediation has existed since time immemorial. India can be proud of the fact that in a communitarian society like ours, mediation was historically the choice for dispute resolution at different points of time. Today, with the proliferation of disputes and conflicts and lack of infrastructure to meet the demand, mediation is being chosen because of its natural and simplistic nature. It has won national and global acceptance which is increasing steadily and quickly.

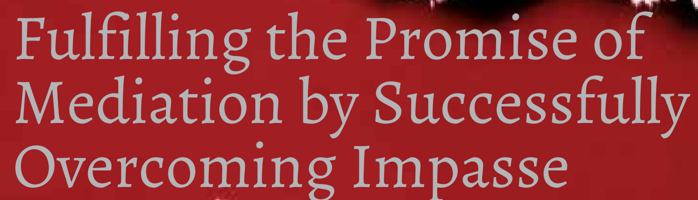
In the words of Chief Justice Chandrachud, "Mediation as a processual intervention in the legal system fulfils other instrumental and intrinsic functions which are of an equal, if not greater importance. In its instrumental function, mediation is a means in fulfilling stated objectives. The intrinsic function of mediation emphasizes the value of mediation as an end in itself." This means mediation has come to stay and promises better resolution. As life can never be static, disputes and conflicts arising out of it and their resolutions will also be subject to change. But the promise of mediation will always show all its stakeholders the best road to resolution and peace!

AMARJIT SINGH CHANDHIOK

Amarjit Singh Chandhiok, a gold medalist and topper from the Faculty of Law, Delhi University, is presently the President-Elect of The Bar Association of India. He is also President of INSOL India, a renowned association of turnaround and insolvency professionals, and Maadhyam, International Council for Conflict Resolution, an organization that aims at excellence in the development of law and resolution of conflict through alternative dispute mechanisms. He has been President of the Delhi High Court Bar Association for six terms.

Mr. Chandhiok is a distinguished Senior Advocate practicing in the Supreme Court and High Courts in India. A former Additional Solicitor General of India, he has been Principal Counsel to the European Union Commission from August 2013 to March 2016. He is known for his expertise in in civil law, insolvency matters, arbitration and mediation. He is a qualified mediator and mediation trainer who has been accredited by the Singapore International Mediation Institute and the Straus Institute for Dispute Resolution, Pepperdine University, USA. On 9th January 2023, Mr. Chandhiok was honoured by the Straus Institute for appointing him as 'International Honorary Senior Fellow.' This was in recognition of his distinguished career and service to the field of mediation, including in the development of international mediation and dispute resolution. Also, for the impact of his leadership on the current generation of students, lawyers and mediators. He is also a member of the Russian Centre for Dispute Resolution of the BRICS Forum, London Court of International Arbitration and Indian Council of Arbitration.

Mr. Chandhiok been conferred with many prestigious awards for his distinguished work in the field of law. He has been awarded two doctorates (honoris causa).



Fulfilling the Promise of Mediation by Successfully Overcoming Impasse

Victor Schachter

Introduction

Almost every dispute in mediation reaches a point of impasse, many times quite early in the process, primarily because of the strong feelings of the disputing parties. Being prepared for such an event, and knowing how to best overcome the impasse, will greatly increase the likelihood of a successful outcome, achieve a good resolution for all the parties, and fulfill the "promise" of a worthwhile mediation process and experience.

Somewhat surprisingly, especially with new mediators, theymay not even recognize when an impasse has been reached. While there are many definitions of "impasse", for this article it is defined as a situation in which no further progress seems possible, especially because of the disagreements of the parties, resulting in a deadlock. To break this deadlock, I suggest the following key strategies; (1) assess the origins of the impasse; (2) evaluate the nature of the impasse; (3) implement focused efforts to break the blockage, such as bracketing, and if necessary, a mediator's proposal; (4) specifically identify the parties' areas of resistance, and address them directly; and (5) always demonstrate the finest mediator qualities that promote a fair, voluntary and productive process.

Let's briefly take a closer look at each of these strategies:

Origins of the impasse

Knowing and understanding the origins of the impasse often suggests to the mediator how to approach possible resolutions. For example, are the parties standing on principle; showing a lack of knowledge about the facts or the law; struggling with limited financial or material resources; ignorant of realistic bargaining ranges; incompetent or poorly represented; missing key stakeholders not yet invited to the mediation; or lacking sufficient authority to realistically reach a resolution? Are the parties motivated by personal animosity, need for vindication, pride, ego, fear of losing face or being taken advantage of, or fear of change? The answers to the questions will open up productive avenues of discussion and explorations, and possible settlement terms. For example, where a claimant feels personally humiliated and victimized by the alleged conduct of a superior, acknowledgement of the pain and a sincere apology (even without admitting guilt or unlawful conduct) can often go far to break an impasse and open up candid and renewed possibilities for settlement.

Evaluating the steps to address the impasse

Determine if there is truly a deadlock; don't be discouraged by so-called "final offers" as there may yet be a lot of room to negotiate a resolution. In most cases a "final offer" may yield many more proposals, albeit within a narrower range. Diagnose the critical problems, causes and claims, identify substantive and process issues, each of which may be critically important to address.

Breaking impasse

Shift gears by using both joint and private caucus sessions; acknowledge and remind the parties of their commitment to a good faith process to reach resolution; fully review the parties' BATNA and WATNA, carefully analyzing and charting out the likely litigation outcomes/risks; take a break – a brief timeout, a walk, a different location to meet, or rest for a day or so (or more, giving parties the chance to consult with others who might be helpful). In certain cases, suspending the mediation, to allow the parties to proceed with further litigation, can provide a very sobering experience, and bring the parties back with a more realistic and fruitful negotiation "mind-set." This is especially true where one or more parties has highly exaggerated (and probably mistaken) expectations as to the results of litigation or strengths of its case.

Focus on the goal to reach a voluntary resolution, often with remedies not available in court litigation in a timely way; remind them that the parties (not mediators) resolve disputes, and that the purpose is not to punish any party. Always emphasize as much as possible what really addresses the needs of the parties – not on fine points of law as or who has the best legal or factual argument. Revisit options as necessary; move off a topic that is an impediment, and work on more resolvable issues. Frequently, resolution of secondary issues builds trust and confidence to tackle the more difficult ones. Sometimes, though rarely, you take a longer break and start over – usually only effective where new, important stakeholders or experts are brought into the process. Consider using expert resources to help clarify complex issues as property/stock/business evaluations and the like.

Don’t hesitate to use varying techniques

Of course, engage in very active listening, which includes silence and reflection in a compassionate and caring manner. Shift perspectives from gain to loss. Bring in a fact-finder, or a possible legal expert (agreed to by the parties) in complex matters. Inject humor in a respectful way to lessen the tension and provide perspective. Always hold out hope and optimism that a settlement is possible with the parties’ continued good faith efforts. Change location or sitting arrangements to support stronger personal engagement; propose hypothetical offers. Where ongoing shuttle diplomacy is not working and the parties are making only minor movements with a large gap in offers, consider the use of “bracketing techniques” whereby the parties can more flexibly discuss ranges of possible resolution, rather than a specific, hardline number. If negotiations are exhausted, and the mediator senses, based on confidential information that has been provided, that a mediator’s proposal is timely and might achieve a settlement, this certainly should be considered after fully discussing with each party how that process works and gaining their consent. However, it is very important that the mediator not suggest such a proposal before it seems really necessary, since it is the parties’ voluntary efforts that must drive the outcome to the fullest extent possible.

Addressing party resistance

Carefully consider the best approach to address resistance: ask open-ended questions to explore parties’ needs, concerns and underlying interests (brain-storming”); address those needs and interests; educate the parties where appropriate; listen actively, carefully and objectively ; where possible demonstrate how outstanding proposals will satisfy the resisting parties’ interests; explore options; if helpful refer to objective criteria and standards (e.g., property evaluations, stock option values); emphasize the positive aspects of the proposals, but do not pressure, intimidate or oversell either party; address any concerns about the capability of a party to honor the terms of the agreement (lump sum payments, staggered payments, third party holder of money to be distributed over time, etc.). In discussing the possible negative consequences of not reaching an agreement, permit the resisting party to express how he or she feels; defuse inflammatory statements or rhetoric.

Finest mediator qualities that help with impasse

These qualities are endless patience; constant optimism; objective detachment; perseverance, persistence, flexibility, calm and a respectful sense of humor (and perhaps some good story telling). Such behavior truly reflects the professionalism and artistry of a good mediator and a laudatory, humane and fair process.

Conclusion

This modest article is only meant to highlight some of the many and varied approaches which can be utilized to break impasse and reach a successful resolution, and it is certainly not intended to be all-inclusive. Indeed, many mediators have developed other unique “tools in their toolbox” from which we can all learn and experiment, and determine what works best for you. Most importantly, the quality, sincerity and credibility of your effort will greatly enhance the success of the parties and bring about the peaceful, effective and timely resolution of their disputes. It will also enhance your joy and satisfaction in providing such a unique service to the parties, their colleagues and their loved ones.

VICTOR SCHACHTER

Victor Schachter is the founder and president of The Foundation for Sustainable Rule of Law Initiatives (FSRI), an NGO dedicated to establishing sustainable mediation centers globally to achieve timely, fair and peaceful conflict resolution in countries with backlogged court systems. He has served extensively as a mediator, and as an advocate representing clients in numerous mediations and arbitrations over his fifty-year career. In addition, he has led rule of law and related educational initiatives promoting judicial reform, alternative dispute resolution and judicial case management in India, Brazil, Liberia, Bulgaria, Croatia, the Republic of Georgia, Turkey, Vietnam and Malaysia, among other countries. Mr. Schachter has been honored as a California Lawyer Attorney of the Year for his service in judicial reform, rule of law and mediation building. In October, 2020, he received the Mediator of the Year Award from The Mediation Society of San Francisco for "outstanding contributions to the field of mediation." His work has been reported and cited in numerous publications. Previously, he was a litigation partner at Fenwick & West LLP in Silicon Valley, California for 17 years.

The Multiple Facets of Promises and Mediation

Sriram Panchu

1. Does mediation have promise?

We have come a full circle. From resolving disputes amongst ourselves, to bringing them to the attention of an external Panchayat, to having our day in court – it seems that the climate of conflict resolution demands that we go back to simplifying that which we have deliberately complicated over the last many years. While our legal system has tried to construct procedures and statutes to ensure a just resolution of the conflict, it has often failed to provide practical meaningful solutions or to provide closure to those who are primarily affected by such conflict. This certainly explains why mediation has promise – it carries within itself a promise of mending, of coming together, of finding answers and some respite in the grey between the black and white. And while mediation has taken a long time to find its rightful place in India, it is here to stay. This is evidenced by India's matchless performance in its court annexed mediation system. In the space of less than 20 years, we have thousands of mediators, mostly lawyers but also others, who deal with lakhs of cases and manage to settle more than half of them.

2. What is so promising about mediation?
To begin with, it gives a chance for the parties in question to come and sit across a table to talk about the dispute, a liberation from the hopelessness of relying on lawyers and judges and clerks and the propriety of the legal system to decide the logical end of a conflict that primarily affects these parties. It gives back the power to those in conflict to decide how it should be resolved. Further, it is consensual, confidential, and fractional in cost and time. It delivers solutions which all parties can accept, instead of judicial verdicts which always leave one party, and sometimes both, unhappy. It ends dispute finally. It focuses on parties rather than the law, on the present and future rather than just the past. Mediation settlement agreements are enforceable easily. And it repairs and restores relationships.

3. What exactly is the promise?
The promise entails that a culture of conflict resolution be cultivated wherein the parties can participate in finding ways of resolving their conflict. It's no longer 'Alternative' in ADR, it is Appropriate Dispute Resolution. Giving a chance for the parties to diagnose the problem at hand and choosing the right remedial method, instead of taking out the surgical saw at first blush and amputate the relationship by aggressive notices and pleadings.

4. Will promises work?
They have worked. There are plenty of success stories about how mediation has resolved even decades old complex disputes, and these need to be circulated and made aware of. This is of prime importance. Promises must be seen to be kept, rather than just be kept as promises.

5. What is better than the promise?
A certainty of the promise getting acknowledged from those already a part of the legal system. Mediation is at a stage where its legitimacy cannot be questioned, it is no longer the ignored cousin of litigation but a rightful member of a family, and yet it needs a push and a nudge from those who actively participate in the legal system to get that assuring sense of credibility.

6. What does the promise mean?
The promise indicates a coming of age, an evolvement of the way we resolve our disputes, an evolvement of our legal structure, an evolvement of the society in general that prefers a party-centric approach to bring disputes to their logical end.

7. What does the Mediator promise?
Time, patience, attention and confidentiality. In addition to that, the promise of identifying the root of the dispute and taking it to its final conclusion in a way that involves actually hearing those who are primarily affected by the dispute, a promise that has not been kept by any other forms of dispute resolution till date. It is the promise of the Mediator to move the parties from a "me vs. you" approach to a joint search for solutions to the dispute. And since the settlement options are floated by the parties, a greater sense of accountability rests on their shoulders to meet such ideas with an open mind.

8. What does the mediation system promise?
A promise to bring out a radical shift in the way we view conflict and its resolution, better yet an amicable resolution.

A promise of preventing conflicts, unlike litigation and arbitration, mediation can be deployed at a nascent stage of a conflict as well, making it preventive and reformative in nature.

A promise of accommodating a large set of matters including - Personal and Matrimonial matters. Civil and Consumer. Minor Criminal matters. Corporate and Commercial. Tangible and Intellectual Property. Negotiable Instruments and Rent Control. Family Business. Disputes with Government. Transnational Disputes. Neighbourhood Disputes. Public Disputes of the highest kind. And with it, the promise of lightening the load of the litigation benches as it moves cases on to mediation tables.

9. How should this promise be upheld?

Firstly, it needs a foundational Mediation enactment which is comprehensive and purposive and helpful. This should set out the basic principles and embody a code of ethics. Create the necessary institutions but keep the flexibility of the process intact. Certify training institutes and service providers and have some standards. Avoid duplication between mediation and conciliation; world over it is now recognised that the terms are synonymous and mediation has become the more accepted term. Think of it as a professional activity and encourage its growth accordingly. That means stop thinking of it only in the court annexed sector where mediators function after court hours for a pitiful honorarium. That's like a poor cousin of legal aid services. Instead see it as a full-fledged career which can serve up reasonable incomes.

Keep a proper place for judges in the mediation ecosystem. Judges are excellent for propagating it, and for setting up and overseeing court annexed mediation systems. But when it comes to appointing mediators for specific cases they should give parties the first option to select their own mediator. When making appointments themselves they should look for experience and credibility, and look to giving younger mediators a boost. Retired judges, if they have the temperament to mediate, will make exceptional good mediators especially when they have built up impressive reputations for probity while in service. However, the switch from decision-maker to facilitator is crucial, and it does not come easily.

Combine arbitration and mediation; there is a happy harmony between the two which needs to be encouraged. Disputants can be encouraged to try mediation at multiple stages of an arbitration – before commencement, during the process, before the award is passed, before Section 34 proceedings. And there are cases where mediation leaves an unresolved gap, and this can be sorted out by a well-designed quick arbitration.

Ratify the Singapore Convention on Enforcement of Settlement Agreements of International Commercial Disputes reached in Mediation. India was one of the first signatories. The Convention provides for quick and easy enforcement in any country across the globe which has signed and ratified the Convention. At one stroke, all the difficulties of enforcement present in litigative decrees or arbitral awards are done away.
This is a great boon for mediation, and a great encouragement to businessmen to use the process in disputes with persons and organisations from another country. This will also enhance the ease

of doing business in India; we know that foreign investors and collaborators are wary of the Indian legal system's delays.

Courts should get realistic about costs, not dispose of matters heedless of the pain that one party has been put to by frivolous and unmerited litigation. Costs should be based on actuals and current basis not on an outdated taxing system. The fear of costs is the main driver for cases to go to mediation in foreign legal systems. Once parties are made aware that costs will follow the litigation, they will form lines to attend mediation tables, and will try their best to settle there. Another method is for the court to encourage parties to make offers for settlement. If a party receives an offer which he does not accept, and in court does not achieve better, then he has in fact wasted the time of the legal system and the resources of his adversary by refusing a reasonable offer. A practical list of incentives and disincentives is an excellent propeller towards success in mediation.

10. Lawyer and Mediation: Promise or threat?

There is plenty of benefit for lawyers in mediation. They represent parties, and can charge professional fees for advice and attendance. Their clients will be pleased with their efforts in helping them get a good settlement, and as we all know, there is nothing as good for practice than a happy client. And good lawyers like to see good happening to their parties, and few things are as good in this world as ending conflict and enabling people to have better lives.

11. What about promises to mediators?

Of course they have wonderful work to do, blessed by the Almighty's preference for peace makers and peace keepers. But we must both promise and live up to the promise of giving them the work, not leave them stranded after training programmes. There is plenty of potential work lying in court dockets accumulated over the years, in the cases that can be mediated before coming to court, and the disputes that don't go to court but nevertheless need remedy. But it is crucial to bear in mind that such work must be remunerative and capable of yielding reasonable incomes; Of course there is the satisfaction of doing good, but there are stomachs to feed and lives to live comfortably.

12. And the mediator's promise to mediation?

That we try, we try our best, we try where we can, and we keep trying. In the knowledge that we are settling for more, that talk works, and the best way to handle dispute is to end it. With the gratitude of being the foot soldiers of a revolution in the law.

SRIRAM PANCHU

Sriram Panchu is a Senior Advocate of 46 years standing at the Bar. He is an internationally recognized Indian mediator and an alumnus of the Government Law College, Bombay. He commenced practice in 1976 at the Madras High Court and was designated a Senior Advocate in 1996. His field of law practice is constitutional and commercial law. He has appeared pro bono in several significant public causes before the Supreme Court and High Courts.

For almost thirty years he has been in the forefront of the mediation movement in India. In 2005 he was instrumental in setting up India's first court-annexed mediation centre at the Madras High Court, and has assisted the Supreme Court and other High Courts to do so. He has trained over a thousand mediators. His books on mediation are Settle for More (2007), Mediation Practice & Law (2011, 2015, 2022) and the Commercial Mediation Monograph (2019). He has mediated a large number of complex and high-value commercial disputes in India and abroad. He has also mediated significant family disputes including inheritance and family business disputes. He has been appointed by the Supreme Court of India to mediate significant public disputes; this includes a major border dispute between the States of Assam and Nagaland, and a dispute within the Parsi community in Bombay over a ban on priests. In March 2019, he was appointed on a three-member panel to mediate the Ayodhya Ram Janmabhoomi-Babri Masjid dispute.

In December 2018 the Bar Association of India conferred on him its Lawyers of India Day Award of Honour and Distinction. Mr. Panchu has served on the National Legal Services Authority of India, (NALSA), and was the first President of the National Association Mediators India. He was also a Director of the International Mediation Institute (IMI), The Hague. He is on the panel of senior mediators of national and international institutions. He serves on the committees of several public charitable and social organisations.

UNDERSTANDING BODY LANGUAGE

Communication is not just about talking and listening, but also about how the body speaks

Musings of a Judge: Mediation a Game Changer

Neena Bansal Krishna, J.

I would like to acknowledge the research assistance provided by my Law Researcher Ms. Esha Kumar for her contributions.

"If you can keep your head when all about you
Are losing theirs and blaming it on you,
If you can trust yourself when all men doubt you,
But make allowance for their doubting too;"[1]

– Rudyard Kipling

It was just another day in the court. I briskly rushed through the corridor in race with the hands of the clock as they moved to strike 10.00 a.m. A little frazzled being just in time, my attention was caught by an old man, sitting forlorn and dejected, anxious, and angry, gazing into emptiness. Many questions came rushing to my mind and also struck a discordant note in my heart.

During the mediation, I got to know that the old man was one of the two brothers involved in a property dispute for the last 20 years. The eye opener for me was their obstinacy to fight for the property, at the age of 84 and 86 respectively. As the conversation progressed, I realized that the older brother had no ulterior interest to acquire the property to the exclusion of the younger brother, but his only disinclination was that the younger brother, despite being raised, educated, by the older brother, who had also conducted his marriage as a father

1 A Poem: Rudyard Kipling, "IF"

figure, failed to give him due love and respect for his sacrifices. The disrespect shown by the younger brother and his family was the only impetus for the older brother to pursue the litigation. The suit had gone on for ages without any resolution. Evidently, the conflict stemmed from a disagreement that was driven by an individual value system with underlying emotions of hurt and ego. It led me to ponder whether either of the parties would truly be satisfied with the adjudication of such a matter, where, even after adjudication, the root cause of the dispute would still remain unaddressed and unresolved.

Our adjudication system is built around concretized and strait jacketed pillars of Rules that stand on a foundation of an adversarial framework. Irrespective of the era of our society, conflict has persistently remained a constant in legal battles or interpersonal relationships with every individual having an independent viewpoint that arises from a vested interest. All stakeholders are accustomed to viewing any dispute in a one-dimensional way on the anvil of law as a subliminal step rather than an ace in the hole measure. For some, the only option to deal with a dispute is through court litigation despite its volatile, and at times, disruptive ramifications. The outcome - one side wins while the other loses!!

The subtraction of emotions seems to be a fundamental principle by which the court transforms a complex social issue to fit the normative legal principles and takes a particular expression reflected in the decision which might be the diktat of law, but which often leaves a sense of dissatisfaction as the underlying conflict may continue to linger. When looking closer at the dynamics of legal proceedings, the emotional and rational perspectives on a conflict work as a dialectic within the legal narrative.[2] From there, the juridical decision takes a step back in dissolving a conflict.[3] Similarly, the idea of emotional implications to rational justice challenges the prevailing emphasis on the notion of objectivity in the field of law.[4] That is not to say that the traditional form of dispute resolution through adjudication has lost its efficacy, relevance or has become obsolete, but only a realization has dawned that litigation is not a "one-size-fits-all" solution and there is a need to explore other mechanisms for dispute resolution.

Mediation came to be introduced by way of Amendments in 2005 in the Code of Civil Procedure, 1908 like a whiff of fresh air. Through the prism of mediation, the dispute split into myriad colours symbolizing that disputes are multi-layered with emotions being one major component, and that there are various levels at which disputes need to be addressed. My journey through a judicial career has witnessed multitude of cases being heard each day, which are invariably a reflection of the arduous judicial process that each individual is engaged in. Be it dejection, dissatisfaction, hope or joy, once placed on a judicial platform, we are precluded from being enveloped by emotive arguments that are devoid of any legal foundation. Mediation however, brought in a change in mindset – from adversarial

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2 Dahlberg, L. (2016). Spacing law and politics: the constitution and representation of the juridical. Abingdon: Routledge

3 Ibid

4 Bergman Blix, S & Wettergren, Å.(2016) A Sociological Perspective on Emotions in the Judiciary Emotion Review,Vol. 8, 1:32-37 Sage Publications, Ltd.

to conciliatory, from compromise to collaboration, from positions to interests and from the past to the future. Mediation is totally transformative and self-empowering. The process itself calls for introspection with one's inner self to enable the separation of the chaff from the grain.

A mediation professional, unlike a Judge, both consciously and spontaneously, performs *emotional labour*, to borrow the term from Hochschild, A. R.[5], in order to address and manage suppressed emotions in the dispute, thus managing both affect and atmosphere, having implications for how the proceedings take shape. Emotional management in mediation has gained sociological attention which shows that the emotional regime constitutes an integral, yet underestimated part of the legal venture[6] converting the court rooms from a battlefield to a place of peace. The general judicial inclination to adjudicate upon disputes with little attention to the emotional aspects needs a relook which has been brought to the fore by mediation.

The following is an example of how the authoritarian disposition of judging silently gave way to empathic listening:

In one case, the lady insisted on return of jewelry as part of settlement of divorce litigation. No other alternative was acceptable to her except the return of jewelry. The situation became exasperating since the entire matrimonial dispute including custody, alimony and divorce stood settled but was stuck on the aspect of jewelry. Tempers went high with allegations and counter allegations. The parties were called in separate sessions. What was revealed by the lady was that one set of jewelry given to her belonged to her grandmother which she had cherished since her childhood for which no monetary value could be fixed. With some persuasion and effective use of separate sessions, the husband conceded to return the jewelry. However, now came the ego and face loss as he was not agreeable to admitting that the jewelry set was with him. Some innovative ideas were generated and eventually the matter got settled. This may not have happened if handled in Court. The clouds of peace descended on two families and the smile on the face of parties were more valuable than 10 cases decided in the Court.

Given that mediation is essential for making a reconnaissance of the interpersonal and emotional elements in a conflict, this effort can be fruitful only if the parties participate in the process with an intent to resolving the conflict. In any given conflict situation, it is the parties that are best equipped to comprehend the issue at hand. However, their inherent predispositions and presumptions, i.e. their *coloured glasses* prevent them from understanding the perspective of their adversary. Being cognizant of that, expecting two minds to be concordant, is a utopian expectation. To quote Mahatma Gandhi, "Conflict is an inescapable consequence of any human interaction or relation. Peace is not the absence of conflict, but the ability to cope with it." It is for this very reason that a third party acting as a neutral mediator, who adorns the

5 Hochschild, A R. (2012). The managed heart [Electronic resource]: commercialization of human feeling. Updated ed. Berkeley, Calif.: University of California Press

6 Wettergren Å. & Bergman Blix, S. (2016) Empathy and objectivity in the legal procedure: the case of Swedish prosecutors, Journal of Scandinavian Studies in Criminology and Crime Prevention, 17:1:19-35.

role of a peacemaker, becomes essential, as he/she enables each party to look at the dispute with an open mind. The herculean task of the mediator is to evoke faith in the process, mutual trust between the parties, an honest intention to settle and the vision to rationalize individual emotions in the warring parties to be able to effectively resolve the *inter se* disputes.

The role of the advocate, their support and assistance in mediation can never be over emphasized. Their endeavor, no doubt, is to defend their client's interest to the best of their abilities, but at the same time, to also recognize the best interests of their clients. It is encouraging to see that lawyers are now donning two hats by providing their services in the judicial proceedings as well as in the mediation process.

In one case, the dispute was between an old man and his own son. A little questioning revealed that the father was adamant that his son and his family vacates his house. The underlying reasons were ego, obstinacy, and intolerance towards their independent ideologies. Human emotions recognize no statutory rules. The father had all the affection for the son but he strongly felt betrayed because his son had married outside their religion, much to the dismay of the father. Preventing the defiant son from continuing to stay in the property or claiming any title in the property, seemed to have become the sole means to settle scores and punish the son for his perceived misdeeds. The only solution according to the father was to somehow make the son leave his wife. No amount of reason, logic or counseling could address his ego, difference in perception or the feeling of anger and hurt. The suit had prolonged for years without any resolution in sight. What was visible as a simple dispute for property, in fact stemmed from the varied emotions which laid hidden under the surface. The moot point was whether a judicial decision of such a case when the root cause of the dispute would remain unresolved, satisfy the parties, repair their relations and unite them. Addressing the inherent craving for respect and acknowledgement of the sentiments of the father brought a happy end to this family dispute. The smile on the face of all as they left the mediation centre, was more valuable than judicial decisions in ten cases in the court. The court file contained a narration of facts with a projected property dispute, but in reality, it was the life story of a family that was finally understood and a solution tailormade to suit their needs was found.

This case demonstrated that not only do parties to a dispute come with a one-dimensional mind set, but they also set foot in court with unattainable expectations as if both were taking strides on an escalator to swiftly reach the top, the catch being that they are actually moving downwards. This climbing of the disputants goes on in perpetuity, only for them to find that they are nowhere close to their desired destination; till a mediator holds their hand and redirects parties to the right direction. The mediator, through his holistic lens, allows the parties to see how a simple act of changing direction makes even a ludicrous task achievable.

Often, the real challenge comes when to sort out the actual dispute, the colour of criminality is given for quick solutions. This happens not only in criminal litigation, but even in business transactions. In one such instance, a fertilizer manufacturer 'A'

from Delhi entered into a contract with Company 'B' in Mumbai, for the purchase of customizable packaging machines for automatically filling and sealing the fertilizer powder. For designing and manufacturing such a machine, 'B' required 'A' to provide a ten kilogram sample of the fertilizer powder to identify its density and run trials on the prototype. 'A' asked the machine manufacturer to use chickpea flour as it had a density very similar to that of their fertilizer. The trials were run using chickpea flour and with the approval of 'A' the machine was dispatched. In no time, the machine began to malfunction when the fertilizer powder was put in the auger filler. Handicapped by the jurisdiction clause which restricted the civil jurisdiction to the courts in Mumbai, 'A' filed a criminal case in Delhi under Section 420 of the Indian Penal Code alleging that 'B' induced the approval of 'A' by showing fake trial results. The case lingered on for several years as neither was 'A' able to prove the fraud, nor was 'B' able to prove that the usage of chickpea flour was suggested by 'A' himself. The lack of any record or formal communication between the parties led to an impasse in the judicial proceedings. The fertilizer manufacturer kept seeking dates which required 'A' go through the ordeal of travelling to Delhi again and again, with no resolution. Recognizing the deadlock and the prolonged ordeal as neither of the parties may be able to prove their respective case, the court empowered by Section 89 of the Code of Civil Procedure, 1908, referred the parties to mediation to address the underlying dispute which essentially had its genesis in a civil dispute. Further, acquittal or conviction would not have any solution to the real conflict without the interests of the parties being addressed.

In several legal cases, even though one side may put forth a compelling case from a logical standpoint, the letter of the law may not support their contention. In such seemingly difficult situations, where the hands of the court may be tied by the legal parameters with little scope of providing succor, it is worthy to note that the limit of mediation is boundless. One such situation arose in a dispute between an estranged couple wherein the wife who had settled in Australia, was being represented by her father and was claiming her share from her husband in a jointly owned property, in order to settle the divorce. The husband, soon after their marriage, had booked an apartment with his own money but had registered the house under the joint name of himself and his wife out of his love for her. Differences between the couple arose soon after the marriage and the wife left the country to settle abroad where she pursued her MBA and was employed in a better financial position than her husband. Legally, there was nothing preventing the wife from claiming her share in the property that was duly registered under their joint name. Insufficient means to compensate for the wife's share was the husband's main predicament, coupled with his hesitation to give away a share in the property that he had purchased with his own hard-earned money with no contribution from her end. The dispute lingered in the court for years; while the husband suffered and was unable to move ahead in life, the wife had moved on in life and settled abroad. Ironically, despite being a deliverer of justice, the court was limited by law which favoured the wife as she was a co-owner in the title documents of the property, even though in equity it may be termed as unfair. The case was referred to mediation. While interacting with the parties and

acknowledging that the wife was entitled to claim her share, the unfairness of situation prompted the mediator to dig deep into its reservoir of techniques to use the tool of *Role Reversal*. A hypothetical question was posed to the father if his stance would have been the same if he was representing the son and the same claim was made against his own son. Dumbstruck by the question, he became completely silent. Few moments of thinking and introspection rekindled the sense of fairness and equity in him. He understood the predicament of the petitioner and his perspective changed as he put himself in the shoes of the husband of his daughter. His vociferous resistance turned into co-operation. Ultimately, he agreed to settle for an amount of Rs 15 lakhs.

The husband, though on a weak footing, had trouble agreeing to pay even this settlement amount as he felt betrayed and cheated. It was like being asked to pay his hard-earned money to a person who was in the wrong. He may have been justified on moral grounds, but he was unable to see the lack of tenability in his assertions under law. He lacked legal realism which happens to be the case in most conflicts of such nature. The mediator changed the looking glass of the husband to recognize that the cost benefit ratio in the context of time and the wherewithal to contest the case may ultimately leave him in a serious disadvantageous position. He immediately agreed to settle. Effective and skillful application of mediation tools and techniques led to a mutually acceptable settlement in a matrimonial dispute that was languishing for long in the court. Peace descended, with both parties free to move ahead in life. The words of famous poet *Joy Harjo*, succinctly expresses the sensibility of a settlement in the words: *If you sign this paper we will become brothers. We will no longer fight. We will give you this land and these waters as long as the grass shall grow and the rivers run."*[7]

The pain and travails of a party who emerges successful in a court case, unfortunately do not end with a decree in his hand. It is a common experience in courts that the actual struggle commences as one seeks execution. One such experience was when one day walked in an old man totally dejected, like a loser, in the mediation centre. The other party was equally old, but had an air of defiance, supremacy and arrogance. As the conversation began, it was found that the dispute pertained to the execution of a decree of Rs. 1 lac, which was pending since the last 15 years. The judgment debtor had taken a hardened position that under no circumstance would he pay, while the decree holder was not willing to accept a penny less. A little questioning revealed that the decree pertained to return of Rs.1 lac which was given as earnest money pursuant to an agreement to sell. The judgment debtor was convinced that the was the fault was of the decree holder who had failed to execute the agreement to sell and the decree against him was not correct as he had the right to forfeit the earnest money. The decree holder felt further wronged by the judgement debtor who despite the decree, was not willing to pay. Both stood firm on their positions. The extreme remedy of sending the judgment debtor to jail was neither feasible at this age, nor was it a workable solution. Some probing questions were put to the parties by the mediator, and it was found that judgment debtor had no issues in paying the principal amount but was adamant not to pay the interest component. Addressing the underlying

7 A Poem: Joy Harjo, "Conflict Resolution for Holy Beings"

currents and reasons for the positions, the mediator shifted the focus of the disputants from positions to interests, from the past to the future and from adversarial to collaborative, with some reference to their past relations. Consequently, the decree holder agreed to accept the principal amount of Rupees 1 lac. The execution that was pending for 15 years, got settled in 30 minutes**.** This compels me to express the sentiment of Mahatma Gandhi who in a similar situation stated:

"My joy was boundless. I had learnt the true practice of law.I had learnt to find out the better side of human nature and to enter men's hearts. I realised that the true function of a lawyer was to unite parties riven asunder.
I lost nothing thereby – not even money, certainly not my soul."

This case demonstrated that there is no appropriate stage or time for mediation. It works at all stages of the court proceeding, so long as the issue is identified.

The importance of good and effective communication skills has not remained confined to mediation. They are all pervasive and play a significant role at all times. It reminds me of a day in the Court when a lawyer started on a high pitch to be equally reprimanded in the same tone by the opposing lawyer leading to a volatile atmosphere and a very tense situation in court. Everyone came under considerable pressure. However, the core techniques of active listening aptly captured in the mnemonic with six letters AAREE as coined by John Sturrock[8], immediately came to the rescue. The six steps are:

A – *Acknowledging* the other person's perspective;

A – *Accepting that this is how people perceive things from their point of view*;

R – *Recognising* how it affects people and what they are attempting to achieve;

R – *Reassuring* them that you respect their perspective and are trying to find a solution to the problem;

E – *Engaging* with them on a human level; and

E – *Explaining* your position and how you arrived at it.

Thus, the mediator by acknowledging, accepting and recognizing the stance of the parties, instills a sense of reassurance. It is only after providing such reassurance by pacing with the parties, can a mediator lead and engage with them to explore different aspects of the conflict and find reasonable explanations for it. This endeavor helps in evoking the logic and rationality in parties who come with a headstrong mindset.

When parties come with a pre-conceived notion, the mediator has to be very considerate and understand how the nature of any question can affect a party's perception towards the mediation process. *Marilee Adams* postulated the theory of *Questions Thinking* where she elucidated that every thought or statement that arises in our mind is a product of subconscious series of questions and answers. The theory further posits that behavior acts as an answer to an unsaid question, thus drawing conclusions in the mind. Thus, she had observed that on the conclusions drawn through observations, the

8 Sturrock. (2020, March 3). *Better Conversations Better Outcomes* [Audio]. Tune In - Podcast. Retrieved March 27, 2023, from https://tunein.com/podcasts/Education-Podcasts/John-Sturrock-Better-Conversations-Better-Outcom-p2672664/?topicId=214734444

questions posed to the parties must be very tactful as *"A question can be an invitation, a request, or a missile. What impact do you want your questions to have?"*[9]

Another aspect which may be considered is that the roadblock may not be the parties who get into a dispute on account of differences and expectations with their own assumptions, but the mediator with his judgmental attitude. A mediator may think that he understands the parties and has a solution to all the issues between the parties, and is most equipped to solve their problems. This misconception clouds *active listening*, a necessary skill required in mediation, the lack of which may result in disastrous consequences. Instead of resulting in a settlement to which the parties are agreeable, this lack of understanding of the self-determination of the parties, may lead to dispute escalation. The onerous task lies with the mediator not only to manage the parties but also himself and never to jettison the tool of *active listening* by replacing it with a judgmental attitude and not impose his own ideologies on the parties. It has been seen that often, the value system, cultural mindset and stereotypes held by a mediator play a significant role while resolving a dispute. During one mediation, a couple who was educated and fully conscious of their differences, was inclined to separate. Yet they were unable to reach at a settlement purely because the mediator assumed that it would be in the interest of the parties to continue with the marriage for the sake of their 5-year old daughter. An impasse emerged and the case could not be settled.

This case is an example that for a mediator the need to be a good communicator and a good listener at the same time, is absolutely essential. *Marilee Adams* had identified that *Question Reluctance* acts as a stumbling block in having a productive conversation. Such reluctance is a result of discomfort in creating an apprehension of being ignorant or rude. From her experience, the author found that reviving one's curiosity is the only antidote to this fear. She had beautifully articulated the sentiment in the following words;

"There is .... No progress without change,
No change without learning,
No questions without curiosity,
No curiosity or questions without an active Inquiring mindset"[10]

Thus, acting as an intervener between two parties, it is imperative for a mediator to have a childlike inquisitiveness and to address the *what, why, when, how, where* and *who* of every issue. As Rudyard Kipling had rightly put:

I keep six honest serving-men
(They taught me all I knew);
their names are What and Why and When
and How and Where and Who.[11]

These simple questions can enable a mediator to get a correct and true understanding of the dispute and also to generate options to help parties work out enduring solutions.

Coming back to the above divorce case, the mediator got identical responses from couple, revealing that

9 Adams, M.G. (2013, September 23). Teaching That Changes Lives: 12 Mindset Tools for Igniting the Love of Learning.

10 Ibid

11 A Poem: Rudyard Kipling, "I Keep Six Honest Serving Men"

they were essentially on the same page.

> *What* is the issue?
> *Separation by way of mutual consent and bifurcation of assets and responsibilities.*
>
> *Why* do you plan to separate?
> *Incompatibility.*
>
> *When* did decide that separation was the only solution?
> *Our goals in life became antipodal as we changed career paths.*
>
> *How* do you plan to share your joint assets?
> *We plan to continue to remain in joint ownership, while the wife will be the caretaker and have complete possession of the properties.*
>
> *Where* will your child stay after the separation?
> *The child will stay with the mother throughout the year and move in with the father during vacations.*
>
> *Who* is willing to take the responsibility of the child's financial needs and education?
> *The mother and father will contribute equally towards the child's educational and other financial needs.*

It is very rare that two parties to a mediation are so compassionate, sensitive and empathetic of each other's decisions and wholeheartedly wish to arrive at a middle ground. It was absolutely unfortunate to find that despite having similar answers, the parties could not enter into a settlement agreement. It was found that the mediator strongly believed in the institution of marriage and was inclined for parties to continue together. It led to a situation where a settlement could not be reached despite the parties having the solution to the conflict right in front of them, simply because of the value system of the mediator who desperately wanted them to be together. Despite all good intentions, the solution the parties wanted could not come through.

The mediator entered the session with a *judger's mindset* rather than a *learner's mindset.* He was quick to judge and come to conclusions based on his assumptions rather than understanding the rationale of the parties. In most cases, it is the parties that apply a judger's mindset against one another, making this instance an anomaly.

It is thus de-rigueur for a mediator to keep his personal beliefs on the sanctity of marriage aside and assist the parties. If mediator impose their orthodoxy on the parties, a dispute where the parties are amenable to settlement would also meet the same fate as the disputes that have been prolonged and left unresolved for years before the courts. It is important for mediators to put their emotional quotient to use. However their emotional quotient must not become an impeding factor in understanding the wants, desires and emotions of the parties. Thus, it is the duty of the mediator to ensure that their actions do not decelerate or impede the settlement process.

Mediation as a process, may in the first instance, seem most successful and fruitful for family disputes, but the development of ADR in the commercial space is a testament in opposition to this presumption. Parties to a commercial transaction either intend to maintain their business relations even after the resolution of the dispute or

acknowledge that it would be a mammoth task for either of them to prove their claim before a court of law.

Mediation is totally transformative and self-empowering. The process itself calls for introspection, to have a conversation with your inner self and to find solutions from within. This reminds me again of the insightful words of Joy Harjo:

"When we made it back home, back over those curved roads that wind th rough the city of peace, we stopped at the doorway of dusk as it opened to our homelands. We gave thanks for the story, for all parts of the story because it was by the light of those challenges we knew ourselves. We asked for forgiveness. We laid down our burdens next to each other."[12]

With that being said, mediation may not work in all cases as it requires a consensus ad idem and a facilitating mediator, but it aids in humanizing the conflict and enables the parties to see reason beyond the letter of the law. For that purpose alone, it is worth giving mediation a shot in all disputes barring those that are precluded by the law to be resolved by way of settlement agreements. Mediation is a way forward to dispute resolution as well as a personality changer for all!

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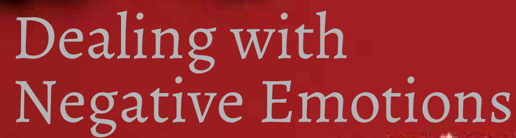
JUSTICE NEENA BANSAL KRISHNA

Justice Neena Bansal Krishna completed her LLB and L.LM from the Faculty of Law, Delhi University. She joined the Delhi Judicial Service as Civil Judge in 1992 and was promoted to Delhi Higher Judicial Service in 2003. She held jurisdiction in various civil and criminal courts and dealt with various cases in the nature of matrimonial disputes, motor accident claims, Protection of Children against Sexual Offence (POCSO), Money Laundering, Terrorist and Disruptive Activities (Prevention) Act, Prevention of Terrorism Act (POTA) and Prevention of Food Adulteration Act. She was the Presenting Officer in the National Human Rights Commission (NHRC), New Delhi, from 2005 to 2006. She was appointed as First Director in the Department of Law and Justice, NCT of Delhi, for setting up Delhi Dispute Resolution Society, which was the first institution set up by any State Government for pre-litigation and community mediation.

She is a Trained Mediator and Master Trainer with the Mediation & Conciliation Project Committee (MCPC), Supreme Court of India, having taken her Training of Trainers from Centre for Effective Dispute Resolution (CEDR), U.K, in 2007. Since then, she has travelled to various States in India for imparting training in mediation to lawyers, Judges and other sections of society. She held the post of Director (Academics) in the Delhi Judicial Academy since February, 2017 till May, 2019. While she was District & Sessions Judge, South-East District, Saket Courts, New Delhi, she was elevated as Permanent Judge of Delhi High Court on 28 02 2022.

ACTIVE LISTENING

Appreciating that active listening is about listening completely, with full attention and interest



Dealing with Negative Emotions

Claudia L. Bernard
and Howard A. Herman

Introduction

“I’m not going to pay that jerk a dime! I don’t care if it costs me a million dollars in fees to take this case to trial. I will never give in to this kind of extortion from that @#$%!”

“What they did to me was so outrageous! I hate them! I have never been treated with so much malice, hatred, and disrespect in my entire life! There is no way that I am settling this case for less than five million dollars!”

Strong negative emotions are all around us in the world of litigation. The parties, counsel, sometimes even we ourselves as mediators are so filled with pain, anger, and indignation that we abandon all thoughts, values, and other interests that do not feed our fury. The parties and their lawyers believe they are right about their negative views of their opponents, about their moral stance, and, of course, about the facts and the law. Needless to say, as humans we frequently believe that our opponents are deeply, inalterably, and completely wrong – if not downright evil.

In our experience, parties who are so negatively focused raise real challenges for mediators.

Mediators need tools and strategies to help parties make good decisions despite their deeply negative emotions. We also believe that mediators can achieve better results for their clients and more personal satisfaction for themselves, and truly achieve the promise of mediation, if they can work with these challenging people without losing their own emotional centers.

Over the combined 70 years we have been mediating cases, we have dealt with our share of angry, self-righteous parties and lawyers. And over those years we have developed some theories about the dynamics of these emotional states as well as some tools for handling productively the parties who come to mediation steeped in them.

In their book, *Beyond Reason; Using Emotions as You Negotiate,* Dan Shapiro and Roger Fisher posit that we humans are driven by core concerns. When these core concerns are met, we are at peace; when they are not met, we are in distress. We theorize that when our core concerns are violated, we experience righteous indignation. The core concerns, as articulated by Shapiro and Fisher, are:

1. Appreciation
2. Autonomy
3. Affiliation
4. Status
5. Identity

To this list, we have added a sixth core concern: fairness. In our experience, violation of a person's sense of fairness is prime among the causes of righteous indignation. Our sense of fairness is so core, we can trace it to other primates. Scientists found that chimpanzees who had been perfectly happy eating cucumbers became enraged, throwing their cucumbers at experimenters, when the experimenters fed grapes to neighboring chimps without giving any to them. These chimps would rather go hungry – would rather have no food at all – than suffer the unfairness of being served a lesser meal than was served to their neighbors. Thus, fairness seems to be quite high in the pantheon of core primate concerns.

Existential threats to core values tend to elicit a seemingly insurmountable mindset which:

1. Breeds the conviction that our perspective is morally superior,
2. Demonizes the other side,
3. Prevents us from examining our own contributions to the problem,
4. Prevents us from acting in our own best interests, and
5. Elevates the perpetuation of the conflict over its resolution.

It goes without saying that this mindset is antithetical to the resolution of disputes. We believe that if we can understand in some way what goes on in the minds of the righteously indignant parties with whom we work we can provide more effective service to them.

Understanding the Righteously Indignant Mind

Neurologists estimate that our human brains process eleven million pieces of information per second! Our conscious minds process a mere forty pieces of information per second. Our brains process the other 10,999,960 pieces of information outside of our conscious awareness.

In *Thinking, Fast and Slow*, Nobel Prize winner Daniel Kahneman calls the quick, automatic part of our brains that process the 10,999,960 pieces of information per second, *System 1 Thinking*. He calls the conscious, controlled part of our brain that processes the 40 pieces of information per second, *System 2 Thinking*. As you can see from the numbers above, System 1 does the vast amount of the work. And yet we are completely unaware of all the heavy lifting going on below our conscious awareness. Because the parts of our brain that process *System 2 Thinking* evolved later than those that process *System 1 Thinking*, they are further from our sensory inputs, making *System 2 Thinking* – that is the thinking of which we are conscious – slower than *System 1 Thinking*. *System 1's* speed advantage means it processes information first, long before *System 2* is even aware that any sensory input has been received. This gives *System 1* a distinct advantage in determining how we perceive our world and the people within it.

System 1's major job is to keep us safe. Friend or a foe? Approach or avoid? Existential threat? Fight, freeze, or flee? Out of necessity, *System 1* works fast. But to do so, it suppresses all ambiguity. It generates a simpler and more coherent view of the world than actually exists. Thus, a piece of twisted rope on a trail is perceived as a coiled snake, causing us to freeze. As soon as *System 2* is able to correct the misperception, we move on and laugh off the momentary error.

But sometimes *System 2* believes *System 1's* assessment of a threat, even when none is present. This is essentially the problem of those who suffer post-traumatic stress disorder. *System 1* constantly interprets benign events as existential threats, and *System 2* believes the dire assessment. But it's a problem suffered in smaller doses by us all. *System 1* perceives less than perilous events as existential threats and *System 2* believes the assessment.

Neuroscientists have discovered that the anguish of social rejection registers in the same part of the brain that processes physical pain, thus we process rejection as an existential threat just like we do a punch to the gut. When we are fired from a job, or don't get the promotion we feel we deserve, *System 1*, processing quickly, experiences shock and anger, like a punch to the gut, and perceives a distinct absence of safety. *System 2*, working more slowly, weighs in next, and develops reasons for the pain and lack of safety. This usually entails identifying someone as the cause of the pain and then viewing them as wrong and dangerous. As Jonathan Haidt concludes in *The Righteous Mind*, intuitions come first, and strategic reasoning comes second.

Daniel Shapiro, in *Negotiating the Nonnegotiable*, characterizes the form our strategic reasoning takes in response to these kinds of existential emotional threats as:

1. Adversarial: we minimize similarities and magnify differences;

2. Self-righteous: we believe that our perspective is morally superior, and develop unassailable rationales to defend it;

3. Closed: we see our essential nature and that of the other side as immutable – we are always good, and they are always bad - thus causing us to resist efforts to take responsibility for our own actions or try to understand the actions of our adversaries.

Reasoning with the *System 2* thinking alone can create more adversariness, more self-righteousness, and more closed thinking. To reach the righteous mind, we need to speak to *System 1* first. What follows are our thoughts about some tools, to help us do so.

Tools for Working with Parties and Counsel

Empathy – The skill of empathy as practiced by mediators is demonstrating in words that one has heard and understood the thoughts and feelings of another. Empathy, a vital human competency, is one of the mediator's most powerful and effective tool. When a party feels understood, or empathized with, the pleasure centers of her brain light up. He or She relaxes and experiences a sense of well-being. Righteously indignant parties have been known to let go of outrageous and unrealistic positions once the mediator has understood their pain and anger and the underlying situation. You know you've hit home when shoulders drop, voices lower, and the incessant repetition of injustice ceases. You have accomplished this feat, not through reasoning with *System 2*, but through connecting with *System 1*.

Maya Angelou said, "I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel."

We can't emphasize enough, the transformative power of helping people feel respected and understood. It is tool number one in handling righteous indignation and other negative thought states.

Improving Mood – Mood, defined as "a relatively long-lasting emotional state," is firmly within the purview of *System 1*. The mood of those trying to negotiate a solution to a problem turns out to have significant effect on their ability to do so successfully.

Studies have shown that negotiators who are in *good* moods:

- Behave more flexibly than those in bad moods
- Act more creatively than those in bad moods
- Think more complexly than those in bad moods
- Achieve better joint negotiation outcomes than those in bad moods
- Propose more alternatives than those in bad moods, and
- Propose more trade-offs than those in bad moods.

Studies also have shown that negotiators who are in *bad* moods:

- Are more fearful than those in good moods
- Negotiate overly cautiously
- Are less accurate in identifying their own interests, and
- Are more interested in hurting their opponent than in helping themselves.

We have found that figuring out ways to help our clients to be in better moods is invaluable in diffusing righteous indignation and supporting effective negotiation. One of the best ways of promoting the good moods of others is to be in a good mood yourself. Our emotional states are highly contagious. We catch our moods from each other. As the mediator, you want to make sure that the parties and lawyers are more likely to catch a good mood from you than you are to catch a bad mood from them. One advantage you will have is that the mood of the person in the more powerful position is generally more contagious. But watch out, because unpleasant emotions are more contagious than pleasant ones.

One of our colleagues, Daniel Bowling, co-editor of *Bringing Peace Into the Room*, believes it is a professional responsibility of mediators to know how to regulate their own emotional states, an assessment with which we agree. Other ways to help mediating parties to be in a good mood include the following:

- Help people connect with their most important personal values. Studies have shown that spending time reflecting on what matters most, helps people face stressful situations without feeling stressed. One of the ways you can do this is to ask the parties questions that have nothing to do with the problem at hand, like, "What are the qualities you want to be remembered for?" "What do you have a passion for?" "What makes you really angry?" "Beyond your basic human needs, what must you have in order to experience fulfillment?"

- Another approach is for you to identify the values and the character strengths you see in the parties with whom you are working. Label their strengths in a precise way (e.g., "I see that you really value fairness." "I see bravery in you.") Offer an example or rationale for what you see. Make your feedback genuine and honest. Research shows that this "strength-spotting" is a real mood booster.

- Genuinely connect with the participants. When we have a real, human connection with another person, our bodies release pleasure hormones, improving our moods. If you really don't like the person, try to find one thing you can genuinely like about them, since for this to work, the connection has to be genuine. Help mediation participants cooperate with each other.

When one of us (Claudia), worked at the Ninth Circuit, she traveled around to remote locations within the Circuit to conduct mediations. Often the room provided was not well set up for the mediation so she would have the mediation participants work together to move the furniture. Another cooperation building mediation tool is to start the mediation by having the participants create an agenda of what issues need to be addressed in order to reach a resolution. The parties don't negotiate; they just list what they need to see the agenda include. Both of these options force the participants to cooperate on a joint project at the outset of a mediation. Cooperation is a mood enhancer.

Humanization – One of the effects of intense conflict is that disputants demonize each other – they refuse to see the other person as possessing basic human qualities. In our mediations, we try to counteract this pernicious effect in a few different ways.

If lunch is to be ordered in, we have one side take the lunch order of the other, thus forcing cooperation and the recognition of at least some common humanity over the shared need to nourish the body.

We also start the mediation with a joint opening in which all participants, lawyers included, share something about themselves that is entirely unrelated to the lawsuit. This may sound hokey, but it has reaped incredible benefits, particularly when people on opposite sides find out they have something important in common – like having a disabled child, or loving the same kind of dog. It's very hard to demonize someone who shares something important with you. But this tool is useful even without helpful synchronicities. Just learning that the evil person on the other side volunteers to clean oil-slicked birds in his free time or is learning to play the flute can have a humanizing effect.

We often use a joint session to allow the client(s) on each side to tell their stories. We usually coach the parties and their lawyers in advance about the best way to do so to enable the other side to hear what they are saying. Hearing directly from the client on the opposite side can go a long way in helping a litigant appreciate the humanity of the other. Claudia mediated one case in which parents sued police officers for failing to arrest and detain a disturbed, armed man they had stopped for a traffic violation. Within an hour of the stop, the man had shot and killed the plaintiffs' 18-year- old son. At the mediation, the police officers told the parents that they had done everything they could think of to arrest the man. They placed him in their patrol car, reviewed their rule book, called their boss, and tried to find some legal way to detain him. Coming up with none, they had to let him go. Hearing the police officer's story, the parents stopped demonizing the officers and were able to easily reach a resolution of the lawsuit.

Tools for Being in the Middle of Righteous Indignation Without Losing Yourself

Develop Emotional Regulation
It can be very challenging to sit with people who are self-righteous, adversarial, and closed-minded without feeling judgmental, annoyed, or angry, or all of the above. And yet succumbing to – and acting upon – these emotions is highly detrimental to the role of mediators. Staying calm, focused, and centered, while surrounded by negativity is critical. Here is how to do so:

When you feel yourself getting reactive, pay attention to the physical sensations building inside of you. Perhaps you feel a rising heat in your body, a pulse in your head, a knot in your stomach, sweat in your palms, or a tightening in your chest. Recognize these physical sensations as your *System 1* telling you that something is important. Ordinarily these sensations are priming you to act. Don't take the bait. Pause and do nothing. Take a deep breath. This signals to *System 1* that there is no threat and that it can relax its vigilance. Make a mental note of what triggered your physical responses. Then, choose how you wish to proceed. Make a calm, deliberate, non-reactive choice about your best next step. Sometimes that can be ignoring what's triggered your reaction, sometimes that can be taking a break, sometimes that can be dealing with what's triggered you in a mindful way.

Replace Judgment with Curiosity
When you find yourself experiencing judgments about a party, a lawyer, or anyone else with whom you are working, try asking yourself, "What is it that I am not understanding?" or "I wonder why she might have acted like that?" or "Have I ever acted that way?"

You might also think about asking the person about whom you are experiencing judgments something like, "Help me understand why you feel so strongly about . . . " or "What about this situation strikes you as so problematic?" Replacing judgment with curiosity forces us to keep asking questions until we develop understanding, and hopefully, compassion. From understanding and compassion on our part come the ability to let go of righteous indignation on the parties' part. As an added benefit, employing curiosity in this way tends to enhance our resilience in the face of adversity and decreases any aggressive tendencies we may have.

Conclusion

Understanding righteous indignation as a natural, perhaps, inevitable part of human brain function and psychology helps us to harness our own reactions to it, allowing us to be more effective when encountering it in our practices. Extreme negativity and moral indignation may be with us for the foreseeable future, but we can get past it. By appreciating the need to speak to *System 1* first, we can help the parties access the higher reasoning of *System 2* and guide them toward better, more satisfying solutions to their problems.

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CLAUDIA L. BERNARD AND HOWARD A. HERMAN

Howard Herman *has worked as a mediator and as a developer of ADR Programs since 1985. He currently mediates through JAMS in San Francisco, where he specializes in matters involving high emotion and complex power dynamics. For more than 23 years, he led the highly regarded ADR Program for the U.S. District Court, Northern District of California. He previously directed a California state court ADR program and co-directed an early version of what is now the Mediation Program of the United States Court of Appeals for the Ninth Circuit. Mr. Herman frequently teaches negotiation and mediation related courses at the University of California College of the Law, San Francisco ("UC Law SF," formerly known as UC Hastings College of the Law), where he also for many years co-led a seminar for international judges and lawyers entitled "Envisioning, Designing and Implementing Court ADR." In addition, Mr. Herman has developed numerous ADR training courses for lawyers and judges throughout the United States and internationally.*

Mr. Herman is a recognized leader in the development of the ADR field. He was Chair of the ABA Section of Dispute Resolution in 2015-16, and he has served on that Section's Quality of Mediation Task Force, the Ninth Circuit ADR Committee, the California Judicial Council's working group for the development of ethical standards for court-connected mediators, and the ADR Committee of the California State Bar. Mr. Herman previously practiced as a civil litigator with the firms of Graham & James and Kindel & Anderson in San Francisco. He received his J.D. from the UC Law SF, and his A.B., with Highest Honors, from the University of California at Berkeley. Mr. Herman was an inaugural recipient in 2002 of the Robert F. Peckham Award for Excellence in Alternative Dispute Resolution presented by the United States Court of Appeals for the Ninth Circuit, and he received this award again in 2019. In 2011, he was co-recipient of the Mediation Society of San Francisco's annual Award for Outstanding Contribution in the Field of Mediation. In 2013, he was the inaugural recipient of the Exceptional Service Award presented by the UC Law SF's Center for Negotiation and Dispute Resolution.

Claudia Bernard *is an independent trainer, mediator and consultant in the San Francisco Bay Area.*

Claudia designs and leads trainings and workshops for courts, law firms, community organizations, educational institutions, and religious congregations on such topics as addressing implicit bias, effective communication, conflict resolution, mindful leadership, bridging differences, developing a growth mindset, and handling the righteously indignant individual. She also develops and leads mediation and mediation advocacy training courses for judges, mediators, lawyers and law students nationally and internationally. For many years she co-led an annual seminar for international judges and lawyers entitled "Envisioning, Designing and Implementing Court ADR."

Until 2018, she served as Chief Circuit Mediator for the Ninth Circuit Court of Appeals. There she led a staff of eight professional mediators, mediated cases on appeal, served as chair of the Federal Judicial Center's Advisory Committee on Executive Education, and served on the Ninth Circuit ADR Committee. Prior to her appointment as Chief Circuit Mediator, she served as a Ninth Circuit Mediator for eighteen years. She has mediated over 3,000 cases.She has received thousands of hours of post-graduate training including: Applied Compassion Training, Mindfulness in Law Teacher Training, Nonviolent Communication, Self-Reflective Practice, Unlearning Racism, Myers Briggs Personality Inventory, Restorative Justice, Mediation and Negotiation. She is the co-recipient of the Mediation Society of San Francisco's 2011 Award for Outstanding Contribution to the Field of Mediation. Under her leadership, the Ninth Circuit Mediation Office received the 2014 Robert A. Peckham Award for Excellence in Alternative Dispute Resolution. Prior to her 30 years as a mediator with the Ninth Circuit, Claudia practiced civil litigation in San Francisco and clerked for a federal judge. She is an honors graduate of U.C. Berkeley and U.C. Law S.F. (formerly Hastings College of Law).

USING THE RIGHT COMMUNICATION TECHNIQUES

Techniques like summarizing, rephrasing and reflecting are powerful tools to move the mediation process forward

The Advent and Growth of Mediation in India

Dr. Justice Sudhir Jain

Mediation in India: A necessity

The preamble to the Constitution of India resolves to secure to its all citizens social, economic and political justice. A strong and independent judiciary has traditionally acted as the sentinel on the qui vive to fulfill the preambular promise. As a result, however, as behooves such a sentinel, the Indian judiciary has found itself overburdened at time with cases demanding adjudication of citizen's rights. Of course, the judicial system must balance the volume of cases, with providing qualitative and timely justice. In the recent past, citizens have also become more aware of their constitutional and legal rights. In case of infringement of their rights, they seek redressal through the traditional adjudicatory system of dispensation of justice, which increases the burden on courts, and has led to 'litigation explosion', of sorts. Urbanization, globalization, social and economic reforms, increased governmental activities, waning of non-judicial institution etc. are various other factors which have also added to 'litigation explosion'. Further, the adversarial system of adjudication, practiced in India, results in a 'win-lose' situation and often leads to further adjudication by way of appeals.

Thus in terms of both volume and pendency, the situation is becoming untenable, and we have had to find new solutions. The assurance of timely and speedy justice to the citizens is essential to transform rule of law into a reality as per mandate of the Constitution. In this regard, "Alternative Dispute Mechanisms" (ADR), which are characterized by procedural flexibility, and are also able to save valuable judicial time and taxing costs of litigations, seemed to offer new possibilities. ADR in application is found to be a pragmatic and practical way for providing expeditious resolution of disputes and have lessened the burden on court systems across the world.

ADR is not a substitute for a trial, but rather offers possibilities in addition to the adjudicatory system. It is an attempt to find other ways of settling a dispute. Thus dispute resolution mechanisms complement traditional adjudication in courts. They include a wide range of methods such as arbitration, conciliation, mediation, LokAdalat etc. which are informal, encourage communication between the parties, focus on the basic causes of the disputes and underlying interests of the parties, repair their fractured relationship and offer significant savings in time and cost. Borrowing from our history and traditional community based dispute resolution methods, the legal system in India always laid emphasis on such practices, and various statutes such as the Code of Civil Procedure, 1908, the Arbitration Act, 1940, the Industrial Disputes Act, 1947, the Hindu Marriage Act, 1955, the Family Courts Act, 1984, the Legal Services Authority Act, 1987, Arbitration and Conciliation Act, 1996 have provisions for use of ADR for addressing and settling disputes outside of litigation.

One such alternative dispute resolution mechanism is Mediation, which is a structured process wherein the parties to the dispute, with the facilitation of a mediator, attempt to find an amicable solution. Mediation facilitates the parties to resolve their disputes by encouraging direct communication and negotiations between them. The process of mediation involves gathering of information by the mediator, from the parties, to understand the factual background of the dispute and the underlying interests of the parties. The mediator then attempts to facilitate the generation of options for a potential mutually acceptable settlement, with the objective of a win-win situation. Mediation recognises the right of self-determination of the parties, is confidential and innovative. While litigation is adjudicatory, governed, restricted, controlled by the statutes, its logical end is a decision that is binding on all parties. Litigation focuses on the past and uses that in the determination of rights and liabilities and as such, there is no direct communication between the parties. In contrast, mediation is comparatively quick, private and inexpensive and considered to be a different paradigm from traditional litigation. Mediation involves party centred negotiation, direct communication between the parties and a flexible procedure. It is collaborative and focuses on resolution of disputes by mutual agreement, irrespective of rights and liabilities. It is not governed or restricted by statutes.

A hesitant beginning

In India, efforts were made by the judiciary and the legislature to introduce mediation in the judicial process. However that was a reluctant beginning because mediation was considered

to be a compromise with settled values and principles of judicial process. However, over time, introduction of mediation in the judicial system, selection of mediators and their training in the concepts, procedures and techniques of mediation, establishment and management of mediation centres, referrals of suitable cases for mediation, awareness about benefits of mediation, credibility and acceptability of mediation were experienced and found to be useful.

Parliament and the Supreme Court on judicial and administrative sides, have also initiated and taken various steps to formally introduce mediation as one of the modes of ADR in the justice delivery system. The parliament, by virtue of section 7 of the Civil Procedure Code (CPC) Amendment Act, 1999, in order to resolve disputes without going to trial, and in pursuance of recommendations of the 129th Report of Law Commission of India and the Report of Committee on Reforms of Criminal Justice System (Dr. Justice V.S. Malimath Committee Report) reincorporated section 89 in the Code of Civil Procedure, 1908 which was implemented with effect from 01st July, 2002.

Section 89 of CPC reads thus:

> *89. Settlement of disputes outisde the Court.–(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:–*
>
> *(a) arbitration;*
>
> *(b) conciliation;*
>
> *(c) judicial settlement including settlement through LokAdalat: or*
>
> *(d) mediation.*
>
> *(2) Where a dispute has been referred –*
>
> *(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;*
>
> *(b) to LokAdalat, the Court shall refer the same to the LokAdalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall .apply in respect of the dispute so referred to the LokAdalat;*
>
> *(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a LokAdalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a LokAdalat under the provisions of that Act;*
>
> *(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.*

Supreme Court stands behind ADR: Mediation takes wings

After incorporation of section 89 in the CPC, mediation was legally recognised and introduced more systematically in the justice delivery system and the judicial process. The Supreme Court delivered various significant decisions which proved

to be milestones in developing the institution of mediation. The constitutional validity of section 89 was challenged before the Supreme Court in *Salem Advocates Bar Association, Tamil Nadu v. Union of India& others, being Writ Petition (Civil) 496 of 2002* decided on 25th October, 2002. The Supreme Court upheld the constitutional validity of section 89. The Supreme Court observed that it has now become imperative that alternative dispute resolution mechanisms must be tested, with a view to bring to an end litigation between the parties at an early date. The relevant part of the judgment reads:

> *It is quite obvious that the reason why Section 89 has been inserted is to try to see that cases, which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) Mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through LokAdalat or mediation.*

The Supreme Court also constituted a committee to ensure that section 89 is made effective and results in quicker dispensation of justice. It was also observed that such a committee shall iron out the creases with respect to mediation and its acceptability amongst disputants, as also amongst legal professionals. The Supreme Court further directed that the committee may consider devising a 'model case management formula', as well as rules and regulations, which should be followed while taking recourse to ADR as referred to in Section 89. The Model Rules so formulated may be adopted by the High Court concerned for giving effect to Section 89(2)(d). The constitutional court's endorsement of mediation, and its implementation through constitution of a committee had given new direction, and further consolidated the institutionalization of mediation.

The Supreme Court also highlighted the utility of ADR as experienced in other jurisdictions. It was observed that in certain countries, ADR has been successful to the extent that over 90 per cent of the cases are settled out of court.

In the second Salem Advocate Bar Association case, decided on 02nd August, 2005, the Supreme Court passed other positive directions to further develop the institution of mediation. Directions were passed to the effect that if mediation succeeds, and if parties agree to the terms of the settlement, the mediator shall report the settlement to the court and the court, after giving notice and hearing the parties, shall effect the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. The Court also clarified that if there is no settlement, then the referral court is not barred from hearing the case.

In order to encourage the parties to adopt mediation for an early resolution of their disputes, and in cases of compulsory referral by courts, the Supreme Court directed that the expenditure for mediation would be borne by the Government. The High Courts and the District Courts were also directed to prepare a panel of trained mediators. The positive and affirmative directions given by the Supreme Court in *Salem Advocate Bar Association cases* (I and II) thus further developed mediation in India.

Administrative reforms by the Supreme Court in aid of institutonalizing mediation practice

On the administrative side, Supreme Court constituted the Mediation and Conciliation Project Committee (MCPC) on 9th April, 2005 to introduce and develop mediation and to oversee the implementation of mediation practice, at the national level. MCPC in its meeting held on 11.07.2005 resolved to initiate a pilot project on Judicial Mediation in Delhi District Courts, beginnign with the Tis Hazari Courts. Under the pilot project, thirty Judicial Officers from Delhi Higher Judicial Service were imparted 40 hours of training on "Concept & Techniques of Mediation" by experts invited from the *Institute to Study Development in Legal Systems (ISDLS), California*.

The Delhi High Court and the Delhi District Courts success story

Formal Judicial mediation was introduced in Delhi District Courts with effect from 13.09.2005 and six judicial officers started to function as trained mediators. The encouraging success of mediation led to the establishment of the first mediation centre at Tis Hazari Courts on 24.10.2005, and subsequently, in each of the Delhi District Courts. The mediation centres were managed by senior judicial officers. In Delhi Mediation Centres, functioning at the Delhi District Courts, around 248000 (two lakh forty eigth thousand) cases (including connected cases) have been settled through mediation as of 31.01.23, out of a total of 3,80,000 (three lakh eighty thousand) cases, referred to them(source : Delhi Mediation Centre, Tis Hazari Courts).

Mediation Centres have also been established with requisite infrastructure and made functional with the help of a panel of trained mediators. The judicial officers have been sensitized towards referring suitable cases for mediation. Awareness programmes have been conducted to disemminate knowledge among different stakeholders, regarding the concept and the benefits of mediation. Court referred mediation is well established in India. Mediation Centres are now functional in the Supreme Court, different High Courts and the District Courts.

Under the aegis of the Delhi High Court, a lawyer managed mediation centre *Samadhan* has been functioning since 2006. *Samadhan's* successful statistics can be found in 'The Story of Samadhan', within this journal. *Samadhan* has played a vital role in introducing, developing and establishing mediation in the country.

Mediation at par with 'judicial settlement'

In 2010, in *Afcons Infrastructure Ltd & Another v. Cherian Varkey Construction Co.(P) Ltd. & Others, (2010)8 SCC24*, the Supreme Court gave a new dimension to the development of mediation and addressed many functional issues related to it. A mandatory duty was cast on courts to consider recourse to ADR including mediation in every pending case but with a rider that actual reference is not mandatory in every case. The Court clarified that the definitions of mediation and judicial settlement as originally given in section 89 were interchangeable. The Supreme Court also clarified that the referral court is not required to formulate and reformulate terms of the settlement as provided in section 89, but rather that the referral court needs only to understand

the summary of the dispute. The Court also listed categories of cases which are suitable for ADR, including mediation.

The Supreme Court recommended that a case should be referred preferably after completion of pleadings, but before framing of issues, with the additional clarification that that cases may be referred even after framing of issues and commencement of evidence. The Court also preferred that matrimonial disputes should be referred before filing of the written statement/ counter reply to avoid further hostility between the concerned parties.

In *Moti Ram (D) through LRs & another v. Ashok Kumar & another*, *being Civil Appeal No.1095/2008* decided on 07th December, 2010, the Supreme Court observed that mediation proceedings are confidential in nature. Similarly, the Supreme Court, in various other decisions, including *B.S. Joshi & others v. State of Haryana & Another, (2003) 4SCC 675; K. Srinivas Rao v. D.A. Deepa, (2013)5SCC226, Gian Singh v. State Of Punjab & another,*(2012) 10SCC 303 further expanded the scope of court referred mediation, and further consolidated and developed mediation practice in India.

Legislative intervention for mediation

The Legislature has also made amendments by incorporating suitable provisions in various statutes to introduce mediation for resolution of disputes outside the court system. *Chapter V of the Consumer Protection Act, 2019,* read with the *Consumer Protection (Mediation) Regulations, 2019* provide mechanism for use of mediation in disputes related to consumers. *Chapter III A of the Commercial Courts Act, 2015* read with *Pre Institution Mediation and Settlement Rules, 2018* deal with pre-institution mediation and settlement and make the use of mediation compulsory in commercial disputes. *Section 442 of the Companies Act, 2013* and *Companies (Mediation and Conciliation) Rules*, 2016 provide for use of mediation in corporate disputes. *Micro, Small and Medium Enterprises (MSME) Development Act, 2006* and *Real Estate (Regulation and Development) Act,2016* are other statutes which also rely on mediation for dispute resolution.

Beyond being a "necessity": possibilities for the future

United Nations Convention on International Settlement Agreements Resulting from Mediation has already come into force. The United Nations General Assembly has adopted the Convention on 20th December, 2018 , which was opened for signature on 7th August, 2019 in Singapore. The Convention is also known as the Singapore Convention on Mediation. India has already marched towards international commercial mediation by signing the Convention in July, 2019. The Convention is an essential instrument in promotion of mediation as an alternative and effective method of resolving trade disputes and ensures that a settlement reached by parties becomes internationally binding and enforceable, in accordance with a simplified and streamlined procedure. The signing of the Convention by India will enable swift mediated settlements of corporate disputes and will increase the confidence of investors, by providing a positive signal about India's commitment to adhereence to international practices of ADR .

Arbitration, Conciliation and LokAdalats, which are different modes of ADR are governed by different statutes. However, there is still no statutory enactment to govern various aspects of mediation. It was frequently said that a suitable legislation on mediation is required for further development and implementation of mediation in India. To give definite shape to mediation, the Government of India is stated to be in the process of enacting the *Mediation Bill, 2021*.The proposed Bill as per its preamble has been enacted to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, to enforce mediated settlement agreements, to provide for a body for registration of mediators, to encourage community mediation and to make online mediation an acceptable and cost effective process. *The Mediation Bill, 2021* primarily addresses civil and commercial disputes. It would certainly be a positive and meaningful step towards further development of mediation practice. If a meaningful Mediation Bill is enacted,, then it will go a long way in introducing and , promoting, mediation in India, as a viable alternative for litigants in the resolution of their disputes.

Mediation is a democratic way for dispensation of justice and is a meaningful journey, which moves from dispute adjudication to dispute resolution, confrontation to collaboration, negativity to productivity and past to future. Mediation has already been introduced and is in the process of being developed in a practical and pragmatic manner in India. Mediation has made strong inroads in the justice delivery system for quick resolution of disputes in comparison to litigation. However, despite success in implementation of mediation in India, there is still a long way to go before it becomes the preferred choice for disputants, rather than a forced-upon alternative due to heavy backlog of cases resulting in delays for the litigants.

DR. JUSTICE SUDHIR JAIN

Dr. Justice Sudhir Jain did his LL.B, LL.M and Ph.D. from the Faculty of Law, Delhi University. He practiced as an Advocate in the Delhi District Courts and High Court of Delhi. He served as a lecturer of Law in the Campus Law Centre, Faculty of Law, Delhi University. He joined the Delhi Judicial Service in 1992 and was promoted to the Delhi Higher Judicial Service in 2003. He worked in different jurisdictions such as Civil, Criminal, Rent, CBI. He was editor of Indian Law Report (ILR) Delhi Series. He was posted as Principal District & Sessions Judge in Shahdara and North-East Districts, Delhi and as Principal District & Sessions Judge-cum Special Judge (PC Act), CBI at Rouse Avenue District, Delhi. He was posted as Joint Director, Additional Director and Director, Delhi Judicial Academy. He served as Judge-in-charge of Delhi Mediation Centres at Tis Hazari Courts and Rohini Courts. He was elevated as Permanent Judge of Delhi High Court on 28.02.2022.

He was a member of the Academic Council, National Judicial Academy at Bhopal. He has been a regular resource person in National Judicial Academy and other Academies/State and District Legal Services Authorities, Law Colleges/ Schools and other institutions. He has written articles on Administrative Law, Mediation and other legal issues.

A trained mediator and trainer for mediators, he completed 40 hours training on 'Concept & Techniques of Mediation' in 2005 from experts from Institute to Study Development in Legal System (ISDLS), California and received Training of Trainers (TOT) from experts from Centre for Effective Dispute Resolution (CEDR), UK. He has conducted mediation in about 12,000 cases of all categories with experience of more than 12,000 hours. He has conducted more than 100 mediation training programmes throughout India for judicial officers, advocates and law students. He has spoken as an expert at various Regional, National and International conferences on Mediation. He is an accredited mediator by the International Mediation Institute, Holland.

The Promise of Mediation for Family Business Disputes

Laila Ollapally and Tara Ollapally

In her 60s, Meera looked nervous, and grief stricken. She came into the mediation room, carrying a framed photo of her husband. He had passed away a year ago and ever since, every conversation in their home regarding their family business was volatile. It was costing her health, peace in the family and was also impacting the morale of the staff. She was almost angry with her husband for leaving her this mess.

Meera and her husband had built a successful business which grew beyond their expectations. As a young man, Vijay, her husband, had dreams of being an entrepreneur. Together they started a company. As a director and equal share holder, she supported him with good counsel, silent financial acumen, skillful management of human resources and efficient operations on the ground. Vijay was a loving husband and a man who knew how to lead the family and the business. He had vision, creative ideas and strong leadership qualities. They complemented each other and brick by brick, they built their empire.

Their two sons, Anil and Ashok, were loving children and from childhood were noticeably different personalities. Anil was bold and always protective of his younger brother. Ashok was the sensitive

and gentle one. Anil went to Singapore for higher education and then worked with a multinational company there, while Ashok studied in India and joined the family business. Meera's family was her pride and the envy of their community. Everything was perfect until Vijay's grave diagnosis that required intense and prolonged medical treatment abroad. The family came together as families always do when crisis hits. It was decided that Anil who was living abroad, would quit his job and focus on taking care of his father along with Meera, while Ashok would focus on the business in India. The long intense treatment was to no avail. Vijay passed away. As desired by the father, Anil moved back to India and joined the family business.

Adaptive challenges were many for the family. Vijay's death left a vacuum in the family. They were all gripped with grief and the brothers were struggling to work together. Communication was getting harder. Their wives were also struggling in their relationship with each other. In despair for a solution, Meera approached a friend who was a lawyer. The wise lawyer, pained by the anguish of her dear friend, explained that litigation would only further divide the family. Since they were looking for a solution as early as possible, the lawyer suggested that the family try mediation first.

What mediation revealed

When the family came into mediation, they were almost unable to look at each other. The frequent quarrels had created a divide. However, as mediation progressed, the mediator gently built trust in the room and created a safe space for them to be open and frank. She set in place a structure for them to communicate productively.

Gradually, the family addressed the many issues that existed in their relationship. Ashok found Anil overprotective and patronizing. Ashok had been running the business successfully on his own with his wife's support over the past two years but was now being labelled 'irresponsible and impulsive'. He felt that he was being relegated to the back room, taking care of the technical aspects of the business, while mother and Anil were client facing. His older brother's domination, insistence on transparency, accountability and other 'MNC' jargons were impractical for the Indian business environment. It was even disrespectful and hurtful. Ashok needed his space and freedom and did not appreciate frequent interference. He enjoyed the technical work but saw personal growth only with more interactions with his customers. He felt his wife complemented him and they could work well together in the business.

Anil meanwhile found Ashok naïve and casual in the business operations and was struck by how he would trivialise and ignore grave situations. He disapproved of the way Ashok spent money lavishly and was maintaining a flamboyant lifestyle. Ashok completely ignored Anil's international experience and seemed to reject all his good and well-meaning suggestions. Anil wanted to be respected for his international exposure. He wanted the company to have the systems in place for future international collaborations. He was concerned about the involvement of the wives in the family business.

The childhood pattern of the siblings was to run to their mother with grievances. This became dysfunctional when it continued into this phase of their life. A grieving Meera could not handle this

anymore and was slipping into a depression. Her children focused only on their issues and failed to notice the impact on their mother. Meera's priority was the relationship between her children and she immensely feared the loss of family reputation.

Long conversations between the family members at the mediation, jointly and sometimes separately with the mediator, unearthed each one's underlying needs, concerns, goals and priorities. These valuable discoveries formed the material to create several options for resolution.

Mediation was also able to bring out the common grounds that existed between the parties. Despite all the differences and the acrimony, it was clear that each of them believed in being together in the family business. They were not willing to give up their sense of belonging, safety and security that the family business gave them. Often heard statements during the mediation were 'I will give every drop of blood for my brother'; 'It is important that Ashok focuses on the technical aspect of the business as he is good at it' ; 'Anil has always been there to pull me out of difficult situations.'

The family also recognized that although the business had to remain under the same umbrella, many aspects were not working and restructuring was required. Boundaries had to be built, roles defined, disagreements to be anticipated and mechanisms to address them was to be set in place.

After almost 25 hours of mediation sessions which included technical and financial experts, lawyers and even a business consultant, a family settlement agreement, optimally incorporating what they all wanted, was found. There was relief all around. The air felt lighter. An animated, friendly and satisfied family left the mediation to go back to daily business. Meera was silently rejoicing. Her family survived the storm.

As they lived the family settlement for a year, they realized that this new path needed further fine tuning. The family returned to mediation to make a few changes to the agreement. What was obvious to the mediator this time around was that their earlier experience of mediation had given them a learnt skill - an enhanced ability to work on disagreements and differing perspectives. They were open to creating many more options to find a solution. Spinning off a new venture, bringing in investors and even dividing the business in a manner where they could continue to support each other. As these options were discussed, Meera looked stronger and more optimistic. Meera, to whom staying together was overwhelmingly important, began to see other ways of keeping the family together. Time was allowing realizations that were impossible a year earlier. Mediation gave the family time to walk through grief, unearth their true needs with minimum damage to the business and their personal relationship and come to realisations that enabled informed decisions.

Layers of Complexity Unique to Family Businesses

Family business disputes entail the complex intersectionality of running a business and preserving family relationships. There are overlapping values in both, yet sometimes these two values do not align. Historical issues such as sibling rivalry, unresolved childhood incidents,

dysfunctional communication patterns, outdated family traditions, children's desire to differentiate themselves from their parents or parents' apprehension to turn over the reins come to the forefront. These factors add fuel to the fire. Coupled with this, families are inherently wired to stay together and safeguard family reputation. All these complexities make resolution even more challenging.

It is precisely for the said reasons that mediation is perfectly suited for family businesses. This process is structured on understanding each one's experience without judgement and is based on the premise that differing viewpoints exist. It skillfully addresses emotions and encourages creative options.

The Promise of the Process – Set up for Success

Parties often come into mediation after unsuccessful attempts to negotiate. A mediator assists the parties to frame the negotiation differently.

The mediator engages in extensive pre-mediation work to understand the family dynamics, sensitivities involved and obstacles to negotiation. Attention is given to the documents required to bring clarity; participation of decision makers on the table and identification of influencers. The mediator works hard to 'design the mediation'. When Meera's family was sensitive about confidentiality and insisted that nobody else from their city should get to know of the mediation, they brought lawyers and experts from other cities. In some mediations, parties want spouses to be included and, in some others, not.

As Steve Jobs said, 'Design is not just what it looks like and feels like. Design is how it works'. For family businesses, bearing in mind the competing interests of family and business, careful designing is necessary to ensure that business interests and family relationships are protected.

Additionally, the mediator structures the negotiation to withstand high emotions that are almost always present in Family Business disputes. Roger Fisher and Daniel Shapiro in their book *Beyond Reason: Using Emotions as You Negotiate*, provide for a framework for effectively managing emotions in negotiation. According to Fisher and Shapiro, by addressing the five core concerns - appreciation, affiliation, autonomy, status, and role - negotiators can be successful and effective in dealing with conflict.

The mediator works through each of these core concerns to facilitate a successful negotiation, especially when emotions are high:

• Appreciation: The mediator listens deeply to the parties and helps them feel heard, understood and appreciated. This allows them further to understand and appreciate the other.

• Affiliation: Affiliation is described as the sense of connectedness with another group or person. Building affiliation bridges the gap between parties and increases the ability to productively work together. The collaborative structure of the mediation process allows the mediator to foster feelings of affiliation between the parties, which come naturally to most parties from the same family. The process is designed to get parties to

work together to find solutions as opposed to setting them up as adversaries that naturally isolates and disconnects parties.

• Autonomy: Mediation is a process of self-determination. Solutions are not imposed by the mediator. Instead, the mediator works with the parties to enable them to find creative solutions. Autonomy empowers the parties and motivates them to move on and find solution.

• Status: Fisher & Shapiro share that "Status refers to our standing in comparison to the standing of others." In this party centric process, the mediator structures his/her responses to acknowledge and respect the status of the parties. The flexibility of the mediation process also allows the mediator to creatively design sessions that allows parties to acknowledge and respect the status of the other. The example of a recent mediation, involving a long-standing dispute between two brothers, wherein the dynamics of the negotiation completely changed when the younger brother touched the feet of his older brother, strongly evidences the power of status in negotiation.

• Role: Parties work hard in a mediation. They have a clear role and are not bystanders. The sense of participation and responsibility is enhanced when they are actively working towards the common goal. They organize information, work with lawyers to prepare briefs, invent options and forms a core part of the team involved in drafting the settlement terms. The mediator ensures that each party feels they have a clear role in the process. This moves parties away from the grip of emotion to active involvement.

Conclusion

In our mediation practice we have mediated a wide variety of civil and commercial disputes and have experienced how particularly well suited this process is for family business disputes.

Just as family mediations have layers of complexity, the satisfaction of a mediator after a family business dispute, has many layers. When Meera's business was described as a premier organization in the country in a Business Journal, Meera wrote to the mediator in appreciation "Our business has been able to achieve this, thanks to the mediation we did". In another mediation that resolved a family dispute after ten years in court, the parties wrote "The Mediator was the toast of our Family Reunion held after more than a decade."
The ability to facilitate a resolution that often restores family relationships and builds commercial interests is special. For us, many fulfilling moments come through our family business mediation practice.

LAILA OLLAPALLY AND TARA OLLAPALLY

Laila Ollapally *is the Founder of CAMP Arbitration and Mediation Practice. She has practiced as an advocate for over 3 decades in the Supreme Court of India and the High Court of Karnataka. Since 2014, she is a full-time mediator. She is a Founding Coordinator of the Bangalore Mediation Centre (BMC), the Court Annexed Mediation Program of the High Court of Karnataka. She is a senior Mediator and Master Trainer at BMC. She was nominated to 'The International Who's Who Legal' of Commercial Mediation 2020. She is on the Advisory Board of Global Mediation Panel, UNDP. Ms Ollapally is on the Board of Directors of the International Mediation Institute (IMI). She is on the Panel of Mediators of the Singapore International Mediation Centre, American Arbitration Association's International Centre for Dispute Resolution (AAA-ICDR) and other International and Domestic Mediation Centres.*

She was a member of the committee constituted by the Mediation and Conciliation Project Committee (MCPC) of the Supreme Court of India to make recommendation for a legislation for Mediation in India. Ms Ollapally has undergone advanced mediation training at Harvard Law School, JAMS (San Francisco), Straus Institute for Dispute Resolution at Pepperdine University, California and International Summer School on Business Mediation, Austria. In 2011 she was awarded the Weinstein Fellowship, a prestigious international fellowship for ADR professionals. As a Weinstein Fellow, she spent a semester as a Visiting Scholar at the Gould Institute for Conflict Resolution, Stanford Law School.

Tara Ollapally *is an international lawyer of 20 years who started her career in human rights law in the United States. Since 2015 she has been actively involved in building the mediation movement in India. She is the co-founder of CAMP Arbitration and Mediation Practice Pvt Ltd., one of India's leading and pioneering private mediation institutions. To raise awareness to mediation, she regularly speaks on mediation and holds awareness sessions for law firms, businesses, in-house legal teams. She trains lawyers and mediators as part of the CAMP - Edwards Mediation Academy partnership. Tara has also served as Coordinator for the Mediating Disputes course at Harvard University. Tara also leads multiple collaborations with the government, international institutions and domestic partners to make mediation a part of the dispute resolution landscape in India.*

Tara has mediated a wide variety of disputes including inheritance, family, construction, real estate, educational and consumer disputes. Her style of mediation is largely facilitative - she places importance on parties making informed decisions from a place of understanding, empathy, and connection. Tara has undergone numerous mediation trainings. She was a participant in the Mediating Disputes program at Harvard Law School in 2015. She has also trained with Bangalore Mediation Centre (court annexed mediation program of the Karnataka High Court), JAMS, Edwards Mediation Academy and Centre for Dispute Resolution. Tara is licensed to practice law in New York and Bangalore, India. She is a graduate of University Law College and received her Masters in Law from Columbia Law School. She lives in Newton, MA with her husband and three children.

ASKING THE RIGHT QUESTIONS

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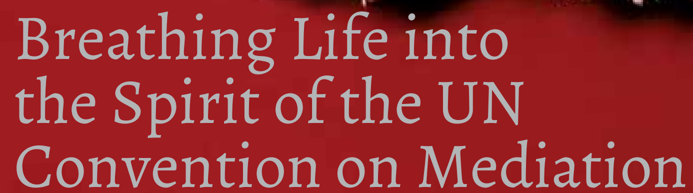


Breathing Life into the Spirit of the UN Convention on Mediation

Aloysius Goh and Esther Huang

46 jurisdictions signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Mediation Convention”) at its inception on 7 Aug 2019. In the subsequent 4 years, less than 10 new jurisdictions signed up. One key factor for the slow progress was the COVID-19 pandemic. As governments rightly focused attention on overcoming one of history’s worst global health crisis, activities around international trade-related treaties took a back seat. However, as history has repeatedly shown, major pandemics often precede a dangerous rise in trade and political tensions.

While the world recovers from COVID-19, we are today confronted with conflict-based threats. Widening inequalities are leading to riots and government failures. Aggressive nationalism has led to armed conflict between states in possession of nuclear weapons. Observing these developments, it is tempting to conclude that any international treaty proposing amicable and practical resolution of disputes is a doomed tool. This is an unnecessarily cynical and pessimistic view that focuses too much on the fallibility of human nature. It is one we must counter because cynicism has a nasty tendency to be self-fulfilling.

When there is such a sharp rise in conflict and tensions such as the current times, mediators need to work harder to bring to fruition the ideals and hopes of the drafters of the Mediation Convention.

Styled as a dialogue between a budding young mediator ("EH") and a professional international mediator from Singapore ("AG"), this article explores what are the possibilities for mediation and looks at how mediation professionals can collectively overcome the foreseeable obstacles to the growth of mediation for international commercial disputes.

EH: I first came to know mediation when I reached out to Sage Mediation to conduct an introductory workshop in my school for students interested in the study of law. At a previous internship in a law firm, I had seen the impact of litigation proceedings. I recall witnessing very bitter exchanges. This and the high legal fees in Singapore created great stress for the clients. I also sat in for a mediation. I felt immediately drawn to it because, in contrast, it appeared as a collaborative and cheaper way of resolving disputes. Parties could walk away amicably, or at least, without further acrimony.

As an intern at Sage, mediation has excited me not only because of its merits. I am seeing that the way we choose to resolve disputes reflects our personal values and cultures. I think the world needs more problem-solving that is inspired by active listening, empathy, and respectful adaptation.

Aloysius, you have been working as a professional mediator for some time. What drew you into this field and what is the promise of mediation to you?

AG: I really like your observation that the way we choose to resolve disputes reveals our personal values. May be for this reason, I had struggled when I was in Law School. Like many, I had been drawn to the study of Law on the idealistic notion of pursuing Justice – with a capital "J". It became evident to me after reading many case precedents that Law and Justice were, at best, cousins. They did not mean the same thing.

The law does not always offer just and meaningful solutions to human disputes. In practice, in the last few years, this reality has been even starker.

The law, be it as a code in Civil Law, or precedent-based in Common Law, is necessarily backward looking. Parliaments legislate and courts adjudicate based on situations brought to their attention and where it is clear that human conduct requires guardrails. So the behaviours that the laws pertain to needed to happen first. They needed to happen on a sufficient scale and it needed to cause sufficient concern because of the potential good or harm if it happened on a larger scale.

This was fine before the internet when change spread relatively slowly. Legislation could be passed and court precedents could be created before a large number of people engaged in the activity. These could then guide future human conduct. However, modern human community has been evolving new frontiers at a pace which parliaments and courts cannot respond to in time.

From self-driving cars, to cryptocurrency, to AI tools like Chat GPT, regulation has not caught up. And, it will likely continue to fall further behind.

This creates a critical need for dispute resolution processes which can lead parties to fair and sustainable outcomes despite the lack of clear guidance. In the face of growing gulfs between the generations, and between people from different social classes and cultures, mediation is a necessary counter force to encourage empathy and to try to prevent the social fabric from fraying.

For me, mediation has proven attractive because it combined legal principles with creative dialogue and building empathy. Mediation is more than a process. It is a mindset that drives us to use human ingenuity to craft outcomes which are fair, efficient and sustainable. At a time of growing polarization, mediation reminds us that discovering differences can be opportunities for deepening trust and inspiring grace.

As a mediator, I have seen grandsons insulting grandmothers in family disputes. On the other hand, I have also seen leaders apologise and seek forgiveness so as to put an end to bloody feuds. Their wisdom, humility and courage create a path of peace for the future generations. Conflict brings out the best and worst of humanity and mediation offers the means for every member of the community, young and old, rich and poor, to take ownership in defining their Justice and shaping their Peace.

EH: You make mediation sound very ideal. I think that promoting wisdom, humility, and courage is especially relevant for youth. Schools in Singapore feel like they are becoming increasingly individualistic and competitive. Despite many different initiatives to encourage group-work, empathy, and healthy communication, students do not prioritize these over training in individual academic excellence. We are often reminded by parents and teachers of the dangers of falling behind our peers.

I do not want to be too cynical but it does seem like the world generally rewards those who are outstanding in the measurables. It seems like there are winners and losers and the win-win narrative I often hear associated with mediation is just too good to be true.

Do you think this is why mediation has not become more popular? Is this cynicism not why so many jurisdictions have still not signed the Mediation Convention and invested in mediation infrastructure?

AG: While I would more likely brand myself as an idealist than a cynic, I like to think that I am not a naïve idealist. And, I think not being naïve as a mediator is the critical factor in being successful in our pursuit of peace and justice.

This is connected to your earlier insight on how our choices reflect our world view. Many of our leaders and teachers propose a scarcity narrative or the "fixed-pie mentality". They believe that there is very limited resource in the world, i.e. the pie to be shared is only this big. We need to compete for these limited resources and anyone who comes in second will only get the crumbs. It is not because they are cynics. It is because of the context within which they were raised. And, it is not altogether untrue. In many countries, the top 1% control more than 60% of the country's wealth.

The flip of the scarcity narrative is the abundance narrative. Some of us call this, expanding the pie. Instead of fighting, we work together to make the

pie bigger so even the "crumbs" would be enough to satisfy.

I think most mediators, including myself, would, on a spectrum, lean more towards the abundance narrative. However, many political leaders of today lean towards the scarcity narrative. This is manifested in slogans that propose making one great again and that fire up fears of mediocrity. It is as if a life without power and visible achievement is not meaningful. Such rhetoric appeals to the public. It is populist. And such populism is a dangerous mutation of democracy because it is premised on mobilising the majority by enflaming their fears and resentment of the weakest in the minority. Many of its proponents argue that the scarcity narrative drives excellence while the abundance narrative leads to complacence.

I think the scarcity narrative is what creates rifts and drives wedges between families, businesses, and governments. And, I think the abundance narrative actually supports innovation through the open sharing of ideas.

Win-win may be too good to be true in most cases. However, if we do not give dialogue and collaboration a chance, that is when we really lose. There are many different reasons why different governments have not yet come forward to sign the convention. I served with the government for nearly 2 decades. Policymaking is complex. My guess is that for many governments, it is simply a case where there had been too many other priorities that the governments are confronting, bearing in mind there was the pandemic.

That said, I have also seen a lack of understanding of what mediation is amongst government officials from different jurisdictions. Some of this misunderstanding is sown by individuals and organisations which thrive on the continuation and escalation of conflict. Some examples of such misleading characterisations of mediation include suggestions that it enables the powerful to bypass justice. I have also read critics describe how mediation undermines the rule of law because it denies judges the chance to pronounce their views on evolving situations.

The Singapore Chief Justice Sundaresh Menon once explained that mediation was needed because it ensured access to justice. He encouraged a broader definition of Justice that included and centralized Social Justice. Many disputants today do not have the financial means and time to pursue litigation or arbitration, even if they may have a winning case. Mediation gives them a chance to be heard and gain closure. If you believe, as I idealistically but not naively do, that one of the foundational purposes of the Law is that to protect everyone in society, especially those most vulnerable and marginalized, then modern judicial systems around the world should, as a matter of good, inclusive jurisprudence, include mediation.

EH: What you have explained is the philosophical part of why some jurisdictions may not have incorporated formal mediation processes. You mentioned to me that much of your work today is to help developing nations set up their mediation infrastructure. What is "mediation infrastructure"? Is it complicated to create good infrastructure to promote and provide high quality mediation services?

AG: Building any infrastructure starts with laying the foundation. The more I practice mediation, the more I appreciate it as a craft, and the more I see that good mediation starts with good education. Investment in high quality education in the law schools is key. In the information age, good education is no longer about having the best questioning or process management techniques. It is about helping your students to discern, distil, and personalise what works for them in different contexts.

I once attended a Japanese tea ceremony. It was held in a simply furnished room. Very zen. The master brewer quietly explained the origins of the tea he was using. With skillful and gentle motions, he moved cup, tea leaves, and hot water before me. It was as if I was watching a mix of tai-chi, ballet, and Master Chef. He was clearly enjoying himself and feeling a deep peace as he shared his craft and passion. I think of my practice as a mediator as being like the master brewer.

Good foundations come with learning, reflection, and practice. Mastery comes with a hunger to always seek greater wisdom and perfection. It is a hunger motivated not by egoistic desire to be superior over others but by a desire to see what the craft reveals about ourselves and the world.

It is excellent that many law schools are including mediation in their undergraduate syllabus. It is great that these schools are fostering an exchange amongst academics, judges, and practitioners on what defines good mediation practices in their communities. These investments are what will produce good local mediators.

The second critical infrastructure is a professional mediation centre. To me, a professional mediation centre is one that focuses on delivering prompt and effective mediation services to the public. Because one of the key advantages of mediation is its flexibility, mediation centres must always be improving their delivery to keep mediation accessible.

For this reason, I am annoyed when I hear from individuals that they decided not to mediate because they could not get facilities or they could not afford mediation. Those are terrible excuses not to mediate. And, I think, if true, they reflect on the failure of the mediation centres. There are enough technologies and mediation expertise to increase efficiencies and lower costs for disputants. If we allow cost to become an excuse for not enabling mediation to take place, we lose a key advantage we had over the adversarial processes.

Last but not least, I think a key infrastructure is a standards body. When Singapore launched the Singapore International Mediation Centre in 2014, we launched the Singapore International Mediation Institute on the same day. This was deliberate. Standard bodies assure mediation clients that local mediators have proven themselves competent according to global best practices. They help to raise the quality of mediation practice by aggregating, discerning, and pronouncing what may work best for that time, age, and place. Their work inspires and enables mediators from different contexts to dialogue and enhance the quality of their practice.

Good schools, professional mediation centres, and a world-ready standards body. It may sound

like a lot of capital investment is required. And, there is no doubt that some government funding will help to kick start what is arguably a public good. But, it need not, and does not cost a bomb. Good infrastructure takes time, planning and prioritisation. It is not complicated. Each initiative will make some mistakes that require adaptation to one's context. But, as always, one must never let the pursuit of perfection keep you from the good.

EH: As we have discussed, mediation can have a real, positive impact on varying groups of people, including the youth, legal professionals and organizations who use mediation to resolve their business disputes. With the impact on society in mind, do you think that governments should make it a priority to sign the Singapore Convention?

AG: My biased opinion is yes, in the least, signing the convention sends a strong and powerful signal. To the domestic audience, it shows that the government is interested and committed to the preservation of harmony. In reality, social justice requires the collaboration of everyone in the country. To the international audience, it shows that the government supports efficiency and creativity in problem solving.

Mediation can co-exist with litigation and arbitration. Courts and judges are still needed to provide clarity on the principles by which our communities should live. What signing the convention simply means is the government acknowledging that conflicts come in different shapes and sizes, and societies should have that sophistication and maturity to find the right processes for the conflict.

EH: Now that we understand what governments can do, I think it's also relevant to consider the other stakeholders who can play a part in fulfilling the promise of mediation. Can you suggest what mediation professionals in the private sector can do to fulfil the promise of mediation?

AG: What has changed since 12 September 2020 when the Mediation Convention came into force is that there is now that added possibility of easy enforcement of mediated settlement agreements. What has not changed is that what really ensures the performance of a mediated settlement agreement is that signatories to the mediated settlement agreement see the benefits of performing the obligations therein. It is not because of the Mediation Convention.

Ironically, the Mediation Convention should motivate mediators to work hard at improving our skills so that their mediated settlement agreements do not need the Convention to be applied. It should be an agreement that truly meet the needs of the signatories and has their full buy-in to the terms.

A major responsibility of mediation professionals is to keep their practice relevant to client needs. Experienced international mediators, recognize that what defines a conflict depends a lot on the context, culture, and age of the parties. Keeping the practice of mediation relevant requires mediation professionals to continually dialogue with an open mind, and to not be too quick to dismiss different practices as unethical or of poor quality.

Private mediators should try to work with state entities and vice versa. In many jurisdictions, I have encountered private mediators and state entities

trading blame for the low awareness of mediation. This is not helpful. Promotion of mediation use and protection of the field from rogue practices are shared responsibilities.

For mediation to be professionalized and credible, mediators must be able to state clearly and unequivocally what is good ethics. The Mediation Convention has set general markers for this: the process should be confidential and the mediator should not be imposing outcomes on the parties, which means parties must take ownership of the solutioning.

Mediation professionals should work with government and judicial officers as well as research bodies to actively update what constitute mediation's best practices, and educate users on these standards.

EH: Thank you for sharing all that you have. I understand from this that the Mediation Convention is the beginning. It is at best a catalyst for an evolution that was already taking place in dispute resolution.

AG: Absolutely correct. While governments and courts move to mandate mediation use, lawyers need to evolve their practice to be more sophisticated in their mediation advocacy where they help to persuade based on empathy-building rather than convince based on empirical data and expert opinion. Law schools and research institutions should be more than aggregators of best practices and should think of what are society's evolving conflict resolution needs and how mediation can be further adapted to meet those needs.

This collective effort will be what really enables mediation to fulfil its promise as a counterforce to the many social divisions and a method of resolving conflicts that keeps humans at its center.

ALOYSIUS GOH AND ESTHER HUANG

Aloysius Goh *is the Founder and CEO of Sage Mediation, an international mediation service provider based in Singapore. He is an accredited international mediator and serves on the International Mediation Institute Taskforces for Inter-culture Mediation and Mediation Advocacy. He was also formerly the CEO of the Singapore International Mediation Centre, the Head of the Ministry of Health Mediation Unit, and the General Counsel to the Singapore Institute of Technology. This article was contributed in his personal capacity.*

Esther Huang *has just graduated from National Junior College and is presently waiting for university. As an intern at Sage Mediation, she is constantly gaining insight into the world of mediation its ability to guide people to reach creative, amicable solutions in today's conflict-driven world. Esther aspires to contribute to the field of mediation in the future with the understanding that critical thinking, problem solving and empathy are skills of a good mediator. In her free time, she enjoys making music with others and exploring new places.*

The Promise of Negotiation in Mediating Conflict

J. P. Sengh

Litigating Conflict

Conflict comes through the process of creation. Whether you believe in creationism or Darwin's evolution theory, conflict is a reality of everyday life. The perspective we hold concerning conflict often dictates the outcome of disagreements.

Conflict has followed the steps of mankind since creation. With time, as life has become complex, so have disputes that form the more identifiable parts of conflict. This has given way to a conundrum of what is the most optimal way to resolve disputes. While disputes are very often the ostensible reason for parties to move the court, the real conflict is often buried deep within and stems from continued hostility between the parties that usually does not surface in the pleadings filed by the disputants in a court of law (*Bercovitch and Jackson*, 2001).

There are a number of ways to resolve a conflict, but options like traditional litigation have become burdensome in time due to the long wait it entails. The traditional legal approach is essential as it has played a critical role in our society and litigation will always have its place in appropriate cases. However, litigation results in one side becoming a winner and the other a loser. The judicial decision ordinarily

leaves deep scars - psychological, emotional and financial on both parties, not necessarily on the loser only. Further, it cannot be denied that the practice of litigation, because it is adversarial, has unfortunately also become murky. Coercion, manipulation and even dirty tricks are used for winning a case.

Mediating Conflict

This dissatisfaction in litigation gave way for rise of alternate dispute resolution mechanisms. One of these options is that of mediation. The recognition of the importance of mediation as a way of resolving disputes outside of the court system has been recognized for centuries.

India has no official records of indigenous processes of dispute resolution. Yet, there is scattered information traced back to ancient times in the post Vedic period in India. The practice of elders mediating disputes has been prevalent in India for time immemorial. The Tribunals known as *Kula*, *Shreni* and *Puga* dealt with disputes between members of the family, artisans and traders respectively. The *Mahajans*, who were respected businessmen used to resolve disputes between members of business associations by way of mediation. Merchants set up their own tribunals which decided the disputes of the members of their association and every dispute had to per force be brought before this Tribunal or they were dismembered.

Mediation is perceived as the beacon of hope not just for a more healthy and less burdened judiciary, but also for resolution of conflict in society where we can work on achieving a higher level of satisfaction for the aggrieved parties.

Simply put, mediation is facilitated negotiation. It involves a direct discussion between parties with the goal of reconciling their different needs with help of a third neutral party.

The neutral third party, the mediator, helps disputing parties reach an agreement. The mediator has no power to impose a decision on the parties. Mediation is a voluntary process with the goal of facilitating a mutually acceptable resolution between the parties. It gives parties a lot of satisfaction as their emotions and sentiments are addressed. They feel heard. Most people feel the need to have at least moderate control of their lives. Having choices means the ability to control or to influence conflict situations. They must feel heard by those with whom they are in a relationship. The mediation process empowers individuals by establishing direct communication between the parties thereby giving them choices – the choice to participate or not, the choice of which options to explore, the choice of which emotions to show and the choice of which option to choose to find the best solution.

Mediation helps us to discover our individual and societal problems. Moving from competitive to cooperative problem-solving is a shift of great magnitude producing opportunities for significant growth and change in today's world.

Mediation is thus fit to address a wide range of conflict types such as family issues, labor management disputes and commercial disputes. In addition to satisfaction, mediation is also certainly less expensive than traditional litigation in India. This serves not just to decrease the burden of the

overstressed judiciary but also works to ensure the most appropriate accessibility of justice for aggrieved parties that helps them resolve their disputes quickly in a more congenial and safe setting.

Negotiating Conflict

We are all negotiators. Negotiation is a fact of life. When you are trying to buy a car or two lawyers try to settle a suit pending in court or you talk to your parents to buy you a cell phone or a lap top or what is a good time to return home at night, you are negotiating. Negotiation in that sense is a basic means of getting what you want from others.

You can be a *soft negotiator* in as much as you want to avoid personal conflict and would rather make concessions easily to reach an agreement. In such a case you may come to an agreement but end up being exploited and feeling bitter. On the other hand you can be a *hard negotiator*. You see every situation as a contest of wills. You argue for your position and seek to justify the same. Unproductive outcomes happen when people treat conflict as a contest. Most negotiators are somewhere between hard and soft. They try to get what they want while at the same time getting along with people they are closely associated with.

There is another kind of negotiaton called *principled negotiation*. Principled negotiation shows you how to obtain what you are entitled to and still be decent. It enables you to be fair while protecting you against those who would take advantage of your fairness. Instead of treating every negotiation as a contest you can look at your common interests and achieve results which are not just a zero-sum game but you add value and achieve something which is much more than the whole i.e. the fixed pie. You enlarge the pie.

The most powerful interests are basic human needs such as:

- security
- economic well being
- a sense of belonging
- recognition
- control over one's life.

A 'position' in negotiation is what you have decided upon. On the other hand, 'interests' are what caused you to decide. Interests define the problem. Interests motivate people. They are the silent movers behind the positions they take. How do you reach those interests of the other side? The most important question to ask is *why* ?

Let us look at the following example. Two persons were quarrelling in a library. One wanted the window in the room closed while the other wanted it open. The positions taken by the two looked irreconcilable. The librarian watching this play out, asked the former as to *why* he wanted the window closed? He answered *because the gust of wind was blowing away the papers he was working with.* When the other person was asked as to *why* he wanted the widow open, he replied *because he wanted fresh air.* The wise librarian opened the window of the next room which brought in fresh air and closed the window in the room which prevented the papers from being disturbed. The needs of both persons were satisfied!

Agreement is often made possible precisely because interests differ, or, in some cases even when they

are common. The shoe seller and you may both like money and the shoes. Relatively, the shoe seller's interest in Rs. 2000, fixed as the price of the shoe, exceeds his interest in the shoes. For you the situation is reversed in case you like the shoes and want to possess them. You like the shoes better than the Rs.2000 in your purse. Hence the deal. Shared interests and differing but complementary interests can both serve as the building blocks for a wise agreement.

One of the important skills to arrive at real interests, is to appropriately communicate with the other side to understand them. Asking appropriate questions in a negotiation setting are completely different from an adversarial environment. Do you have the necessary skills? They say "Don't fear to negotiate but do not negotiate out of fear". Negotiation is a craft that blends art and science and positive outcomes are a consequence of knowledge, experience, careful planning and some luck. For any skill-based learning you require to acquire the basic skills to deal with different situations effectively.

People loosely use *bargaining* and *negotiation interchangeably*. That is not an accurate understanding of the two terms. While bargaining is about economic benefit - who gets a better deal in terms of money- negotiation involves an exchange of value. The focus is on *creating value* by redefining the terms offered by the other party. Negotiation is a two-way street. It is a process that involves not just *claiming value* but *creating it*.

Negotiation's value to Mediation

The *value* of any commodity depends on its use and exchange. The exchange value will vary with time and place. *Value claiming* refers to how value is distributed in negotiation. People have a tendency to jump to bargaining or asserting their positions as soon as they arrive at a negotiating table. When you begin with parties making their claims in a negotiation you are trying to distribute the value of a fixed pie. In distributive negotiation, parties are trying to get the larger piece of the pie which results in a smaller piece going to the other side. In a way, one sides' gain is another's loss – it is a win-lose negotiation.

Conflict resolution affects the size of the pie i.e. who gets what size? Litigation can shrink the size of the pie by calculating costs, time spent, relationship, priorities, needs and the like. Negotiation can add / create value and thus enlarge the pie.

There are several ways in which you can add value in a negotiation:

i) Use power of reciprocity – if you give the other side some useful information you are likely to get a favourable answer.

ii) Practice making trades across issues – both parties give up things they value less for things they value more.

iii) Make multiple offers – ask the other side which they like the best. It will give you a clue where you can find value creating trades.

iv) Search for post settlement settlements – ask can we improve upon the final offer? If not, continue with the settlement.

Value creation happens when solutions are found that benefit both the parties or at least benefits one

of them without making the other worse off. This is commonly called a win-win negotiation because both the parties leave the bargaining table in the same or better position than they arrived.

At the most fundamental level interdependence has the potential to lead to synergy which is the notion that 'the whole is greater than the sum of its parts' e.g. a joint venture or collective bargaining. One of the main sources of value-creation is contained in the differences that exist between negotiators like differences in interests, differences in opinions, differences at risk aversion or differences in time preference. It is also possible to create value through shared interests and through scale, e.g. companies entering into a joint venture to reach the scale required to compete, or complete a project, which they can't do individually; or instances where pharma companies pool their resources for research. Collaborative efforts are certainly more rewarding.

A negotiation is successful when participants have resolved their conflict and settled for what they believe they deserved. The goal of negotiation is to provoke a change in the party's assessment and assumptions of how they perceive their disputes. In business disputes the logic of the law should yield to the reality of commercial markets.

Only by appraising both your own and the other party's substantive and relationship priorities can negotiators effectively choose a negotiation strategy. The win-win strategy is accompanied by the bipartisan efforts of both the parties to either make the value of the 'pie' larger or find elements within it to satisfy needs of both parties.

Mediation empowers parties to find their own solutions collaboratively. But no collaborative solution is complete without the indispensable role that negotiation plays by adding crucial value to the best outcome of mediation, by 'enlarging the pie' and by creating a win-win result for both parties!

J.P. SENGH

Mr. J.P. Sengh has been practicing as a Senior Advocate in Delhi for over four decades. A well-known civil, commercial and arbitration lawyer and an accomplished mediator, he has been the founder Organizing Secretary of Samadhan, the Delhi High Court Mediation and Conciliation Centre. Mr. Sengh is also Secretary-General of Maadhyam, an organization that aims at excellence in the development of law and resolution of conflict through alternative dispute mechanisms.

He received his Basic Training in mediation in India and his Advanced Training at the S.J. Quinney College of Law, University of Utah and the Strauss institute for Dispute Resolution, University of Pepperdine, Malibu, USA. He is also a certified mediator accredited by the Straus Institute for Dispute Resolution, Pepperdine University, California U.S.A having attended the Leadership and Mediation International Training conducted by the Institute.

He has trained lawyers of several High Courts and District Courts in the country and also Judicial Officers at the Delhi and Jharkhand Judicial Academies and has conducted workshops for students at various law schools. He has been appointed an observer by the Mediation and Conciliation Project Committee of the Hon'ble Supreme Court of India for observing the training of the trained Mediators. He has also been a member of the panel constituted by the Supreme Court for recommending legislation on mediation. He has been appointed mediator in several important and large commercial disputes by the Supreme Court and the Delhi High Court.

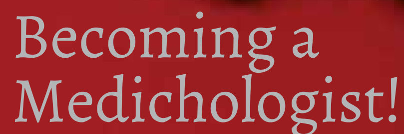
He was recognized for his outstanding contribution to the development of the legal profession in India and for his deep involvement and conscientious engagement in the promotion and maintenance of the highest standard at the Bar on the Lawyers of India Day Award by Bar Association of India in 2022.

USING EMPATHY

Considering things from the other's point of view by putting oneself in their shoes

MAINTAINING AND IMPROVING RELATIONSHIPS

Recognizing that in the anger, hurt and heat of a dispute, it is important to rekindle the capacity to love and respect



Becoming a Medichologist!

Veena Ralli

'Medichologist' is a term that you may not find in any dictionary. This term was introduced to me by a 21-year old girl, Madhavi (name changed) who was a victim of a disturbed family and conflicting parents during her childhood.

The matter of Madhavi's parents was referred to facilitate an amicable resolution between disputing parties who were in a full-blown matrimonial litigation. Madhavi, who was 10 years old at that time, was completely invisible in the dispute though both the warring parents, Ramya and Shyam (names changed), were fighting for her custody and maintenance completely oblivious of Madhavi's needs, desires and expectations.

After almost 4 months and 20 rounds of marathon mediation sessions, Ramya and Shyam decided to peacefully part ways by way of a mutual consent divorce. However, Ramya, a scientist by profession, felt that her own work schedule would not allow her to be with her daughter Madhavi all the time since she had no support at home to look after Madhavi. Another strong reason to consider was that she believed that Shyam's mother would take care of

Madhavi better under the circumstances. Therefore, with a very heavy heart, Ramya agreed to give away the custodial rights of their daughter to Shyam and kept visitation rights with the child with her once a month.

They both sat for hours to come up with a parenting plan with a lot of contribution made by their lawyers. But the mistrust between the parties created a stalemate on the point of 'location for visitation.' They ultimately decided it would to be the children's room of the mediation centre. Madhavi used to visit the mediation centre every month till she turned a major. Her visits to the centre gave her a chance to celebrate her birthdays and achievements with staff members of the centre who became an integral part of her extended family. Occasionally sorrow used to shadow the visitation room despite mother and daughter being together, and sobs could also be heard, leaving everyone in the centre wondering if "all was well." Shyam meanwhile had got remarried. Madhavi stopped visiting the centre on attaining majority.

Recently, I heard a lovely voice on the phone saying "Hi Medichologist!" I was taken aback and asked whom she wanted to speak with. That is when she introduced herself and I was able to recall her in seconds. She said, "I have coined this word for you. You have been a lawyer, a counselor, a mediator, a therapist and a psychologist for me and so, I have coined a name for and am calling you Medichologist. You handled all my emotional outbursts, and encounters with my step mother. You healed my family, not by joining the broken pieces but by showing us the beauty of each broken piece." Her statement made me numb and speechless.

There are emotions involved in every matter. People have wide ranges of emotions that further fuel the conflict which can be very destructive. Daniel Goleman said, "When in control, the emotional mind harnesses the rational mind to its purpose, thus distorting past memories and current realities". Mediators often find themselves in a paradoxical position. On one hand their role is to encourage the parties to be productive and on the other hand, their role requires them to also handle negative emotions of the parties and remain unbiased! The question is whether to handle or tell the parties to hide their emotions. Since emotions are often the foundation of most conflicts, having an emotional discourse is important. The challenge for the mediator is to allow an emotionally charged dialogue and try to normalize the situation without making any party feel marginalized. The only skill required of the mediator is to have the ability to perceive an emotion and integrate it into achieving rational thoughts. This is possible only if one has compassion. A lawyer may or may not be compassionate, but s/he can still win a case. A judge, may or may not be compassionate, but s/he can still pass a good judgment. A mediator can be successful only if s/he is compassionate.

In another case, a young, brilliant boy Akhilesh (name changed), ran away in anger because he hated his parents, taking away all the cash and valuables from his residence. Simultaneously he withdrew a sizable amount of money through his mother, Neelam's (name changed) credit card. Unable to find their son with no track of their valuables and money, Sunil (name changed) Akhilesh's father, along with Neelam got a First Information Report registered against their absconding son after losing all hopes of

finding him on their own. While the police started searching for Akhilesh, he was running from one state to another hiding his identity. When Akhilesh realized that he could not manage anymore, he ultimately approached a lawyer to protect him. The lawyer presented his case for grant of bail but surprisingly requested for reference of the matter to mediation!

The sensitive judge before whom the matter came, referred it for mediation despite it being a simple case for conviction. On the first day of mediation, I saw a couple sitting in the mediation room even before I reached. The woman was crying and the man was just sitting with a still face. They introduced themselves to be Neelam and Sunil, mother and father of their son Akhilesh who was sitting outside the mediation room in a corner. They insisted not to call their son inside and requested me to listen to them first. Looking at their condition, I had a brief sitting with them. When I spoke with Akhilesh, I found he was not prepared to face his parents and he kept repeating, "I can't face them, please don't make me sit with them. Tell them I am sorry." After a few private sessions to understand the core problems, both sides were prepared to face each other. In the first joint session, Neelam and Sunil could not control their anxiety and asked Akhilesh, "Why did you do this? What have we not done for you." Speechless, Akhilesh did not reply to any such question. After a point, the silence in the mediation room became unbearable. Eventually I lent my hand to Akhilesh and encouraged him to speak. Akhilesh shared in confidence that both his working parents had given an authority to a close relative to monitor his behavior and academics, which had irked and upset him. Quite often, he used to feel intimidated and humiliated in front of his younger brother. In revolt, he thought of leaving home, taking away all the money he could lay his hands on – a typical teenager's revolt syndrome.

This is where the strength of mediation, especially the need for compassion became clear. Mere compassion towards Akhilesh and his parents, could encourage them to hold difficult in-person conversations. A meeting of Akhilesh was also arranged with the relative who had taken the charge of correcting him. In the beginning, both Neelam and Sunil were very apprehensive. Forgiveness was nowhere in their consideration and taking back Akhilesh to the same house was out of the question because of social pressures. They were also worried that Akhilesh might repeat what he did earlier. With the help of a counsellor, the family was united. The leftover money taken away by Akhilesh was given back to the family by court's order. Akhilesh and his parents were grateful to his lawyer and the judge who saved him from conviction by referring him to mediation and allowing him to be with his family. As a student of Delhi University, Akhilesh now looks at a bright future ahead. This transformational magic was possible only through compassion. Akhilesh's brilliance is now an asset to his parents who depend on him to guide and support his younger brother in his studies. They can also now concentrate on their respective jobs.

As we all know, feelings, sentiments and emotions play a dominant role in spiraling a conflict and successful management of the conflict, paves the way for amicable resolution. For effective conflict resolution, the mediator needs to find out the root cause and then address it, motivate the parties to

find what would work best for everyone and achieve a win-win situation. Clearly this would largely depend on the ability of the mediator to recognize the emotions of the conflicting parties. We have seen from our experience as mediators that in an organization, generally subordinates tend to hide emotions while supervisors tend to express them, however small or limited they may be. Also, generally, women find it difficult to hide their emotions whereas men find it difficult to express them. The mediator's challenge is to identify the emotion and empathically comprehend it from the parties' point of view and handle it with utmost care.

In conflict the parties are often in a hellish state, the lowest mental state where they are dominated by the impulse of rage to destroy themselves and everyone around. In this state, parties are utterly devoid of any freedom and undergo extreme and indescribable suffering. They reach this state while travelling through various zones of hunger and animality. This hunger is not always related to the stomach. It can be hunger for wealth, acknowledgment, validation, appreciation, expectation, power, fame and so on. The unmet hunger tormented by relentless craving associated with inability to assuage, leads to animality. It is a condition governed by instinct, completely devoid of rationality, even morality, and survives in the shadow of strong hate, and preys upon those weaker than oneself, losing the sense of right and wrong in terms of behavior, belief and ethics. Anger leads to rage, visible or non-visible and ego that blinds one's vision to the agony of others. The one who is living in a world of anger, motivated by the warped desire to be better than everyone else, is forever belittling others and exalting himself like a hawk, sweeping the sky in search of prey. The mediator needs to drive such people from their living hell to a peaceful heaven while helping them wipe out negative emotions and bringing them to a happy life state.

Mediation brings parties to a state of heaven, despite all hell's challenges, provided the mediator uses all available skills and opens the channels of communication between the parties, where they judge fairly, control their instinctive desires with reason and act in harmony with people around them. The mediator drives the parties to the road of knowledge and understanding of others that eventually leads to increasing the potential of their own improved participation and performance. This process of learning and exchange of knowledge acquired during the process, brings realization. Realization is a condition in which one perceives the impermanence of all phenomena and strives to free a person from the sufferings of misunderstanding. Learning and Realization are the two vehicles of transformation. The enlightenment of parties by transformation leads to a condition of perfect and absolute freedom, in which one enjoys boundless wisdom and compassion with the courage and power to surmount all hardships.

To achieve this transformation of the parties and to change the toxic to nontoxic behavior, and to be a true 'Medichologist', the mediator needs to use all the skills and techniques of mediation available. Using mediation skills start from a warm welcome with a pleasant smile. Providing a safe space to vent while practicing active and effective listening is crucial to success of the process. The mediator should also be able to ask the right questions, at the right moment, in the right way, in order to get

appropriate and positive responses from parties. Summarizing, reframing and reflecting accurately i.e shifting them from their past to the future, from negative to positive, from their adopted positions to their real interests and converting devalued negative statements to value laden positive statements are important skills for a mediator. Allowing the aggrieved parties to take a break to help calm their emotions is also vital. Helping parties in goal setting can make all the difference in the way the mediation will unfold. There may be situations where the mediator might need to change the physical location of the parties or use role reversal and other mechanisms for a phased and effective redressal rather than a rushed process.

Finally, though a written settlement is seen as the ultimate goal by many, the success in meeting the emotional requirements of the parties bring out long lasting and rational agreements which are never ever challenged in future. “I am happy that we are finally talking” is often heard by us even in matters where there is no settlement. Since mediation is described as guided negotiation by a neutral third party, the mediator should create an environment that lets parties feel safe in their negotiations. Emotionally charged parties often vacillate between wanting and not wanting to settle. This dilemma can be handled with the maturity of the mediator while handling their emotions. The mediator’s comfort level in dealing with emotions will often dictate the level of emotional expression that is allowed and thus may limit or expand opportunities for resolution. A warm hand of compassion is much needed by conflicting parties to resolve their invisible and visible conflicts which can lead to transformation of the conflicting parties and can make the mediator a ‘Medichologist!

VEENA RALLI

Veena Ralli has been a practicing lawyer in Delhi for four decades. Presently she is the Organising Secretary of Samadhan, the Delhi High Court Mediation and Conciliation Centre and leads over 250 empanelled mediators. She received her Basic Training in mediation in India and her Advanced Training of Trainers at the S.J. Quinney College of Law, University of Utah, USA and the Strauss institute for Dispute Resolution, University of Pepperdine, Malibu, USA. She received her Advance Mediation Master Class from SIMC, Singapore. She is an accredited mediator with CI Arb, London and SIMI at Singapore. She has also obtained special training of mediation in commercial matters by Bangalore Mediation Centre in association with JAMS.

Despite being a lawyer practicing mainly on original side, doing commercial practice and being on the panel of Arbitration with DIAC, she is especially known for helping parties in commercial, family and matrimonial disputes of all ages from 2 to 93 years, where emotions run high and egos clash constantly between parties! Her Midas touch with people of all ages has become legendry in the Delhi High Court. She has also been appointed mediator in several important and large commercial and family disputes by the Supreme Court and the Delhi High Court. She has trained Judicial Officers and lawyers of various High Courts, University students and other professionals and also been invited specially to train counsellors attached to Family Courts at various High Court because of her expertise in helping parties to resolve their complex family and business-related issues.

Right to Fair Justice to all – A paradigm shift!

Anil Xavier

Why Mediate?

The moment we are born into this world, we are born into dependence. There is no way a human baby can survive without the support, provision and love of a caregiver. Our first life lesson is that if we suffer, others can help. We learn that mankind owes the better part of its existence to everyone else and that we cannot afford to turn away from one another, live in isolation or be indifferent to the pains or pleasures of others. So we are naturally attuned to those around us, and all sympathy, morality, and kindness spring from these "cradle moments" of attachment.

So, when we suffer or face a problem, there could be two choices by which we can find a solution. One is to take refuge in an inanimate system that functions under the grid of laws and adjudicates who is right and who is wrong based on substantive legal rights. Another choice would be to communicate with one another to resolve the problem based on the best interest of both so that we can live with the solution happily.

Edmond Burke, an eighteenth-century Irish philosopher had said that manners are of greater importance than laws. Manners are the unwritten

expectations that allow society to function, and they are the rules by which we cooperate. We don't have to hold a door open for someone, help a stranger with their luggage, or swap seats so a mother can be with her child, under an obligation of any law, but we do them from our values. Aristotle argued that ethical action, or doing the right thing, comes down to being virtuous. Manners are of huge importance because they reveal our values and hand responsibility back to us as individuals.

This responsibility brings to us the option of resolving our disputes by mediation, not only because it is the natural human way, but also because it reflects the value and virtue of humanism.

The Virtue of Humanism – Self Respect

As per the Constitution of India, all citizens are equal and have the same fundamental rights. It has been held that the right to life embodied in Article 21 of the Constitution, is not merely a physical right but also includes within its ambit, the right to live with human dignity. The right to life and liberty is meaningless unless it encompasses within its sphere individual dignity. The most common response people offer is that dignity is about respect. Dignity is our inherent value and worth as human beings; everyone is born with it.

A story is told in Indian nationalist lore of the time when the Prince of Wales, the future Edward VIII, visited India in 1921. The Prince pointed to a few magnificent buildings, cars, and electrical installations and remarked to an Indian accompanying him, "We have given you everything here in India! What is it you don't have?" And the lowly Indian replied, gently: "self-respect, sir." After people learn about dignity, a remarkable thing happens. Everyone recognizes that we all have a deep, human desire to be treated as something of value.

Social justice goes beyond equality. It requires equity and a fundamental recognition of the value of human diversity. Social justice makes societies and economies function better and reduces poverty, inequalities, and social tensions. It plays an important role in attaining more inclusive and sustainable socio-economic development paths and is key for reaching the UN Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development.

When we have a dispute or when any of our rights are breached, what are the options that we can exercise to get our dispute resolved or our rights restored through a process that also preserves our dignity and self-respect? We need to understand how many dispute resolution mechanisms or agencies allow us to approach them keeping our heads high and demanding restoration of our impeached right. Can a common man go to a police station or court in such a manner and get dignified treatment?

This is where mediation becomes different. A conversation is best if we pause to listen to the other person. Better still if we take the time to reflect on what we've heard. Great insights do not happen in the dogfight of talking over one another, but in the silent moments, when the germ of an idea takes root. Here we can reflect and resolve our dispute with the help of a mediator, who acknowledges our dignity and self-respect.

Access to Mediation

Even though mediation enthusiasts support the merits and benefits of mediation, what is the purpose of access to mediation, that is not available to people? When people have disputes, they know where the police station is, and they know where the court is; but do they know where the mediator is?

Access to justice relates to the ease of entry to a legal institution. The concept of access to justice has undergone an important transformation; earlier a right of access to judicial protection meant essentially the aggrieved individual's formal right to merely litigate or defend a claim. The reason behind this was that access to justice was a natural right and natural rights did not require affirmative state action. However, with the emergence of the concept of the welfare state, the right to access justice has gained special attention and it has become the right to effective access to justice. In the modern, egalitarian legal system, effective access to justice is regarded as the most basic human right which not only proclaims but guarantees the legal rights of all.

In today's world, "access to justice" means having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum. The words "access to justice" focus on two basic purposes of the legal system – firstly, it must be equally accessible to all, and second, it must lead to results that are individually and socially just.

Mediation has gained the confidence of parties by which resolution is possible with dignity. The disputants have also recognized that online dispute resolution has certain advantages over physical meetings in terms of ease of access, convenience, scheduling, and affordability. It can be more easily accomplished without parties needing to take off work, waste time and money driving through traffic, or needing to hire expensive meeting halls.

We need to understand the seismic shifts that are taking place and quickly adapt. It is about anticipating future trends and party needs by being aware, predictive, and flexible to the changing scenario. Henry Ford said, "If I had asked people what they wanted, they would have said faster horses". (Motor cars would have been out of their imagination). Therefore, innovation beyond party expectation is the key to survival – envisioning to understand what they need tomorrow.

Shifting Online

With our everyday lives intertwined with the internet, equity and human rights must be embedded within it as we strive for social justice. The International Telecommunication Union (ITU) estimated in 2018 that 30% of the world's youth are digital natives and over the next 5 years the number of digital natives will be more than double. They will need a dispute resolution process in the digital world. Imagine living during one of those revolutionary moments in the history of ideas! Those years after Darwin's Origin of Species showed how humans were not that special, or when Copernicus revealed our planet was not the center of the universe. Think how upending these must have been. These moments in scientific history are what twentieth-century American philosopher Thomas Kuhn called "paradigm shifts".

In the 1800s it took six weeks to sail across the Atlantic. Today it takes six hours by plane. The

speed of change in the last two centuries has been astronomical. The question, then, is whether we've had time to work out where we as humans fit into the world around us. Have we developed the skills, virtues, and behaviours necessary to deal with this new world? This is also a world of paradigm shift.

We need to enter the concept of digital readiness, i.e., our capacity to use technology actively, expertly, responsibly, and confidently. It requires the ability to shift from physical to online mediation practice in a manner that upholds the integrity of the mediation process as a client-centered process that maximizes opportunities for parties to make informed decisions.

While shifting to online mediation, we have to focus on the extent to which the online mediation service is user-friendly, intuitive, and customizable, and users can rely on the integrity of the mediation process, and finally, ability to access mediation services in terms of geography, infrastructure, venue facilities, cost, and language.

Many mediators seem content with social communication platforms such as Zoom. But is that the correct method or online mediation should include a dedicated ODR (Online Dispute Resolution) platform? ODR traces its antecedents to leading practices from alternative dispute resolution (ADR), harmonizing them with the latest technology. In today's age of data-driven solutions and machine learning, ODR has the potential to be much more than just replicating existing processes of ADR online through a social communication platform.

ODR is successful not only in facilitating communication between the parties but also in assisting them in resolving disputes in the comfort of their homes. This does not only ease the process of the disputants, but also assists in reducing the burden of the court.

Today we need technology that works with us; supports us to make minimal errors and improves outcome, to make the lives of humans better. AI (artificial intelligence) and automation promise to be the biggest technological shift in our lifetime. AI is augmenting our capabilities, allowing us to do more, with better accuracy, in less time.

We need customized platforms and applications, which could bring in automation and AI, allowing dispute resolution processes by negotiation, mediation, and arbitration available to people on their smartphones and helping mediators and arbitrators use automated AI assistance to make minimal errors, with greater efficiency. One such application is the "Peacegate App". This App has options for Online Negotiation, Online Mediation, Mediation through the Centre, Online Arbitration, and Arbitration through the Centre. The App is available on Play Store for android devices and on App Store for apple devices. The web version is available at www.peacegate.in.

Peacegate – Dedicated Online Dispute Resolution Application

Peacegate is a first-of-its-kind attempt to bring in automation and Artificial Intelligence (AI), to make dispute resolution processes available to people on their smartphones and help mediators and arbitrators to function with automation and AI assistance to make minimal errors, and work with

high efficiency. This makes access to justice easy and affordable and also designs a new justice system that works at the speed of technology, enabling fast and fair resolutions anywhere within the reach of the internet.

This helps not only people who have relationship disputes to choose the best option for resolving their disputes in the best manner possible but also allows the business community to handle their disputes in the age of the digital economy. Dispute Resolution in Digital Economy (DRDE) is possible only through online platforms. UNCITRAL in its Technical Notes on ODR has emphasized the equal treatment of the parties, maintaining the neutrality of the system, and providing a consistent, fair, transparent process with accountability, due process, and predictable procedures. It has also highlighted the desirability to disclose the relationship between the ODR administrator and a particular vendor so that users of the service are informed of potential conflicts of interest. Thus Peacegate dispute resolution application is best suited for all e-commerce platforms to address their dispute resolution requirements.

For the common man, an ODR platform like Peacegate ensures efficient and affordable access to justice, through remote processes. Similarly, ease of doing business could be stimulated through ODR mechanisms that ensure timely resolution in large numbers. The Peacegate App allows you to invite a person for online negotiation either to resolve a dispute or to make a deal. The entire conversation in the chat room gets deleted from the party's chat room on completion, maintaining complete confidentiality/ privacy of the process. If the other person refuses to communicate, or if the negotiation fails, you can end the negotiation and can opt to refer the dispute for mediation.

Through Peacegate Mediation Service, you can initiate mediation to resolve a dispute with the assistance of a mediator for conducting it in a mediation centre near you or to be conducted online. Peacegate will provide a list of various mediation centres available near you and also display the details of mediators enlisted in such centres. The entire administrative process of appointing the mediator and complying with the necessary legal and administrative requirements will be done with the Peacegate automation process, ensuring a hassle-free commencement of mediation.

In case of offline mediation, the App will also help in scheduling the meetings and booking the conference room in the mediation centre. For online mediation, Peacegate uses the dedicated web platform of "Edrameet", which provides a customized room for mediation, providing confidentiality and privacy, where parties can also chat with the mediator privately. The entire process is confidential and no audio/video recording is possible.

The App also assists the mediator to generate the Mediated Settlement Agreement, making sure that all mandatory legal requirements of the settlement agreement are complied, with so that human errors are eliminated. The parties, lawyers, and mediator can also sign the settlement agreement online, with absolute digital security.

Since Peacegate has incorporated multilingual options, the services can be used by people with

diverse language and cultural backgrounds from different countries, for resolving their disputes, without any language barriers or difficulty.

What holds in the future?

The classic telling has a donkey torn between a stack of hay and a pail of water. If there's absolutely no reason for the donkey to choose one or the other, the story runs that it will die of hunger or thirst, unable to satiate either. Indecision will cripple the chooser.

One of the iconic examples of what happens if we do not recognize and accept digital technology is the annihilation of one of the most powerful companies in the world, Kodak, which was so blinded by its success that it completely missed the rise of digital technology.

Humans have wonderfully complex minds, and they do magical things. Many of these things we are still only just beginning to work out entirely. These "cognitive processes" enable us to interact with the world and each other. They allow us to function. When we use the term "our mind", what we really mean is a catch-all term for memory, attention, motor control, agency, sensation, and so on. But why do all of these have to be limited to the brain?

If we define our mind by the processes it performs, then why not include the tools and technologies we use for these cognitive functions? Memory is the recall of information, so if we use our phones to recall numbers or a journal to remember a holiday, are these not part of our mind? These extended objects are performing cognitive functions as much as any brain tissue or synapse does. If this is true, it could be argued that certain tools we use, such as our smartphones, computers, or diaries are part of our minds.

This is just the beginning. The future of the digital revolution is notoriously difficult to predict. Many technological dreams that were once in science fiction are now a reality. It is said that with the development of AI, computer systems can complete or augment tasks that would require human intelligence – at a much larger scale than we could on our own – in fields that include speech recognition, visual perception, and decision-making. Research is going on with "Hybrid Thinking," an interplay between human and cyber intelligence. Augmented Reality, Projection Mapping, etc. could ultimately make online communication as real as reality, allowing for collocated collaboration between users.

Dr. Justice D.Y. Chandrachud, Chief Justice of India, had mentioned at a closed-door meeting organized by the NITI Aayog: "Above all, there needs to be a fundamental change in the mindset – look upon dispute resolution not as relatable to a place, namely a court, where justice is "administered" but as a service that is availed of."

There could be no better access to fair justice, than access to the service of justice through online dispute resolution applications. This is the new paradigm shift. The trend will continue to involve the use of chatbots and virtual assistants to help parties resolve disputes in real time, as well as the use of predictive analytics to identify and prevent potential conflicts before they escalate. The future looks interesting!

ANIL XAVIER

Mr. Anil Xavier is the Chairman of the Asia Pacific Centre for Arbitration & Mediation (APCAM) and the President of Indian Institute of Arbitration & Mediation (IIAM). He is a lawyer since 1991 and practises mostly in corporate, commercial, contractual, company and constitutional matters. He has dealt with corporate arbitrations and mediations and has been involved in multiparty complex civil/ commercial/ business/ corporate domestic and international mediations and arbitrations.

Mr. Xavier is an international Accredited Negotiator and Mediator of ADR Chambers UK, affiliated with the Civil Mediation Council (UK). He was designated as a Senior Fellow of the Dispute Resolution Institute of the Hamline University School of Law, USA. He was nominated as Chair of the International Accreditation Committee of Asian Mediation Association (AMA) for making standards for training and accreditation of mediators among member countries. He is the first IMI Certified Mediator from India and also an APCAM International Certified Arbitrator and Mediator. He is empanelled as an International Accredited Mediator of the Singapore International Mediation Centre, the Florence International Mediation Chamber, Italy and as a Senior Mediation Expert with the Mainland Hong Kong Joint Mediation Center, Japan International Mediation Center and with the ADGM Arbitration Centre, UAE. He is also empanelled as International arbitrator and mediator with APCAM Centres in Malaysia, Indonesia, Thailand, Hong Kong, Australia, South Korea and Nepal.

Mr. Xavier was a member of the Independent Standards Commission and Ethics Committee of the International Mediation Institute (IMI), at the Hague. He was a member of the 3-member Mediator Certification Committee of the Supreme Court of India and a member of the drafting committee of the Mediation Law in India. He is a resource person for training Judges at the National Judicial Academy, India. He was nominated as one of the world's leading practitioners in the field of ADR by Who's Who Legal, London, UK consecutively from 2016 onwards.

FOCUSSING ON LONG-TERM INTERESTS

Looking beyond the current dispute towards an improved future.
Not dwelling on the past

Mediating Speech

Shahrukh Alam

I was on a long-haul flight between Toronto and New Delhi recently. It was a cramped flight; I had the middle seat, and the two gentlemen on either side of me were cinephiles, clearly: they watched films from start to finish. Since we were departing from Canada, the airline had a significant selection of Akshay Kumar films. The gentleman on my right chose the 'jingoist genre'. As the films played, through meals and lights-out, through in-flight announcements, I could only see images of war on screen, and of bloodshed caused mostly by visibly Muslim villains. On the other hand, the passenger to my left had made 'slapstick humour' his genre of choice. Thankfully, I couldn't hear, but the visuals involving women were bad enough. Over fifteen hours thus, I witnessed the unfortunate immersion of two co-passengers in two different yet equally toxic discourses.

We have had a 'hate speech' problem in India. To be clear, 'hate speech' is not a problem of causing offence or hurting sentiments through one's speech. The visuals on either side of me were offensive, but more pertinently they were feeding into systems of prejudice and discrimination pertaining to women and to Indian Muslims.

The constitutional guarantee of protection from 'hate speech' is not supposed to protect people from being offended. Rather, this guarantee is supposed to protect the dignity of an individual or group. Jeremy Waldron, in his book *The Harm in Hate Speech* (Harvard University Press: 2014), says that dignity refers to a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify her from ordinary social interaction. That is what *systemic* hate speech attacks and that is what laws suppressing hate speech aim to protect.

The Supreme Court of India, too, said as much when it stated that 'the idea of discrimination lies at the heart of hate speech'. Its impact is not measured by its abusive value alone, but rather by how successfully and systematically it marginalizes a people. 'Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society.' [*Pravasi Bhalai Sangathan* v. *Union of India* [(2014) 11 SCC 477, Paragraph 8]

However, it is equally true that 'hate speech' is not stand-alone vitriolic speech that may always and easily be countered by action of law. Of course, there is speech that is immediately inciteful of violence or social exclusion, but equally, 'hateful speech' is cumulative and systemic. Speech that is prejudicial or that normalizes inequality of status feeds into broader contexts of discrimination at the societal level. The 15 hours' worth of propagandist film-time is not a kind of violent provocation, but it does amass the prejudices against Indian Muslims and legitimizes the male gaze on women.

Such prejudices are accumulated in one's daily lives too, in the ostensibly 'harmless' jokes about women, or in popular 'common sense' about the laziness of working people, the criminality of black people, and the treacheries of Muslims. These sentiments eventually feed into systems of discrimination and structural violence.

During mediation sessions too, we often see the same kind of quotidian prejudices and accumulated mistrust giving way to some drastic action. In matrimonial mediations, especially, the accumulated anger of years comes out in violent ways that often impacts children, where they are present.

What does one do, legally speaking?

In all honesty, we cannot criminalize all hate speech, for that would establish an unreasonably low threshold. Discursive hate speech is slowly being recognized as a constitutional tort, making it at least theoretically possible to bring about suits for damages against constitutional authorities for not having protected targeted groups from prejudicial and discriminatory discourses that have the potential to *materially harm* them. The material harm might refer to structural discrimination, to social and political exclusion, and to actual violence in some cases. However, given the scale of the problem of prejudice, even tortious suits seem impractical.

Again, drawing an analogy from matrimonial mediations, there are cases that exhibit an egregious breach of rights and dignity: a fraudulent eviction

for instance, where the wife had gone on an innocent holiday with friends and the in-laws used her absence to attempt a court order injuncting her from coming back to their house. Of course, the mere filing of such a petition in court caused a rupture in their relationship; the wife wished to fight this in court and defend her right to stay in their house. That also seemed like the immediately 'just' thing to do: to fight the good fight, for one's dignity. However, as mediators perhaps, it is useful also to look at the idea of justice from different perspectives. I have learnt to recognize, from my very limited experience of mediation, that justice, too, is layered. It need not always result in convictions or civil damages, nor in it being acknowledged that one side was unilaterally wronged by the other (which is often all that parties to a dispute actually want). Sometimes, justice lies in helping to heal by slowly chipping away at the hurt and the mistrust, by presenting other honest perspectives. For instance, to the wife, wrongfully evicted: there is dignity in legally fighting your way back into the in-laws' house; but there is dignity, also, in becoming financially autonomous, by returning to work, after a long career break. Perhaps, this also aids in shifting the conversation towards the affective ruptures caused by commonplace cruelties, and focusing on repairing trust and avoiding further alienation.

Mediation as a way of life: mediating hate speech

In the same vein, it is useful to reimagine mediation as an everyday response to prejudicial and discriminatory speech.

I was struck by a recent initiative announced by Dr. Justice D.Y Chandrachud, Chief Justice of India, involving work on a '*Glossary of inappropriate gendered terms*', which seeks to identify and eliminate, through discussion, ubiquitous biases that are subconsciously normalized through speech. This, to my mind, is a fine example of mediating prejudicial speech, such that it doesn't accumulate into systemic hate speech. Similarly, teaching critical race theory, or teaching caste in US schools (which has been quite contentious), engages, and hopefully mediates, prejudices. Subaltern histories – histories that tell the stories not of kings and kingdoms but of the ordinary men and women who inhabited them – complicate conversations, and thus mediate homogenous, simplistic views about invaders/outsiders. They tell stories of how even victorious armies brought with them unexceptional men and women - slaves, cooks, stable boys – who hardly ever formed part of the ruling elite, and of how their subaltern lives were entirely different from those of rulers and warriors. I must also clarify that complicating history is quite different from erasing or falsifying it. One opens windows for engagement, the other immediately excludes certain groups.

To conclude, mediation as a way of life might prove useful in restoring societal mistrust. Much like good literature, mediation is the promise of continued engagement in bad times.

SHAHRUKH ALAM

Shahrukh Alam read law at the National Law School of India and at the London School of Economics, where she was a Chevening Scholar. She also has a research degree in sociology.

She worked at the Planning Commission of India during the making of the 12th (and the last) Five Year Plan. Shahrukh is interested in constitutionality and in criminal law and its intersections with political power, identity and class. She practices law at the Supreme Court of India, and is discovering the promise of mediation.

Shahrukh is an activist-lawyer who has keenly supported vulnerable and marginalised groups in their struggle for justice. Her special interest focusses on gender issues.

MEDIATION ESSENTIALS

COLLABORATIVE PROBLEM-SOLVING

Arriving at mutually agreeable results

CREATING A SAFE ENVIRONMENT

Where the parties can express themselves without fear:
a crucial requirement of the mediation process

The Story of Samadhan

A Journey of Love

It was in May, 2006, that *Samadhan's* journey began. The seed of the Centre at the Delhi High Court was sown by the then Chief Justice of the Delhi High Court, **Justice Markandey Katju** (later Judge of the Supreme Court) with a unique model – a lawyers run and managed centre. This first step was indeed a courageous one, especially in an environment of stiff opposition from the practising lawyers of the District Courts of Delhi. Mr. Amarjit Singh Chandhiok, Senior Advocate, as the then President of the Delhi High Court Bar Association in 2006, graciously accepted the challenge to establish a court-annexed mediation centre against all odds. He became a pillar of strength for the mediation movement in Delhi and continues to guide us even today.

The first training workshop was held in March 2006, to train the first batch of lawyers of the Delhi High Court as mediators. An Overseeing Committee was constituted comprising of judges and lawyers to continuously co-ordinate and monitor the activities of the Centre, symbolizing the joint commitment of the Bar and the Bench to mediation. 35 lawyers and all the judges of the first Overseeing Committee attended this training workshop. Mr. Niranjan Bhatt, Senior lawyer and mediator from Ahmedabad

and Mr. Sriram Panchu, Senior Advocate and mediator from Chennai, guided *Samadhan* as trainers.

Following the first training, *Samadhan* was formally inaugurated on 26th May, 2006. The Bench and the Bar together rose to the occasion and whole-heartedly welcomed the idea of mediation. However, even before *Samadhan* formally started, the first successful settlement had been recorded. The Centre started functioning from two small rooms on the ground floor with a couple of mediation references per week. There was a small reception area between these two rooms with hardly any place for advocates and parties to stand. Within a short period of time, small queues of parties and advocates started assembling, waiting for their turn to avail of the mediation rooms.

Invaluable Support from our Judges

The backbone of the success of *Samadhan* has been the trust and faith reposed by the judges on the lawyers. The first Chairman of the Overseeing Committee, **Justice Manmohan Sarin,** who later retired as the Chief Justice of the High Court of Jammu and Kashmir, pro-actively guided the growth of the Centre along with his brother judges on the Overseeing Committee in its formative years. The then **Chief Justice of India, Justice K. G. Balakrishnan** launched its name and logo. Awareness material highlighting the advantages of mediation, the Delhi High Court Rules governing mediation and the functioning of the Centre were published and circulated.

Seeing the positive response of the litigants and the lawyers towards mediation, it soon became necessary to expand the infrastructure of the Centre. On 7th January, 2008, Chief Justice of India, Justice K.G. Balakrishnan inaugurated the expanded Centre on the ground floor. *Samadhan* now had a bright and colourful reception along with six mediation rooms and a staff room of the Extension Block, to accommodate advocates and parties more comfortably. On this occasion, *Samadhan's* website was also launched. As mediation gathered momentum, the Centre grew, the number of referred cases increased, as did the number of trained mediators.

*Samadha*n soon needed further expansion. As a result of the unstinting support of our then **Chief Justice, A.P. Shah**, who was a visionary and motivator, and had been a great source of support and strength, seven state-of-the-art mediation rooms, including a multipurpose conference room, were added on the first floor of the Extension Block. *Samadhan* became more functional and spacious with a better reception and waiting area for the litigants and a total of 13 mediation rooms. Further, during his tenure, the strength of empanelled mediators crossed the 200 mark. It was under his leadership that workshops to sensitize all the members of the Delhi Higher Judicial Service as referral judges were held.

Dr. **Justice Arijit Pasayat**, former Judge, Supreme Court of India, initiated our participation in the Lok Adalat movement in the Supreme Court. He involved our mediators in assisting the Supreme Court of India in its Lok Adalats as *amicus curiae*. **Justice Mukundakam Sharma** as Chief Justice of Delhi High Court (former Judge, Supreme Court of India) gave a fillip to the mediation movement by

encouraging increasing referrals to the Centre. He created further infrastructure in the Centre for the ever-increasing number of cases.

Justice Vijender Jain, the then Acting Chief Justice of the Delhi High Court (later the Chief Justice of Punjab and Haryana High Court) fully supported *Samadhan* throughout his tenure and carried forward the initiative to the Punjab and Haryana High Court, where he set up a court-annexed mediation. Justice Vijender Jain gave the first opportunity to mediators from *Samadhan* to be trainers for the first batch of mediators in the Punjab and Haryana High Court.

During his tenure as the then Acting Chief Justice, **Justice Mukul Mudgal** of the Delhi High Court (former Chief Justice, High Court of Punjab and Haryana) was the second Chairperson of our Overseeing Committee. He supported the mediation movement along with his brother judges of the Overseeing Committee, in every endeavour to ensure that the next steps crucial for *Samadhan* were taken from better quality of training to better quality of mediation.

Justice A. K. Sikri (former Judge, Supreme Court of India), the then Judge, Delhi High Court, was the third Chairperson of the Overseeing Committee and has been a mentor and has guided the Centre from its inception. He continues to help *Samadhan* to innovate and Indianize mediation and to make mediation more dynamic in facing both 'global' and 'local' challenges effectively. He and his brother Judges of the Overseeing Committee ensured that mediation was taken to the next level both in terms of referrals as well as the professional commitment of mediators.

Under the fourth chairmanship of **Justice Sanjay Kishan Kaul**, former Judge Delhi High Court and presently Judge, Supreme Court of India, Chairman National Legal Services Authority (NALSAR), Chairman of the Mediation and Conciliation Project Committee (MCPC), *Samadhan* expanded its operations to the fourth floor of the Administrative Block. This huge expansion gave the Centre pride of place in the Delhi High Court. With 31 rooms and a state-of the art infrastructure, *Samadhan* became a model mediation centre to be noticed not just in India but also globally. Foreign delegations from all over the world started visiting Samadhan to see and feel the growth of a court-annexed mediation centre in a short period of time. Justice Kaul and his brother Judges of the Overseeing Committee personally supervised every aspect of the building of the infrastructure.

The fifth Chairperson of the Overseeing Committee **Justice Gita Mittal** Judge, Delhi High Court (later Chief Justice of the High Court of Jammu and Kashmir), and her brother Judges of the Overseeing Committee, too played an extremely pro-active role in giving the right direction to the dreams of *Samadhan*, especially in the gender sensitisation of mediators and the empathy required in the conduct of mediation. She set an example of how a Judge prepares the parties and counsel for mediation and drafts an ideal referral order. She and her brother Judges of the Overseeing Committee gave priority to the functioning of the Delhi High Court especially with regard to the video conferencing facility to connect parties located in different parts of the country.

The sixth Chairperson **Justice G.S. Sistani** (since retired) and his brother Judges of the Overseeing

Committee ensured that standards set earlier were maintained and enhanced. His personal connect with mediators individually and collectively ensured increased participation and renewed energies of mediators and counsel to facilitate successful mediations.

Justice Hima Kohli, then Judge of the Delhi High court and presently Judge, Supreme Court of India took over as the seventh Chairperson of the Overseeing Committee. Her passion and commitment in mediation showed the way forward for the mediators even during the period of pandemic. With her vision, mediation reached everyone's doorstep instead of parties reaching *Samadhan*.

The eighth Chairperson **Justice Vipin Sanghi**, (then Acting Chief Justice of the Delhi High Court and presently Chief Justice of Uttarakhand High Court) left no stone unturned in continuing to promote the activities of the Centre and giving lawyer members of the Overseeing Committee a completely free hand in making the required changes and modifications for the better functioning of the Centre. During his tenure he and his brother Judges of the Overseeing Committee also ensured that the maximum number of sitting Judges of the Delhi High Court participated in the training workshops conducted by trainers of *Samadhan*. He has already initiated the process of entering into collaboration between the court annexed mediation centre of the Uttarakhand High Court and Samadhan, in order to spread awareness in mediation and making it more effective and popular as the alternative mode of resolution of disputes in the state of Uttarakhand.

Presently, **Justice Manmohan** has taken over the mantle as Chairperson of the Overseeing Committee. His tenure has seen the largest number of Judges and lawyers on the Overseeing Committee. Under his able leadership and with the support of Justices Sanjeev Sachdeva, Yashwant Varma, Naveen Chawla, Dr. Sudhir Kumar Jain, Purushaindra Kumar Kaurav, Vikas Mahajan and Saurabh Banerjee, the Overseeing Committee is conducting the National Mediation Conference, a first of its kind by Samadhan. The lawyer members comprise of Mr. Mohit Mathur, President Delhi High Court Bar Association, Mr Jatan Singh, Vice President, Delhi High Court Bar Association along with the trainers of Samadhan namely Mr. J.P. Sengh, Senior Advocate, Mr. Sudhanshu Batra, Senior Advocate, Mr. Rajeev Virmani, Senior Advocate, Ms. Sadhana Ramachandran, Advocate and Ms. Veena Ralli, Advocate, and the present Organizing Secretary. Apart from the present National Mediation Conference, this team has extensive plans for continuous professional learning workshops, panel discussions and seminars to be conducted by *Samadhan*.

Our Proactive Bar

The unique feature of *Samadhan* has been a pro-active Bar that has led from the front through every successive Executive Committee of the Bar Association. It is because of the commitment of the Bar that *Samadhan* has become a living example of a multi-door court house. When a client comes to a lawyer, the lawyer examines the matter and advises his/her client on what would be the best alternative for him/her to opt for – mediation, arbitration, litigation or the *Lok Adalat*. Since its very inception, lawyers of the Delhi High Court

have become catalysts in the healing process where parties in conflict, often over a long period of time, are encouraged to opt for mediation first. Driven by their lawyers, they soon begin to agree to mutually acceptable solutions.

Mr. J. P. Sengh, the first Organizing Secretary of *Samadhan* has nurtured the Centre from its inception through its continuous evolution, very ably and with great distinction. Ms. Sadhana Ramachandran, took over as the Organising Secretary after J.P. Sengh, followed by Mr. Sudhanshu Batra. Presently the position is being held by Ms. Veena Ralli. All four of them together with their respective teams at different points of time have seen *Samadhan* grow to be a well acclaimed, model mediation centre of International standard.

Pre-litigation

On popular demand, in 2007, *Samadhan*, started conducting mediations at a pre-litigation stage. Several pre-litigation matters are being referred by lawyers, who are constantly advising their clients to opt for mediation even before approaching the court. Simultaneously, because of the growing awareness among citizens, pre-litigation matters are being brought by the parties themselves on a daily basis.

Training

Samadhan conducts training programmes regularly. The special feature of these programmes is that they are usually residential where the trainers and trainees come out of their daily professional environment and stay together for the entire duration of the basic and advanced training. This creates a warm and informal environment that adds value to the training and understanding of the concept and process of mediation. The bond that residential programme creates between participants, has evolved into what we call the *Samadhan family*. It is this quality of training that has led to a long waiting list of lawyers wanting to become mediators.

Role Plays form an integral and essential part of every training programme. They are also very popular with the participants, who eagerly look forward to them. Participants simulate an actual mediation session through different dispute situations which they enact in a role play, thus learning the finer nuances of mediation techniques. They also learn how to overcome impasse and dead-lock situations through brainstorming exercises and other techniques. Almost all sessions are designed to be interactive, giving ample opportunity to each of the participant to engage themselves in discussions an deliberations.

The subjects that are taken up in training include: legislative history of mediation in India; the law on mediation; the relevance of training; understanding and transforming conflict; comparative study of mediation with other modes of dispute resolution; negotiation and bargaining; the mediation process and its stages; the roles of the mediators, co-mediators, the lawyers and the parties; communication and active listening; dealing with impasse; closing and wrapping up mediation sessions; drafting settlement agreement; ethics and confidentiality in mediation; co-mediation; special features of different types of cases that come to mediation; the relevance of domain knowledge amongst others.

Matters to *Samadhan* are not only referred by the Delhi High Court but also by the Supreme Court, District courts of Delhi and various Tribunals and other Authorities. Over the years, cases relating to disputes in the genres of matrimonial and family matters, real estate transactions, commercial disputes, construction issues, intellectual property rights, banking and insurance have been very successfully handled by qualified and experienced mediators of the centre. *Samadhan* also has on its panel, professionals in the field of child and family counselling to deal with issues of child custody and other sensitive matrimonial disputes. It also has a well-equipped children's room to ensure children coming to the Centre feel comfortable and cared for.

Some of the senior mediators have become trainers. Some of them have successfully participated in 'train the trainers' programme conducted in the USA to enhance their training skills. These trainers are not only conducting basic and advanced level courses for the Delhi High Court but also travel throughout the country to train advocates from other courts to become mediators. The mindset of litigants and lawyers has changed dramatically since the mediation movement started. *Samadhan* can boast of having contributed to this change to a large extent. The trainers of *Samadhan* have also conducted workshops to create awareness and sensitise judicial officers of the District Courts in Delhi and other states.

Foreign Delegations and Academics

At *Samadhan* we have continuously received foreign delegations from various countries including the United States, Japan, Singapore, China, Italy, Brazil and Kenya etc. who interact with the members of the Overseeing Committee and mediators. Visits of these delegations have led to greater understanding of the new trends in mediation across the world.

We have also received senior academicians to share their experiences with us and ours with them. Prominent among them have been late Prof. Sally Merry, Professor of Law and Anthropology, New York University who has written and researched widely on mediation in her early academic career; Prof. Shareen Hertal, Professor of Political Science and Human Rights at the University of Connecticut, who has researched and taught ADR as a means to further human rights; Prof. Shrimati Basu, Professor of Law, University of Kentucky, who has researched and written on mediation in family courts; Prof. Oshikawa Fumiko from the Centre for Integrated Area Studies, Kyoto University; Prof. Mika Yokoyama from Kyoto University; Mr. Stefano Cardinale, Managing Partner, Bridge Mediation Italia, who expressed keen interest in a comparative mediation programme in the future.

Publications and Awareness

Samadhan has produced its own training material to ensure that the essentials of mediation and its process are understood by all participants in any training programme. *Samadhan* has its own basic training manual as well as one for advanced training. There is a special training manual for matrimonial and family disputes.

Pamphlets that contain the Mediation Rules of the Delhi High Court and answer 'frequently asked questions', are available for the awareness of the public, litigants and lawyers alike. Bilingual pamphlets published in Hindi and English that

explain the advantages of mediation to the ordinary person were sent initially to create awareness with every summons or notice that was issued by the Delhi High Court.

As an important step in creating awareness about the concept and process of mediation, *Samadhan* brings out an annual calendar with a different theme each year.

We are very proud of our logo. Accordingly *Samadhan* has designed ties, scarves and mediator badges that are worn with pride by our Judges and mediators. The ties and scarves are also proudly presented to our visiting guests. These were released on the occasion of the fifth anniversary of *Samadhan* on 1st april, 2011 by **Mr. Justice Dipak Misra**, the then Chief Justice of the Delhi High Court.

Using Technology

During the pandemic, *Samadhan* faced the communication challenge squarely. Almost immediately, the centre switched to conduct mediations online. By adopting this new method of conducting mediation, it ensured that parties and their lawyers could continue to participate in the mediation process in the safety of their homes and offices and did not lose precious time in negotiating and exploring possible terms of amicable settlement. Online mediation still continues very effectively, especially in relation to commercial disputes.

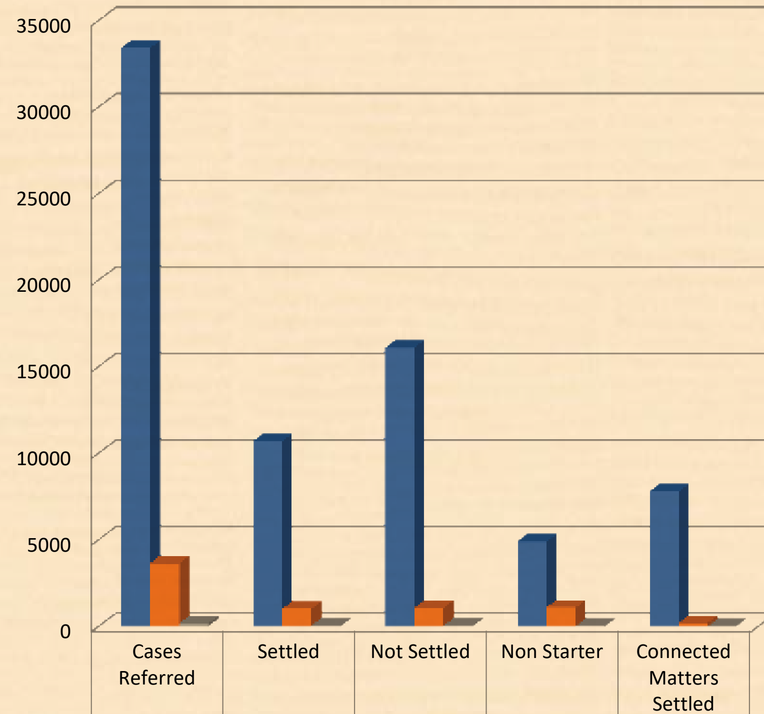
Samadhan has launched a website in order to facilitate the administration of the Mediation Centre and its coordination with mediators and parties. The website allows the mediators to coordinate online with the staff and disputants by allotting a convenient time for the mediation process, without any third-party intervention. The website will also have a payment gateway to make the process of payment to mediators easier and efficient.

Samadhan will now also have the facility of its own server to build a data base, which can be used for the purposes of analysis and research. The provision will link the mediation website with the court server. This will enable the process of marking a matter by the court to the mediation centre faster. Steps are also being taken to upload awareness material on the advantages of mediation, which will be accessible to the public.

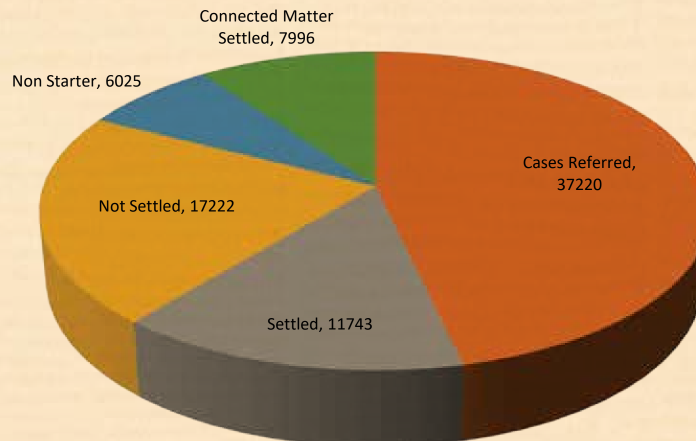
Samadhan continues to strive to find excellence in the quality of mediations its mediators conduct, in maintaining high ethical standards and in assisting all parties to find true happiness and peace in their lives.

Sadhana Ramachandran, Sudhanshu Batra
with Team Samadhan

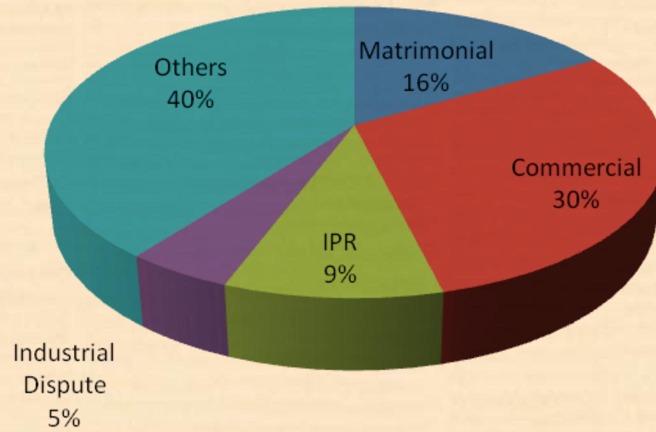
Samadhan: Statistics of Referral and Disposal from March 2006 till February 2023



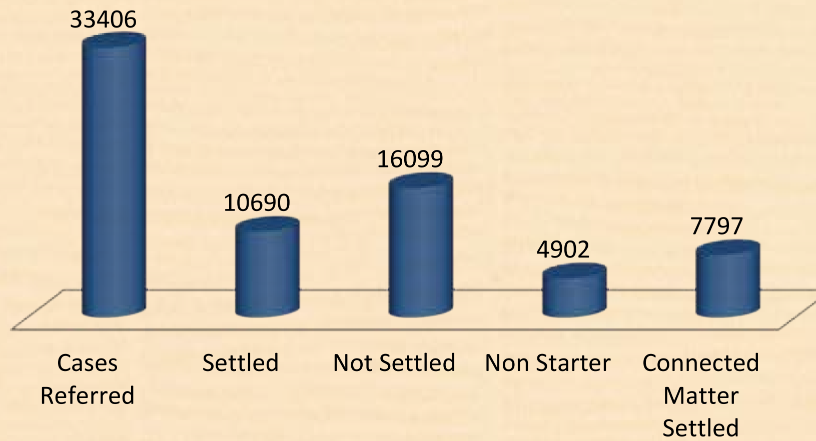
	Cases Referred	Settled	Not Settled	Non Starter	Connected Matters Settled
Court Referred	33406	10690	16099	4902	7797
Pre Litigation/Conciliation	3642	1012	1074	1111	197
Pre-Institution Mediation	172	41	49	12	2



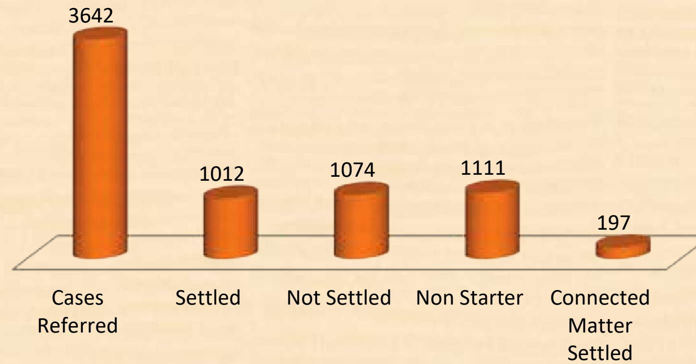
Court Referred Cases



Subject Wise	Matrimonial	Commercial	IPR	Industrial Dispute	Others
Cases Settled	1771	3163	1021	504	4231

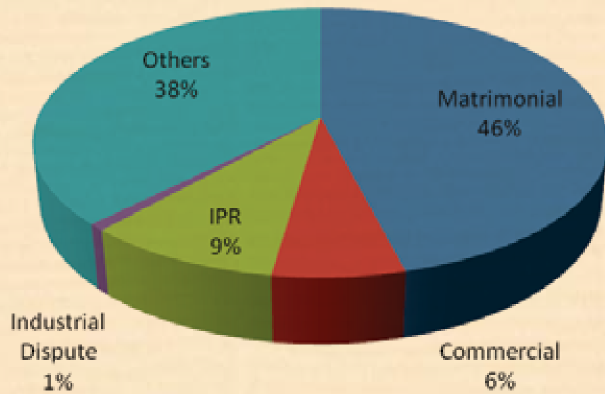


Pre-Litigation/Conciliation Cases

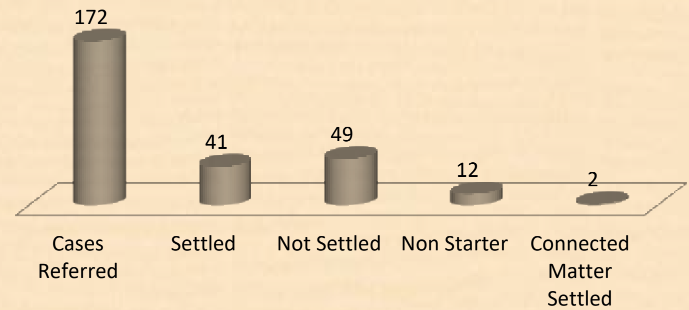


Subject Wise	Matrimonial	Commercial	IPR	Industrial Dispute	Others
Cases Settled	466	63	94	8	381

Pre-Litigation Cases Settled



Pre-Institution Mediation under the Commercial Courts Act



BALANCING POWER BETWEEN THE PARTIES

A skill that produces settlements that are fully informed and voluntary, making them binding

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