

MEDIATING MEDIATION IN INDIA

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. . . both were happy with the result, and both rose in public estimation. . . . I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing thereby--not even money; certainly not my soul.

Mahatma Gandhi²

I. INTRODUCTION

A. The Issues

The development of mediation in India holds enormous promise. In particular, the neutralizing communication skills and powerful bargaining strategies of facilitated negotiation can strengthen the system's capacity to bring justice to the society. Despite the demonstrable value of these techniques, however, several large obstacles block the path to mediation in India. Exposure to these facilitated negotiation processes, though spreading rapidly, remains limited. Judges and lawyers harbor understandable apprehensions about the relationship between mediation and the formal judicial process and deep skepticism over the application of mediation to a wide variety of Indian legal

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² MAHATMA GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH, 134 (6th ed. 1965).

disputes (particularly outside the commercial area). The courts are still in search of an operational case management trigger (e.g., under Section 89 or Order X of the CPC)³ for referring cases to mediation. The explicit terms of Section 89 (calling for a form of judicial conciliation by the trial judge) may be incompatible with subsequent referrals to mediation under that provision. Trained mediators in most courts are not yet available. In advance of a more comprehensive exposure and engaging national debate over these important concerns, some opinion leaders have formed prematurely strong opinions about the limited role of mediation. Finally, notwithstanding these obstacles, a series of short-term incentives (judicial evaluation schemes, lawyer compensation methodologies, litigants in defense of dispute resources) further motivate resistance to mediation, thus producing a social dilemma in which critical actors view their professional or personal, short-term interests as potentially inconsistent with the system's long-term objectives. In making critical choices on how best to navigate around these obstacles, issues, and tradeoffs, the country (through this national conference and many other similar regional and local encounters) is engaged in a set of national deliberations that seek to resolve conflicting views and positions on mediation within the Indian justice system. The debate over mediation in India, therefore, simultaneously engages legal actors at two levels: mediation of specific legal conflicts, and mediation of system-wide conflicts over the shape, scope, and timing of mediation reform itself.

In an effort to address both levels of discussion, Section II sketches the global context out of which mediation emerges as an attractive complement to formal judicial systems, explicates several techniques of facilitated negotiation that cluster under the rubric of mediation, and explains the particular value of each tool. Section III explains why, notwithstanding its incalculable promise, mediation is not self-effectuating. Specifically, this Section identifies the impediments that frustrate its growth and application, suggests ways in which these obstacles can be overcome, and articulates a series of implementation questions for sustained attention in both national and (diverse) local settings. Notwithstanding several potentially debilitating caveats,⁴ this Essay thus seeks to contribute to the national dialogue on the development of mediation in India.

³ See INDIA CODE CIV. PROC. Section 89, *Settlement of Disputes outside the Court* and ord. X rule 1(a)-(c) (as amended in 2002 by Code of Civil Procedure (Amendment) Act (1999), at 36-37, 90); Salem Advocate Bar Association vs. Union of India, 35 (2002) (8), 146-152 (Chief Justice Kirpal joined by Justice Y.K. Sabharwal and Arigit Pasayat). See also Law Commission Consultation Paper on ADR and Mediation Rules (2003) 1 (calling for a Section 89 proceeding "after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X"); and Law Commission, *Consultation Paper on Case Management*, Rule 4, at 9 (2003)

⁴ The Essay's foray into these complex issues must be read with many caveats (grains of salt, if not an entire box). Though a student of the Indian civil justice system for the past seven years, (unlike the reader) I am no expert. Though an academic with special interest in conflict resolution and justice reform processes, (unlike the reader) I am neither a judge, nor (any longer) a practicing lawyer. Though a person with a strong emotional and personal connection to the country, (unlike the reader) I do not work and live in the system. The ultimate determinations of these difficult issues are thus beyond my full competence, experience, or privilege. I only offer here the benefit of a foreign educator's preliminary

II. MEDIATION: TOOLS AND VALUES

A. The Global Context

Many national legal systems have made sweeping commitments to three areas of substantive political and economic reform. First, traditionally authoritarian political systems have sought to achieve greater *democracy* through popular elections, more accountable and transparent public service, and the effectuation of domestic human rights protections. Second, governments have loosened their grips on economic systems, embraced a *freer marketplace*, and recognized a broader range of real and intellectual property rights. Third, the international community has embarked on a nearly uncontrollable and irreversible process of *globalization*. Unprecedented daily flows of capital, technology, goods, services, information, and people currently permeate national borders. In pursuit of these commitments (democracy and human rights; free, knowledge-based economies; globalization and the reduction of cross-national barriers), countries have generated an enormous amount of new substantive law, including civil rights, criminal justice reform, commercial legislation, constitutional law, and free trade agreements and regional economic unions.

Courts and supporting public and private institutions are increasingly considered critical to the implementation of legal reform in pursuit of widely shared 21st century objectives. No branch of government is better designed to hold political and economic actors accountable to law, or to ensure commercial and property rights and obligations are enforced through impartial judgment. To perform this role, however, courts (or some functional equivalent to them) must be independent from undue political interference, maintain integrity in the face of private financial pressures, and operate at a high level of efficiency, especially given frequently inadequate allocations of human and financial resources. As Amartya Sen has emphasized in a broader context, “[o]ur opportunities and prospects depend crucially on what institutions exist and how they function.”⁵

The judiciary may be the least dangerous branch of government, but sadly it is also the most *neglected*. Courts are fragile political institutions, and more resilient political, economic, and cultural forces easily undermine their effectiveness. Judiciaries are underfunded, undersupported, undertrained, and underprotected. National judicial systems have not been able to keep pace with substantive commitments to democracy, free markets, and globalization. Political and economic interference with impartiality and delay in the administration of justice currently undermine the achievement of core objectives in many countries. An excessively partial or slow process renders

observations and limited expertise both beyond and within India. Please submit comments, questions, and criticisms to me at hiram.chodosh@cwru.edu.

⁵ See AMARTYA SEN, FREEDOM AS DEVELOPMENT 142 (1999).

fundamental public legal principles ineffectual, eviscerates private legal rights and obligations, cultivates conditions conducive to corruption, and favors the powerful over the weak. These common institutional problems undermine equality under the law and corrode the incentives critical to legal compliance.

The growing importance of recently implemented law has also imposed new burdens on courts. New rights create new forms of legally cognizable claims and disputes. In most market-oriented or democratic countries, case filings are on the rise; yet, most countries are not close to keeping pace. India is far from alone on this single index: in many countries from Latin America to Eastern Europe case filings (roughly) doubled over a single decade. Notwithstanding the common need for institutional reform, these backlogs occur not only because the courts do not have the institutional resources to shoulder these new burdens, but also because the society has heightened expectations of getting justice from the courts.

In light of this global challenge to national court systems, what promise, if any, does mediation offer? Does mediation, as one particular form or cluster of attributes that differ from features of European-originating court systems, offer even a partial solution to meet these pressing burdens?

B. Initial Attraction to Mediation

Mediation is no panacea, no magic solution to overcome the institutional challenges of national court systems. Similar to other alternative dispute resolution techniques, however, it does offer a cluster of features that differ from the formal judicial systems of Europe that have had global influence over the primary ways in which legal conflicts are resolved. In this regard, mediation both builds and diversifies the capacity for resolving conflicts in society. With many qualifications and exceptions, European-style courts (both common law, Anglo-Saxon, and their continental European, civil law counterparts) are state institutions, conducting public, formal proceedings, that presuppose literacy, posture the parties in a conflictual, legal position-based, backward-looking fact finding processes that result in binary, win-lose remedies, subsequently enforced through social control over the losing party. In contrast, mediation (and other clusters of consensual dispute resolution techniques, except for arbitration) are private, informal, oral, more collaborative, facilitative, future-looking, interest-based processes that bring parties to a calibrated, multi-dimensional, win-win remedy that is more durable because of the parties consent in the outcome.

Because of these basic contrasting features, for many non-European legal cultures, mediation bears a comforting alternative and similarity to traditional forms of dispute resolution that predate colonial influence. Reformers have grown increasingly interested in reviving or extending traditional forms of dispute resolution (such as the process of *sulha* in the Middle East or methods used by the traditional *panchayats* in India) and integrating them into the formal litigation system (the distinctive form of

evaluative Chinese mediation known as *tiaojie*). Egypt, for example, now requires mediation before a retired judge in each case brought by private parties against the government.⁶

Throughout Europe, mediation is seen as a potentially promising mechanism for the resolution of both simple and complex disputes. Norway's conciliation boards (*Forlikssradene*) provide a model of extensive comparative interest and international study. In 1995, France expanded the legislative basis for judicial conciliation and mediation. Diverse countries from Tanzania to the Ukraine are pursuing mediation reforms as a response to contemporary demands. In many of these jurisdictions, mediation is seen as useful not only for small claims, auto accidents, family disputes and petty crimes in court systems clogged by a modern docket, but also as an alternative dispute resolution device for the most complex matters, including those involving environmental (e.g., water rights) and intellectual property law disputes (e.g., patents) previously considered to be irreconcilable. The speed of change in strong national and emerging global markets puts increasing pressure on large business interests to resolve disputes quickly and inexpensively, as well as amicably, constructively and creatively, in order to maximize long-term interests and to maintain ongoing commercial relationships.

Effective forms of mediation at the local level may also provide a strong foundation for the resolution of cross-border armed conflict. When direct negotiations fail, communities that seek to resolve profound intra- and inter-border conflicts are increasingly turning to neutral third parties from countries with well-developed mediation practices.⁷ This invaluable service, however, is often too late or too remote from the community level to nip the budding emergence of these conflicts. Thus, the development of a more proximate, indigenous mediation capacity may help to prevent deeply rooted conflicts from erupting into communal violence.⁸

The application of mediation to the legal dispute resolution process is not intended to replace or supplant the need for public adjudication and normative judicial pronouncements on the critical issues of the day, but to complement and preserve that

⁶ See Hiram E. Chodosh, Stephen A. Mayo, Fathi Naguib, & Ali El Sadek, *Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach*, 17 MICH. J. INT'L L. 865, 895 (1996). This study conducted by the Institute for the Study and Development of Legal Systems led to new legislation requiring suits against the government to be mediated by retired judges. See Law No. 7/2000, Concerning The Establishment Of Conciliation Committees In Certain Litigations To Which The Ministries And Juridical Persons Are Parties (Egypt).

⁷ These neutrals may be prominent foreign political leaders or diplomats, e.g., former U.S. Senator George Mitchell in Northern Ireland or the Norwegian diplomat Terje Roed-Larsen in the Middle East.

⁸ See Hiram E. Chodosh, *Local Mediation Capacity in Advance of Armed Conflict*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION __ (forthcoming 2003).

core normative purpose of the judicial system. Indeed, self-standing mediation reforms often collapse for failure to grasp the necessarily integral relationship between courts and the alternatives. As will be discussed further below, mediation reform and other measures to improve court and case management must go hand in hand.

In particular, mediation may serve to relieve some of the pressures currently impeding the performance of European-style court systems. First, mediation may have a modest effect on political interference with the courts. By placing control for the resolution of disputes in the hands of the parties, the state has less power to interfere with the resolution of private disputes, and by relieving the burden of the courts, the political branches may be less able to debilitate the courts through neglect, e.g., paltry public investments in their institutional well-being. Second, mediation reduces the incentives for corruption because the neutral third-party has no authority to bind the parties to an outcome of his or her choosing. This lack of power over the parties (and a lack of monopoly over dispute resolution by the courts more generally) means that officials have greater difficulty extracting rents from litigants through coercive means. Finally, putting aside the more controversial role of plea-bargaining in criminal procedure, mediation is utilized in attempts to reduce court backlogs and delays. The search for docket clearing devices present the first source of motivation for exploring mediation reforms; however, the relationship between mediation and court delays is more complex than either detractors or supporters like to admit. The most valuable contribution of mediation to the society may actually lie elsewhere (e.g., in the internalization of the communication and negotiation techniques within the legal process and broader society).

The use of mediation as a solution to court backlogs thus merits a more thorough explanation.

Imagine the legal system in the metaphor of a funnel designed to sift through small and large stones in an effort to produce precious gems. If I pour stones into the wide mouth of the funnel at the top, the system will process them through a narrow channel, producing the gems through the narrow mouth at the bottom. Let's assume that the stones *en masse* represent all of the legally cognizable disputes in society, and the gems that come through the narrow neck represent judicial decisions as the articulation of public norms that then guide the society in its public and private behavior. Let's further assume that the purpose of the funnel is to find and process the gems, not (by itself) to resolve every single dispute in the society.

Now let's imagine that, because of the sheer scale of the number of disputes in society and the unchanged, narrow neck of the funnel, the stones (and even smaller jewels) are creating a bottleneck, and too many disputes put into the funnel are not allowing the valuable ones, (those worth the public investment of the courts), to pass through the system efficiently.

Generally, legal systems apply three strategies to this bottleneck. First, they try to prevent more stones from entering the funnel, but here they often try to do this by imposing increases in court costs or creating other incentives (cost shifting) to prevent claims from entering the system. Such prevention measures (court costs in particular--the cause of current disturbances by the bar in Gujarat) are crude and unjust tools for preventing backlogs: crude, because they do not contemplate that cases of great normative value may never get to the courts because the claimant cannot afford the costs or that cases of no normative value brought by parties who can afford the costs may still clog the system; unjust, simply because for poor litigants these costs impede access to the justice system. Second, legal systems employ alternative dispute resolution techniques to divert cases from the narrow neck of the funnel. Alternatives create valves, escape hatches, exits from the system, thus (or so the theory goes) taking pressure off of the system by moving cases out before they need to be processed at trial or through appeals. Third, legal systems employ streamlining, tracking, and other interventions to manage the internal operation of the courts (court management) and the particular cases (case management). These mechanisms require infrastructural improvements (e.g., court technology for case and event tracking) and cleverly calibrated investments of invaluable court time to manage cases efficiently.⁹

In the early stages of these efficiency driven reforms (aside from the undesirable litigation prevention techniques described above), court systems may face a troubling paradox. As the society internalizes the signal that the system is working more efficiently, those who would not have bothered with filing litigations (for fear of cost or the time involved) may newly seek the court's services. This means that in the early stages anti-backlog measures may actually increase court filings. This phenomenon is similar to the paradox of traffic reduction strategies. City planners create wider, better, more versatile networks of roads and highways, which then gives a greater incentive to more people to drive on them. Thus, anti-traffic interventions can result in more traffic. This paradox, however, is not necessarily a negative one; nor is it as relevant to the question of access to justice. More cars on the road or more legally cognizable claims coming into the court system is not necessarily a bad development; (aside from the negative externalities (e.g., pollution, noise, overcrowding) it may be actually quite positive. Greater traffic may mean that more people are getting to their destination. More case filings may mean that more legal conflicts are being redressed (rather than just lumped or forgotten). Even so, the metaphor requires an additional qualification. The law is unlike getting from one place to another in at least one critical respect. Access to justice does not mean merely gaining access to courts. If the legal system works well, people internalize the norms (and, as the Essay points out below, the conflict resolution techniques employed) in their daily lives. In that way the legal system brings the destination to the people (rather than the people to their

⁹ By efficiency, I do not mean speedy or inexpensive. That is only one side of the coin—the inputs into the process. To determine efficiency, one must also weigh social product (judgments, settlements) that are created after even a speedy or inexpensive process. The question is whether the time and cost are significantly less than the benefit achieved.

destination). Mediation thus may enhance access by helping to bring justice to the society.

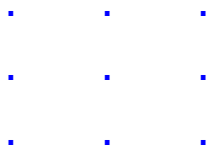
C. The Specific Value of Mediation Processes

An evaluation of the usefulness of mediation in light of core objectives presupposes an awareness of what it is and the specific value it offers. Furthermore, an effective adaptation of mediation to a set of new conditions first counsels separate treatment of a wide variety of features clustered under the mediation rubric. Separate treatment of these processes and techniques underlines the view that many, if not all, of these features are severable from the rest. Severability allows for more creative designs and experiments to overcome problems encountered in the application of mediation to legal disputes.

What then is mediation? Put simply, mediation is facilitated negotiation. Yet, specific attributes clustered together in mediation systems vary greatly. The result is always consensual, the facilitator is neutral, and the process is usually (but not necessarily) confidential, jointly participatory, interest-based, future-looking, and aimed at a durable, win-win solution. Initiation of mediation may be voluntary or compulsory (usually as one of several constrained options of other ADR techniques), court-annexed or private, position-based, or interest-based, facilitative or evaluative, and free of charge or not. The point to underline here is that mediation does not come as an unchangeable recipe or rigid system. Indeed, one of its most attractive features is its flexibility (and thus its consequential adaptability), and overly prescriptive or doctrinaire views about the *essentials* of mediation risk undermining one of its greatest overriding values.

This Essay focuses on two integral, though distinct, types of techniques in the mediator's tool kit. As an advanced form of facilitated negotiation, the mediator employs both (1) sophisticated bargaining techniques that allow the parties to think beyond the formal parameters of the law,¹⁰ and (2) neutralizing communication and

¹⁰ Typically, even tritely, mediation trainers conduct an exercise to test the ability of an audience to "think outside the box." The box, so to speak, is a series of nine dots in three rows of three dots each.



The instructor then asks the participants to connect the dots in no more than four (straight) line segments, without lifting the pen from the paper. The solution requires the participants to extend the line segment beyond the square, before bringing it back to capture the remaining dots. (Try it.) To make the exercise more difficult, try to connect all nine dots with only *one* line segment. A critical mind

facilitations skills that attempt to neutralize the self-destructive aspects of the conflict. Each tool is of considerable value in resolving legal disputes, and when applied in combination over several phases of the process, the resulting mediation process poses a powerful approach to both routine and seemingly irreconcilable conflicts.

1. Negotiation Techniques: The Intellectual Technology
 - a. Position-Based Bargaining

As one example of overly prescriptive view, many mediation experts stress the negative consequences of position-based bargaining and urge that mediations should focus primarily (if not exclusively) on a determination, prioritization, and maximization of the parties' interests. Indeed, the first chapter in the seminal book, *Getting to Yes*, begins with the mandate: "Don't Bargain Over Positions."¹¹ For reasons advanced here, particularly in the early stages of developing mediation practice, such advice may be misplaced. Position-based bargaining can help the parties to reach a more realistic view of the settlement value of their claims and defenses (thus narrowing their differences) and to take that settlement valuation into account as one of their many *interests*.

Let's suppose that the plaintiff and defendant are equally and completely confident of the merits of their claims and defenses. Let's further assume that the claim is for 100 lakhs (or any other unit of currency). As for settlement positions, the defendant's first position is that he owes nothing, and the plaintiff's first position is that she is entitled to 100 lakhs. In conducting position-based bargaining, a mediator may point out to the parties that they cannot both be completely correct in their insistence of a certain result in their favor. They may begin to see that there may be a modest weakness in their positions. If that weakness can be quantified as a twenty percent weakness, the settlement values can be recalculated.

If the parties can be convinced of a 20% weakness in their positions (a modest proposition), the settlement values to each may be recalculated as follows: plaintiff's claim has a 80 lakh value (100 x 80%); and the settlement valuation for the defendant is 20 lakhs (100 x 20%). With this simple operation, the difference between the two parties settlement valuations (from 80 to 20) has been reduced by a difference of 40 laks from 100 to 60.

will recognize that this is no box; it's a two dimensional square. By folding the paper onto itself, one may place the dotted lines together, and with a fat marker connect the dots. This exercise underlines that mediators may have to think not only beyond the four corners of the law, but also in more than two dimensions (or beyond the dimensions of the law to consider other aspects of relationships between the parties). This will be discussed in the description of interest-based bargaining below.

¹¹ See ROGER FISHER AND WILLIAM URY, *GETTING TO YES* 3-8 (1983).

Beyond recognition of weakness is further sensitivity to the uncertainty of the process and the determination on the merits. Even with the most predictable legal process, there are uncertainties in realizing the expected result. If there is an additional 10% uncertainty (or chance from one party's perspective that the court will be in error), the parties' settlement valuations will come even closer to one another: 70 for the plaintiff, and 30 for the defendant. With these calculations, only 40 lakhs separates the parties' settlement estimates.

At this point, the mediator may explore the expected costs of proceeding with trial. These include court costs (which can be considerable), legal fees, non-monetary costs of aggravation and stress, and opportunity costs (distraction from other valuable activities). Some of these costs are easily quantifiable; others not. Recognition of these costs, however, allows the parties to see that the final judgment is not the only indication of cost or benefit (to which these other items need to be added or subtracted). The avoidance of those costs (through settlement), e.g., a reduction in court costs prior to framing of issues, a reduction in legal fees having alleviated a good deal of work over many years) may be captured, indeed shared by the parties and their attorneys through position-based settlement negotiations of this type.

Finally, especially in a system burdened with protracted delays, the time value of money may dramatically discount the settlement value to the plaintiff. If under the best of circumstances a plaintiff will not recover the full amount due for a period of ten years; if the cost of an unsecured loan is fifteen per cent (nine per cent greater than the maximum prejudgment interest rate that might be applied (e.g., six per cent), then the time value of money will reduce the present value of a 100 lakh claim to approximately 40 lakhs (or 40% of its original value). This economic reality, though an unfortunate consequence of delay, may provide a more realistic picture for the plaintiff of the settlement value of their claim, and this means that the quantifiable differences in the parties' settlement valuations are even smaller (40% of 40 lakhs in our example equals 16 lakhs) (and thus the proportionate cost savings even greater).

b. Interest-Based Bargaining

The foregoing discussion took a modest step beyond the conflicting views of the parties on the legal merits of their positions. A more realistic settlement value based on weaknesses in their positions, uncertainty, hidden costs, and the time value of money may be helpful in bringing the parties closer together, if not in settling the matter altogether. Surely some cases will settle with the help of these tools, alone; others will not. For this latter subset of conflicts, effective mediators explore the parties' interests (beyond their legal positions).¹² For example, a plaintiff injured by an allegedly

¹² To go beyond the positions of the parties does not mean that they are no longer relevant. Experts speak in terms of knowing the best alternative to a negotiated settlement (BATNA), the worst alternative to a negotiated settlement (WATNA) and the most likely alternative to a negotiated settlement (MLATNA)

defective or harmful product may have interests beyond the 100 lakhs requested for (i) continuing health care, (ii) schooling for her children, (iii) a job lost as the result of an injury, or (iv) a concern about preventing similar injuries to others. (This is but a small list of examples.) Commercial parties in a contractual dispute may have interests in a continuing business relationship. (Mediation may also be effective forming new relationships from a conflict or severing *lock-in* relationships where exiting them is in the interest of the parties.) A separated couple has a shared interest in the best situation for their children. A family torn apart by a property partition has an interest in continuing their business investments that may have been stalled by severed communication in the wake of the conflict. These interests provide potential resources for settlement that tap the additional dimensions of relationships (one legal and others not), and provide the basis to settle conflicts in the interest and according to the determinations of the parties.

This requires an exploration of why conflicting parties are fighting over limited resources and whether there are benefits of particular terms of settlement that override those of even the most favorable legal outcome. The famous story of two girls who fight over an orange presents the adjudicator with the task of finding a rule of decision: who had it first (property); who purchased it (contract); who needs it more (equity)? The arbitrator (upon failure to find a rule of decision) might split the difference, awarding half to each girl. The mediator, however, will ask the girls why they each want the orange. If one wants the juice and the other wants the rind from the skin, the girls will quickly agree to a distribution that meets the interests of both. This process of interest identification and accommodation creates a win-win outcome of mutual gains.¹³

(similar to BATNA, but including a factor of probability in the calculation) (together referred to as ATNA). As in any negotiation, these provide useful guideposts to help parties recognize their options (both good and bad) which include settlement under different terms and alternatives to settlement through trial and its aftermath. Although many mediators may stress the irrelevance of positions to interest-based bargaining, negotiation in the shadow of alternatives actually necessitates exploring the likely outcomes of a litigation. To do that realistically, the position-based bargaining skills presented above will be quite useful. Therefore, exclusive (and misplaced) emphasis on interest-based bargaining in legal disputes undermines the full value of ATNA evaluations. In other words, the current valuation of rights and liabilities is *one* of the parties' many interests to be factored into an "*exclusively*" interest-based negotiation.

¹³ In an exploration of their interests, parties to a lawsuit may discover the opportunity to share mutual gains if they cooperate (that they cannot enjoy if they compete). The common savings in litigation costs may be one example of mutual gains, but let's take another example to illustrate the value to be achieved through mutual gains bargaining. Two companies engaged in a patent dispute over an approved vaccination for a severe and common illness may quickly discover that preventing each other from selling the vaccine is in neither party's interest, whereas cooperation would allow them both to share the mutual gains from bringing the product to market without delay. Mechanisms in this case would include forming a joint venture, which entity would own the patent, an exclusive license arrangement for the party that gives up the patent right, or a profit sharing arrangement that recognizes the different core competence of each company (when one might have a better brand name; the other a better distribution channel). Here the possibilities are not only greater than those in court, they are nearly endless.

for both girls, and they are unlikely to continue fighting over the distribution after it is made (both because it is consistent with their interests and because they were involved agreeing to the particular outcome). Not every case, perhaps not even most, will resolve this easily, and may require other distributional bargaining strategies,¹⁴ but the exploration of interests (beyond positions) provides a powerful negotiation strategy for creating durable settlements of seemingly unreconcilable conflicts.¹⁵

c. Integrative Bargaining

If the parties cannot agree on how to share or cooperate, an effective mediator may explore integrative bargaining strategies. Integrative bargaining explores the investment of resources *outside* those at stake in the controversy. A wonderful illustration of integrative bargaining is a story I have heard in many different cultural contexts.¹⁶ In this story, a camel herdsman dies and leave seventeen camels to his three sons. The will provides that the eldest shall receive 1/2 of the camels, the middle son 1/3, and the youngest 1/9. The sons do not want to wait to breed the camels before their distribution, and they do not want to sell them off because they are worth more to keep than to sell on the open market. They go to a wise man who has a simple solution. He lends them a camel and sends them home to think about their problem and directs them to return the next day and give him back the loaned camel. When they go home, they count the camels; they now have eighteen, which to their pleasant surprise divides evenly: the eldest gets nine; the middle son gets six; and the youngest gets two. The distribution adds up to seventeen. They return the extra camel to the wise man the next day and are forever grateful for his assistance.

Examples of integrative bargaining applied to legal conflict are many: convincing a bank not party to the dispute to finance a new business arrangement formed from a breach of conflict claim; a wealthy malpractice claimant promising to donate money to

¹⁴ An orange or a piece of pie can be easily distributed by the parties. What if the parties, however, are fighting over something that is fixed or illiquid or an indivisible, mutually exclusive right? Varied forms of distributional bargaining look for creative ways in which to split or share contested rights or assets of this nature. At times, this requires some understanding of the interests of the parties. For example, if two sons inherit a single, but very valuable diamond, what are the different possible outcomes of a distributional bargain. The sons may alternatively be interested in the value of the diamond (rather than the diamond itself, its invaluable nature or sentimental value). If so, the diamond can be sold, and the money divided. If they want to keep the diamond in the family, they may distribute the diamond in a temporal way, by sequencing their use or enjoyment of it, e.g., each year the diamond is moved from one residence to another. Alternatively, each son may wish to be able to show off the diamond to their friends as if it were his own. In this case, assuming an extended family living arrangement, they might place the diamond in a shared (or common area) space, and enjoy the benefits, as if the asset did not need to be divided at all.

¹⁵ See generally ROGER FISHER AND WILLIAM URY, GETTING TO YES (1983).

¹⁶ See Greg Relyea, Mediation Training Materials for ISDLS Bombay Program, at 82 (2003).

the retraining of doctors in the relevant area of practice; a landlord-tenant family repossession case where the owner gets a contractor to knock down the building and build more units for a growing family and provides a new flat to the recalcitrant tenant, or an unenforceable maintenance award in a divorce proceeding where the broader community pays the maintenance (thus alleviating the underlying source of conflict, e.g., financial pressure) and eventually bringing the couple back together.¹⁷

2. The Value of Neutralizing Communications Skills

Beyond the negotiation techniques employed by an effective mediator, several communication techniques are useful tools of facilitation. As in negotiation strategies, none is a sure-fire way to settle a dispute; however, each one alone has the ability to bring the parties further together by neutralizing the emotionally harsh and irrationally exaggerated behavior and perspectives of the parties and to transform the frequently self-defeating aspects of their conflict (particularly where they have an interest in preserving or enhancing a relationship) into a mutually beneficial settlement.

a. Establishing Joint Communication

Mediations reestablish joint communication between the parties in three significant ways. First, particularly in private mediation, the parties may have to communicate about logistics for the mediation itself (e.g., timing, exchange of documents, confidentiality agreements, etc.). Second, the mediator brings the parties together and in the first joint session, they hear from one another their varied points of view (and often those of their attorneys). Third, as the mediator moves from private caucusing into the settlement or agreement phase, the parties frequently begin to speak directly to one another. Joint communication of each varied kind is obviously no guarantee to settlement; however, this one factor may be key to bringing parties together where resistance to communicating with one another further escalates the conflict.¹⁸

¹⁷ Mediators may also be extremely clever in finding non-obvious solution, based on experience or pure wit. In one story relayed by Mr. Niranjan Bhatt, two brothers inherited a diamond and were instructed in the will to hold a horse race, with the owner of the *losing horse* winning the diamond. Expectedly, when the race was held, neither son moved their horse forward a single inch. A clever friend resolved the problem by suggesting that they switch horses.

¹⁸ A lawyer from Hyderabad relayed a story about a married couple engaged in a serious conflict. The husband had decided to donate one of his kidneys to his ailing mother, without having consulted with his wife. The wife, who had no substantive disagreement with his decision, was offended by her husband's failure to confer in advance of such an important decision. The couple grew estranged and could not speak to one another as a result of the conflict. A family lawyer asked them to come to his house. He placed them in a room together and then abruptly left. The couple sat silent for a long time, then began to yell at each other, and after some time began to talk (and listen). Finally, they were able to overcome their conflict. This was no mediation. The lawyer only facilitated the meeting of the couple, their joint *presence*, short of *communication*, which only came later. However, this anecdote shows that even the

b. Establishing Tone

An effective mediator establishes a positive tone and environment conducive to settlement by behaving in a professional, confident, purposeful, open, constructive, and socially engaging manner. By setting an example, the mediator may encourage through body language and emotional tones the kind of behavior expected in the session. Again, this can have a neutralizing impact on the more negative, insecure, closed-minded, destructive, and resistant behavior frequently encountered in adversaries.

c. Active Listening

Both as a necessary tool for effective facilitation and as a way of acknowledging the viewpoints of each side, active listening is an essential quality of a good mediator. It allows for a more accurate comprehension of the dispute, the ability to distinguish dispositive or helpful from irrelevant or unhelpful comments, positions from interests, less important interests from higher priority ones. Again, active listening also signals to the parties that what they have to say is important, and that can encourage the parties to listen actively to one another as well.

d. Acknowledgment

Acknowledgment is one of the most important communication skills in effective mediation.¹⁹ As emphasized by Albie Sachs of the Constitutional Court of South Africa and an architect of the Truth and Reconciliation Commission,²⁰ acknowledgment may be the most critical means to breaking the vicious cycle of human conflict. To acknowledge the views of one party or another is not to express any judgment (either positive or negative) but to register that the view has been heard and understood. Acknowledgment of one party by another (without apology) often defuses a conflict by allowing the combating parties to feel that their voice has been heard.

establishment of a meeting (nothing more) can help to bring parties together to resolve their disagreements.

¹⁹ WILLIAM URY, GETTING PAST NO 40 (1991) ("Every human being, no matter how impossible, has a deep need for recognition.")

²⁰ See, e.g., ALBIE SACHS, SOFT VENGEANCE OF A FREEDOM FIGHTER (2000).

e. Neutral Restatements, Summaries, and Word Changes

Mediators listen to and use language effectively to take the edge off volatile statements and words.²¹ They may reframe a statement as neutrally as possible without trivializing the viewpoint of the speaker.²² Parties often describe the factual background in a disorderly fashion, and a mediator's role is to bring some order to confusing statements.²³ Finally, an effective mediator will be careful in the choice of words. "Damages" may become "bills or expenses." "Liability" may become "responsibility." "Your side of the story" may be restated as "factual background." Again, here, by rephrasing more neutrally, the mediator defuses the language of its explosive impact without changing the core meaning, and by doing so, may encourage the parties by example to speak with fewer offensive or conflictual phrases and words that put the other side on the defensive.

f. Sequencing: Agenda Setting; Deferring; Redirecting

Effective mediators control the sequencing of what is discussed by setting the agenda, deferring, and redirecting. They may postpone the discussion of positions until they explore interests. They may advance those topics they believe are more likely to bring the parties together. For example, instead of focusing a separated couple on what led to their conflict, a mediator might ask the parties to give a description of their children. A mediator who is asked early on for a premature evaluation of a case might reply that it is too early to do so at that particular time. The ability to adjust the sequence provides the mediator with enormous flexibility to move in fruitful directions based on input from the parties.²⁴

²¹ See Gregg. F. Relyea, *The Critical Impact of Word Choice in Mediation*, 16 Alternatives No. 9, 1 (Oct. 1998). The author is particularly grateful to Mr. Relyea for sharing his mediation materials prepared for Indian audiences.

²² Take, for example, the statement, "My husband is a pathological liar! I hate him!" The effective mediator may reframe the outburst as: "I can understand why you would be so angry if you feel that your husband was not truthful." Here no judgment, only acknowledgment has been expressed in a neutral way without losing the substance of what was declared.

²³ For example, let's say that the litigant exclaimed:

And then she left for the hospital, but before she got back she took out money from our joint bank account, which did not belong to her, and then she went shopping with it, for shoes, but that was before she went to the hospital or so she said; she is always doing stuff like that, lying, taking money, not going where she says she's going.

An effective mediator might reply, in a more neutral and structured summary:

So you appear upset about two things: First, you feel that your wife should not have taken money out of your joint bank account; and second, you feel that she does not tell you what she's going to do.

g. Changing the Messenger

In conflictual relationships, even close ones, suggestions by one party are automatically discounted by the other. The very same suggestion may come from a third party and be far more readily accepted. Mediators are able to supply that role. They can solicit ideas from one side, and communicate those suggestions to the other, without attribution, and thus without any reactive discounting by the recipient. Changing the messenger thus can advance acceptance of the message, and confidential private caucusing allows the mediator to play this important role of a go-between.

3. Structure of the Mediation Process

The foregoing negotiation strategies and communication skills may be structured in wide variety of ways. As currently practiced in much of the world, mediation exhibits several definable stages; however, this does not mean that variations from this basic structure undermine the mediation process. The structure creates an efficient convention for mediators and parties to follow in multiple iterations; however, adjustments may be desirable, indeed even necessary in many cases. For example, in the U.S., it is considered desirable to conduct a mediation in one continuous proceeding. This assumes that the primary participants have full and independent authority to settle. In contrasting social, economic, or bureaucratic settings, whether in family, business, or government cases, the participants may lack this full authority: the spouse has to consult his parents; the manager has to consult the CEO; the civil servant has to consult the Minister; etc.²⁵ Those who have conducted many mediations in India, for example, report the frequent need to conduct mediations in a series of shorter sessions (in contrast to one long session). Nonetheless, it may be useful to outline the major stages of the mediation process (however differently they may be sequenced or separated): preparation, introduction, joint sessions; private caucusing; and the agreement phase.

a. Preparation

In the preparation phase, the mediator is selected (whether by the court as part of an annexed process from a panel of eligible neutrals, or by the parties themselves in a private mediation). In the absence of statutory rules that govern the confidentiality of

²⁴ Effective mediators also choose the most appropriate moment for giving an overview of the conflict. If the parties are lost in the trees of their allegations and cross-allegations, the mediator helps them to rise above the woods to clarify what the dispute appears to be about from the neutral's point of view.

²⁵ Justice Rao's consultation paper addresses this concern in Rule 3 of the *Consultation Paper on ADR and Mediation Rules*, *supra* note 3, at 1-2.

the mediation process or in the event of a private mediation in which the neutral is compensated, a mediation agreement must be negotiated. Provisions may include the time, place, and duration of the mediation, as well as the terms of the neutral's engagement. In some mediations, the parties prepare short statements or memoranda or supply key documents to the mediator to save time by acquainting the neutral with the case.

b. Introduction

In the first session, the mediator attempts to set a positive tone, relaxed atmosphere, basic structure, and ground rules for the mediation. The neutral often begins with a self-introduction of mediation experience and credentials. The parties and lawyers introduce themselves. The mediator then explains the process, the limited role of the neutral, explains the restrictions of confidentiality, disposes of any administrative matters, and solicits questions from the parties before proceeding.

c. Joint Sessions

The joint session focuses on input from the parties (and their attorneys) on the nature of the dispute and attempts to explore any early avenues for settlement. Parties usually tell their stories (and may be listening to one another for the first time since the conflict erupted). The lawyers may discuss how they see the case from a positional point of view. The mediator may use several communication techniques (reframing, agenda setting) to confirm comprehension of the factual and legal background and the emotional postures of the parties. Unless the case can be settled in the joint session, the mediator will ask the parties whether they would be willing to go into private caucuses.

d. Private Caucuses

In the private caucus, the mediator is often able to gain a deeper understanding of the problem. The parties are freer to discuss their views candidly, sharing information they would not convey to the other litigants, acknowledging weaknesses in their legal positions, identifying and prioritizing their interests, and exploring settlement options that would be difficult to discuss directly with the other party. Mediators may also use ATNA (alternative to a negotiated agreement) strategies to conduct a form of reality testing and to achieve a more rational perspective on the resolution of the conflict.

e. Agreement

Assuming the parties have reached an agreement in either private or subsequent joint sessions, the mediator will transition into the agreement phase. The terms of settlement will be articulated and further clarified. The mediator will facilitate the drafting of the agreement, if necessary, as well as efforts to transfer consideration and

dismiss claims simultaneously, thus minimizing the low risk of non-compliance with the consensual agreement. The mediator may also take interest in remaining informed about any necessary future exchanges as part of a settlement, e.g., transfers of custodial children from one spouse to another.

4. Conclusion: the Benefits of Mediation

Through the combination of these various strategies, techniques, and phases, mediation may offer many benefits to the system and the parties. Mediation may take both routine and very difficult cases out of the bottleneck, thus relieving pressure. Through the internalization of these techniques, mediation may prevent the underlying conflict (or the need to go to court) and advance compliance with the law in general. Finally, even where mediation does not result in a final settlement, and the dispute remains in trial, the joint communication established and the clarification of the nature of the dispute, if not an actual narrowing of the conflict, makes the trial proceed much more efficiently.

For the litigants, mediation may save time, money, and aggravation, as well as preserve (even enhance) relationships (or sever ones in which they are locked). Participants in mediation comparatively experience high levels of satisfaction with the process and outcomes (which they alone determine). Beyond savings and satisfaction, however, parties have a better chance in general to make forward-looking, durable, win-win solutions that are consistent with their underlying and multifaceted interests.

III. OVERCOMING CONCERNS AND BUILDING CAPACITY

A. Overcoming Negative Resistance among Critical Actors

The growth of mediation does not necessarily follow from these perceived advantages, however. For ample reason, mediation is not self-effectuating. Resistance emerges from many sources. In many systems, at least initially, mediation poses an ostensible threat to important values and individual incentives of key actors in the system. Furthermore, issues arise from the implementation of the current statutory framework for mediation. Finally, even when actors are convinced of the theoretical value of mediation, they may have difficulty applying those processes to current legal conflicts. How can these perceived threats and issues be persuasively addressed?

1. Judges

Judges may see mediation as potentially undermining their authority to make public judgments and normative pronouncements. Furthermore, professional incentives may discourage judicial support for mediation. For example, judges may feel they will lose the professional satisfaction of issuing judgments if cases settle and also may be evaluated on the number of "legal" dispositions they reach, excluding settlements.

Judges quickly see, however, that effective mediation depends on (while complementing) the core function of adjudication. Without normative standards, the parties have much greater difficulty negotiating according to their alternatives (ATNA), and thus mediation alone is not likely to bring justice to a law-based society. As a complement to the formal process, mediation may alleviate the burdens placed on the courts, transmit norms more effectively to society, increase compliance with the law, prevent parties from pursuing extra-legal strategies (i.e., crimes) to resolve their disputes, and improve the communication skills used *within* the courts. Furthermore, many judges will take as much satisfaction, some even more, from settling difficult cases, particularly in ways that please both parties (rather than only one, as in litigation). Finally, methodologies for evaluating judicial performance can be adjusted to take the relative value of settlements into account, if that is an additional disincentive that impedes support for mediation.

2. Lawyers

Lawyers may be understandably concerned that mediation threatens their livelihood by reducing the number of matters they handle or fees they charge. If more disputes are to be mediated, lawyers might view ADR as nothing more than an “alarming drop in revenues.” They may encounter pricing problems in how to charge for their role in a mediation. Additionally, they may wonder about the value of their own role in a party-dominated process and how they will act as zealous advocates when their parties do not want to settle and engage in a process that calls for cooperation (which may be a sign of weakness in trial).

Here, too, attention to the unmet need for legal dispute resolution in society, the underlying economics of litigation, the need for integrated legal expertise in mediation, and the professional opportunities to represent litigants in mediation as well as serve as mediators tend to allay these initial concerns.

First, in any society, particularly where use of the legal system is costly (in terms of money, time, or uncertainty), many legally cognizable disputes are not brought to court. Legal injuries are internalized or “lumped,” and many lawyers are not consulted for their advice. When either those costs decrease or superior conflict resolution services are provided, a significant subset of those potential litigants will consult a lawyer, if not file a claim. Just as better roads bring more cars to the city; better conflict resolution processes bring greater need for legal services, even when it does not necessitate work in court. Furthermore, legal mediations provide another venue in which legal services can be valuable to litigants, thus creating new opportunities for law practice and for lawyers to serve as neutrals.

Second, as pointed out above, the time value of money dramatically discounts the *actual* value of claims filed in the courts. From an economic perspective, legal fees are

a function of the difference they make in extracting social or economic value from the legal process. If delays in the system discount this value, the fees that lawyers can charge will be significantly less. Consider the following example. If a litigant approaches a lawyer who suggests that he or she can make on average a 20% difference in the outcome of the litigation, and the litigant and the lawyer agree to split that value between them, the lawyer would be justified economically in asking for approximately ten lakhs of fees. If, even under the best case scenario, an injured party cannot collect a 100 lakh claim for ten years (especially when both observations of delays are much more devastating, e.g., fifteen years in Ahmedabad to twenty-five years in Mumbai), the difference between the cost of money for an unsecured loan (e.g., 15%) and the highest prejudgment interest rate (6%) may discount the value of that claim by some 60% (for a net present value of little more than 40 lakhs). With these calculations, a plaintiff (economically) would be justified in paying the lawyer four lakhs (not ten) in fees. This means that a more economically efficient system translates into higher legal fees for lawyers. There is neither any theory nor any evidence that the growth of mediation has any negative impact on the fees for legal services. Indeed, some lawyers (including a handful in India) have left their litigation practices to conduct mediations full-time.

Finally, after an initial adjustment, when engaged in the process of mediation, with its own set of special practices and incentives, lawyers have no difficulty in adapting their modes of representation, and may find a wider range of skills upon which to draw to provide valuable service to their clients outside formal court settings.

3. Private and Public Litigants

Private litigants, too, may harbor anxiety about mediation as an alternative to the court system. Fearful of exploitation, distrustful of private proceedings, comforted by the familiarity of the court system, insecure about making decisions about their own interests, or interested in vexatious litigation or in delaying the case for economic reasons, some litigants may prefer the lawyer-dominated, public, formal, and evaluative judicial process.

First, mediation will not frustrate the preferences of such litigants; indeed, their right to trial will be preserved. An effective mediation process can quickly allay these fears. Litigants involved in the process are much less likely to be exploited. They will quickly understand that the mediator has no power or social control over them or their resolution of the dispute. Second, effective facilitators will gain their trust over time. Third, if the parties still feel the need for an evaluation of the legal issues, the mediation can be accordingly designed to deliver that service. At times, litigants can better save face with members of their family, community, or organization, if they can cast responsibility for the result on a neutral third party, and for this group, a strong evaluative process may be appropriate. Surveys of litigants find that mediation receives the highest satisfaction ratings of any dispute resolution process, and the reason for

that high rating rests in the valuable features of the process explicated in Section II above. For vexatious litigations, unlike trial, mediation has the ability to get beneath the surface of the filed dispute to address the underlying conflict that motivates a frivolous lawsuit.

Finally, the conventional view that incentives for settlement for one of the parties will be low, thus frustrating the likelihood that the mediation will succeed, carries an unexamined and false assumption. Naturally, the defendant in the example of the 100 lakh claim has a weak incentive to settle the claim *for that amount*. Indeed, the claim by the plaintiff does not represent its real present value, if the defendant can delay for fifteen years before facing his responsibilities. Once the plaintiff realizes that the true value of that claim may be as low as one-tenth of its stated value, the defendant's incentives to settle the case with a more realistic plaintiff will suddenly become stronger. Please note that it is not the availability of mediation that reduces the value of the claim but delays in the formal system. Settlement negotiations merely take realistic account of that unfortunate reality.

Public litigants may present a less permeable set of barriers, at least in the early growth of mediation. Suits against the government may be difficult to settle for a number of reasons. Private caucusing with government litigants may give an appearance of impropriety. Officials may be reluctant to settle cases for fear that they will be accused of differential treatment, will undermine government policy, or will give rise to a flood of additional claimants seeking compensation. For these reasons, the officials participating in the mediation may not have sufficient authority to agree to a settlement. Overcoming these impediments will require a good deal of ingenuity. Mediators may shape the proceedings to be transparent and public (forsaking private caucusing). They may have to innovate ways to join all relevant cases together in one mediation so that there is no risk of inequitable results, uneven policies, or a new flood of litigation. Alternatively, if these adaptations are initially unworkable, the expansion of mediation services to cases against the government may be deferred until it is sufficiently developed in private litigations that themselves present problems due to incomplete authority of the participants to settle the case.

B. Concerns about the Statutory Framework of Section 89

In addition to the foregoing questions about the acceptance of mediation by different actors in the legal process, many concerns arise from a critical reading of Section 89.²⁶ Section 89 contemplates that the judge (presumably the judge assigned to the case) should first determine whether there exist "elements of a settlement which may be acceptable to the parties." If so, the court secondly "shall formulate the terms of settlement and give them to the parties for their observations." Third, "after receiving

²⁶ Concerns about enforcing confidentiality and ensuring that the Section 89 process does not further protract the trial process are additional concerns.

the observations of the parties, the court may reformulate the terms of a possible settlement” and refer the same for arbitration,²⁷ conciliation, judicial settlement, including through *lok adalat*, or mediation.²⁸

These provisions, drawn from the conciliation provisions of the Arbitration and Conciliation Act (1996),²⁹ based on the UNCITRAL model law, itself derived from mainly European practice of conciliation, raise several issues. First, the timing (after written statement, when parties are examined, before framing of issues, or as a precondition to an application for ad interim relief) of Section 89 through a case management proceeding of some kind remains an open question. An answer to the question of timing depends on an assessment of when the *perceived* incentives for settlement are highest (as a function of a sense of jeopardy or the early mutual gains of saving costs).

Second, it is unclear how the judge will determine whether there are *sufficient* elements of a settlement to justify the investment of time. Every case has elements of settlement; however, these are difficult to identify without reviewing the case and questioning the parties about their underlying interests. Without further guidance, these cost-benefit decisions will be difficult to conduct. This difficulty may be resolved either by using Order X (1a)³⁰ as a primary and *independent* mechanism for triggering a choice of alternative dispute resolution venues or by sequencing the types of cases in which Section 89 processes will be employed as a matter of course (rather than discretion).

Third, if the Section 89 judge is the same one who presides over the trial, the parties are not likely to share observations that would narrow the differences between them. There is no Section 89 provision for the confidentiality of these observations, and even if there were, the parties would be understandably reluctant to express weaknesses in their positions or to suggest compromise for fear of appearing weak to the other side. Assignment of a special Section 89 (or settlement) judge within the court and ensuring the confidentiality of the party observations may help to alleviate these concerns.

²⁷ This may be seen by some to mean that a judge might refer parties to binding arbitration without their consent. Surely, the statute can be read to allow for that understanding; however, it would be inconsistent with the principle of consent and self-determination to compel parties to binding arbitration without their consent. The control of the parties over the outcome in each of the other proceedings reduces concern about compelling a constrained choice of an ADR technique.

²⁸ See Section 89, *supra* note 3.

²⁹ Cf. Arbitration and Conciliation Act, 1996, The Gazette of India, New Delhi, the 16th January, 1996/Pausa 26, 1917 (Saka), Part III, Section 73 (using language nearly identical to Section 89).

³⁰ Order X (1a) may solve this and other problems raised in the context of Section 89, including the question of timing: “After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89.”

Finally, it is unclear what impact the specific terms defined by the judge will have on a subsequent settlement through mediation or other techniques. If the settlement discussions lead the parties away from or beyond the specified terms, they may worry about the enforceability of the settlement agreement. In contrast, if they constrain their negotiations to the specified terms, the likelihood of settlement may be significantly diminished. Again, instead of the judicial conciliation process contemplated by Section 89, treating Order X (1a) as an independent provision for triggering Section 89 ADR *options* (a-d) may provide a quicker, cleaner, or more versatile bridge to mediation and other Section 89 alternatives that promote settlement.

C. Adaptation Concerns

In addition to these concerns, many lawyers and judges wonder about the applicability of these techniques to the specific nature of the diverse Indian caseload. Will mediation work effectively beyond commercial disputes in family matters, property partitions, landlord tenant, industrial disputes, cases containing elements of a crime, and as noted claims against the government? Theoretically, mediation may work very effectively to deal with the complex social relationships that make formal trial so difficult. Its reliance on orality may be better suited for the undereducated litigant or the litigant that does not speak the language used in the court proceedings. Mediation may be able to plow beneath the surface of frequently vexatious litigations by addressing the underlying conflicts. Mutual gains and distributional bargaining techniques may help to resolve partition cases. Integrative negotiation (including investments by those not engaged in the dispute) in landlord-tenant cases may allow for reconstruction and expansion of currently limited space. Deeply embedding mediation in the community may alleviate underlying causes of conflict and even some forms of criminal activity (e.g., assault). Notwithstanding the theoretical benefits in these applied contexts, however, these questions cannot be answered in the abstract. Mediation must be tried and tested, lessons learned, and adjustments made. In a phrase, the proof will be in the pudding, and early signs of mediation practice in Ahmedabad, Mumbai, and Chennai indicate early success in many of these important areas of legal conflict.

D. Building Capacity: Next Steps

Naturally, the foregoing sketch of issues is far from exhaustive. A number of implementation questions will be raised and addressed: how to make mediation economically desirable, how to cultivate a larger number of mediators available to the courts, how to promote and improve educational exposure and training methodologies throughout the country, including those under the direction of the High Courts.³¹ These capacity-building issues also demand attention and intellectual investment.

³¹ See Rule 7, *Consultation Paper on ADR and Mediation Rules*, *supra* note 3, at 5.

Finite answers to these questions would be premature. Thus, it may be useful, however, to highlight a list of questions and make some preliminary observations. These questions include:

- How should mediation attract litigants from a purely economic point of view?
- Who will serve as neutrals in mediation?
- How will mediation be initiated (for which cases) and concluded?
- Which attributes of mediation are most likely to be effective in different litigation contexts?
- How should the courts establish quality controls (including ethics and discipline) over the emerging practice of mediation?
- How should the courts build both internal and external capacity without incurring unaffordable costs?

First, the early economics of mediation may be critical to its long-term growth. Developing a pro bono commitment of neutrals (at least outside of high stakes commercial disputes, where parties are already paying for mediation services) may be necessary. If addressed with costs in addition to court fees, litigants will be reluctant to enter mediations. Furthermore, ensuring Section 89 or Order X proceedings take place before the framing of issues can take advantage of any applicable court fee reduction rules. Working with lawyers on how to structure fee arrangements for cases that settle (e.g., splitting in half the expected total fees from full blown trial and appeal before they have completed even close to half the work, thus sharing the savings with clients) will be equally necessary.

Second, the potential pool of mediators should be as large as possible so as not to foreclose the application of invaluable human resources, even from unexpected subsets of professionals. In addition to judges (as specialists within court), retired judges, lawyers (both junior and senior), and academic experts in ADR in collaboration with law students in legal services clinics, non-lawyers (including doctors, accountants, engineers, family psychologists) should be considered as well.

Third, coordination of the mediation process with the trial system will need to be developed further. In particular, the specific trigger for mediation will need to be chosen. Court-annexed mediation through Section 89 or Order X requires a case management event to give life to the rule. The chief judges of courts will have to designate the official responsible for triggering the process (whether a judicial officer, registrar, or special administrator), and case event tracking mechanisms must ensure continuing oversight of the annexed ADR process to ensure unsettled cases return to the trial track without undue delay (e.g., within two months) or are dismissed upon full settlement. Ways in which to capture the benefits of “unsuccessful” mediation by allowing the parties to narrow the issues clarified by the mediation can also be

explored.³² Whether the choice of ADR technique is obligatory or voluntary, the specific timing of that choice, and the cases subjected to the process (old or new, family or commercial) are additional questions to be resolved.

Fourth, the selection of specific attributes (the negotiating techniques, the communication skills, the structure and sequence) of Indian mediation will be tested against the context of a wide range of legal disputes. Whether these processes will be primarily evaluative or facilitative, employ private caucusing or a community model, ensure confidentiality or embrace publicity (in cases of public interest) will require special attention to the specific nature of the controversies to which mediation will be applied. Here it is important to avoid dogmatic perspectives about foreign models (whether wholly positive or negative), to resist the view of any specific configuration as necessary to the essentials of mediation, and to stress the value experimentation and pragmatism as a way to maximize the values of the great array of techniques offered by mediation practices.

Fifth, ways to achieve oversight (without excessively regulating and thus stiffening mediation) will be equally important. Evaluating mediators through surveys of litigants and lawyers, continual review of panels and periodic retraining will be critical to the integrity of the system. Additionally, the determination of ethical norms (self-determination, impartiality, disclosure of conflicts of interest, competence, confidentiality, and overall quality of service) and disciplinary systems (ethics hotlines, calibrated sanctions) to enforce them are a few of the available tools of effective oversight.³³

Finally, the courts will seek ways in which to build human resources and administrative capacity for mediation as a complementary institution. Strategies include building court units (with internal staff or external panels of trained neutrals) to perform mediation services or act merely as clearing houses. Legal educators are also exploring ways to enhance a growing set of graduate diploma courses, experiential mediation education, and training methodologies, in particular for young lawyers. Here, as demonstrated by this national conference, there is much opportunity for exchange and collaboration in pursuit of common goals.

E. Conclusion: Mediating Mediation

None of the foregoing concerns (or preliminary answers) is necessarily dispositive of the adaptability of mediation to India. Groups of leaders in the legal community raise many important issues (ranging from the relationship of mediation to the judicial system, types of cases where mediation may be difficult to apply, and the currently limited

³² See, e.g., Rule 5, *Consultation Paper on Case Management*, *supra* note 3, at 9.

³³ See generally Part II, detailing draft mediation rules in *Consultation Paper on ADR and Mediation*, *id.*, at 6-13.

capacity of human resources to conduct mediations effectively). Once it is understood that mediation is intended to complement (not replace) the judicial process, that it is highly adaptable to different contexts, and that expertise in India is already growing rapidly, these apprehensions may quickly dissipate.

The gravest concern of all, however, would be to draw the conclusion that these points of resistance should be therefore summarily dismissed or that any one person or court is capable of determining the answers for the rest of the country, especially since the caseloads in different districts are so stunningly diverse. To avoid these pitfalls, expressions of apprehension should be directly solicited, frankly expressed, and thoughtfully answered by broad sections of the society and legal community. Indeed, this important process of deliberation may even capture and apply the very techniques of mediation that are specifically at issue. These collaborative exchanges at both national and local levels, therefore, hold great significant promise for the more effective delivery of justice to the society at large.

Archived