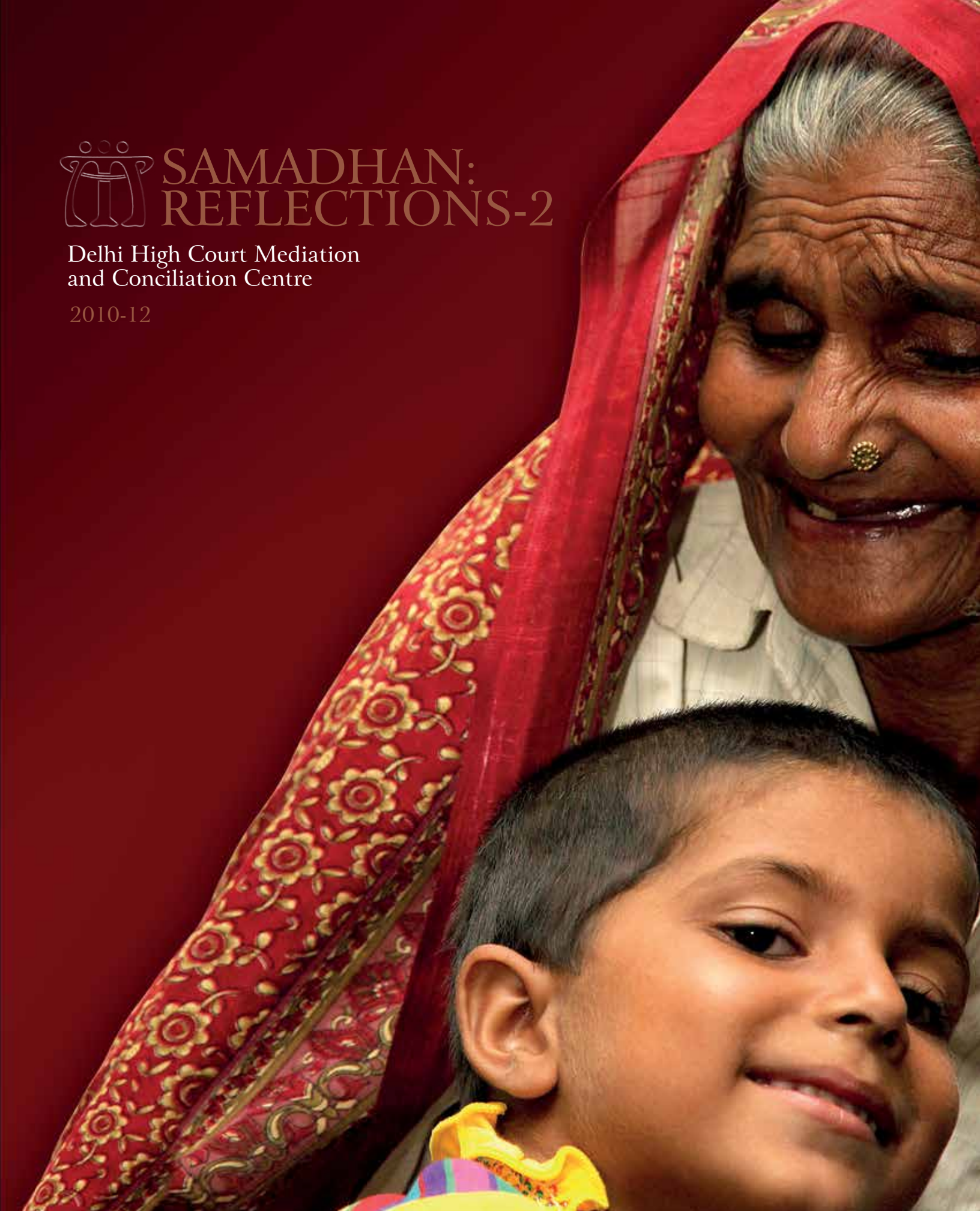
SAMADHAN: REFLECTIONS-2

Delhi High Court Mediation
and Conciliation Centre

2010-12



Samadhan
Reflections 2

SAMADHAN
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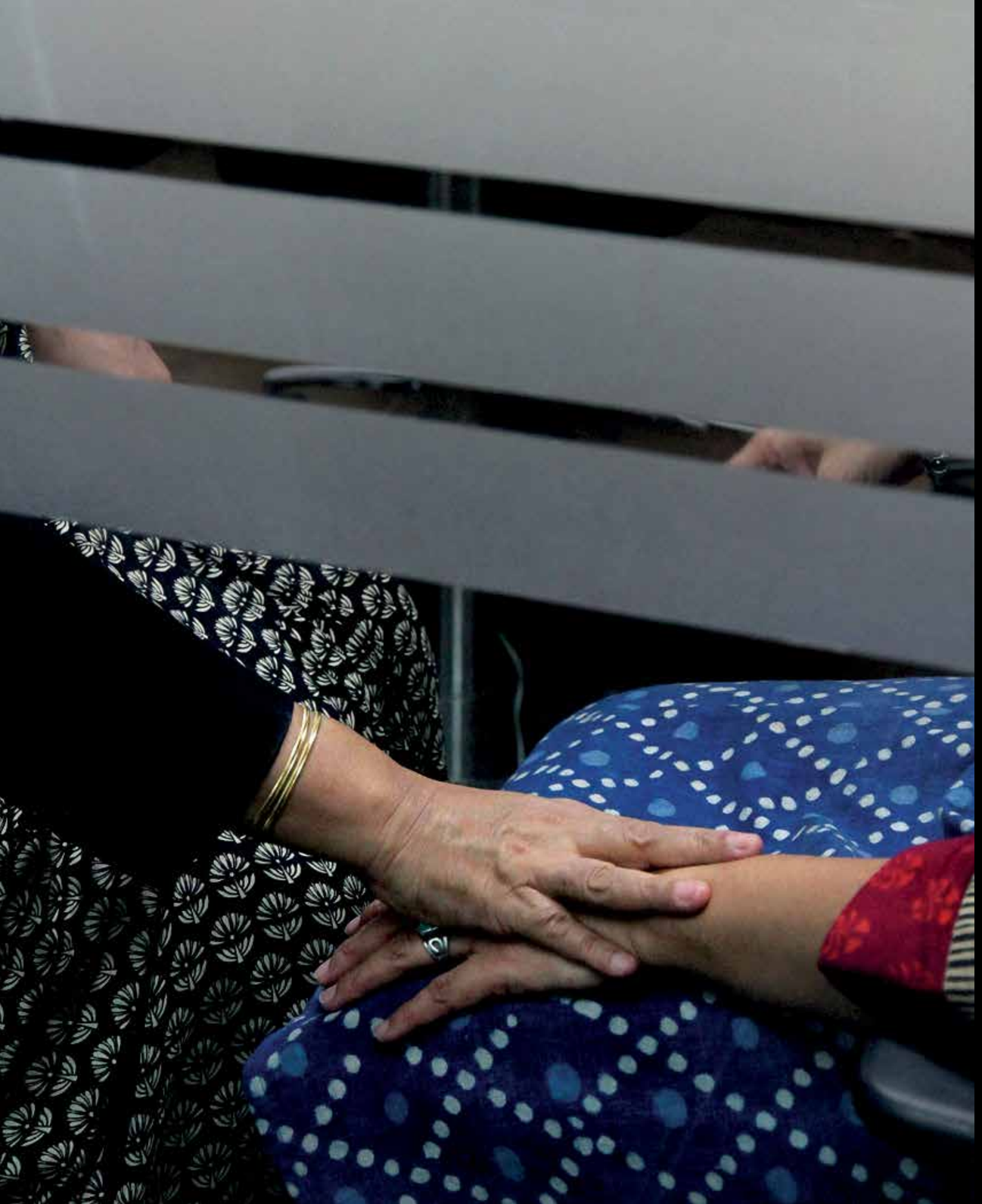
Organising Secretary: Sudhanshu Batra (Sr Advocate)
Joint Organising Secretaries: Veena Ralli (Advocate) and
Kewal Singh Ahuja (Advocate)

Cover: *A photograph taken at the Samadhan Centre after a successful matrimonial mediation involving 3 estranged generations within a family*

Reflections 2

2010-12

Samadhan
Delhi High Court Mediation and
Conciliation Centre



Too often
we underestimate
the power of a touch,
a smile, a kind word,
a listening ear,
an honest compliment,
or the smallest act of caring,
all of which have the potential
to turn a life around."

LEO BUSCAGLIA

Contents

Editorial

SUDHANSHU BATRA
Organising Secretary, Samadhan

Communication, relationships, present and future interests and assisted negotiation are integral to the process of mediation. When mediation was introduced in the judicial process by the enactment of Section 89 of the Code of Civil Procedure, no one quite understood the true import of the concept. Gradually, when the courts started recognising the newly introduced provision and started invoking it to dispense justice, the legal community started waking up to mediation. Justice, in its true sense, means that rival parties resolve their disputes amicably in a manner that is beneficial to all concerned.

In the year 2006, then Chief Justice of the Delhi High Court Justice Markandey Katju flagged off Samadhan, the Delhi High Court Mediation Centre. Lawyers were initially sceptical about the acceptance of mediation. Activists of this movement took upon themselves to inspire and motivate lawyers of the Delhi High Court to participate in this unique movement in Indian judicial history. Lawyers and judges began talking to and convincing members of the Bar to take the lead in creating an appropriate Disputes Redressal Forum. Persons with prior exposure and experience in mediation were called in to sensitise them and, eventually, train them to act as mediators. This was done so the disputants could come to terms with reality, understand the conflicts involved and focus on their present and future interests rather than quarreling over past differences and taking tough positions in legal battles. More than anything else, mediation would help restore their broken relationships and, assisted by mediators, they would be able to evolve their own solutions.

With passing years, mediation has become the call of the day. More and more lawyers are keen on becoming mediators and are waiting to attend training programmes organised by the trainers of the centre. The primary reason for this is the unexplainable satisfaction of seeing the happiness and contentment on the faces of the parties when they walk away by signing a settlement agreement, regaining peace and harmony for themselves and finally putting an end to their long-drawn legal battles.

With almost 266 mediators on the rolls of the centre, Samadhan has achieved great heights and is today acknowledged as one of the best centres in the country. In the process of understanding the nuances of mediation, the mediators themselves claim to have improved their own lives both at home and at work. Lawyers of the Delhi High court have been fortunate in getting the unlimited support, encouragement and guidance of all the past and present Chief Justices of the High Court – starting with Justice Markandey Katju to the Acting Chief Justice A.K. Sikri, and now the Chief Justice D. Murugesan.

The centre's achievements can be attributed to the judges of the overseeing committee of Samadhan. Justice Sanjay Kishan Kaul has been chairing the committee since the past four years with Justice S. Ravindra Bhat, Justice Hima Kohli and Justice Rajiv Shakdher and four trained mediators. The invaluable support, vision and participation of the judges on the committee in all the activities of the Mediation centre has built trust and confidence between the Bench and the Bar making it an exemplary team.

With the fast changing cultural and social needs of the people, life for the common man has become extremely stressful and gives rise to unhappiness, rage and revenge. Mediation is one method of resolving these conflicts in their lives.

In 2010, Samadhan released the first issue of Reflections, tracing the history of the centre since its inception. In the present issue, the centre looks at the path it has taken since 2010 and the goals accomplished through the untiring efforts of the mediators. I hope that the movement which has started with such enthusiasm blazes new trails and creates a society which the next generation will like to live in and cherish.

Swatanter Kumar
Judge
Supreme Court of India

MESSAGE

It gives me great happiness to know that "SAMADHAN", the Delhi High Court Mediation and Conciliation Centre has completed six years, and is regularly coming out with this all-encompassing report regarding its activities from inception till date. The greatest need of the hour, given the overburdened court system, is alternate modes of dispute resolution. "SAMADHAN" is a timely and necessary solution to the same. The power of mediation is that it creates a new dynamic for future interaction. The control that the parties have over their situation, which allows them to craft unique solutions for their problems, with the advantage of privacy which encourages a conflict-free and non-adversarial atmosphere, reduced costs, timely-solutions to conflicts and a peaceful resolution of the same are but few of the advantages of mediation. The rapid growth and popularity is ample proof of the public's faith in the avenues of mediation and conciliation, which provide a convenient, fast and amiable solution.

The Centre, in imparting requisite training to aspirant mediators, and further, equipping Judges with the ability to be good mediators, is performing a great service not only to the legal community, but to Society in general. Whether they are family problems, civil law or public policy disputes stretching all the way to international conflicts, mediation has proved to be an effective tool in dealing with such disputes. The key to a successful mediation is the ability of the mediator. The mediators can create a more productive environment, ensure peaceful and successful resolution of disputes and can improve the relationship between the parties leading to a more successful future relationship. An understanding of legal rights helps the parties make decisions in their own best interests and their increased involvement in the entire process ensures that they have a higher commitment to upholding the settlement. It is an endeavour, to not only provide amicable settlement of disputes, but to build trust and understanding for the future betterment of the relationship.

I am extremely happy to see not only the growing responsibility taken on by "SAMADHAN", but also the mediators of the Delhi High Court becoming trainers for other courts in the country, thus spreading awareness throughout the country.

My best wishes and congratulations to the entire team at "SAMADHAN". May they grow from strength to strength and remain self motivated and committed to the cause.

I am sure that "SAMADHAN" will reach the epitome of mediation, that is "संतोषम परम सुखम".

(JUSTICE SWATANTER KUMAR)

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November 6, 2012

MESSAGE

It is really heartening to note that Delhi High Court Mediation and Conciliation Centre has achieved new heights in the field of Mediation. Mediation is a concept aimed to provide justice to the needy as against redressal by Courts. The concept of Mediation is basically exchange of information to achieve a settlement through communication and persuasion. Mediation is one of the most sought areas as it has inherent potential for redressal of disputes by mutual consent. It appears to me that the team of Hon'ble Judges of Delhi High Court and Members of the Bar working for mediation have made continuous and concerted efforts to bring the concept of mediation to such a stage where Delhi High Court Mediation and Conciliation Centre can boast of being the best in the country, although, it would not be wrong if I compare it with other Mediation Centres in the world.

Looking at the data of successful mediation, one can very well imagine the devotion, hard work, persistence and honest attempts that have been put in to achieve those targets. I am also informed that even pre-litigative mediation has been undertaken with an object of nipping the disputes in the bud. This is really a salutary initiative to save the future generations from falling in the vicious circle of protracted litigation.

Although, a completely equipped infrastructure and supporting staff is very essential for any mission, but the need to have more and more devoted, committed, trained and hard working mediators cannot be over emphasized. I really appreciate the results shown by the Mediation and Conciliation Centre in its mission and convey my best wishes for their noble cause the whole team is engaged in.

I convey my best wishes to the Delhi High Court Mediation and Conciliation Centre for bringing out this Souvenir as to the activities undertaken and also to be undertaken by it.

JUSTICE D. MURUGESAN

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November 19, 2012

Congratulations to *Samadhan* on the publication of this edition of *Reflections*.

At the University of Utah, S.J. Quinney College of Law, our mission is to improve the human condition through collaborative research, innovative training, and direct service. The condition of human conflict is a priority in our mission. Conflict is an inherent aspect of life. On the one hand, conflict highlights value choices, remedies wrongs, and helps to allocate power and limited resources. On the other, conflict imposes incalculable costs of an emotional, social, economic, and political nature, particularly when it escalates into violence. We view mediation (its richly adaptable techniques of facilitated communication and negotiation) as a vital strategy that can maximize the benefits and minimize the costs of conflict at a local, national, and global level.

However, the power of mediation in any setting is only as effective as the institution responsible for realizing its promise. And that is why the work of *Samadhan* is so inspiring from a global view.

Samadhan has generated a mediation model of national and global significance through the generous support of the government, the superior leadership of the High Court, the effective management of *Samadhan*'s organizers, and the dedicated, selfless service and imaginative adaptation of mediation techniques by over two hundred High Court lawyers. The success of *Samadhan* goes well beyond the thousands of cases it has settled and the benefits those settlements have bestowed on the litigants. The creative application of mediation techniques inspires further adaptations in India and around the world.

We are very humbled by and proud of our long-term institutional collaboration and partnership with *Samadhan* in pursuit of our common mission.

The many stars of *Samadhan* have aligned and enlightened us all.

Very truly yours,

Hiram E. Chodosh
Dean and Hugh B. Brown Presidential Professor of Law

Discussion is an exchange of knowledge; argument is an exchange of ignorance.

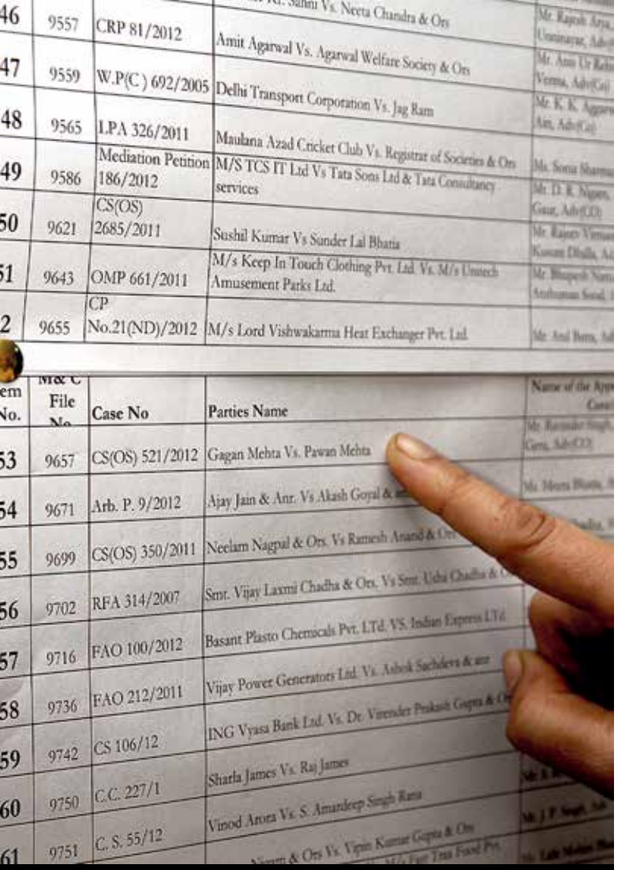
Justice D Murugesan
Chief Justice, Delhi High Court
Patron, Samadhan

The key to resolving conflict is suspension of one's own point of view as the only point of view.

SAMADHAN OVERSEEING COMMITTEE

Sitting, from left:
AS Chandhioke (Sr Advocate, ASG & President DHCBA), Justice Hima Kohli, Justice SK Kaul (Chairman), Justice Ravindra Bhat, Justice Rajiv Shakdher

Standing, from left:
Sadhana Ramachandran (Advocate), JP Sengh (Sr Advocate & Vice President DHCBA) and Sudhanshu Batra (Sr Advocate & Organising Secretary)



Stepping Ahead

The gentle hands of Samadhan have touched the lives of thousands of people – re-uniting them or assisting them in amicably resolving their disputes and differences pending before the courts. Started in May 2006, Samadhan has actively commenced pre-litigation mediation. This indicates the increasing awareness among people about the Appropriate Disputes Redressal (ADR) Forum. Under the chairmanship of Mr. Justice Sanjay Kishan Kaul, the Overseeing Committee includes four sitting judges of the Delhi High Court.

Run primarily by the members of the Delhi High Court Bar Association, Samadhan has expanded its infrastructure from 2 rooms to 13 on the ground and first floors of the Delhi High Court Extension Block. Soon, it will expand its operations to the fourth floor of the New Administrative Block on the Delhi High Court premises. Extensive computerisation of operations is under way making available awareness material, besides providing administrative connectivity with each mediator on its website.

Matters to Samadhan have not only been referred by the Delhi High Court but also by the Supreme Court of India, District courts of Delhi, the Company Law Board and Telecom Regulatory Authority of India. Cases and disputes relating to matrimony, real estate transactions, construction, employment and services, industry, intellectual property rights, banking and insurance and commercial disputes have been very successfully handled by 266 qualified and experienced mediators of the centre. The Mediation Centre also submits verification reports in Habeas Corpus matters referred by the High Court. Looking at the success of the ADR Forum, PSUs, too, have started actively participating in resolving disputes through mediation with private companies or individuals.

Samadhan 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.

Some of the senior mediators have also become trainers. They successfully participated in 'Train the Trainers' programme conducted in the USA to enhance their training skills. The trainers have not only been conducting basic and advance course for the advocates of the Delhi High Court Bar Association but have also travelled throughout the country to train advocates from other courts to become mediators. The mindset of litigants and advocates has changed dramatically since the mediation movement started. Samadhan can boast of having contributed to this change to a large extent.

Trained mediators and trainers of Samadhan have also participated in courses conducted for judicial officers of the District courts in Delhi in order to sensitise them and make them more aware about the process of mediation and its advantages.

The following activities were initiated by Samadhan during 2010-2012:


Prof. James Holbrook at the Workshop on New Dimesnsions in Mediation, December 2010


Introductory Training Workshop at Manesar, September 2011

Training Programmes and Other Related Activities

• The Punjab and Haryana High Court organised an Introductory Training Workshop for mediators in Chandigarh from 23rd to 25th April, 2010 for training 125 lawyers from 18 districts of Punjab and Haryana by Samadhan trainers.

• The second phase of the aforementioned training workshop was held again in Chandigarh from 30th April, 2010 to 2nd May, 2010 for the purpose of taking forward the training of the 125 lawyers who participated in the introductory phase.

• Mr. J. P. Sengh was invited by the Madras High Court, Chennai, to be a resource person for mediation workshops started by them at their centre.

• Dr. Rajeev Shukla, Dr. Indu Kaura and Dr. Nandita Chaudhary (Counsellor, Family Counsellor and Child Psychologist respectively) held interactive sessions with Samadhan mediators on 30th October, 2010 with a view to sharpen the skills of mediators.

• Two separate workshops on 'New Dimensions in Mediation' were held at the Heritage Village, Manesar, in December 2010. Mediation experts, including Professors James Holbrook and Aaron enlightened mediators of Samadhan on the process of mediation and its effectiveness.

Right: Talks on Peer Mediation orienting school children

Below: Refresher Programme on Revisiting Mediation, March 2012

• Mr. Sudhanshu Batra and Ms. Veena Ralli, Samadhan mediators, addressed students in April 2011 on 'Peer Mediation' at an orientation programme held in DAV School, Model Town, Delhi.

• Eleven Samadhan mediators were invited by Dean Hiram Chodosh, S.J. Quinney College of Law, Salt Lake City, University of Utah, USA, in May 2011 to attend a 'Train the Trainers' programme.

• Mr. J. P. Sengh and Ms. Sadhana Ramachandran represented Samadhan at a symposium organised by the Utah Council for Conflict Resolution (UCCR) in Utah, USA, held on 19th and 20th May, 2011. They made an audio-visual presentation on the evolution of Samadhan over the last five years.

• Mediators Ms. Lalit Mohini Bhat and Mr. Rajiv Agarwal conducted a Mediation Training Programme at FICCI in August 2011 as part of Mediation Advisory Centre (MAC).

• An Introductory Training Workshop was held for the members of the Bar between 2nd and 4th September, 2011 by Samadhan trainers at Heritage Village, Manesar.

• Mediators Ms. Veena Ralli, Mr. Kewal Singh Ahuja, Mr. Rajiv Agarwal and Ms. Lalit Mohini Bhat (all advocates) participated in the North Zone Conference on Mediation, organised by the Regional Body of MCPC, held in Jammu on 17th March, 2012.

• Samadhan held a refresher programme, 'Revisiting Mediation', for trained mediators of the Delhi High Court Mediation and Conciliation Centre between the 23rd and 25th March, 2012 at Heritage Village, Manesar.

• Samadhan mediators, Mr. J.P. Sengh and Ms. Sadhana Ramachandran, along with Mr. Niranjan Bhatt, conducted a refresher programme in Guwahati, Assam, for mediators on 31st March, 2012.

• An Orientation programme on "Principles of Mediation, Importance and Role of Referral Judges and Case Management" was conducted by Samadhan Trainers from 13th July to 15th July 2012 at Manesar.

Left: Samadhan mediators at Utah University, Salt Lake City, USA

Below: Release function of the first issue of Reflections

• An Advanced Training Programme was conducted for Samadhan Mediators from 12th October to 14th October 2012 at Manesar.

Awareness Programmes

• 'Reflections', a report of Samadhan from 2008-2010 was released on 6th December, 2010 by the Chief Minister of the Government of NCT of Delhi, highlighting how Samadhan has evolved over the last five years.

• MMTC, Delhi conducted a lecture series in March 2011 by Mr. J.P. Sengh and Mr. Sudhanshu Batra, both senior advocates, in which they sensitised senior executives of the MMTC on the 'Techniques of Mediation'.

Left: Advanced Training Programme for co-mediators, October 2012

Right: Justice Murugesan, Chief Justice of Delhi High Court, addressing the gathering at the Advanced Training Programme.

Right: Shri Niranjan Bhatt training Samadhan mediators

Below: Release of badges for Samadhan mediators and administerial staff

• Badges for Samadhan mediators and administrative staff; and ties and scarves, designed for Samadhan mediators, were released on the occasion of the fifth anniversary of Samadhan on 1st April, 2011 by Mr. Justice Dipak Misra, then Chief Justice of the Delhi High Court.

• Mr. J.P. Sengh and Ms. Sadhana Ramachandran, along with Mr. Niranjan Bhatt, conducted an awareness programme at Dimapur and Kohima in Nagaland on the concept and process of mediation from 1st-4th April, 2012. They visited villages of the Ao Angami and Sema tribes and interacted with the members of the Lotha tribe. Participants comprised the Gaon Burahs (village elders), Do Bhashis (interpreters), members of the village councils, (all of whom together constitute the Village and District Customary Courts in Nagaland) and judicial officers. Panel lawyers of the Nagaland Legal Services Authority also participated in a separate orientation programme.

• Samadhan mediators, Mr. J.P. Sengh and Ms. Sadhana Ramachandran, along with Mr. Niranjan Bhatt conducted an awareness programme on the theory and practice of mediation at Imphal, Manipur, on 5th April, 2012, for lawyers and police officers.

• Samadhan mediator Ms. Veena Ralli on 15th June, 2012 held an orientation programme for legal and para-legal workers of Ajeevika Bureau, an NGO in Udaipur, Rajasthan.

• A lecture was delivered by Prof (Dr.) Nancy D. Erbe (USA), an international expert in Alternative Dispute Resolution and Peace Building, on "Mediation Practice: Benefits to Lawyers" on 6th November 2012 at Delhi High Court.

Clinical Workshops on Mediation held for Law Students

• The Institute of Law, Nirma University, Ahmedabad, by Samadhan mediators, Mr. J.P. Sengh and Ms. Sadhana Ramachandran.

• The College of Legal Studies, University of Petroleum and Energy Studies, Dehra Dun by Samadhan mediators, Mr. J.P. Sengh, Ms. Sadhana Ramachandran, Ms. Veena Ralli and Mr. Kewal Singh Ahuja.

• Campus Law Centre, University of Delhi, by Justice Hima Kohli and Samadhan mediators, Mr. Sudhanshu Batra, Ms. Anita Sahani, Ms. Veena Ralli and Mr. Rajiv Agarwal.

First National Moot Mediation Competition

• The first National Moot Mediation Competition in India was held on 13th-15th January, 2012 at the Ram Manohar Lohia National Law University in Lucknow in which 23 national teams from several law schools participated. Six mediators from Samadhan guided the participants and judged the quarter-finals, semi-finals and finals of the event. The Samadhan mediators were: Mr. J.P. Sengh, Ms. Sadhana Ramachandran, Mr. Sudhanshu Batra, Ms. Veena Ralli, Mr. Rajiv Agarwal and Ms. Anita Sahani.

Foreign Delegations

• A delegation from Kenya visited the Delhi High Court Mediation and Conciliation Centre and discussed with Samadhan mediators the process of and trends in mediation in both the countries.

• Prof. Sally Merry, Professor of Law and Anthropology, New York University, who has written and researched widely on mediation in her early academic career, shared her experiences in mediation with Justice Hima Kohli and Samadhan mediators.

• Prof. Shareen Hertal, Professor of Political Science and Human Rights at the University of Connecticut, USA, who specialises in ADR as a means to further human rights, held discussions with Justice Sanjay Kishal Kaul, Justice Hima Kohli and Samadhan mediators.

• Prof. Shrimati Basu, Professor of Law, University of Kentucky, USA, met Justice Hima Kohli and Samadhan mediators to discuss the role of mediation in family courts.

• Prof. Oshikawa Fumiko from the Centre for Integrated Area Studies, Kyoto University, Kyoto, Japan and Prof. Mika Yokoyama, Kyoto University, visited Samadhan as part of a Japanese delegation and discussed some concepts in mediation with the mediators of Samadhan. They also evinced keen interest in the activities of Samadhan.

• Mr. Avv. Stefano Cardinale, Managing Partner, Bridge Mediation Italia, visited Samadhan along with Mr. Anuroop Omkar, India Coordinator of Bridge Mediation Italia and shared his experiences of mediation in Italy. He expressed keen interest in a comparative mediation programme in the future.

• Delegations from China and Kenya separately attended proceedings and activities of Samadhan in May 2012 and participated in an orientation programme with Justice A.K. Sikri, the Acting Chief Justice, Delhi High Court and his co-judges and Samadhan mediators.

A delegation from Kenya visiting Samadhan

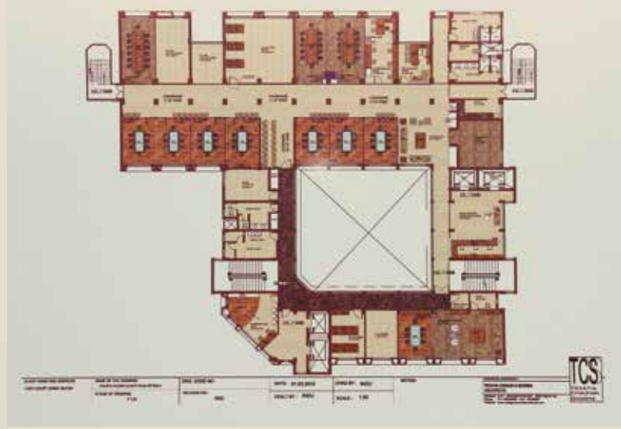
Annual Calendars

• Mr. Justice Dipak Misra, then Chief Justice of the Delhi High Court, released a calendar for the year 2011. The calendar used photographs of human hands to convey the message of mediation.

• Acting Chief Justice A.K. Sikri released the calendar for 2012. This calendar draws attention to the need for Indianising mediation through using the paintings of Madhubani artists to convey the message of mediation.

Infrastructure Renovation

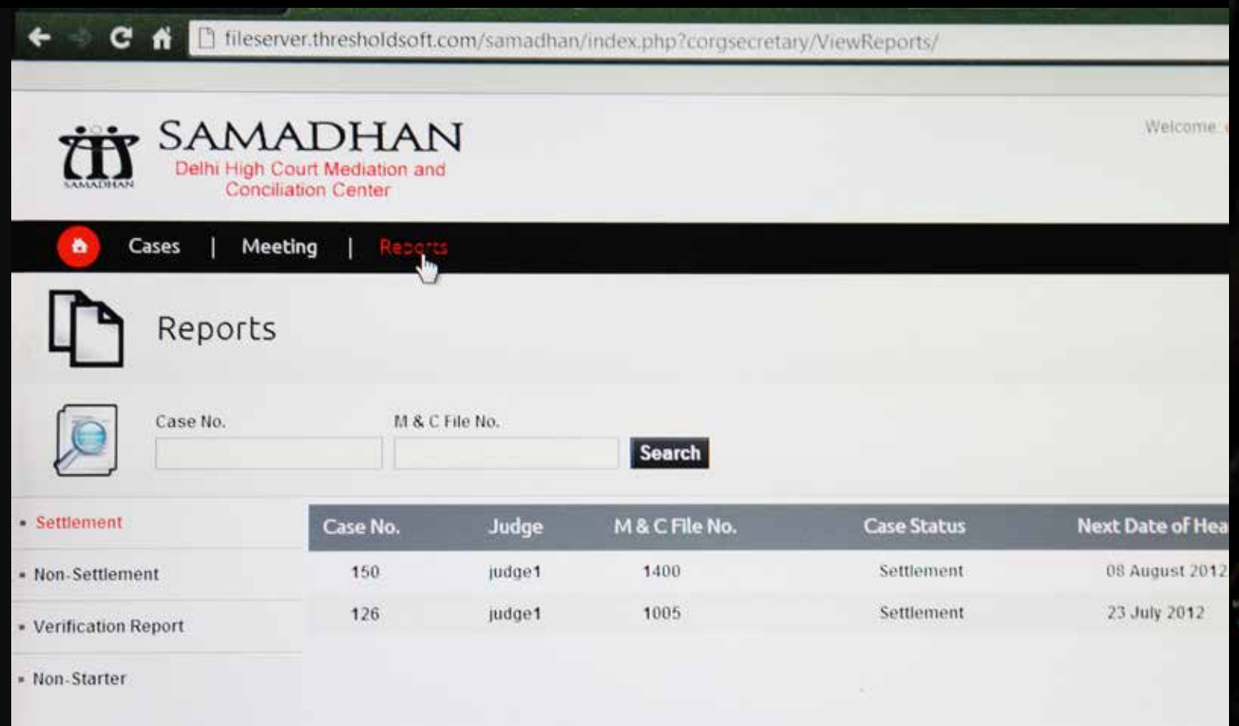
Samadhan began its journey in May 2006 on the Delhi High Court premises with two small rooms on the ground floor for mediation and a small reception area which also included a waiting area for the parties and mediators. In January 2008, it added six more rooms for mediation sessions, a room for the staff and a separate reception area. Another six rooms for mediation sessions were added subsequently taking the number to thirteen. The ground floor was renovated for creating a better working environment.



Owing to the increase in the number of cases referred to the centre, Samadhan is headed for another expansion in this third phase. The fourth floor of the Administrative Block of the Delhi High Court with an area of approximately 8500 sq. feet is now dedicated to the working of the centre. The floor will have 12 rooms for mediation sessions. Two rooms have been earmarked for the staff, one for children to play and spend time while the parties are involved in resolving their disputes with the mediators. Another room is where meditation will take place and there is one large meeting room, a reception area and two waiting rooms for the parties. The construction of the building is complete and work on the interiors is in progress. The entire floor will be functional very soon.

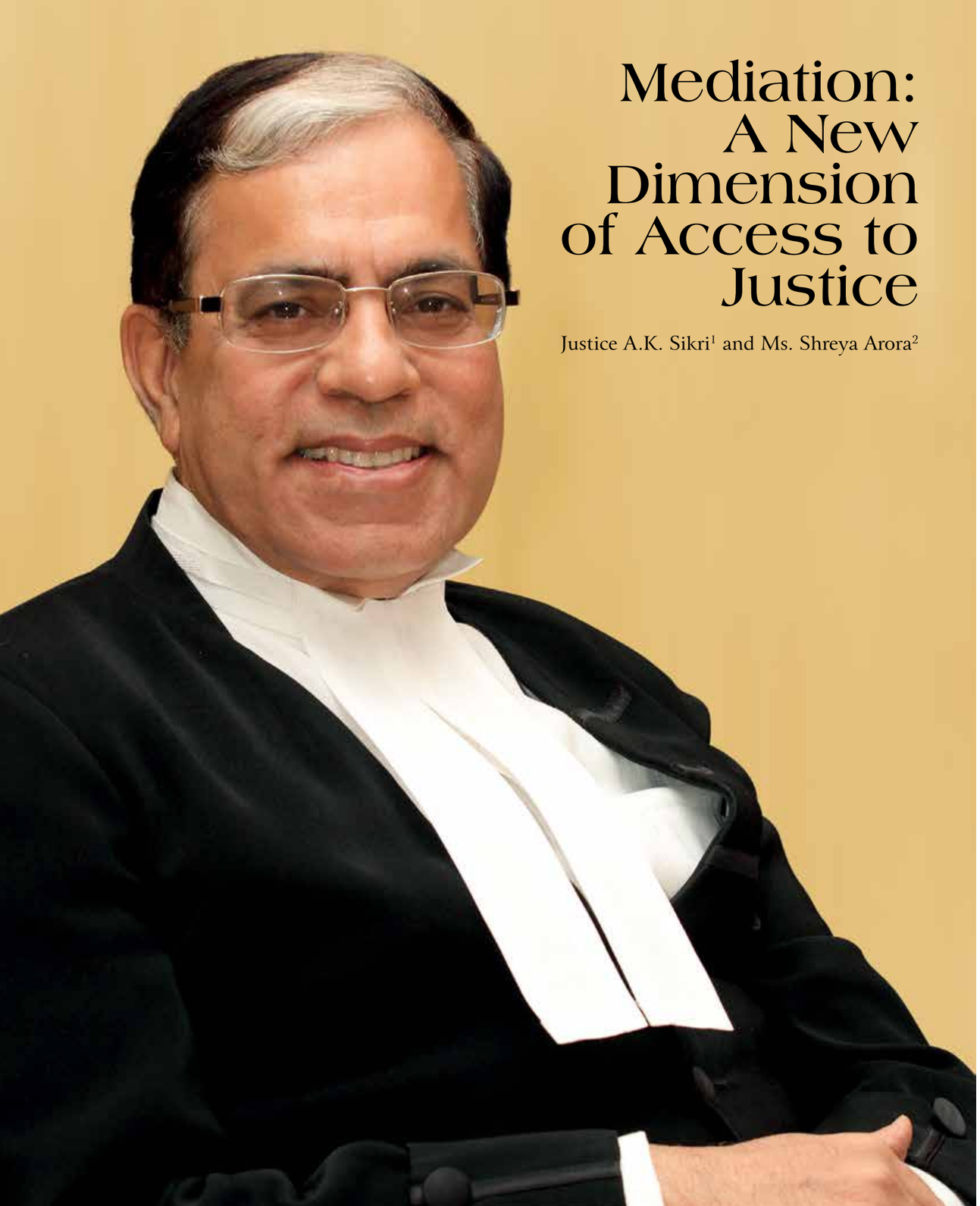
Samadhan Website

Samadhan has launched a website in order to reinforce 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 more efficient. The Mediation Centre will now also have the facility of its own server to build a database which can be used for the purposes of analysis and research. The provision will link the mediation website with the court server. This will help to make the process of marking a matter by the court to the mediation centre faster and effective. Steps are also being taken to upload awareness material on the advantages of mediation, which will be accessible to the public.



NEW MEDIATORS

1 Aakash D Pratap
2 Ajay Digpaul
3 Anil Airi
4 Anita Sharoha
5 Anshuman Sood
6 Arati Mahajan
7 Archana Gaur
8 Arun Aggarwal
9 Arun Kumar Satija
10 B.L. Wali
11 D.K. Sharma
12 Deepak K. Thakur
13 Dhanajay Kumar Singh
14 Gajendra Giri
15 Gulshan Chawla
16 Indira Unninayar
17 Jitender Vashisht
18 Kamal Kant Jha
19 Kamal Kumar Ghei
20 Kamal Nijhawan
21 Kanchan Jain
22 Kiran Arora
23 Kishore M Gajaria
24 Kusum Dhalla
25 Laxmi Chauhan
26 Madan Gera
27 Manisha Agrawal
28 Mansi Gupta
29 Manu Nayar
30 Mohammad Sajid
31 Mritunjay Kumar Singh
32 Parveen Dahiya
33 Pawan K Bahl
34 Pradeep Gaur
35 Puja Anand
36 Puneet Bhatnagar
37 Pusshp Gupta
38 Ravi Dutt Sharma
39 Ravinder Yadav
40 Reema Kalra
41 Rupinder Singh Suri
42 S.C. Gupta
43 Sachin Verma
44 Sadhana Sharma
45 Saleem Ahmed
46 Sandhaya Kohli
47 Sangeeta Grover
48 Sangeeta Mehrotra
49 Sangeeta Sondhi
50 Shailender Bhatnagar
51 Shalini Shishodia
52 Sharanjit Singh Wadhwa
53 Shobhana Takiar
54 Shreekant N Terdel
55 Sukhbeer Kour Bajwa
56 Sumati Anand
57 Suresh Kalia
58 Sushma Tyagi
59 Taruna Chowdhary
60 Tirath Singh Duggal
61 Vaishalee Mehra
62 Vandana Bhatia
63 Vijaya Singh
64 Yogendra pal Singh
65 Jitendra Vijay Tomar
66 Ram Singh Baliyan



Mediation: A New Dimension of Access to Justice

Justice A.K. Sikri[1] and Ms. Shreya Arora[2]

"Access to justice is basic to human rights. The right to justice is fundamental to the rule of law and so 'we, the people of India' have made social justice an inalienable claim on the state, entitling the humblest human to legal literacy and fundamental rights and their enforcement a forensic reality, however powerful the hostile forces be… Declarations and proclamations, resolutions and legislations remain a mirage unless there is an infrastructure which can be set in locomotion to prevent or punish a wrong and to make legal right an inexpensive, enforceable human right. Injustices are many, deprivation victimises the weaker sections and the minority suffers the oppression syndrome."

Understood in this sense, the words 'access to justice' immediately stir up in our mind, and rightly so, that every person who seeks justice must be provided 'legal aid' to approach a court of justice. Normally, it involves the notion of providing a lawyer to the aspirant of legal aid. In fact, its emergence as 'the most basic human right' was in recognition of the fact that possession of rights without an effective mechanism for their vindication would be meaningless. But that is not the only meaning of these words.

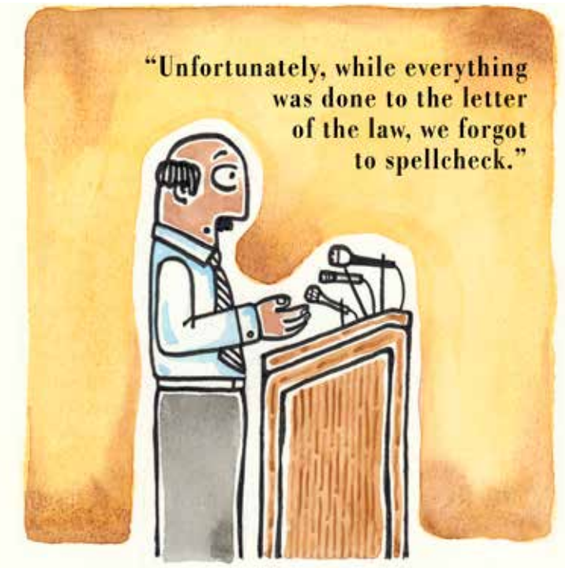
This article attempts to deliberate conceptually upon how 'access to justice' may be achieved and furthered through the process of mediation. It proceeds in three parts. Part I sets out the jurisprudential basis of justice and conflict resolution in general terms. Part II focuses on the conceptual understanding of 'access to justice' and its development. Part III elaborates upon the concept of justice in mediation, access to justice through mediation and how it can become the most effective facilitator for promoting this access.

I. Concept of Justice and Conflict Resolution

Justice is a core value not only in the field of theology, law and political philosophy, but also in politics, social life and economics. It is a value that generates other values.

At the same time, what we really mean by justice has eluded jurists, political thinkers and philosophers throughout the history of civilisation. They have debated issues, points of controversy and innovative ideas according to their respective understanding of justice. Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, is the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today's context when we consider it in the light of social justice and marginalised people.

In post-traditional liberal democratic theories of justice, the assumption is that all humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as 'Reflective Equilibrium'.



The method of Reflective Equilibrium was first introduced by Nelson Goodman in 'Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the conception of 'Justice as Fairness'. While on the one hand, we have the concept of 'justice as fairness' as propounded by John Rawls and elaborated by various jurists thereafter in the field of law and political philosophy, we also have the notion of 'Distributive Justice' propounded by Hume which aims at achieving a society producing maximum happiness or net satisfaction. When we combine Rawls' notion of 'Justice as Fairness' with the notions of 'Distributive Justice', to which Noble Laureate Prof. Amartya Sen has also subscribed, we get the jurisprudential basis for doing justice to the weaker sections of the society.

Before delving onto the concept of justice in mediation, let us look at a few harsh realities pertaining to conflicts. Conflicts exist in every sphere of human life. Society can never be free from conflicts and disputes as they are by-products of communication between people. Conflicts began with the dawn of civilisation, nay, even before that, and can be said to be an inseparable shadow of advancement – industrial, economic, social, cultural etc. The shadow has only got longer with time. At the same time, it is also recognised that conflicts have to be resolved in a manner befitting a civilised society. It is also accepted (and there cannot be any exception to it) that the sooner a dispute is resolved, the better it is not only for the parties to the dispute but for the society as a whole.

History demonstrates that various forms of conflict resolution have been institutionalised from time to time. Now, even though judicial systems may differ, disputes are resolved through courts in almost all civil societies. Traditionally, our justice delivery system is adversarial in nature. Of late, however, capabilities and the method of this adversarial justice system have been questioned. People appear to be disillusioned and frustrated with it.

Adversarial System and Social Context Judging

A judicial mechanism must serve to advance justice. Warren Burger once said: "The obligation of the legal profession is… to serve as healers of human conflict…(we) should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."

Going by the above, the adversarial system is widely perceived to not have necessarily achieved justice. Often, it has failed to provide just solutions leading to discontentment on both sides – the so-called 'warring groups' – in the adversarial system. Judges and other actors in the system have deliberated to neutralise such a result leading to the adoption of social context judging.

Prof. (Dr.) N.R. Madhava Menon explains the meaning and contours of social justice adjudication as the application of equality jurisprudence evolved by the Parliament and Supreme Court in various situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the socio-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to not only be sensitive to these inequalities but also be positively predisposed to the weaker party lest the inherent imbalance results in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.

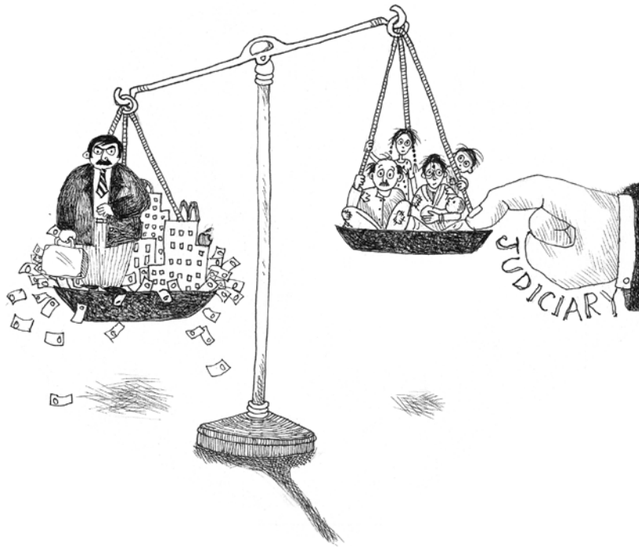
Judges have, thus, started invoking the principle of fairness and equality which are essential for dispensing justice. Purposive interpretation is given to sub-serve the ends of justice, particularly when the cases of vulnerable groups are decided. Judges have started keeping in mind the 'problem-solving approach' by adopting therapeutic ways to the maximum extent the law permits rather than simply 'deciding' cases. This has served to bridge the gap between law and life, between law and justice.

II. Access to Justice: Conceptual Understanding

From the perspective of human rights, persons from the weaker sections are disadvantaged because they are unable to acquire and use their rights owing to poverty, and social or other constraints. They are not in a position to approach the courts even when their rights are violated. They are either victimised or deprived of their legitimate dues. This denial of the basic right to survive and access justice serves to aggravate their poverty. Therefore, accessing justice by the poor sections of society becomes imperative to eliminate poverty itself. It is a constitutional mandate and, therefore, the responsibility of all the players in the judicial system to make justice accessible to those in need. Not only is the State bound to secure a legal system that promotes justice on the basis of equal opportunity but also provide free legal aid by suitable legislation / schemes / any other way to ensure that opportunities for justice are not denied to any citizen for reasons of economic, social or other constraints.

The term 'access to justice' has been most commonly used to reform the lacunae and loopholes in the state legal system to "ensure that every person is able to invoke the legal processes for legal redress irrespective of social-economic capacity" and "that every person should receive a just and fair treatment within the legal system."

"Access to justice" as a general term, connotes an individual's access to court or guarantee



of legal representation. It may be expressed through identification and recognition of a grievance, awareness and legal advice or assistance through mediation camps, accessibility to court or claim for relief and adjudication of grievance. Enforcement of relief, however, would most likely be the ultimate goal of a litigant. The concept of 'access to justice' has two significant components. The first is a strong and effective legal system with rights, enumerated and supported by substantive legislations. The other is a useful and accessible judicial / remedial system easily available to the litigant public.

The legislature, executive and the judiciary have moved variously to enable access to justice. National Legal Services Authority (NALSA) at the national level and State Legal Services Authority at the regional level have also taken steps in the direction. But much remains to be done.

III. Mediation: Expansion of Access to Justice

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 parties' 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, 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 fairness of many disputants. Legal rules, in Stulberg's vision, are ill-equipped to do justice because of their rigidity and inflexibility.[3] Professors Lela Love and Jonathan M. Hyman argue that mediation is successful because it provides a model for future collaboration. The authors state 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 goals, 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 the 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-20th century… For many years now, I have suggested that 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)."

Justice in mediation also encompasses external developments, beliefs about human nature and legal regulation. Various jurists are drawn to mediation in the belief that litigation and adversarial warring are not the only, or the best, ways to approach conflict and how optimistically and skeptically mediators assess the capabilities of individual parties and institutional actors to construct fair outcomes from the raw material of human conduct.

Further, as Dias puts it, in his book on 'Jurisprudence', that one of the tasks in the achieving of justice is adapting to change. No society is static. Adaptability is truly a condition sine qua non of the continued existence of a legal system. Keeping in view the aforesaid concept of justice in mediation as fairness beyond legal justice and adapting to change as justice, the deliberations were also made apart from social context adjudication to institutionalise the process of mediation. This shift brought the advent of alternative methods of dispute resolution and significant amendments were carried out in the Civil Procedure Code of 1908 providing for the settlement of disputes outside the court.

Given the import of the amended Section 89 of the Civil Procedure Code, 1908 the provisions of the Legal Services Authority Act, 1987 and the Arbitration and Conciliation Act, 1996 an attempt was made to look beyond the confines of conventional procedures and seek settlement fair to both the parties. Mahatma Gandhi, the Father of the Nation, wrote in his autobiography about the Role of Law and Lawyers:

"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. 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."

Mediation is one such mechanism which has recently been brought into place in our justice system. It is one of the methods of Alternative Dispute Resolution and resolves the dispute in a way that is private, fast and economical. It is a process in which a neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. It embraces the philosophy of democratic decision-making.[6]

Thus, mediation being a form of Alternative Dispute Resolution is a shift from adversarial litigation. When the parties desire an on-going relationship, mediation can build and improve their relationships. To preserve, develop and improve communication, build bridges of understanding, find out options for settlement for mutual gains, search the unobvious from obvious, dive underneath a problem and dig out underlying interests of the disputing parties, preserve and maintain relationships and collaborative problem solving are some of the fundamental advantages of mediation.

There is always a difference between winning a case and seeking a solution. Via mediation, the parties will become partners in the solution rather than partners in problems. The beauty of settlement through mediation is that it may bring about a solution which may not only be to the satisfaction of one party and, therefore, create a win-win situation. This outcome cannot be achieved by means of judicial adjudication. Thus, life as well as relationship goes on with mediation for all the parties concerned resulting in peace and harmony in society. While providing satisfaction to the litigants, mediation also solves the problem of delay in our system and further contributes towards economic, commercial and financial growth and development of the country.

The notion of access to justice is to be taken in a broader sense as highlighted in the beginning of this article. Right of access to justice meant essentially the aggrieved individual's right to litigate or defend a claim – in other words, the needy and the underprivileged are provided with legal aid in the form of a lawyer or the court fee / litigation expenses etc. However, this cannot be crafted as access to justice but only as an 'access to courts'. If we want to render justice to the poor by way of fair solutions to the conflict, mediation will play a major role. That would mean providing real access to 'justice'. Mediation is one such positive step towards expanding the scope of access to justice so as to inhere in it the complete notion of justice. Social context adjudication, after all, remains adjudication by the court and the outcome would depend upon the competence of the judge handling such cases as would be equipped with a proper mindset, training expertise and dexterity to provide just solutions.

Thus, mediation is a step forward which ensures a just solution acceptable to all the parties to the dispute, generating a 'win-win' situation. Mediation alone puts the parties in control of both their disputes and its resolution. Through this mechanism, the parties can communicate in a real sense with each other – something they have not been able to do since the dispute started. It is mediation which makes the process voluntary and does not bind the parties against their wish. It saves precious time, energy as well as costs which minimise the burden on exchequer when poor litigants are to be provided legal aid. It focuses on long-term interest and helps the parties in creating numerous options for settlement. It restores broken relationships and focuses on improving the future instead of dissecting past.

Mediation restores broken relationships and cements them for future. In other words, mediation does not uphold the principles of court-based justice; it is based on an alternative set of values in which formalism is replaced by informality of procedure, fair trial procedures by direct participation of parties, consistent norm enforcement by norm creation, judicial independence by the involvement of trusted peers, and so on. This presents an alternative conceptualisation of justice. The concept of justice in meditation is distinguished by its direct accessibility, particularly in comparison with the economic obstacles to legal justice, and by its responsiveness to the peculiar needs and interests of the parties. Further, the parties continue to relate after their dispute has been managed, for example, in the families, in the workplace and in neighborhood communities.

Access to justice, then, is not merely access to the judicial system. It includes access to adequate dispute resolution. Thus, there is a special place for alternative dispute resolution process in access to justice. The establishment of alternative means of dispute resolution could serve to significantly reduce the number of disputes before the civil courts and, thereby, lead to an increase in overall efficiency. So, effective implementation of alternative means of dispute resolution explicitly eases the citizens' access to justice. The amendment has been brought forth keeping in view a sense of crisis in the administration of civil justice troubled by excessive costs, delay and complexity.

Finally, the notion of access to justice constitutes: one, a strong legal system with rights enumerated and supported by substantive legislation; two, approaching the courts and emphasising legal aid and legal representation and making an accessible judicial system; three, an effective remedial system and its enforcement.

An old African proverb goes: "When spider webs 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. The concept and practice of mediation as an important aspect of 'access to justice' exemplifies wholesome, pure justice. It means that a party-acceptable outcome is synonymous with fairness which is synonymous with justice. So, party-acceptability of outcomes is, and should be, the defining feature of justice.

References

[1] Judge, High Court of Delhi

[2] Judge, District & Session Courts of Delhi

[3] Joseph B. Stulberg, 'Fairness and Mediation" (1998) 13 Ohio State Journal on Dispute Resolution 909 (Issue 3)

[4] Jonathan M. Hyman & Lela P. Love, "If Portia Were a Mediator: An Inquiry Into Justice In Mediation" (2002) 9 Clinical Law Review 157

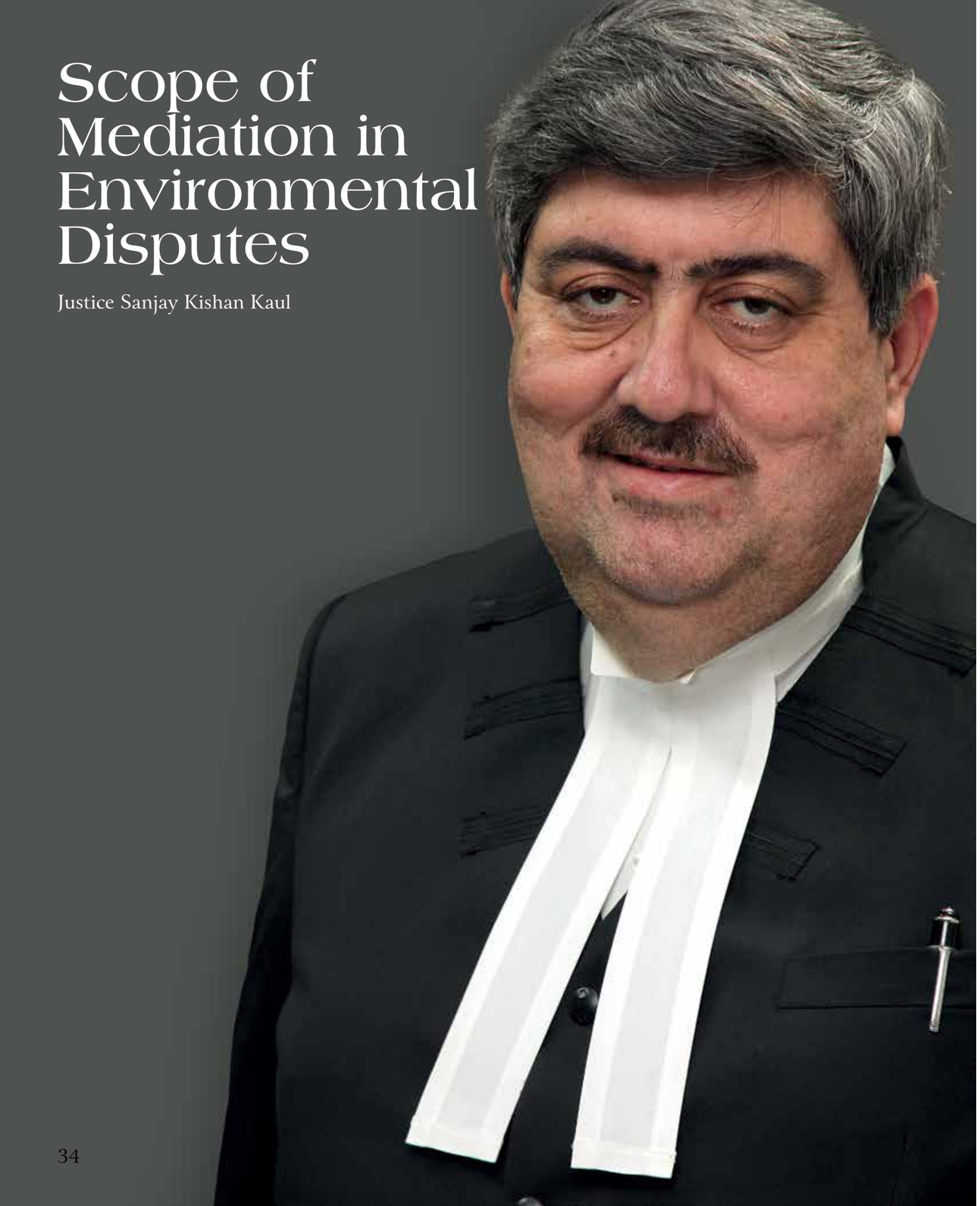
[5] Carrie Menkel-Meadow, 'Practicing in the Interests of Justice" (2002) 70 Fordham Law Review 1761.

[6] James Alfini et al., Mediation Theory and Practice, 2nd Ed. (Lexis Nexis, 2006)

[7] Adrian Zuckerman, Justice in Crisis: Comparative Dimensions of Civil Procedure, (Oxford 1999).

Scope of Mediation in Environmental Disputes

Justice Sanjay Kishan Kaul



"We're in a giant car heading towards a brick wall and everyone's arguing over where they're going to sit"

– DAVID SUZUKI
Canadian environmentalist, scientist and broadcaster

Introduction

Rapid globalisation and fast-track industrialisation have led to an increase in environmental conflicts, thanks to scarce natural resources and their steady depletion: everyone is clamouring for more. In an era of modernisation, where profit is the supreme concern, issues arising from the misuse or excessive use of natural resources go on the backburner. Conflict arises only when these issues are brought to the knowledge of those in control and / or power. Rise in environmental conflicts in the last decade or so has encouraged the development of various techniques of adjudication and dispute resolution at the state or national level. This is because the nature of an environmental dispute is very different from a commercial dispute. Unlike in the latter, several parties are involved in an environmental dispute. Preservation of the environment becomes the sole objective while personal interests in such a dispute take the backseat.

These rapid developments have prompted efforts towards developing a quicker, less formal and less expensive mode of dispute resolution as compared to the age-old form of formal adjudication. Alternative Dispute Resolution (ADR) focuses on the core issues of environmental problems and attempts to preserve the interests of all parties involved. It has been observed over time that disputants may be in a better position to understand the core issues at hand and, hence, informal procedures involving active participation of the parties is necessary to resolve an environmental conflict.[1]

Environmental Mediation

Environmental mediation is an evolving, dynamic field, which uses innovative techniques to balance and reconcile. Since the 1980s, multiple stakeholders have used environmental mediation to successfully resolve conflicts.

From disputes over sanitary landfill dump sites to regional and national disputes involving sophisticated scientific data, environmental mediation addresses a range of high-profile, complex environmental and public policy issues arising from environmental irresponsibility.

The key to resolving most of these disputes is in factual issues: how must contaminated properties be cleaned up? Which regulations apply to certain operations? Has a contractor provided adequate services? Unfortunately, factual issues in environmental matters are frequently unclear and often perceived differently by the parties involved. Another problem is that people sometimes have trouble in comprehending these factual issues. Since these disputes may encompass several

scientific disciplines and involve numerous individuals with varying levels of technical proficiency, it can be difficult for parties to reach a common understanding of what is at stake. To resolve an environmental dispute effectively, a dispute resolution process must enable the participants to understand the underlying facts and their implications. To do this, good communication is essential.

Viability of the Mediation Process in an Environmental Conflict[2]

a) Recognition and Classification of Parties: As mentioned already, the number of persons involved in an environmental conflict is large and there is a possibility of multiple stakeholders with convergent or conflicting interests (e.g. government, corporations, environmental groups, communities each with a distinct and, often, conflicting interest in the issue). Consequently, it is very important to identify the parties which would be affected by the outcome and have an interest in the final result. Non-involvement of these parties may, among other complications, halt the decision-making process or the implementation of a successful outcome, negating the results of mediation. Due to the multiplicity of interests, it is up to the mediator to bring together similar groups so as to avoid such multiplicity of demands.

b) Development of Issues and Building Consensus: The mediator needs to identify all the underlying issues and grievances of the disputants to present the parties with a clear solution. The issues should be clearly demarcated to prevent any polarisation in case the parties feel that they may have entered into mediation pre-maturely. The key objective of environmental mediation is to build consensus among the groups so as to overcome the initial hurdles which may arise due to the differences between them and, then, work towards reaching middle ground.

c) Stimulus and Motivation: The mediator should endeavour to motivate and encourage the parties to participate in the mediation process so as to achieve a positive outcome depending on the need and the urgency to resolve the dispute.

d) Implementing the Outcome: The outcomes achieved through mediation stand a far better chance to be implemented than the ones gained through an enforced decree because the former have emerged from the disputants reconciling and balancing divergent interests in public interest.

Forms of Environmental Dispute Resolution (EDR)

1. Legalistic Mediation: A type of mediation mostly used in environmental disputes is legalistic mediation. Resembling litigation, this type of mediation portrays a symbolic relationship with the judicial system.[3] Quasi-legal in style, legalistic mediation is demonstrated through its practice where it intends to narrow down the issues in a structured and planned manner. The mediator in such a situation plays a key role where the parties communicate through him instead of interacting directly. Legalistic mediation was used to resolve the Foothills Water Project dispute in Denver and the senator acting as mediator encouraged the parties persistently to arrive at an amicable solution.[4]

2. Issue-expanding Mediation[5]: One of the foremost qualities of mediation lies in its scope to expand the issues involved in a dispute so that these can be discussed in detail by the parties to familiarise themselves with the concerns and demands of the other side as well. This is known as issue-expanding mediation and is justified by its idealistic search for fresh and improved solutions. This form doesn't focus only on narrowing down issues and problems of the parties along with balancing their rights and interests. It also aims to expand the options and prospects available to the parties since the solutions provided to them would be of the benefit to the larger community. This type of mediation process functions differently: it develops an analysis of the wider social cause(s) involved in an environmental conflict and may empower the community / environmentalist groups / parties to participate enthusiastically towards achieving an effective and efficient solution agreeable to them.

3. Facilitative Mediation[6]: Facilitative mediation is one of the preferred techniques in mediation because it effectively tends to the difficulties and shortcomings involved in an environmental mediation, such as communicating complex and technical information keeping in mind the differing interests. This type of mediation focuses primarily on making the parties understand the issues at stake and the consequences of such a dispute. It also focuses on jointly resolving the dispute. The skill of the mediator in using a structured process and several other techniques to broaden the scope of the dispute becomes useful in enabling the parties to view every aspect of the dispute. This technique of mediation is different from the "evaluative mediation": the mediator refrains himself from giving his opinions / suggestions on the merits of the case. This structured mode of mediation:

- assists in an easier exchange of communication between the parties
- increases awareness about the factual position and the legal aspects involved in the disputes
- builds faith of the parties in the mediator; and
- assures the parties to find an amicable and acceptable solution

4. Evaluative Mediation[7]: In evaluative mediation, the parties are given the option of voicing their opinions and suggestions and presenting their case before the mediator who offers his advice on the merits of the dispute. This piece of information is then utilised by the parties to decide their way forward and weigh their options regarding a compromise and an amicable settlement. The confidential sessions, known as "caucuses", are held by the mediator to assist the parties with options, depending on the extent of their compromise. Mediation vis-à-vis Environmental Litigation Environmental conflicts are usually plagued with the problems of power, inequality and depoliticisation (of the conflict), and privatising of decision making.[8] Based on

relationships, mediation aims at reaching a collective agreement and recognises the shared interests of the parties and the motivations of their interactions. Environmental mediation could also be defined as "a process whereby existing or potentially conflicting parties concerned with an environmental and / or land resource matter get together with a neutral third party to discuss positions with regard to the resource. It involves bargaining, sharing of information, and ultimately, compromising to achieve a solution 'acceptable' to all the parties involved."[9] It could be seen that out of 162 environmental mediations carried out in the United States, 133 worked towards reaching an amicable solution and 104 were resolved, summing up to a total of 78 per cent success rate.

But it has also been noticed that success has been higher in cases where disputants opted for mediation early in the pre-litigation stage, and parties that had authority also participated. Gail Bingham, one of the pioneers of environmental mediation proposed through her detailed survey that "where the parties at the table had authority to make or implement their agreements, they were able to reach an agreement in 82 per cent of the cases. When agreements took the form of recommendations to a decision-making body that did not participate directly in the negotiations, the parties reached an agreement 74 per cent of the time. When those with authority to implement decisions were directly involved, the implementation rate was 85 per cent; when they were not, only 67 per cent of the agreements reached were fully implemented."[10]

Over time there have been many instances[11] where mediation has assisted in resolving environmental disputes in the spaces of:

- "Allocation of water rights
- The appropriateness of conditions attached to the granting of development approval
- Proposals for infill housing or dwellings close to neighbouring properties in residential areas
- Development applications for major projects such as landfills, lifestyle block subdivision and intensive animal farming
- Complaints arising from environmental policies
- Enforcement of development conditions where there are environmental impacts on neighbourhoods
- Vegetation clearing disputes
- Establishment of new industries on Greenfield sites
- Clean up or new uses for Brownfield Sites"[12]

Mediation is being widely accepted and is very helpful in reducing the burden on the judicial system. The Land and Environment Court Working Party Report in New South Wales, presented recommendations that "Councils are encouraged to make appropriate delegations, including the power to negotiate and settle matters, so as to enable their representatives to participate effectively in alternative dispute resolution facilitated by the court (that is preliminary conferences and mediation).[13]

Usually, a panel of three or more mediators is appointed while addressing environmental concerns so as to have a detailed analysis of the environmental issues. It is advisable that a single mediator might not be suitable for the expansive size of the dispute and the manifold parties involved.

Environmental Litigation

Often, it has been noticed that litigation has its set of disadvantages in dealing specifically with environmental concerns and disputes. In a dispute where the parties choose environmental litigation as a viable option to resolve the dispute, the experts and scientists involved in the conflict are relegated to a secondary role compared to the attorney who remains at the forefront even though the latter does not have an in-depth knowledge of the issue. Judges, too, may not be well-equipped to handle complex environmental disputes. The former Chief Justice of India, Mr. Justice S.H. Kapadia, has also said, "We can have facilitative mediation in disputes on pricing of natural resources, like gas and oil, which are complicated matters. Judges do not have the expertise to deal with those matters. The judgments delivered by judges sometimes can hit the economy of the country."[14]

Sharing his views on the role of the judiciary in environmental disputes, Judge Harold Leventhal[15] has said, "Environmental matters are likely to be of secondary concern to agencies whose primary mission is non-environmental. Environmental cases require that the judicial role change from formalistic to policy-oriented legal reasoning."[16] He has further suggested that since there are no specific forums for adjudicating environmental disputes, judges can attempt to be quasi-legislators to be able to do justice in environmental conflicts.[17] Litigation does not involve the active participation of the parties as in mediation where the latter, as is documented, have a greater role in the decision-making process. So, while mediation produces a mutually satisfactory decision, the outcome of litigation is usually in favour of one party.

Suggested Models for India: Examples from other Jurisdictions

United States of America

Environmental Mediation was initially experimented with and pioneered in the United States of America after which it has become one of foremost methods of dispute resolution. Organisations such as Rockefeller, Hewlett and Ford supported mediation in environment-related issues.

Australia[18]

Mediation in Australia began in the early 1990s when the Australian Resource Assessment Commission suggested it be used in the inquiry process. It developed further

as courts offered optional mediation in 1991 and 1992. The institutional framework of environmental mediation here and resolution of environmental techniques are different from that of the United States where environmental mediation was pioneered.

UN Framework[19]

"In UN Convention, mediation has been used successfully in negotiating international environmental conventions and treaties. Environmental mediation tends to involve multiple parties and complex technical and scientific issues, necessitating more extensive upfront assessment work, mutual learning and collaborative fact finding, as well as agreement building and implementation planning. Researchers confirm the effectiveness of environmental mediation in reaching high-quality agreements and building cooperative working relationships among parties."

As per the UN Security Council Report, April 2009, the Secretary-General outlined several benefits of mediation. It:

- Addresses the root causes of conflict
- Helps overcome obstacles that block progress through conventional means
- Takes economic, environmental and community interests and values into account
- Is sensitive to cultural differences and accommodates peace and justice concerns
- Creates sustainable agreements that facilitate implementation[20]

Developing EDR: Some Next Steps

1. Development of a national approach and an institutionalised framework for mediation with context-appropriate socio-economic and environmental indicators that may assist in the quantification and measurement of socio-economic / developmental benefits vis-à-vis environmental costs.

2. Creation of a trained cadre of multidisciplinary environmental mediators equipped with the knowledge of public policy, economics, law and the sciences. Such a cadre will go a long way in meeting the needs and ensuring not only sincerity of purpose but also consistency of approach. Additionally, this cadre must be subjected to continuous refreshers to ensure that their sensitivity and knowledge remain current and grounded to the context in which they work.

3. Institution of a robust and independent overseeing mechanism, such as social audit, to ensure that the outcomes of mediation are implemented effectively and efficiently, in letter and spirit, and are not rendered nugatory, either on account of vested interest or bureaucratic / public apathy.

Conclusions

Mediators in environmental disputes / issues must necessarily be sensitised to the impact of allocation or agreements on the under-represented or voiceless groups in the affected communities. Likewise, they must remain sensitive to the maximisation of joint net gains while keeping in perspective the long-term, intended and, often, unintended / unforeseeable / spill-over effects of settlements or resolutions produced by mediation. Additionally, they must have keen appreciation of the precedents that have been established and are being referred to besides the dynamic and changing contexts within which the dispute resolution process is placed.

The mediators and the parties must collectively endeavour to ensure that the outcomes of mediation are just, fair and stable. These ends may be met sometimes by the mediator having more force than the conciliator. While it may be impossible to please all parties, efforts must always be to ensure that the mediation process is neutral and seeks to bring about a just and equitable result.

To address environmental concerns in a better way, it is very important to bring the disputing parties on a level playing field where the benefits of the society supersede personal interests, and people can find mutual trust and respect and learn to appreciate larger concerns.

References

[1] Garth, *The Movement towards Procedural Information in North America and Western Europe: A Critical Survey, in the Politics of Informal Justice*, (R. Abel ed. 1982)

[2] Goldbeck W., *Mediation: An Instrument of Citizen Involvement*, The Arbitration Journal, 241 (1975) and Cormick, G., *Theory and Practice of Environmental Mediation*, Environmental Professional, 2 (1980) and Susskind and Weinstein, *Towards a Theory of Environmental Dispute Resolution*, Boston College Environmental Affairs Law Review, 9, 2: (1980) Jeffery, Michael, *Environmental Mediation: An Alternative Form of Dispute Resolution*, International Business Lawyer

[3] Supra Note 3

[4] Susskind, L., *Environmental Mediation and Accountability Problem*, 6 Vermont Law Review 1, 30-37 (1981)

[5] Supra Note 3

[6] Salamone, Teresa B., Hendry, Jim M., *"Uranium Mine Tailings, Struggling for Consensus on Decommissioning Requirments"*, NR&E, Winter 1998

[7] Ibid

[8] Supra Note 8

[9] Jacobs and Rubino, *Environmental Mediation, an Annotated Bibliography* (1987), cited in Roberts, Environmental Mediation: Dispute Resolution or Dispute Management" [1995] Australian Dispute Resolution Journal 150, 152.

[10] Bingham, Gail, *Resolving Environmental Disputes: A decade of experience resolving locational conflict*, Centre for Urban Policy Research

[11] *Environmental Mediation Booklet*, Ecodirections

[12] Ibid

[13] Ibid

[14] Third National Conference on Mediation held on 7th & 8th July, 2012, Vigyan Bhavan, New Delhi

[15] Circuit Judge, United States Court of Appeals for District of Columbia Circuit

[16] Judge Harold Leventhal, *Environmental decision making and role of courts*, 122 U. Penn L.J. 509, 515

[17] Stein, Daniel., *Environmental Mediation: a viable alternative to costly litigation*

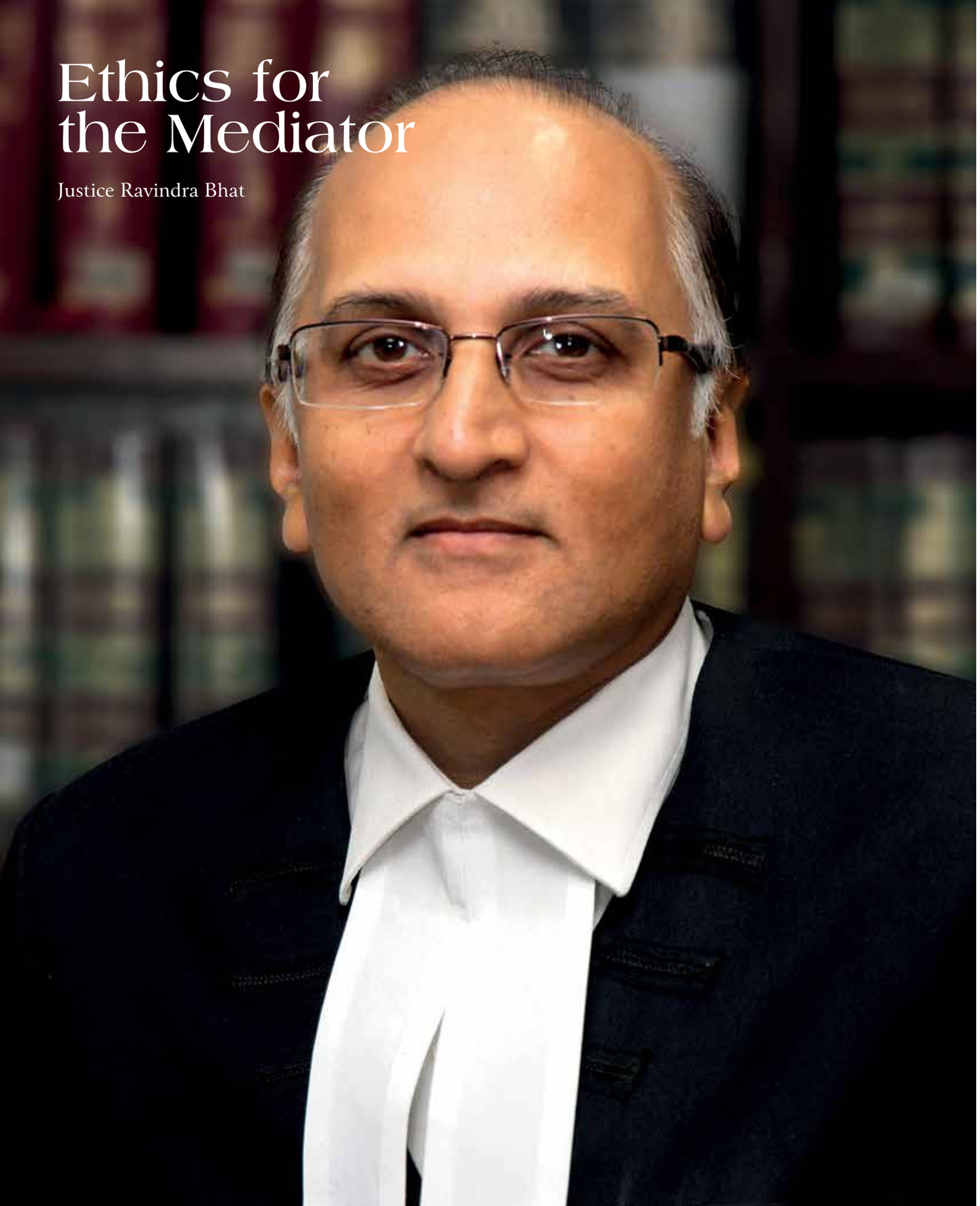
[18] Supra Note 4

[19] *"Supporting Statement on the Importance of Mediation to Climate Change"*, Mediators Beyond Borders, August 19, 2009

[20] Ibid

Ethics for the Mediator

Justice Ravindra Bhat



Ethics is to know the difference between what you have a right to do and what is right to do.
- Justice Potter Stewart

One would think that ethics is a fairly uncomplicated subject, with well-defined and clear rules, that ought not to engage too much time. Surprisingly, in mediation – as in other spheres – this is not so. Just keying in the phrase "mediation ethics" in a search engine resulted in no less than 10,200,000 hits! This serves to emphasise that perceptions can be deceptive, and the boundaries between right and wrong, ethical and the unethical, are as unclear in the case of mediator behaviour, as in any other professional's actions.

The Process

The first step towards understanding acceptable standards of ethical behaviour would, unsurprisingly begin with the revisiting of the process of mediation itself. It is not adjudicative; the mediator is a third-party neutral, tasked with facilitating parties to arrive at a mutually acceptable and satisfactory resolution to their dispute. The origin of the dispute is irrelevant, and the context from where it lands to the table of the mediator is also – at least to begin with – of little consequence. What is important is that the mediator establishes trust, and inspires the respect of both the parties to the conflict before her (or him), then walks them through the various elements by application of mediation tools, and, at the same time, draws from past experience at conflict resolution through the mediation process. Therefore, the primary responsibility which the mediator shoulders, is to generate and maintain trust, in her (or his) discretion, ability and competence to facilitate a solution. This trust, or confidence, goes a long way in achieving the desired end. From the beginning to the end, therefore, the mediator should never lose sight of this primary element – trust and confidence in her (or his) ability and discretion to assist the parties in their quest for the most mutually acceptable solution.

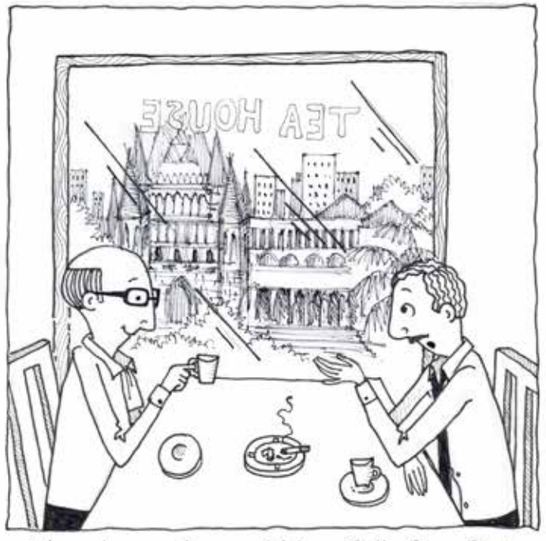
Various Elements that Constitute Mediators' Ethics

Most mediation systems have well-defined rules, in the form of code(s) of conduct, or entrenched principles, often elaborate, which guide mediators in their conduct and behaviour during the process, as well as after its closure. It is not the object of this article to analyse the various codes evolved and published by mediation bodies, and comment upon their merits and drawbacks. It is to present a broad-brush view of the various elements that constitute "ethical" behaviour, which at once would help distinguishing from what is unethical.

Avoiding Conflict of Interest with Parties

Mediators do not adjudicate, or act as decision makers. The question, then, is why the standard of impartiality should be underlined as a pre-requisite for the success of the process. The answer ought to stare one in the face: the parties repose faith and trust in a mediator as a third-party neutral, one who will guide them without personal stake, except as assisting two human beings who have to resolve their conflict with each other. Though not a decision maker, the absence of any stake whatsoever for the mediator emphasises her (or his) complete objectivity. As a corollary, any semblance of interest, which can cloud the desired objectivity, has to be avoided. Therefore, mediators have to avoid conflict of interest, or even an appearance of conflict, in the course and after the conclusion of the mediation process. The conflict may or may not be direct. It may be even in respect of a relationship – personal or professional. The conflict of interest must be avoided with any mediation participant.

It is not always possible to foresee conflict, or potential conflict; therefore, mediators have to make a semblance of reasonable inquiry to determine if the dispute involves facts which, from a reasonable man's viewpoint, would be likely to create potential or actual conflict for them. The nature and mode of that inquiry, however, is left to the mediator; the thumb rule, however, is that the inquiry should be conducted before the onset of the process itself. Once this task is done, the mediator should disclose as soon as practicable all actual and potential conflicts of interest that are reasonably discernible and can be seen as raising a question about the mediator's impartiality. After disclosure, however, if all parties agree, the mediator may proceed with the mediation. If in the absence of such an agreement, or despite the agreement, the mediator determines that his conduct may be called into question having regard to the nature of the conflict, she or he shall withdraw from the proceeding forthwith. The same would apply if such conflict or potential conflict is revealed after the mediation process begins.



It's a shame the world is so full of conflict.
On the other hand, I'm a lawyer.

Another rule which the mediator should always bear in mind is that after the conclusion of a mediation process, he (or she) should not establish another relationship with any of the participants in any matter that would raise questions about the integrity of mediation. While considering such relationships with parties, other individuals or organisations involved, the mediator should consider factors such as time elapsed following the mediation process, the nature of the relationship established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

Here again, the thumb rule is that the closer in time a relationship is established following mediation, the greater is its vulnerability. Unlike in the case of client- counsel relationship, the efficacy of the mediation process rests predominantly on the trust generated in the participants, and about the impartiality of the mediator, which would extend beyond the boundaries of the life of the dispute itself.

Challenge of Impartiality

The second bulwark of mediation is that the mediator maintains impartiality. It is, often, challenging to engage the parties without developing some feelings about or for them. The duty to remain impartial during the entire course of mediation does not require one to recuse or withdraw. The challenge is to distance and eliminate those feelings from the process. This is, at once, a pre-requisite, and also a professional standard. At all times while assisting the disputants in the task of an acceptable resolution, the mediator has to scrupulously show an impartial and even-handed approach in expression, deed, and articulation of ideas. It is only when the mediator feels difficulty in distancing from his or her feelings about the parties (or any of them) that the required impartiality no longer exists. Then, the mediator has to withdraw from the case.

Self-determination and Voluntariness

It is possible, at times, that the parties who approach the mediation process may do so with a misconception about its true meaning. Or they may understand its content to be something other than what it really is. They may have been referred to mediation without a proper grasp of what it entails. The mediation process being entirely rooted in voluntariness, the parties concerned should have the right, at a certain point, to walk away from the table. The mediator should be acutely conscious of this central choice, and at crucial times, keep emphasising to the parties that any agreement they reach must be a product of their own free will, and, therefore, the latter may withdraw from the process if it is not moving in the direction of an agreement that they prefer to the alternative – i.e., continuation of the dispute or resolution of it in some other manner.

Mediators are frequently asked by the parties: what would she or he do in their place? Is the mediator fair in her / his thinking? What do the courts usually do in cases of this kind? The mediators' task, in such cases, is to assist parties find their own answers – i.e., arrive at a resolution that meets their test of fairness rather that of the mediators'. It is also imperative that mediators ensure that one party is not overwhelmed or dominated by the other during the mediation process in a manner which prevents their ability to make their decisions.

Duty to Third Parties

Another important ethical consideration in the mediation process is for the mediator to take into account if a proposed settlement may harm non-participant third parties. This can arise where third parties affected by a mediated settlement are children or other vulnerable people (such as the elderly or invalid). At times, the affected third parties might be the general public – e.g., in a case involving allegations of faulty construction of a public project, or where the dispute pertains to a faulty product or service, in a consumer dispute. Since the third parties are not directly involved in the process, the mediator may have a duty in some cases to ask the parties for information about the impact of the settlement on others and encourage them to bring the interests of one or more third parties to bear on the discussions in mediation. If the settlement results in putting a lid on regulatory concerns, or violation of general standards of safety of products or the environment, the larger duty to the general public may preclude the mediator from approving such settlement.

Conclusion

Ethical behaviour and adherence to ethical standards is not only good practice; it is central to the success of mediation itself. If one understands the reason for parties opting for mediation, as a speedier and inexpensive dispute resolution mechanism, it is essential that mediator integrity in the process is maintained. It is not enough that the mediator is a person of ability and competence, but also that she or he has compassion and at the same time keeps within the bounds of ethical behaviour. Any deviation from such standards will undermine the given mediation and, possibly, even trust in the system. Public confidence in the integrity, impartiality and fairness of the process, therefore, has to be guaranteed in the action and behaviour of the mediator.

Mantle of the Mediator: Ethics, Confidentiality and Impartiality

Justice Hima Kohli

"The main object of conciliation lies in reaching a solution to a case based upon morals and with a warm heart."

The aforesaid thought expressed by Confucius – China's famous teacher, a great philosopher and political theorist – eloquently captures the true spirit of mediation. Ethics, in general, can be defined as a set of moral principles in a school of thought. Ethics in mediation are those moral principles that guide the mediator in conducting the mediation process. The importance of being ethical in mediation cannot be overemphasised. The entire process of mediation is rooted in the trust that the parties repose in a mediator. The said trust can only be invoked by a mediator by working upon the parties who appear before him. Unlike a situation where parties engage a particular lawyer only if they have known him in the past and have confidence in him, a mediator in court-annexed mediation is unknown to both sides. And, therefore, he must maintain high standards of integrity so as to assure the parties of his neutrality and to inspire confidence in them. If, for any reason, the parties feel they are unable to trust the mediator, then this feeling may act as a major stumbling block and result in frustrating the entire process.

Checking for Conflict-of-Interest Situations

The first step towards the aforesaid direction is for a person appointed as a mediator to check if a conflict of interest between him and a party appearing in mediation exists or is likely to exist. There can be innumerable circumstances where a mediator can be confronted with a situation of conflict of interest. Such a reason can be as simple as the mediator knowing either or both parties or he may have acted in his professional capacity for one of them or is related, in some way, to their family or friends. Relationships may range from personal relationships to professional. A party may be related by blood or matrimony; may be a friend or is part of the social circle; or is a business contact. Just as a mediator must ensure that he does not have a conflict of interest with the parties to mediation, he shall also make sure that he or his family is not related to, or connected with, any of the parties. Such a conflict may not surface in the initial stages but crop up in the course of the mediation process. This is sufficient grounds for the mediator to recuse himself from the case. It is this keen sense of right and wrong that should act as the guiding star for a mediator.

Impartiality, Doubts and Disclosures

Rule 8 of the Delhi High Court Mediation and Conciliation Rules, 2004 (referred to as `the Rules' subsequently in this article) lays down that it is the duty of a mediator to disclose any circumstance likely to give rise to a reasonable doubt as to his independence or impartiality. The said provision elaborates that every mediator / conciliator shall from the time of his appointment and throughout the continuation of mediation / conciliation proceedings, without delay, disclose to the parties the existence of the circumstance giving rise to a reasonable doubt as to his independence or impartiality. The Rule takes a cue from Section 12 of the Arbitration & Conciliation Act, 1996 (referred to as `the Act' subsequently in this article) which mandates that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality and, further, right from his appointment and throughout the arbitral proceedings, an arbitrator shall, without delay, disclose to the parties in writing any of the aforesaid circumstances.

Rule 9 of the Rules permits the court, where the suit or proceeding is pending, to withdraw the appointment of a mediator / conciliator or replace him upon information that is furnished

by the mediator under Rule 8 or upon any information that is received from parties or from other sources giving rise to a reasonable doubt as to his independence or impartiality. Therefore, the golden rule for the mediator at the time of his appointment and even in the course of the mediation is to ensure that not the slightest doubt be cast on his credibility or impartiality by any party.

Just as a full and frank disclosure by a client to his lawyer helps the latter come up with the best possible defence, trust in the mediator is of paramount consideration. The most acceptable way of initiating the mediation process is for the mediator to inform the parties that he is a neutral person and does not know any of them. He should clarify right away any reservations that the parties may have as to his appointment.

This is sure to put to rest any anxieties that may exist in the minds of the parties regarding his neutrality and also act as a confidence-building measure. The step shall also encourage the parties to unhesitatingly open their hearts to the mediator in the subsequent meetings, create space for a dialogue and help keep the negotiations centred on their interests.

Common Conflict-of-Interest Situations

In oft-faced conflict-of-interest situations, a lawyer-mediator may have:
• been briefed at some time by one of the parties in another litigation
• been engaged by any of the parties for giving advice
• appeared in court for near relatives of the parties or associate concerns of corporate entities who are parties in mediation
There could be circumstances where the mediator is personally interested in the outcome of the dispute – the subject matter of mediation. In such circumstances, the safest option for the mediator is to withdraw without giving an occasion to any of the parties to approach the court with a grievance as to his impartiality. When taking such a decision, what matters is not the degree of interest that a mediator may have in a dispute before him, but any "interest" that should act as a signal for him to withdraw from the mediation process. In other words, while the litmus test laid down for judges when dispensing justice is that "justice should not only be done, but also seen to be done", the touchstone for a mediator is not only that he is impartial or neutral but that he is also perceived to be so.

There have been cases where mediators have not succeeded in inspiring confidence and lowering the guard of the parties due to the latter's lack of inherent trust in the former. The moment in which a mediator sees a party losing faith in him because of his conduct is the moment in which he must pause, retrospect, identify the reason and address it either by clarifying the position or by simply declining to continue with the mediation.

Another important element in discussions on conflict of interest is the personal bias of a mediator which can unknowingly creep in and adversely impact the mediation process. Remaining impartial to the parties or the issue involved in dispute is as much a feature of neutrality and impartiality as is any other ground of conflict of interest. A mediator must try to rise above his personal likes and dislikes and consciously step back to look, with an unbiased mind, at the parties and the dispute.

A fairly common example is of a matrimonial dispute. A lady appointed as a mediator may tend to empathise with the aggrieved wife more as a consequence of an inherent gender bias. These are some blind spots that mediators must identify and scrupulously avoid. An endeavour must be made to overcome social and cultural stereotypes and consciously rule out any bias – of gender, social background, vocation, personality, polished upbringing and the like – from creeping in.

Patience, Focus and other Skills

The high moral ground that the mediator treads includes his professional competence in the field of mediation. While a mediator is not expected to be conversant with every aspect of law or be an expert in the subject of dispute referred to him in mediation, he is certainly expected to utilise the tools of mediation and hone his skills to facilitate the parties in keeping the channels of communication open with each other for exploring all possible solutions as smoothly as possible. This competence includes the special quality of a mediator to remain patient and encourage the parties to focus on the solutions to the dispute and examine alternatives to arrive at a just settlement. He should be skillful in checking if the parties are able to explore all the options without his opinion being thrust on them at any stage.

It is a part of the mediation ethics for a mediator to initiate the process by laying down the ground rules and announcing his neutrality before the parties. It is equally important in ethics for the mediator to terminate the mediation process if he finds that it is not resulting in a settlement, or the parties are trying to abuse the process, or they are indulging in some unlawful conduct,

or the dispute between them is deteriorating their intense relationship, rather than healing it. If the mediator comes to the conclusion that mediation is not an appropriate dispute resolution method, he can share his decision with the parties without revealing confidence or breaking trust in the mediation process. Another solution for him is to consider discussing his views with the parties in separate sessions. Similarly, if he believes that the mediation process shall adversely impact third parties who are not before him, like minor children in a matrimonial dispute, or a mentally infirm / physically incapacitated person in a family dispute, he needs to stop and ask himself if the process should be continued or ceased.

Seal of Confidentiality

Another key element of mediation is confidentiality. While ethics is the very foundation of mediation, confidentiality is its hallmark and signifies an intention to protect words – spoken or written – from public knowledge and the public domain. The confidentiality clause has been spelt out in Section 75 that falls under Part III of the Act which deals with conciliation. It is a non obstante clause and stipulates that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings and that confidentiality shall also extend to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement. The aforesaid provision applies with equal force to mediation where confidentiality is a sine qua non for the process.

Confidentiality in mediation works at two levels. The first facet of confidentiality arises when the parties commit themselves to participating in the mediation process in good faith with the intention to settle the dispute, if possible. At that stage, the role of the mediator is to facilitate voluntary resolution of the said dispute by the parties and communicate their views to each other, assist them in identifying the issues, reduce the misunderstandings, clarify priorities, explore areas of compromise and help generate options to resolve the dispute. At the same time, the mediator must explain to the parties that his role is only that of a facilitator and he will not impose his opinions / decisions, or thrust on the parties a settlement tooled out by him.

The aforesaid role to be adopted by the mediator has been well articulated in Rules 16 and 17 of the Rules. Rule 20, which is akin to Section 70 of the Act, lays down the rule of confidentiality, disclosure and inadmissibility of information. The said rule mandates that a mediator should disclose the substance of the factual information concerning the dispute received from one party to another party so that the latter has an opportunity to respond. There is a caveat, though. If a party shares some information with a mediator on the condition that it should be kept confidential, the same should not be disclosed to the other side. Similarly, receipt / perusal / preparation of records, reports and other documents by the mediator are also required to be kept confidential and he cannot be compelled to divulge the said information before any forum, including the court. Thus, the views expressed by parties in the course of mediation, the documents submitted, the admissions made by a party and the proposals exchanged shall remain confidential during the said process. To reinforce confidentiality of the mediation process, Rule 20 stipulates that there shall be no audio or video recording of the mediation process, nor can the statement of parties or witnesses be recorded by the mediator.

Another aspect of confidentiality is the privacy that a mediator is expected to maintain during the process. In other words, the mediation sessions are required to be conducted in private and only the parties to the dispute or their authorised representatives / constituted attorneys are expected to attend the mediation sessions / meetings. A third person can attend the mediation sessions only with the prior permission of the parties and with the consent of the mediator.

When focusing on confidentiality, a mediator must conduct himself in such a manner as to refrain from using the names of the parties outside the session. He should destroy all but essential notes in the final sessions and be clear in his mind as to the relationship he ought to maintain with the parties during and upon the conclusion of the mediation process, irrespective of whether it has resulted in a settlement or not. One of the ways to avoid mistrust or lack of confidentiality by the parties is to ensure that the mediator verify if any aspect of confidentiality is involved before disclosing his views / stands to the other side. He must also use his prudence while sharing communication, oral or written, with the other side after weighing the pros and cons and taking adequate measures to ensure that it does not breach the confidence of a party. This will go a long way in minimising any confusion on that score.

It may be clarified here that the documents that form part of the court records, for

example, pleadings and compilation of documents filed by the parties, need not be treated as confidential since they have already been disclosed. But all other documents, including the information furnished by the parties in the course of the mediation proceedings – statement of accounts, reports, flow charts, expert opinions and the like – are completely protected from disclosure, unless stated otherwise by a party. At the end of the mediation proceedings, all privileged communication ought to be destroyed by the mediator to avoid it from being leaked out.

Mediator and the Court

The second facet of confidentiality is the communication between the mediator and the court. Rule 23 of the Rules provides that in order to preserve the confidence of the parties in the court and the neutrality of the mediator, there should be no communication between him and the court, except where such a communication is necessary or where the mediator has to submit a 'progress' report to the court. Such a report is not required to

elaborate the progress made in the process but only to convey if the mediator needs more time to facilitate the settlement. He is also entitled to communicate to the court the failure of the parties to attend the mediation proceedings. Similarly, in circumstances where the parties have managed to or have been unable to arrive at a settlement, the mediator is empowered to communicate to the court by submitting a report of settlement / non-settlement or as a third option, give his assessment that the case is not suited for settlement through mediation.

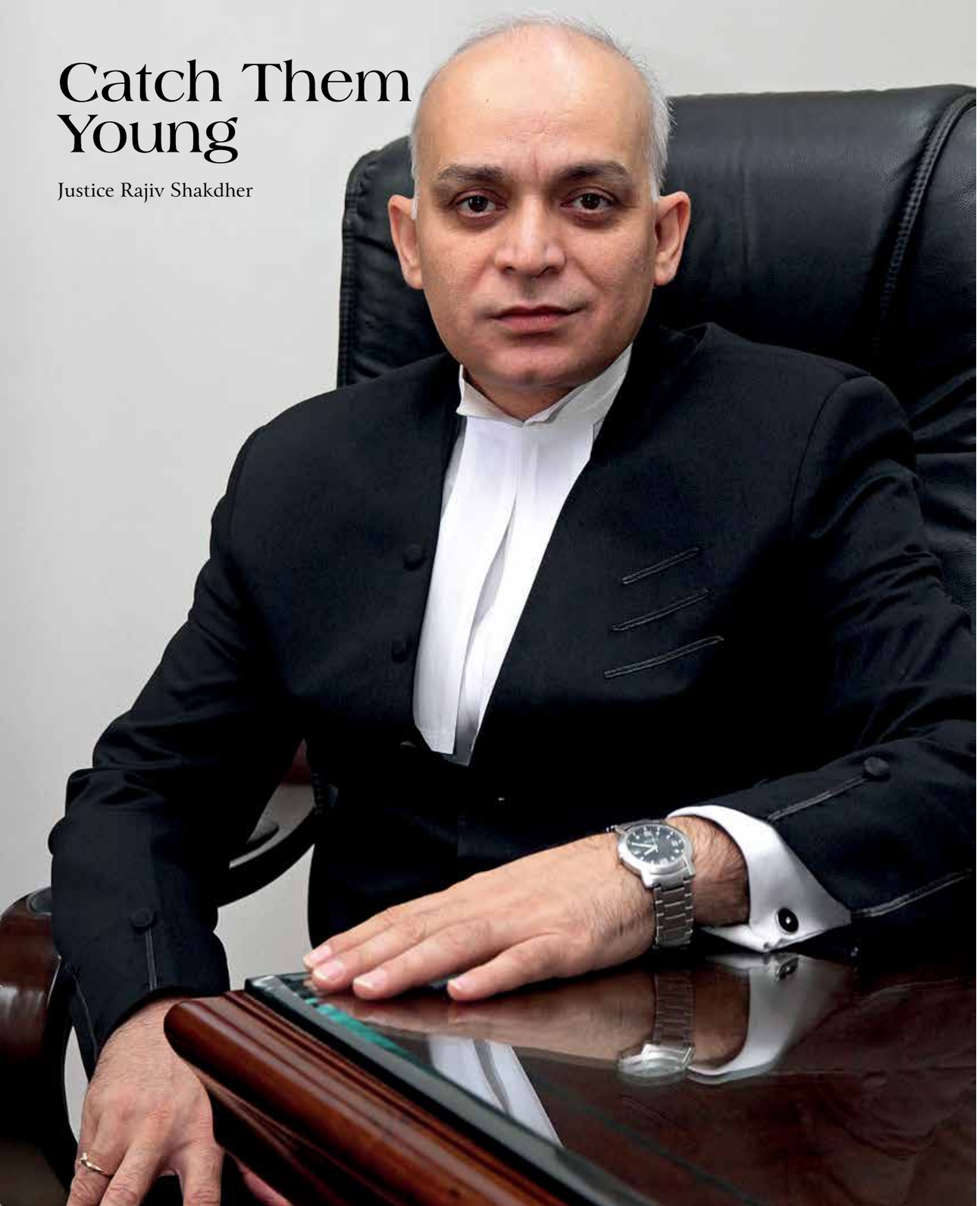
The mediator is, however, not expected to share with the court the manner in which the mediation was conducted or the views that were expressed by the parties during the session. Nor is he under any obligation to communicate the stands of the parties or the relative merits / demerits of the case or furnish reasons for returning the case as unsettled. In fact, when the dispute is returned to the court as unsettled, the report of the mediator is quite brief. It is only when a settlement is arrived at between the parties that the mediator is expected to forward the settlement report setting out all the terms and conditions of the agreement reached.

Conclusion

To sum up, it must be understood that the contours of mediation ethics and confidentiality are virtues that constitute the very essence of the process. The conduct of a mediator should be exemplary – within and outside the process of mediation. On a lighter note, he cannot be Mr. Jekyll during mediation and Dr. Hyde outside! He, like Ceaser's wife, must be above suspicion. Subsumed in the character of an honest and upright person are the sterling qualities of a good mediator. In other words, his roles may differ depending on the hat he wears. But the inherent personality traits cannot change. As a neutral third party, the mantle that a mediator takes shall always remain heavy. However, the same mantle can rest lightly on his shoulders if he conducts himself with rectitude and remains above reproach. By placing himself in a higher ethical bracket, the abiding faith that a mediator evokes in the parties who appear before him in mediation is the richest dividend that he can harvest.

Catch Them Young

Justice Rajiv Shakdher



One can sense palpable angst in the society we live in. The reasons for it are complex and, therefore, not easy to fathom. Advertising gurus will have us believe that creature comforts have increased. Statisticians and government administrators will tell us poverty has gone down, health care has improved and a fewer number of people are homeless.

Why is there, then, an underlying strain in the society? Perhaps, the upwardly mobile have moved further up while those at the bottom of the barrel, so to say, find themselves pushed into oblivion, if not into extinction. Our children reflect these social tensions.

Nearly 40 per cent of the Indian population is under 25 years. Some look upon it as an asset. Others say it is a time bomb of unfulfilled aspirations, unutilised energy, actual and perceived inequality and discrimination – reasons why we have young people questioning the state of affairs by stringing together songs like Kolaveri Di (meaning, murderous rage). No one hums songs of patriotism, hope and aspirations any longer. Six and a half decades into independence, there is a kind of ennui and disappointment. The malady requires a cure. But that is not our domain, at least not entirely.

An effective remedy may be to reach out to our children in schools and colleges and help them understand that human interaction almost inevitably and invariably leads to strife and dispute. Having done that, they have to be enabled in dealing with these conflicts and differences. The students of today are leaders, opinion makers, administrators, doctors, engineers, lawyers, accountants and teachers of tomorrow.

Does the curriculum in our schools teach them how to deal with strife?

Before I delve on the issue, I would like to share with you how I stumbled upon the question. At one of our core committee meetings, one of the members at the meet (Justice Bhat) propounded the idea of getting the Delhi High Court Mediation Centre offer its services to the community at large – something I too had been thinking about.

In one of my conversations with my daughter, I learnt of her interaction with other pupils at school to which I had not paid much attention till then. She was concerned with aspects that bothered her and some of her friends which I had earlier put aside as insignificant prattle of a nine-year-old. However, closer interaction with other school-going young people led me to discover that children, like adults, had unresolved issues which required sorting out. These issues related to name calling, physical attributes, ethnicity, religious affiliation, class discrimination, bullying and ragging. What was more unsettling was the fact that these issues prevailed across the spectrum – from junior school to the senior level. Higher the level, the more serious were the consequences. Co-educational schools had other related problems like, to put it euphemistically, poaching and territorial infringement.

I know the kids don't like you and they pick on you, but you have to go to school. . .you're the teacher!

Countries Where Peer Mediation is Established

This set me on the journey to finding out if there was a mechanism in place in schools and colleges, even in countries other than India, which allowed students to resolve inter-se conflicts. Happily, I discovered that conflict resolution and peer mediation was embedded and institutionalised in schools and colleges in both the USA and United Kingdom. Apart from the UK, there are other European countries which have also institutionalised peer mediation in their schools. Among non-European countries, countries such as Australia and South Africa appear to be the front runners. Unfortunately, the concept is missing in India.

Processes to be put in Place

Peer mediation in schools is no different from mediation which is practiced generally. It is a collaborative effort, which allows disputants to be in charge. The mediator only enables identification of the issues at hand. There is in peer mediation an effort to arrive at a win-win solution for both parties, much the same as in adult mediation. The difference is that disputes between students are resolved by the intervention of another student. The usual pattern is to train an entire group of students in conflict resolution after which those who are interested are given further training as mediators. Once trained, peer mediators work in pairs. Disputants invariably are younger than the mediator.[1]

Guidelines have been put in place to ensure that only certain kinds of disputes are placed before peer mediators. While there is confidentiality with regard to what is disclosed to the mediators by the disputants, there are certain aspects which don't come within the non-disclosure or confidentiality regime. These may be matters pertaining to physical abuse, or similar matters that are so grave that they require the intercession of an adult i.e. a teacher or an administrator of the school. Having said so, those who have closely studied experiments made in peer mediation are vehement that children often prefer to confide in other children rather than in adults.[2]

Spin-off Benefits

Apparently, the pluses of peer mediation include providing an opportunity to children to play an active part in decision-making vis-à-vis issues and aspects which interest and concern them. It enables them in growing into intelligent citizens, and grounds them in life skills, which help them in school, at home and in their interaction with the society as a whole. It also appears to benefit people by reducing disaffection and aggressive behaviour. There is perceptible growth in confidence and competence in students which may not take place otherwise.[3]

Facilities Required

Effectuating this concept in schools will necessarily require the same basics to be followed as those in mediation with respect to adults. Schools will have to allocate an area for mediation. A process would have to be put in place whereby young disputants can approach the mediators through their teachers. The mediators will require time to carry out this activity. Common wisdom appears to be that this activity can take place either during break or lunch time or after school hours, wherever older students are involved.[4]

Role of the Delhi High Court Mediation Centre

To my mind, the Delhi High Court Mediation Centre could start with identifying certain schools where imparting education in mediation can be executed as a pilot project. If the High Court Mediation Centre is in a position to replicate the establishment of such mediation centres in one or two target schools or colleges, then services could be offered by these schools and colleges to other similarly circumstanced institutions.

As a matter of fact, it may be a good idea to replicate such an exercise, in the first instance,

in juvenile homes, where young people in conflict with law could be trained to handle human conflicts without recourse to physical aggression.

In my view, it would be a small contribution to the society, which will help strengthen the sinews of democracy in our country. In order to ensure that the fundamentals of our democracy remain robust, we need to strengthen its edifice. That is possible by catching them young: by reaching out to our students.

References

[1-4] See: Peer Mediation in UK – A Guide for Schools by William Baginsky

Mending Fences by Breaking Bread

Rachel Jones, MPH, RD

Rachel Jones is an Assistant Professor in the Department of Nutrition in the School of Health at the University of Utah, Salt Lake City, Utah, USA.

The Cultural Study of Food

As an Assistant Professor of Nutrition at the University of Utah, I teach the Cultural Aspects of Food Programme in which 450 students each semester do collaborative work both in the classroom and in a foods laboratory ("lab"). The purpose of the programme is to bring students together in an experiential learning environment where they can safely explore and embrace their unique cultures and learn from others who have widely different backgrounds. Students meet weekly to discuss topics related to the eclectic nature of food, while acquiring basic hands-on skills regarding food preparation. The university hires a chef who helps students prepare foods from all around the world.

Students in the programme learn about the huge variety of foods that we humans consume, including different animals, insects, seeds and plants, as well as the different spices which add bold, savoury and subtle flavours to food. Students learn about food from the perspectives of religion, economics, geography, history, psychology, availability, marketing, socialisation, law, etc. Students, thereby, learn that foods serve important human cultural and social purposes in addition to fulfilling nutritional needs. They also learn about the roles which food can play in conflict resolution.

Food Differences

This semester, a student from Korea and a student from Saudi Arabia discussed the many languages and social differences each had encountered in the United States. They found common ground in their similar academic struggles and they laughed about how the Korean student had been raised on a diet of pork, whereas the Saudi Arabian student had never tasted pork. By discussing their food differences, they were able to overcome many other differences, find common ground, and become friends.

American college students, often, eat alone at most meals. International students find this hard to understand because social eating in their cultures is part of their identity and the roles they play in their families and communities. Most international students have never eaten alone until they arrive in the United States and find this experience quite uncomfortable. By contrast, American students are used to eating alone and, often, become socially awkward when they are required to sit at the same table and eat food with strangers.

Similarly, in one of our food labs, we prepared Ethiopian food and experimented with students eating it without utensils, using their clean hands. Some students refused to eat without utensils, even though this is a common custom worldwide. This experiment demonstrated how powerful social norms are about the various ways people expected to eat food.

Food and Brain Chemistry

The amygdala and limbic systems in the brain form a circuit in the forebrain which fires in response to perceived pain or fear. A novel situation causes specific areas of the brain to "light up" (as measured by increased blood flows seen in functional MRI brain scans) based on past experience. Perceived fear causes a greater response in the brain than an actual physical threat, which causes a quick motor response.

Similarly, the senses involved in eating food (e.g., taste, smell, sight, sound and touch) light up different parts of the brain. These regions of the brain involve short and long-term recall, complex analytical processes, and a broad-spectrum analysis of the current environment.

Food Rituals and Identity

Many of my Polynesian students talk about how their life revolves around rituals of food, dance, entertainment, and other shared experiences. One of their specialty foods is taro which is a starchy root vegetable used in Polynesian cooking. Taro is the main ingredient in fermented poi, which is a Polynesian staple food eaten almost daily. When some Polynesian students first came to the United States to play American football in college, they were told by their American coaches to stop eating taro, even though they were raised on this high-calorie starch. These players felt they lacked the energy needed to compete in the same way they had performed at home. In essence, they were asked to give up more than just a simple starchy vegetable. They were asked to give up a part of themselves, their culture, and their identity.

Food and Conflict Resolution

Because food is part of culture, physiology, ritual, and identity, it is not surprising that food can play multiple roles in conflict resolution. Providing water and sweets in a mediation room, taking a "tea break" during negotiations, "breaking bread" together during lunch with an opponent, are all examples of how food can facilitate conflict resolution by showing courtesy and respect, demonstrating care and kindness, and creating psychological ("luminal") space "in-between" disputants. The economic cost of food used in these different ways during conflict resolution is insignificant in comparison to the multiple benefits which food can engender.

Skillful Mediation Effectively Bridges Differences

Prof. Nancy D. Erbe

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When I despair, I remember that through history the way of truth and love has always won. There have been tyrants and murderers and for a time they seem invincible, but in the end they always fall – think of it – ALWAYS.

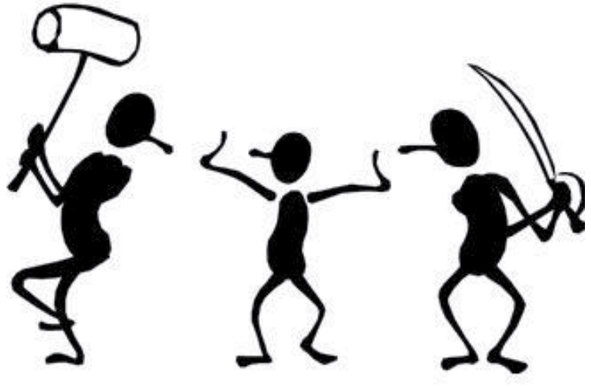
– Mahatma Gandhi

Empowerment must be induced by first creating consciousness ... To facilitate ... is the role of external agents. Experience has demonstrated that empowerment takes place in different scenarios.... There are no magic formulas or infallible designs, no single recipe or prescriptive (evaluative) model. Empowerment is not a linear process with a well-defined beginning and ending that is the same for all.... Empowerment is shaped for each individual or group by their lives, context, and history, as well as according to the location of subordination in the personal, familiar, communal, and higher levels.

– (Deere & Leon, 1993)

[I found helpful] the knowledge to resolve conflicts peacefully and restoratively in my community pregnant with conflicts, the development of my mind on the importance of peace in the development of the home and the community... the improvement of my social relationships with friends, neighbours and even long time enemies... the definition of peace as a continuous process of resolving conflicts without the use of violence.

–(Erbe, 2001)



Assertive + Empathetic = Effective Mediator

Survey respondents from four very different parts of the world laud and illustrate some key themes for optimal multicultural mediation. Dispute resolution professionals from the United States may feel ill-qualified to respond. Unexpected and striking, however, are the parallels between the evaluation detailed here and a study of the best lawyer negotiators in the United States. The most effective in both studies are universally perceived as assertive and empathetic problem-solvers.[1] Skilled empathy, or deep recognition and understanding of the other's perspective, seems ideally suited for cross-cultural mediation. Perspective-taking describes the popular "walking in another's shoes," or attempting to "see through another's eyes" and experience.

Parties to conflict spoke out in gratitude for their third party's understanding: "Leaders always tried to understand our point of view."[2] More than one recognised that this was a "very delicate situation regarding cultural and religious differences." Americans may imagine the understanding being appreciated as intellectual or academic as the requirement for evaluative expertise in arbitration or litigation. In a majority of the cases here, mediation being validated, however, emulates facilitative, not evaluative, skills and attitudes.

For example, some respondents evaluating mediation disparaged a closed mind and "put-downs", the opposite of empathy. Open-minded tolerance, or lack of prejudice, described the most popular climate and spirit. Positivity was stressed repeatedly in evaluating the most effective multicultural mediations. When third parties, or mediators, failed to create a positive climate, for example, by forgetting to suspend judgement, they were often criticised. One party felt scolded and saw the mediator emphasising the negative aspects of their conflict. Another

someone criticised lack of sensitivity to the parties. In turn, the opposite was praised. One respondent appreciated mediators and mediations "transforming the existing negative attitudes and stereotypes." To another party in mediation, patience was prized.

Once again, these survey results mirror research of lawyer negotiators in the United States. Words like stubborn, arrogant, egotistical, and unethical describe the least effective lawyer negotiators studied in the United States.

Suspension of Judgement and Flexibility

A Jewish-Palestinian group studying peacemaking in West Asia described what they need to engage in dialogue: suspension of judgement so that all can speak candidly without fear of being labelled. Respect and open-mindedness for all, without domination or attack, encourages voices seldom heard and testing out of thoughts without feared "eternal stigma". Passionate concern that allows open expression of deep feelings, without screaming and shouting, is requested. Mentioned most was the need for flexibility, or the willingness to change opinions with new understanding.

Why would empathy lead the skills mastered by the most highly rated dispute resolvers, in both tough US litigation and cross-ethnic disputes around the world? Fierce advocacy popularly symbolises legal contests. Police and military forces are the most visible international presence with cross-ethnic violence. Yet related research illuminates that, not surprisingly, misunderstanding results from closed minds filled with prejudice and judgement. This same characteristic was criticised in four different regions of the world. Pre-judgement or quick judgement based on one's own worldview and experience, rather than broader realities, reinforces erroneous assumptions. Prejudice hinders and precludes actual experience with and understanding of the "other". Those defending judgement only "see" and gather data supporting their preconceptions.

There has been a tendency to quite inaccurately characterise the cognitive perspective in psychology as viewing people as entirely conscious and rational. This erroneous characterisation is deserved up to a point. It was quickly discovered, however, that if anything, people are better described as faulty computers – their natural cognitive functioning produces all kinds of biases and distortions.[3]

These cognitive challenges are not simply faced by those defending rigidly held beliefs, however. Research shows a human tendency to create more favourable versions of ourselves and less favourable versions of the "other" when in actual and perceived conflict.[4]

Empathetic mediators, on the other hand, are more likely to interpret the behaviour of others accurately.[5] What could be more important under the pressure of devastating conflict than the ability to objectively gather quality information? A federal community relations mediator who diffused ethnic crisis within the United States for his lifetime describes the value of empathy with information gathering[6]:

Empathetic Listening

The ability to listen with empathy may be the most important attribute of interveners who succeed in gaining the trust and cooperation of parties to intractable conflicts and other disputes with high emotional content. Empathic listening enables the skilled listener to receive and accurately interpret the speaker's message. [It] 1) builds trust and respect, 2) enables disputants to release their emotions, 3) reduces tensions, 4) encourages the surfacing of information, and 5) creates a safe environment that is conducive to collaborative problem-solving. Empathic listening is often what sets the mediator apart from others involved in the conflict.[7]

The ability to avoid cognitive distortion and facilitate understanding deserves special recognition across cultural differences. As introduced earlier, according to some theorists, people perceive what is against them, or outside, their core sense of identity as a threat. This can result in cognitive distortion in an attempt to "reduce", even eliminate the threat. An attempt to protect and defend identity may be made through ignoring, minimising, or rationalising what is threatening. Once again, by choosing to defend what is familiar and known, rather than focusing on learning more about what is new, less true information is received. As the reactor increases reliance on his or her own psychological interpretations to describe, dehumanise and objectify "the other", misinformation increases. An escalating spiral of destructive conflict easily results.[8]

Third parties intervening in volatile conflict, however, cannot soar on one skill, no matter how important or strong. The most effective lawyer negotiators in the United States are described as both empathetic and assertive. This critical combination is also stressed in the regions surveyed here.

Some of the most esteemed cross-cultural mediators have the following rank descriptors:

1. Knowledge and Experience
2. Tolerance; No Prejudice; Open-Mind
3. Skillful Facilitation
4. Engaging; Interesting
5. Energetic / Dynamic
6. Cultural and Religious Understanding
7. Amusing
8. Influence / Charisma
9. In charge while Guiding
10. Promotes Cooperation
11. Positive Spirit / Feeling
12. Patient
13. Impartial

References

[1] The most effective lawyer negotiators are also described as "trustful", "sincere", and "facilitative".
Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, 7 Harv. Negot. L. Rev. 143, 147-48, 153 (2002).

[2] The degree to which a disputant is treated with respect and dignity also influences perceptions of procedural justice in the United States. People feel as if they are treated fairly when they trust that the "authorities with whom they are dealing are concerned about their welfare and want to treat them fairly". Waldman citing Tom R. Tyler & E. Allan Lind, A Rational Model of Authority in Groups, in 25 Advances in Experimental Soc. Psychol. 115, 137-66 (1992).

[3] John A. Bargh, Automatic Information Processing: Implications for Communication and Affect, in Communication, Social Cognition, and Affect 9 (Lewis Donohew et al. eds., 1988).

[4] See, e.g., Roy Cameron & Don Meichenbaum, The Nature of Effective Coping and the Treatment of Stress Related Problems: A Cognitive-Behavioral Perspective, in Handbook of Stress: Theoretical and Clinical Aspects 695 (Leo Goldberger & Shlomo Breznitz eds., 1982); see also Beverly Davenport Sypher & Howard E. Sypher, Affect and Message Generation, in Communication, Social Cognition, and Affect 81 (Lewis Donohew et al. eds., 1988). Such distortions do not simply damage the other. Distorted reaction increases the probability of conflict or issue avoidance and hinders effective diagnosis of reality. Distortion prohibits the comprehensive, in-depth information gathering necessary for optimal formulation of strategy to advocate one's own needs.

[5] Schneider, supra note i, at 147.

[6] Richard A. Salem, The Importance of Empathetic Listening in Mediation (2003) (Working Draft).

[7] Id.

[8] See, e.g., Terrell A. Northrup, The Dynamic of Identity in Personal and Social Conflict, in Intractable Conflicts and Their Transformation 55 (Louis Kriesberg et al. eds., 1989); Stuart J. Thorson, Introduction: Conceptual Issues, in Intractable Conflicts and Their Transformation 1 (Louis Kriesberg et al. eds., 1989).

Reflections on Multi-Party Mediation

Michele Straube

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Many traditional legal disputes involve multiple parties. Family disputes often involve the two spouses and a multitude of family members. Business disputes can involve multiple partners, suppliers and customers. Disputes relating to construction projects usually include the project proponent, the project designer, as well as multiple contractors and sub-contractors.

These traditional multi-party legal disputes can benefit from mediation, where a neutral third party facilitates the negotiation discussion between the parties, helps the parties find common ground and creates focus out of the potential chaos.

Multi-Party Consensus Building Opportunities

In my line of work, public policy mediation, there are additional opportunities for multi-party consensus-building.

The normal process for all levels of US governments (federal, state and local) to develop new regulations and policies is to work internally to create a proposal, which is then made public for a 30-day to 60-day comment period. Sometimes public hearings are held during the comment period as well. The government then reviews the public comments, makes changes to the proposal (or not), and the final regulation or policy is issued. Those who object to the new regulation or policy often file a legal challenge.

In some situations, government officials have set aside this normal process in lieu of developing new regulations or policies collaboratively with the public. They convene a multi-party group with representatives of the significant stakeholder interests, with the objective of co-creating a policy approach that will satisfy everyone and that will not be challenged in court.

Several years ago, I helped a state environmental agency work with industry and environmental groups to create a programme that provided incentives for manufacturing and other facilities to take actions that were more protective of the environment than those required by current regulation. Rather than having the government tell the industry what to do, the industry and environmental groups together designed a programme that could be implemented with community support. Several years later, the programme is very successful, with a wide range of large, medium and small companies who have developed internal strategies to prevent environmental emissions altogether or reduce them below the legal standards.

Another major opportunity for multi-party consensus-building arises in situations where no one party has adequate resources to fix a problem or get the job done. This is particularly true where the government wants to take action, but needs cooperation and support from other entities to be successful.

I am currently working with a collaborative partnership that came together to remove invasive plant species along 90 miles of a major river in the US southwest. The invasive plants are found on land owned by three different federal government agencies, at least one state agency and many private landowners. The invasive plants are so thick and difficult to kill, that it can take a seven-person crew a full week to clear a small section of river bank. In addition, no-one has attempted to conduct an invasive plant removal project at this large scale and the methods for doing so are untested. The partnership initiated a multi-year, multi-party, consensus-building process to jointly design a successful plant removal project, and to find the resources to implement the full project. The group's ongoing discussions require active organisation and mediation.

Before the Multi-Party Mediation Starts

Having multiple parties involved in a dispute or mediation obviously creates greater complexity than is found in two-party disputes. More people, more issues, more emotion, more potential for confusion and impasse. It's hard to know which topic to talk about first. You may or may not have the right people involved in the conversation. These are only a few of the potential complexities.

Whenever possible, I recommend that the mediator conduct some type of situation assessment before the multiple parties have their first meeting to ensure that the negotiations will be productive. A situation assessment usually involves the mediator having confidential interviews with as many people as possible who may have relevant information about the subject of the dispute.

Using the information learned during the assessment interviews, the mediator can then design a process that has the greatest likelihood of success. A successful multi-party process will probably include:

• A representative from each entity that has decision-making authority. Ideally the person who will have to make the decision will be at the negotiating table, but if that is not possible, that person needs to be kept fully informed about the progress of the negotiation.

• A representative from each entity that will have to implement any consensus solutions.

• A representative from all entities that have the power to block final implementation of any consensus solutions. This can include organisations or individuals who might file a legal challenge, and/or organisations or individuals who have political or community power to change the final result.

• Additional organisations or individuals who have relevant data to provide to the group.

The situation assessment report will also identify the issues that are of concern to the various stakeholder interests, as well as the opportunities the mediator sees for mutual gain.

Nurturing the Consensus-Building Process

Designing and managing a multi-party consensus-building process is as much an art as a science. There are, however, three approaches that I have found particularly effective.

First, the mediator should help the parties understand what "consensus" means and continually work with them to strive for "consensus". As I use the term, a "consensus" agreement is one that all parties can live with and are willing to implement. No-one loves it, no-one hates it, but everyone is willing to sign it and support it.

In the multi-party processes that I mediate, I encourage the parties to agree in the first meeting that everyone will share responsibility

for finding solutions that will meet everyone's needs. Just as no one person can dictate the decision for the others, no one person has veto power. Likewise, no person can simply state that they don't like a potential solution without offering another suggestion that they think might be satisfactory to everyone. This approach to consensus encourages everyone to fully understand all the perspectives in the room, and promotes creative problem-solving. It is time-consuming, but the results are, often, unexpected and effective.

Second, the mediator needs to allow adequate time for the parties to learn from each other, and in some cases, to learn together. With encouragement to keep an open mind, the parties should share their perspectives with each other and ask questions to ensure full understanding. In many of the projects on which I work, the group starts by sharing the relevant information each party already knows about the underlying issue. The group members then ask themselves if there is any information they need, but have not yet shared. If so, they work together to find the new information or even to create it (e.g., taking scientific samples together). The side benefit of spending time to learn together is that it models collaboration in a relatively stress-free activity, and it encourages the parties to think about the issues from multiple angles.

Finally, the group can be encouraged to create a future vision or joint goal that can serve as an anchor for the upcoming give-and-take of negotiations. In one of my projects, local ranchers and environmental groups agreed on desired future conditions for the land under discussion (what measures would reflect a "healthy" landscape), from which they were able to reach an agreement on the changes in grazing practices that would allow the land to recover from over-grazing. In another project, local residents, community groups and groups that provide services to homeless people agreed on their future vision for a local park, which then informed the actions they jointly took to change the use of the park to make that vision come true. As a final example, oil and gas exploration companies and environmental groups agreed in principle that critical animal habitat should be protected, which helped them decide where to place oil wells (and where not to place them).

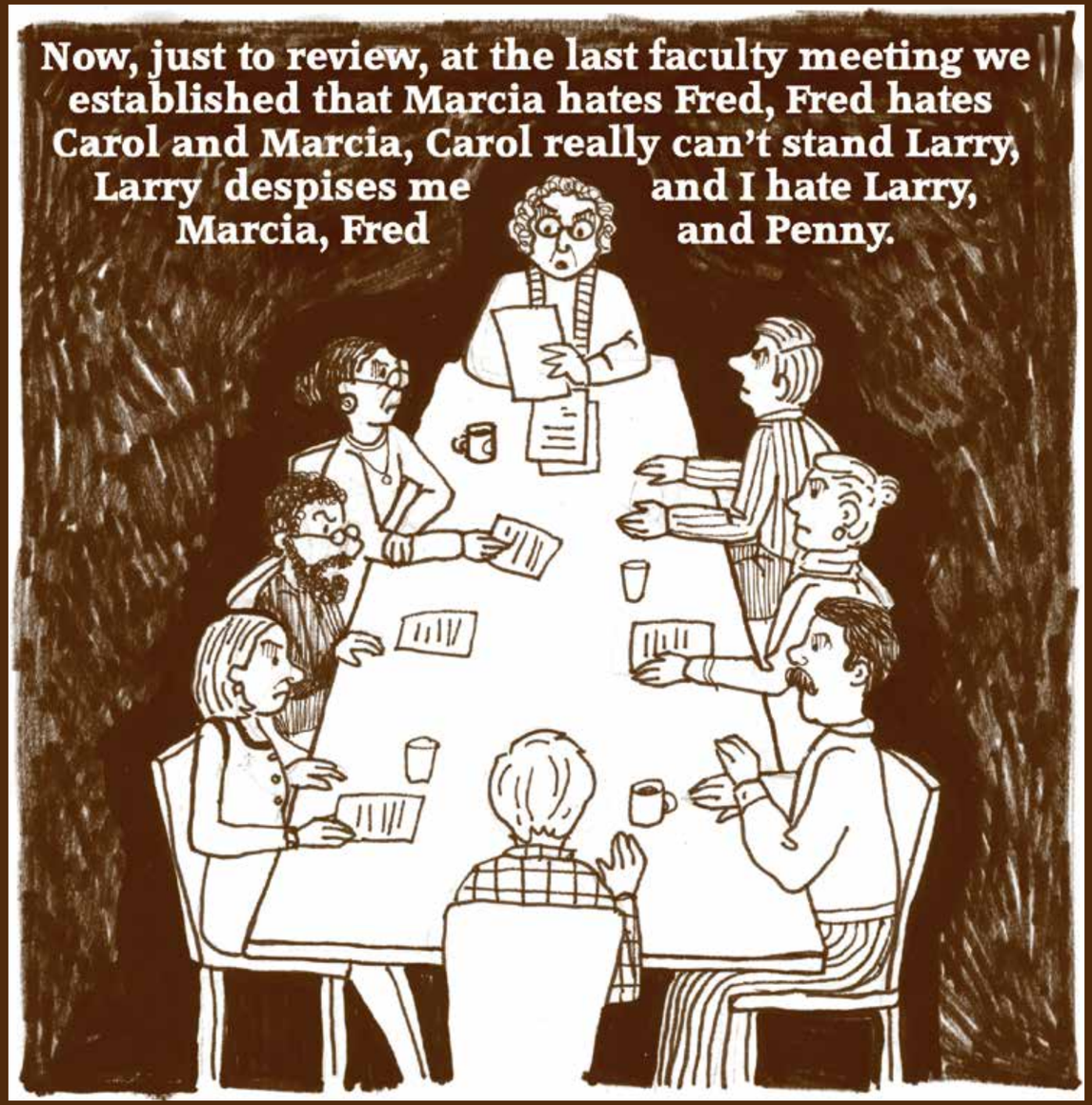
Multi-party mediations or collaborations are not easy, but the process of bringing multiple parties with diverse interests to consensus can be magical.

Case studies of multi-party consensus-building processes can be found at these websites:

- US Institute for Environmental Conflict Resolution (http://www.ecr.gov/Projects/Projects.aspx)

- Consensus Building Institute (http://cbuilding.org/case-studies)

- Policy Consensus Initiate, National Policy Consensus Center (http://www.policyconsensus.org/casestudies/index.html)



Naming, Blaming, Claiming and so on: A System of Conflict Escalation and Resolution

James R. Holbrook

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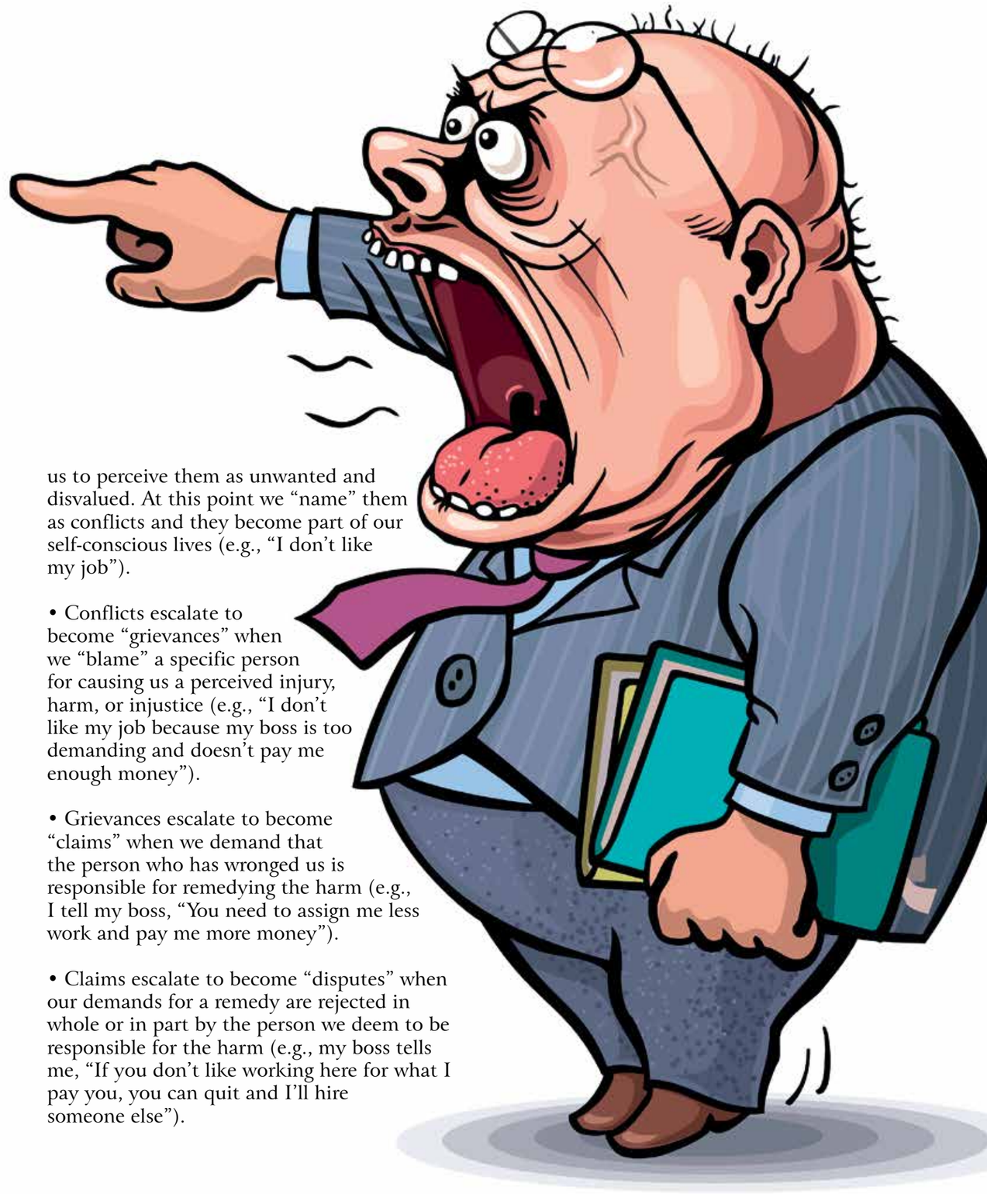
A famous law review article ('the Article") describes a system of conflict escalation and resolution.[1] The Article explains the evolution of a litigated dispute from the time it is perceived by a party as significant until it is filed in court to be decided by adjudication. Along this timeline of conflict escalation, parties can resolve their disputes themselves by negotiation, or they can submit their disputes to private mediation before the disputes become cases filed in court. Once disputes are filed in court, assigned judges can refer appropriate cases to court-annexed mediation. If the cases are not resolved in referred mediation, they will return to court to be adjudicated and finally decided by judges. Cases that are lost in court can be appealed.

At every point along this timeline of conflict escalation, parties are motivated by the forces of personal preferences and experience, relationships, psychology, family and social upbringing, cultural norms and values, and avoidable risks and transaction costs to resolve their conflicts and get on with their lives.

The Article contends that disputes are social constructs that evolve through specific predictable stages:

• We ignore and, therefore, tolerate most injurious experiences that we encounter in our lives in traffic, at work, in commercial transactions, and at home. These injurious experiences never rise to the level of becoming "conflicts".

• Injurious experiences become "conflicts" when they become significant enough for us to perceive them as unwanted and disvalued. At this point we "name" them as conflicts and they become part of our self-conscious lives (e.g., "I don't like my job").



• Conflicts escalate to become "grievances" when we "blame" a specific person for causing us a perceived injury, harm, or injustice (e.g., "I don't like my job because my boss is too demanding and doesn't pay me enough money").

• Grievances escalate to become "claims" when we demand that the person who has wronged us is responsible for remedying the harm (e.g., I tell my boss, "You need to assign me less work and pay me more money").

• Claims escalate to become "disputes" when our demands for a remedy are rejected in whole or in part by the person we deem to be responsible for the harm (e.g., my boss tells me, "If you don't like working here for what I pay you, you can quit and I'll hire someone else").

• Disputes escalate to become "lawsuits" when we engage lawyers to reframe these rejected claims into legally cognizable causes of action and file them as cases to be decided in court (e.g., my lawyer states in a legal complaint that my boss pays me less than his male Indian Hindu employees because I am a dark-skinned female Muslim from North Africa, and my boss is engaging in religious, gender, ethnic, and racial discrimination).

So, on the timeline of conflict escalation: unperceived injurious experiences become conflicts when we give them names; conflicts become grievances when we blame a specific person for injuring us; grievances become claims when we demand that the person remedy the harm; claims become disputes when the person refuses to remedy the harm; and disputes become lawsuits when lawyers reframe disputes as legally cognizable causes of action.

We also can imagine the timeline of conflict escalation as having the shape of a pyramid. At the bottom of the pyramid are the many troubles, problems, and personal and social

"Remember to look miserable when you meet the workforce son. We've spent years convincing them that money can't buy happiness."

upsets which are everyday occurrences that we ignore and tolerate as unperceived injurious experiences. These injurious experiences go unnamed and, therefore, do not ripen into conflicts.

At the next level up the pyramid, injurious experiences ripen into conflicts when we name them as unwanted.

At the next level up the pyramid, conflicts become grievances when we blame a specific person for harming us.

At the next level up the pyramid, grievances become claims when we demand that the person remedy our injury. Because often we express our grievances only to people intimate with us, and not to the person whom we blame, most grievances do not ripen into claims.

At the next level up the pyramid, claims become disputes when the person who harmed us rejects our demands for a remedy. Because some claims are accepted and remedied by the wrongdoer, or because we decide not to pursue a claim any further, only a small fraction of injurious experiences ever matures from rejected claims into disputes.

At the next level up the pyramid, some disputes become lawsuits because they are significant enough that we engage lawyers to file our disputes in court. Because the transactional costs of litigation (including time, money, hassle, and uncertainty) can be substantial, most disputes are never filed in court and, therefore, never ripen into lawsuits.

At the top of the pyramid are the lawsuits which are lost in court which are appealed. Because the transactional costs of an appeal are substantial, most cases lost in court are never appealed.

There are numerous important lessons to be learned from the Article:

1. Most injurious experiences never mature into conflicts; most conflicts never mature into grievances; most grievances never mature into claims; most claims never mature into disputes; most disputes never mature into lawsuits; and most unsuccessful lawsuits never mature into appeals.

2. Parties are psychologically and socially incentivised to tolerate conflicts.

3. Parties are economically incentivised not to escalate grievances into claims.

4. Parties are psychologically, socially, and economically incentivised to avoid asserting frivolous claims which are highly likely to be rejected.

5. Parties are economically incentivised to resolve meritorious claims by pre-litigation negotiation or private mediation and, thereby, avoid the transactional costs of disputes maturing into lawsuits.

6. Courts are incentivised by docket management concerns to submit appropriate cases to court-annexed mediation.

7. Parties are economically incentivised to participate in good faith in court-annexed mediation to settle their lawsuits and, thereby, minimise the transactional costs of litigation.

The Article in effect describes a conflict escalation and resolution system that is affected at every point by personal preferences and experience, relationships, psychology, family and social upbringing, cultural norms and values, and an unavoidable economic cost / benefit / risk / reward calculus. These forces either cause us to stop where we are on the conflict escalation timeline and enable us to choose to accept, resolve, and tolerate the level of conflict we experience, or the forces drive us farther along the conflict escalation timeline from conflicts, to grievances, to claims, to disputes, to lawsuits, and ultimately to appeals.

One intuitive argument that can be made about such a conflict escalation and resolution system is: the more inefficient the conflict resolution system is (i.e., the fewer disputes the system resolves), the fewer perceived injurious experiences will be filed as lawsuits in court. This is the argument sometimes heard in India that the huge backlog of cases in court discourages disputes from being filed as lawsuits.

A second, but counter-intuitive, argument that can be made about such a conflict escalation and resolution system is: the more efficient the conflict resolution system is (i.e., the more disputes the system resolves), the more perceived injurious experiences will be filed as lawsuits in court. This is the argument sometimes heard in India that the success of court-annexed mediation will be socially perceived as reducing the backlog of cases in court, thereby encouraging more disputes to be filed as lawsuits.

Mediators can intervene in this system of conflict escalation and resolution to encourage and empower parties to consider personal preferences and experience, relationships, psychology, family and social upbringing, cultural norms and values, and avoidable risks and transaction costs. These forces can motivate disputants to choose to accept, resolve, and tolerate the level of conflict they experience and, thereby, enable them to get on with their lives.

References

[1] William L.F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .," 15 *Law & Society Review* 631-54 (1980-81).

Mediation and the Rights of Children:

A COUNSELLOR SPEAKS

Dr. Nandita Chaudhary

Children in Legal Battles

Based on my experience with the Mediation Centre of the Delhi High Court over several years now, I have been able to assemble some important concerns regarding children as scapegoats in the process of marital discord, separation or divorce. The reason why extra attention is critical for children is because they are not merely victims of situations; they also become a commodity for partners to settle scores with each other. This is not an unknown phenomenon. In the proceedings of the court, the child's vulnerability focus comes under sharper spotlight on account of the desperation of the partners, manipulation of the family, and the enthusiasm of the respective advocates. In this article, I wish to make the child the central focus of discussion.

The predominant concern of parents in a legal battle is to get back at each other for past deeds. Most arguments take place in the presence of children and, often, end up seriously damaging them. They are exposed to exaggerated details about their own parents whom they love and admire. Unfortunately, the bitterness that a parent feels towards his or her partner completely overshadows the affection, needs and rights, both of the child and the other partner.

What is best for a Child?

I strongly believe that these matters MUST be decided primarily by the mother and father of the child, and not by the paternal or maternal grandparents or other family members. It is also essential for mediators to be aware of the fact that the protection of a child's interest is also their concomitant responsibility. They must be aware of the fact that children's minds are highly impressionable. One important characteristic of young children is that they hold themselves responsible for the small and big things that happen in their lives. A child psychologist concluded on the basis of a study that young children's mind is characterised by something he called "psychological causality". Children between the ages of 3 to 7 believe that things happen because of their actions or thoughts: "My father went away because I did not eat my food", or, "My mother is sick because I was disobedient", or, "My parents are fighting because I didn't do well in my exams."

People dealing with children must be aware of this detail about the minds of children and understand that when parents quarrel, and more seriously, when they separate. However, instead of understanding this aspect, and actually helping the child to overcome the imagined inadequacies, adults, rather unwittingly, actually heighten the disaster of a broken family for the child. It is mostly out of our proclaimed love for children.

In a recent incident, my observation of a four-year-old child in difficult circumstances displayed a frightening outcome of fear and disturbance. The child was incapable of feeling secure even in a child-friendly environment. Everything induced fear in him. The comforting presence of the mother was not effective either and the child did not open up to explore the environment, and even attacked a friendly adult when he was being encouraged to play. Such inability to distinguish between a friendly and secure environment from the one that is threatening to one's safety was a critical outcome of a disturbed environment. Every child can have a different reaction to a particular situation, and circumstances are never the same even for siblings of the same family. Thus, it is not always possible

to predict the outcome of a situation may be for a particular child. What can be predicted with confidence is that such a situation will be hurtful for a child.

At What Age Should a Child's Perspective be Considered?

Concern for the child MUST be paramount at ALL ages. Children of all ages, including an unborn child, are vulnerable. Even adult children are susceptible to disturbances in the family. In fact, no one goes unscathed in a family discord. When children are unable to understand why such things are happening in their lives, is when their perspective is most important to consider. For instance, it is critical for a young baby to be with the mother (except under extremely difficult conditions of maternal ill-health or inability).

The matter of custody should favour maternal care unless there is serious reason for considering this unfavourable for the child's health and welfare. As the child gets older and gains the capacity to understand language and communication, it is able to understand, but only partially. This makes the child imagine his or her own version of experiences, and can lead to life-long vulnerability if the child's position is not understood and cared for by others in its life. It is when the protector becomes the perpetrator of difficulties in a child's life that counsellors need to step in and find ways to facilitate the repair of the child's situation. This does not always mean that the estranged couple has to come back together; but that they have a responsibility towards the child and must consider the child's point of view, and not only their own hurt and revenge.

Children and Abusive Language

A child should be kept away from manipulation and fear. If abusive language is used with a child, or with someone the

child loves, it can be extremely hurtful. We need to remember that the child loves both parents, and admires them. Often, love can also be hurtful, when a child is prevented (through deceit and manipulation) from meeting with or building a relationship with the other parent. Thus, it is not the blatant use of abusive language alone, but also the unintended abuse of depriving a child of her rightful place in a family that can become abusive.

Who is to be considered the Better Parent for a Child between Warring Spouses?

Whether a child should or should not be with one parent, before or after re-marriage, or whether a child should be allowed visitation from an estranged parent or not is not something that can be recommended across all cases. It depends on the circumstances of each case, the people involved, the age of the child, the presence of siblings, and economic status. There are step-parents who are very favourable towards their children, and there are biological parents who may fail to protect their own children from abusive situations.

Each case, each child and her circumstances have to be constantly reviewed by the people concerned. As the child grows older, it is always favourable to ask for her opinion and views, and also provide her with information about the circumstances rather than considering the child to be a passive victim of others' choice. All children are interested in matters concerning themselves and their family. Children are very sensitive to circumstances, especially emotionally charged situations. So, NOT telling them can be extremely disturbing. Other decisions should be taken on the merit of the circumstances. No packaged solutions can be provided from outside.

Child Custody

A Trainer Looks at the Challenges of a Family Mediator

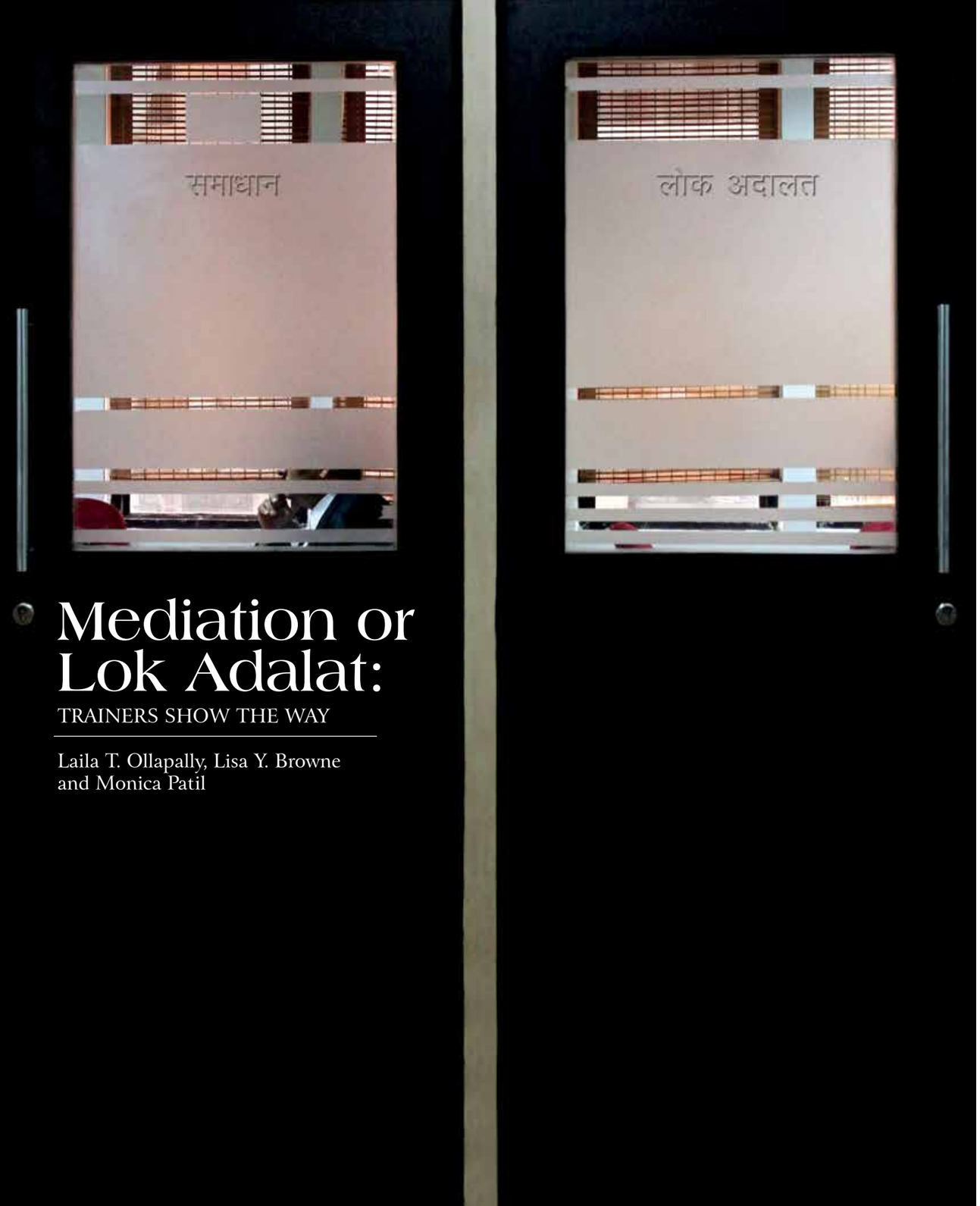
Justice Manju Goel (retired)

It is commonly understood in a matrimonial dispute that the child's welfare is the main consideration in determining who should be given the latter's custody. However, it may, sometimes, become difficult to assess where the welfare actually lies. Material comforts are important but secondary to, and not more vital than, stability, security, compassion, care and guidance.

In such disputes, the mediator is required to make a subtle evaluation of the contesting claims of the two parties seeking the custody of the child. The parent with whom the child is living at the time of the contest may complicate the situation by influencing the latter's mind against the other parent. The child may refuse to go to the other parent even if its welfare may lie there. The mediator must remember that the opinion of the child becomes important when the child is mature enough to make an intelligent preference.

In the context of such disputes, the mediator has to adopt a more proactive role – that of a counsellor. She has to persuade the parent to sacrifice his / her 'right' in favour of the 'welfare' of the child. The child also has to be helped to overcome the prejudice drilled into her mind by one of the parents.

The whole exercise requires patience, time and the right atmosphere. It is worthwhile to take the guidance of a child psychologist. With the wisdom and experience our mediators have gained, I am sure that they are capable of handling child custody issues with sensitivity and skill and protect not only the interest of the child but also of the two parents.



Mediation or Lok Adalat:

TRAINERS SHOW THE WAY

Laila T. Ollapally, Lisa Y. Browne and Monica Patil

"One lakh!"

"Two lakh!"

"1.2 lakh!"

"Why don't you compromise a bit and scale down your demand?"

"1.9 lakh is what we will accept! We will not cut back further!"

"We cannot accept to pay such a high amount for this man's injuries. The most we will pay is 1.2 lakh."

"Your Honor, my client has lost his livelihood as a result of the motor accident. Surely 1.9 lakh is a small amount for a state bus service to pay for the injuries caused?"

Exchanges such as this are common experience when seeking settlement at a Lok Adalat. Settlements are reached based on mutual agreement between the two parties after limited negotiations guided by the conciliators of the Lok Adalat.

In the above case, the injured man limped to the Bench at the behest of his advocate to show the panel his crushed foot. Those present only saw the life-changing injuries caused by the accident.

In a matter of five minutes, a pre-existing formula was used to calculate the compensation based on a set of factors. Information was gathered and an amount settled by the two-member panel.

In mediation, however, the experience is different. Consider the following example:

A couple living in a gated community lost their only son in an accident resulting from faulty construction of the footpath. The grief-stricken parents sought compensation to the tune of Rs. 50 lakh from the builder. The builder offered only Rs. 5 lakh which, for the parents, was an insult to the memory of their deceased son. During mediation, both parties had the opportunity to communicate their feelings to each other. Listening to each other helped them understand better the other's position consequent to which an agreement was reached that went above and beyond any monetary compensation the builder could have offered, and the couple could have expected.

In addition to a smaller monetary settlement, the builder agreed to construct two rooms in a school to which the mother had devoted her life after her son's death, institute a scholarship for two students in the same school, repair the roads and footpaths in the gated community and rename the street in the son's name.

Mediation is party-centric – it addresses emotions, needs and core concerns of the parties involved. Settlements are reached by negotiations conducted over several days accommodating the complexities of the dispute. Multiple options are generated after a detailed exchange of information and parties ultimately agree on a mutually acceptable solution. The mediator's skill in understanding the emotional state of the parties and her ability to facilitate communication vastly improves the chances of reaching a lasting and satisfactory settlement. These elements have a holistic impact on the emotions and experiences of the sides involved and are unique to mediation.

Cases suitable for Lok Adalat
The Lok Adalat is better suited for disputes where the time needed to determine liability is short and an established formula is available to calculate a monetary settlement. Such cases involve a party that is usually represented by authorised personnel who do not have much flexibility and discretion while negotiating. These parties routinely face numerous similar claims and apply the same fixed formula to reach a settlement. An example of such disputes is the motor vehicle accident claims against insurance companies. In such disputes, there may be no scope to reach customised settlements.

Cases suitable for mediation
Cases where parties have the power to negotiate, alter terms and customise settlements are suitable for mediation. Mediation is appropriate in situations where human stories are relevant, relationships are involved or where channels of communication need to be re-established in order to work towards a resolution. For example, cases including complex commercial disputes, contract disputes, personal injury claims, real estate, property, family disputes or matrimonial cases are suitable to go into mediation.

In the light of this information, let us re-visit the cases cited above. Mediation offered an opportunity to both the parents and the builder to reach an understanding of all the circumstances so that amenable solutions could be reached. If the case involving the man with the crushed foot had been referred to mediation, it is entirely possible that the injured party would have received more than just monetary compensation had the other party not been a state bus company. So, for instance, the other party might have also agreed to re-employ the man in a position where he could have utilised his skills after retraining. Or, the parties could have agreed to hire the man's son as the father was no longer in a position to carry out his duties.

Since mediation allows and encourages all parties concerned to tell their stories and reach an agreement that is suitable to all, compromises such as the one mentioned above are beneficial. The outcome is not only the deliverance of a settlement, but enhanced satisfaction of parties and mending and preserving of relationships.

There is no disagreement with the fact that the practice of ADR is crucial to the administration of justice in India. Litigants repose immense faith and confidence in our courts in times of conflict. Our courts bear the heavy responsibility to direct and guide the parties to the most suitable and appropriate dispute resolution mechanism, based on the unique characteristics of each case. Only then can it be truly said that justice has been delivered.

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Innovative Tool, Skillful Workman

EXPERIENCES OF A SAMADHAN MEDIATOR

I would like to share a particular case in which the deadlock among members of an educated and respectable family of Delhi was resolved by the simplest of all acts. During the discussions at the mediation sessions, the parties discovered that they hadn't eaten together in years. Much to my surprise, one of the parties called all his siblings the next day for lunch. They enjoyed a sumptuous meal together over which they also buried their differences and arrived at an amicable settlement at the Mediation Centre.

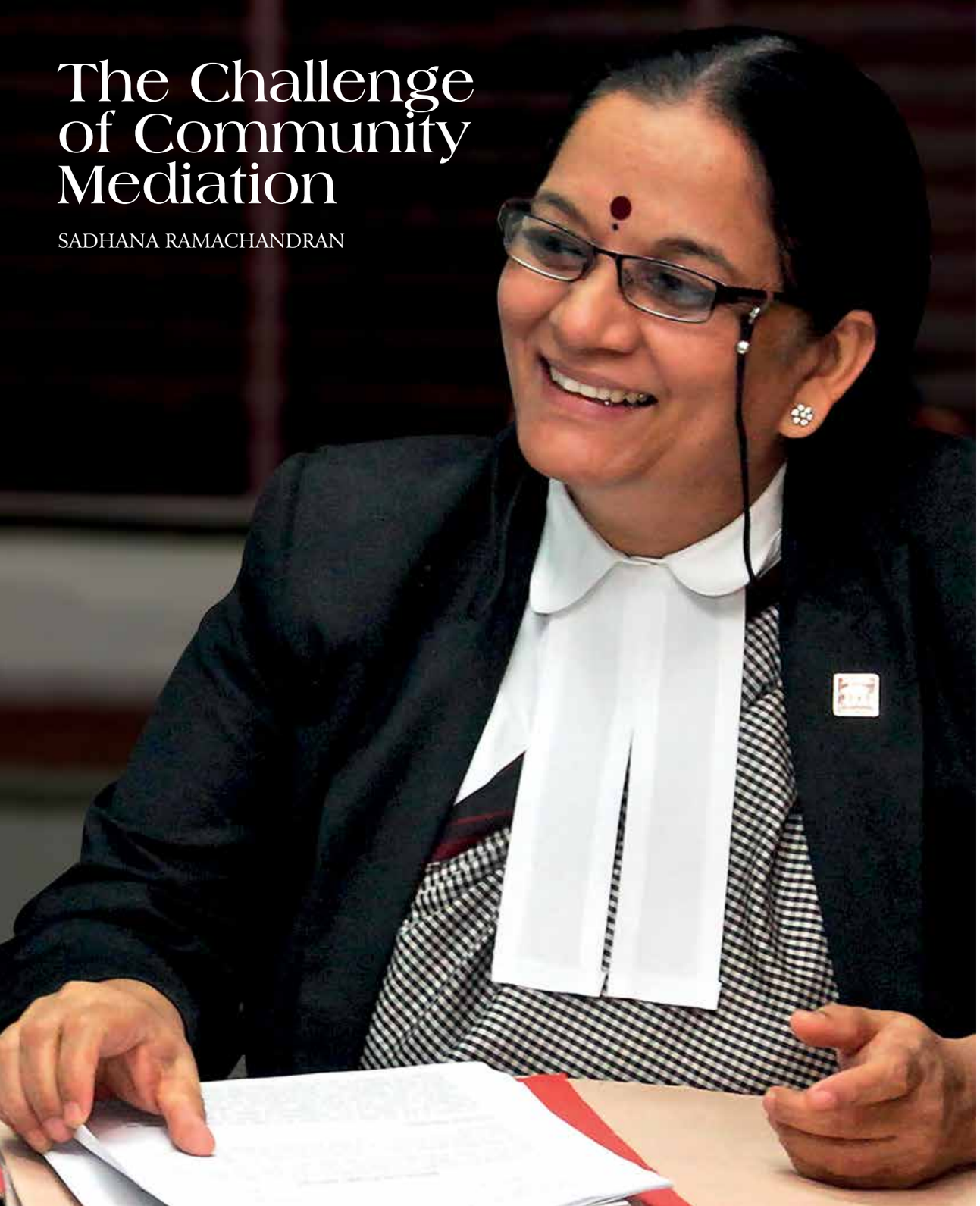
Mediation is not just another form of alternative dispute resolution, such as arbitration or early neutral evaluation. It is a neutral, third-party assistance to the disputants to resolve a dispute outside the adjudicative space of the court room. My experience tells me that mediation is a highly innovative method of dispute resolution which calls for specialised skills of a mediator in assisting the disputants to resolve complicated issues which have been hounding the parties, involving emotional and other causes of discord.

When mediation was formally introduced for the first time in this country and particularly in the Delhi High Court, we all had our apprehensions about its success. The great zeal and involvement of the members of the Bar and Bench and the innovative ideas of the legal fraternity made it possible for the founder members of the Mediation Centre to launch such a movement. Trainers were actively engaged in imparting mediation techniques to lawyers. Basic and advanced courses were introduced so that lawyers could qualify as mediators.

There was much enthusiasm among lawyers after they qualified as mediators. But the absence of success in some mediation proceedings was disappointing. However, we soon realised that the success of mediation was hardly a parameter to evaluate the success of the centre or the movement because they saw marked improvement in the relationship between the disputants even though the results remained inconclusive.

The Challenge of Community Mediation

SADHANA RAMACHANDRAN



This write-up attempts to analyse the challenges of community mediation from the experience mediators have had in an interface with the community both in a court-annexed mediation set-up and outside of it. In doing so, it attempts to underline the challenge of understanding culture and conflict to build a consensus in the community for the acceptance of mediation as an appropriate dispute resolution process.

Community:
The ultimate challenge of mediation

The ultimate challenge of mediation does not lie merely in the right case being referred at the right time by the referral judge. Neither is it merely in the role played by a sensitised and proactive legal profession in spreading the vital message of mediation or only in the support given to it by a sensitive government. All of this the mediation movement in Delhi has illustrated in the last six years. It lies in the acceptance of the idea of mediation by the community that it seeks to serve because in the process of mediation lies the dignity of a society and its communities. In these communities are also located the government, the Bar and the judiciary that are essential components of every community that they serve, but are also communities unto themselves.

The first challenge:
understanding the term 'community'

'Community' has many meanings. It is defined as a number of individuals with some unifying relationship. It is also often used to describe a group of people who live in close physical proximity to one another, or who have language or culture in common. But experts in mediation describe the term as a feeling of connectedness, a process of communicating and living together and a relationship based on collaboration in which the whole becomes greater than the sum of its parts. It is that whole which this article seeks to address.

It is necessary to accept at the outset that it is the community (however defined) that makes the individual. Understanding that is a challenge. Most people regard freedom as an individual attribute, yet without the community no individual can develop into a social being. It is only in relation to others that individuals experience love or hate, acceptance or rejection, success or failure, resolution or impasse. Therefore, the message of mediation becomes as essential to communities as it does to individuals that comprise them.

The second challenge:
understanding the nature of 'community'

There can be both 'negative' and 'positive' communities. 'Negative communities' are characterised by conformity, obedience to authority, and fear or hatred of others. These 'negative communities,' or communities 'against' rather than 'with', 'of,' or 'for' others, frequently arise in moments of crisis, often in

response to fear, selfishness, recrimination, and rage, rather than empathy, altruism, learning and compassion. They rest on conformity and power over others. Communities can also be lasting or momentary, fragmented or whole, large or small, accidental or intentional.

On the other hand 'positive communities' are created when differences are transcended and commonalities are recognised. They support collaboration and diversity, and encourage equality, equity, and democracy. This, done even in small ways, personal or social, increases people's ability to connect with others through affection and commonality. It also stimulates interest-based responses of conflict and collaborative social change, generating positive, democratic forms of community. This positive community is what mediation intends to promote and create.

The third challenge: consensus in the community

The challenge of creating and promoting positive communities can be met only by bringing consensus in the community. Consensus is essential for community acceptance of any idea.

The foundations on which consensus is built in a community are substantially the same as foundations for implementing mediation as an appropriate dispute resolution mechanism. They are: trust, respect, self-empowerment, unity of purpose, active participation and equal access to power for all the players, positive communication, conducive environment, understandable conflict resolution processes, non-violence, improving the future rather than dissecting the past, co-operation, collaboration, conflict resolution by creative and realistic solutions, and commitment of the community.

Accordingly, while implementing mediation at the community level, the challenges are the same as the impediments to consensus like lack of awareness and training, external hierarchical structures and social prejudice.

The fourth challenge: understanding, accepting and changing the culture of the community

Culture has been described and defined in many ways. However, for the purposes of understanding conflict, culture may be defined as a set of beliefs, norms, rituals and perspectives that people share within a community or group. Culture establishes some basic ground rules within a group. It allows everyone to perceive the world similarly, defines what people value and drives conflict. It defines appropriate ways to behave in particular kinds of dispute. It defines institutions in which disputes are processed. It is fairly well understood in the Indian context that there have been cases where people would rather surrender their lives than give up ultimate values.

Values within a culture are based on views about human nature, religion, economic theory and political ideology. For example, the term 'family values' embodies a general statement that people across the world would acknowledge. However, the precise meaning of family values may vary dramatically. People in same-sex, monogamous relationships may believe in family values, yet they are condemned by those who see family values exemplified by the 'nuclear family', consisting of heterosexual married partners and children.

Culture also defines what people are likely to dispute about. Conflicts over power, resources and relationships may vary. Since culture helps communities separate the relevant from the irrelevant, it helps define what issues are important. The use of abusive language may be a compliment to manhood in one culture and an insult in another. The covering of the head with the chunni or sari by married women is important in some North Indian cultures and failing to do so have raised conflicts in the community, the family and between husband and wife. This practice is totally irrelevant in other cultures and a positive taboo in some South Indian cultures. In a Tamil Hindu family, a girl can marry her mama (maternal uncle) or his son in a perfectly valid marriage. In a rural society in west Uttar Pradesh, a girl cannot marry within five neighbouring villages as all the boys there are de culture, brothers. The same practice may vary in urban and rural cultures.

There is a misconception about culture that it is timeless and unchanging. Our experience with families and communities in the Delhi High Court has illustrated that the challenge of consensus can be met. We have found that culture is dynamic and highly responsive to new circumstances. Within six years, we have seen the culture of Delhi communities changing in accepting mediation and the culture of our Bar changing in looking at litigation as the last resort in appropriate cases.

The fifth challenge: understanding culture and conflict in the community appropriately

In mediation, it is crucial to analyse the interplay between culture and conflict. When two people meet who have different models for recognising and dealing with power and conflict, and when their respective models are backed up by some special authority, authenticity, or feeling of rightness, then the mediator must recognise 'cultural differences.' Conflicts cannot be completely understood or resolved if they are perceived as isolated by-products of personality differences, while the social and cultural influences that shaped them are ignored or left unresolved. This is a constant challenge for mediators. The challenges we have faced at Samadhan in addressing different cultures in a city like Delhi have been phenomenal. Some important lessons we have learnt include:

• Recognising different values in Punjabi, Sikh, Bengali, Jat, Rajput, Kannadiga, Tamil, Gujarati, Maharashtrian and Parsi cultures, even in business disputes.

• The mediator speaking the same language as the parties makes all the difference between a settlement and a non-settlement.

• The importance of changing techniques depending on the culture of the parties. One of our mediators keeps the holy books of all religions handy for parties who were most comfortable with religion while taking crucial decisions. Another mediator supported a party when he expressed a desire to go to the religious 'guru' he believed in to get assurance of the decision he was taking, because the 'guru's' endorsement provided great comfort to the party.

• Adapting to different cultural conditions. In a labour matter, a mediator found the trade union members tongue tied in the air-conditioned precincts of the court which they entered for the first time. So she went out and stood in the open truck in which they had come to talk to them and achieved great results in communication because parties were more comfortable in a more rugged environment.

• Adapting to the different nature of disputes. A matrimonial dispute has to be dealt with

differently in terms of time and patience from a trademark dispute involving issues of intellectual property.

• The importance of cultural sensitivity. Our mediators have needed to be culturally sensitive even about the day and date suitable to parties to come for mediation, their festivals, customs and traditions.

• The impact of social and economic factors even in intimate relationships like marriage. An example is that of a young couple referred for mediation to Samadhan, after they had obtained a mutual consent divorce decree. When they appeared before the court in proceedings under Section 482 of the Criminal Procedure Code for all criminal actions to be quashed and for consideration of the wife's prayer for maintenance of the children, an extremely sensitive judge, taking their consent, sent them to the mediation centre to reconsider their relationship! The mediator found that their dispute was about money where the husband was accusing the wife of being a spendthrift, while the wife who had left her job to care for the two children, accused the husband of being tightfisted. While the couple experienced their conflict subjectively and personally, the mediator discovered that their conflicts were deeply impacted by their social and economic conditions. The mediation process facilitated them to deepen their empathy for each other, learn to manage their money better, work together to alter the social and economic environment in which they lived and helped them to find a number of ways out of their conflict. They resolved to re-marry each other!

The sixth challenge:
Who is the messenger of mediation?
A significant factor in implementing mediation is the institution or person who spreads its message in the community. In court-annexed mediation, it is the judiciary that understands the needs of its community to use mediation to resolve conflict. Several judges in various district courts, high courts and the Supreme Court have shown their own commitment to the cause of mediation by proactively making referrals in appropriate cases. Members of the Bar have risen to the challenge, both by training as mediators and by advocating mediation through their appearances in mediation proceedings along with their clients.

Two incidents from Nagaland illustrate the point. The Chief Justice of the Guwahati High Court wished to explore how the communities of the North-Eastern states, particularly Nagaland, could benefit from the new dimensions mediation was bringing into the justice system in other parts of the country. This exploratory gesture itself was an important message to the communities of judges, lawyers and the various tribes of Nagaland.

The first lesson we mediator-trainers from Samadhan learnt from the Naga community was that there is a misconception about tribal communities that they do not know or understand the concept and nuances of mediation and administer justice only in an archaic manner. But we found that the Gaon Burahs (meaning the wise village headmen) and the Do Bhashis (the ones who know two languages, or interpreters) who are part of the hierarchy of the Village Council, the Village Customary Courts and the District Customary Courts that co-exist with regular district courts, were using several skills of mediation in their customary practice of dispute resolution for centuries though they were unaware of the word 'mediation'. They have every potential of becoming the best messengers for mediation in their community. Young lawyers who belonged to the various tribes showed great interest in mediation training.

The second lesson we learnt was from the district judge of Kohima. He was known to be a strict disciplinarian in his judicial work and did not tolerate inefficiency, unpreparedness or a casual approach by the lawyers appearing before him. We visited villages of the Ao, the Angami and the Sema tribes with him and also met members of the Lotha tribe. We were amazed to find he knew virtually every person in every village by name! It made no difference to any tribe that he did not belong to it. All that mattered was that he had ensured over the years that he kept in touch with the problems of his own and other communities he was presiding over as a judicial officer. His was a rare relationship between a judicial officer and his people. At the awareness programme he conducted at Dimapur for about 200 Gaon Burahs, Do Bhashis, members of Village Councils and some judicial officers, he helped serve the tea and set up the audio system that he had brought from his own home. He then acted as interpreter of the proceedings in flawless Nagamese. He was an example of one of the most powerful messengers of mediation.

The seventh challenge:
Indianising mediation
While western mediation philosophy differentiates the concepts of mediation and peacemaking on various grounds, it is the proposition of this author that in the Indian context, both mediation and peacemaking have to do with values and seeking restored relationships in the community with personal responsibility. For example, in mediation just as in peacemaking, we have seen that apology and forgiveness are powerful tools for restoring relationships and dealing with conflicts. People and communities are culturally facilitated, often against their current feelings, to activate their capacity for good.

In the Indian context, nowhere are the threads of personal growth of the individual and social evolution of his community more interwoven than in the writing of Mahatma Gandhi. He believed not only that personal, social, economic and political conflicts are inseparable, but also that they are creative sources of spiritual evolution. It is time we developed our own Indian model of mediation.

References

PEACE MAKING: Practicing at the Intersection of Law and Human Conflict by Douglas Noll, Cascadia Publishing House, 2003

ON CONFLICT AND CONSENSUS: A handbook on formal consensus and decision making, C.T. Lawrence Butler, Amy Rothstein, Food Not Bombs Publishing, Second Edition, 1991.

CONFLICT REVOLUTION: Mediating Evil, War, Injustice and Terrorism: How Mediators can help save the planet by Dr. Kenneth Cloke, Janis Publications, 2008.

Some Samadhan Stories

From Acrimony to Harmony

The warm smile on 80-year-old Urmila's face scarcely hid the tension writ large in her eyes when her young grand-daughter Seema wheeled her into the Mediation Room. The mediator helped the old lady get off the wheelchair and sit in the visitor's chair.

"Ma'am, could I offer you a cup of coffee or tea," asked the mediator.
"No *beta*, just get me out of the courts, I am looking for peace and can't take it anymore," Urmila said.

The mediator smiled sympathetically, and tried to comfort her without touching upon any of her emotional conflicts. He had just begun to introduce himself to Urmila when a tall, middle-aged lady walked into the room with her son and daughter. On her entry into the room, Urmila's face dropped and the smile disappeared. The mediator welcomed them and requested them to sit comfortably. The body language on either side was a clear indication that there was immense acrimony and tension between them.

The mediator once again introduced himself and got the two sides to introduce themselves. The lady who had walked in was Pratibha, Urmila's daughter-in-law. Before launching into questions about why they were in the court and what the dispute was about, the mediator quietly introduced the mediation process to the parties. He got the assurance of both sides that they had voluntarily opted for mediation and that they were open to a negotiated settlement of their dispute and differences. Having spent over half an hour in building communication with the two sides, the mediator was ready to start discussing the dispute.

Moderated by the mediator, each party got a chance and time to speak about their woes without being interrupted by the other. Urmila was emotionally shattered at the treatment Pratibha had meted out to her. Both lived in the same house, which belonged to Urmila, but Pratibha claimed it to be her matrimonial home. Pratibha's husband had passed away four years ago. Communication between the mother-in-law and daughter-in-law had broken down.

Urmila alleged she did not get proper food to eat and was treated shabbily. She wanted Pratibha to move out of the house and let her live in peace. Pratibha contended that even though the house was in her mother-in-law's name, it had been financed by her late husband and that she had every right to live in it. She denied she treated her mother-in-law badly but insisted that the house be transferred in her name as she had no savings for herself and wanted to secure her children's future before her own demise. Bitterness and acrimony had increased beyond imagination since the last three and a half years that the two parties had been litigating in the courts.

The mediator listened to the parties without commenting or interrupting as they spoke their hearts out, though periodically reminding them of their agreement not to react to the allegations of the other. Having heard them, the mediator spoke to them separately during which the real issues of conflict emerged. He helped them separate their interests from the positions taken by them in the court. He found out that the Urmila loved Pratibha's children and was ready to secure their future. Options were generated by both sides which the mediator shared with them in these separate sessions. The whole process took several days and eventually the parties agreed to an out-of-the-box settlement. Pratibha agreed to live in a rented accommodation, while Urmila agreed to partition the house and rent one portion to a third party. The rent so received would be paid to Pratibha for the welfare of the two children and for paying for her rented accommodation. Urmila agreed to transfer her house to Pratibha's children. The agreement was signed and culminated in an order of the court binding the parties to the settlement.

The parties were happier and content was evident as they bid adieu to the mediator and walked out of the Mediation Centre with smiles on their faces. What otherwise would have been a long protracted legal battle with uncertain results and huge expenses resulted in the return of peace and harmony within the family.

A Case of Consummate Mediation

Rahul and Anita got married fully aware of each other's biological disabilities but believed their marriage could be consummated. The marriage took place with the usual fervour. The two lived together for a short while before Rahul filed for divorce on grounds of mental cruelty. He alleged that their marriage could not be consummated owning to the disability of his wife. Anita contested the petition alleging that their marriage could not be consummated due to Rahul's disability. Although both admitted that the marriage was solemnised after knowing fully well the disabilities of each other but the extent and the kind of their disability was in dispute. The matter was referred to mediation.

Anita was not at all prepared to accept divorce and geared up to fight tooth and nail to prove she was right. Hailing from a rural background, Anita, an educated girl, lived in a joint family with five brothers. She had the support of 17 cousin brothers. Some of them even accompanied her to the Mediation Centre for a few sessions.

Backed by a strong family, Anita had made up her mind to go through the cross-examination and prove herself medically fit even if it meant to be embroiled in a long-drawn out, expensive legal battle.

Realising the long-term interests of the parties, the mediator succeeded in gradually getting Anita's brothers to view the matter differently. The mediator's perseverance and patience in holding separate sessions with each one of 17 cousin brothers ultimately resulted in returning peace to both the parties. Anita and Rahul agreed to divorce by mutual consent with the latter providing sufficient financial support to the woman.

When you find peace within yourself you become the kind of person who can live at peace with others.

Of Immovable Property and Shifted Positions

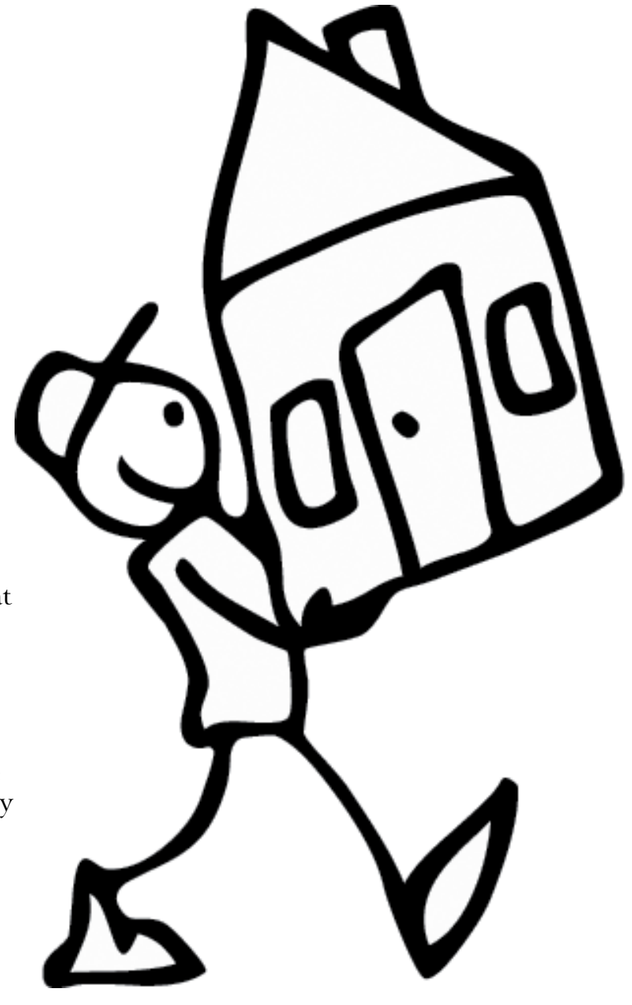
Every conflict reflects what each person most needs to learn in that moment.

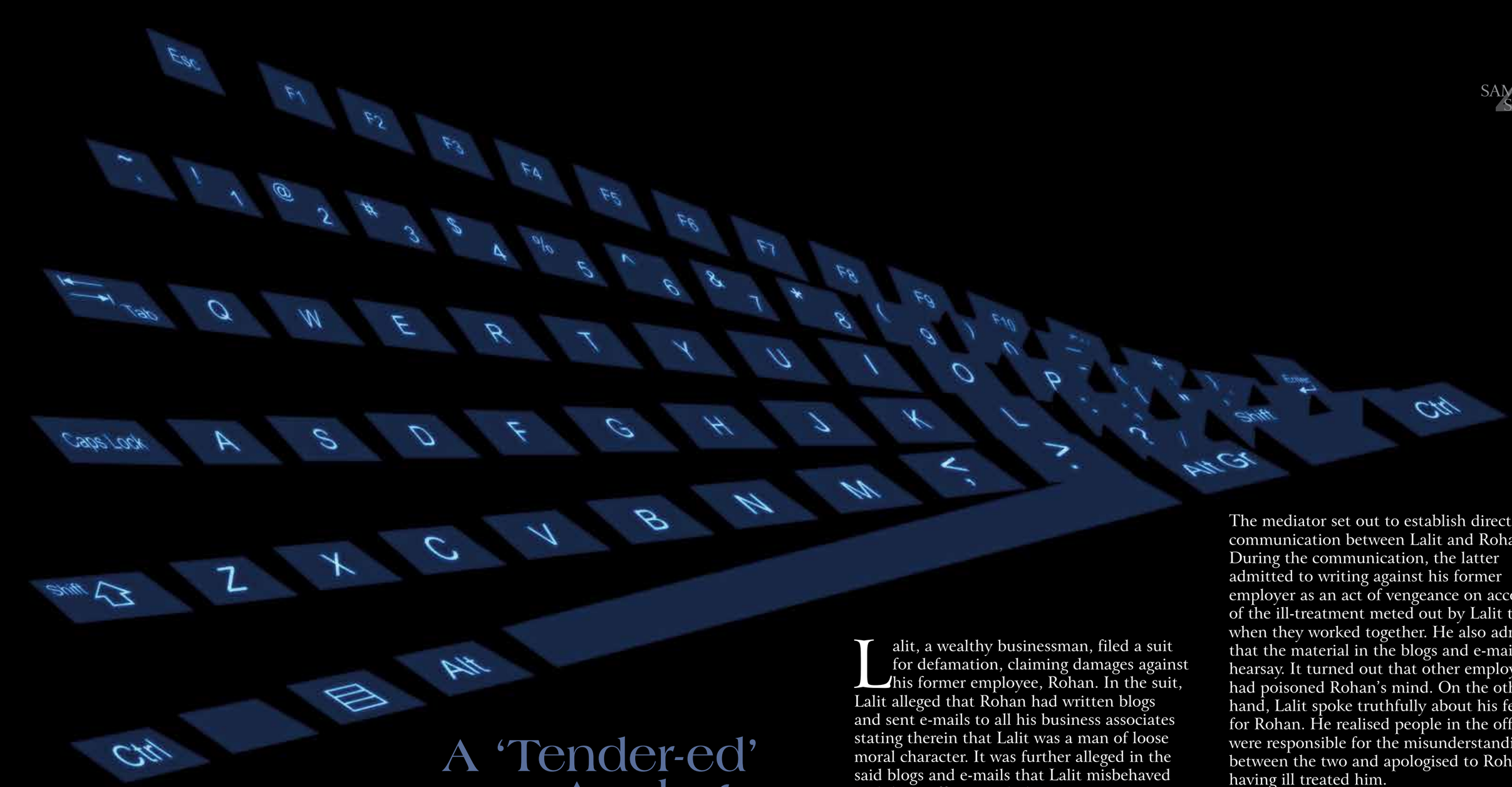
Ram Prakash, a rich businessman, died in Delhi and was survived by his wife Sarla, two married daughters and a son who lived abroad with his wife. His estate comprised an immovable property in a posh colony of the city and a joint business with one of his sons-in-law. Ram Prakash left behind a Will bequeathing his immovable property to his widow. The Will was silent on leaving his share in the business to one of his sons-in-law. After the demise of Ram Prakash, Sarla lived with her two daughters in Delhi. About a year after the death of her husband, Sarla instituted a probate petition seeking probating the Will of her deceased husband.

The two daughters contested the probate petition and, in turn, instituted a Suit for Partition before the Delhi High Court. Although, the mother continued to stay with the daughters, the daughters contested the genuineness of the Will. During the pendency of the litigation, the matter was referred to the Delhi High Court Mediation and Conciliation Centre.

Following several mediation sessions between the parties, it transpired that Sarla desired to bequeath the immovable property exclusively to her son even though she and her daughter-in-law were not on the best of terms. The daughters insisted that the immovable property be divided into three equal shares. It also turned out that Ram Prakash had, during his lifetime, assured his son-in-law (with whom he held the business jointly) that the latter had exclusive rights to run the business.

The property dispute led to souring of ties between the parties, consequent to which the mother was neglected and harassed. In separate sessions, Sarla offered to shift abroad with her son. But this suggestion was not acceptable to her daughter-in-law. This is when Sarla decided that the immovable property would be divided, after her death, into three equal shares among her three children. She also persuaded her son not to claim any right on the joint business of the father with the son-in-law. The parties agreed to bury the dispute, keeping in view Sarla's welfare, financially and otherwise. The children agreed that Sarla would stay at the daughter's house in Delhi and that they would each contribute Rs.10,000 as monthly allowance to her. The immovable property would continue to belong to her during her lifetime, with the right of residence. It would be sold after her death and the proceeds would be divided equally among the children who eventually signed a settlement agreement, thereby disposing of all pending litigations between them.





A 'Tender-ed' Apology

Lalit, a wealthy businessman, filed a suit for defamation, claiming damages against his former employee, Rohan. In the suit, Lalit alleged that Rohan had written blogs and sent e-mails to all his business associates stating therein that Lalit was a man of loose moral character. It was further alleged in the said blogs and e-mails that Lalit misbehaved with his staff, particularly women.

Rohan contested the litigation, alleging all that he had stated was factually correct. During the pendency of the suit for defamation before the High Court, the matter was referred to the Mediation Centre with the consent of the parties.

The mediator set out to establish direct communication between Lalit and Rohan. During the communication, the latter admitted to writing against his former employer as an act of vengeance on account of the ill-treatment meted out by Lalit to him when they worked together. He also admitted that the material in the blogs and e-mails was hearsay. It turned out that other employees had poisoned Rohan's mind. On the other hand, Lalit spoke truthfully about his feelings for Rohan. He realised people in the office were responsible for the misunderstandings between the two and apologised to Rohan for having ill treated him.

At this point, Rohan expressed willingness to tender an apology for having written the 'defamatory' blogs and e-mails and Lalit agreed to an unqualified withdrawal of the defamation suit. Lalit and Rohan signed an agreement which finally disposed of the pending litigation between them.

SAMADHAN STORY 5

Abandoning an Impasse

A workman was dismissed without a show-cause notice on grounds of abandonment of service. Claim before the Labour Court resulted in an ex-parte award granted in favour of the workman inter-alia with back wages amounting to Rs. 5 lakh and reinstatement. A civil writ petition was filed and the award was stayed. During the pendency of the matter, the parties consented to refer their dispute to the Mediation Centre.

Both the parties stuck to their respective stands during the joint session which was attended by the workman along with a representative of the union. While there was much evident acrimony, fact finding during joint sessions and caucus revealed that the workman was not hostile. He was sensitive and admitted to his mistake of abandoning his work for two days, contrary to the stand taken by the union. He, however, blamed the management for creating a hostile environment and said he was forcibly prevented to join his duty when he wanted to.

In the caucus, the management made it clear that they would not reinstate him in view of organisational discipline. But they also indicated giving some kind of financial compensation. The management further indicated that they were close to nailing evidence that the workman was employed somewhere else since his alleged termination. The management wanted these facts to be conveyed to the workman. On being so informed, the man admitted he was working elsewhere but requested that this be not disclosed to the management. He also consented to settling the matter with some compensation. He agreed to do so since he had taken some loan which he had to repay. He also required funds for his children's education. The two parties started negotiations with the assistance of the mediator through private sessions.

There was an impasse during the process of assisted negotiation where the workman was unwilling to settle for anything below Rs. 3 lakh and the management was against giving anything above Rs. 2 lakh. Both turned out to be tough negotiators.

At that point, the mediator applied the principles of BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement).

The parties agreed to a middle path when they were made to see the futility of a legal battle fraught with uncertain results, delays in the final judgment, mental trauma and the disagreement on the amount vis-à-vis further costs of litigation.

They signed a settlement agreement wherein the workman agreed to accept Rs. 2.5 lakh as full and final settlement and the management agreed to pay the same in two monthly instalments. The workman also agreed not to press for reinstatement.

SAMADHAN STORY 6

A Bruise and a Balm

A franchisee of a chain of restaurants and a landlady entered into a lease agreement for restaurant space in West Delhi. The franchisee agreed to pay a minimum fixed amount (called the Guarantee Amount) per month for use of space for the restaurant and to share profits on sales at the restaurant-cum-bar. However, the landlady filed a suit for eviction against the franchisee for alleged default in monthly payment. Pending the suit, the matter was referred to the Mediation Centre.

It turned out during the mediation sessions that the franchisee's son and the landlady did not see eye to eye. In what appeared to be a case of bruised egos, it was revealed that the two had fought and used uncivil language against each other. After ascertaining the facts, the mediator thought it fit to allow the two sides to vent their feelings. With sensitive handling, the mediator succeeded in getting the parties to talk about the good times they had shared with each other. This helped diffuse the animosity between them.

The private sessions that the mediator held with the parties played a crucial role in allowing them to open up. The caucus also revealed how default in payment had led to bitterness, which in turn escalated into character assassination. The landlady was in need of funds and was willing to settle on reasonable terms. The franchisee was finding it difficult to break even in the absence of a bar license owing to delay by the government. The joint and private sessions enabled the two sides to see how they had drifted from the issue of the lease agreement to unwarranted and unfounded personal attacks. Both felt sorry and were now willing to talk about the lease agreement and the default in payment. Even though the focus had now shifted to present and future interests, the two parties required more time to talk separately since both of them were being represented by hard-nosed negotiating lawyers.

Eventually, a new agreement was entered into since the two sides wanted to continue the relationship. All the arrears were cleared, though in instalments, and the landlady agreed to provide the necessary assistance to the franchisee to quickly obtain the bar license.

The mediator learnt from the case that there was no one formula to handle bruised egos. Every situation and factual matrix required a different technique. In this case, more time was given to the parties to talk to each other alone, apart from sensitively handling the emotional conflicts. This ultimately led the parties to find the path of least resistance i.e. settlement.

Conflict is always a product of the ego and the mind, not the heart.

Landing a Peaceful Settlement

X owned a large piece of land measuring 7.50 acres in Chattarpur village. He entered into an Agreement of Sale in 1978 for the sale of the entire land with A for a total consideration of Rs. 85 lakhs. A paid Rs. 30 lakhs to X with a promise that he would pay the balance amount of Rs. 55 lakhs within six months of the date of the execution of Agreement of Sale.

However, both the parties continued to mutually extend the time for the completion of sale documents from time to time. By the year 1990, A had paid an additional amount of Rs.10 lakhs to X; Rs. 45 lakhs still remained to be paid. In 1990, A requested X to obtain the necessary clearance certificates from the authorities concerned and for the execution of the sale deed. By this time, the prices of the land had appreciated considerably. X refused to obtain the clearances. A was inclined to pay a little more but not as per the terms of X.

The relationship between the two parties came under strain. A served a legal notice upon X for the due performance of the Agreement to Sell entered into between them. When X failed to comply with the legal notice, A filed a suit for specific performance against X in the Delhi High Court.

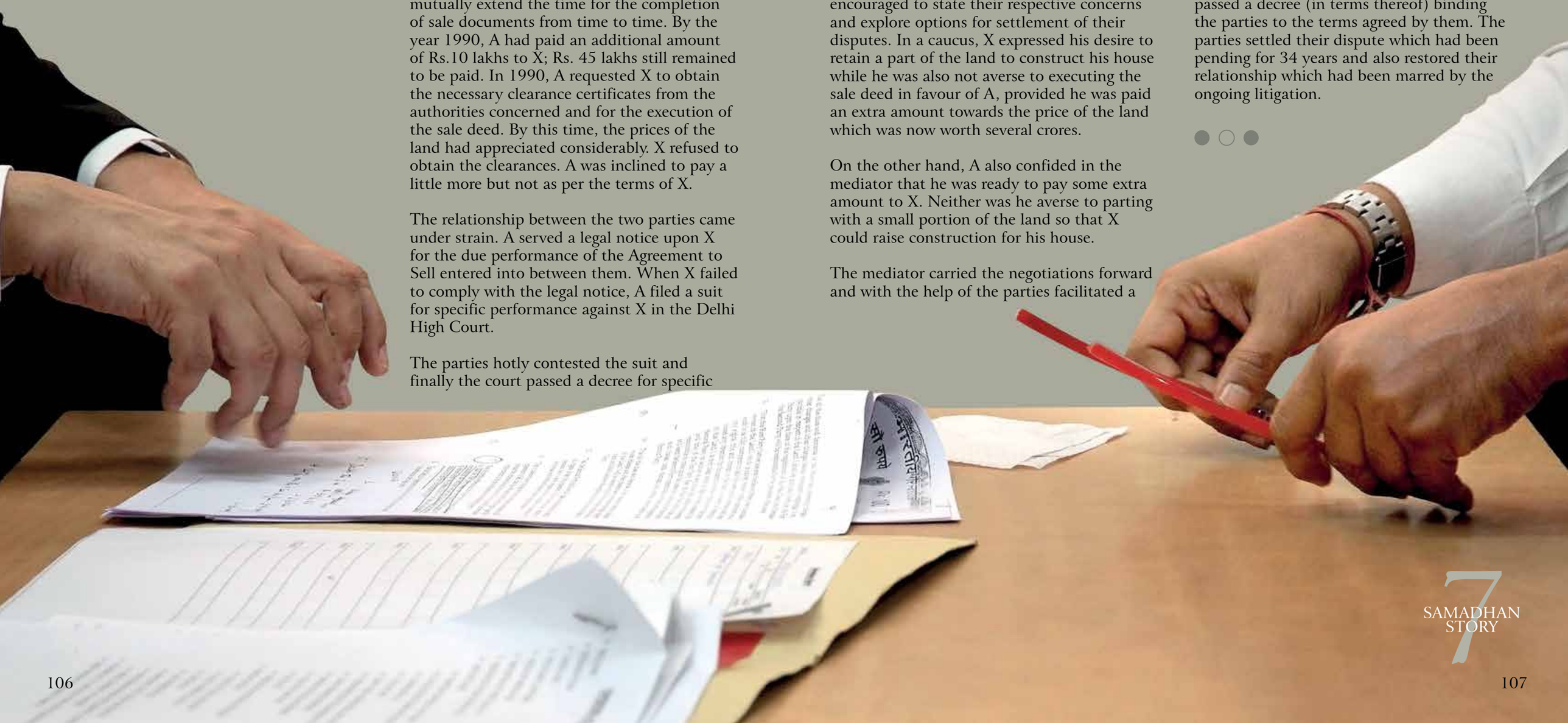
The parties hotly contested the suit and finally the court passed a decree for specific performance in favour of A. X preferred an appeal before the Division Bench. After some arguments, the Bench referred the matter to the Mediation Centre.

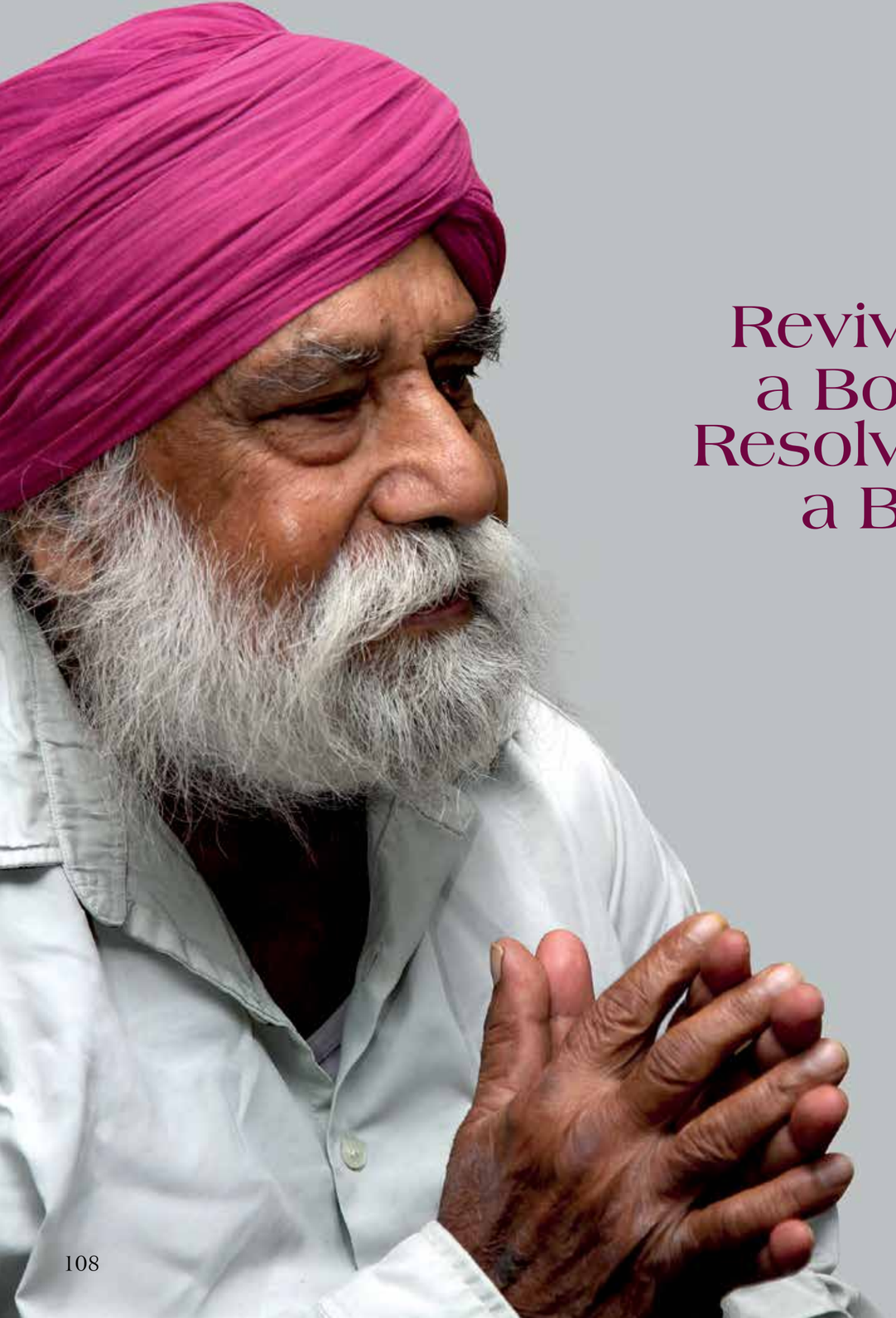
Following the opening statement by the mediator, the parties explained their respective positions. The most encouraging part was that the counsel on either side were very helpful and interested in settling the matter amicably. Following many sessions, the parties were encouraged to state their respective concerns and explore options for settlement of their disputes. In a caucus, X expressed his desire to retain a part of the land to construct his house while he was also not averse to executing the sale deed in favour of A, provided he was paid an extra amount towards the price of the land which was now worth several crores.

On the other hand, A also confided in the mediator that he was ready to pay some extra amount to X. Neither was he averse to parting with a small portion of the land so that X could raise construction for his house.

The mediator carried the negotiations forward and with the help of the parties facilitated a settlement whereby an area of 4000 sq. yards was earmarked for X for his personal use and to construct his residential building thereon. It was agreed that the rest of the land would be handed over to A on payment of an additional amount which was satisfactory to X. The Settlement Deed was drafted and signed by the parties and their respective counsel.

The settlement agreement was sent to the court by the Mediation Centre and the court passed a decree (in terms thereof) binding the parties to the terms agreed by them. The parties settled their dispute which had been pending for 34 years and also restored their relationship which had been marred by the ongoing litigation.





Reviving a Bond, Resolving a Bind

Mr. RL was the owner of three houses in Kamla Nagar, Delhi, two shops in Khari Baoli and one double-storeyed house built on a plot of 360 sq. yards. Mr. RL passed away leaving behind four sons and two daughters without executing any will. Post his death, disputes arose between the siblings with respect to the father's estate. The parties agreed to refer their disputes to arbitration of a retired district judge. The arbitrator made and published his award. The youngest brother was unhappy with the award and challenged it. During the course of arguments, the court suggested to the parties that they attempt resolution through the process of mediation. The disputants agreed and the matter was referred to the Delhi High Court Mediation and Conciliation Centre.

The first session was attended by all the members of the family along with their respective advocates. Accusations and heated exchanges flew, particularly between the eldest and the youngest brother. Each blamed the other for the bitterness in their relationship. They were not even willing to talk to each other. The mediator calmed them down and made his opening statement, preferring separate meetings over a joint session in the first instance so he could hear all sides. He said it would not be possible to do so with all sides sitting together because of the deterioration in their relationship.

As mediation progressed and several sessions were held, the disputants realised that early resolution to the dispute was in everyone's interest. The mediator, with the help of the sisters, succeeded in getting the brothers to the negotiation table. They started talking to each other initially through the mediator. The atmosphere improved and several options were generated by the parties to amicably divide the estate. The mediator found during sessions that all the brothers had a lot of respect and love for their sisters. Aided by the mediator, the sisters took the lead in exploring several options.

The turning point came with the sisters proposing that they would not claim any right in the properties left behind by the father if the brothers settled their disputes amicably. A settlement was finally arrived at with respect to the shops in Khari Baoli as well as in Kamla Nagar. They mutually agreed that the double-storeyed house in Gujranwala town would be remodelled so that each one of them could use his portion i.e. independently, without any interference from the other.

The parties executed a deed of settlement in terms of which binding orders were passed by the court and the award was set aside.

The mediator found that once the bond amongst the family members was revived, it became possible for the parties to move from their positions and negotiate a settlement which met the interests of all. The sisters, who were happily married and well placed, did not lose anything. But the family ties became stronger and relationships were restored.

Decisions, Not Damages

A well known company, A & Co. filed a suit for permanent injunction against C & Co. on the grounds that the latter was using the trademark 'XXX' for exporting their garments to various countries including America.

The allegation of A & Co. was that 'XXX' was their trademark and a very popular brand globally and C & Co. was passing it off as its own and earning huge incomes from the sales.

C & Co. refuted the allegations on the ground that the word 'XXX' was conjoint with the product 'oil', not with 'cloth'. C & Co. was using this name only for the purpose of exporting garments. The court granted an interim injunction and the suit was put on trial on the question of damages.

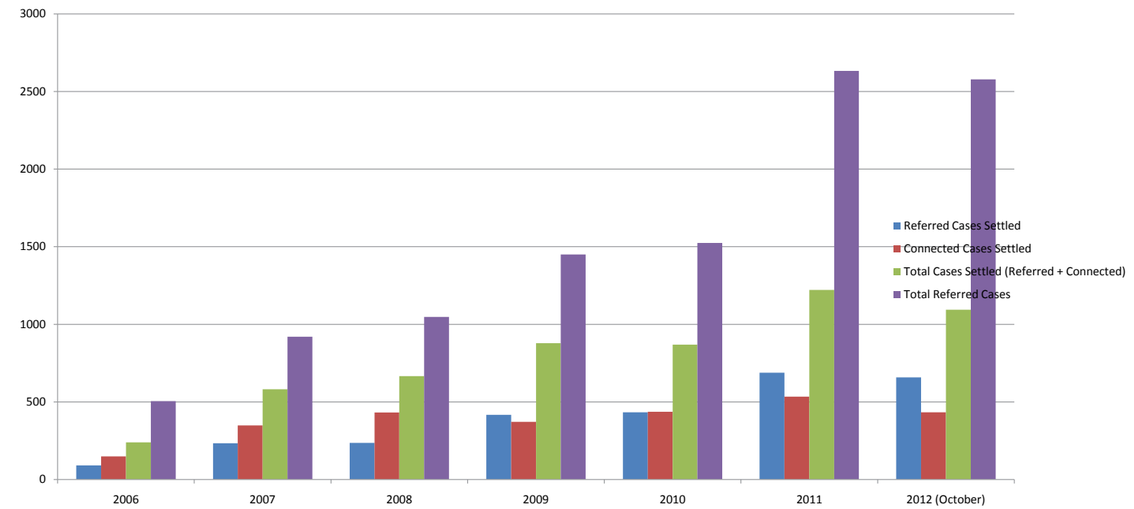
While the suit was in progress, the matter was referred for mediation. The parties were apprised of the benefits and advantages of the mediation process. The parties stuck to their positions initially but softened somewhat during the process. In the process of generating options, C & Co. proposed that

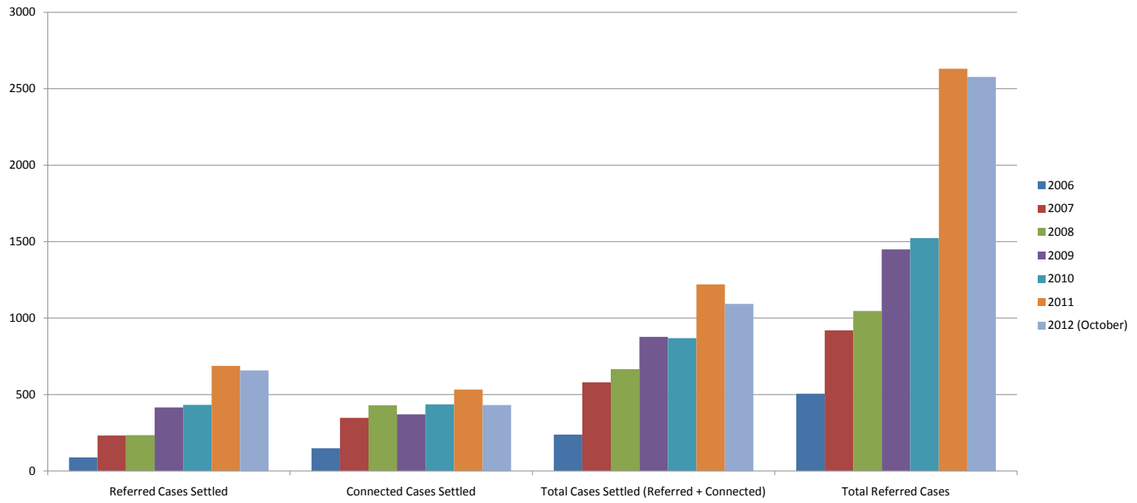
since the word 'XXX' was a known brand globally, A & Co. should not object to its use by them. The latter, A & Co., were adamant to begin with. Asked by a mediator to think about the proposal and come forward with any other option suitable to both the parties, they agreed they would not object to the use of the word 'XXX' by C & Co. with respect only to the garments that were exported. They would not use it for clothes that were sold in Indian markets.

The company, C & Co., responded positively and agreed upon a settlement which was drawn between the parties with an undertaking that they will not use 'XXX' for any of their products sold in Indian markets directly or indirectly.

It is interesting to note that A & Co. gave up its claims for damages against C & Co. It was apparent that both the parties were looking at a solution where they could feel duly protected with respect to their rights under law and to have the freedom to do their own business without causing any loss or harm to each other.

Samadhan Statistics

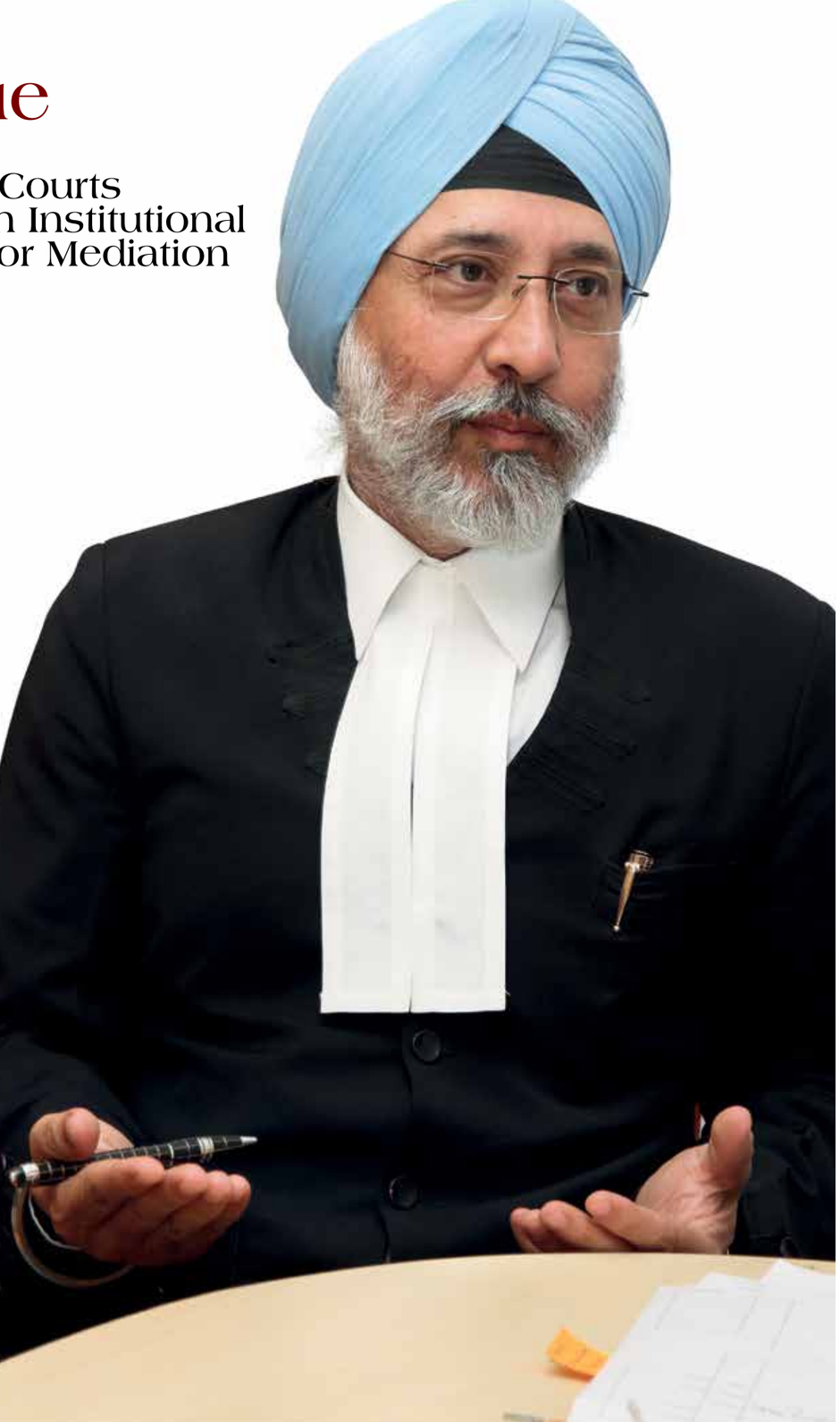




Epilogue

Role of High Courts in Creating an Institutional Framework for Mediation

J P Sengh



Mediation was very often referred to as 'meditation' when the Delhi High Court Mediation and Conciliation Centre organised a workshop for CEOs and senior officials of public sector undertakings and other governmental agencies in Delhi. This only affirmed that there was lack of awareness on mediation amongst the participants even at that level. The biggest challenge before us, therefore, is to increase public awareness of mediation as an effective alternative dispute resolution (ADR) mechanism and also propagate its usefulness in resolving conflicts. The role of high courts in every state is pivotal in creating an institutional framework for mediation.

Several studies propagate that there is a need for setting up a strong institutional ADR mechanism in India. Under the supervision of the courts in India, judicial mediation and Lok Adalats have had limited impact in reducing the backlog of cases and speedy dispensation of justice. The faith of the litigant in India in "the court system" of justice strongly suggests that providing court-based mediation services is both desirable and effective.

Ours is a country of multilingual populace professing various religious and social beliefs. They are riddled with caste-based systems which require a proper and sensitive approach by mediators. The message of usefulness of the mediation process to the institutional set-up has to percolate down to every individual: for starters, at least to the level of each district. The high court in each state is ideally suited for this purpose.

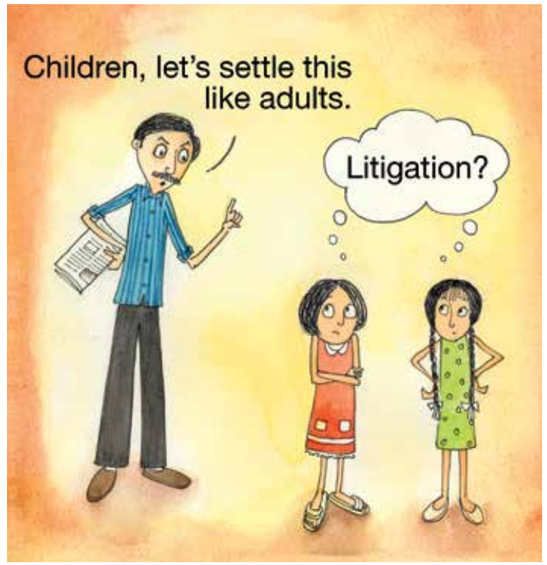
The term "institutionalise" comes to mean "bureaucratise" to some of us when we speak of creating an institutional framework. There is that risk in institutionalising the process of mediation: it will take on familiar contours of procedures that agencies regularly use. While there is need for standardising procedures and content for acquiring the basic skills necessary for a mediator, it is important that we are flexible in our approach. There is a lot to be achieved at the ground level keeping in view our local conditions. We can't be rigid. Our experience tells us that it is not always by the book that one conducts an actual process of mediation.

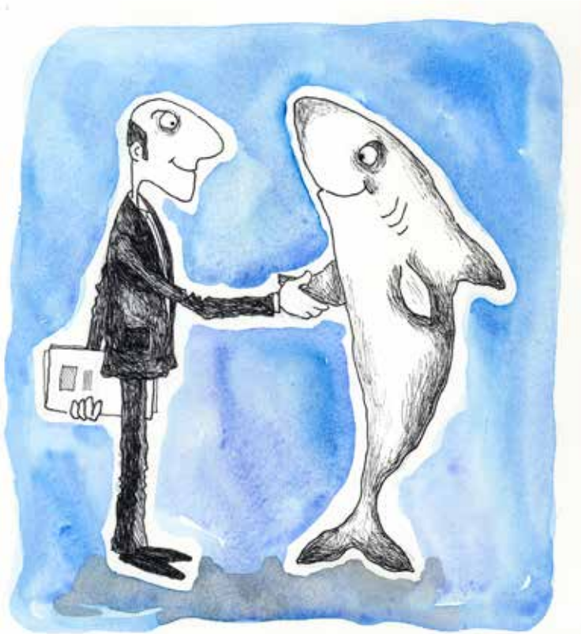
The high courts have essentially to address and achieve the following:

i) Set up the mediation centre on the precincts of the court or adjacent to the court complex and appoint a full-time mediation coordinator.

The tremendous faith of the litigant in the court system makes it important that courts supervise the process of mediation. Going by the response so far, a part-time organising secretary may not serve the purpose of effectively monitoring the process.

ii) Increase public awareness of and use of mediation by organising seminars, workshops and bringing out publications in regional languages which reach out to the common man.





- WHY WON'T SHARKS ATTACK LAWYERS?
- PROFESSIONAL COURTESY.

Workshops and seminars can serve to increase public awareness of the concept. We can make it simpler and, sometimes, more effective by drawing from our scriptures and texts, and even using folklore.

iii) Train mediators and organise awareness programmes to raise comfort levels and awareness among the Bench, Bar and the public with regard to mediation as an integral part of the Court Case Management System.

It is important to dispel any misgivings that the members of the Bar may have with regard to mediation. It has to be a joint venture of the Bar and the Bench. When the process began in 2006, the lawyers perceived mediation not so much as an alternate dispute resolution mechanism but as an 'alarming drop in revenue' system! Today we have a large number of members of the Delhi High Court Bar Association waiting to be trained as mediators.

iv) To decrease judicial involvement in active conduct of mediation sessions. Besides paucity of time, a judge – by virtue of his office – cannot leave the decision-making authority to the parties. But that is truly the essence of mediation. A judge is bound to tell the parties that the court expects them to reach an agreement, if they possibly can, and also the sort of agreement which is expected of them.

v) To produce early, effective resolution of pending cases through voluntary settlements by increasing referrals to the mediation centre. It is important while increasing referrals to the centre that the presiding judge clarifies to the parties why they are being sent into mediation; that it is in their interest to go for the process; and that it is not being done merely to take the case out of the court's cause list. We have frequently faced situations where the parties, during the first session of mediation, quip "we do not know why we have been sent here. We wanted the judge to decide our case, not a lawyer".

vi) Implement and test a data collection format that would assist the courts in monitoring mediation and mediators to ensure quality. This is an area which needs to be addressed so that the progress achieved can be monitored by the high court.

vii) Monitor all the district courts within its (high court's) jurisdiction through the full-time mediation coordinator and provide round-the-clock mediation services by creating a panel of mediators.

All district courts, tribunals and other authorities offering mediation services should be brought under the supervision of the high court for uniformity in procedure, fee structure of mediators and to maintain data.

viii) Equip all district courts with a computer and monitor the data collection of all mediation processes conducted under its jurisdiction.

ix) Evolve a method by which the government and its agencies and PSUs are brought to the mediation table with the desire and proper authority to resolve the dispute.

According to Mr. Masse from CEDR London, the above objective has not been achieved in England even after over 20 years. So we need not lose heart! Some guidelines have to be laid down for officers who are deputed to attend mediation sittings. They have to be fully authorised to take a decision to reach settlements without fear of vigilance hounding them or their terminal benefits in danger of being forfeited.

It is important today to have mediators with impeccable integrity and skill to persuade and understand human behaviour and psychology. Workshops must be organised to impart education in understanding the process of mediation. Holding the attention of an aspiring, brilliant and busy lawyer for 40 hours to mediation training in one stretch may not have the desired result. These training hours could be spread over a longer period. That said, practical learning is what needs to be emphasised as very important to becoming an effective mediator.

The process of training can be taken up at regular intervals for the desired number of hours. The 40-hour training can be achieved, say, by organising three workshops. A preliminary workshop is conducted to familiarise the participants with the basic concepts of mediation. After the participants have had a feel of conducting actual mediations as co-mediators under the guidance of experienced mediators, they are initiated into advanced training. A refresher workshop is, then, conducted to test their skills as mediators. In the words of Justice B.N. Aggarwal at the lecture series organised by the Supreme Court Bar Association in 2007 "skills can, to some extent, be taught in college. But skills have to be acquired by experience and learning from the experienced members of the Bar."

A lawyer learns every day. So does a judge, case by case. There is, thus, no need to be bogged down by setting very high standards at this point in time. It certainly does not mean that we do not have standardised course material or maintain a code of conduct and professional ethics which would ultimately build the credibility of mediators. But every workshop need not be aimed at certification of expert mediators. This may be left to a university, some other institute or an expert body. Workshops and seminars should, primarily, further the cause of spreading awareness of the process of mediation and its usefulness as a tool in resolving disputes and relation-building.

We have followed the process of holding a preliminary workshop followed by an advance training workshop after which we have organised a refresher workshop for the members of our Bar over weekends in

residential programmes. The workshops have been conducted by Indian trainers who have had the benefit of attending training sessions oversees. They have the advantage of also knowing our local conditions – and the results are for everyone to see.

Inspired by the effort of the lawyers trained as mediators at the Delhi High Court Mediation Centre, various religious institutions have decided to open similar centres with our help instead of setting up legal aid clinics for resolving disputes amongst their members all over Delhi. Similarly, several school managements have expressed keen interest to introduce Peer Mediation in their schools. The Delhi Government is eager that the process of mediation be taken to the grassroots by spreading awareness in villages and within communities.

That apart, the Delhi centre has received a number of requests for pre-litigation mediation and many disputes have been successfully resolved without going to court. We cannot claim to be experts in the field, but the beginnings have been very encouraging.

Several attempts made in the past to popularise the concept of mediation met with little success until court-based mediation centres gave the movement the necessary impetus. The problem did not end here. There were very few referrals in the initial months post setting up of the mediation centre in some courts. We have often heard a judge ask, "Given a little time, I can push a settlement. Why send it to the Centre?" The judges have to be sensitised and this mindset needs to change.

The judiciary bemoans the inadequate strength of judges. It would be a good idea for the judges to give their time to cases which require court intervention and its pronouncement on rights. Mr. Justice Arijit Pasayat puts succinctly in an article, "The question, therefore, is not 'Is this case suitable for mediation?' but 'Why is this case not suitable for mediation?'" Judges must encourage litigants in appropriate cases to try mediation in their own interest.

Sensitising judges on referring matters to mediation is an important task. It is also important that after mediation sittings which fail to settle a case, the judge before whom the matter is listed enquires as to how far have the parties been empowered and whether the sittings have helped them understand the strengths and weaknesses of their case.

Such initiatives have helped in several matters where parties have reached a settlement in the court. It is important to note that mediation sessions have improved relationships enough for the parties to agree to a settlement before the court. Mediation made it easier for them to communicate with each another directly even after the sessions were over.

While it is a matter of great satisfaction that the general public holds our judicial system in high esteem, it is important that we keep the faith of the common man. As his expectations of justice from the courts go up, his level of satisfaction with what is delivered goes down.

Unfortunately, the feeling among the people is growing that our courts are becoming increasingly anxious to encourage parties not to seek judicial help. The government does not have the resources to provide infrastructure or increase the existing strength of judges. But many tribunals have come up and many more are in the process of being set up. Today, there is emphasis on ADR. Lord Wolf included ADR in his review of access to justice in the court and recommended that "where there is a satisfactory alternative to the resolution of disputes in court, use of which would be an advantage to the litigants, the courts should encourage the use of this alternative." Are we actually moved by the concern for the litigant? Are we asking: is ADR advantageous to the litigant rather than the court?

It is too early to juggle numbers. But the results at the mediation centre are hope-inspiring. We need to look at mediation as an 'appropriate dispute resolution process' and not as an alternate dispute resolution mechanism. It must be perceived as a mode of enabling parties to resolve their differences in a way that is best for them and not as a way of relieving the courts from the cases they would otherwise try. Like all other propagators of mediation, we see it as a supplement to the traditional judicial system, not as an alternative to it.

The position of the courts vis-à-vis the litigant is unenviable. They should encourage the parties to agree to mediation: a win-win situation for the parties as well for the courts.

SAMADHAN MEDIATORS

Co-mediators at the Advanced Training Programme, Manesar, 2012

Mediators at the
Refresher Programme, Manesar, 2012

I do not know how to thank my mediators for settling my divorce case which was pending for the last four years. They were sincere, patient and very willing to help me.

– Aditi Bembi

I would simply like to record my immense thanks to the mediator of the Delhi High Court for her consummate professionalism and inexhaustible patience, combined with irrepressible optimism, in persuading my wife and her sisters to patch up their differences and come to a resolution of the inheritance matter upon the passing away of my mother-in-law. Through all the vicissitudes and meanderings which unavoidably occurred during the proceedings, the mediator kept rallying the parties and their legal representatives with great empathy and care. Her sincerity and willingness to help, as well as her commitment to the legal process, was exemplary and a sight to behold. If this is the quality of the Mediation Centre can provide, I am sure it bodes well for India inasmuch as this may provide a way to deliver justice in a timely manner…timely justice is far more relevant than the mere provision of a technically sound judgement which then becomes trapped in procedural obfuscation and delays. I commend the Delhi High Court's serious efforts to make life better for the people of India as evidenced in my singular experience.

Please accept my heartfelt thanks as one speaking from among the masses of the county. My wife is also most appreciative of the unfailingly consistent and compassionate conduct of the mediator through the process.

– Prof Gautam Chatterjee

Approaching the Delhi High Court Mediation and Conciliation Centre was the most sensible thing I did in my life. It marked the end of most of my marital problems and I owe it to my mediator at the centre. I started a new journey on November 5, 2010.

I am the mother of two beautiful children – a son by birth and a daughter by choice. My daughter is from my husband's first marriage. I took to my daughter naturally and she unhesitatingly called me 'Mom' from day one. But things changed after my son was born and I found I had suddenly become a step-mother to my eight-year-old daughter. Relationships became strained and every day was a struggle for my husband and me. This struggle ended after I approached the Mediation Centre. We found ourselves in a very congenial atmosphere with kind people all around. My husband and I were helped to identify our mistakes and make amends for them. I was encouraged to find an occupation for myself which I did. More than that, the centre changed my perspective about myself and my life. It helped me evolve as a person. I was all bottled up and could not talk to anyone. In mediation, I was heard and understood without any bias or prejudice by a neutral person who gave me time that I needed to understand myself. So was my husband. Today I look after my home, husband and my children and am proud to say I am economically independent. Our wounds may not have healed fully but we all live a positive, fulfilling life under the same roof as one unit that had earlier broken into two. For this, I cannot thank the Mediation Centre enough. I make it a point to share my experience with a lot of people so that they choose to seek help through mediation before ending their relationships and marriages.

– Ritika Whig

Thanks to my mediator, I have been able to resolve my marriage dispute which would have otherwise trapped me in many years of litigation. This would have meant additional financial burden for me. Now, my former husband and I are working as friends for our child.

– Mitali

Some Letters of Appreciation

Samadhan Staff

Veena Kumar
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Text editing: Bhavana Pankaj
Photographs: Ajay Lal, Samadhan
Design and production: Designations
The illustrations in this publication are inspired from
various sources, and have been adapted by Proiti Roy.

Thought For Today

" We Can't Solve a problem
by Using the Same kind
of thinking we Used When
we Created them"