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Reading Material

**ONE YEAR ADVANCED DIPLOMA IN
ALTERNATIVE DISPUTE RESOLUTION**

**1.1 ALTERNATIVE DISPUTE RESOLUTION
SYSTEMS**

By:

Ms. Kritika Krishnamurthy

B.Com. LL.B. (Hons.)

GNLU - Gujarat National Law University, Gandhinagar

Partner at AK & Partners

&

Mr. Anuroop Omkar

B.Com. LL.B. (Hons.)

GNLU - Gujarat National Law University, Gandhinagar

Partner at AK & Partners

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CHAPTER ONE: INTRODUCTION TO BASIC CONCEPTS

1. SUBSTANTIVE LAW

Laws can be broadly categorized into two categories – substantive law and procedural or adjective law. Both categories are essential to the rule of law and should be complementary to each other. Substantive laws may be defined as those laws or provisions of laws which lay down the rights and liabilities of each person. On the other hand, procedural laws are those provisions of laws which lay down the process which helps in determining the rights and liabilities of the parties. Each of substantive law and procedural law is incomplete without the presence of the other. A substantive law may convey the rights or liabilities of a party, however, the manner in which such rights or liabilities are determined may lead to confusing or chaotic results if a proper procedure is not followed to determine them. Similarly, a procedural law is ineffective if there is no right or liability to be determined. Therefore, both are essential to each other's existence and together form the spirit of the rule of law.

The Civil Procedure Code, 1908 ('CPC') is the primary source of procedural laws governing matters of a civil nature. However, certain provisions in the CPC also grant rights and impose liabilities on parties. Most of the provisions which may have a substantive character also have procedural aspects. These provisions tend to dictate a right that may have been given to a person and the manner in which such right can be enforced. Certain substantive provisions of the CPC also provide immunity for some parties from being sued. This may be construed as a right granted to such parties. Section 86 of the CPC, for instance, states that a foreign State may not be sued in any competent court without the sanction of the Central Government of India through the pertinent Secretary. The same provision, however, also lays down the positions which the foreign State may take that would enable a Secretary to grant sanction. These positions are reproduced below:

“(a) has instituted a suit in the Court against the person desiring to sue it, or

(b) by itself or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to it by this section.”¹

The above produced portion, in essence, states the conditions which must be present in order to give effect to the substantive right of the Secretary to grant sanction. The said portion could also be said to be a

¹ Section 86, Civil Procedure Code, 1908.

mix of substantive and procedural law.² Section 86 also carves out an exception for some persons. It states that tenants of an immovable property may sue a foreign State, without sanction of the Central Government, in case such tenant ‘...holds or claims to hold the property’ from the foreign State. Therefore, Section 86 is an example of the CPC granting rights to persons.

A liberal reading of the CPC may also lead to some other provisions being considered substantive in nature. For instance, Section 65 states that:

“Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.”

Similar to the previous example, Section 65 may also be considered a provision whose text contains a mix of substantive and procedural aspects. Section 65 bestows a right on purchaser to claim title of an immovable property where the transfer has taken place due to decree executed in the purchaser’s favour. It clarifies this right by stating that such immovable property shall be “deemed” to vest in the purchaser from the day it is sold in execution of a decree and not from the day the sale becomes absolute. The word “deem” used in the text of the provision essentially means that even though a sale has to be absolute in order to have an effective transfer of property, a purchaser is given the right to claim title to such property from the day he purchased it, in case such sale has become absolute. The procedural aspect in this provision is the pre-conditions prescribed in the first line of the provision – sale must be in execution of a decree and sale must become absolute. It can be said to be procedural because the Court will look at the satisfaction of these mechanical points before giving the benefit of Section 65 to the purchaser.

The CPC is a procedural law. The presence of substantive provisions in CPC does not change its character. It prescribes the manner in which justice may be achieved for a wrong done. However, the presence of such substantive aspects is equally important for the effective utilization of the CPC. Major substantive laws include the Contract Act, 1872, the Transfer of Property Act, 1882, the Indian Penal Code, 1860 and the Constitution of India.

2. PROCEDURAL LAW

The second broad category of law is procedural or adjective law. These are the provisions of laws which prescribe the procedure to be followed by the court and the participants of a dispute to reach a legally satisfactory decision. Procedural law protects and supports substantive law insofar as it is required to reach a fair and just conclusion in substantive law. The major procedural laws include the Civil Procedure Code, 1908 (‘CPC’), the Code of Criminal Procedure, 1973 (‘CrPC’) and the Evidence Act, 1872

² *GMS Marine Company Limited v. The Owners and Persons Interested in the Vessel MV Vinashin Sky*, AIR 2003 Bom 470.

(‘**Evidence Act**’). These three legislations are considered some of the most important documents in the practice of law. Whereas CPC is applicable to disputes which come within civil jurisdiction – to be filed in a civil court, the CrPC is applicable to criminal matters – to be filed in criminal courts. The Evidence Act applies to all judicial proceedings, except Court-martials relating to the armed forces and arbitrations, wherein the adjudicator is authorized to take evidence.

The CPC is the basic document relating to procedure to be followed by the Court and the parties in civil dispute. A civil dispute may include property disputes, commercial disputes, loan recovery disputes (exceptions present)³, inheritance disputes, etc. The CPC prescribes a comprehensive manner in which such a dispute shall be brought to the court, how a notice should be given to the other party, how to take evidence, and all the interim measures a party can request for during the proceedings. Proceedings under the CPC are often supported by the provisions of the Evidence Act, Contract Act, Specific Relief Act, Transfer of Property Act and certain substantive provisions contained in the CPC itself. The Evidence Act, in particular, is a significant part of a proceeding as it defines what kind of evidence is admissible, the manner in which the court shall examine evidence, which party shall have to bear the burden of proof, who can be a witness and how to examine a witness.

The CPC is broadly divided into two parts – Sections and Orders. Sections are those provisions which set a rule of general procedure or a substantive rule or a mix of both. Sections lay down general rule on the basis of which a proceeding must be conducted. An example of a general rule is the rule of res judicata.⁴ Res judicata is a legal concept which states that a dispute between the same parties concerning the same subject matter shall not be entertained again if it has been already dealt with by another court of appropriate jurisdiction. It means that parties may not bring a decided matter back to court unless certain issues relating to the matter were not decided by such court. Orders, on the other hand, are the actual rules of procedure which shall be followed by the court and the parties. Orders may or may not flow from the general rules of procedures contained in the Sections. Orders are sub-divided into Rules. These Rules contain the specific requirements which shall be applicable to a dispute.

The procedure prescribed in the CPC is comprehensive in nature. It usually contains a provision relating each detail that may affect the hearing of dispute. Apart from the exhaustive provisions, Section 151 relates to the inherent power of the court. This provision is used whenever the court deems it necessary in the interest of justice. It is used when any lacunae is observed in any of the provisions in CPC.

³ Does not include loan disputes involving banks and financial institutions.

⁴ Section 11, Civil Procedure Code, 1908.

3. RULE OF LAW

Introduction

The term ‘rule of law’ is derived from the French phrase ‘*La Principe de Legality*’ which refers to ‘an administration based on principles of law’ and not of men. By this definition, the concept of ‘*La Principe de Legality*’ opposes the existence of powers that are arbitrary in nature.⁵ Very few written constitutions inculcate the concept of “rule of law” expressly and it is merely seen as a desired value that a legal system must possess.⁶ It may be difficult to define the rule of law with scientific precision but it cannot be dismissed as an elusive notion or as an unruly horse. It denotes commitment to certain principles and values. An essential principle of the rule of law is that “every executive action, if it is to operate to the prejudice of any person must have legislative authority to support it”.⁷ A.V. Dicey's explanation of rule of law concept contemplated the absence of wide powers in the hands of government officials. According to him, wherever there is any violation there is room for arbitrariness.⁸

This concept can be understood through the decisions rendered by the Indian Supreme Court and an analysis of which from 1950 till date would reflect the increased usage of this concept since mid 1970s. The concept acted as a point of support for many Supreme Court decisions in 1980s and 1990s.

Conceptual Framework of Rule of Law

General Framework

Before beginning to study the Supreme Court's approach to rule of law, it would be useful to adopt a working framework of rule of law for the purpose of the present analysis and look at its various theoretical formulations that fit within the framework. The article uses the model⁹ which provides that various formulations of rule of law can be summarized to two basic categories, known by theorists as “Thin version”¹⁰ (Formal) and “Thick version” (Substantive), each coming in three different forms.

THIN VERSIONS	1. Rule-by-law	2. Formal Legality	
	Law as an instrument of government action.	General, prospective, clear, certain.	

⁵ I.P. Massey, Conceptual Objections against the Growth of Administrative Law, in Administrative Law 12 (2001).

⁶ Joseph Raz, The Authority of Law: Essays on Law and Morality, Oxford: Oxford University Press, 1979, at p. 211

⁷ Entick v. Carrington, (1765) EWHC KB J98 : 95 ER 807 : [1558-1774] All ER Rep 41, (per Camden, LJ.).

⁸ A.V. Dicey, The Rule of Law: Its Nature and General Applications, Introduction To The Study of The Law of The Constitution 202 (1915).

⁹ Brian Tamanaha, On the Rule of Law: History, Politics, Theory, Cambridge, Cambridge University Press, 2004, p. 91.

¹⁰ Version, conception and theory have been used interchangeably in this paper in the light of different terminologies used by legal scholars to mean the same thing

THICK VERSIONS	3. Democracy, Individual Rights Property, contract, privacy, autonomy.	4. Right of Dignity and/or Justice	5. Social Welfare Substantive equality, welfare, preservation of community.
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The thin concept on rule of law stresses the formal or instrumental aspects of rule of law—those features that any legal system must possess to function effectively as a system of laws, regardless of whether the legal system is a part of a democratic or non-democratic society, capitalist, liberal or theocratic. The constitutive elements of the thin version are that there must be rules for determining which entities may make law and law must be made by an entity in accordance with such rules, to be valid. Laws must be made public and readily accessible. Laws must be generally applicable, be clear, consistent on the whole, relatively stable and generally prospective rather than retrospective. Laws must be enforced—the gap between the law in books and law in practice must be relatively narrow and fairly applied.¹¹ In contrast to thin versions of rule of law, thick or substantive conceptions, begin with the basic elements of a thin conception but then incorporate elements of political morality such as particular economic arrangements, forms of Government or conception of human rights etc. Further, certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between “good” laws, which comply with such rights, and “bad” laws which do not.¹²

A.V. Dicey on Rule of Law

A.V. Dicey regarded the rule of law as a fundamental feature of the Constitution of the United Kingdom. His definition of the rule of law has to be the starting point of any article on the topic, even one that focuses on the Supreme Court of India. Dicey offered three meanings of the rule of law, which are as follows:

- The rule of law meant the supremacy of the “regular law” over “arbitrary power”.
- ‘Equality before the law’, by which he meant that officials were bound by the same laws as ordinary subjects.
- The Constitution is a product of the common law, not of any constitutional instrument.¹³

Sir Ivor Jennings criticized the A.V. Dicey definition of rule of law and considered the definition to be an Anglo-centric, Court-centered view of the legal system. Dicey exaggerated the virtues of the

¹¹ Randall Peerenboom, *Varieties of Rule of Law* in Randall Peerenboom et al., *Asian Discourses of Rule of Law*, (London: Routledge, 2004) at p. 2.

¹² *Ibid* at p. 4.

¹³ Peter W. Hogg and Cara F. Zwibel, *The Rule of Law in the Supreme Court of Canada*, 55 *University of Toronto Law Journal* (2005) at p. 716.

courts, exaggerated the risks of administrative decision making, misunderstood the state of administrative law even at the time when he wrote, and refused to see the merits in the civilian systems of Europe. Because of the power of the criticisms of Dicey, the rule of law is often dismissed as meaningless rhetoric.¹⁴

The Rule of Law Argument in the Supreme Court of India

The text of the Constitution of India does not expressly refer to “rule of law”. A review of around three hundred decisions of the Supreme Court in constitutional law cases since 1950 till date indicates that the contexts in which rule of law has been expressly used by the Court fall into four broad categories, viz., judicial review of executive action, basic structure doctrine, judicial independence and miscellaneous which are discussed as follows:

Judicial Review of Executive Action

In *Satwant Singh Sawhney v. D.Ramarathnam*¹⁵ Sawhney carried on the business of import, export and manufacture of automobile parts and engineering goods for which he was taking passports for visiting foreign countries. In August 1966, the Assistant Passport Officer asked him to return the said two passports as Union of India had decided to withdraw the passport facilities availed by him. In spite of repeated requests from Sawhney to reconsider the decision, no reply was received for the Executive action. It was contended by Sawhney that such action amounted to infringement of fundamental rights under Articles 21 and 14 of the Constitution which was upheld by the Supreme Court.¹⁶ It was explained by the Apex Court that:

*“Article 14 says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This doctrine of equality before the law is a necessary corollary to the high concept of the rule of law accepted by our Constitution. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported by some legislative authority. Secondly, such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification.”*¹⁷

In *Epuru Sudhakar v. Govt. of A.P.*,¹⁸ the Supreme Court chose to interpret the pardoning power of the President and the Governor under Articles 72 and 161 of the Constitution through the rule of law concept. While interpreting rule of law concept became the basis through which the power of the executive to pardon could be reviewed. It was further held that rule of law concept should be used to evaluate all

¹⁴ Peter W. Hogg and Cara F. Zwibel, *The Rule of Law in the Supreme Court of Canada*, 55 *University of Toronto Law Journal* (2005) at p. 716.

¹⁵ AIR 1967 SC 1836

¹⁶ AIR 1967 SC 1836 at para 1

¹⁷ AIR 1967 SC 1836 at para 32

¹⁸ (2006) 8 SCC 161 : AIR 2006 SC 3385

decisions and prerogatives. The Court also explained that rule of law meant “Government according to law” which mandated that principles of fairness and certainty should be used to exercise prerogative. But Kapadia, J., began his analysis by stating that the power of pardon and reprieve “is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself”.¹⁹ One fails to see where the Constitution refers to the rule of law expressly. Hence, contrary to its own statement, the Court chose to limit the exercise of a power written in the Constitution on the basis of a principle not written in the Constitution.

In the notorious case of *ADM Jabalpur v. Shivkant Shukla*,²⁰ the Court held that the principle of rule of law as enshrined in Article 21 does not exist as a distinct and separate principle conferring independently, the right of personal liberty, and apart from that Article. Consequently, when the enforcement of right to personal liberty conferred under Article 21 is suspended by a Presidential Order, the detenu cannot circumvent the Presidential Order and challenge the legality of his detention by falling back on the supposed right of personal liberty based on the principle of rule of law. The Court held that—

*“The emergency provisions in Part XVIII are by themselves the rule of law during the times of emergency. There cannot be any rule of law other than the constitutional rule of law. There cannot be pre-constitutional or post-constitutional rule of law which can run counter to the rule of law embodied in the Constitution, nor there any invocation to the rule of law to nullify the constitutional provisions during the times of emergency.”*²¹

Application of the Basic Structure Doctrine

In *P. Sambamurthy v. State of A.P.*,²² validity of clause (5) of Article 37-ID of the Constitution, which was inserted in the Constitution by the Constitution (Thirty-second Amendment) Act, 1983, was challenged before the Court. The said clause empowered the State Government to decide whether it would confirm the order of the Administrative Tribunal concerned, to modify it or even to annul it. Taking into account that “almost invariably in every service dispute before the Administrative Tribunal” the State Government was a party, the Supreme Court noted that the said party was granted ultimate authority to uphold or reject the determination of Administrative Tribunal. The Court reasoned that-

“This power of modifying or annulling an order of the Administrative Tribunal conferred on the State Government under the proviso to clause (5) is violative of the rule of law which is clearly a basic and essential feature of the Constitution. It is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the

¹⁹ AIR 1967 SC 1427 at para 65

²⁰ (1976) 2 SCC 521

²¹ (1976) 2 SCC 521 : AIR 1976 SC 1207 at para 101

²² (1987) 1 SCC 362

Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with a view to (ensure) that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death-knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet to get away with it. The proviso to clause (5) of Article 371-D is therefore clearly violative of the basic structure doctrine.”²³

In the landmark case of *Keshavananda Bharti*, it was declared that the rule of law does form part of the basic structure of the Constitution which was reconsidered in *Indira Nehru Gandhi v. Raj Narain*.²⁴ The case involved the constitutional validity of the Constitution (Thirty-ninth Amendment) Act, 1975 which was challenged to have violated the basic structure of the Constitution by violating Article 14 and thereby violating the concept of rule of law. The Court held that to apply any unwritten principle it is necessary that its constituent elements must be gathered from the Constitution. Mathew J., observed that:

“There is a genuine concept of rule of law and that concept implies equality before law or equal subjection to all classes to the ordinary law. But if the rule of law is to be the basic structure of the Constitution, one must find specific provisions in the constitution embodying the constituents of the element of the concept... The provisions of the Constitution were enacted with a view to ensure the rule of law. Even if I assume that the rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14.”²⁵

Nevertheless, even if we assume that the concept of rule of law is a part of the basic structure the Court, this case had made it evident that when its applicability was brought about, its elements must have been located in the Constitution itself. In other words, the necessity of written provisions would ensure that where there is no scope for the written provisions, the unwritten concept cannot be brought about to the rescue either.

²³ (1987) 1 SCC 362

²⁴ 1975 SCC 1

²⁵ 1975 SCC 1 at para 341

Further in many cases it was held by the Supreme Court that “democracy is a part of the basic structure of our Constitution; and rule of law and free and fair elections are basic features of democracy”.²⁶

Judicial Independence

It is in this category of cases that rule of law has found the maximum amount of support and usage by the Supreme Court. In fact, in many instances, as will be observed, rule of law has been elevated to the status of positive law.

In *S.P. Gupta v. Union of India*,²⁷ controversy revolved around a letter written by the Law Minister of India to Chief Justices of various High Courts of the country. The letter contained instructions requesting Judges working in different High Courts to be appointed in High Courts of another State. Advocates all around the country filed several writ petitions against the letter. While upholding the primacy of the executive in matters of appointment and transfers, the Court made several observations regarding the independence of judiciary and rule of law, which can be summed up as:

*“Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says “Be you ever so high, the law is above you”. This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution.”*²⁸

In *Supreme Court Advocates-on-Record Assn. v. Union of India*,²⁹ by a majority of 7:2, the Supreme Court, overruled its decision in the *S.P. Gupta* case and held that the opinion of the Chief Justice of India has primacy in the matter of appointment of High Court and the Supreme Court Judges. The reasoning adopted was that this would ensure independence of the judiciary which is necessary for the maintenance of rule of law.

*“It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution; and an adjunct of this principle of the absence of absolute power in one individual in any sphere of constitutional activity.... A homogenous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary “symbolised by the view of the Chief Justice of India” which is given greater significance or primacy in the matter of appointments.”*³⁰

²⁶ 1992 (2) SCC 651 : AIR 1993 SC 412 at para 179

²⁷ (1982) 3 SCC 223 : 1981 SCC 87 : AIR 1982 SC 149

²⁸ (1982) 3 SCC 223 : 1981 SCC 87 : AIR 1982 SC 149 at para 27

²⁹ (1993) 4 SCC 441 : AIR 1994 SC 268

³⁰ (1993) 4 SCC 441 : AIR 1994 SC 268 at para 466

The Court bolstered the idea of how this consultative process ensures non-arbitrariness and truly reflects the opinion of the entire judiciary. Thus, the Court's reasoning was that if non-arbitrariness was to be achieved such that rule of law is maintained, executive's primacy over appointments should be set aside to give primacy to the Chief Justice of India irrespective of the written text of the Constitution. Hence, unwritten principle was taken aid of to disregard the written text of the Constitution.

Miscellaneous

In *M. Nagraj v. Union of India*,³¹ the Supreme Court, while dealing with the constitutional validity of Article 16(4-A) of the Constitution inserted via Constitution (Eighty-fifth Amendment) Act, 2001 to provide reservation in promotion with consequential seniority interpreted the provisions of the Constitution on equality. It held that—

*“Equality has two facets—“formal equality” and “proportional equality”. Proportional equality is equality “in fact” whereas formal equality is equality “in law”. Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.”*³²

The Court was much clearer when it observed that—

*“The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case to case basis.”*³³

Such an approach fits neatly with the thin theory of rule of law. Similarly, in *Ashoka Kumar Thakur v. Union of India*,³⁴ the Supreme Court, while dealing with the constitutional validity of Article 15(5) of the Constitution inserted via Constitution (Ninety-third Amendment) Act, 2005, reiterated the *M. Nagraj* ruling on the meaning of equality vis-à-vis rule of law.

³¹ (2008) 1 SCC 125 : AIR 2007 SC 71

³² (2008) 1 SCC 125 : AIR 2007 SC 71 at para 102

³³ (2008) 1 SCC 125 : AIR 2007 SC 71 at para 118

³⁴ (2008) 6 SCC 1

4. PRINCIPLES OF NATURAL JUSTICE

Introduction

The principles of natural justice are not codified in the body of Indian law but hold a significant place in the system through which justice is delivered. They have been defined to mean “fair play in action”.³⁵ The principles embody the essential elements of fair hearing which derive their root from the inherent human characteristics of fair play and justice, which are meant not to protect the interest of any particular race or country but are shared by all humans.³⁶

Natural Justice is another name of common-sense justice, the principle of which, are ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical particulars. It is the substance of justice which has to determine its form.”³⁷

The Right to Be Heard

As a part of the rule of Natural Justice, the right of *audi alteram partem* is a valuable right which mandates that no one should be condemned unheard. A corollary has been deduced from the above rule, namely “*quialiquid statuerit parte inaudita altera, aequum licet dixerit, baud aequum fecerit*” which means that he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right³⁸ or in another word as it is now expressed, justice should not only be done but should manifestly be seen to be done.

Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time.³⁹

³⁵ Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 286

³⁶ Union of India v. Tulsiram Patel, (1985) 3 SCC 398, 470

³⁷ Canara Bank v. Debasis Das, (2003) 4 SCC 557 (pr. 8)

³⁸ Boswell, (1605) 6 Co Rep 48-b, 52-a

³⁹ Canara Bank v. Debasis Das, (2003) 4 SCC 557 (pr. 15)

Rule against Bias

“*Nemo in propria causa judex esse debet*” is another important principle of natural justice which means that no one should be made a judge in his own cause and popularly known as the rule against bias. It is the minimal requirement of the natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias. Bias means an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue. Dictionary meaning of the term bias suggests anything which tends a person to decide a case other than on the basis of evidences. The rule against bias strikes against those factors which may improperly influence a judge against arriving at a decision in a particular case. This rule is based on the premises that it is against the human psychology to decide a case against his own interest. The basic objective of this rule is to ensure public confidence in the impartiality of the administrative adjudicatory process, in *R v. Sussex*⁴⁰, it was elucidated that justice should not only be done, but also manifestly and undoubtedly seen to be done. A decision which is a result of bias is a nullity and the trial is *Coram non judice*.

De Facto Prejudice

A glance over the judicial dicta would also establish the current trend of the judicial thinking that it is not mere want of notice which results in violation of natural justice but it is sufferance of *de facto* prejudice (other than non-issue of notice). Here are some of the judgments to appreciate what Indian Judiciary now thinks about requirement of notice or affording opportunity of hearing for satisfying PNJ.

When No Prejudice Is Caused

In *Rachhpal Singh v. State of Punjab*⁴¹, the Court upheld the award of compensation with the reasoning that:⁴²

“.....*From the order sheet of the proceedings of revision petition, it is seen that the Court had tagged the revision petition along with the reference case as well as criminal appeals at the time of admission though no notice was issued. Parties were aware of this petition because arguments were addressed on this question. Hence, this technical objection cannot be entertained because no prejudice is caused to the appellant on this count.*”

⁴⁰ (1924)1KB 256

⁴¹ (2002) 6 SCC 462. The brief facts are : the High Court awarded Rs. 4 lack as compensation in its exercise of powers under S. 357 Cr PC. The same was assailed in the Supreme Court on the ground that the appellant had no court notice of the revision petition filed by the complainant as the revision petition was neither actually admitted nor any notice was issued therein.

⁴² SCC p. 468, para 11

The defects against the award of compensation were held to be a matter which is too technical in nature and did not prejudice any of the parties. Therefore, the no prejudice component cured the technical defect of want of want of Court's notice of the revision petition.

When Only One Conclusion Possible

In Aligarh Muslim University v. Mansoor Ali Khan⁴³, the Court observed that,

“As pointed recently in M.C. Mehta v. Union of India⁴⁴, there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in Gadde Venkateswara Rao v. Govt. of A.P.⁴⁵, it is not necessary to quash the order merely because of violation of principles of natural justice.”

It was further observed that in the S.L. Kapoor case⁴⁶, exceptions were laid down that if the admitted or indisputable facts point towards only one conclusion then the principle that indicates breach of natural justice would not apply. But great and due care should be observed while applying this exception.

Empty Formality

The Courts have also evolved the ‘theory of empty formality’ which means that principles of natural justice are not required compliance, if even their compliance ultimately result in an empty formality. In other words, ‘theory of empty formality’ would imply non-application of PNJ where the complainant would finally get no relief against the impugned action/order and the grant of writ by the Court would be in vain. In M.C. Mehta v. Union of India⁴⁷, the Supreme Court construed the Empty Formality Theory in the following words:

“..... Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a “real likelihood” of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their ‘discretion’, refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed..... We do not propose to express any opinion on the correctness or otherwise of the ‘useless formality theory’ and leave the matter for decision in an

⁴³ (2000) 7 SCC 529

⁴⁴ (1999) 6 SCC 237

⁴⁵ AIR 1966 SC 828

⁴⁶ S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379

⁴⁷ (1999) 6 SCC 237

appropriate case, in as much as the case before us, 'admitted and indisputable' facts show that grant of a writ will be in vain as pointed by Chinnappa Reddy, J."

Fact-Situation Decisive

In the case of *Ravi S. Naik v. Union of India*⁴⁸, it was held by the Court that in order to identify whether the requirements of natural justice have been complied with or not has to be considered in the context of the facts and circumstances of a particular case. In another case of *Ashok Kumar Sonlar v. Union of India*⁴⁹, it was held that where the selection of the appellant employee was illegal, as he was ineligible to be considered for appointment, the cancellation of his appointment without affording opportunity of hearing to him by the Visitor of the University concerned was held to be proper, as it would have been a futile exercise to give him an opportunity of hearing.

In *K.L. Tripathi v. SBI*⁵⁰, the Supreme Court while explaining the application of principles of natural justice as a fact-based scenario referred *Wade's Administrative Law*⁵¹ which read that:

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter, the application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

PNJ Supplements & Not Supplant Law

In *Hari Pada Khan v. Union of India*⁵² the Court held that the principles of natural justice need to be interpreted in consistency with the rules and, that it is a settled law that the principle of natural justice cannot supersede but can add to the law.

Compliance at Trial Stage Also

In *State of U.P. v. Mohd. Nooh*⁵³, the Court mandated the compliance of principles of natural justice at the preliminary stages of hearing. In doing so, the Court observed that:

⁴⁸ 1994 Supp (2) SCC 641

⁴⁹ (2007) 4 SCC 54

⁵⁰ (1984) 1 SCC 43

⁵¹ Fifth Edition, pp. 472-475

⁵² (1996) 1 SCC 536

⁵³ AIR 1958 SC 86

“If an inferior court or tribunal of first instance acts wholly without jurisdiction in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned.”

Knowledge of Proceedings qua Need for a Formal Notice

In a case, where the person concerned has “knowledge” of the proceedings but decides to protest the proceedings due to lack of a formal notice then the legal maxim “*Error qui non resistitur, approbatur*”⁵⁴ would apply which means that an error which is not resisted or opposed is considered to be approved. Similarly, “*Consensus tollit errorem*”⁵⁵ applies in such scenario which means that the acquiescence of a party who might take advantage of an error obviates its effects. In Nilkantha's case⁵⁶ the 5- Judges Bench of the Supreme Court observed that the notice can be delivered through oral means and in that case the question as to the formal delivery of the notice would not arise. Notice does not mean communication in writing.

However, in 3 judgments of the Supreme Court in Agra Development Authority⁵⁷, Kerala Water Authority⁵⁸ and Kanak⁵⁹, the view taken in the context of Section 50 (2) of the L.A. Act was that there is need of a formal notice to the beneficiary of acquisition proceedings despite its “knowledge” of the pending proceedings. In Agra Development Authority's case, which was the point of support for the Kerala Water Authority Case, it was observed that:

“.....all that was submitted that the appellants were aware of the proceeding and had held meetings with the Government and the Collector. In our view, this is not sufficient. What is required by S. 50 of the Land Acquisition Act is that the body for whom the property is being acquired is given an opportunity to appear and adduce evidence for the purposes for determining the amount of compensation. Nothing could be shown to us that this has been done.....”

Metal Forgings⁶⁰ is another significant decision in which Hon'ble Hegde, J. dealing with the issue held:.

⁵⁴ Black's Law Dictionary, Sixth Edn. at p. 544.

⁵⁵ *Ibid* at p. 305

⁵⁶ (1962) 2 SCR 551

⁵⁷ (2001) 2 SCC 646

⁵⁸ (2002) 3 SCC 228

⁵⁹ Kanak v. U.P. Avas Evam Vikas Parishad, (2003) 7 SCC 693

⁶⁰ Metal Forgings v. Union of India, (2003) 2 SCC 36.

“.....issuance of a show-cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection to such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show-cause notice.....”

Metal Forgings is, thus, an instance where the statute peremptorily required show-cause notice in a particular format to contain certain details. As there was want of such notice, the Apex Court rightly took the view that each and every communication could not be construed as a show-cause notice. The decision, thus, turned on the mandate of law rather than the PNJ.

Conclusion

The principles of natural justice cannot be reduced to any hard and fast formulae.⁶¹ They are not ‘immutable’ but ‘flexible’. *Audi alteram partem* is one of the basic pillars of natural justice, but it is not just for technicality. Rather, the entire purpose of its evolution has been to further the ends of ‘justice’ (and not injustice, illegality or idle formality). The recent judicial thinking confirms this salutary point of view. The principles of natural justice have presently undergone a sea change by shifting its earlier concept that even a small violation would result in the order being rendered a nullity. Now, it stands well settled that there is nothing as a mere technical infringement of natural justice. A complainant for applying principles of natural justice is to satisfy to the Court that not only he has been denied the right of hearing or a notice, but also that the denial in fact has resulted in “real prejudice” to him by frustrating his lawful rights. By applying “useless formality theory”, the court does not ‘prejudge’ what is to be decided by “decision making authority”. Rather the Court strives to satisfy itself that the complainant has got a bona fide and genuine cause which stood frustrated for want of ‘hearing’/‘notice’ to him. The principles of natural justice are required to be complied with having regard to the ‘fact-situation’ of ‘case to case’ without there being any straitjacket formula with the thrust to find out prejudice caused to the complainant. The entire approach of the Judiciary for application of PNJ should be justice oriented, intended to effectuate the legal enforceable right of the complainant. Principles of natural justice should be applied also to a fact-situation where bona fide disputes exist, requiring an adjudication by the “decision making authority”. In other words, if more than one reasonable view is possible in the given controversy, right of hearing/notice needs to be given to a complainant. The failure to comply the principles of natural justice at the initial stage cannot be cured by a sufficiency of natural justice in an appellate body. The principles of natural justice require to be modulated consistent with the scheme of the

⁶¹ State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364 p. 28

particular law in as much as they do not supplant but can supplement the law. Therefore, while applying the principles of natural justice, the Courts bear this aspect in their minds and, accordingly, apply them with modulations/adaptions.

5. COURT STRUCTURE IN INDIA

Introduction

The position of judiciary is very important in the Indian Federal structure. It acts as a tool for resolution of disputes and conflicts of interests. The division of legislative authority between the Union List, State List and Concurrent list gives rise to disputes between Centre and states, between states and the judiciary is responsible for resolution of such disputes. Further, the responsibility with respect to protection of rights and legitimate interests of the citizens of the country also vests with the judiciary. In order to do so, the independence of judiciary from the legislative and the executive bodies is very vital for upholding the responsibility vested in it. For the interpretation of the grund norm, the Constitution of India and resolution of disputes a unified judicial set-up is made on which Supreme Court is at the top and High Courts are at the top of the State level. Under each High Court there are subordinate courts which are subordinate to the High Court. Further, for the speedy disposal of justice tribunals are also provided the authority to resolve disputes in the matters of persons and for the similar objective Lok adalats are also established.

Development of the Judicial Structure

The development of the Indian judicial system was a result of the constitutionalism and the modern-nation states although steps were already being taken in that direction. The ancient judicial system acknowledged the religious norms in order to deliver justice and was hugely based upon the customary laws. Caste panchayats acted as the judicial body at the local level by being in line with the religious laws set-up by the monarchs. The concept of justice revolved around the religious law called as *dharma* under which every individual is bound to perform their respective duties in the four stages of life and the status of every individual. The religious texts acted as the grund norm from which the King's power to make laws was derived from. During the medieval era the power of the King to administer justice increased largely and was based upon the dictum that the King can do no wrong and therefore he became the highest judge in the judicial system of the kingdom. However, this led to arbitrary decision making and improper use of authority.⁶²

The colonial rulers brought about a judicial system based upon the Anglo-Saxon jurisprudence. In 1661, the Royal Charter of Charles II empowered the Governor and Council with the power to decide criminal

⁶² Jaideep Yadav, IGNOU Indian Society - India Democracy and Development, accessed from <http://www.scribd.com/doc/155551232/IGNOU-Indian-Society-India-Democracy-and-Development>.

and civil cases in India as per the laws of England. The Supreme Court of India was established in 1773 by the Regulating Act at Calcutta. The bench comprised of the Chief justice and three judges who were appointed upon the directions of the Crown. Later, Supreme Courts were established in Madras and Bombay. The Courts functioned as King's courts and held jurisdiction over His Majesty's subjects.

During this period, the judicial system had two distinct systems of courts, the English system of Royal Courts, which followed the English law and procedure in the presidencies and the Indian system of Adalat/Sadr courts, which followed the Regulation laws and Personal laws in the provinces. These two units were combined under the High Court Act of 1861, replacing the Supreme Courts and the indigenous courts (Sadr Dewani Adalat and Sadr Nizamat Adalat) in the presidential cities of Calcutta, Bombay and Madras with high courts. The largest court of appeal, nevertheless, was the Privy Council's judicial committee. In order to meet the needs of the colonial power, British attempts were rendered to create a unified court structure in the Indian legal system.

The Government of India Act, 1935⁶³ established the Indian Federal Court which functioned till the Constitution of India was established, wherein appeals were heard from the High Court and from where appeals went to the Privy Council with respect to interpretation of the Indian Constitution. Although the Court had the power to interpret the law but couldn't enforce compliance of its decisions and therefore it had very limited power.

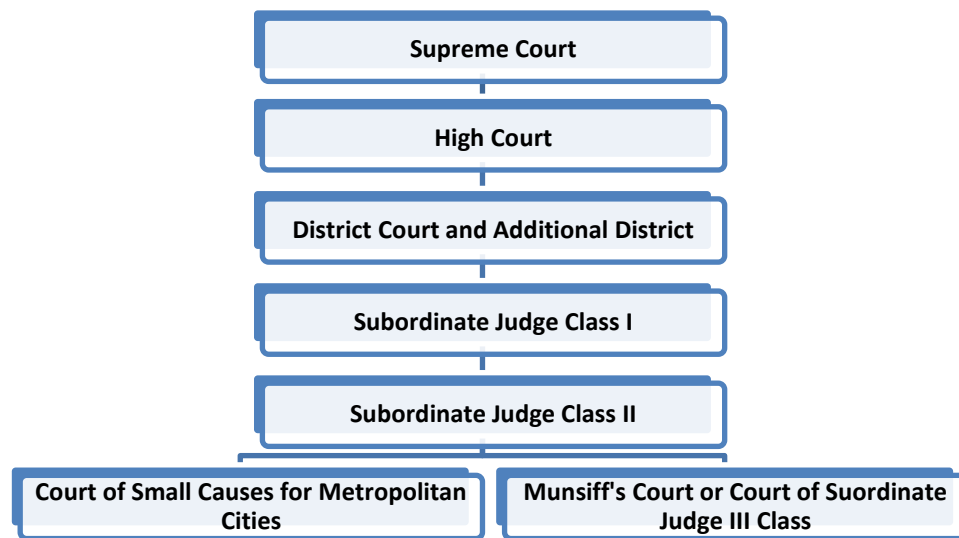
Structure of Judiciary

The Constituent Assembly wanted to insulate the delivery of justice and protection of rights from coercive forces which acted from within and outside the government, the evidence of which lies in the Constitution of India. The guidelines for the working and functions of the judiciary are mainly derived from the Sapru Committee report on judiciary and the ad hoc committee of the Constituent Assembly.

With the slightest screening, the unitary judicial system appears to have been embraced. The Supreme Court was vested with a unique obligation to protect rights of the individual throughout the country. The judiciary is constituted in a manner to be independent and non-partisan.

The quasi-federal structure of 29 states and 601 administrative districts is delivered justice by the Indian judiciary which is a single embedded system of courts for center and states which administers both union and state laws separately and concurrently and the Supreme Court of India is at the top of the whole arrangement. Broadly the structure is a three-tier arrangement wherein each district has a district court and each state has a High Court and each state by virtue of its own laws constitutes courts subordinate to the District Court. The Courts in a broad manner can be structured as below:

⁶³ Section 200



The Supreme Court

The highest court of law in India is the Supreme Court. All appeals from all the High Courts are heard in the Supreme Court and therefore Supreme Court is the country's largest tribunal. The law declared by the Supreme Court is binding on all courts subordinate to the Supreme Court⁶⁴. It has the ultimate power to interpret the Constitution. Independence and integrity, powers and functions, and judicial review are therefore the matters of the Supreme Court's utmost relevance. The President shall appoint the Chief Justice of India after consultation with such judges of the Supreme Court and of High Courts as he may deem necessary. And in the case of the appointment of other judges of the Supreme Court, consultation with the Chief Justice, in addition to judges is obligatory.

Power of the Supreme Court

The jurisdiction vested with the Supreme Court is very vast and this position becomes stronger due to the appellate jurisdiction of the Supreme Court. The Supreme Court is entrusted with the responsibility to protect the sanctity of the Constitution and has the power to review the judgments pronounced by it. The jurisdiction of the Supreme Court is explained as below.

Original Jurisdiction and Writ jurisdiction

The Supreme Court has exclusive and original jurisdiction with respect to conflicts between the Union and a State, or between one State and another, or between group of states and others. The parties to the dispute are units of a federation.⁶⁵ Further, the responsibility to protect the Fundamental rights of the

⁶⁴ Article 141

⁶⁵ Abhinav Chandrachud, An Empirical Study of the Supreme Court's Composition, 46(1) ECONOMIC & POLITICAL WEEKLY 2011

citizen is also a non-exclusive original jurisdiction of the Supreme Court. Under the Writ jurisdiction, the Supreme Court can issue writs such as *Habeas Corpus*, *Quo Warranto*, *Certiorari*, *Mandamus* and Prohibition for the protection of rights of the individual who have invoked the writ jurisdiction of the Court⁶⁶. Furthermore, the authority to issue appropriate directions and orders to the executive is also enjoyed by the Supreme Court.

Advisory Jurisdiction

The Supreme Court can advise the President with respect to any matter raised by the President regarding question of law or of fact which is of public importance.⁶⁷ The advice can be sought for matters relating to pre-Constitution treaties and agreements which fall outside the purview of Original jurisdiction of the Supreme Court. However, the opinion is not binding upon the President or the Government as it is issued as a judgment. The Supreme Court can reserve its opinion also in cases involving political controversies.

Appellate Jurisdiction

The highest court of appeal is the Supreme Court above which no appeal lies. The appellate jurisdiction can be divided into:

- Cases which involve interpretation of the Constitution, civil, criminal or otherwise
- civil cases, irrespective of any Constitutional question,⁶⁸
- Criminal cases, irrespective of any Constitutional question.⁶⁹

The appeal from the High Court to the Supreme Court lies after due certification⁷⁰ from the High Court, the Supreme Court may also grant a Special Leave to appeal.⁷¹ Special leave maybe granted from any judgment, decree sentence or order in any case or matter passed or made by any court or tribunal.

Review Jurisdiction

Subject to the provisions of any law enacted by the Parliament or rules made under Article 145, the Supreme Court has the authority to review any order or judgment passed by it.⁷²

However, the jurisdiction of the Supreme Court may be extended in regard of any of the issues in the Union List as conferred by law by the Parliament. By law, Parliament may also extend the powers and

⁶⁶ Article 32

⁶⁷ Article 143

⁶⁸ Article 133

⁶⁹ Article 134

⁷⁰ Article 132

⁷¹ Upendra Baxi, Preface in *THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA* (Mayur Suresh and Siddharth Narrain eds., 2014)

⁷² Article 137

functions exercised by the Supreme Court or may impose restrictions on the exercise of such power. Since the Constitution creates Parliament and the judiciary, such acts must result in a harmonious relationship between the two and must not result in changing the constitution's basic structure. In addition, all of these powers can also be suspended or replaced whenever there is an emergency situation in the nation.

High Courts

Every state has its own High Court⁷³ and every High Court is a court of record through which they have all the powers of such a Court including the power to punish for its contempt.⁷⁴ The Parliament has the power to establish a common High Court for two or more states and Union Territory.⁷⁵ Each High Court has a Chief Justice and such other judges which are appointed by the President in consultation with the Chief Justice of India, the Governor of the State and also the Chief Justice of that High Court in the matter of appointment of a judge other than the Chief Justice.

Power of High Courts

A state's high court's jurisdiction is co-terminus with that state's territorial boundaries. High court's original jurisdiction involves enforcement of fundamental rights, settlement of conflicts over election to the Union and state legislatures, and revenue jurisdiction. The jurisdiction for appeals applies to civil and criminal matters also vests with the High Court. On the civil hand, either a first or second appeal lies to the High Court.

The jurisdiction of the criminal appeal comprises of appeals from judgments of:

- a session judge, or an additional session judge where the sentence exceeds 7 years of imprisonment
- an assistant session judge, metropolitan magistrate or other judicial magistrate in certain certified instances other than 'petty' instances.

High Court's writ jurisdiction implies issuing writ orders for the enforcement of fundamental rights as well as legal rights. High Court also has the authority to oversee all other courts and tribunals, with the exception of those dealing with military forces. It can also frame laws and issue guidelines with directions for speedier and more efficient judicial remedy from time to time. The High Court also has the authority to transfer cases from subordinate courts on the interpretation of the Constitution to itself.

⁷³ Article 214

⁷⁴ Article 215

⁷⁵ Article 231

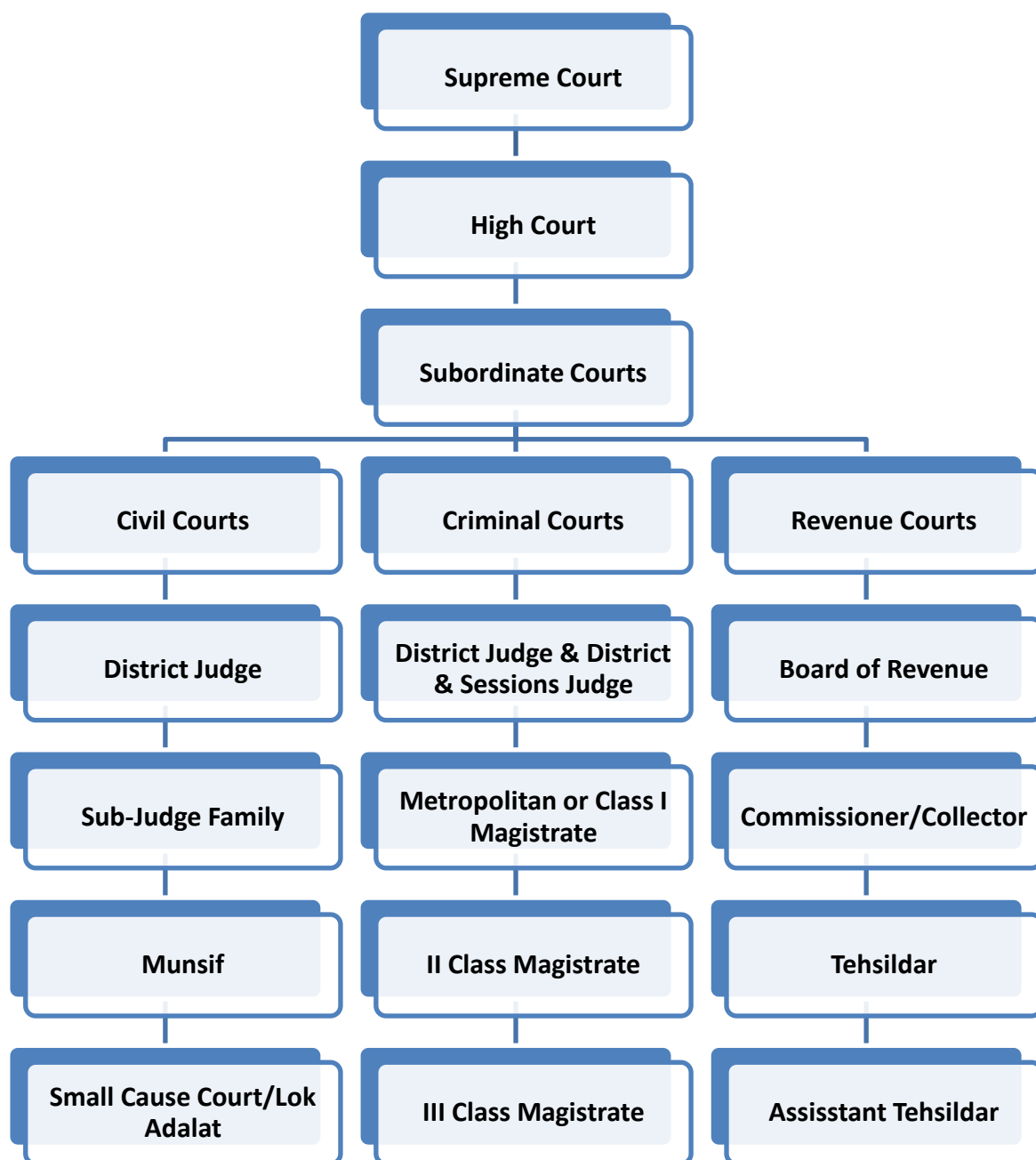
By legislation, however, Parliament may extend the authority of a High Court to any Union Territory, or exclude from it the authority of a High Court. The original and appeal jurisdiction of the High Courts is also limited by the establishment of Central Administrative Tribunals for services within the Union and it has no power to invalidate any Central Act, rule, notification or order issued by any Union administrative agency.

Subordinate Courts

Subordinate courts are referred to as the hierarchies of courts that are subordinate to the High Court. It is for the governments of the state to enact laws for subordinate courts to be established. These subordinate courts' nomenclature varies from state to state, but the organizational structure is widely uniform. There are district courts for each district which are below the high courts, appeal from which lies to the High Court.

Under the district courts, there are smaller courts such as the Additional District Court, the Sub Court, the Munsiff Magistrate Court, the Special Judicial Magistrate Court of Class II, the Court of Special Judicial Magistrate of Class I, the Court of Special Munsiff Magistrate for Factories Act and labor laws, etc. Below these courts are the Panchayat Courts. However, these are not regarded to be courts under the jurisdiction of the criminal courts. Special status may be given to the district courts for the recognition of original issues. The Governor makes appointments for the district courts in consultation with the High Court. The appointment of individuals other than the District Judges to the judiciary of a State shall be rendered by the Governor in accordance with the regulations made by him in that regard after consultation with the High Court and the State Public Service Commission. The High Court exercises administrative power over the district courts and their subordinate courts in matters such as posting, promotions and leave to all individuals belonging to the state judiciary.

Further, the court structure is also classified as per the subject matter, namely, civil, criminal or revenue. The hierarchy of which is illustrated as below:



6. JURISDICTION

The word ‘jurisdiction’ is derived from two Latin words – ‘*iuris*’ meaning law and ‘*dicere*’ meaning to speak. It is the authority bestowed on a body to administer justice pertaining to the subject of the jurisdiction. In the context of law and justice, jurisdiction is the authority vested in the judicial system of a country to try, hear, adjudicate and decide disputes between parties or crimes, and to interpret the laws of the country. In most republic countries around the globe, the jurisdiction of a court is bestowed upon it by the constitution or legislations of such country. In India, jurisdiction of the courts is bestowed upon them by the Constitution of India.

Jurisdiction is generally divided on the basis of – territory, subject-matter or pecuniary limits. The jurisdiction of each court is defined by the Constitution or any of the Acts in force. Tribunals which deal with specialized matters derive their jurisdiction from the Act they are established under. This jurisdiction is generally to the exclusion of all other courts except the appellate and writ jurisdictions of the High Courts and the Supreme Court. For instance, the Debt Recovery Tribunal (‘DRT’) derives its jurisdiction from the Recovery of Debts and Bankruptcy Act, 1993 which excludes the jurisdiction of any other court from entertaining cases relating to debt given by banks and financial institutions.⁷⁶ Jurisdiction is generally defined by the legislature, an exception being arbitration. In arbitration, the parties may decide the jurisdiction of the arbitrator (akin to a judge) and the arbitrator has the authority to rule on its own jurisdiction as well.⁷⁷ Further, jurisdiction may also be discretionary. The Supreme Court, for instance, by virtue of Article 136 of the Constitution may by its own discretion allow the petitioner to proceed with his grievances in the form of a Special Leave Petition.⁷⁸ In such cases, the petitioner has to first prove to the Court why his matter must be heard. The Court, in this manner, decides on its jurisdiction first and then goes on to hear the merits of the case. Some jurisdictions may also require certain pre-conditions to be fulfilled. For instance, the Recovery of Debt and Bankruptcy Act, 1993 first requires the debt to originate from a bank or financial institution,⁷⁹ second it is requires to fulfill the minimum debt amount threshold (currently INR 10 lakhs)⁸⁰ and third must be within limitation period.⁸¹

As discussed before, jurisdictions may be of different kinds. Following are briefs explaining the same:

Territorial jurisdiction

Jurisdiction based on the physical location of a court is territorial jurisdiction. In India, Territorial jurisdiction is bestowed upon courts relating to territories within a state’s boundaries, territory within a

⁷⁶ Section 18, Recovery of Debt and Bankruptcy Act, 1993.

⁷⁷ Section 16, Arbitration and Conciliation Act, 1996.

⁷⁸ Article 136, Constitution of India.

⁷⁹ Section 17 (1), Recovery of Debt and Bankruptcy Act, 1993.

⁸⁰ Section 1 (4), Recovery of Debt and Bankruptcy Act, 1993.

⁸¹ Section 24, Recovery of Debt and Bankruptcy Act, 1993.

district's boundaries and territory within the national boundaries. High Courts are limited to exercise jurisdiction over disputes which occur within the boundaries of the state where such High Court is located. Similarly a District and Sessions Court exercises jurisdiction over disputes which occur within the boundaries of a district. The boundaries of a district and the territorial jurisdiction of a District and Sessions Court are defined by the State Government. Certain territorial jurisdictions may also include areas belonging to different states. For instance, National Company Law Tribunals ('NCLTs') established in different cities may cover areas of more than one state within their respective territorial jurisdiction. Certain Courts and Tribunals have territorial jurisdiction over the entire territory of India. For instance, the Supreme Court exercises jurisdiction over the territory of India and the National Company Law Appellate Tribunal ('NCLAT') exercises jurisdiction over all appeals cases emanating from the various NCLTs. It is also pertinent to note that Courts usually exercise a mix of different types of jurisdictions. For instance, a court may exercise territorial and appellate jurisdiction over certain matters. Such matters will have to satisfy both the territorial and appellate requirements in order for the court to entertain it.

Pecuniary Jurisdiction

Pecuniary jurisdiction relates to the monetary threshold to which a dispute should qualify into for a court to entertain it. For instance, to invoke the jurisdiction of the DRT, a dispute must have as its subject matter at least INR 10 lakhs. Pecuniary jurisdictions for District Courts are not consistent throughout the territory of India. High Courts have the authority to decide the pecuniary jurisdiction of the District Courts within its territorial jurisdiction. Therefore, District Courts belonging to different states may have different pecuniary jurisdictions. Even High Courts may not have the same pecuniary jurisdictions. This is because the pecuniary jurisdiction is decided by the respective Rules of the various High Courts. It is pertinent to note that pecuniary jurisdiction may only apply to original cases. It is applicable when a party decides to file a case for the first time. It may be in a District Court or the High Court according to the pecuniary jurisdictions of both. Also, similar to territorial jurisdiction, pecuniary jurisdiction is presented along with another type of jurisdiction, such as territorial jurisdiction, in relation to a court.

Jurisdiction based on subject-matter

Jurisdiction based on subject-matter is when the subject-matter of a dispute, for example – infringement of fundamental rights, determines the jurisdiction of a court. Writ jurisdiction, appellate jurisdiction and admiralty jurisdiction are sub-categories within jurisdiction based on subject-matter. Infringement of fundamental rights would invoke writ jurisdiction and may be presented in the High Court or the Supreme Court. Similarly, appellate jurisdiction relates to authority of certain courts to entertain appeal hearings. In civil jurisdiction, an appeal from a subordinate court lies to the District Court, an appeal from the District Court lies to the High Court and an appeal from the High Court lies to the Supreme Court. In each of

these cases, the relevant court is invoking its appellate jurisdiction. In case of tribunals, appeals from the NCLTs, irrespective of region of origination, go to the NCLAT. In slight contrast to this, appeals from a DRT may go to the regional Debt Recovery Appellate Tribunal ('DRAT'), thereby invoking both territorial and subject-matter based jurisdiction. Admiralty jurisdiction relating to maritime disputes may only be heard at the High Courts of the coastal states and appeals from them lie to the Supreme Court.

7. CIVIL SUIT

A civil suit is initiated on the institution of the plaint before the Civil court and is decided upon the principle of preponderance of probabilities unlike in criminal cases wherein the principle of beyond reasonable doubt is applied. The procedure involved in the civil suit proceedings and related aspects are explained in the document.

Plaint⁸²

The entire legal machinery under Civil Law is set in motion by filing of a plaint and, therefore, the plaint is the real point of institution of a civil suit and for initiation of pleadings.

The plaint should mandatorily contain the following information

- Name of the court to in which suit is to be instituted.
- The plaintiff's name, description and address of residence.
- The defendant's name, description and location of residence as much can be ascertained by the plaintiff.
- Where the plaintiff or defendant is a minor or of unsound mind then declaration for that purpose.
- the facts which constitute the cause of action and when it arose.
- Facts which prove the jurisdiction of the court.
- Relief claimed by the plaintiff.
- Where the plaintiff has permitted a set-off or waived a part of his claim, the amount so permitted to be waived.
- Statement of value for jurisdiction and court charges of the subject-matter of the plaint.

If the court discovers that the plaint should be submitted before some other court, the plaint should be transferred and to the plaintiff intimation should be provided.

Rejection of Plaint

The court has the authority to reject the complaint on the following grounds:

⁸² Order 7

- Where the cause of action is not disclosed
- Where the requested relief is understated and the plaintiff fails to correct the assessment within the prescribed time.
- If the relief is correctly valued but the court fee is not sufficiently paid and the plaintiff fails to pay the required amount.
- From the statements in the plaint, where the suit appears to be time-barred.
- If no cause of action is disclosed in the plaint.

In *Roopal Sathi v. Singh* 1982 3 SCC 487 it was held that when a plaint is rejected it should be rejected in entirety and not in parts. The rejection of the plaint on the aforementioned basis, however, does not prevent the plaintiff from presenting a fresh plaint.⁸³

Service of Summons

Summons is a tool used by the Court to initiate the civil suit or proceedings and is a means of gaining jurisdiction over the party involved in the suit. It is a process aimed at a proper officer mandating him to notify the person named, that an action has been initiated against him, in the court from which proceedings are issued, and that he is required to appear on a day named in such action, and to respond to the claim. Upon duly instituted suits, summons to appear and answer the claim can be issued to the defendant.

Defendant to whom a summons has been delivered may appear in person or by a duly instructed pleader or by a pleader accompanied by someone who can answer all issues.

The court may order the filing of written statement on the date of appearance and issue appropriate summons for that purpose in order to speed up the filing of the response and the adjudication of the claim. Under Order 8, Rule 10, failure to do so may lead in an ex-parte judgment.

Where the court is convinced that there is reason to assume that the defendant is trying to keep out of the way in order to escape service or that the summons cannot be served in a normal manner or for any other reason, the court shall order summons to be served by attaching a copy of the summons to the conspicuous portion of the house.⁸⁴ In order to speed up the summons service, one additional clause relates to the substituted service under which the court orders the service of summon through advertising in a newspaper, the newspaper shall be a regular newspaper circulating in the place where the defendant last lived or carried on his livelihood or worked for profit.⁸⁵

⁸³ Order 7, Rule 13, Code of Civil Procedure

⁸⁴ Order 5, Rule 20, Civil Procedure Code

⁸⁵ Order 20, Rule 1A, Code of Civil Procedure

Appearance of Parties

The defendant has to appear and answer on the day fixed in the summons and the parties shall attend the court unless the hearing is adjourned to a court-specified future day, if the defendant is absent from the court, the court can proceed ex parte. Where on such day it is discovered that the summons was not served on the defendant due to the plaintiff's inability to pay the court fee or postal fees, the court may dismiss the suit. The court may reject the suit where neither the plaintiff nor the defendant appears on the appointed day. This does not prohibit a new institution of suit for the same cause of action.

Ex-Parte Decree

Under the following conditions, a decree may be issued against the defendant without hearing him or in his absence or in the absence of his defense:

- Where a party from whom a written statement is required, fails to present it within the time authorized, the court shall pronounce a judgment against him or make such order as it thinks fit against the defendant.⁸⁶
- Where the defendant has not filed written statement, the court shall be entitled to give decision on the grounds of the facts contained in the plaint, except against persons with disabilities.⁸⁷
- Where the plaintiff appears and the defendant fails to appear when the suit is called for hearing and the summons is served in a proper manner, the court may issue an order to hear the suit ex parte.⁸⁸

If an ex parte decree is passed and the defendant proved the Court that he has been prevented by sufficient cause, the following remedies can be availed:

- Prefer an appeal against the decree.
- Request a review.
- Apply to set the Exparte Decree aside.

In *UCO Bank v. Iyenger Consultancy Services*, 1994 SCC 399 it was held that the words "Sufficient Cause" were not defined and will rely on the facts and circumstances of each case.

Interlocutory Proceedings

There is a significantly lengthy period between the initiation and disposal of litigation. Sometimes the court's intervention may be needed to keep the stance as it prevailed on the litigation date. The *status quo* of the matter has to be preserved and in order to do so the interlocutory orders are passed which are

⁸⁶ Order 8, Rule 10, Code of Civil Procedure

⁸⁷ Order 8, Rule 5(2), Code of Civil Procedure

⁸⁸ Order 9, Rule 6(1)(a), Civil Procedure Code

provisional, interim, temporary. They do not finally determine cause of action but only decide some intervening matter pertaining to the cause. Interlocutory orders of the following kind are passed:

- Arrest and attachment before judgment⁸⁹
- Temporary injunctions and interlocutory orders⁹⁰
- Appointment of receiver⁹¹
- Appointment of commissioner⁹²

Written Statement⁹³

The defendant has to file his defense in the written statement at or before the first hearing or at any moment permitted, if the defendant disputes the suit's sustainability or pleads that the transaction is void, it must be indicated specifically. A general denial of grounds asserted in the plaint is not enough and must be specific otherwise the facts not denied specifically will be deemed to be admitted. The denial should not be an evasive rejection, but it should be on the point of substance.⁹⁴ There was no time limit before the 2002 amendment in CPC to submit the defendant's written statement. By amendment 2002 in accordance with order 8 Rule 1 of C.P.C. defendant must submit written declaration within 90 days from the date of the summons service. Under this rule, it is the court's discretion that if the defendant fails to submit a written statement within a period of 30 days, he may file the same on that other day, which may be specified by the court, but no later than 90 days from the date the summons is served.

By Amendment 1999, in Rule 1-A of Order 8, it is the obligation of the defendant to create records on which he bases his defense or other records in his possession along with a list.

Production of Documents

Documents are the next phase of the suit after the defendant has filed a written statement. Both parties must file records in court that are in their possession. If parties rely on records that are not in their possession in that event, they must apply to the court to issue summons to the authority or persons in possession of those records. The parties must deposit the costs of production of such documents.

Party Examination⁹⁵

Party examination is a significant post-appearance phase. The court shall, at the first hearing of the suit, determine from each party or its pleader whether they accept or reject such allegations of fact as made in

⁸⁹ Order 38

⁹⁰ Order 39

⁹¹ Order 40

⁹² Order 26

⁹³ Order 8

⁹⁴ Order 8, Rule 5 Code of Civil Procedure

⁹⁵ Order 10

the plaint or written statement. It is necessary to record such admissions and denials. The exam may be an oral examination. If the party's pleader appearing refuses or is unable to answer any material question court, the court can order the party involved to be present in court. If the party does not stay in court, orders considered fit may be passed.⁹⁶

Discovery and Inspection

The aim of discovery and inspection of documents and facts is to allow the parties to prove the facts. With the court's leave, the plaintiff or defendant may submit written interrogations to examine opposing parties that are needed to be answered and linked to the issue.⁹⁷

Admission

Each party may call on the other party to accept any document saving any exception within seven days from the date of service of the notice.⁹⁸

Framing of Issues

The next step is to frame the issues. The job of framing issues is exclusively assigned to a judge. Issues are framed considering provisions of order 14, rule 1 of C.P.C. Issues can be issues of fact or issues of law.⁹⁹

Rule 1 sub rule (1) states, "Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other."

Sub rule (2) states, "Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense,"

Sub rule (3) States "Each material proposition affirmed by one party denied by other shall form subject of distinct issues."

Summoning and Attendance of Witnesses¹⁰⁰

On the date appointed by the court and not later than 15 days after the date on which issues are settled parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents.

⁹⁶ Order 10, Code of Civil Procedure

⁹⁷ Order 11

⁹⁸ Order 12

⁹⁹ Order 14

¹⁰⁰ Order 16

Hearing of Suits and Examination of Witnesses¹⁰¹

The plaintiff is entitled to have the first right to start unless the defendant acknowledges the facts alleged by the plaintiff and claims that the plaintiff is not entitled to any portion of the relief either in law or on some extra facts submitted by the defendant. Defendant has the right to start in such a situation. The plaintiff must state his case before the judge. The plaintiff must present the previously labeled proof. If no proof was previously labeled, the court will not consider it. Then the defendant's Advocate will cross-examine the plaintiff. Also the witnesses from the side of the plaintiff must appear in court, who is also being cross-examined by the lawyer of the defendant.

The defendant also introduces from his side the narrative backed by his witnesses and proof. The proof must be marked to the court previously; otherwise the court will not consider it. The defendant will then be cross-examined by the plaintiff's lawyer.

Argument

As quickly as there is evidence from both sides is complete, the suit will be held for argument. Once the proof has been presented and the plaintiff and defendant conduct cross-examination, both parties are permitted to submit a summary of their case and proof to the judge at the final argument meeting.

Judgment¹⁰²

Judgment refers to the judge's statement on the ground upon which the decree is passed.

The court shall pronounce decision in open court within one month of the completion of the case or as soon as practicable thereafter, and the judge shall set a day in advance for that time when the decision is to be pronounced.

Preparation of Decree¹⁰³

Once the decision is made by a judge, a decree shall be prepared by the clerk involved.

The decree shall be in agreement with the decision and it shall contain the suit number, the parties' names and descriptions, their registered addresses and the claim's details, and shall obviously indicate the relief given or any other determination of the suit.

¹⁰¹ Order 18

¹⁰² Order 20

¹⁰³ Order 20 Rule 6, 6A

Appeal, Review, Revision

Appeal

An appeal could arise from an order or from a decree. All orders are not appealable and in order 43 of the Code of Civil Procedure the full discretion of the appealable order have been provided. The appeal must be preferred before the appellate court within the prescribed limitation period. High Court's limitation period for appeal is 90 days and District Court's appeal is 30 days. If the limitation period is expired, the request for condonation of delay must also be moved.

Review

Under the Civil Procedure Code, the right to review has very restricted scope. A request for review can only be maintained if the following requirements are met,

- If it includes a decree or order from which no appeal is permitted or is not preferred if it is permitted.
- The appellant was concerned on the ground that, owing to the discovery of a fresh and significant issue of proof which, after due diligence had been exercised, was not within his understanding or could not be generated by him at the moment of the decree or because of some error, apparently in the presence of the record, or for any reason adequate, he wished to obtain a review of such decree. Once any review request has been given, the other party will be given a chance to be heard.

Revision

Under certain conditions, the High Court may interfere in any case decided by the subordinate court by virtue of its revision jurisdiction under certain cases.

The High Court may request the record of any subordinate court case in which there is no appeal if such subordinate court appears:

- To have practiced the jurisdiction not vested in it by legislation or
- Not having exercised such a jurisdiction which is vested in it, or
- To have behaved illegally in the practice of their authority; or with material irregularity.

Execution of Decree¹⁰⁴

Execution is the means by which a decree-holder compels the judgment-debtor to execute, as the case may be, the mandate of the decree or order. It allows the decree-holder to recover the judgment's fruits. The execution is complete when, by decision, decree, or order, the judgment-creditor or decree-holder receives cash or anything else given to him.

8. DECREE

Definitional Dimension

The purpose of law is to deliver justice and to adjudicate a conflict in favor of a litigant does not in itself imply full fulfillment of the responsibilities of the state under the administration of justice. The advantages that the adjudication provides must effectively reach the litigant. Then alone can continue his belief in the structure, which is the strongest basis for the system's growth, survival, and development.

A decree is a legal outcome of a specific act that the competent court pronounces after weighing both sides of the situation, and it is a confirmation that the order of the court is being executed.

Decree is defined in accordance with Section 2(2)¹⁰⁵ and is a formal expression that gives for the determination of the interests of both sides in a conclusive way with regard to a controversial issue or a civil suit. Therefore, the vital components of a decree are:

- Adjudication
- Adjudication should be of a suit
- Conclusive determination of the rights of the parties with regard to all or any of the disputed issues
- Decree may be either preliminary or final
- Such adjudication should be formally expressed

Furthermore, the rejection of a plaint is a decree, the determination of any issue under Section 144 of CPC is also a decree. A decree is said to be nullity if a court has no inherent jurisdiction to pass it. But the following fall outside the ambit of decree:

- Any adjudication from which an appeal arises as an appeal from an order
- Any order of dismissal for default

¹⁰⁴ Order 21

¹⁰⁵ Code of Civil procedure, 1908

Preliminary Decree

A preliminary decree determines the parties' rights in regard to all or any of the disputed issues in the suit, but does not dispose of the suit in its entirety. Preliminary decree is a phase in the determination of the parties' rights that are eventually to be decided by a final decree.¹⁰⁶ The preliminary decree is independent of the final decree.

A preliminary decree is issued in suits of possession of property and *mesne* profits, in suits of administration, in suits of preemption, in suits of dissolution of partnership, in suits of partition, in suits of mortgage, in suits of sale, etc. but this list is not exhaustive.¹⁰⁷

The following provisions allow the Court to pass Preliminary decree

- Under Order 20, rule 2 for suit for possession and mense profits.
- Under Order 20, Rule 13 for Administration Suits.
- Under Order 20, Rule 14 for suit for pre-emption.
- Under Order 20, Rule 15 for dissolution of partnership.
- Under Order 20, Rule 16 for suits for accounts between principal and Agent.
- Under Order 20, Rule 18 for suit for partition and separate possession.
- Under Order 34, Rule 2-3 for foreclosure of mortgage
- Under Order 34, Rule 4 -5 for the sale of mortgaged property.
- Under Order 34, Rule 7-8 for redemption of mortgage.

Final Decree

A decree is said to be final:

- Where, within the prescribed period, no appeal is lodged against the decree and the matter has been decided by the decree of the highest court
- Where the decree, to the extent that it is passed by the court, disposes the case in its entirety
- When it finally resolves all the controversial issues between the parties and nothing else remains to be decided.

The decree forms the latter part of the judgment and is extracted from the same after obtaining the basic results of the case. The date of the decree is the judgment date to facilitate the execution process.

¹⁰⁶ Shankar v. Chandrachud

¹⁰⁷ Narayanan v. Laxmi Narayan AIR 1953

A decision of an administrative nature or an order dismissing a default suit cannot be described as a decree because it does not deal with the issue in a judicial manner. Order passed by a non-court officer is not by decree.¹⁰⁸

The decree should be passed in relation to a matter raised in a suit. Decree is passed in a civil proceeding which is initiated by a presentation of a plaint, a tribunal's decision although defined as a 'decree' under the Act is a decree issued by the tribunal and not the court.¹⁰⁹

The words 'formal expression' means that it must be intentional and granted in the way authorized by law. Decree follows the judgment and must be drafted separately.¹¹⁰ On the other hand, an 'order' is the official expression of a civil court's decision, which is not a decree.

Execution of a Decree

There are diverse meanings affiliated to the term 'Execution' It means, in its broadest sense, enforcing or giving effect to judgments or court orders. In a narrower sense, it means enforcing those orders or judgments by a public official under the court's orders and directives.¹¹¹ Execution is the act of executing a court or other tribunal's final judgment. The writ authorizing a specific officer to implement such judgment is called execution.¹¹² In the rational and practical sense execution is the formal method prescribed by law by which the parties entitled to the advantage of the judgment or any other equivalent commitments may acquire that benefit.¹¹³ Execution is the rapid phase of a lawsuit by which the possession / recovery of anything / amount retrieved by the judgment is made. It is the final process in the civil suit.

The term execution encompasses all the suitable means by which a decree is implemented and involves all procedures and proceedings in support of or in addition to execution.¹¹⁴

The Civil Procedure Code does not define the term "Execution." It is the enforcement by the judicial system of decrees and orders in order to allow the holder of the decree to realize the benefits of the decree.¹¹⁵

Different Types of Decrees

The various types of decrees that can be passed under the Civil Procedure Code are as follows

¹⁰⁸ DEEP CHAND V/s. LAND ACQUI, OFFICER, (1994) 4 SCC 99 (102).

¹⁰⁹ DIWAN BRUS. V/s. CENTRAL BANK OF INDIA. AIR 1976 SC. 1518

¹¹⁰ SHAKUNTALADEVI V/s. KUNTALKUMARI, AIR 1969 SC 575

¹¹¹ HALSBURY'S LAWS OF ENGLAND, 4th EDITION

¹¹² BOVVIET'S LAW DICTIONARY

¹¹³ BINGHAN JUDGEMENT AND EXECUTION REFERRED BY BANERJEE ON LAW OF EXECUTION AT PAGE 2

¹¹⁴ RAMNARAYAN V/s. ANANDILAL AIR 1970 M P 110 AT 118

¹¹⁵ STATE OF RAJASTHAN V/s. SAVAKSHA AIR 1972 GUJARAT 1719

- Decree in original is the decree which does not fall under any specific class listed below.
- Preliminary Decree as defined above is passed when further proceedings have to be taken before the suit is finally disposed off and they are not executable. It is only the final decree which can be executed.¹¹⁶
- Final Decree is passed when adjudication process is finalized and completely disposes off the Suit.¹¹⁷
- Partly Preliminary and Partly final is a decree for passed in relation to possession and *mesne* profits. It can be preliminary for *mesne* profits and final for possession.
- Order rejecting a plaint also comes within the ambit of decree but excludes the order returning a plaint.
- Order or adjudication determining question under section 47 or section 144 Order 47 which deals with questions to be determined by court executing decree and under Section 144 with application for restitution.
- Consent Decree is decree which can never be a contract even though it requires free consent of both the parties. It is obtained as a result of adjudication and reason of such adjudication is consent of parties.¹¹⁸
- Exparte Decree is a decree which is passed in the absence of a Defendant.
- Decree passed in appeal is an appellate decree although an appeal is Continuation of litigation between the parties.
- Decree on compromise petition is passed in petition filed by both parties.
- Conditional Decree is a decree with inbuilt conditions forming part of the decree.

Under the Civil Procedure Code Preliminary Decrees can be passed under following provisions.

Courts Which May Execute the Decree

Under Section 38 of the CPC, the basic guidelines are that the decree can be executed either by the Court that passed it, or by the Court to which it is sent for execution.

The phrase 'Court which passed the decree ' need to be further elucidated and the phrase involves the following courts:

- The court that effectively and actually passed the decree (Court of first instance)
- Court of First-instance in an appeal decree.

¹¹⁶ VENKATTA REDDY V/s. PETTY REDDY, AIR 1963 SC 992

¹¹⁷ SHANKAR V/s. CHANDRAKANT, AIR 1995 SC 1211

¹¹⁸ TRIBHUVAN LALLUBHAI SHAH V/s. CHHITALAL SHAH, AIR 1963 GUJARAT 256

- First-instance court if the court that would have jurisdiction to try the suit at the moment of execution ceases to function.
- Where the court of first instance has ceased to have jurisdiction to execute the decree, the court that would have had jurisdiction to try the suit at the time of execution.¹¹⁹

For instance, If court A passes the decree and subsequently part of that area within that court's jurisdiction is transferred to court B, the Supreme Court held that the court that actually passed the decree does not lose the jurisdiction to execute only because the subject matter is transferred to the jurisdiction of any other court. The view that B court can also implement the decree is not very evident as there are conflicting High Court judgments on this point.¹²⁰

As a general law of territorial jurisdiction is a prerequisite for the execution of a decree by a court. It cannot be executed by the court that passed the decree or the court to which it is sent for execution in regard of assets outside their respective territorial jurisdiction. Another significant point is that a decree issued by a court without jurisdiction is nullity and its unconstitutionality can be established whenever and wherever it is required, even at the execution stage. A jurisdictional defect, whether pecuniary or territorial hits on the very jurisdiction of the court to pass a decree and such a defect cannot be eradicated even by the consent of the parties.¹²¹

An executing court is generally not required to see behind the decree and must execute the decree as it is. However, it may investigate the question of whether the decree was passed by a court without jurisdiction and may not execute the decree if it so established.¹²² The objection with respect to the jurisdiction dispute must be raised previously and the execution may be continued if the judgment debtor has not raised any objection after receiving the execution request. Objections to such jurisdictions are raised mechanically, depriving the holder of the decree its fruits.

With regard to territorial jurisdiction, the decree cannot be executed if such a jurisdiction is missing. The High Court has no authority to attach or sell property outside the territorial boundaries of its Civil Jurisdiction.¹²³ On request of the decree holder, the court which passed the decree may send it to another court of competent jurisdiction for execution under the provisions pertaining to the transfer of the decree.

9. APPEALS

Almost all the jurisdictions recognize the provisions with respect to appeal. The right to appeal under the Civil Procedure Code is not naturally or inherently accompanied with the litigation process but can be

¹¹⁹ RAMAKUTTY V/s. AVARA 1994 2 SCC 642.

¹²⁰ MERLA RAMANMA V/s. NALLPA RAJU AIR 1956 SC 87 591

¹²¹ KIRAN SINGH V/s. CHAMAN AIR 1954 SC 840

¹²² KUBER BANK LTD, V/s. STATE OF WEST BENGAL 63 C.W.N. AT PG-21

¹²³ DEKUNIA BANKING CORP. 58 OWN AT PAGE 61

invoked under the situations laid down in the said statute for such purpose. Part VII of the Code of Civil Procedure, 1908 lays down provisions with respect to appeal in civil matters.

Introduction – Appeal from Original Decree

Every person who is aggrieved by the order passed by a subordinate court exercising original jurisdiction can prefer an appeal to the Court who is authorized to hear appeals from the decisions of such subordinate Court.¹²⁴ Appeal can be preferred against the decree which is passed *ex parte*.¹²⁵ But parties which have led to the passing of consent decree cannot prefer an appeal to the appellate authority.¹²⁶ Appeal can be admitted only when it involves a question of law against a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed Rs. 10000. It is to be noted that no appeal can be admitted to the appellate authority when the party did not appeal against the preliminary decree and the same is being contested after the passing of final decree.¹²⁷ The appellate court may remand a case to a trial court if the latter has dispensed of the case without recording any findings. The decision of the appellate authority is conclusive. If an appeal under this provision is heard by a bench of multiple judges, the opinion of the majority will be considered.¹²⁸ In the absence of a majority, the original decree will stay. Where the bench digresses on any point of view, the same may be determined by any number of the remaining judges of the court, and the decision shall be taken by a majority of the judges hearing the appeal, which includes the judges who have heard it originally. The judgment may confirm, modify or reverse the decree.

Who Can File An Appeal?

Any of the following persons can file an appeal:

1. Any person who is a party to the original proceeding or his/her legal representatives.
2. Any person claiming under such party or a transferee of interests of such party.
3. Any person appointed by the court as the legal guardian of a minor.
4. Any other aggrieved person after taking leave of the court.

¹²⁴ Section 96(1)

¹²⁵ Section 96(2)

¹²⁶ Section 96(3)

¹²⁷ Section 97

¹²⁸ Section 98

The following persons cannot file an appeal

1. A party which has relinquished its right of appeal as per an agreement which is clear and unambiguous.
2. A party which has availed the benefits under a decree.
3. Parties with a consent decree. Consent, in this case, could be a lawful agreement or compromise, or could even be presumed from the conduct of the parties.
4. Parties whose factum or compromise is in dispute or hasn't been formulated.
5. Parties involved in petty cases.
6. No legal representatives are entitled to file an appeal against a deceased person.

Memorandum of Appeal

Any appeal under these provisions must be supported with a memorandum of appeal, which is a document comprising of the grounds of appeal. The constituents of a valid memorandum of appeal include:

1. The grounds for filing an appeal.
2. Signature of the appellant or his/her pleader.
3. The attachment of the certified copy of the original judgment.
4. The remittance of the decretal amount or security (in case of a money decree).

The appellant, with respect to this provision, is not entitled to take any grounds or objection except the ones mentioned in the memorandum. However, the court may accept such objections on its own accord, provided the opposite party is provided with adequate opportunities to contest such grounds. The court has the right to reject or amend any memorandum which it finds to be inappropriate. The court shall record the reasons for such rejection.

Remand of a Case

Remand, in this context, refers to the reverting of a case. The appellate court may revert the case to the trial court if the latter has disposed the suit on a preliminary point without recording any findings.¹²⁹ The appellate court may also demand the trial court to admit the suit in its original number in the register of civil suits. The evidence (if any) recorded in the original suit could be used as evidence if the case is remanded to the trial court. An order of demand disqualifies the verdict of the lower court and is

¹²⁹ Section 105

appealable. On the other hand, the appellate court is not entitled to remand a case if the lower court has misconceived the evidence or, the lower court has provided a verdict on insufficient material.

Furnishing of Additional Evidence¹³⁰

The general course of law doesn't allow any parties to an appeal to produce additional evidence, be it oral or documentary. However, the appellate court may permit the same under the following circumstances:

1. If the lower court declined the acceptance of any evidence despite having the grounds to accept the same.
2. The party adducing the evidence substantiates that the evidence was not within his/her knowledge despite exercising due diligence earlier.
3. If the party substantiates that proper evidence could not be produced by him/her in spite of exercising due diligence.
4. The appellate court finds it essential to examine any document or witnesses to facilitate the adjudication of the case

Decree of the Appellate Court

Decree refers to the legal implications of a particular act. The decree of the appellate court shall include:

- 1) The date of the judgment.
- 2) The number of the appeal.
- 3) The names and description of the parties.
- 4) The grant of relief and any other adjudication made.
- 5) The total cost incurred.
- 6) The property from which the cost was incurred.
- 7) The property from which the cost will be payable.
- 8) The proportion of payment of costs.
- 9) Signature and date of the judges.

Second Appeal

Section 100 of the Civil Procedure Code provides that an appeal can be moved to the High Court from every decree passed in appeal by any subordinate Court if the High Court finds that the case includes a substantial question of law.

¹³⁰ Section 107(d)

Taking this into context, the memorandum of appeal must clearly state the substantial question of law in this appeal. If the High Court deems it to be satisfactory, it may go on to formulate the pertinent questions, based on which the appeal would be heard. Also, the High Court may hear the appeal on any other substantial question of law not formulated by it if it feels that the case involves such question.

It may be noted that a second appeal is only meant for questions of law and hence cannot be made on the grounds of an erroneous finding of fact. On the same page, in the absence of any errors or defects in the procedure, the finding of the first appellate court will be considered as final, if the particular Court produces evidence to support its findings.

In another important note, second appeals cannot be made for a decree if the subject matter of the original suit is intended to recover a sum of Rs. 25,000.

Appeals from Orders

Appeals from orders could be placed with respect to the following pronouncements on the grounds of any defect or irregularity in law:

1. Any orders under Section 35A of the Code allowing special costs, and orders under section 91 or 92 refusing leave to institute a suit of the kind referred to in Section 91 or Section 92.
2. Any orders under Section 95, which involves the compensation for obtaining attachment or injunction on insufficient grounds.
3. Orders under the code which deals with the imposition of fine, direction of detention or arrest of any person except in execution of a decree.
4. Appealable orders as prescribed under Order 43, R.I. However, appeals cannot be filed based on any order enlisted in clause (a) and from any order passed in appeal under Section 100.

Appeals to the Supreme Court¹³¹

Appeals to India's highest jurisdictional body can be made if the former considers the case to be appropriate for an appeal to the Supreme Court or when a special leave is granted by the Supreme Court itself. Appeals can be filed to the Supreme Court by filing a petition with the court which enacted the decree, upon which the petition would be heard and disposed of within a period of sixty days. Petitions submitted for this purpose must state the grounds of appeal. Also, it must include a plea for the issuance of a certificate stating that the case involves a substantial question of law which needs to be decided by the Supreme Court.

¹³¹ Section 159

The opposite party will be provided with an opportunity for raising any objections against the issue of such certificate. The petition would be disposed of if the applicant is denied the certificate. If accepted, the appellant would be required to deposit the required security and costs within a prescribed time-frame.

After the applicant performs the above obligations, the court from whose decision an appeal is preferred shall declare the appeal as admitted, an intimation of which will be addressed to the respondent. Further to this, the jurisdictional body forwards a precise copy of the record under seal and furnishes the copies of such papers in the suit.

10. WRIT JURISDICTION

Introduction

The writ jurisdiction of the Supreme Court and High Courts in India arises out of Articles 32 and 226 of the Constitution, respectively and can be affiliated to the maxim “*ubi jus ibi remedium*” which means that wherever there is right, there exists a remedy for the protection of the same. Under Article 32, the Supreme Court may issue the prerogative writs named therein for the enforcement of any of the Fundamental Rights conferred by Part III of the Constitution. The same power to issue writs for enforcement of Fundamental Rights is also conferred on the High Courts by Article 226. A large number of the Fundamental Rights are guaranteed against the “State”. They can thus be enforced against the “State” by proceedings under Articles 32 and 226 of the Constitution. Thus, the definition of “State” in Article 12 assumes great significance, as any entity that is held to fall within that definition, has then to be prepared to desist from acting in breach of the rights enumerated in Part III of the Constitution, which the “State” is to guarantee, or face appropriate proceedings under Articles 32 or 226.

Article 226 of the Constitution also gives the High Courts the right to issue writs “for any other purpose” i.e other than for the enforcement of Fundamental Rights. Thus, the writ jurisdiction of the High Courts is wider than that of the Supreme Court. Writs can be issued by the High Courts against any “person or authority”. Now, the term “authority” in Article 226 has been given a wider interpretation than the term “authorities” appearing in Article 12. “Authority” as it appears in Article 226 has been interpreted by the Supreme Court to include any person performing a public duty, and not just statutory authorities or instrumentalities of the “State”.¹³² Thus, to fall outside the writ jurisdiction of the High Courts and the Supreme Court, an entity must satisfy two tests — that it is not “State” under Article 12, and also that it is not a “person or authority” under Article 226.

¹³² Shri Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvana Jayanti Mahotsav Smarak Trust v. V.R Rudani, (1989) 2 SCC 691

Article 32: Right to Constitutional Remedies

Article 32 of the Constitution of India, 1950 attracted for the protection of Fundamental Rights guaranteed under Part III is stated as below:

“32. Remedies for enforcement of rights conferred by this Part

- 1. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed*
- 2. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part*
- 3. Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)*
- 4. The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution”*

"If I was asked to name the particular Article in this Constitution as the most important without which this Constitution would be a nullity, I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it. This in my judgment is one of the greatest safeguards that can be provided for the safety and security of the individual."

- Dr. Ambedkar

It does not provide a simple protection of these rights but the remedy available under this article is ‘guaranteed’. It means that once it is established that a particular fundamental right as provided in the constitution is violated or breached, its remedy is guaranteed under this article. The Supreme Court is not empowered to refuse to hear the writ petition on any ground whatsoever it is. However, the relief would flow from the merits of the writ petition filed in this regard.

Under this Article, the Supreme Court is empowered to relax the traditional rule of *Locus Standi* and allow the Public Interest Litigation (PIL) at the instance of public-spirited citizens. The Supreme Court can provide relief to various types of litigants such as bonded labour, undertrial prisoners, victims of police torture, etc. The Supreme Court may also award exemplary damages by exercising its power under Article 32.¹³³

¹³³ Bhim Singh v. State of Jammu & Kashmir, AIR 1986 SC 494

Article 226 as available in the constitution is reproduced below:

“226. Power of High Courts to issue certain writs —

- 1. Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including, quo warranto and certiorari, or any of them for the enforcement of any of the right conferred by Part III and for any other purpose.*
- 2. The power conferred by (1) to issue directions, orders or writs in any government, authority or person may be exercised by any High Court exercising jurisdiction in relation to the territories within the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*
- 3. Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made or in any proceedings relating to petition under (1) without—*
 - a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and documents in support of the plea for such interim order; and*
 - b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within the period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of the period, before the expiry of next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.*
- 4. The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by (2) of Article 32.”*

The Supreme Court refrains from acting under Article 32 of the Constitution of India, if the party has already moved to the High Court under Article 226. Similarly, when a party had already moved High Court with a similar complaint and for the same relief and failed, only an appeal can lie to the Supreme Court and no fresh proceedings can be initiated under Article 32.

Article 32 is not to be invoked for infringement of a personal right of contract, nor is to be invoked for agitating questions which are capable of disposal under special enactments.¹³⁴

Types of Writs

There are five types of writs as defined under Article 32, namely, *Habeas Corpus*, *Quo Warranto*, *Mandamus*, *Certiorari* and Prohibition. These are known as prerogative writs in English Law because they had originated in the King's prerogative power of superintendence over the due observance of law by his officers and tribunals. The prerogative writs are extra-ordinary remedies intended to be applied in exceptional cases in which ordinary legal remedies are not adequate.

1.1.1. *Habeas Corpus*

The Latin term *habeas corpus* means "you must have the body". By this writ the court directs the person or authority who has detained another person to bring the body of the prisoner before the court so as to enable the court to decide the validity, jurisdiction or justification for such detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or the person so detained. The great value of the writ is that it enables immediate determination of the right of a person as to his freedom.

By virtue of Article 22, a person arrested is required to be produced before a magistrate within 24 hours of his arrest, and failure to do so would entitle the arrested person to be released. *Habeas corpus* cannot be granted where a person has been committed to custody under an order from a competent court when *prima facie* the order does not appear to be without jurisdiction or wholly illegal. Writ of *habeas corpus* can be invoked not only against the State but also against any individual who is holding any person in unlawful custody or detention and hence can be issued to private bodies as well which are found outside the purview of "State" as defined under Article 12. In such circumstances it is the duty of the police to make necessary efforts to see that the person detained is released.

An application for *habeas corpus* can be made "by any person" on the behalf of the prisoner/detenu as well as the prisoner/detenu himself. In *Sunil Batra v. Delhi Administration*¹³⁵, a convict had written a letter to one of the Judges of the Supreme Court alleging inhuman torture to a fellow convict. The Court treated the letter as a petition of *habeas corpus* and passed appropriate orders. Hence, Courts can also act *suo motu* in the interests of justice on any information received by it from any quarter/source. The general principle is that a person illegally detained in confinement without legal proceedings is entitled to seek the remedy of *habeas corpus*.

¹³⁴ C.K. Achuthan v. State of Kerala, AIR 1959 SC 490

¹³⁵ AIR 1980 SC 1579

However, the writ of habeas corpus is not issued in the following cases:

- Where the person against whom the writ is issued or the person who is detained is not within the jurisdiction of the Court.
- To secure the release of a person who has been imprisoned by a Court of law on a criminal charge.
- To interfere with a proceeding for contempt by a Court of record or by Parliament.

Thus writ of *habeas corpus* is a bulwark of personal liberty. The said writ has been described as “a great constitutional privilege” or “first security of civil liberty”. The most characteristic element of the writ is its speedy and effective nature for having the legality of detention of the person enquired and determined by the Court.

In *Gopalan v. Government of India*¹³⁶, the Supreme Court ruled that the earliest date with reference to which the legality of detention may be examined is the date on which the application for the same is made to the court.

1.1.2. Quo Warranto

The term *quo warranto* means “what is your authority” or “by what authority”. The writ of *quo warranto* is used to judicially control executive action in the matter of making appointments to public offices under relevant statutory provisions. The writ is also used to protect a citizen from the holder of a public office to which the holder has no right. The writ calls upon the holder of a public office to show to the court under what authority he is holding the office in question. If he is not entitled to the office, the court may restrain him from acting in the office and may also declare the office to be vacant. The writ proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right.

Quo warranto prevents illegal usurpation of public office by an individual. The necessary ingredients to be satisfied by the Court before issuing a writ of *quo warranto* are:

- That the office in question must be public
- That the office is created by the constitution or a law
- That the person holding the office is not legally qualified to hold the office else it would be in clear infringements of provisions of the constitution or the law.

It is the person against whom writ of *quo warranto* is directed, who is required to show by what authority the person is entitled to hold the office. While issuing such a writ, the High court merely makes a public

¹³⁶ 1966 SCR (2) 427

declaration of the illegality of the appointment and will not consider other factors, which may be relevant for issuance of a writ of *certiorari*.

1.1.3. *Mandamus*

The meaning of *Mandamus* is “we command” and the writ of *Mandamus* is issued as a command issued by a court to an authority directing it to perform a public duty imposed upon it by law. The writ is "issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly". For instance, when a body omits to decide a matter which it is bound to decide, it can be commanded to decide the same.

Mandamus can be issued when the Government denies to itself a jurisdiction which it undoubtedly has under the law, or where an authority vested with a power improperly refuses to exercise it. The function of *mandamus* is to keep the public authorities within the limits of their jurisdiction while exercising public functions. *Mandamus* can be issued to any kind of authority exercising any type of function-administrative, legislative, quasi-judicial or judicial. It is used to enforce the performance of public duties by public authorities and cannot be issued when the Government has no duty under the law. For example, when an authority fails in its legal duty to implement an order of a tribunal, *mandamus* can be issued directing the authority to comply with the order so issued.

It is a discretionary remedy and the High Court may refuse to grant *mandamus* where an alternative remedy is available for the redressal of the injury complained of. *Mandamus* is not refused on the ground that there is an adequate alternate remedy where the petitioner complains that his fundamental right is infringed.¹³⁷ The courts are duty bound to protect the fundamental rights and therefore *mandamus* is issued. It is only when *mandamus* is issued "for any other purpose" that the existence of an alternate remedy bars its issuance.¹³⁸ *Mandamus* will not, however, be refused when ordinary civil proceedings or administrative appeals or revision do not provide an equally effective and convenient remedy. Thus if the alternative remedy imposes a heavy financial burden on the petitioner, it will not be regarded as a ground for refusing *mandamus*.¹³⁹ In India, *mandamus* will lie not only against officers who are bound to do a public duty but also against the Government itself as Article 226 and 361 provided that appropriate proceedings may be brought against the Government concerned. This writ is also available against inferior Courts or other Judicial bodies when they have refused to exercise their jurisdiction and thus to perform their duty

¹³⁷ *State of Bombay v. United Motors*, A.I.R. 1951 S.C. 252; (1953) S.C.R. 1069

¹³⁸ *Veerappa Pillai v. Raman Rtimin Ltd.*, A.I.R. 1952 S.C. 192; (1952) SCR 583

¹³⁹ *Himmatlal v. State of M.P.*, AIR. 1954 S.C. 403; (1954) S.C.R. 112.

.Further, *Mandamus* will not be granted against the following persons:

- The President or the Governor of a State, for the exercise and performance of the powers and duties of his Office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.
- A private individual or body whether incorporated or not except where the State is in collusion with such private party, in the matter of contravention of any provision of the Constitution or a Statute or a Statutory instrument.
- It will not lie against the State legislature to prevent from considering enacting a law alleged to be violative of constitutional provisions.
- It will not lie against an inferior or ministerial officer who is bound to obey the orders of his superiors

In *Bombay Municipality v. Advance Builders*¹⁴⁰, the Court directed the municipality to implement a planning scheme which was prepared by it and approved by the Government under the relevant statute but on which no action was taken for a considerable time.

1.1.4. Certiorari and Prohibition

These writs are designed to prevent the excess of power by public authorities. Formerly these writs were issued only to judicial and quasi-judicial bodies. *Certiorari* and Prohibition are regarded as general remedies for the judicial control of both quasi-judicial and administrative decisions which affect rights of persons.

A writ of *certiorari* or a writ in the nature of *certiorari* can only be issued by the Supreme Court under Article 32 and a High Court of competent jurisdiction under Article 226 to direct inferior courts, tribunals or authorities to transmit to the court the record of proceedings disposed off or pending therein for scrutiny, and, if necessary, for quashing the same. But a writ of *certiorari* can never be issued to call for the record or papers and proceedings of an Act or Ordinance and for quashing such an Act or Ordinance.

Certiorari under Article 226 is issued for correcting gross error of jurisdiction i.e. when a subordinate court is found to have acted:

- without jurisdiction or by assuming jurisdiction where there exists none, or
- in excess of its jurisdiction by over stepping or crossing the limits of jurisdiction, or
- acting in flagrant disregard of law or rules of procedure or acting in violation of principles of natural justice where there is no procedure specified and thereby occasioning failure of justice.

¹⁴⁰ 1972 SCR (1) 408

A writ of prohibition is normally issued when inferior court or tribunal:

- proceeds to act without jurisdiction or in excess of jurisdiction, or
- proceeds to act in violation of rules of natural justice, or
- proceeds to act under a law which is itself ultra vires or unconstitutional, or
- proceeds to act in contravention of fundamental rights.

There is a fundamental distinction between writs of Prohibition and *Certiorari*. They are issued at different stages of proceedings. When an inferior court takes up a hearing for a matter over which it has no jurisdiction, the person against whom hearing is taken can move the superior court for writ of prohibition on which order would be issued forbidding the inferior court from continuing the proceedings. On the other hand, if the court hears the matter and gives the decision, the party would need to move to superior court to quash the decision or order on the ground of want of jurisdiction.

11. MODELS OF JUSTICE

Introduction

Two types of models are primarily used in order to inculcate the process that finally leads to the delivery of justice, namely, the adversarial system and the inquisitorial system. The models act as guidelines and do not provide a stringent framework that needs to be compulsorily complied with. The way these systems are discriminated against each other can be ascertained through the control of the party or the Court on three major aspects of the litigation process, namely, initiation of the action, gathering evidence and determining the sequence and nature of the proceedings. 9

Adversarial System

Introduction

In a common law system, an adversarial approach is used to investigate and adjudicate guilt or innocence. The English Court procedure did not recognize the representation of the defendant through an attorney and they had to represent themselves through their personal representations which led to disadvantage of the persons who were not guilty as they had to represent themselves in the capacity of the accused and witness and the trial procedure put pressure on the accused to speak in person about the charges and the evidence leveled against him.¹⁴¹ In such circumstances even if he has a good defense, he may not be in a position to highlight it instead he unknowingly, to a certain extent disclose the information, which he has and get himself prosecuted. So, the concept of legal representation was not recognised. In 1696, the

¹⁴¹ John H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford University Press, 2003, at.20

Treason Trial Act was enacted which recognised the right to the defense counsel and by 1730 judges began to depart from the rule forbidding defense counsel in cases of ordinary felony.¹⁴² After 1730, the altercation trial gave way to a radically different style of proceeding, the adversary criminal trial under which the legal representation was recognised. Lawyers of the sides, prosecution and defense supplanted the victim and the alleged accused. The advocates prepared the case in advance, conducted the examination and cross-examination of witnesses and raised question of law in the court. The judge became a stranger to the proceedings and the accused was silenced. Hence, lawyer free trial transformed into a lawyer dominated trial.

Characteristic Features of the Adversarial System

The adversary system has five main characteristics, namely, conflict resolution, relatively passive and neutral role of the judge, active role of the counsels for each litigant, obligation of the accuser to establish the complaint beyond reasonable doubt and separate agency for investigation. These main features are the main differences between two systems.

Conflict Resolution System

The adversarial system is a conflict resolution mechanism which involves the two opposing parties, the accused, the prosecution respectively and the judge. Both the litigants bring their dispute before the court. After proper representations from both the parties the dispute is resolved through the judgment passed by the judge. Justice is delivered between the parties after the judge is satisfied that the primary facts of the case are properly found by the judge on the basis of fair trial between the parties. Once the primary facts are established in a secure manner, judges can draw inferences or conclusions from those facts.¹⁴³ The primary facts can be securely established from powerful examinations and through cross-examinations the witness evidence can be tested of credibility.

The penal action by the judges cannot be initiated without an accuser, who takes the initiative in it and the responsibility for proving it. The act of accusation is a social function as the violation of the law laid down is an act that harms the society therefore the society takes the lead and assumed role of the prosecutor and brings the case before the judge. The act of proving the violation takes place before the unbiased judge who decide the conflict to ascertain the two things, first, whether the accused is the perpetrator of the crime and second, if so to what extent he is morally responsible for it. Each party produces at his discretion his means of proof in the manner laid down by law.

¹⁴² Id.at.106

¹⁴³ Jones v. National Coal Board [1957] 2 All E.R. 155

Passive Role of the Judges

The judges in the adversarial system of justice are required to hold a passive role in the entire justice delivery system. They have to be impartial. There are two conditions with which the judge has to comply:

- The judge should be free from personal involvement in or any kind of bias towards the case at issue
- They should be institutionally impartial.

Under the adversarial system the decision making authority has to be vested with neutral decision makers. In many common law jurisdictions, the judge determines the applicable law and facts are determined by the jury. But in Indian jurisdiction, both law and facts as analyzed and interpreted by the judiciary.¹⁴⁴ The judge cannot act as a prosecutor under the adversarial system. The judge's role is limited to the analysis of the evidence given and questions are asked with respect to witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by the law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. Under his system, if the judge goes beyond this, he drops the mantle of the judge and assumes the role of an advocate.¹⁴⁵ The interference of the judge can be done to clarify matter that he did not understand or thought the jury might not have understood.¹⁴⁶ If the interference is of the nature that hinders or in any way hampers the process of cross-examination by the counsel then that amounts to material irregularity.¹⁴⁷ The presumption under the adversary system with respect to the judge's interference is that the judge who does so is clouded by the dust of the conflict and is therefore unable to hold his unbiased position.¹⁴⁸ Therefore under this model the judge is restricted to the evidences produced before him.¹⁴⁹

The system presupposes that the responsibility on the judge is to hear and determine the issues raised by the parties and not to conduct an investigation or an examination on behalf of the society. In the Australian jurisdiction, in order to preserve the impartiality of the judge, the judge holds no power to call witness without the permission of the party or to direct the prosecution to call a witness. And since the

¹⁴⁴ In India jury trials were abolished by the Government of India in 1960 as they would be susceptible to media and public influence.

¹⁴⁵ Ibrahim Husen v. State, A.I.R. 1969 Goa [1957]2 All.E.R.155

¹⁴⁶ R v. Sharp [1993] 3 All. E. R. 225

¹⁴⁷ Id at p. 235

¹⁴⁸ Yuill v. Yuill, [1945]1 All.E.R.183 (C.A.) p.189

¹⁴⁹ Zeidler, —Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure||, 55 A.L.J.390, 395 (1981)

judge is not involved in the investigation process, he does not have the idea with respect to the implications of calling the witnesses.

With the notion of the neutral role assumed of the judge under this system a just decision is expected to be delivered in lieu of the conflict raised before him. And since each party is assumed to present their side of the case in the best way possible, the judge can conclude the truth of the matter and deliver the judgment which is unbiased and free from encumbrances by analyzing the case presented by both sides.¹⁵⁰

For this system to work as per the model there is a need for well-trained lawyers in the trial system, without which the system would not work efficiently and the delivery of justice may fail because the possibility of the whole truth coming out before the judge becomes less in that scenario. Due to this possibility wider powers are given to the judges in India. In Indian jurisdiction the judge can ask questions to the witnesses regarding the relevancy of the facts or can order production of documents or things to elicit the truth.

When the Indian Evidence Act was passed, the necessity to give wide powers to the judge was highlighted. It was stated that the judge should not only hear what is put before him by others, but that he should ascertain by his own enquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matters in issue, but may lead to something that is, and it is in order to arm judges with express authority to do this that section 165¹⁵¹, which was highly objected to was framed. The Indian justice system granted powers to the judge to find out truth and administer justice with fairness and impartiality because it was assumed that courts cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to the proceedings. But he has to be careful with respect to these powers because under Indian system also he cannot assume the role of the prosecutor.¹⁵² The model situation is that the court, the prosecution and the defense must work as a team whose goal is justice, a team whose captain is the judge. The judge like the conductor of a choir must by force of personality induce his team to work in harmony, subdue the raucous, encourage the timid, and conspire with young, flatter the old.

In this system it can be guaranteed that his decision is not the result of outside pressure, or of arbitrary and subjective ideals but strictly adhere with the law prevailing in the State. At the same time, neither the parties can make any objection to the question put by the judge. Similarly, no party can, as of right, cross-examine the witness upon the answers given on the question put by the judge. The judge has an unlimited power to make the matter clear.¹⁵³ This power is given to the judge in accusatorial system is to elicit the

¹⁵⁰ Commissioner, Federal Police v. Propend Finance Pty. Ltd. (1997)188 CLR 501

¹⁵¹ Indian Evidence Act

¹⁵² Ramchander v. State of Haryana A.I.R. 1981 SC 1036

¹⁵³ Jamatraj v. State of Maharashtra, A.I.R 1968 SC 180

truth and to minimize the errors in the process of trial.¹⁵⁴ So, it is clear that the intention behind the granting of such wide power is to make the judge as a participant in the trial by evincing intelligent and action interest by putting questions to witnesses in order to ascertain truth. He is duty bound to explore the truth and for which he can explore new avenues. In short, the power will make the judge an independent umpire, who is trying to find out the truth.

Competing Counsels

During the last part of the eighteenth century, the altercation trial was replaced by the adversary criminal trial. The system developed into a lawyer dominated process. The Lawyers for the prosecution and defense assumed commanding roles at trial. Both counsels are conducting the trial by adducing facts. Under this system, lawyers have to actively prosecute the client's case before the judiciary and to disprove the case of the opponent. The burden of gathering and presenting facts and evidence is upon the counsels. The system presumes that the State using its investigative resources, and employing a competent prosecutor to prosecute the accused, and the accused will appoint an equally competent lawyer to defend the prosecution case. Hence, the confidence of public also vests in the lawyers as the truth will emerge from the powerful statements made from both sides. The expectation of the parties to win the case gives lawyers an image if they actually win the case and they are expected to save their client by means which are legal and necessary.

The lawyers are, under the adversarial structure, allowed to present the case without any hindrances or interruption as fairly and strongly as he can unless the sequence of his arguments are lost.¹⁵⁵ The advocate should not determine the effect of the legal argument and should argue on points which are in the favor of his client. There is no authority which directs the way in which the lawyer should conduct the trial and is in sole discretion of the lawyer.

Presumption of innocence

The principle of presumption of innocence is a very important safeguard provided to the suspects in the justice system. This is the principle which is incorporated in both adversarial and inquisitorial justice system. This principle comes from the maxim *nulla poena sine culpa* which means that no man should be punished unless he is guilty.

The doctrine has two main elements:

- High standard of proof
- Burden on the prosecution to prove the charges leveled

¹⁵⁴ State of Rajasthan v. Ani, A.I.R 1997 SC 1023

¹⁵⁵ Abraham v. Jutsun [1963] 2 All. E. R. 402

The doctrine prohibits the conviction of the innocents and to punish someone there should be legitimate proof with respect to the person breaking the law.¹⁵⁶ The high standards of proof in the adversarial system involved the proving of the charges beyond a shadow of doubt that may be raised by any reasonable prudent person. These are precautionary measures employed to check that miscarriage of justice does not take place by the conviction of innocents. The objective of the trial is to establish the truth alongside another very important objective which is to cross-check if there is sufficient evidence to establish the guilt of the accused with respect to the charges leveled. Therefore the trial procedure is a mechanism which ensures that persons who are demonstrably guilty are convicted and punished.¹⁵⁷ In common law jurisdictions it is a very important right guaranteed to the accused.

The beyond reasonable doubt principle may also lead to acquittal of the guilty person. But in the system an innocent person should not be convicted for the wrong he did not commit. It is an age-old saying that “Let hundred guilty persons be free but an innocent should not be punished for the wrong he did not commit.” But this creates a dilemma as guilty persons being free create a problem for the victim and the society. So a balance has to be set up by the judges in order to maintain the credibility of the community and the delivery of justice system¹⁵⁸. In this context, it is to be remembered that the unrealistic emphasis on the burden of proof, which prompts the police to manipulate the available evidence in order to prove the correctness of their investigation, results in the failure of the criminal justice system. This unhappy result could be avoided by taking balancing approach by the court.

Investigation

Investigation refers as pre-trial stage, which includes information to the police, arrest, search and seizure, interrogation of the accused and filing of final report. The entire investigation in the adversary system is being conducted by the police without judicial supervision. The police in India enjoy ample freedom to decide whether to prosecute the offender depending on the availability of the evidence against him. Similarly, in India police have enough power to conduct further investigation also. Even after taking cognizance of the offence by the magistrate it is permissible to conduct further investigation.

The judiciary holds no power to supervise the process of investigation so that the independence and individuality of the judiciary is preserved. Thus, the accusatorial system ensures the preliminary assessment of the case in two stages by independent agencies, firstly by the police and then by the judge.

¹⁵⁶ H L A Hart, Punishment and Responsibility, Clarendon Press, Oxford (1968) p.22.

¹⁵⁷ Davies, Croall & Tyrer, Criminal Justice: An Introduction to the Criminal Justice System in England and Wales, Longman Ltd. London, 2nd edn. 1998, p.204

¹⁵⁸ Shivaji Sahab Rao Bobade v. State of Maharashtra 1973 SCC (cri.) 1033

Inquisitorial System

Under this model the investigation and the decision making agency are the same and called as the investigating magistrate or *juge d'instruction*. The investigating magistrate is thoroughly involved in the process of investigation in order to identify the basis of claims. Under this system the findings that are derived out of the inquiry, are considered as true and the trial is conducted on the basis of that report called as the dossier.¹⁵⁹ This model of justice is based on the philosophy that all the state agencies should be involved in the truth finding process in order to render justice.

Characteristic Features

The inquisitorial system has four main distinguishing features viz., active role of the judiciary which also embodies another characteristic of judicial investigation, comparatively passive role of the counsels, diluted principle of the presumption of innocence.

Active role of the judiciary

In the inquisitorial model of justice, the state is represented by the judicial bodies and therefore they take up the responsibility to uphold the policies of the State by performing the pre-trial investigations. Although the judicial officer is actively empowered to take part in the investigation, still he mainly supervises the process of investigation but is actively engaged in the preparation of dossier.

During the trial the judge acts as the prosecutor and the decision making body and *juge d'instruction* holds no power of conducting trial inspite of having ultimate control over the investigation and collection of evidence. Therefore the functions of the police, prosecutors, jury, committing magistrate, and defense attorney are concentrated in the hands of *juge d'instruction*.

Although, *juge d'instruction* cannot initiate this process on his own apart from the cases of serious crimes and is empowered to conduct the investigation only when he gets such authority by the prosecutor. The public is not informed about the investigatory process or inferences. The trial is controlled by the presiding judge who leads the evidence.

The accused is interrogated by the Court and his statements are recorded and the parties can ask questions to the accused only through the agency of the presiding judge.¹⁶⁰ After this the witnesses are questioned by the court and attorneys and the dossier is used to check the correctness of the statements made by the witnesses. And unlike the adversarial system, judge levels charges upon the accused and therefore is well

¹⁵⁹ Dossier is the counterpart of Indian 'final report' filed by the police after the completion of the investigation under Section 173 CrPC

¹⁶⁰ Morris Ploscowe, *The Investigating Magistrate (Juge d' Instruction)* in *European Criminal Procedure*, 33 H.L.R.1010 (1934-35).

informed about the intricacies of the case. The judge is not bound by the evidences produced before him, instead he can proceed upon his own motion with the investigation of the case to search for evidence which is permissible within the constraints of law.¹⁶¹ The nature of proceedings, unlike the adversarial system, involves direct attacks by the judge.

Passive role of the counsels

Due to the active role of the judges, the lawyers act in a passive mode during the course of proceedings under this system. The structure requires the judge to collect evidence, to prosecute the offender, to examine the witness, to prepare the inquiry report and therefore the role of lawyers is very limited.

Although legal representation is permissible to assist the accused but the counsel does not hold the authority to examine the witnesses. Only after the interrogation is completed by the Presiding Judge, the lawyer can question the witnesses. Under the French system, the defense is always given the opportunity of the last word. But no major role is designated to the lawyer and since the entire process is judiciary dominated, falsification of the findings is an impossible task. This brings in a major drawback as the defects in the process are overlooked and no remedy is available in that scenario since the investigation is presumed to be a correct.¹⁶²

Presumption of innocence

The concept of presumption of innocence in the French system of inquisitorial justice cannot be completely relied to as the investigative process is dominated by the judiciary and the dossier so prepared acts as a major source of evidence upon which the judgment is based. The French principle is called as *presomption d'innocence*¹⁶³ which means that everyone is presumed innocent until proven guilty. Also, the inquisitorial system uses the inference that the triers of fact to acquit in cases of doubt.

Although the inquisitorial system places the burden of proof upon the prosecution, still the French consider the investigative outcome as the findings of truth upon which the final outcome primarily rests. Therefore, one can say that the result is pre-determined and the trial is only a demonstration trial. The philosophy behind this structure is that only the guilty needs the backing of trial in order to falsify the proof so obtained. Hence the doctrine of presumption of innocence is hardly applicable in this system of justice.

¹⁶¹ P.M.Bakshi, Continental System of Criminal Justice, 36.J.I.L.I.,419 at. p.421

¹⁶² Manfred Pieck, The Accused's Privilege Against Self-Incrimination in the Civil Law, 1962 (2) Ame.J.Comp.L.585.

¹⁶³ section 9 of the Declaration of Rights of Man 1789

Judicial Investigation

The Judicial police officer, under the inquisitorial system, has to notify every offence in writing and has to submit the dossier prepared after investigation, to the concerned prosecutor. If *prima facie* no case is made out, the prosecutor can close the case. However, if he feels the need for further inquiry, he can persuade the judicial police to carry out further investigations. The judicial police are needed to collect proof in a neutral and objective way for and against the accused as it is their responsibility to help the inquiry and prosecution in the discovery of truth. If the prosecutor feels the case includes severe offenses or complicated offenses or politically delicate matters, the prosecutor may transfer the instructional judge to assume responsibility for overseeing the inquiry of such instances.

Jugd'instructions has the authority to issue warrants, direct search, seizure, arrest the accused and to examine the witnesses. The accused has the right to be heard and to engage a counsel in the investigation proceedings before the judge of instructions and to make suggestions in regard to proper investigation of the case. It is the duty of the judge of instructions to collect evidence for and against the accused, prepare a dossier and then forward it to the trial judge. The statements of witnesses recorded during investigation by the judge of instructions are admissible and form the basis for the prosecution case during final trial. Before the trial judge the accused and the victim are entitled to participate in the hearing. However the role of the parties is restricted to suggesting the questions that may be put to the witnesses. It is the Judge who puts the questions to the witnesses and there is no cross-examination as such.

CHAPTER TWO: ADR METHODS

1. INTRODUCTION

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements which can cause problems. Unresolved disputes become conflicts.¹⁶⁴ In a society, it is impossible to eliminate contradictions, conflicts and disputes. Conflicts and disputes are bound to happen no matter how civil or barbaric the society may be. Therefore, to ensure stability and security in the society, it is essential to have a dispute resolution mechanism in place. Every state provides for a formal dispute resolution system through a system of courts. Often these state-provided courts are overburdened and are not able to deliver justice in time.

The proliferation and pendency of litigation in civil courts for a variety of reasons has made it impracticable to dispose of cases within a reasonable time. The overburdened judicial system is not in a position to cope up with the heavy demands on it mostly for reasons beyond its control.¹⁶⁵ Due to delay and huge pendency of cases in India, it is essential to use Alternative Dispute Resolution processes along with the formal process to ensure that the justice is not denied to the masses. This module provides an introduction to various ADR mechanisms and the philosophy and the basis for ADR in the Indian Legal System.

2. DISPUTES AND THE APPROACHES TO DISPUTE RESOLUTION

Conflicts and disputes are a fact of life. They are not good or bad. However, what is important is how we manage or handle them.¹⁶⁶ Disputes are conflicts may arise due to several reasons such as lack of information or misinformation, different interpretations of information, differences in goals and needs, differences in perception, poor communication, misconceptions, stereotypes, distrust, different criteria for evaluating ideas or different ways of life and ideology. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it.¹⁶⁷ However, it is essential to see a few definitions of disputes before proceeding ahead with the module. The Black's Law Dictionary defines a dispute as follows:

*A dispute is a conflict or controversy, esp. one that has given rise to a particular lawsuit.*¹⁶⁸

Other definitions for a dispute which capture the essence are as follows:

¹⁶⁴ Mediation and Conciliation Project Committee- Supreme Court of India, Mediation Training Manual of India <<https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>>

¹⁶⁵ Law Commission of India, Report No. 238 Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions (December, 2011)

¹⁶⁶ Nishita Medha, Alternative Dispute Resolution in India, <http://www.fdrindia.org/old/publications/AlternativeDisputeResolution_PR.pdf>

¹⁶⁷ Christoph Schreuer, What is a Legal Dispute? <<https://www.univie.ac.at/intlaw/wordpress/pdf/95.pdf>>

¹⁶⁸ Bryan A. Garner, Black's Law Dictionary Thomson West(10th edition, 2015)

*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.*¹⁶⁹

Or

*A dispute is a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.*¹⁷⁰

Or

*A dispute is a present divergence of interests and opposition of legal views’.*¹⁷¹

On a combined reading of these different definitions, the following are the common points:

- A dispute is between two or more parties.
- A dispute is based due to difference in opinion or opposing views.
- A dispute may be due to a legal position, rights or obligations.
- A dispute may lead to a law suit.

A dispute may be resolved either by the use of traditional state-established court system or through the use of Alternative Dispute Resolution Mechanisms. ADR can be defined as encompassing all legally permitted processes of dispute resolution other than litigation. While this definition is widely used, ADR proponents may object to it on the ground that it privileges litigation by giving the impression that litigation is the normal or standard process of dispute resolution, while alternative processes are aberrant or deviant. That impression is false.¹⁷² Alternative processes, especially negotiation, are used far more frequently.

The Black’s Law Dictionary defines ADR as follows:

*Alternative dispute resolution: A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.*¹⁷³

ADR covers within its ambit a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own

¹⁶⁹ Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, at 11.

¹⁷⁰ Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74.

¹⁷¹ Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic, Preliminary Award of 27 November 1975, 53 ILR 389, at 416 (1979).

¹⁷² Bryan A. Garner, Black’s Law Dictionary Thomson West(10th edition, 2015)

¹⁷³ Bryan A. Garner, Black’s Law Dictionary Thomson West(10th edition, 2015)

disputes.¹⁷⁴ Parties may use arbitration, mediation, and other hybrid forms of dispute resolution to settle their disputes without proceeding through the trial process.¹⁷⁵

ADR is not a recent phenomenon as the concept of parties settling their disputes themselves or with the help of third party, is very well-known to ancient India. Disputes were peacefully decided by the intervention of Kulas (family assemblies), Srenis (guilds of men of similar occupation), Parishad etc.¹⁷⁶ In India, disputes were even settled by a council of village elders, known as a Panchayat which was an accepted method of conflict resolution.¹⁷⁷

To summarize, Alternative Dispute Resolution Mechanism are:

- legally permitted processes of dispute resolution other than litigation
- structured or unstructured processes
- processes which help resolve dispute and harmonize the relation of the parties¹⁷⁸
- processes such as mediation, negotiation, arbitration, Lok Adalats etc

3. Philosophy underlying alternative dispute resolution methods

Cost of Dispute Resolution in India

As per Daksh's Access to Justice Survey 2015-16¹⁷⁹ civil litigants spend 497 per day on average for court hearings. They incur a loss of 844 per day due to loss of pay. Criminal litigants spend ` 542 per day for court hearings on average and incurred a cost of 902 per day due to loss of pay. The survey suggests that the loss of productivity due to attending court hearings because of wages and business lost comes to 0.48% of the Indian GDP.

As per PRS Legislative's Report "Vital Stats: Pendency of cases in the judiciary"¹⁸⁰, as of 2018:

- There are over three crore cases pending across the Supreme Court, the High Courts, and the subordinate courts (including district courts).

¹⁷⁴ Law Reform Commission, Alternative Dispute Resolution: Mediation And Conciliation (LRC 98-2010)

¹⁷⁵ Mr. Adithya Joseph, Alternative Dispute Resolution Mechanisms In The Intellectual Property Regime <<http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=78779378-b7d0-44bd-a04c-b637daee867f&txtsearch=Subject:%20Intellectual%20Property%20Rights>>

¹⁷⁶ Hon'ble Thiru Justice S.B.Sinha, ADR and Access to Justice: Issues and Perspectives <<http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf>>

¹⁷⁷ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

¹⁷⁸ Hon'ble Thiru Justice S.B.Sinha, ADR and Access to Justice: Issues and Perspectives <<http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf>>

¹⁷⁹ Daksh India, Access to Justice Survey 2015-16 <<http://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf>>

¹⁸⁰ PRS Legislative Research, Vital Stats- Pendency of cases in the judiciary <<https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary>>

- Of these, the subordinate courts account for over 86% pendency of cases, followed by 13.8% pendency before the 24 High Courts. The remaining 0.2% of cases are pending with the Supreme Court.
- Between 2006 and 2018 (up to April), there has been an 8.6% rise in the pendency of cases across all courts. Pendency before Supreme Court increased by 36%, High Courts by 17%, and subordinate courts by 7%.

The Daksh Report also suggests that the average pendency of any case in the 21 high courts is about three years and one month (1,128 days). If the case is in any of the subordinate courts in the country, the average time in which a decision is likely to be made is nearly six years (2,184 days). These statistics show that dispute resolution through courts is a long and costly process. Hence, it is necessary to have alternative methods so as to get justice in a faster and less expensive manner.

Need for ADR

The presumption that courts are the principal forum for dispute resolution continues to be eroded. Alternative forms of dispute resolution (ADR), including agreement-based ADR (such as mediation and conciliation) and adjudicative ADR (such as arbitration), continue to proliferate and are increasingly institutionalized, leading to their characterization as ‘appropriate’ or ‘proportionate’ dispute resolution.¹⁸¹

The major objective of ADR is that it is a peaceful method of conflicts resolution. The main philosophy underlying the relevance and growth of Alternative Dispute Resolution (ADR) methods is that it is quicker and cheaper and above all parties have a level of control of the process and the advantage of having a continued harmonious co-existence even after the process. ADR, which includes arbitration and mediation, apart from its primary goal of dispute resolution also have broader goals such as capacity building, skills development and reductions in social friction.

4. STATUS OF ADR

Constitutional Mandate to ADR

The Constitution of India through provides every citizen a Right to Justice through a combined reading of Article 14, Article 21 and Article 39A.

Article 14 of the Constitution of India reads as under:

“14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Article 21 of the Constitution reads as under:

¹⁸¹Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR European Journal of International Law, Volume 26, Issue 3, August 2015, Pages 607–634, <<https://doi.org/10.1093/ejil/chv039>>

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

In *Anita Kushwaha V Pushap Sudan*¹⁸², the Hon’ble Supreme Court of India made the following observations:

“If “life” implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of “access to justice” will not affect the quality of human life so as to take access to justice out of the purview of right to life guaranteed under Article 21. We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed under Article 21 of the Constitution.

We need only add that access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. We say so because equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before Courts and tribunal and adjudicatory fora where law is applied and justice administered.

The Citizen’s inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal protection of laws and reduce it to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well.

Furthermore, Article 39A of the Constitution of India reads as follows:

“Equal justice and free legal aid

39A. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for

¹⁸² (2016) 8 SCC 509

securing justice are not denied to any citizen by reason of economic or other disabilities.”

Article 39-A of the Constitution of India provides for easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent judiciary within a reasonable time. Thus, access to justice, provision of legal aid for poor and needy and dissemination of equal and speedy justice are the cherished goals of our Constitutional Republic.¹⁸³

Traditional concept of "access to justice" as understood by common man is access to courts of law. For a common man a court is the place where justice is meted out to him/her. But the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like.¹⁸⁴ Delay, unpredictability and cost are considered as three main enemies of efficient administration of justice.¹⁸⁵ It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights.¹⁸⁶ To give effect to this mandate, Parliament has recognized various alternative dispute resolution mechanisms, such as arbitration, conciliation, mediation, and Lok Adalats to strengthen the judicial system.¹⁸⁷ The need for Alternative Dispute Resolution process is to ensure that justice may be met to masses in a faster, cheaper and simpler way.

ADR in other statutes

References to ADR can be found in several statutes in India. An illustrative table of the various statutes referencing to ADR is as follows:

S. No	NAME OF THE ACT	PROVISION	REFERENCE
1)	The Company Act, 2013	S 442	Mediation
2)	The Commercial Courts Act, 2015	S 12A	Mediation
3)	The Arbitration and Conciliation Act, 1996	The Complete Act	Arbitration, Conciliation

¹⁸³ Mahboob Ali, Judicial Training And Research Institute, U.P.- Alternative Dispute Resolution Mechanism in Modern Indian Society
<<http://www.ijtr.nic.in/Alternative%20Dispute%20Resolution%20Mechanism%20inModern%20Indian%20Society.pdf>>

¹⁸⁴ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

¹⁸⁵ Arun Mohan, *Justice, Courts and Delays*, Vol. 1, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) p. 19.

¹⁸⁶ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

¹⁸⁷ Bar Council of India, All India Bar Examination Preparatory Materials <<http://www.barcouncilofindia.org/wp-content/uploads/2010/08/AIBEBook1.pdf>>

4)	Code of Civil Procedure	S 89	Mediation, Conciliation
5)	The Real Estate (Regulation & Development) Act, 2016	S 32(g)	Mediation
6)	The Legal Services Authorities Act, 1987	S 7	Lok Adalat
7)	The Industrial Disputes Act, 1947	S 10A	Arbitration, Negotiation

From the table, it can be observed that ADR is widely recognized in India in different laws from Corporate and Commercial Laws to Labor Laws to Infrastructure related laws.

Cases suitable for ADR

Section 89 of the Code of Civil Procedure provides for settlement of disputes outside the court. The section reads as follows:

89. Settlement of disputes outside the Court

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for -

- (a) arbitration;*
- (b) conciliation;*
- (c) judicial settlement including settlement through Lok Adalat; or*
- (d) mediation.*

(2) Where a dispute has been referred -

- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;*
- (b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*
- (c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be*

a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

In ***Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd.***¹⁸⁸, the Hon'ble Supreme Court of India while discussing Section 89 of the Code of Civil Procedure, provided an illustrative list of the categories of cases suitable for ADR and those which are not suitable for ADR. The Apex Court held the following categories of cases considered to be not suitable for ADR process:

- i. Representative suits under Order 1 Rule 8 CPC which involves public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).
- ii. Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).
- iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.
- vi. Cases involving prosecution for criminal offences.

The Court further held that all other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes:

- i. All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims);
 - a. disputes relating to specific performance;
 - b. disputes between suppliers and customers;
 - c. disputes between bankers and customers;
 - d. disputes between developers/builders and customers;

¹⁸⁸ (2010) 8 SCC 24

- e. disputes between landlords and tenants/licensor and licensees;
 - f. disputes between insurer and insured;
- ii. All cases arising from strained or soured relationships, including
 - a. disputes relating to matrimonial causes, maintenance, custody of children;
 - b. disputes relating to partition/division among family members/co-parceners/co-owners; and
 - c. disputes relating to partnership among partners.
- iii. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
 - a. disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
 - b. disputes between employers and employees;
 - c. disputes among members of societies/associations/Apartment owners Associations;
- iv. All cases relating to tortious liability including
 - a. claims for compensation in motor accidents/other accidents; and
 - b. All consumer disputes including
 - c. disputes where a trader/supplier/manufacture/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

The Court further clarified that the enumeration of `suitable' and `unsuitable' categorization of cases was not exhaustive or rigid.

5. OVERVIEW OF ADR METHODS

Negotiation

Negotiation is a process where two parties with differences which they need to resolve are trying to reach agreement through exploring for options and exchanging offers and an agreement.¹⁸⁹ Negotiation can be defined as:

‘The process through which two or more parties who are in conflict over outcomes attempt to reach agreement. It is the constructive, positive alternative to haggling or arguing; it is aimed at building an agreement rather than winning a battle.’¹⁹⁰

¹⁸⁹ Cambridge University Press, Effective Negotiation: From Research to Results 978-0-521-73521-6 -

¹⁹⁰ Pillutla, M. and Nicholson, N. (eds). (2004). Negotiation: how to make deals and reach agreement

Characteristics of negotiation are¹⁹¹:

- It is a process.
- Multiplicity of parties
- Differences between the parties exist.
- Parties attempt the resolution of differences.
- Parties attempt to reach agreement

Negotiations are not limited to business and commerce. People negotiate constantly in everyday situations even outside the workplace. For example bargaining with a shopkeeper is also a negotiation. Negotiations are very common in business and can include¹⁹²:

- producing deals with suppliers, partner businesses or customers
- inter-departmental or team discussions to determine aims, processes and resources
- management and staff discussions to discuss job priorities and workload
- discussions between management and trade unions, for example, rates of pay
- Recruiting new people to the business, for example, interviews.

The Negotiation process has multiple steps

- Preparation and planning
- Definition of ground rules
- Clarification and justification
- Bargaining and problem solving
- Closure and implementation.

Negotiation is not provided for in any law. It is more of a skill set which is useful in coming to an amicable solution without the inclusion of a third party. If negotiation is successful, the dispute does not escalate.

Mediation

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute

¹⁹¹ Cambridge University Press, Effective Negotiation: From Research to Results
978-0-521-73521-6 -

¹⁹² CIMA, Topic Gateway Series No. 25- Negotiation

<https://www.cimaglobal.com/Documents/ImportedDocuments/cid_tg_negotiation_mar07.pdf.pdf>

and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.¹⁹³

During mediation, the mediator communicates with both parties and tries to unearth their actual underlying interests in the dispute. The mediator does not take evidence or hear pleadings because he is not the decision maker. The mediator helps the parties streamline their key disputed issues and encourages them to devise commercially feasible solutions which will meet not just immediate interests of the parties but also provide long lasting solutions. The mediator holds joint meetings with all disputing parties and private meetings with each disputing party to brainstorm possibilities out of the dispute. The outcome of a mediation is a settlement agreement which the disputing parties execute. Some schools of thought also propagate converting the mediation settlement into an arbitration or conciliation award. In such a case, the possibility of appeal is very low since the parties have voluntarily agreed to the terms of the award.

In addition to dispute resolution, mediation allows building stronger relationships between the parties and focuses on people cohesion more than the actual problem. The mediator has to use psychological and communication skills in order to understand the parties and influence them to agree on a single solution.¹⁹⁴

Characteristics of Mediation are:

- It is a voluntary and non-binding negotiation process
- Occurs outside the courtroom to resolve a dispute.
- A third, impartial and neutral party manages the interaction between the disputing parties.
- The parties decide the terms of settlement.
- Mediator only facilitates the process.

The parties may refer the dispute to mediation at any stage of the dispute:

- Before arbitration
- After arbitration
- Before initiating court proceedings
- During the court proceedings
- At appeal stage of court proceedings right upto the Supreme Court of India

The process of mediation may be initiated by the disputing parties by appointing one or more individual private mediators chosen mutually by the disputants or referring the matter to a mediation service

¹⁹³ Mediation and Conciliation Project Committee- Supreme Court of India, Mediation Training Manual of India
<<https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>>

¹⁹⁴ Anuroop Omkar and Kritika Krishnamurthy, The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Backbone, LexisNexis Publications (2015)

provider. While direct appointment of mediation is generally referred to as private mediation, referring the dispute to a service provider is known as institutional mediation.

Provision for Mediation is incorporated in several statutes in India. The following are an illustrative list of the provisions.

- ***Code of Civil Procedure***

Section 89 of the Code of Civil Procedure provides the courts the power to refer the dispute for settlement or conciliation with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. In *Afcons Infrastructure Limited v. Varkey Construction Co. (P) Ltd.* (2010) 8 SCC 24, the Hon'ble Supreme Court has provided a list of disputed that can be mediated. (Discussed earlier)

- ***The Company Act, 2013***

Section 442 of the Company Act, 2013 provides that the parties to a dispute may apply to the tribunal for referring the matter to mediation. The section also provides the power to the tribunal to refer the case suo moto for mediation. The Company Act, 2013 r/w Rule 30 of the Companies (Mediation and Conciliation) Rules, 2016 provide that all Company Law dispute may be refereed except:

- the matters relating to proceedings in respect of inspection or investigation or the matters which relate to defaults or offences for which applications for compounding have been made by one or more parties.
- cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion etc.
- cases involving prosecution for criminal and non-compoundable offences.
- cases which involve public interest or interest of numerous persons who are not parties before the Central Government or the Tribunal or the Appellate Tribunal as the case may be.

- ***The Commercial Courts Act, 2015***

Section 12A of the Commercial Courts Act, 2015 provides that a suit shall not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation unless it contemplates urgent interim relief. The Commercial Courts Act, 2015 r/w the Commercial Courts (Preinstitution Mediation and Settlement) Rules, 2018 provide that any commercial dispute can be mediated.

- ***The Consumer Protection Act, 1986***

With a combined reading of section 89 of the CPC and the decision of the Hon'ble Supreme Court in *Afcons Infrastructure Limited v. Varkey Construction Co. (P) Ltd.* (2010) 8 SCC 24, Consumer protection cases can also be mediated. The Consumer Protection Bill, 2018 even provides for mediation cells attached to the District, State and National Commissions. The bill provides the Commissions the power to refer a matter for mediation if the parties consent to settle their dispute in this manner.

- ***The Real Estate (Regulation & Development) Act, 2016***

Under section 32(g)(2) of the RERA, the Authority is entitled to make recommendations to the Government on measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations.

Conciliation

Conciliation is the process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement. Conciliation can be defined as follows:

“A settlement of a dispute in an agreeable manner.

A process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved; esp., a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences.”¹⁹⁵

A conciliator may have professional expertise in the subject matter in dispute and will generally provide advice about the issues and options for resolution. However, a conciliator will not make a judgment or decision about the dispute. Like mediation, conciliation is a voluntary, flexible, confidential, and interest based process. The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.

¹⁹⁵ Bryan A. Garner, *Black's Law Dictionary* Thomson West (10th edition, 2015)

The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. Once the conciliator has made their recommendations, it is up to the parties to decide whether to agree to any proposals. The suggestions or opinions of a conciliator cannot be imposed. If a settlement is achieved, it must be set out in writing in order to be legally binding.

Characteristics of Conciliation are:

- It is a voluntary and non-binding negotiation process
- Occurs outside the courtroom to resolve a dispute.
- A third, impartial and neutral party manages the interaction between the disputing parties.
- The parties decide the terms of settlement.
- Conciliator actively participates in the settlement.

Conciliation is suitable in cases where the parties:

- want to reach an agreement on some technical and legal issues
- want assistance with the process
- want to make the decision with the other participants involved
- want advice on the facts of the dispute.

Conciliation under the Arbitration and Conciliation Act, 1996

The process of conciliation may be initiated by a party to a dispute by sending to the other party a written invitation for conciliation. Such an invitation should contain a brief on the subject matter of the dispute.¹⁹⁶ Conciliation proceedings begin once the other party accepts in writing the invitation.¹⁹⁷ If the other party rejects the invitation, the conciliation proceedings will not begin.¹⁹⁸ The inviting party may specify the number of days within which a reply shall be given or adhere to the 30 days period given in the Arbitration and Conciliation Act, 1996 (the “Act”).¹⁹⁹ If a reply is not received in such period, the inviting party may treat such non-receipt as a rejection of the invitation by the other party. In such a case, the inviting party shall inform the other party in writing regarding the rejection of the invitation.²⁰⁰

The Act provides for appointment up to three conciliators, who shall act jointly.²⁰¹ Parties may choose the conciliators themselves or request another person or institution to either assist the parties in appointing

¹⁹⁶ Section 62(1), The Arbitration and Conciliation Act, 1996.

¹⁹⁷ Section 62(2), The Arbitration and Conciliation Act, 1996.

¹⁹⁸ Section 62(3), The Arbitration and Conciliation Act, 1996.

¹⁹⁹ Section 62(4), The Arbitration and Conciliation Act, 1996.

²⁰⁰ *Ibid.*

²⁰¹ Section 63, The Arbitration and Conciliation Act, 1996.

conciliators or appoint conciliators on behalf of the parties.²⁰² In any case, under the Act, the parties are tasked with appointing the conciliator jointly, in case of one conciliator;²⁰³ separately (one by each party), in case of two conciliators;²⁰⁴ in case of three conciliators, parties may appoint one conciliator each and the two conciliators shall agree on the third conciliator who shall act as the presiding conciliator.²⁰⁵ Institutions may assist the parties by recommending names of conciliators. For this purpose, the institutions shall take into account such considerations as may be required to secure the appointment of an independent and impartial conciliator and with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.²⁰⁶

Any conciliator appointed:

- a. shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings; and²⁰⁷
- b. shall not be presented by the parties as a witness in any arbitral or judicial proceedings.²⁰⁸

Upon appointment, the next step in the process involves the conciliator requesting the parties to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Copies of the written statements submitted by the parties shall be shared by the parties with each other.²⁰⁹ The conciliator shall reserve the power to request either party, at any time, to submit to him further written statements of their respective positions and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The parties shall also share copies of such statements, documents and other evidences with each other.²¹⁰

The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).²¹¹

²⁰² Section 64(2), The Arbitration and Conciliation Act, 1996.

²⁰³ Section 64(1)(a), The Arbitration and Conciliation Act, 1996.

²⁰⁴ Section 64(1)(b), The Arbitration and Conciliation Act, 1996.

²⁰⁵ Section 64(1)(c), The Arbitration and Conciliation Act, 1996.

²⁰⁶ Section 64(2), The Arbitration and Conciliation Act, 1996.

²⁰⁷ Section 80(a), The Arbitration and Conciliation Act, 1996.

²⁰⁸ Section 80(b), The Arbitration and Conciliation Act, 1996.

²⁰⁹ Section 64(1), The Arbitration and Conciliation Act, 1996.

²¹⁰ Section 65(2), The Arbitration and Conciliation Act, 1996.

²¹¹ Section 66, The Arbitration and Conciliation Act, 1996.

1. The roles and duties of the conciliator include:

- a. to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute;²¹²
 - b. to be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.²¹³
 - c. to conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.²¹⁴
 - d. to make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons.²¹⁵
2. The parties are enabled to request the assistance of a third person or an institution for the administration of the conciliation proceedings.²¹⁶ With respect to place of the proceedings, parties may agree upon a place, or the conciliator, after consulting the parties, may decide on the place of the proceedings.²¹⁷ Communications with the conciliator can be orally or in writing and the conciliator is permitted to communicate with the parties separately or together.²¹⁸
3. With respect to disclosure of information, the conciliator may share any factual information relating to the dispute with the other party,²¹⁹ unless the disclosing party deems such information to be confidential. In such a case, the conciliator shall not disclose the information to the other party.²²⁰ However, the parties and conciliator are prohibited from disclosing any information relating to the proceedings to any third party, except in cases where its disclosure is necessary for purposes of implementation and enforcement.²²¹

²¹² Section 67(1), The Arbitration and Conciliation Act, 1996.

²¹³ Section 67(2), The Arbitration and Conciliation Act, 1996.

²¹⁴ Section 67(3), The Arbitration and Conciliation Act, 1996.

²¹⁵ Section 67(4), The Arbitration and Conciliation Act, 1996.

²¹⁶ Section 68, The Arbitration and Conciliation Act, 1996.

²¹⁷ Section 69(2), The Arbitration and Conciliation Act, 1996.

²¹⁸ Section 69(1), The Arbitration and Conciliation Act, 1996.

²¹⁹ Section 70, The Arbitration and Conciliation Act, 1996.

²²⁰ *Ibid.*

²²¹ Section 75, The Arbitration and Conciliation Act, 1996.

The parties may also, at any point, suggest ways to settle the dispute to the conciliator.²²²

If the conciliator observes any chance for settlement of the dispute, he may formulate the terms of such settlement and share them with the parties. The parties may then convey their observation with respect to the terms of settlement. After taking into account parties' observations, the conciliator may reformulate terms of the settlement.²²³

If the parties reach a settlement, they may draw up a written settlement agreement either by themselves or with the assistance of the conciliator.²²⁴ Such a settlement agreement shall be signed by both parties and shall be deemed final and binding on both parties.²²⁵ The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.²²⁶ The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.²²⁷

The parties shall not initiate during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.²²⁸ Notwithstanding the preceding statement, conciliation proceeding may be considered terminated:

- a. by the signing of the settlement agreement by the parties, on the date of the agreement;²²⁹ or
- b. by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;²³⁰ or
- c. by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration;²³¹ or
- d. by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.²³²

²²² Section 72, The Arbitration and Conciliation Act, 1996.

²²³ Section 73(1), The Arbitration and Conciliation Act, 1996.

²²⁴ Section 73(2), The Arbitration and Conciliation Act, 1996.

²²⁵ Section 73(3), The Arbitration and Conciliation Act, 1996.

²²⁶ Section 73(4), The Arbitration and Conciliation Act, 1996.

²²⁷ Section 74, The Arbitration and Conciliation Act, 1996.

²²⁸ Section 77, The Arbitration and Conciliation Act, 1996.

²²⁹ Section 76(1), The Arbitration and Conciliation Act, 1996.

²³⁰ Section 76(2), The Arbitration and Conciliation Act, 1996.

²³¹ Section 76(3), The Arbitration and Conciliation Act, 1996.

²³² Section 76(4), The Arbitration and Conciliation Act, 1996.

Cost of the conciliation proceedings, including fee of the conciliator, shall be borne by both parties equally.²³³ To this effect, the conciliator may request both parties to deposit an amount as an advance for the costs.²³⁴ The conciliator is also permitted to request for supplementary amounts to be deposited by both parties.²³⁵ If the deposits are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.²³⁶ Upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.²³⁷

The parties shall not rely on or introduce as evidence in any arbitral or judicial proceedings, irrespective of any relation to the dispute that is the subject of the conciliation proceedings,—

- a. views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;²³⁸
- b. admissions made by the other party in the course of the conciliation proceedings;²³⁹
- c. proposals made by the conciliator;²⁴⁰
- d. the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.²⁴¹

Mediation v Conciliation

Many a times, conciliation and mediation are used interchangeably and they are together referred to as Mediation. A Mediator assists the parties to reach an agreement for resolving the dispute and he does not express his opinion on merits of the dispute, whereas a Conciliator may express an opinion about the merits of the disputes. In both, a third party is appointed to assist the parties to reach a settlement of their dispute. The Mediator is not given any power to impose a settlement. His function is only to try to break any deadlock and encourage the parties to reach an amicable settlement. A Mediator does not determine a dispute between parties.

²³³ Section 78(1), The Arbitration and Conciliation Act, 1996.

²³⁴ Section 79(1), The Arbitration and Conciliation Act, 1996.

²³⁵ Section 79(2), The Arbitration and Conciliation Act, 1996.

²³⁶ Section 79(3), The Arbitration and Conciliation Act, 1996.

²³⁷ Section 79(4), The Arbitration and Conciliation Act, 1996.

²³⁸ Section 81(a), The Arbitration and Conciliation Act, 1996.

²³⁹ Section 81(b), The Arbitration and Conciliation Act, 1996.

²⁴⁰ Section 81(c), The Arbitration and Conciliation Act, 1996.

²⁴¹ Section 81(d), The Arbitration and Conciliation Act, 1996.

A Mediator may act as a communicator filtering out the emotional aspects and allowing the parties to focus on the key issues. He encourages the parties to reach an agreement on their own as opposed to having it imposed upon them.²⁴²

Arbitration

Arbitration can be defined as follows:

“Arbitration is a reference to the decisions of one or more persons either with or without an umpire, a particular matter in difference between the parties”

²⁴³

Or

*“A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding”*²⁴⁴

In arbitration, the parties submit a dispute to an appointed decision-maker (arbitrator), or panel of arbitrators (the tribunal). This is typically done by providing for arbitration in the contract (the arbitration agreement). The agreement should also cover the number of arbitrators, the location (also known as the seat) of the arbitration, and the procedural rules that will govern the arbitration. The tribunal will generally give its decision (the award) following a hearing during which each party will have the opportunity to present its position. If appropriate, arbitrations can be conducted on paper only, for example, where the sums or issues in dispute do not justify a hearing. Generally, the tribunal will decide the dispute in accordance with the law governing the relevant contract.²⁴⁵

Arbitration provides a final and binding outcome and being regarded as an alternative to court litigation, the existence of a valid agreement to arbitrate intends that state courts refuse to hear disputes falling within the scope of that agreement.

Characteristics of Arbitration are as follows:

- Arbitration is a voluntary and consensual process.
- Arbitration offers dispute resolution in a neutral forum.
- The parties to an arbitration have considerable choice in determining how, where, by whom, and in what language their dispute is resolved.

²⁴² Ashwinie Kumar Bansal and Rahul Kaushik, Arbitration and ADR (Universal Law Series)

²⁴³ *Collins v. Collins* 1858 28 LJ Ch 184: 53 ER 916

²⁴⁴ Black's Law dictionary

²⁴⁵ <https://www.ashurst.com/en/news-and-insights/legal-updates/introduction-to-international-arbitration/>

- Arbitration is particularly advantageous for commercial parties because of the privacy and confidentiality that it can offer.
- Most arbitration do not allow for the award to be challenged except in very limited circumstances.
- Arbitration is simpler than litigation because it is less formal than litigation.

Arbitration under Arbitration and Conciliation Act, 1996

Part I of the Act deals with Arbitration and Part II deals with enforcement of certain foreign arbitrations. Part I of the Act applies where the place of arbitration is in India. Also, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 are applicable to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act unless the parties agree otherwise.²⁴⁶

“Arbitration” under the Act has been defined to mean any arbitration whether or not administered by permanent arbitral institution.²⁴⁷ An “international commercial arbitration” has been defined as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- i. an individual who is a national of, or habitually resident in, any country other than India; or
- ii. a body corporate which is incorporated in any country other than India; or
- iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or
- iv. the Government of a foreign country;²⁴⁸

The Act defines an Arbitration Agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.²⁴⁹ An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.²⁵⁰ The Act provides for the manner for receipt of written communications unless agreed to by the parties.²⁵¹ The Act provides that if a party loses his

²⁴⁶ Section 2(2), The Arbitration and Conciliation Act, 1996.

²⁴⁷ Section 2(1)(a), The Arbitration and Conciliation Act, 1996.

²⁴⁸ Section 2(1) (f), The Arbitration and Conciliation Act, 1996.

²⁴⁹ Section 6(1), The Arbitration and Conciliation Act, 1996.

²⁵⁰ Section 6(2), The Arbitration and Conciliation Act, 1996.

²⁵¹ Section 3, The Arbitration and Conciliation Act, 1996.

right to object if he had proceeded with an arbitration knowing about a derogation of any provision of the act or any requirement under the Act.²⁵²

Judicial Intervention and Appeals

The Act provides that no judicial authority shall intervene except where so provided in part I of the Act.²⁵³ Section 8 and Section 54 provide the power to refer parties to arbitration where there is an arbitration agreement. Section 9 provides for interim reliefs that can be issued by courts. Section 27 provides that the assistance of court can be taken for taking evidence. Section 34 provides for application for setting aside arbitral award. The Section provides that an arbitral award may be set aside by the Court only if—

- (a) the party making the application furnishes proof that—
 - i. a party was under some incapacity, or
 - ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
 - iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.
 - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with Part I of the Act²⁵⁴
- (b) the Court finds that—
 - i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
 - ii. the arbitral award is in conflict with the public policy of India.

The Act also provides that an award is in conflict with the public policy of India, only if,—

- i. the making of the award was induced or affected by fraud or corruption or was in violation of Confidentiality provisions or in violation of section 81 related to Admissibility of evidence in other proceedings
- ii. it is in contravention with the fundamental policy of Indian law; or

²⁵² Section 4, The Arbitration and Conciliation Act, 1996.

²⁵³ Section 5, The Arbitration and Conciliation Act, 1996.

²⁵⁴ Section 34, The Arbitration and Conciliation Act, 1996.

- iii. it is in conflict with the most basic notions of morality or justice.

An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.²⁵⁵

Appeals in Part I of the Act are from the order refusing to—

- a. refer the parties to arbitration under section 45;
- b. enforce a foreign award under section 48, to the Court authorised by law to hear appeals from such order.²⁵⁶

Part II of the act provides that an appeal shall lie from the order refusing—

- a. to refer the parties to arbitration under section 54: and
- b. to enforce a foreign award under section 57, to the Court authorised by law to hear appeals from such order.²⁵⁷

Composition of the tribunal

The Act provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.²⁵⁸ A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.²⁵⁹ The Parties are free to agree on a procedure for appointment of arbitrators.²⁶⁰ Section 11 also provides the method of appointment of arbitrator in case the parties do not come to a consensus.

An arbitrator who has been appointed may be challenged on the grounds that

- (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- (b) he does not possess the qualifications agreed to by the parties.²⁶¹

The parties are free to agree on a procedure for challenging an arbitrator.²⁶² If a challenge under any procedure agreed upon by the parties is not successful, the arbitral tribunal shall continue the arbitral

²⁵⁵ Section 34(2A), The Arbitration and Conciliation Act, 1996.

²⁵⁶ Section 50, The Arbitration and Conciliation Act, 1996.

²⁵⁷ Section 59, The Arbitration and Conciliation Act, 1996.

²⁵⁸ Section 10, The Arbitration and Conciliation Act, 1996.

²⁵⁹ Section 11(1), The Arbitration and Conciliation Act, 1996.

²⁶⁰ Section 11(2), The Arbitration and Conciliation Act, 1996.

²⁶¹ Section 12(3), The Arbitration and Conciliation Act, 1996.

²⁶² Section 13(1), The Arbitration and Conciliation Act, 1996.

proceedings and make an arbitral award and the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.²⁶³

The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if

- a. he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
- b. he withdraws from his office or the parties agree to the termination of his mandate.²⁶⁴

In addition to the above, the mandate of an arbitrator shall terminate—

- a. where he withdraws from office for any reason; or
- b. by or pursuant to agreement of the parties.²⁶⁵

The Act provides for substitution of terminated arbitrator.²⁶⁶

Jurisdiction of Arbitral Tribunals

The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

- a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- b. a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause²⁶⁷

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal shall decide on a plea and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.²⁶⁸ A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.²⁶⁹

An arbitration tribunal has the power²⁷⁰ to make interim orders

²⁶³ Section 13(5), The Arbitration and Conciliation Act, 1996.

²⁶⁴ Section 14, The Arbitration and Conciliation Act, 1996.

²⁶⁵ Section 15, The Arbitration and Conciliation Act, 1996.

²⁶⁶ Section 15, The Arbitration and Conciliation Act, 1996.

²⁶⁷ Section 16, The Arbitration and Conciliation Act, 1996.

²⁶⁸ Section 16(5), The Arbitration and Conciliation Act, 1996.

²⁶⁹ Section 16(6), The Arbitration and Conciliation Act, 1996.

²⁷⁰ Section 17, The Arbitration and Conciliation Act, 1996.

- i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- ii. for an interim measure of protection in respect of any of the following matters, namely:—
 - a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - b) securing the amount in dispute in the arbitration;
 - c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - d) interim injunction or the appointment of a receiver;
 - e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

The Act mandates that the parties are to be treated with equality and must be given a full opportunity to present their case.²⁷¹ The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.²⁷² The parties are also free to agree on the place of arbitration²⁷³ and the language of the proceedings.²⁷⁴ The arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent unless agreed otherwise by the parties.²⁷⁵

The claimant and the respondent shall submit claim and counterclaim along with the relevant documents to the tribunal.²⁷⁶ The parties may amend these submissions unless agreed otherwise. The arbitral tribunal has the power to decide whether to hold oral hearing or whether the proceedings are to be conducted on the basis of document unless the parties have agreed otherwise.²⁷⁷ In case of a default by the claimant in submission of the claim, the tribunal may terminate the proceedings and in case the respondent fails to communicate his defence, the proceedings shall continue.²⁷⁸ In case a party fails to appear at an oral

²⁷¹ Section 18, The Arbitration and Conciliation Act, 1996.

²⁷² Section 19(2), The Arbitration and Conciliation Act, 1996.

²⁷³ Section 20, The Arbitration and Conciliation Act, 1996.

²⁷⁴ Section 22, The Arbitration and Conciliation Act, 1996.

²⁷⁵ Section 21, The Arbitration and Conciliation Act, 1996.

²⁷⁶ Section 23, The Arbitration and Conciliation Act, 1996.

²⁷⁷ Section 24, The Arbitration and Conciliation Act, 1996.

²⁷⁸ Section 25, The Arbitration and Conciliation Act, 1996.

hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.²⁷⁹

The arbitral tribunal, unless agreed otherwise by the parties, has the power to

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.²⁸⁰

Rules applicable to disputes

Where the place of arbitration is situate in India,—

- a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
- b) in international commercial arbitration,—
 - a. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
 - b. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
 - c. failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.²⁸¹

The Act provides that while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.²⁸²

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.²⁸³ The Act provides time limits for making of arbitral award²⁸⁴ and fasttrack procedure.²⁸⁵

²⁷⁹ Section 25, The Arbitration and Conciliation Act, 1996.

²⁸⁰ Section 26, The Arbitration and Conciliation Act, 1996.

²⁸¹ Section 27(1), The Arbitration and Conciliation Act, 1996.

²⁸² Section 27(3), The Arbitration and Conciliation Act, 1996.

²⁸³ Section 29, The Arbitration and Conciliation Act, 1996.

²⁸⁴ Section 29A, The Arbitration and Conciliation Act, 1996.

The Act provides that during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.²⁸⁶ The Act also provides for the Form and contents of arbitral award²⁸⁷ and provisions for costs of arbitration.²⁸⁸

Expert determination

Expert Determination is a private process in which an independent technical expert makes a binding decision on technical - legal issues after questioning the parties. The decision is binding unless it is agreed by the parties at the outset that the determination will not be. Expert determination has been defined as follows:

*“Expert determination is a procedure in which a dispute or a difference between the parties is submitted, by agreement of the parties, to one or more experts who make a determination on the matter referred to them.”*²⁸⁹

Or

*Expert Determination is a non-binding and flexible ADR process in which the parties agree to appoint an independent third party, who is expert in a particular field, to adjudicate on a dispute within the field of his expertise. The parties may settle the dispute based on Expert Determination. The decision of the expert is not binding on the parties but it opens the doors for an amicable settlement.*²⁹⁰

Notable features of expert determination are:

- ***Expert determination is consensual***

Expert determination can only be initiated if both the parties agree it or if the agreement which is the source of the dispute. In contrast to mediation, a party cannot unilaterally withdraw from expert determination.

- ***The parties choose the expert(s) with relevant expertise***

The parties have the option to choose a specialist in relation to the subject matter of the dispute. This allows for a better understanding of the dispute providing a better chance of resolution.

- ***Expert determination is neutral and flexible***

²⁸⁵ Section 29B, The Arbitration and Conciliation Act, 1996.

²⁸⁶ Section 30(2), The Arbitration and Conciliation Act, 1996.

²⁸⁷ Section 31, The Arbitration and Conciliation Act, 1996.

²⁸⁸ Section 31A, The Arbitration and Conciliation Act, 1996.

²⁸⁹ WIPO, What is Expert Determination? <https://www.wipo.int/amc/en/expert-determination/what-is-exp.html>

²⁹⁰ Ashwinie Kumar Bansal and Rahul Kaushik, Arbitration and ADR (Universal Law Series)

In addition to their selection of an expert with appropriate qualifications, the parties are able to choose such important elements as the language of the expert determination or the place of any meeting.

- ***Expert determination is a confidential procedure***

Confidentiality is of the essence in an expert determination, and any disclosures made during that procedure, and the resulting determination are not disclosed in public.

- ***The determination of an expert is binding, unless the parties agree otherwise***

In principle, the determination of an expert is binding and as such it has contractual effect between the parties. Alternatively, by party agreement, the determination may have effect as a recommendation to the parties.

- ***Expert determination is a flexible procedure***

Expert determination can operate on a more informal and expeditious manner than broader processes such as arbitration. Expert determination may be used on a stand-alone basis or in connection with an arbitration, mediation or court case.

Dispute resolution board

Dispute Board (DB) is a concurrent mechanism for resolution of disputes before recourse to arbitration or litigation. It is a system of dispute prevention and dispute resolution mechanism to alleviate situations arising out of uncertainties and not always explicit in construction projects. The DB is constituted at the very start of a construction project and consists of independent and impartial professionals. The DB follows construction progress, encourages dispute avoidance, and assists in resolving disputes that may arise during the execution of the project.²⁹¹

A DRB has two primary functions²⁹²:

- The first is to become familiar with the project during its construction (on the assumption that the contract involves construction).
- The second is to resolve, efficiently and cost-effectively, any disputes referred to it during that phase.

The DRB process is aimed at dispute avoidance or dispute minimization, rather than dispute resolution. The advantages can be summed up in the old adage that 'prevention is better than cure'.²⁹³ One of the primary benefits of the DB process is that it can help the parties avoid disputes and is not there just to resolve disputes. Therefore, the parties should be encouraged to settle their disputes without referral to the

²⁹¹ World Bank, Improving The Functioning Of Dispute Review Boards (DRB) In India
<<http://www.icaindia.co.in/DB-ica/Final-SOP.pdf>>

²⁹² Robert Hunt, Dispute Resolution Boards <<http://www.roberthuntbarrister.com/Dispute.pdf>>

²⁹³ Robert Hunt, Dispute Resolution Boards <<http://www.roberthuntbarrister.com/Dispute.pdf>>

DB. Sometimes just a clarification of the issues may be sufficient to enable the parties to come to a resolution themselves.

Hybrid methods

Apart from the aforementioned methods, hybrid methods of ADR can be used as well. The following table²⁹⁴ explains these processes:

PROCESS NAME	MANAGED BY	HOW TO	KEY FEATURES & ADVANTAGES	MAJOR DISADVANTAGES
Mediation (Med)	Mediator	Parties go through a negotiating process where the parties themselves decide what the solution is.	Interest based negotiation. Parties make final decisions. Potential for transformation. Long-term satisfaction with agreements. Saves time with no arbitration. Confidential.	May not come to agreement, so time may be wasted.
Arbitration (Arb)	Arbitrator	Parties present their arguments to a neutral who makes the final decision for the parties.	Third party settles dispute. Due process. Guaranteed decision. Finality. Quicker than litigation.	Arbitration can be time-consuming. Costly. Potential for unsatisfied parties and resurfacing of conflict.
Med-Arb (Pure)	One person is both the mediator and the arbitrator	Mediation takes place and if all issues are not resolved it goes to	Continuity of ideas via same neutral. Good chance of long-	Can be time consuming and expensive. Confidentiality

²⁹⁴ Mark Batson Baril and Donald Dickey, MED-ARB: The Best of Both Worlds or Just A Limited ADR Option? <<https://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf>>

PROCESS NAME	MANAGED BY	HOW TO	KEY FEATURES & ADVANTAGES	MAJOR DISADVANTAGES
		arbitration to decide remaining issues.	term satisfaction with agreements. Guaranteed decision. Finality. Speed of settlement. Fear of arbitration decision pushes parties.	issues. Coercive issues.
Med-Arb	Diff Mediator and Arbitrator (two different people)	Mediation takes place and if all issues are not resolved it goes to arbitration to decide remaining issues.	Complete Separation of processes. Confidentiality is maintained. Guaranteed decision. Finality. Speed of settlement.	Can be more time consuming and expensive compared with Med-Arb (Pure)
Med-Arb DiffRecommendation	Mediator and Arbitrator (two different people)	Mediator submits a recommendation to Arbitrator on unresolved issues.	Mediation insights flow into arbitration. Guaranteed decision.	Confidentiality and power of Mediator are in question.
Co-Med-Arb	Mediator and Arbitrator (two different people)	Mediator and Arbitrator conduct fact-finding hearing together followed by mediation without the arbitrator.	Mediator and parties get a sense of what arbitration may look like. Facts are put out early for all to see. Guaranteed decision.	Can be time consuming and expensive as both arbitrator and mediator are paid for all time

PROCESS NAME	MANAGED BY	HOW TO	KEY FEATURES & ADVANTAGES	MAJOR DISADVANTAGES
Med-Arb-Opt-Out	Mediator and possibly new Arbitrator	After normal Med-Arb mediation stage, either party can call for a new arbitrator.	Gives control to parties for better neutrality, confidentiality and feel. Fairness in neutrality. Guaranteed Decision	Extra time needed for new neutral to “catchup” with details. Can be time consuming and expensive.
Arb-Med Same	One person is both Arbitrator and Mediator	Arbitration concludes with sealed envelope of Arb decisions. Mediation then takes place to see if parties can settle without Arb decision.	All facts of the case are on the table prior to mediation. Guaranteed decision. Neutral needs no catch-up time.	Puts fear and uncertainty of decision into the mediation. Confidentiality issues.
Arb-Med Diff	Arbitrator and Mediator (two different people)	Arbitration concludes with sealed envelope of Arb decisions. Mediation then takes place to see if parties can settle without Arb decision.	All facts of the case are on the table prior to mediation. Guaranteed decision.	Puts fear and uncertainty of decision into the mediation. Catch-up time needed by
MEDOLA	One person is both Mediator and Arbitrator	Mediation and Last Offer Arbitration. After mediation, each party submits their last offer and the	Guaranteed decision.	Limits the discretion of the Arbitrator. Can be time consuming and expensive.

PROCESS NAME	MANAGED BY	HOW TO	KEY FEATURES & ADVANTAGES	MAJOR DISADVANTAGES
		arbitrator must decide between the two offers. Parties make the final recommendation based on their new knowledge in mediation. Parties are forced to make a reasonable offer.		
Med Windows in	Arb One person can act as both or a new mediator can be brought in. Process can move to mediation at any time within the arbitration in order to better understand and solve specific issues.	Parties are encouraged to mediate at strategic points. Creativity and flexibility are enhanced. Guaranteed decision.	Can be time consuming and expensive.	
High-Low Med-Arb	Mediator and Arbitrator	The last offer each party makes during mediation transfers as the high/low amounts the arbitrator can award.	Parties maintain some control over final decision. No surprises. Guaranteed decision.	Can be time consuming and expensive
Binding Mediation	Mediator	After mediated agreement is	Very quick settlement.	Power of mediator diminishes

PROCESS NAME	MANAGED BY	HOW TO	KEY FEATURES & ADVANTAGES	MAJOR DISADVANTAGES
		signed, mediator makes decision on all remaining issues.	Guaranteed decision.	neutrality. Lack of due process of law.

Online dispute resolution (ODR)

ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others), and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.²⁹⁵ ODR must be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake. The principles that underpin any ODR process include fairness, transparency, due process and accountability.

Uses of ODR

- Use of Computers in the dispute resolution process facilitates dissemination of information, creation of data, upkeep of the judicial records and betters judicial delivery system.²⁹⁶
- An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions.
- An ODR process may apply to disputes arising out of both a business-tobusiness as well as business-to-consumer transactions.
- An ODR process may apply to disputes arising out of both sales and service contracts.

.The benefits of ODR²⁹⁷

- One of the most widely discussed benefits of ODR is cost savings. ODR is said to be more cost-effective than traditional forms of dispute resolution, both for parties to a dispute and to the dispute resolver, be that a lawyer, a mediator, or a member of the judiciary.

²⁹⁵ UNCITRAL, Technical Notes on Online Dispute Resolution

<http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf>

²⁹⁶ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

²⁹⁷ Charlotte Austin, Online dispute resolution <<https://www.mbie.govt.nz/assets/00ddeb604/online-dispute-resolution-report-2018.pdf>>

- Time savings and convenience In addition to cost savings, ODR is said to be more a more efficient form of dispute resolution, able to resolve disputes faster and more conveniently for the parties involved.
- Increased access to justice ODR is also said to improve the accessibility of dispute resolution by removing barriers to access due to financial status, disability, geographical location, shyness in face-to-face contexts, and other such potential hindrances to accessing justice
- Environmentally friendly A less well publicised benefit of ODR is the environmental benefit that ODR services offer compared with traditional dispute resolution services.

Court annexed ADR processes,

The Lok Adalats, Nyaya Panchayats, Legal Services Authorities are part of the campaign to take justice to the people and ensure that all people have equal access to justice in spite of various barriers, like social and economic backwardness.²⁹⁸

Lok Adalat is a unique system developed in India. It means people's court. It is a forum where voluntary effort at bringing about settlement of disputes between the parties is made through conciliatory and persuasive means. It encompasses negotiation, mediation and conciliation as tools to settle disputes between the parties. Lok Adalats have been given the powers of civil court under the Code Civil Procedure. The summary procedure employed in Lok Adalats help in the speedy disposal of cases by the team of experts involved in Lok Adalats. One of the advantages of Lok Adalat is that a number of disputes between different parties can be settled at one go without wasting much time.

Revolutionary changes are also happening in the administration of Lok Adalats with the introduction of mobile Lok Adalat systems to bring justice to the doorsteps of needy and poor. Lok Adalats have got statutory recognition under the Legal Services Authorities Act 1987 and the award made by the Lok Adalat is deemed to be a decree of civil court. The award is final and binding on the parties. Parties may refer any dispute during pre-litigation stage or during the pendency before the court of law to Lok Adalats for amicable settlement. The reference to Lok Adalats may be made by State Legal Services Authority or District Legal Services Authority upon the receipt of any application. There are also permanent Lok Adalats operating for the settlement of cases relating to Public Utility

Services like transport services, postal services, telegraph services etc. Added to this, national level Lok Adalats are held on every month on a fixed day relating to different subject matters. A huge number of cases are disposed off during national Lok Adalats.²⁹⁹

²⁹⁸ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc.

²⁹⁹ Prof. (Dr.) Sandeepa Bhat, Alternative Dispute Resolution (ADR) Mechanism and Legal Aid in the Settlement of Disputes: A Case Study of State of West Bengal
<<http://doj.gov.in/sites/default/files/Final%20Report%20West%20bengal%20NUJS.pdf>>

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1)	Judicial Process is an adjudicatory process where in a third party (judge) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator appointed by the parties decides the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. The parties participate directly in the resolution of their dispute and decide the terms of settlement.
2)	Procedure and decisions are governed, restricted and controlled by the provisions of the relevant statutes.	Procedure and decisions are governed, restricted and controlled by the provisions of the Arbitration and Conciliation Act, 1996.	Procedure and settlements are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3)	The decision is binding on the parties.	The award in arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
4)	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities
5)	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is required.
6)	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non judicial and informal proceeding held in private with flexible procedural stages.
7)	Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/ Order in terms of the settlement is final and not appealable.

³⁰⁰ Mediation and Conciliation Project Committee- Supreme Court of India, Mediation Training Manual of India
<<https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>>

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
8)	No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of mediator.
9)	Involves payment of court fee.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the rules.

	MEDIATION	CONCILIATION	LOK ADALAT
1)	Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under section 19 of the Legal Services Authority Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987
2)	Voluntary process	Voluntary process.	Voluntary process.
3)	Mediator is a neutral third party.	Conciliator is a neutral third party	Presiding officer is a neutral third party.
4)	Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
5)	Mediation is party centred negotiation.	Negotiation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
6)	The function of Mediator is mainly facilitative.	The function of the Conciliator is more active than the facilitative function of the Mediator.	The function of Presiding officer is persuasive.
7)	The consent of the parties is not mandatory for referring a case for mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.

	MEDIATION	CONCILIATION	LOK ADALAT
8)	The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree in terms of the agreement.	In Conciliation, the agreement is enforceable as it is a decree of the court as per the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per the Legal Services Authority Act, 1987.
9)	Not appealable.	Not appealable.	Not appealable.
10)	The focus of mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
11)	Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
12)	In mediation, parties are actively and directly involved.	In Conciliation, parties are actively and directly involved.	In Lok Adalat, Parties are not actively and directly involved so much.
13)	Confidentiality is the essence of mediation.	Confidentiality is the essence of Conciliation.	Confidentiality is not observed in Lok Adalat.

6. ETHICS OF ADR

Legal ethics are the principles of conduct that members of the legal profession are expected to observe in their practice. The need for following ethics is even greater in ADR because of absence of state established courts. Ethics in ADR have been widely discussed by multiple authors across the world. The following are the common issues discussed in this regard.

Confidentiality

Confidentiality is an essential feature of ADR processes. Confidentiality is generally maintaining private and secret: all discussions; the contents of documents disclosed that will not be used as evidence; and information provided during the ADR process. Maintaining confidentiality encourages meaningful participation and can promote good outcomes. Respecting confidentiality encourages a full and frank discussion between the parties about the issues in dispute and this can assist in the resolution or narrowing of the issues.³⁰¹ Confidentiality in ADR is more complicated as party interests along with third-party

³⁰¹ Confidentiality in Alternative Dispute Resolution Processes;
<<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/ConfidentialityInADRProcesses.pdf>
>

neutral and process interests have to be kept in mind. What is particularly tricky in the ADR area is ascertaining exactly what is protected.³⁰²

The neutral must keep confidential all information arising out of or in connection with the ADR, including the fact that the ADR is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.³⁰³

Conflict of Interest/ Neutrality

Neutrality refers to the Neutral's having no personal or institutional interest in the outcome of a dispute. In other words, the neutral should not have any conflict of interest in the dispute involved. Therefore, questions of role, time, place and vicarious conflicts must all be analyzed to consider whether a particular conflict should be prohibited or can be waived.³⁰⁴

Neutrality requires the following:³⁰⁵

- Freedom from bias and prejudice.
- Ability to evaluate and apply legal, business, or trade principles

Familiarity between the neutral and the involved attorneys can raise ethical concerns. Commonly, neutrals are also practicing attorneys, and may have close ties with many of the fellow lawyers, either from previous professional associations or from past dealings.³⁰⁶

If there are any circumstances that may, or may be seen to, affect a neutral's independence or give rise to a conflict of interests, the neutral must disclose those circumstances to the parties before acting or continuing to act. In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent. The duty to disclose is a continuing obligation throughout the process of mediation.³⁰⁷

³⁰² 1997 Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities Carrie Menkel-Meadow

³⁰³ European Code Of Conduct For Mediators, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>

³⁰⁴ 1997 Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities Carrie Menkel-Meadow

³⁰⁵ International Centre for Dispute Resolution International Panel of Arbitrators and Mediators, Application Information

<https://www.adr.org/sites/default/files/document_repository/icdr_panel_application_information_and_form.pdf>

³⁰⁶ Legal Ethics And ADR: Do You Pass The Test? Nancy Neal Yeend & John Paul Jones

First published in the San Francisco Attorney, June/July 1998

³⁰⁷ European Code Of Conduct For Mediators, <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>

Fairness in ADR

The process of litigation contains many safeguards for fairness and justice. Procedural and evidentiary rules followed during litigation ensure that each person has a chance to present their case and to challenge the arguments and evidence of the other person.³⁰⁸ Since the rules and procedures of ADR are governed by the parties and neutral, it is essential to maintain fairness at all cost. The neutral must ensure that all parties have adequate opportunities to be involved in the process.³⁰⁹ The neutrals must therefore focus on procedural fairness and not the substance of the outcome.³¹⁰

Personal Values in ADR

Values can be defined as follows:

*"Values are a learned organization of rules for making choices and for resolving conflicts. Values form the basis of social norms and "teach us what is useful, good, right, wrong, what to strive for, how to live our life, and even what to die for." Many values are unconscious to those who hold them, but they form the core of culture. By the age of ten most children have formed their value system. Values can be both individually held and permeate a culture, creating cultural value patterns."*³¹¹

The Neutral must consider the difference in values of the parties must find a balance between the values of the parties. A neutral's personal values or belief system should not interfere with his/her duty to uphold the ethical standards of mediation.³¹²

The Ten Commandments of Appropriate Dispute Resolution³¹³

The Ten Commandments of ADR were developed by Carrie Menkel-Meadow of Georgetown University Law Center which explains the ethics which should be followed by the neutrals and parties during an ADR. The following is the text of the commandments:

- i. Lawyers should have an obligation to consider and inform the client about the possible methods of resolving a dispute, planning a transaction, or participating in legislative, administrative or

³⁰⁸ National Alternative Dispute Resolution Advisory Council, Issues Of Fairness And Justice In Alternative Dispute Resolution

<<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Issues%20of%20Fairness%20and%20Justice%20in%20Alternative%20Dispute%20Resolution.PDF>>

³⁰⁹ European Code Of Conduct For Mediators <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>

³¹⁰ Ethical Challenges for Mediators around the Globe: An Australian Perspective Mary Anne Noone Lola Akin Ojelabi Journal of Law & Policy Vol. 45:145

³¹¹ Processes Julia Ann Gold, ADR through a Cultural Lens: How Cultural Values Shape Our Disputing Journal of Dispute Resolution, Vol. 2005, Iss. 2 [2005], Art. 2

³¹² Code of Ethical Standards for Mediators Multi-Door Dispute Resolution Division Superior Court of the District of Columbia <<https://www.dccourts.gov/sites/default/files/MultiDoor-PDFs/MD%20Mediators%20Code%20of%20Ethics.pdf>>

³¹³ Carrie Menkel-Meadow, Ethics and Professionalism in Non-Adversarial Lawyering 27 Fla. St. U. L. Rev. 153 (1999-2000)

- other processes that might best address the client's needs. Lawyers should educate themselves and their clients about all available options for handling the client's matter.
- ii. Lawyers should promptly communicate all proposals to resolve disputes by any process suggested by other parties, clients or decision-makers.
 - iii. Lawyers should consider and promptly communicate all substantive proposals for dispute resolution or transactional agreements to their clients, including both legally based remedies and resolutions and those that address other needs or interests. Lawyers should assist clients to consider non-legal concerns including social, ethical, economic, psychological and moral implications of any possible solutions or proposals.
 - iv. Lawyers should not misrepresent to or conceal from another person, a relevant fact or legal principle (including opposing counsel, parties, judicial officers, third party neutrals or other individuals who might rely on such statements).
 - v. Lawyers should not intentionally or recklessly deceive another or refuse to answer material and relevant questions in representing clients.
 - vi. Lawyers as representatives should not agree to a resolution of a problem or participation in a transaction that they have reason to know will cause substantial injustice to the other party. In essence, a lawyer should do no harm.
 - vii. A lawyer serving as a third party neutral should decline to approve or otherwise sanction an agreement achieved by parties which the third party neutral has reason to know would effect an injustice on a party (or third party).
 - viii. Lawyers serving as third party neutrals, such as arbitrators and mediators, should disclose all reasons the parties might consider relevant in determining if the neutrals have any bias, prejudice or basis for not acting fairly and without improper interest in a matter.
 - ix. Lawyers serving as client representatives or as third party neutrals should fully explain to their clients and parties any and all processes and procedures that will be used to facilitate solutions, make claims, or plan transactions so parties can understand and participate in the decision about what procedures to use.

Lawyers should treat all parties to a legal matter as they would wish to be treated themselves and should consider the effects of what they accomplish for their clients. In essence, lawyers should respect a lawyers' golden rule.

7. ADVANTAGES AND DISADVANTAGES OF ADR

Advantages of ADR:

- It is less expensive and less time-consuming.³¹⁴

³¹⁴ Law Reform Commission, Alternative Dispute Resolution: Mediation And Conciliation (LRC 98-2010)

- It is free from technicalities as in the case of conducting cases in law Courts.
- Parties are free to decide on the procedure and rules of the ADR.
- Parties are free to discuss their differences of opinion without any fear of disclosure of this fact before any law courts.
- Parties have the feeling that there is no losing or winning side between them but at the same time their grievance is redressed and their relationship is restored.³¹⁵
- ADR provides confidentiality to the dispute.

Disadvantages of ADR

- Parties cannot be compelled to go in for ADR unless they sign an agreement or mutually agree to resolve their disputes by ADR.
- Success of ADR depends upon the good faith of the parties and their attorneys.
- Prevents elaboration of development of law and precedent.
- Poor mediator / arbitrator (qualifications, style and attitude) can result in unsuccessful resolution, and can defeat the purpose of ADR.³¹⁶
- Lack of public accountability
- Privatization of justice is another issue related with the use of ADR. Some scholars argue that the privatization and informalization of justice could run counter to the claims of rule of law.³¹⁷

8. SELECTION OF A METHOD

It is the nature of the dispute and relation of the parties which decide the choice of ADR method.³¹⁸ In simple cases relating to the matters where legal principles are clearly settled and there is no personal animosity between the parties ADR such as Lok Adalat may be used. Complicated cases which may require several rounds of negotiations, may be referred to mediation or arbitration depending on the relationship between the parties.³¹⁹ ODR may be considered for small value transactions wherein parties are located at different places. An expert determination may be considered wherein the dispute is based on a techno-legal point and Dispute Resolution boards may be used in case of conflicts in infra related matters. Each method of ADR is suited to different kinds of disputes. It is on the parties' discretion to choose one method on the basis of the nature of dispute and the relations between them.

³¹⁵ Law Commission of India, Report No. 222 Need for Justice-dispensation through ADR etc

³¹⁶ Dr. Anil Kumar Singh, ADR Mechanism in India: Achievements and Challenges Indian Journal Of Research Volume : 5 | Issue 8

³¹⁷ Jasmine Joseph Alternate To Alternatives Critical Review Of The Claims Of ADR
<<https://nujs.edu/workingpapers/alternate-to-alternatives-critical-review-of-the-claims-of-adr.pdf>>

³¹⁸ Dr. Anil Kumar Singh, ADR Mechanism in India: Achievements and Challenges Indian Journal Of Research Volume : 5 | Issue 8

³¹⁹ Recasting Section 89 CPC — Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2011) 4 SCC J-16

CHAPTER THREE: NEGOTIATION

1. MEANING

Although we do not notice this, negotiation is becoming one of the most common forms of communication. We negotiate every day, more often than we think and most of the times, unintentionally. Negotiation is a basic means of getting what you want from others. It involves securing an agreement between parties with different needs and goals where each has something to offer to the other and each may benefit from establishing an agreement, though the balance of power can be dependent upon whether one party's needs are significantly greater than the others. It is a process of back-and-forth communication aimed at reaching agreement with others when some of your interests are shared and some are opposed. Very often, negotiation is compared to sailing an ancient ship with sails. In between you and your goal lie strong winds, tides, shoals and reefs as well as squalls and storms. To get where you want to go, you need to zigzag your way to your destination.

The moment we hear the word 'negotiation', we generally imagine a glass conference room with a long table with serious looking, suited people with longer faces. However, negotiation is not limited to the formal activity of sitting across the table discussing a contentious issue. It is the informal activity we engage in whenever we try to get something we want from another person. It may be our parents, spouse, boss, colleague, friend or the usual clients and business partners.

In a way, negotiation is the pre-eminent form of decision making in personal and professional life. It is a back and forth communication we engage with a third party to understand what we can get out of a situation or what we will be required to give up. This shapes our life choices.

Sometimes, even if we are not personally sitting at a negotiation table, our lives are affected by the outcome of negotiations. When India finalizes the nuances of implementation of a nuclear treaty with USA, thousands of people may get jobs at nuclear facilities, lakhs may get a new electricity connection, crores may get 24X7 electricity supply, fresh opportunities may come up for research and academic facilities specializing in atomic energy and at the same time, several thousands of people may be displaced in the construction of the nuclear facilities. All this because Modi and Obama shook hands.

Although negotiation takes place every day, it is not every man's cup of tea. Standard strategies for negotiation often leave people dissatisfied, worn out, or alienated and frequently- all three. But in relation to conflict, negotiation is one of the most effective and one of the most neglected tools of dispute resolution. But in the present day, everyone wants to participate in decisions that affect them; fewer and fewer people are willing to accept decisions dictated by someone else. So, it is important for every person to understand the basics of negotiation.

It is not necessary for every person to implement every tip and strategy discussed below. We all have a different personality and so, to be an effective negotiator, pick and choose the things you can easily incorporate in your present framework. Once you start implementing the small changes effectively, go for one big change in your negotiation strategy at a time. Now that you know that negotiation is just another form of day to day communication, use the skills in daily life. It is not necessary that you actually need to be at a negotiation table to negotiate. At the same time, another word of caution- do not overdo it. Every conversation is not a negotiation. If you eat antibiotics every time you sneeze, your body will stop responding to the medication.

Negotiation is a basic means of getting what you want from others. It involves securing an agreement between parties with different needs and goals where each has something to offer to the other and each may benefit from establishing an agreement, though the balance of power can be dependent upon whether one party's needs are significantly greater than the others. It is a process of back-and-forth communication aimed at reaching agreement with others when some of your interests are shared and some are opposed.

Negotiation is not limited to the formal activity of sitting across the table discussing a contentious issue. It is the informal activity you engage in whenever you try to get something you want from another person. Hence, negotiation is the pre-eminent form of decision making in personal and professional life. Even if we are not personally sitting at the table, our lives are affected by the outcome of negotiation.

Negotiation is like sailing. In between you and your goal lie strong winds, tides, shoals and reefs as well as squalls and storms. To get where you want to go, you need to zigzag your way to your destination.

Conflict is a growth industry with more and more occasions requiring negotiation. Everyone wants to participate in decisions that affect them; fewer and fewer people are willing to accept decisions dictated by someone else. Although negotiation takes place every day, it is not every man's cup of tea. Standard strategies for negotiation often leave people dissatisfied, worn out, or alienated and frequently- all three. In such situations, it is important to keep in mind that negotiation is not just about process. It is about human beings and how we make decisions. It is about how we analyse information, and about how we read other people. It is about how we feel about a decision, and the emotional attachment we have to what we are trying to achieve. The more we are familiar with the process and how it works, the more familiar and everyday it seems- just like the monster under the bed at night.

2. THEORIES OF NEGOTIATION

Distributive Bargaining/ Negotiation

When we think of bargaining, we are generally imagining only a distributive bargaining scenario. Distributive bargaining situations are those in which the issues at stake involve fixed sums of goods or resources to be allocated among the negotiating parties. Distributive bargaining is the approach to bargaining or negotiation that is used when the parties are trying to divide something up- distribute something. This is most commonly explained in terms of a pie. Disputants can work



together to make the pie bigger, so there is enough for both of them to have as much as they want, or they can focus on cutting the pie up, trying to get as much as they can for themselves.³²⁰

Distributive bargaining situations are those in which the issues at stake involve fixed sums of goods or resources to be allocated among the negotiating parties. In the purely distributive case, the interests of the parties are negatively correlated, with an increase in the utility of one party's outcome associated with a correspondent decrease in the utility of the other party's outcome. Distributive negotiation predicts that only one party can gain at the other party's expense. The parties are competitive and they claim value. Classic examples include the following:

- The sale of an antique vase, where the buyer and the seller do not know one another. There is no relationship; all that matters are the price, and each side haggles for the best deal. Every gain by one party represents a loss to the other.
- Wage negotiations between business owners and their union employees. The owners know that any amount conceded to the union will come out of their own pockets and vice versa.

In distributive negotiation each negotiator presumably has in mind a reservation price (also known as a resistance point or a bottom line) beyond which he or she will not go in reaching an agreement. In these types of negotiations, reputation and the relationship are not valued. Often, parties that just met engage in distributive negotiations. Since they do not have a previous relationship, they have a tendency to not consider the interests of the other side. Gathering information is crucial to this negotiation method. Often, the first offer plays heavy psychological influence, as this sets the bargaining range. In Distributive

³²⁰ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation*, LexisNexis Publications (2015)

Bargaining relationships, the negotiator is often walking on eggshells, as giving too much information or being too difficult may lead to a stalemate, and may cause the other side to even walk away from the negotiation.

To achieve success in a distributive negotiation, remember the following:

- The first offer can become a strong psychological anchor point, one that sets the bargaining range. Studies show that negotiation outcomes often correlate with the first offer. So, start at the right place.
- Do not disclose any significant information about your circumstances including why you want to make a deal, your real interests or business constraints, your preferences among issues or options, or the point at which you'd walk away from the table. It is advantageous, however, to let the other side know that you have good options if this deal falls through.
- Information about the other side can benefit you. Learn as much as possible about the other side's circumstances and preferences including why they want to make a deal, their real interests and business constraints, and their preferences among issues or options.
- Exploit what you learn about the other side in setting your first offer or demand.
- Don't overshoot. If you claim aggressively or greedily, the other side may walk away. You will have lost the opportunity to make a deal.³²¹

The O' Henry Effect

O. Henry's classic 1905 story 'The Gift of the Magi' describes the extreme romantic relational situation in which a young couple each sacrifice their most prized possession, only to receive in return something that has no practical value. O. Henry, however, argued that the couple made the wisest possible relational exchange.

In a story by O. Henry, one Christmas Eve a young couple who are very much in love, but also very poor, each seek to buy a present for the other. They have no money, but each has a prized possession: Jim, the husband, has a gold watch handed down from his grandfather, and Della, the wife, has beautiful, long flowing hair. Jim decides to sell his watch to buy Della a set of tortoise-shell combs for her hair, which she had long desired. On the same day, Della has her hair cut and sells it to buy Jim a chain for his watch.

That evening the two lovers exchange gifts and realize the irony of their actions. The two had sacrificed for each other their greatest treasure. O. Henry ends the story by advising readers: "But in a last word to the wise of these days let it be said that of all who give gifts these two were of the wisest." O. Henry

³²¹ Harvard Business Essentials: Negotiation, Harvard Business School Press, 2003

leaves no doubt that this exchange provided the young couple with a relational outcome that was of greater enduring value than they would have achieved by mutual retention of their prized possessions and an exchange of less extravagant gifts.

In distributive negotiations, reputation and the relationship are not valued. Often, parties that just met engage in distributive negotiations. Since they do not have a previous relationship, they have a tendency to not consider the interests of the other side. It is important to recognize, however, that sometimes the parties do have a past and a future relationship- as in labor management contract negotiations- but they use the distributive model in spite of this fact and bargain strictly as adversaries, trying to get a maximum 'share of the pie,' seemingly unmindful that in later months or years they may suffer from the retaliatory tactics of the other party, who has been waiting to 'even the score'.

Gathering information is crucial to this negotiation method. Information is the key to gaining a strategic advantage in a distributive negotiation. You should do your best to guard your information carefully and also try to get information out of your opponent. To a large extent, your bargaining power depends on how clear you are about your goals, alternatives, and walk away values and how much you know about your opponents'. Once you know these values, you will be in a much stronger position to figure out when to concede and when to hold firm in order to best influence the response of the other side.

Often, the first offer plays heavy psychological influence, as this sets the bargaining range. In distributive bargaining relationships, the negotiator is often walking on eggshells, as giving too much information or being too difficult may lead to a stalemate, and may cause the other side to even walk away from the negotiation.

The general nature of positional bargaining is highly competitive and the objective of the parties involved is to maximize their share of the fixed resource. As a result, both parties may use a variety of tactics including making threats, concealing their true objectives, misrepresenting information- or even lying and utilizing leverage or power if they perceive it is balanced in their favour. A common example in labor relations would be a union threatening to strike when it perceives that management cannot afford the loss of production.³²²

Distributive bargaining is important because there are some disputes that cannot be solved in any other way- they are inherently zero-sum. If the stakes are high, such conflicts can be very resistant to resolution. For example, if budgets in a government agency must be cut 30 percent, and people's jobs are at stake, a decision about what to cut is likely to be very difficult. If the cuts are small enough that the impact on employees will be minor, however, such distributive decisions can be made more easily.

³²² Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation*, LexisNexis Publications (2015)

Even in cooperative negotiations, distributive bargaining will come into play. Distributive bargaining and integrative bargaining are not mutually exclusive negotiation strategies. Integrative bargaining is a good way to make the pie (joint value) as large as it can possibly be, but ultimately the parties must distribute the value that was created. If they are able to expand the pie enough, distribution is easy. If there is still not enough to give each side what it wants, however, distributive negotiation will be more difficult.

Some conflict resolution theorists believe that positional bargaining is unnecessary. Any conflict, they argue, may be solved cooperatively through integrative bargaining. Some theorists argue that with creativity, disputants can almost always work together to 'expand the pie' and create outcomes that benefit both sides. Even when budgets have to be cut, they would argue, the parties make the decisions together so that all sides get the best possible outcome. Distributive bargaining has also been criticized because it tends to lead to destructive actions and sometimes forces the involved parties to focus too much on their differences. If people want to maintain a good relationship with one another, it is argued, they should take an integrative approach to distribution as well as expansion of the pie. However, in cases where the negotiator wants to maximize the value obtained in a single deal and when the relationship with the other party is not important, distributive bargaining tactics may be very useful.

Integrative Bargaining

Integrative negotiation is based on the premise that solutions can be found, during and because of the process, which reconcile the parties' interests. The key characteristics that distinguish integrative negotiations from distributive ones are: creation of value; focus on interests and not positions; openness and exchange of relevant information, and even learning; and problem restructuring. Also known as a 'win-win' negotiation, it is a cooperative negotiation strategy based on a desire to find 'win-win' negotiated settlements.

Integrative bargaining situations are non-zero-sum encounters in which there is the possibility for joint gain from the negotiation. In the purely integrative case, there is no conflict between the two parties, if they can find appropriate solutions. Few negotiations are purely integrative; most have both integrative and distributive aspects and are described as mixed motive. Integrative bargaining benefits from more communication rather than less. The likelihood that parties will discover solutions that meet one party's needs at little cost to the other party is enhanced when the parties convey their true needs and concerns—their underlying interests and if they remain engaged with each other, exchanging information and exploring options. Thus, being aggressive and self-focused is not productive; neither is it advantageous to be focused only on the other side's needs. Effective integrative bargaining requires concern for one's own as well as the other side's interests as well as persistence and effort. It takes more work to understand each party's interests, create solutions, and reach agreement than it does to simply trade concessions.

Integrative bargaining tends to produce more satisfactory endings for the negotiating parties than positional bargaining. Positional bargaining is based on opposing and fixed point of views (positions) and incline towards compromise or no agreement at all. On many occasions, concessions do not efficiently gratify the underlying interests of the disputing parties. Sometimes, concessions simply split the difference between the two positions and give one half to each disputing parties. Integrative solutions on the other hand are more creative and have the potential to give everyone all of what they want.

In business, integrative negotiations tend to occur at these times:

- During the structuring of complex, long term partnerships or other collaborations
- When the deal involves many financial and non-financial terms
- Between professional colleagues, or superiors and direct subordinates whose long-term interests benefit from the other's satisfaction

Strategies for Integrative Negotiations

Finding opportunities for mutual benefit naturally requires information sharing. Unlike the distributive situation, in which you deliberately play your cards close to the vest, an integrative negotiation encourages negotiators to do the following:

- Value a long-term positive relationship
- Provide significant information about their circumstances.
- Explain why they want to make a deal.
- Talk about their real interests or business constraints.
- Create a collaborative atmosphere
- Reveal and explain in general terms their preferences among issues or options.
- Consider and reveal any additional capabilities or resources they have that might meet the other side's interests and could be added to the deal.
- Use what they learn to find creative options that will meet the interests of both parties to the greatest extent possible.³²³

³²³ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation*, LexisNexis Publications (2015)

Characteristics	Distributive	Integrative
Outcome	Win-lose	Win-win
Motivation	Individual gain	Joint and individual gain
Interests	Opposed	Different but not always positive
	Hidden	Best to share interests with other party
Relationship	Short term	Long term or short term
Issues involved	Single	Multiple
Ability to make trade-offs	Not flexible	Flexible
Solution	Not creative	Creative

One single position may have many underlying interests behind it. The ability to come up with win-win solutions is enhanced if parties concentrate on identifying these hidden interests. One of the most classic examples of interest-based, integrative bargaining and creating joint value by expanding the pie is that of a conflict between two sisters fighting over an orange. Each sister asserts that she wants the whole orange. Their mother mediates the conflict and based on what they have represented breaks the orange into two halves and gives each sister one half. This outcome is an example of compromise of value for both parties. Instead, if the mother would have asked each kid for what purpose she wanted the orange, there could have been a unique, win-win ending to the story. Assuming one sister wanted to eat the orange and the other sister only wanted the peel to use it for a face pack. Had their mother explored these underlying interests, they could have both gotten all of what they want instead of just half of what they wanted and a part of what they did not want at all.

Solutions obtained through integrative bargaining are generally more satisfying for all persons involved in a negotiation, as the real concerns and needs of each negotiating party are met up to some extent. Integrative bargaining involves collaboration through which the parties may in fact end up helping each other and strengthening their relationship. This prevents any possibility of unending ill will towards one another after the negotiation ends. Interest-based bargaining aids positive, constructive relationships between persons who considered opponents before.

Integrative bargaining benefits from more communication as opposed to less communication. The likelihood that parties will discover solutions that meet one party's needs at little cost to the other party is

enhanced when the parties convey their true needs and concerns- their underlying interests and if they remain engaged with each other, exchanging information and exploring options. Thus, being aggressive and self-focused is not productive; neither is it advantageous to be focused only on the other side's needs.

Effective integrative bargaining requires concern for one's own as well as the other side's interests as well as persistence and effort. It takes more work to understand each party's interests, create solutions, and reach agreement than it does to simply trade concessions.

Soft on Person



Hard on Problem



Integrative Bargaining

Identifying Interests: The first stride in undertaking interest-based bargaining is identifying each negotiating party's interests. This requires some plough work by the negotiating parties or the third party, neutral mediator assisting the parties negotiate. This is so because interests are often less concrete than positions and are often not easily revealed in public. A prime approach understanding the interests of the negotiating parties is asking "Why?" Why do you want what you are asking for? What are your concerns about not getting what you are asking for? Hopes? Fears? If a negotiating party thinks he will not get straight answers to these questions the party can get an intermediary to ask them for his information.

The bottom line to integrative bargaining is figuring out why someone feels the way they do and why someone is insistent about their demands. It is important to assure the other party that you are asking these questions so that their interests can be understood (hopes, needs, desires or fears) in a better way and not so that you can challenge their validity or try and figure out how to negate them.

The next relevant question is how the other side views your demands. It is important to analyze what obstacles are standing in the way of the other party agreeing with you? Does the other party know the underlying interests for you in the negotiation and more importantly do you know your own underlying interests? If you can sort out the underlying interests of the other party as well as your own, the likelihood of finding a solution that benefits both sides become higher.

It is also important to analyze the likely outcome of an agreement you are lobbying for, as the other the other negotiating party would see them. This process is important for weighing the pros and cons of the outcome; the only twist in the tale is that you attempt to do it from the other party's perspective. This empathetic analysis will make it easier for you to understand the other party's interests. This will make you better equipped to negotiate an agreement that will be acceptable to both sides.

Some more booster points to remember about identifying interests: firstly, it is important for you to internally realize that every negotiating party will probably have not one but multiple interests that it is planning to satisfy by the end of the process. Additionally, if you are negotiating with a group, not only will the group collectively have interests, each individual in the group may also have differing interests. While meeting interests, it is also relevant to move from basic interests to other elaborate interests. The most powerful interests are basic human needs- economic, security, well-being, recognition, a sense of belonging, and control over one's life. Once the basic needs of each negotiating party are taken care of to a great extent, agreement becomes easier. After each discussion with the other party, it is important to make a list of the other side's interests for your personal reference. As negotiations reach peak, we may lose sight of the basic goals and this list will help you keep on track.

Creating Options: Once the interests of both parties are identified, the negotiating parties should work together in cooperation with each other to try and chalk out the best ways to meet the interests. Brainstorming without deliberating and criticizing each issue but just preparing a tentative list of options is a positive way for parties to come up with creative new ideas. This may help the parties come up with ways of meeting their interests and needs in ways that had not occurred to anyone before. The final goal is to arrive at a win-win outcome which gives each negotiating party as much of their interests as possible and enough at a minimum that they see the outcome as a win, rather than a loss.

Jodha-Akbar and Chandragupta-Helena

Marriage alliances in the politics of ancient India (and possibly present-day India as well) is an interesting example of integrative negotiation and expanding the pie. Matrimonial alliances between royal families to further their power, prestige and influence were a prominent feature of politics in ancient India.

Akbar was one of the most powerful rulers of ancient India. At the same time the Rajputs were a powerful Hindu army based in North India. At that time, being on bad terms with each other was counter-productive for both the Mughal and Rajput empires. But there was no guarantee that even after establishing friendly political ties, one empire would not attack the other. To forge a bond and seal the deal, Raja Bharmal, a Rajput ruler struck a marriage alliance with Akbar in 1562. The younger daughter of Bharmal, Harkha Bai (also known as HeerKuwari, Jodha Bai and as per Mughal chronicle her name was, Mariam-uz-zamani) was married to Akbar. Akbar gave complete religious freedom to his Hindu wives and gave an honored place to their parents and relations in the nobility and he gave high posts to Rajputs in his empire. Most Rajput kings recognized Akbar's supremacy and later on helped Akbar in expanding and consolidating the Mughal Empire. As a measure to promote religious tolerance, Akbar also abolished the Pilgrimage tax in 1563 and Jizya tax in 1564. It is also said that Akbar and Jodha Bai loved each other and their love story has been reproduced in theatre, books, movies and even television sitcoms.

For the Rajputs and Mughals, the marriage alliance helped them 'expand their pie' instead of fighting over what limited was available. The marriage alliance greatly consolidated the place of Mughals and Rajputs in the history of India.

Similarly, long before Akbar married Jodha, a major part of India was ruled by the powerful ruler Chandragupta Maurya. Seleucus was one of the leading generals of Alexander. While journeying back to Greece from India, Alexander reached Babylon, he fell seriously ill and died there in 323 B.C. Alexander died without any heir. So, his extensive empire was shared out by his three generals among themselves. Thus, the far-flung empire of Alexander was split up into three parts- the Greek, the Egyptian and the Asian. The first two parts came into the possession of Ptolemy and Antigones respectively, while the third i.e. the Asian part fell to the lot of Seleucus. Seleucus's Asian empire extended from Syria up to the Euphrates. Some parts of Punjab and Afghanistan were also held by him. Seleucus had accompanied Alexander during his invasion of India in 326 B.C. After the death of Alexander in 323 B.C. Chandragupta Maurya had established a strong empire in India and had driven out the Greeks from the Indian soil. Seleucus therefore wanted to regain these territories and to move further to the east of Indus.

The events of the war between Seleucus and Chandragupta are obscure. Seleucus crossed the Indus, and may have advanced towards the Ganges. If there were any major battles Chandragupta must have won them, for when the war ended (possibly in 303 BC) the peace was greatly to his advantage. Seleucus abandoned any claims east of the Indus and also transferred the satrapies of the Parapanisadai (around Kabul), Aria (around Herat) and Arachosia (around Kandahar) and possibly eastern Gedrosia to Chandragupta. In return he was given 500 war elephants. Seleucus made good use of his elephants, taking them 2,500 miles west to Ipsus, where they played a major part in the defeat and death of Antigonus, a victory that gave Seleucus access to the Mediterranean coast. In India Chandragupta's victory enhanced the strength of the Mauryan Empire, the first in Indian history.

This treaty was fortified by a marriage alliance between Chandragupta and Seleucus. It is said that Chandragupta married Seleucus' daughter Helena on the advice of Chanakya, the famous economist and kingmaker of ancient India. Some stories go on to romanticize the political maneuver and also claim that Chandragupta had invaded Seleucus only because he had fallen in love with Helena, wanted to marry her and saw winning the war as the only means of getting her.

It is well documented that our own perception makes it very difficult to process and evaluate information objectively. This is a problem because successful integrative negotiation requires parties to develop a shared and complete understanding of the situation. They may be trying to solve different problems if their perceptions differ. These distortions will be amplified if emotions are strong. Viewing the situation from the other party's perspective is very beneficial because it enhances problem solving and facilitates

efforts to achieve integrative agreements. For these reasons, stand in the other party's shoes to view the situation from his or her perspective, and have him or her stand in your shoes to see it from your perspective. After doing so, discuss each of your perceptions explicitly. Asking how he or she views the situation, and sharing your own view, will enable you to make sense of your different viewpoints and reconcile them.

There are a number of myths or misconceptions surrounding this strategy. People seem to think it is about being soft or nice, and that they have undertaken an integrative negotiation if they maintain or improve the relationship. Though the relationship matters and may be an important goal, it is only one piece of the puzzle. It is true that integrative negotiators are soft on the person, but they are not soft on interests or the problem. Trading substance for the relationship is more consistent with accommodation. Even worse, the other side may use this against you when trying to claim value.

Hence, aggressiveness is not inappropriate in integrative negotiating. Insisting on digging deeper to find relevant information, ensuring that all of your interests are satisfied, and pointing out problems associated with exercising a possible alternative are examples of when it is appropriate and necessary to be aggressive.

Nor is integrative negotiating about compromising. If you compromise your interests you will not achieve a wise agreement. While it is true that value will eventually have to be claimed and compromising may be involved, the integrative part of the negotiation is the value creation component. Be careful not to confuse satisfaction with integrative negotiating. Just because you are satisfied or happy does not necessarily mean that you have created value.

The assumption of a fixed pie is another myth that may prevent people from using this strategy properly, or even attempting to use it. Negotiators commonly assume that resources are fixed or that their interests are completely incompatible. If this is true, expanding the pie is impossible. While some negotiations truly are zero-sum exercises, most are not. If there are two or more issues and the negotiators prioritize them differently, integrative potential exists.

Integrative bargaining supremacy is also often defended with the assertion that, while most everyone has an intuitive sense of how to use some distributive tactics, such as taking a firm position and grudgingly making concessions, individuals who lack formal negotiation training are less likely to intuitively grasp the fundamental concepts of integrative bargaining. This point is probably accurate, but it can obscure the fact that negotiations generally, and legal negotiations specifically, have more distributive potential than

integrative potential. For this reason, lawyer-negotiators would be better served, on balance, to think of distributive bargaining as the cake and integrative bargaining as the frosting, rather than the reverse.³²⁴

Joint Problem Solving

Also known as ‘Principled Negotiation’, joint problem solving revolves around interests rather than bargaining positions. Although often associated with integrative bargaining, joint problem solving goes a step ahead to enhance facilitation between the parties. The four key things to remember when approaching a dispute are as follows:

1. Separate the person from the problem

This is perhaps the most important thing to remember and repeat to yourself when faced with a dispute. Separating the people from the problem allows you to deal directly and empathetically with the disputants as neutral human beings, thus making possible an amicable agreement. Although we have become a highly technical world, human beings, no matter what they portray, are not machines. We are creatures of strong emotions having radically different perceptions from each other and with a genuine difficulty of communicating clearly. When evaluated objectively, we will realize most of the times that emotions of a disputant generally become entangled with the objective merits of the dispute. Hence, before working on the substantive problem, the ‘people problem’ should be disentangled from it and dealt with separately. Figuratively if not literally, the participants should come to see themselves as working side by side, attacking the problem, not each other.

Separating the people from the problem involves recognizing that every negotiation can be distilled into two primary components: the relationship shared by the people involved in the negotiation and the problem being addressed by the negotiators. The relationship is part of the negotiation’s context, and has significant influence on the way people perceive the problem, on the emotions they have, and on the manner in which they communicate with each other. The problem is the objective predicament that the parties are working to resolve through negotiation. As difficult as it may be, separating the people from the problem is critical to the success of a negotiation. Failing to do so often has immediate negative consequences. For example, when a negotiator expresses negative relational feelings through hostile or emotionally-charged actions, the other negotiator may begin to feel attacked and/or uncomfortable in the negotiation process. Trust, communication, and patience between negotiators dwindle, leading both negotiators to seek a swift end to the process instead of a quality solution from the process. In some cases, resentment between negotiators may also form. In the end, no one comes away fully satisfied with the negotiation process or result.

³²⁴ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Back Bone*, LexisNexis (2015)

A key element of negotiation is to understand and recognize the emotions of our partner and of course, our own emotions. Sometimes it is important to explicitly express how we are feeling and also to encourage the persons collaborating with us to express themselves. This enables us to acknowledge the legitimacy of emotions. Principal negotiation is aimed at channeling our emotions into a fruitful vision by working in collaboration to bridge differences (or, if there is conflict, to attack the problem instead of each other).

Coming to our perceptions, we have already discussed in detail at Chapter I about how each one of us has our own version of reality. The most common problem among people is the ease and speed with which we misinterpret the intentions of others. It is important to apply empathy to perception and see the issue from the other person's perspective, while at the same time acknowledging that comprehending is not the same as agreeing.

In relation to communication, being clear about what we say is important for solving mutual problems and bridging our differences. In essence, communication fails when we refuse to hear, misinterpret and misunderstand. It is of prime importance to listen actively which will help us understand better and to be slow and tolerant to take offence.

Failing to separate the people from the problem also has long-term consequences. For example, if two negotiators who have had a bad encounter meet again later – either inside or outside of a negotiation setting- chances are the exchange will be less than optimal. If they meet inside of a negotiation setting, it is likely that they will revert to the same quick, tempered, and inefficient negotiation process as the one before. If they meet outside of the negotiation process, their exchange will likely be stifled and- if they are participating in any business transaction or social achievement- the result will suffer. A more effective way for the parties is to think of themselves as partners in a hardheaded, side-by-side search for a fair agreement advantageous to each.

2. Focus on interests, not positions

Interests are the silent, powerful movers behind positions that parties take. There will be no resolution if someone believes that his primary interests have not been respected, secured, or advanced.

This principle is designed to overcome the drawback of focusing on people's stated positions when the object of a negotiation or dispute resolution process is to satisfy the underlying interests of the participating parties and not 'getting them what *they think* they came to the mediation for'. As Nelson Mandela once said, "conflicts are resolved through shifts that were unimaginable at the start". A negotiator/mediator should help the parties prioritize their interests and set realistic objectives.

Understanding the difference between interests and positions is important for a successful negotiation. A position is a stand taken by a party that he or she feels will satisfy his interests. But the interests of a party are the needs,

POSITIONS

- A Demand
- A 'Want'
- A strategy to get needs met

V

S.

INTERESTS

- What lies beneath the position
- The 'Human Need'
- The Driver or Motivator

concerns, goals, hopes and fears that motivate parties to negotiate. In a negotiation or a conflict, we often protect our interests and do not let the other side know what we want. As a result, we end up arguing positions rather than sharing the interests behind our positions.

Disputants often describe a conflict in very simple terms. These often take the form 'We want this, but they want that,' or 'I want this, and he wants it too (but we can't both have it).' These simple statements about what people do and do not want are what conflict professionals call 'positions. (The term relates to the political notion that a politician will have a 'position' on a particular issue--he will favor it, or he will be against it.) When people define the conflict in terms of positions, the conflicts often appear to be highly intractable, since one side wants something the other completely opposes, or both sides want something that cannot be shared. In democratic politics, this problem is "resolved" with a vote. But when voting is not possible, or appropriate, arguing over positions can be very ineffective, and even destructive. Parties can get more and more entrenched in their positions, and positions will often move farther and farther apart, as disputants make ever-more extreme statements in an effort to win support for their side.

While some conflicts are really structured a win-lose way, many conflicts which are thought to be unavoidable win-lose situations are more manageable when redefined (or reframed) in terms of underlying interests. Unlike positions, interests are the reasons why people want things.

Compatible and shared interests as well as conflicting interests hide behind opposed positions. When we undertake the process of identifying interests' real disagreements usually get clarified and since some interests will be complementary or shared, the battleground of the dispute will shrink automatically. Showing courtesy, listening with respect and emphasizing concerns to meet the basic needs of the other person directs the focus to interests.

Discovering interests confers many benefits. Positions may still be taken, but now you have many possibilities that can still satisfy interests. Battles may still be fought, but now the loser has choices in defeat to retreat to a lesser position or negotiate a settlement that ends the war. The all-or-nothing, do-or-die approach of positional battles can be also replaced with variable feasts that seek peaceful solutions from the start, preserving the relationship and expanding the pie so both parties can satisfy most of their interests. In addition, people applying this method try to be specific about their own interests and how

important they are to them. The goal is to frame a joint attack on the difference or problem that will accommodate the interests of both parties.

3. Generate a variety of possibilities before deciding what to do

When using the principled negotiation method, generating options for action can often be the hardest step to get partners to participate in. There are four particular obstacles to this: premature judgment, searching for a single answer, assumption of a 'fixed pie', and thinking that no-one else is able to assist in problem solving.

The temptation to leap to a solution before considering the options is often coupled with the assumption that there is only one 'right' answer, rather than an appreciation that there are generally many ways in which interests can be met. Further, it can also be a trap to assume that there are no additional resources that can be brought into play (a 'fixed pie'). The key is to see the areas of difference or conflict as shared problems requiring shared solutions. Seeing them as simply the partner's problem can result in the partner developing solutions that do not take our interests into account.

The most widely used method for generating a variety of possibilities is brainstorming, in which participants are encouraged to rapidly put forward ideas, while at the same time withholding judgments on their merits. Encouraging interaction at speed, without in-depth discussion, tends to circumvent narrow thinking and opens up the possibility of creative solutions. The idea is to search for mutual gains, to dovetail different interests and, if necessary, to give all partners an easy way of backing away from previously stated positions. It is essential to look forward and to leave past disagreements to one side.³²⁵

Writing down what you think can be the possible solutions to the dispute at every stage of the mediation can be a helpful practice in the beginning. Identifying any criteria already suggested as a basis for agreement also helps. At the joint discussion stage, both parties can jointly generate options that are mutually advantageous and seek agreement on objective standards for resolving opposed interests.

4. Insist that the result be based on some objective standard

Sometimes a mediator or negotiator may be faced with a party who is plain stubborn and unwilling to accede his original position and consider his underlying interests. Submitting to the whims and fancies of a stubborn party may lead to illogical or impractical results which will not resolve the dispute finally. Such a stubborn party can be countered by insisting that his single say-so is not enough and that the agreement must reflect some fair standard independent of the will of either side. Some fair standards adopted in business practices are market value, expert opinion, custom, or law governing the trade. By

³²⁵ Principled negotiation: integrating interests,
http://press.anu.edu.au/dialogue_methods/mobile_devices/ch04s04.html as accessed on 28th March 2015

discussing such criteria rather than what the parties are willing or unwilling to do, neither party need give in to the other while still arriving at a fair and satisfactory solution.

This method saves time and energy by cutting out posturing. It also generally leads to better working relationships and mutual benefits in the future.

Most business negotiations are neither purely distributive nor purely integrative. Business negotiations generally have entwined competitive and cooperative elements. Negotiators face a dilemma in deciding whether to pursue a cooperative or a competitive strategy at a particular time during a negotiation. At the core of the negotiator's art is knowing whether to compete where interests conflict and claiming more instead of less or to create value by exchanging the information that may lead to mutually advantageous options.

Practice Active Listening

Tip # 1: Maintain eye contact with the other person.

Tip # 2: Think only about what the person is saying. Resist the urge to begin formulating your reply or your position on the issue.

Tip # 3: Take notes that summarize their thoughts and can be used later as you reflect on their concerns. This attention to detail also shows your sincere interest in what they are saying.

Tip # 4: Pay close attention to their body language, including any significant aspects in your notes.

Tip # 5: Ask reflective questions to let the person know you are listening and that you understand their position. Repeat in your own words what you've heard to ensure that you have understood it and to let the other party know you understood it correctly. Ask probing questions about any aspect that is not entirely clear to you.³²⁶

3. STRUCTURE AND STRATEGY

Background Research

As Benjamin Franklin said, "By failing to prepare, you are preparing to fail." Preparation for negotiations is very important for successful outcomes. Preparation involves developing strategies through the process of delineating issues that require resolution, knowing one's own position and negotiation limits vis-à-vis

³²⁶ Anuroop Omkar and Kritika Krishnamurthy, The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Back Bone, LexisNexis (2015)

each issue and knowing the other side's position. In addition, good negotiators are prepared with realistic options and a clear understanding of what concession to make and ask for.

The Head of Barbarika

One of the examples of use of hierarchy in negotiation in India is the story of Barbarika who is also worshipped as *Khatu Shyamji* in Rajasthan. Barbarika was one of the heroes of Mahabharata who never got his due in the history of time. The people, who know this character, know that he could have been the best warrior in the great war of Kurukshetra. Unfortunately, he did not get the chance to prove this point.

Barbarika, who earned an exceptional skill to destroy the complete army in just one shot of an arrow, once demonstrated the same to Krishna. Krishna asked Barbarika to pierce all the leaves of a 'Peepal' tree. While Barbarika was chanting the mantra just before releasing the arrow, Krishna took one leaf of the tree and hid it under his foot. Barbarika released the arrow and it did what it meant, after piercing all the leaves it started revolving around Krishna's feet. The demonstration of this skill surprised everyone who witnessed. Barbarika claimed that he could finish the war in just few hours. The interesting part of the story was Barbarika's pledge to fight always from losing side. Krishna knew that this warrior has capacity to diminish any side, and so the other side will always be the losing one. And if Barbarika changes sides, he will kill everyone in both sides of the war.

Krishna was troubled by this turn of events for several reasons. The Kurukshetra war was important to complete the cycle of curses (e.g. Karna was cursed by Parashurama that he would forget the art of war at the time he needed it the most) and blessings that the warriors on both sides had received. If these were not completed, the warriors would be trapped in a cycle of re-births to give effect to blessings and curses. Second, Barbarika was destined to fight for the losing side and if he used his arrows for the Pandavas, he would be obliged to shift loyalties to the Kauravas and in turn, would destroy the Pandavas. Third, without a war, establishing dharma and the prowess of the Pandavas would not have been possible.

Aware of the consequences if Barbarika participated in the war, he asked Barbarika, "Whom do you consider your guru?" Barbarika replied that all the skills he earned were always keeping only lord Krishna in his mind, so he, lord Krishna, is his prime guru.

At this, Krishna told Barbarika that he was entitled for gurudakshina (fee or gift asked by teachers for their teachings) and asked Barbarika's head in the gurudakshina. Barbarika took no time to cut his head and give it to Krishna on his own and in return Krishna granted him a wish to live till battle of Mahabharata ends and watch the same from a nearby mountain.

Krishna used two important negotiation tools in this story. First, Krishna had important background information regarding the other party. Lord Krishna knew that Barbarika considered him his Guru and hence, he was able to strategize his demands in the negotiation accordingly. Next, Lord Krishna played his hierarchy of being the guru of Barbarika to negotiate a deal with Barbarika and granted him his one weakness as a warrior in return. Barbarika as a true *Kshatriya* (Warrior community) had a fervent wish to witness the epic war of Kurukshetra and so, even after losing his head and consequently his life, Lord Krishna granted him the boon that his head would be able to witness the war of Kurukshetra and that he would die only once the war was over.³²⁷

Self-Evaluation

The next step is to introspect and identify one's own needs and be aware of the position that should be taken on each issue to satisfy those needs. The goals of the negotiation should be prioritized. It is important that these goals are realistic, concrete and measurable. The parties should also be cognizant of their relative strengths, weaknesses, opportunities and threats (SWOT). Also ponder upon your opening position which will set the tone of the negotiation. Decide the bottom line or reservation price beyond which the negotiation will be called off and an optimistic target point or aspiration price i.e. the ideal situation that one wants to be in the end of a successful negotiation. Consider the alternatives you have if this deal does not fall through. Also, evaluate what can be the worst thing that can happen if you let the deal slip off your fingers.

One should also be ready to beat one's own drums if necessary. Although you may be the sole proprietor of a start-up or a multi-millionaire with varied business interests, it never hurts to be prepared with your business profile and relevant financial figures to quote if necessary.

Counter Party Assessment

It never hurts to background research the company on the other side of the table. If the company is listed, their annual reports and financial statements can be found on their website. Otherwise, the details of the company and annual returns can be obtained from the website of Ministry of Corporate Affairs, Government of India (MCA21 portal).

Apart from the financials it is important to know the nature of work the company undertakes, their previous projects and the arrangements they offered to other parties. If the company has had a similar deal before, you can evaluate how the company may proceed. But be aware of change in management. A company's personality is the personality of the person who is the driving force of the company be it the

³²⁷ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Back Bone*, LexisNexis (2015)

CEO, Managing Director or even an honorary Chairman Emeritus. Policies and decision-making patterns change with the person in the driver's seat.

Additionally, a good negotiator knows the people he is going to meet at the negotiation table. It also does not hurt to research the person you are meeting, their position in the organization, their scope of responsibilities, their industrial expertise and their general professional and academic profile. These things generally give an indication to the way you can hit the right rapport with the opposite party.

In international negotiations, remember to background research the culture and their basic etiquettes. For example, in Japan hierarchy is of prime importance. If the party on the other side is a CEO, they will expect a person from an equivalent or higher designation to undertake the negotiation. Anything lower shall be considered an insult. Italians prefer to take their time negotiating and be familiar with who they're talking to. Indeed, being in a rush to sign an agreement will lead to unfulfilled expectations. For example, during a business lunch, it is important to begin with relaxed conversation; giving your partner the opportunity of enjoying lunch before you get to the subject, you're interested in. In addition, perceptions of time can change depending upon whether business is being conducted with people from the south or north of the Italian peninsula.

A note of caution, a negotiation is not a battle. It is like a football game where both parties are in the same team. Research the opposite party in order to understand the common goals and interests. Their previous deals can also give you an idea to a business structure they generally adopt which you are comfortable with giving common terms to negotiate and kick start the process on a positive note.

Building Credibility

It is important to begin your negotiations with social niceties. This of course is also culture specific. Begin the discussion with a common but non-controversial topic even if it is the conventional topic 'the weather'. Avoid discussing politics and religion since any personal divergent views may affect your business deal. Common place talk serves various purposes. It helps to break the ice and build rapport. In long drawn negotiations, it gives the negotiators a well-deserved break which also aids the negotiation process. Lastly, it helps build a lasting relationship with the other party.

In a recently reported deal, the manufacturer and online seller negotiated a deal smoothly but got stuck on who will bear the burden of 2% convenience fees payable to credit card companies for online payments made by customers purchasing the product. The amount was small but both parties refused to budge. Finally, the online seller agreed to take care of the convenience fee if the manufacturer took out at least one employee of the seller to a \$500 steak dinner every month. The dinner cost obviously did not cover the margin and was of no financial use to the company. But the monthly dinner became a social occasion

for both companies with employees bonding and consequently leading to the growth of a long-term business relationship between the two companies. Funny, but true.³²⁸

Anchoring

Daniel Kahneman, the Nobel award-winning psychologist, has explained how we can use the anchoring effect to our advantage. Anchoring refers to our tendency to focus on the first number as the base rate for negotiation. In negotiation, the first person to say a number can win the negotiation, because they have set the expectations for the entire process of negotiation. It's extremely difficult for the human mind to overcome this cognitive bias. The first number that is explicitly put forth in the meeting is the number that will control the course of the meeting. It is your responsibility to state that number. The only number that matters is the first one, and you're the one who needs to say it.

There are differing schools of thought on this, and many people believe you should never be the first person in a negotiation to quote a price. Let the other side start the bidding, the thinking goes, and they will be forced to show their hands, which will provide you with an advantage. But Kahneman's research has indicated that the result of a negotiation is often closer to what the first mover proposed than to the number the other party had in mind; the first number uttered in a negotiation (so long as it is not ridiculous) has the effect of "anchoring the conversation."

In an experiment conducted some years ago, real estate agents were given the opportunity to assess the value of a house that was actually on the market. Their visit to the house included a comprehensive booklet of information including the asking price. Half the agents saw an asking price that was substantially higher than the listed price of the house. The other half saw an asking price that was substantially lower than the listed price. Each agent gave their opinion about the reasonable buying price for the house and the lowest price at which the house should be sold. Majority agents denied being influenced by the asking price in the information booklet. But they were wrong. The anchoring effect on the agents was statistically computed at 41%. The same experiment was conducted on management students with a slightly higher anchoring effect of 48% with one major difference- the management students admitted that the asking price in the booklet had an impact on their assessment.³²⁹

And one's role in the negotiation can matter, too. In the book *Negotiation*, Adam D. Galinsky of Northwestern's Kellogg School of Management and Roderick I. Swaab of INSEAD in France write: "In our studies, we found that the final outcome of a negotiation is affected by whether the buyer or the seller

³²⁸ Ryan Holmes, How to Win A Difficult Negotiation With "The Steak Clause", *Forbes*, available at <http://www.forbes.com/sites/groupthink/2016/06/16/how-to-win-a-difficult-negotiation-with-the-steak-clause/#207a3b2b26fb>, last accessed on June 20, 2016

³²⁹ Daniel Kahneman, *Thinking, fast and slow*, Allen Lane (2011)

makes the first offer. Specifically, when a seller makes the first offer, the final settlement price tends to be higher than when the buyer makes the first offer."³³⁰

Mindfulness

The purpose of mindfulness, one of the practices that brought the Buddha to enlightenment, is to help us to detach ourselves from the ego by observing the way our mind works. Warning: this is not just a spiritual practice but also good for business. In mindfulness we mentally stand back and observe our behaviour while we are engaged in the normal process of living in order to discover more about the way we interact with people, what makes us angry and unhappy, how to analyse our experiences and how to pay attention to the present moment. Undertaking this practice in negotiations helps the negotiator not just self-evaluate his mistakes but also be unattached to the positions taken in the negotiation, tactics played by other party and outcome of the process itself.³³¹

The savviest negotiators take nothing personally; they are impervious to criticism and impossible to fluster. And because they seem unmoved by the whole situation and unimpressed with the stakes involved, they have a way of unnerving less-experienced counterparts. This can be an effective weapon when used against entrepreneurs, because entrepreneurs tend to take every aspect of their businesses very personally. Entrepreneurs often style themselves as frank, no-nonsense individuals, and they can at times have thin skin. But whenever you negotiate, remember that it pays to stay calm, to never show that an absurdly low counter-offer or an annoying stalling tactic has upset you. Use your equanimity to unnerve the person who is negotiating with you. And if he or she becomes angry or peeved, don't take the bait to strike back. Just take heart: You've grabbed the emotional advantage in the situation. Now go close that deal.³³²

The opposition may seethe, pound their fists, curse you, threaten you, and even physical assault you. To maintain your power and ultimate success don't lose you're cool. It's better to walk away from a deal that's going sour than to lose all credibility by flying off the handle. If you can't take it anymore, pick up your papers, stand up, and walk out the door. One of the most powerful moves in negotiation is walking

³³⁰ Mike Hofman, 5 Things You Should Never Say While Negotiating, Inc., available at <http://www.inc.com/guides/2011/01/five-things-to-never-say-while-negotiating.html>, last accessed on July 01, 2016

³³¹ Karen Armstrong, Twelve Steps to a Compassionate Life, The Bodley Head (2011)

³³² Mike Hofman, 5 Things You Should Never Say While Negotiating, Inc., available at <http://www.inc.com/guides/2011/01/five-things-to-never-say-while-negotiating.html>, last accessed on July 01, 2016

away. If you can walk away with your emotions intact, you have, in essence, won the deal that truly matters — your reputation.³³³

The Neuroscience behind Negotiation

Neuroscience, while exciting, is still in its early stages of development. Neuro-imaging holds the promise, however, of allowing unprecedented access to the mechanisms of the brain as it makes decisions. We are finally able to advance our understanding of just what is happening in the brain during negotiation and mediation, not by words but with pictures. A functional MRI can show the location, intensity, duration and strength of the response to stimuli. But scientists know that this science is still in its infancy and the outcomes depend on what the experimenter does. At most, the technology can only confirm and strengthen what has already been developed on a functional level.

The strides in neuroscience have also had a deep impact on how we look at disputes and decision making involved in resolving a dispute. For example, In Descartes' Error: Emotion, Reason and the Human Brain (1995), neuroscientist Antonio Damasio outlined a groundbreaking discovery. He studied people with damage in the part of the brain where emotions are generated. He found that they seemed normal, except that they were not able to feel emotions. But they all had something peculiar in common: they also couldn't make decisions. They could describe what they should be doing in logical terms, yet they found it very difficult to make even simple decisions. This means that even when we believe we are motivated by logic, the very point of making a decision is based on emotion. Damasio's discovery has had a profound impact on those who are involved with negotiation and mediation processes.

Also, neuroscience has uniform universal applicability. Although neuroscience can't be divorced from culture, history, and geography, there is no Orientalism of the brain. The fundamental biology of social motivations is the same in Bhatinda, Berlin, Bangkok and Boston. It anticipates, for instance, how the mind's natural instinct to reject perceived unfairness can impede similarly innate desires for accommodation, and how fairness can lead to tragedy. It tells us that genuinely conciliatory gestures are more likely and natural than many believe, and how to make our own conciliatory gestures more effective.

Some of the human behavior rules proved via neuroscience which affects negotiation to a great extent are as follows:

Humans can unknowingly pay a high cost to avoid unfairness

³³³ Neil Patel, The Art and Science of a Successful Negotiation, Forbes, available at <http://www.forbes.com/sites/neilpatel/2015/06/22/the-art-and-science-of-a-successful-negotiation/3/#333a35c2191e>, last accessed on July 01, 2016

More than three decades of lab experiments show that humans are prepared to reject unfairness even at substantial cost. This is based in our biology: A decade of studies using brain imaging shows that human neural activity, particularly in the insula cortex region, reflects the precise degree of unfairness in social interactions.

In a classic example known as the ultimatum game, one individual gets an amount of money (e.g. INR 100) and proposes a split with a second player (e.g. INR 80 for herself, INR 20 for the second person). The other individual then decides whether to accept the offer (in which case both get the split as proposed) or reject the offer (in which case both players get nothing). Despite receiving an offer of free money, the second player rejects offers involving less than 25 percent of the money around half the time. In essence, unfairness has a negative value that outweighs the positive value of the money they would otherwise receive.

Even non-human primates show evidence of hardwiring to reject unfairness. In one famous study, two capuchin monkeys were instructed to carry out the same task, but one was repeatedly rewarded with sweet red grapes while the other received cucumbers. In response to such blatant unfairness, the cucumber-fed monkey threw a conniption fit.

In one case, a U.S. firm negotiated for two years with a major Japanese company to create a large-scale joint venture under Japanese control. During this excruciatingly detailed process, the negotiations were halted several times due to what the Japanese team described as a break-down in its consensus process. Each time, however, the Japanese company resumed negotiations with a stronger consensus on the central role of the deal to its long-term global strategy.

When a European firm unexpectedly made a tender offer for the entire U.S. business, the Japanese company had to decide whether to drop out of the process or seek to acquire the whole firm. After years of negotiations and mentally integrating the U.S. operations into its long-term strategy during its exhaustive consensus process, the Japanese company had essentially fallen in love with its target. Rather than face the internal organizational costs of ‘losing,’ it was willing to pay an extraordinarily high price for the U.S. firm- far more than it would have paid had it not been part of the frustratingly long consensus process.

Our perception of fairness is highly subjective

Neuroscience also affirms that perceptions of fairness are highly subjective. We can illustrate this using the ultimatum game described above, where one individual gets an endowment (e.g. INR 100) and proposes an offer (e.g. INR 80 to INR 20 split) that the other individual accepts or rejects.

One study, for example, manipulated individuals' subjective judgment of what constituted a fair enough offer by making participants first take a short quiz to "earn" the endowment. After receiving the money in this way, they went on to make more low offers than usual in the ultimatum game. The subjects may have felt these lower offers were only fair, since they had worked to earn the cash, but this view wasn't shared by the second party, who as normal rejected the low offers, leaving both sides with nothing.

Mutually incompatible judgments of fairness, in other words, made both players worse off. And brain imaging shows that the subjective experience of fairness, which can lead to such mutually incompatible judgments, is encoded in individuals' brain activity.

Why does the inherent subjectivity of fairness matter? It speaks to the kind of tragedy the German philosopher Georg Hegel identified in the epic tales of ancient Greece- one arising because each side in a conflict firmly believes its position to be just.³³⁴

The Hegelian Tragedy

George Wilhelm Friedrich Hegel (1770-1831), the immensely influential German philosopher, in his work *Aesthetik* (1820-29) took a very interesting take on how the human mind thinks in the context of tragedy in Greek mythology. According to Hegel, in classical Greek tragedy the characters are often moved to act because of an ethical interest or 'pathos,' a concern for the family or for the state.

Greek tragic heroes and heroines are moved to act by the ethical (or otherwise justified) interest with which they identify, but they act freely in pursuit of that interest. Tragedy shows how such free action leads to conflict and then to the violent (or sometimes peaceful) resolution of that conflict. At the close of the drama, Hegel maintains, we are shattered by the fate of the characters (at least when the resolution is violent). Yet, we are also satisfied by the outcome, because we see that justice has been done. Individuals, whose interests such as the family and the state should be in harmony with one another, set those interests in opposition to one another. In doing so, however, they destroy themselves and thereby undo the very opposition they set up. In the self-destruction of such 'one-sidedly' ethical characters, Hegel believes, we, the audience, see the work of 'eternal justice'. This reconciles us to the fate of the characters and so provides the sense of 'reconciliation which art should never lack'.

In modern tragedy, by which Hegel means above all Shakespearean tragedy, characters are moved not by an ethical interest, but by a subjective passion, such as ambition or jealousy. These characters, however, still act freely and destroy themselves through the free pursuit of their passion. Tragic individuals,

³³⁴ Nicholas Wright and Karim Sadjadpour, *The Neuroscience Guide to Negotiations With Iran*, <http://www.theatlantic.com/international/archive/2014/01/the-neuroscience-guide-to-negotiations-with-iran/282963/> as accessed on 6th March 2015

therefore- whether ancient or modern- are not brought down by fate but are ultimately responsible for their own demise.

Accommodation and conciliatory gestures are natural

While fairness may drive discord, it's not necessarily our nature to punish unfairness and continue in perpetual conflict until the other side capitulates. Instead, experiments show that humans aren't purely competitive or self-interested, but rather are also driven to cooperate.

The neural mechanisms that initiate and sustain cooperation appear in many brain-imaging studies, and involve the anterior insula cortex, a brain region that processes emotion and social norms. In one 'trust game,' the first player is given an amount of money (e.g. INR 200) each round and can invest any portion of it (e.g. INR 100) with the second player. Then the investment triples, and the second player decides how much of the money to repay (e.g. returning INR 100 and keeping INR 200). Cooperation, in which higher amounts are invested and then paid back, benefits both sides but carries the risk of exploitation.

When pairs play over the course of several rounds, we see how humans maintain and repair breakdowns in cooperation. When collaboration falters and investments are low, individuals often build cooperation by making unilateral conciliatory gestures in the form of high repayments- despite the risk that these generous overtures will simply be pocketed and not reciprocated. Humans use such cooperative gestures as one tool to manage the critical balance between self-interest and cooperation.

Unexpected conciliatory gestures are more effective

The neural mechanisms behind conciliatory gestures offer clues to render them more effective: make them unexpected. Why? The more surprising a reward or punishment is, the bigger the event's impact is on our decision-making. According to dozens of imaging experiments, the brain has sophisticated machinery to compute the crucial difference between what is expected to happen and what actually happens.³³⁵

For example, it is reported that when Donald Trump decides he wants to take someone's business, he apparently stuffs a few tricks up his sleeve before negotiation time. First, he will have his staffers warn you that he is very busy and probably will not be able to stay long and will not shake your hand (the staff will tell you that he just does not do that). Then when Trump enters the room, you are instantly charmed over by his warm handshake, extensive 40minute chat about business and glossed-over terms of sale. You walk out feeling quite good about yourself, says a CBS source. In reality, you were duped into thinking completely normal negotiation courtesies were really flattering, undeniably giving Trump the upper hand.

³³⁵ Ibid

People will do what you tell them not to do

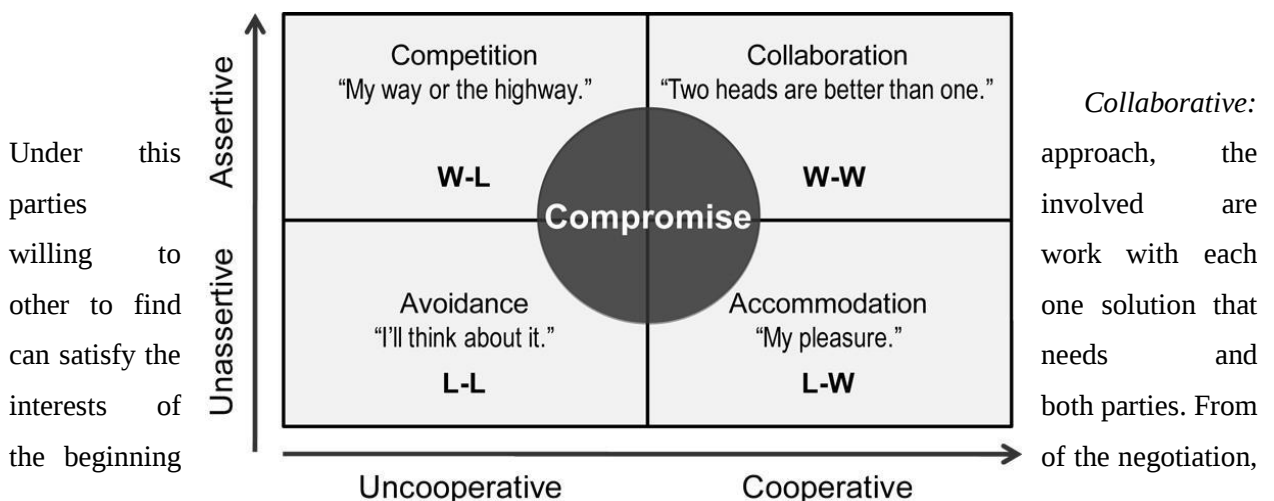
People who feel their sense of control is being taken away from them will grab it back by not doing what they are asked. This can even be actions that are clearly against their best interests. According to Brehm and Brehm (1981) who first propounded this theory, there are four elements that are fundamental to this reactance theory: freedom, threat to freedom, reactance, and restoration of freedom. Individuals must perceive a concrete sense of freedom and have knowledge of it in order for reactance to occur; that is, the notion of freedom cannot be abstract. Threats to freedom can originate from a more powerful social agent through threats of punishment or loss of reward or from someone of lower status through an irreversible act that eliminates materials necessary for freedom. Once a threat is present, some attempt to restore the threatened or lost freedom is made. The success of social animals like human beings' rests precisely on managing this delicate trade-off between conflict and collaboration, a task for which we possess such exquisite neural machinery.

A classic example of this is found in the Bugs Bunny Looney Tunes cartoons where often the characters were shown a big, red button with a sign which says "Don't Push this Button". The characters would invariably end up pushing the button just because it says otherwise. Funnily enough, this experiment has also been proved many times in real life psychological experiments.

While participating in negotiations, always remember that if you make the other party feel you are being unjust or that you are restricting their options or disallowing them something, they will bounce back and defend their demands harder than they generally were.³³⁶

4. STYLE AND SKILLS OF NEGOTIATION

There are five styles to negotiation:



³³⁶ Anuroop Omkar and Kritika Krishnamurthy, The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Back Bone, LexisNexis (2015)

parties engaged in this type of negotiation share information, explore contentious issues, and identify the underlying concerns of both parties to find any kind of alternative that fully satisfies the parties' goals. Collaborative negotiations must be handled with courtesy, directness and good manners.

Competitive: Under this approach, individuals pursue their own concerns at the other party's expense. Each party looks to reach their own goals without sharing any kind of information with the other, and both stay firm on their own positions because they believe that is right. This approach results in aggressive, hostile, and uncompromising demeanors.

Accommodating: Contrary to competitive negotiations, this negotiation tactic involves parties neglecting their own concerns in order to satisfy the needs and the interests of the other party. This approach is taken by negotiators with generous, charitable, and obedient personalities.

Avoidance: Parties taking this approach try to avoid the conflict by postponing the issues for another time in the future. They don't address the conflict. The approach might take the form of diplomacy.

Compromising: Parties taking this approach try to discover acceptable solutions that partially satisfy both parties. They split the differences, exchange concessions, and seek a quick middle ground position.

	Competitive	Collaborative
Goal	Achieve one-sided target	Achieve a mutually acceptable target
Characteristics	- Short-term orientation - Few or forced concessions - Secretive/deceptive communication - Linked with arm's length transactional relationships	- Long-term orientation - Open to concessions - Open communication - Linked with strategic partnerships
Strategy	- Push the settlement near the other party's reservation price - Cause the other party to move its reservation price	- Try to understand the other party's needs - Define the problem in a way that is mutually acceptable to both sides - Establish trust
Tactics	- Disruptive actions - Manipulation - Alliance with outsiders - Aggressive opening offer - Threats/intimidation/aggressive behavior - Hardball tactics	- Depersonalize the problem - Separate problem definition from solutions - Generate alternative solutions - Expand the resources for both parties - Find a bridge solution - Use breaks to cool off

		- Clear and accurate communication
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STRATEGIES

BATNA

BATNA, a concept developed by Roger Fisher and William Ury, is the acronym for best alternative to a negotiated agreement. It is one's preferred course of action in the absence of a deal. Knowing your BATNA means knowing what you will do or what will happen if you fail to reach agreement in the negotiation at hand. Consider this example:

A consultant is negotiating with a potential client about a month-long assignment. It's not clear what fee arrangement she'll be able to negotiate, or even if she'll reach an agreement. So, before she meets with this potential client, she considers her best alternative to an acceptable agreement. In this case, the best alternative to a negotiated agreement—the consultant's BATNA—is spending that month developing marketing studies for other clients—work that she calculates can be billed out at INR 20 lakh.

Always know your BATNA before entering into any negotiation. Otherwise, you won't know whether a deal makes sense or when to walk away. People who enter negotiations without this knowledge put themselves in a bad position. Being unclear about their BATNAs, some will reject a good offer that is much better than their alternatives because they are overly optimistic. For example, Arjun has brought a damage suit against a former employer. That employer has offered to settle out of court for INR one crore. But Arjun wants more. "I know that I'm in the right and can get what I want if I don't settle, but go to court," he tells himself. Going to court is his best alternative to the INR one crore settlement offer. But how good is that alternative? Arjun hasn't really done a thorough job of estimating the probability of winning in court, the time it will take for an Indian labour court and numerous appeals up to Supreme Court if required, the size of a potential award or the bill he shall have to pay his advocate. In other words, he has no real idea of the alternative to the employer's settlement offer.³³⁷

The reason you negotiate is to produce something better than the results you can obtain without negotiating. What are those results? What is that alternative? What is your BATNA- your Best Alternative to a Negotiated Agreement? That is the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavourable and from rejecting terms it would be in your interest to accept.

Your BATNA not only is a better measure but also has the advantage of being flexible enough to permit the exploration of imaginative solutions. Instead of ruling out any solution which does not meet your

³³⁷ Harvard Business Essentials: Negotiation, Harvard Business School Press, 2003

bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interests.

If you have not thought carefully about what you will do if you fail to reach an agreement, you are negotiating with your eyes closed. You may, for instance, be too optimistic and assume that you have many other choices: other houses for sale, other buyers for your second hand car, other plumbers, other jobs available, other wholesalers, and so on. Even when your alternative is fixed, you may be taking too rosy a view of the consequences of not reaching agreement. You may not be appreciating the full agony of a lawsuit, a contested divorce, a strike, an arms race, or a war.

One frequent mistake is psychologically to see your alternatives in the aggregate. You may be telling yourself that if you do not reach agreement on a salary for this job, you could always go to California, or go South, or go back to school, or write, or work on a farm, or live in Paris, or do something else. In your mind you are likely to find the sum of these options more attractive than working for a specific salary in a particular job. The difficulty is that you cannot have the sum total of all those other options; if you fail to reach agreement, you will have to choose just one.

Nelson Mandela and the Apartheid Negotiations

Background

The negotiations to end Apartheid between Mandela and the South African government were significant not only because they changed the social and political landscape of the country, but because they provided an example of peaceful diplomatic negotiation succeeding where violence seemed inevitable. Throughout the process, Nelson Mandela held approximately 60 meetings spanning a decade. While Nelson Mandela represented the interests of the African National Congress, the negotiator on behalf of the South African government was Frederick William de Klerk, the then President of South Africa.

In 1990, with security costs out of control and the economy in a tailspin, de Klerk surprised the world with his decision to release Mandela from his prison on Robben Island, where the graying leader had languished for 27 years. In their first face-to-face negotiation, de Klerk agreed to lift the state of emergency, while Mandela committed the ANC to restrain its supporters and help curb the nation's violence. In their next encounter, the ANC agreed to suspend its armed struggle, while the government agreed to release political prisoners and allow political exiles to return to the country.

In December of 1991, the government and the ANC held the first Convention for a Democratic South Africa (CODESA), which included parties and stakeholders from across the country. Their mission: to negotiate a new constitution, one that would protect and empower all citizens, and to prepare the divided nation for its first multiracial election.

Mandela's BATNA

In a rare case, it is not possible to imagine what Mandela's BATNA could have been. Either there was freedom and equality or there was continued bloodshed, violence, inequality which would have eventually led to civil war. South Africa had already lost too many of its children over the years – it was time for peace and forgiveness.

South African Government's BATNA

In an interview de Klerk admitted the BATNA which the government was foreseeing. In his own words, "If we had not changed in the manner we did, South Africa would be completely isolated. The majority of people in the world would be intent on overthrowing the government. Our economy would be non-existent- we would not be exporting a single case of wine and South African planes would not be allowed to land anywhere. Internally, we would have the equivalent of civil war."

Narrowing Down Opinions

Mandela's negotiations with the apartheid regime began while he was still their prisoner on Robben Island. After an initial meeting with justice minister Kobie Coetsee during a spell in hospital in November 1985, Mandela was separated from his fellow ANC prisoners on his return to jail. He later recalled:

"Immediately in my mind I said: 'Well, this would be a good opportunity to start negotiations with the government and to maintain this element of secrecy.' If you are a member of an organization and your comrades say: 'Don't do this,' whatever your views are, that you have to accept, and that is what I feared. I wanted to confront them [the ANC] with a fait accompli."

For most of us, secretly moving forward with a negotiation against the wishes of our superiors and colleagues would be a risky, even foolish move. Business negotiators typically must secure buy-in from others in their organization before breaking from past practice.

For such contexts, however, Mandela, who was raised by a prominent tribal chief offers another useful shepherding metaphor. As a result of the long hours he spent in childhood listening to the consensus-building conversations of the tribal council, Mandela observed that the chief "stays behind the flock, letting the nimblest go ahead, whereupon the others follow, not realizing they are being led from behind."

This quotation suggests the value of lobbying others in support of your cause, then letting them make your argument to other reluctant parties. Mandela's stealth overtures remind us that those who see clearly what others cannot may have a responsibility to use their powers of persuasion to win over naysayers or to act without them when necessary.

Like the classic proverb ‘Too many cooks spoil the broth’, when negotiations are held by a group, coming to a consensus becomes a problem because each negotiator in the group may have a different negotiation style. Moreover, in community negotiations like the South African negotiation, the negotiator(s) may also be interested parties in the negotiation and may perceive the means of achieving their interests differently although their final goal may be the same.

Stay close to your BATNA instead of the Bottom Line

Negotiations between Mandela and the South African government (National Party) spanned a decade. During that time Mandela was offered release from prison on several occasions that was conditional upon various scenarios that to him would defeat the purpose of the freedom struggle. One notable example was when former President F. W. de Klerk finally agreed to Mandela’s release in 1990. De Klerk wanted to release Mandela discreetly by flying him across the country and he wanted the release to happen within a 24-hour period. De Klerk wanted to deny Mandela his “walk of freedom.” Mandela wanted 10 days so that his organization (ANC) and followers had time to prepare. They settled on seven days and Mandela was allowed to walk out of the gates of Victor Verster Prison a free man, as negotiated. It is important to remember that Nelson Mandela lived in prison under dire circumstances for twenty-seven years. He was given various opportunities to go free with minor concessions for the black. But he stayed focused on his BATNA instead of the bottom line.

Separate the Person from the Problem

In order for the negotiations to be successful both Mandela and de Klerk had to put aside their differences in order to achieve success. De Klerk and Mandela disagreed heavily politically and personally. However, they knew that they needed one another and that they needed to remain on speaking terms if a negotiated dismantling of apartheid was the objective.

Focus on Interests, not Positions

Mandela believed that de Klerk was aware of and supported the ‘Third Force’. He would speak about it publicly, yet focus on the public interests (safety and equal rights) at the negotiating table. (The ‘Third Force’ was a secret organization that would attempt to derail progress towards a true democracy).

Invent multiple options looking for mutual gains before deciding what to do

President Barack Obama delivered a speech at Nelson Mandela’s memorial on December 10, 2013 and he said “Nelson Mandela reminds us that it always seems impossible until it is done...that we can chose a world defined not by our differences but by our common hopes...” Mandela put himself in the

opposition's shoes to gain perspective on their point of view and was skilled at looking for mutual gains during negotiations.

Insist that the result be based on some objective standard

Mandela's objective standard was his principles. He stayed the course no matter the challenge.

BATNA v. Bottom Line

A bottom line signifies the worst possible outcome that a negotiator might accept. The bottom line is meant to act as the final barrier where a negotiation will not proceed further. It is a means to defend oneself against the pressure and temptation that is often exerted on a negotiator to conclude an agreement that is self-defeating. Although bottom lines definitely serve a purpose, they also regrettably foster inflexibility, stifle creativity and innovation, and lessen the incentive to seek tailor-made solutions that resolve differences.

In contrast to a bottom line, a BATNA is not interested in the objectives of a negotiation, but rather to determine the course of action if an agreement is not reached within a certain time frame. As a gauge against which an agreement is measured, it prohibits a negotiator from accepting an agreement which is not favourable or one that is not in their best interests because it provides a better option outside the negotiation.

Since BATNA is the alternative to what a negotiated agreement would be otherwise, it permits far greater flexibility and allows much more room for innovation than a predetermined bottom line. When a negotiator has a strong BATNA, they also have more power because they possess an attractive alternative that they could resort to if an acceptable agreement is not achieved.

Good Will Hunting

Matt Damon conceived the movie Good Will Hunting during his final year at Harvard. He then handed it off to Affleck and they continued to flesh out the script together. Hollywood unknowns Ben Affleck and Matt Damon wrote the script for "Good Will Hunting," starring themselves. Their agent shopped it around and created a bidding war. Castle Rock Entertainment initially picked it up for \$600,000. As exciting as this could possibly be for two struggling actors, Affleck and Damon intended to star in and direct the film and Castle Rock wasn't willing to take the gamble. The studio gave them a limited window to find a buyer for the film, at a higher price. If they could not, Castle Rock would retain the rights and move on without Affleck and Damon. Miramax offered to buy the script. Close to selling the script to Miramax, negotiations broke down when Miramax demanded 'final cut rights' for director Gus Van Sant.

Solution: Van Sant retained the final cut rights, but movie was shown to a test audience selected according to pre-determined criteria. If audience reaction is not sufficiently positive, Miramax would get to re-cut the movie for final release.

Matt Damon and Ben Affleck subsequently won Best Original Screenplay, Robin Williams won Best Supporting Actor and the film was nominated for seven other Oscars, including Best Picture.

Strong and Weak BATNAs

Your best alternative to a negotiated agreement determines the point at which you can say no to an unfavorable proposal. If that BATNA is strong, you can negotiate for more favorable terms, knowing that you have something better to fall back on if a deal cannot be arranged. A weak BATNA, on the other hand, puts you in a weak bargaining position.

Whenever a negotiator has a weak BATNA (or has not taken the time to determine what that BATNA is), it is difficult to walk away from a proposal- no matter how paltry it might be. And if the other side knows that its opponent has a weak BATNA, the weak party has very little power to negotiate. Not that this stops some people from trying to drive a hard bargain.

The Car Deal

Most car deals in India follow a specific BATNA pattern. You go to a showroom, choose a car and negotiate on the on-road-price with the car dealer. Sometimes the parties come to a deadlock. The buyer is not willing to pay so much and wants the seller to lower the price further. The seller cannot sell the car at a price below his margin.

Solution: To convince the buyer, the seller usually offers other ancillary deals which will not affect his margins. Instead of lowering the price, the seller offers free car accessories or free first servicing. The Buyer finds value in the trade off and agrees.

Enhance your Position

A weak BATNA is not the end of the world. Whatever hand you've been dealt, here are three potential approaches to strengthening your position:

1. *Improve your BATNA:* Anything that can be done to improve your BATNA will strengthen your negotiating position. Take a minute to think of ways you could do that, given current circumstances. If you have a strong BATNA and if you are certain that it is much stronger than anything the other side can muster, don't be shy about it. Discreetly let the other side know that you are negotiating from a strong position.

2. Identify the other side's BATNA: Knowledge of the other side's BATNA is another source of negotiation strength. Is its alternative to a deal strong or weak relative to yours? A good estimation of the other side's BATNA can be a big help to you.
3. *Weaken the other party's BATNA*: Anything that weakens the other side's alternative to a deal will improve your relative position. In some cases, weakening the other side's BATNA may be done directly.

Losing a Battle, Winning the War

LVMH had begun stalking Gucci since the beginning of January 1999 by acquiring more than 5% of its shares. By the end of January 1999, LVMH's stake in Gucci had increased to 34%. On January 27th, 1999, Arnault arranged a meeting with De Sole, at which he proposed that, since he was now one of Gucci's largest shareholders, he be allowed to name a director to its board. De Sole however believed that Arnault's people should not be put on the Gucci board, since they were from the rival fashion house Louis Vuitton.

De Sole could not afford to let them have access to inside information regarding store space, publicity, and designers. De Sole alleged that Arnault was plotting a 'creeping takeover' by gradually buying enough shares to dominate Gucci's board. De Sole then asked Arnault to buy the remaining shares.

In July 2001, followers of the Gucci-LVMH tussle were surprised to see media reports that claimed that the battle was over. LVMH had agreed to sell its 20% stake in Gucci to PPR for \$ 2 billion under a condition that PPR forfeit voting rights on this stake.

PPR bought the LVMH stake at \$ 94 per share, raising its stake in Gucci to 53.2%. As a first step, PPR was to buy half of LVMH's 20% stake for \$ 975 million. Then, Gucci was to pay a special dividend of \$ 7 per share to all shareholders except PPR in November 2001. Next, PPR was to launch a full public offer for all Gucci shares at \$ 101.50 per share in March 2004.

PPR, Gucci and LVMH also agreed to release all outstanding claims and withdraw all pending litigation. PPR was planning to finance the deal by issuing equity and convertible bonds. Media reports revealed that the deal was struck at the behest of Dutch investigators, who urged the three parties to reach an agreement without seeking legal intervention.

According to news reports, US attorneys apparently told Bernard Arnault's French luxury conglomerate LVMH that companies which trade on the New York Stock Exchange could not increase their share base by a significant amount without shareholder approval. With this understanding, LVMH acquired almost 35% of Gucci in a takeover bid. However, it turned out that different stock rules apply to companies

based outside the United States. Gucci for instance, traded in New York but was chartered in the Netherlands and is headquartered in Florence. Gucci's defense team discovered this loophole and used it to shut down the deal.

The company first issued 20% new shares to its employees in an ESOP-like transaction and then offered 42% additional new shares to a group controlled by Francois Pinault, Arnault's French rival. LVMH's massively diluted position in effect handed ultimate control to Pinault leaving LVMH trapped as a relatively powerless minority shareholder in Gucci.

In one stroke, Gucci enhanced its BATNA and weakened LVMH's BATNA.

BATNAs and the Other Side

At the same time, you are determining your BATNA, you should also consider the alternatives available to the other side. Sometimes they may be overly optimistic about what their options are. The more you can learn about their options, the better prepared you will be for negotiation. You will be able to develop a more realistic view of what the outcomes may be and what offers are reasonable. Should a negotiator learn that the other party is over-estimating its BATNA before the start of a negotiation then they will be able to effectively use this information to lower the negotiation expectations of the other party.

In deciding whether a BATNA should be revealed to the other party/ parties will depend on the strength/attractiveness of the BATNA. If a negotiator has a strong BATNA, it may be beneficial to disclose it, as this would prevent the other party/ parties from acting as if a viable alternative didn't exist. However, if a negotiator has a weak BATNA, it would be better not to disclose the BATNA, especially if the other party indicates they are over-estimating their own BATNA as this would prove to be a bonus that should not be squandered through disclosure.

It is important to remember that identifying the other Party's BATNA is as important as identifying your own BATNA- even if you have a strong BATNA yourself. It gives you leverage in negotiating a better deal. Asking questions during the negotiation can help you learn about the other side's BATNA, but you can also learn in advance by doing the following:

- Contacting sources within the industry
- Checking potentially relevant business publications
- Reviewing annual reports (or public filings)
- Asking questions informally of the negotiator or others within the company
- Imagining what your interests, preferences, and needs would be if you were in their position

In situations where both parties possess a strong BATNA, the negotiation would seem rather fruitless because there would be very little incentive to reach an agreement. In this scenario, both parties would be better off to seek elsewhere to pursue their business.

BATNAs and the Role of Third Parties

Although it is absolutely essential that you know your own BATNA and try to estimate that of the other side, be aware that most people do not do a good job of estimating BATNA values.

BATNA values can be influenced by your personal perspective. So be as objective as possible. Neutral observers tend to rank the potential of BATNA in between. So, check your thinking with a neutral third party.

A neutral third party can be of great help to negotiating parties to accurately assess their BATNAs by using costing and reality testing. In reality testing, the neutral party assists the parties to clarify and give basis to each negotiating party's alternatives in case they are unable to close the deal. The third party can assist the parties in doing this by asking reality rooted and hard questions about the BATNA asserted: "What would be the outcome? How could you do that? How do you know? What would the other side do?" Or the neutral party may simply provide new perspective or information into the discussion highlighting that one party's presumption of its BATNA is likely incorrect. Costing is a similar, more general route to assess the same loopholes. In costing, a systematic effort to determine the benefits and costs of all available options is made. After costing their options, parties can understand the commercial feasibility of all their alternatives. If this is done by all negotiating parties jointly and the negotiating parties agree on the assessment, the costing provides a common, strong basis upon which the parties may build their negotiated solution which may sometimes be better than the alternatives being suggested by both negotiating parties. But if the negotiating parties cannot come to such an agreement, then negotiations will break down, and both parties will pursue their BATNA instead of a negotiated outcome.

Effective Use of BATNA

For effective use of BATNA, every time you receive an offer from the other side, you need to compare it to your BATNA before rejecting or accepting the offer. A word of caution- BATNA values can be influenced by your personal perspective. So be as objective as possible. Check your thinking with a neutral third party. Your best alternative to a negotiated agreement determines the point at which you can say no to an unfavorable proposal. If that BATNA is strong, you can negotiate for more favorable terms, knowing that you have something better to fall back on if a deal cannot be arranged. A weak BATNA, on the other hand, puts you in a weak bargaining position. Whenever a negotiator has a weak BATNA (or hasn't taken the time to determine what that BATNA is), it is difficult to walk away from a proposal- no

matter how paltry it might be. And if the other side knows that its opponent has a weak BATNA, the weak party has very little power to negotiate.

When You Have No Alternatives

No negotiator is in a weaker position than one with no alternative to a deal. In this case, the other side can dictate the terms. The party without a BATNA is a deal taker, not a deal maker. If you find yourself in this dangerous situation, you must create an innovative alternative.

Not knowing your BATNA

When a negotiator fails to explore its BATNA, they will find themselves in a very shaky situation. They will be exposed to:

- Strong internal pressure to make an agreement, as they will be unaware of what would happen should the negotiation fail;
- They will be over optimistic about proposed agreements which can then result in the associated costs not being fully appreciated;
- They will face the peril of becoming committed to reach an agreement, as they will be unaware of alternatives outside the negotiation. This will foster pessimism about their prospects if the negotiation fails; and
- They will become beholding to the whims of the law of agreement, which holds that when persons agree to something this is entirely dependent on the attractiveness of the available alternatives.³³⁸

In most circumstances, however, the greater danger is that you are too committed to reaching agreement. Not having developed any alternative to a negotiated solution, you are unduly pessimistic about what would happen if negotiations broke off.³³⁹

Long before the acronym BATNA was invented, savvy operators kept their best alternatives in mind as they dealt with opponents. Consider France's Louis XI, one of the craftiest monarchs in fifteenth-century Europe. When England's Edward IV brought his army across the Channel to grab territory from his weaker rival, the French king decided to negotiate.

Knowing that his BATNA was to fight a long and costly war, Louis calculated that it was safer and cheaper to strike a deal with Edward. So, he signed a peace treaty with the English in 1475, paying 50,000

³³⁸ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Back Bone*, LexisNexis (2015)

³³⁹ Fisher, Ury and Patton, *Getting to YES*, Random House Business Books (1991)

crowns up front and an annuity of 50,000 crowns for the rest of Edward's life (which proved to be short). To seal the deal, Louis treated his royal counterpart and the English army to forty-eight hours of eating, drinking, and merrymaking. As an added token, he assigned the Cardinal of Bourbon to be Edward's "jolly companion" and to forgive his sins as he committed them.

As Edward and his army staggered back to their boats, ending the Hundred Years War, Louis remarked: "I have chased the English out of France more easily than my father ever did; he drove them out by force of arms while I have driven them out by force of meat pies and good wine." Such is the power of negotiating when you know your BATNA.³⁴⁰

WATNA

WATNA stands for the Worst Alternative to a Negotiated Agreement. In the preparation phase of your negotiation, you need to consider, what is the worst that will happen if you do not sell in a particular negotiation? Going to the worst-case scenario in your negotiation preparation has a particular benefit: you might reconsider your bottom line.

ZOPA

The ZOPA, or zone of possible agreement, is a third key concept to remember. ZOPA is the area or range in which a deal that satisfies both parties can take place. Put another way, it is the set of agreements that potentially satisfy both parties.

Each party's reservation price determines one end of the ZOPA. The ZOPA itself exists (if at all) in the overlap between these high and low limits, that is, between the parties' reservation prices.

Consider this example:

A buyer has set a reservation price of INR 10 crore for the purchase of a commercial warehouse. "That's as high as I'm willing to go," she tells herself. Naturally, she would prefer paying less. Unbeknownst to her, the seller has set a reservation price of INR 8 crore. That is the least he'll take for the property. The ZOPA, therefore, is the range between INR 8 crore and INR 10 crore. The two parties might haggle a bit in reaching agreement, but an agreement in this range would satisfy each.

BUYER: "What would you say to an offer of INR 7 crore? I could agree to that."

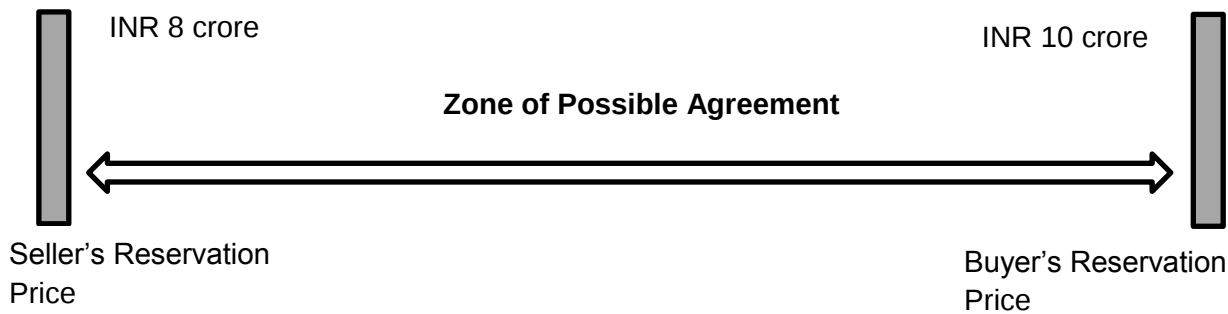
SELLER: "Thanks, but I believe that the building is worth more—and I can get more if I leave the building on the market for another month or so."

BUYER: "Maybe, but maybe not. I'd be willing to pay INR 7.5 crore now if we could reach an agreement."

³⁴⁰ Harvard Business Essentials: Negotiation, Harvard Business School Press, 2003

SELLER: “INR 8.5 crore and it’s yours.”

BUYER: “Then INR 8.5 crore it is.”



In this commonplace example, each party had a reservation price, and they bargained within the ZOPA. In doing so, each got a better price than his or her walk-away. We can assume here that neither knew the reservation price of his or her counterpart. As you can imagine, that knowledge would have been extremely valuable. For example, with foreknowledge of the other side’s reservation price, the buyer might have driven a tougher bargain, holding out for something closer to INR 8 crore. Estimating the other side’s reservation price is sometimes possible. If, for example, equivalent properties in the area were listed for INR 7.5 crore, the buyer could assume with some confidence that the seller’s reservation price would be close to that figure. Likewise, if investigation revealed that the seller was highly motivated to sell, the buyer would offer less.

Now consider what would happen if the numbers were reversed—that is, if the buyer had set a reservation price of INR 8 crore and the seller had set a reservation price of INR 10 crore. That is, the buyer won’t pay more than INR 8 crore, and the seller wouldn’t take anything less than INR 10 crore. There would be no overlap in the ranges in which the two parties could reach agreement—no ZOPA. No agreement would be possible, no matter how skilled the negotiators, unless there were other elements of value to be considered or if one or both sides’ reservation prices changed. For example, if the warehouse seller determined that the potential buyer needed parking space for ten delivery trucks, and if he happened to have that many unused spaces available at an adjacent location, he might offer them to the seller as part of the package. That “sweetener” might break the impasse. This would be an example of the way value is created in integrative negotiations. Information sharing makes it possible.

NEGOTIATION ‘JUIJITSU’

We tend to have a knee-jerk reaction of either offence or defence when someone criticizes our actions or ideas. In a negotiation, when a party announces a firm position which is not in your favour, you may be tempted to reject it outright. If the other side criticizes our proposal, we tend to defend it. In short, if they push you hard, you will tend to push back.

Yet if you do, you will end up playing the positional bargaining game. Rejecting their position only locks them in. Defending your proposal only locks you in. And defending yourself side-tracks the negotiation into a clash of personalities. You will find yourself in a vicious cycle of attack and defence, and you will waste a lot of time and energy in useless pushing and pulling.

How can you prevent the cycle of action and reaction? Do not react. When they assert their positions, do not reject them. When they attack your ideas, don't defend them. When they attack you, don't counterattack. Break the vicious cycle by refusing to react. Instead of pushing back, sidestep their attack and deflect it against the problem. As in the Oriental martial arts of judo and jujitsu, avoid pitting your strength against theirs directly; instead, use your skill to step aside and turn their strength to your ends. Rather than resisting their force, channel it into exploring interests, inventing options for mutual gain, and searching for independent standards.

Rely on Newton's third law of motion- "For every action, there is an equal and opposite reaction." If they shout, become calmer, if they criticize your proposal, seek their guidance and ask them what they would have done in your position.

CHAPTER FOUR: MEDIATION

1. WHAT IS MEDIATION

Mediation is assisted negotiation. It is a flexible process conducted confidentially in which a neutral party i.e. the mediator, manages the interaction between disputing parties to help them come to a negotiated settlement of the dispute. The disputants and not the mediator have ultimate control over the decision to settle and terms of resolution. The final terms of settlement are recorded in the form of a binding agreement. The process is time bound and cost effective. Another motivation for choosing mediation is confidentiality of the entire process and all concessions made by parties during negotiation. Since the parties mutually agree to the settlement terms, probability of litigation over settlement is also low.

Mediation is a process in which a neutral intervener helps people in a dispute improve their understanding of their situation and one another and then develop solutions that are acceptable to them. Unlike a judge or an arbitrator, the mediator has no authority to impose a binding decision on the disputants. The mediator can only persuade them to work things out.

But not all interveners are mediators. What distinguishes a mediator is the duty, both personally and institutionally, to be neutral. That means operating without any preference for resolving the controversy in a particular way. Commitment to rules and standards on the one hand, or, to party choice, on the other, will determine the type of intervener.

A mediator is a coach who consistently and persistently prompts disputing parties to understand one another and develop mutually acceptable options. Contrasted with discussions facilitated by an intervener as compliance officer targeted at securing compliance with a rule, a mediated discussion can be an instrument for change. Customs, practices, laws, and values change over time, and individuals can prompt change as well as adjust to it. Unlike a compliance officer, a mediator helps develop new approaches and strategies to address a situation. She assumes that no conventional practice is immutable, no topic ineligible for discussion and no mandatory standards dictate the acceptability of settlement terms. This does not mean that everything is possible in a practical sense, but that reality represents an annoying practical problem rather than an impenetrable constraint.

Thus, a mediator enjoys enormous freedom in prodding disputants to pay attention to each other's interests and to consider a range of possible settlement options. Although an individual's own values might lead to refusing to serve as mediator in certain disputes, a person must acknowledge that power and effectiveness as a mediator emanate from a steadfast commitment to neutrality- to helping the parties develop settlement terms that they find acceptable, even if the mediator finds those terms objectionable.

It is easy to state that the parties' preferences should prevail. It is much harder to act according to that precept. Most of us like to give orders. In our various roles as friends, co- workers, supervisors, parents, colleagues, group members, or citizens, we are always ready to dispense advice. Mediating, however,

demands that we shed our authoritarian and paternalistic instincts. It compels us to take seriously our commitment to democratic decision-making in our homes, schools, businesses, and communities.³⁴¹

The key characteristics of mediation are as follows:

One of the best ways to understand concepts is to break them down into their constituent qualities. Once you understand each part of the process, it is easier to accept the holistic picture. In the case of mediation, it is an informal and confidential conflict resolution process. Through this process, an impartial third party helps two or more participants better understand their issues, interests and needs. This impartial third party empowers the participants to bridge their difference through a voluntary agreement.

To simplify, the key characteristics of mediation are as follows:

Impartiality: To solve any problem it is very important to take a holistic view of a picture. To take a holistic view of things, it is very important for us to take a neutral look of things which is why the proverb goes ‘looking at the world with rose-tinted glasses. Since the parties embroiled in a dispute find it difficult to be impartial or neutral towards their issues. Hence, they appoint an impartial mediator who can help them look at their problems through a solution-based approach instead of ‘this is all your fault’ approach. Impartiality is therefore a cornerstone of the process of mediation. Generally, people who have a stake in the matter are not allowed to become mediators for the dispute. To maintain impartiality, a mediator does not take any decisions in the mediation process. Also, the mediator unlike an attorney does not represent the interests of any one disputing party. The mediator also does not advocate on behalf of any of the participants in the mediation process. On the other hand, the mediator assists the disputing parties to communicate more effectively and make durable and sustainable decisions about how to resolve their dispute. For this to work out, a mediator will always remain impartial and not favor one party over another. If the process of mediation is perceived to be biased by any of the disputing parties, this perception can undermine any meaningful progress made in the resolution of the conflict. A mediator should be able to run a balanced process that treats all disputing parties fairly. The mediator should not have a material interest in the outcome.

Private and Confidentiality: Confidentiality is a valuable asset for most businesses. Few want their dirty laundry aired in public. The entire mediation proceedings are strictly confidential for the mediator as well as the participants. The process is confidential, and materials assembled for mediation are usually not admissible in court if the mediation fails and the party’s resort to litigation. The mediator will always describe the exact terms of confidentiality and the parties may also sign a non-disclosure agreement. While the terms of a mediation settlement may often be protected from public view under the terms of a confidentiality agreement, this may not be the case for public entities, which have stringent reporting

³⁴¹ Stulberg & Love, *The Middle Voice*, Second Edition, Carolina Academic Press (2013)

obligations. Disclosure of settlement terms will be necessary if one party goes to court to obtain enforcement of the settlement agreement. By entering into a separate confidentiality agreement before the mediation, and incorporating an ADR clause into the mediation settlement agreement, the risk of disclosure can be reduced but not completely eliminated.

Informality: The mediation process has been developed over various years to be flexible and user-friendly. It does not follow rules of procedure like submission of written statements, taking evidence on record, filing of counter affidavits etc. which is followed in litigation and in most arbitration proceedings in India although it is not mandatory to do so.

Party Control: Participants have ultimate control and decision-making power over the outcome of the mediation. Unlike any other adjudicatory process where parties submit the outcome to an adjudicator, mediation allows parties to determine their own fate. The parties cannot be forced to settle or to agree to anything that they cannot live with. To many, this is the single most valuable element of the process. The disputing parties will not be at the mercy of a third-party adjudicator who does not understand the consequences of the final decision or award. Mediation is based on the fact that no arbitrator or panel will ever be as familiar with the nuances of your business and its related disputes as your client is. Mediation allows a disputing party to decide how to respond to settlement proposals, whether they involve sensitive key issues or those of secondary importance. The party itself can decide when it can afford to be flexible and when it cannot.

Cost Effective: Mediation is an extremely cost-effective alternative to litigation and arbitration. The cost of a mediation pales in comparison to trial or arbitration costs. Frequently, the parties will exchange expert reports to enhance the other side's understanding of the strengths and weaknesses of their position. The resulting time that key managers are away from productive work is another cost that parties need to consider when weighing the benefits of mediation. A focused discovery process managed by the mediator will keep the parties' efforts on crafting of potential solutions, and away from stalling and delay tactics. Another reason mediation is less costly is that there is no requirement of filing written affidavits and counters in mediation. Preparing and filing written affidavits and counters generates extremely high legal fees. Their absence from mediation makes this process the most economical by far.

Time Saving: Resolution of disputes through mediation may take approximately six months. On the other hand, litigation extends for years and although the arbitration proceedings themselves may take a year or more, most of the arbitral awards in India are further appealed in the appellate forums and the parties again get stuck in litigation proceedings.

Hence, mediation can save a lot of time and money for the disputing parties. Even if the mediation is not completely successful, by agreeing to resolve some disagreements, leaving only the intractable portion of

the dispute for a third party to resolve in arbitration or litigation, the ensuing adversarial proceeding can become less complex and protracted, hence less expensive. If the parties continue to negotiate after the mediation has ended, their efforts could bear fruit in the form of a settlement of the remaining open issues.

Maintain Relationships: A mediator does not decide on what is ‘right and wrong’ or who will ‘win or lose’. Mediation preserves business relationships by requiring contracting parties to approach conflicts or breaches in a constructive way. Litigation, alternatively, may destroy any chance of maintaining a healthy and successful business relationship in the future.

The mediation process is inherently less adversarial than litigation or arbitration. In order to succeed, a respectful attitude must be maintained by all participants. An experienced mediator will make sure that this occurs by setting the ground rules for the mediation and talking privately in caucus with the parties. When parties act respectfully toward each other, they are more inclined to listen to each other’s point of view. That does not mean that they necessarily accept it. But hearing it is a first step toward working out a mutually acceptable solution.

A consequence of this good behavior often is the repair of the parties’ damaged relationship. Many mediation settlements have included future business arrangements. Especially when parties repeatedly do business together, this aspect of the mediation process could be worth more than a monetary settlement. Certainly, that could not happen if the parties or their counsel were insulting each other and denigrating what the other had to say. Because the parties and counsel are required to behave in a businesslike way and be open to hearing each side’s legal arguments, as well as their interests and needs, there is a higher level of emotional satisfaction from participating in mediation than in more adversarial processes where the results are determined by a third party. The parties usually will be happier with a result that they have helped to craft, than with a resolution imposed upon them by a stranger.

The voluntary decision to take less than one had initially hoped for is a far less bitter pill to swallow than being forced by judge or panel to accept a fraction of the damages originally anticipated. Remember, for the parties, litigation is always a tension-filled and stressful experience. In litigation, each side is competing for the hearts and minds of strangers- whether a judge or jurors. Even though arbitration is less formal, taking place in an office setting with no judge in robes, no bailiffs with guns, and no jury, and even though you select the arbitrators, you cannot be sure of the likelihood of a successful outcome, so there is still quite a bit of risk, which is stressful in itself. Mediation alone puts the outcome in the hands of the parties.

Emphasize Interests: The flexibility and creativity of the solution building process focuses on the interests of the participants, allowing all participants to feel satisfied with the outcome. The participants can tailor solutions that meet their needs.

Mediation at its core is an interest-based process of dispute resolution. Lon Fuller wrote mediation allows parties to reorient “toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship: a perception that will redirect their attitudes and dispositions toward one another.” The mediator’s role is to provide each party’s perspective to the opposing party and bring a new awareness to each side with the goal of achieving an agreement. The traditional focus of mediation is not toward court rules and statutes; rather it is an open forum for parties to be creative in their dispute resolution.

Control the Outcome: Mediation is voluntary and parties retain full control over the outcome including the settlement agreement terms. Mediator does not decide on the outcome of a case, or on any party’s wrongdoing or fault.

The participants are always in control of the mediation process. They resolve the dispute on their own terms and not one imposed by others. They may also decide to withdraw from mediation after the first session, if desired.

The solution need not be, and often is not, an outcome that a judge might or could properly impose through a decision in a court which is limited by legal constraints, rights, and precedents. It is simply the unique resolution found by the participants in the mediation that is 'good enough' for them in all the circumstances. The resolution is often more comprehensive and creative than a judgment or an arbitral award. It can provide a "win-win" outcome for the participants. As part of the search for a solution a skilled mediator will often look for added value which is often missed in mainstream negotiations, but can be a way of removing deadlock.

Non-binding negotiation: Mediation is assisted negotiation. Through mediation, businessmen do what they do best; namely, come to a negotiated agreement that best fulfills their business objectives and fulfills their interests. The assisted negotiation process, in common with all dispute resolution processes, seeks to bring disputes to an end. Unlike expert determination, adjudication, arbitration and litigation however, the various forms of assisted negotiation processes are considered to be consensual, involving the disputing parties directly in the shaping of the terms of the resolution, as opposed to having the terms of the resolution imposed by a third party. However, depending upon the model of assisted negotiation process adopted, what the parties retain control over varies considerably, ranging from the terms of the settlement to the enforceability of the settlement.

In negotiation, or its variant of mediated negotiations (mediation), the parties retain the role of decision maker. Though one party may have more power or influence than the other party, a negotiation still requires mutual influence and the accession of both parties, thus each party must attempt to influence the other. The negotiation process requires parties to communicate, to learn how to influence each other, and to develop some level of collusion and coordination. Negotiation assumes interdependence; thus, parties must influence the other to achieve their own goals. Influencing the other in a negotiation can run the spectrum from persuasion to coercion. Problem solving in negotiation, whether in interpersonal or international, suggests a framing of the task from one where one forces one's solution or decision, to a task where "two heads are better than one" and the parties solve the problem together. The dynamic of the struggle for dominance, of the need to "win," may still play a role; however, the joint responsibility for solving a problem becomes the primary focus.

Mediation is forward-looking: Participants have the opportunity to rebuild relationships that have been strained. This can be key for the ultimate, lasting resolution.

Mediation is therefore generally forward-focused, not backward-looking. The past cannot be changed, but it can sometimes be cathartic to explore and rebuild relationships where this is an important step in securing a resolution. This transformative approach features in some family, community, and workplace cases, but it is not the central theme of most civil and commercial mediation. There, more commonly, the mediation will look to build a solution that works and will be durable.

Addressing Cultural Issues: Many times, cultural issues may become an inter-woven aspect of the dispute itself. Cross-cultural mediation allows people of different social backgrounds to cooperatively and respectfully negotiate common and diverging goals until they agree upon a single settlement that is mutually beneficial.

Agreements reached in mediation are final and binding: The participants memorialize their agreement in writing. The Agreement does not constitute an admission by the participants of any blame or guilt. However, the agreement is contractually final and binding for the participants. Mediated settlement agreements are rarely breached. Each party will have its own interest in performing the agreement; otherwise they would not have signed it.

A mediated settlement can completely resolve a construction dispute. When a dispute is completely settled in mediation, if counsel for both sides do a proper job, there should be no appeals or conditions subsequent to alter the new deal the parties have struck. The mediation agreement would be immediately enforceable. In the event that there are any differences of interpretation or problems with compliance, the settlement agreement could contain an alternative dispute resolution clause so that any disputes under the agreement could be resolved expeditiously. If the parties agree, it is even possible to refer the matter back

to the original mediator. Having a mediated settlement agreement allows your client to put the dispute behind it and move on to new terrain that it will be traversing in the future.

Narrowing Issues: Even if mediation is not completely successful in resolving the entire dispute, it can still be productive. The mediation process can help to identify facts and issues on which there is no dispute; it can also narrow the issues in dispute by having the parties settle ancillary or severable issues. Mediation can then focus on the remaining significant issues in dispute and, no doubt, it will teach the parties that the facts are subject to a variety of interpretations. This can help pave the way for a partial or eventual settlement of the matter. For example, the parties can agree to separately negotiate disputed change orders that may be too numerous to be handled efficiently in litigation or arbitration. Mediation can also narrow the gap between the parties' demands, so that economics of litigation or arbitration tip even more decisively towards a negotiated settlement.

Reality Check: The mediation process allows the true decision makers for each side to view the dispute through the eyes of the other side. Mediation may be the first time your client has been able to see an alternate reality of the case, one that is more nuanced or complex than previously imagined. The mediator can be extremely helpful in this regard as he or she encourages each side during private caucuses to see the real strengths and weaknesses of its case. The process of reality testing often is what motivates the parties to move forward with offers and counteroffers during the mediation.

What it is not

Mediation does not involve the mediator telling the participants the solution - or even venturing suggestions. It is for the participants themselves to find, with the mediator's assistance, and to agree a solution that meets their needs, concerns, and interests. Control remains with the participants. It does not involve the mediator telling the participants what a judge may or will do, or who is right or wrong. Nor does it involve the mediator assessing the merits of the case: after all, the mediator may not be aware of all of the relevant information, or even the relevant law. Mediators are commonly not lawyers and, because participants generally bring their own advisors, mediators do not need to be experts in the legal context of the dispute.

Misconceptions

There are many misconceptions of the role of the mediator, which may hinder participants agreeing to mediate. Those commonly encountered are:

- Mediation requires compromise from one or both participants - it does not: very often the outcome is unexpected and allows both to grow.

- The mediator is an evaluator - there should be no evaluation by a mediator: any assessment of risk or merits is for the participants.
- The mediator is an arbitrator - arbitration is a wholly different statute-based process involving legal assessment by, in effect, a private judge.
- The mediator will impose a solution – a mediator has no such power.
- The mediator will knock heads together - a mediator has no such role.
- The mediator will apply pressure on the participants - the only pressure that participants experience is that from their own assessment of risk.
- The mediator will advise the participants what to do – the participants must rely on their own judgment, or that of their advisers.
- Mediation is unlikely to be successful– around 90% of mediations result in a resolution on the day or shortly afterwards.

Difference between Mediation and Conciliation

Mediation

Mediation is a peaceful mechanism for resolving conflicts. It is a voluntary and non-binding negotiation process that occurs outside the courtroom. In mediation, a third, impartial and neutral party manages the interaction between disputing parties to ensure constructive negotiation, thus helping them to agree on a resolution that is fair, durable, and workable. The disputants, not the mediator, create, and agree on the final decision.

In addition, mediation allows building stronger relationships between the parties and focuses on people cohesion more than the actual problem. The mediator has to use psychological and communication skills in order to understand the parties and influence them to agree on a single solution. Many myths surround mediation that mask its benefits and prevent its popularity in the marketplace. International business professionals are left with the belief that mediation lacks closure or binding authority, which is not the case, as that agreement is as binding as all other contracts.

Conciliation

Conciliation is an alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation is a term often used interchangeably with mediation. At other times, it is used to refer to a more unstructured process of facilitating communication between estranged parties.

Mediation	Conciliation
Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement	It is a process by which representatives of workers and employers are brought together before a third person or a group of persons with a view to persuading them to arrive at an agreement by mutual discussion between them
‘Mediation’ is limited to encouraging the parties to discuss their differences and to help them develop their own proposed solutions	‘Conciliation’ implies a stronger form of intervention. The mediator may be permitted to offer the parties proposals for settlement
A mediator cannot suggest solutions but can only facilitate dialogue between the disputants	A conciliator can suggest solutions to the disputing parties
The mediator at all times maintains his or her neutrality and impartiality. A mediator does not focus only on traditional notions of fault and a mediator does not assume sole responsibility for generating solutions. Instead, a mediator works together with the parties as a partner to assist them in finding the best solution to further their interests. A mediator’s priority is to facilitate the parties’ own discussion and representation of their own interests, and guide them to their own suitable solution- a good common solution that is fair, durable, and workable. The parties play an active role in mediation, identifying interests, suggesting possible solutions, and making decisions concerning proposals made by other parties. The parties come to mediator seeking help in finding their own best solution.	In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure that is responsible for the figuring out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. In this regard, the role of a conciliator is distinct from the role of a mediator
In mediation, attorneys generally offer advice and guidance to clients about proposals made by mediators.	Attorneys are more active in conciliation in generating and developing innovative solutions for settlement.

Assessment of Suitability of a Conflict for Mediation

Each conflict is unique. No two conflicts can be considered the same in terms of the emotional involvement and interests of the parties. Parties might consider various characteristics of resolution procedures when choosing the suitable resolution technique such as litigation, arbitration, expert determination, Lok Adalat, ombudsman, mediation, conciliation and negotiation: party autonomy, confidentiality, flexibility of procedure, impact on relationship with conflict party, enforceability, sustainability of the conflict resolution, material quality of the solution, direct and indirect procedure costs and duration of procedure. This could be the first part of the conflict resolution assessment.

Mediation is suitable for nearly all kinds of civil disputes. To assess the suitability of the dispute for mediation, the interested parties may be invited to attend a preliminary meeting in which the mediator will assess whether mediation is suitable for their particular circumstances. For mediation to be effective, the case must be appropriate for mediation and the timing of the mediation in relation to the stage at which the dispute has reached needs to be deliberately chosen. Especially in connection with a serious effort to resolve complex, fact-based disputes, an early mediation may be more or may be less fruitful than a mediation that occurs later

The second part of the conflict resolution assessment could be to evaluate the suitability of the individual conflict in relation to the available dispute resolution mechanisms.

In evaluating the material suitability of a conflict for mediation, the following issues could be considered:

- Nature of the conflict;
- Methods already tried to solve the conflict;
- Probable costs of different procedures to solve the conflict;
- Possibility of a consensual solution;
- Probable duration of different procedures to solve the conflict including the consideration of a failure of the procedure tried;
- Reasonable and desired success/outcome;
- Importance of control over the conflict solution;
- Extent to which communication problems have contributed to the conflict;
- Importance of an on-going relationship with the conflict party/parties;
- Desire to solve further problems in connection with the conflict.

Mediation has the greatest chance of success when adequately empowered parties are prepared to engage in meaningful and informed discussions with the mediator. If one of these elements is missing, the likelihood of reaching a settlement is reduced. In addition to the skills of a trained experienced mediator, it is more important to have the right people with the right information in the right frame of mind to settle

a dispute in mediation. Thus, a case may not be ready to be mediated until the parties have taken steps to investigate their respective positions and their available options. It is necessary for the disputing parties to be willing to negotiate in good faith for the mediation process to work. This really has little to do with ‘not bidding on me’ and more to do with a willingness to change your perception about a situation and be flexible about considering possible solutions, even those that are less than what the party initially envisioned.

Most often, mediation turns sour because one side is not sufficiently informed or even misled by external factors to recognize a good settlement opportunity. This may be due to ignorance of the facts or the law. But it could also be due to ignorance of the risks involved in allowing a judge, jury, or arbitrator to decide the disputed issues. Unless the parties are realistic of the outcome, they expect from using other dispute resolution methods and the resultant time, money and effort they will be putting to achieve the outcome, the parties may not be mentally prepared to reap the full benefits of mediation.

A full assessment of liability and of damages may require the assistance of a financial advisor like a chartered accountant. It is vital that each side have a realistic view of the dispute. Otherwise it will be difficult to settle. During the mediation, the mediator will assist with this by providing a reality check. There is no reason for ignorance of the law. Prior to the mediation, counsel should provide the client with an assessment of relevant case law so a clear-headed evaluation of risk at trial can be made. Where the case turns on a legal issue, if the jurisdiction does not prohibit the practice, the parties may ask a private mediator for an evaluation of how the case might turn out at trial.

Also, it is imperative that each party send a representative to the mediation who has full authority to settle the matter. An offer met with “I’ll take it back to my boss and consider it” will not provide settlement opportunities. Not only must the parties commit the time and resources necessary to mediate effectively, they must be prepared to bring the mediation to an end with a settlement. Mediation is a process of learning about the dispute and the interests and needs of the other side in order to develop proposals and counterproposals that might be acceptable.

Family Mediation

The first example of a conflict that is well suited for mediation is the breakdown of a family. The classical family dispute is suited for mediation for a variety of reasons. Just to name a few: Mediation is flexible in terms of timing and procedure. Hence, it allows the parties to discuss possible solutions, go into discussions between one party and the mediator only in times of conflict escalation and use various forms of communication, such as mediation sessions, email exchanges, consultation with their lawyers and short phone conversations. Party autonomy allows the parents to search for the solution they feel best fits the needs of their children instead of giving the decision away to a court that needs to decide on the basis of

the court file, oral hearings and expert statements. The same is true for the monetary solution. Instead of the one option offered by statutory law, the parties might find a more creative solution that would allow keeping the family home as a continuing basis for the children instead of selling it. Also, mediation offers the chance of finding a sustainable and relatively quick solution that will bring lasting peace to the family instead of a court battle that might continue for years.

Commercial Mediation

The second example of a dispute which could well be solved by mediation are the once in the commercial arena. In countries like India where many businesses are family run or closely held, mediation becomes an extremely efficient means of resolving disputes. There are many reasons why this conflict might be much better placed in a mediation than in a court proceeding. The open structure of mediation allows dealing with the two dimensions of this conflict: the family dimension and the business dimension. In a court proceeding, only the business dimension would be fought through. A purely rights-based approach, i.e. a court proceeding based on commercial laws limits the number of possible solutions. The shareholders could exert their control rights and determine the future directors, but this might be impossible to reconcile with the family interest to keep the business within the family members. A multi-year shareholder/director court proceeding might further diminish the market value of the company. Mediation instead might open the possibility to formulate, for example, a value and strategy code on the basis of which son and daughter can work together.

When Mediation is not Suitable?

There are a few situations in which mediation may not be the right way to put an end to the dispute. Mediation may be inappropriate for a dispute where it is important for one of the disputing parties to establish a legal precedent that will be binding on all future similar transactions. However, setting a legal precedent is not the same as ‘teaching the other party a lesson’ or ‘showing the other party you are right’. A legal precedent is only a means to correct or enhance interpretation of a law. Also, a poor candidate for mediation is a dispute where a party believes that immutable principles should govern the dispute. For example, a governmental body may prefer to defend a regulatory program or public policy issue against a legal attack, rather than resolve an individual challenge; a contractor trying to prevent a proposed government contract award by challenging legislation that gives preferences to local businesses would likely find that its dispute would not easily be resolved by mediation. Mediation also cannot work if an indispensable party is absent from the table. A frivolous claim is another type of dispute that is not likely to be mediated successfully. Mediation demands that the disputing parties be as informed about the nature and extent of the dispute as can reasonably be managed. It also requires cool heads to dispassionately

evaluate the risks of pursuing alternative dispute resolution vehicles. A reckless disputant is unlikely to be interested in engaging in compromise to put the matter to rest.

Some other disputes in which mediation may not be considered suitable are as follows:

- A risk of violence, fear and power imbalances;
- No ongoing relationship;
- No substantive issue requiring discussion;
- Longstanding disputes spanning over more than ten years;
- Where parties are not interested to settle the dispute and are not inclined to mediate in good faith; and
- If the same two parties have mediated previously but were unable either to reach a resolution or to subsequently adhere to the agreement.

Why Some Mediations Fail?

There are many instances when mediation may not work or may be frustrated for some or the other reason. However, there is no way of knowing whether these circumstances will be present in your mediation. So, just an apprehension that the mediation may fail should not deter a disputing party from engaging in the process.

To protect yourself in some of the situations where the opposite party is only using mediation as a tool to strengthen its position in relation to other dispute resolution mechanisms, the following measures may be taken:

- *Digging for Information:* Sometimes the other party may never have any intention of trying to mediate a resolution. Its purpose in agreeing to mediate may sometimes be to discover the other side's position and facts that otherwise might be difficult to obtain through deposition or answers to interrogatories. This possibility can be controlled to some degree by entering into an agreement before the mediation that limits the amount of discovery in mediation.
- *Getting a Stay in Litigation or Arbitration:* There may be certain situations in which a party seeks to prolong the mediation as long as possible to obtain an advantage and demands that the litigation or arbitration be suspended while mediation is pursued. This possibility can be prevented by agreeing to a reasonable time limit for the mediation.
- *Withholding Important Information:* One party holds back critical or important facts during the mediation out of an ill-conceived belief that through surprise it will do better at trial or arbitration.

This strategy has been called ‘hiding the baby’. There is little you can do to prevent it except discuss with the mediator your suspicions that the other side is holding back important information.

- *Expecting the Mediator to do your Work for You:* Sometimes the parties fail to understand that the mediator is not a decision maker or they expect the mediator to convince the other disputing party to come around to their perception of the merits. There is little you can do about this situation. It is the mediator’s job to make clear that he or she is a facilitator not a judge and that mediation is an opportunity for the parties themselves to take control of the settlement process.
- *Flooding of Emotions:* One or both parties cannot control their emotions and the mediation becomes so antagonistic that an impasse is reached or one party walks out. This can drive the parties further apart with little hope of returning to the settlement process. There is little you can do if the other side is out of control emotionally except rely on the mediator to try to calm things down. When mediation has failed and the bills come in, parties tend to criticize the process. But one should not indict the process because of conduct by an intransigent party. Most parties enter mediation with the sincere hope of putting an end to the dispute. That is why mediation has such a high success rate and has been cited in a survey of corporate counsel as the preferred dispute resolution process.

Self-Assessment Questionnaire

Answer the following questions as objectively as possible to assess for yourself whether you think the dispute is feasible for mediation:

Is this dispute delaying any development opportunity or important decision for you or your business?

Is it important for you to resolve this dispute as soon as possible or within a limited time frame?

Would you prefer some elements of the dispute not to become public/remain confidential?

Are you looking for a long-lasting solution to the dispute?

Is there any point of the dispute that you would like to discuss/clarify with your counterpart outside the strictly legal aspects of the dispute?

Is there an interest in saving/maintaining the business relationship with the other party?

Have you any doubt about the outcome of the trial?

Do you consider that the litigation costs will reduce or even exceed what you could recover through the court case?

Can you handle the emotional burden generated by litigation?

Is it important for you to maintain control over the outcome of the dispute?

Do you fear that a Court decision may be difficult to enforce?

Is there any likelihood that you don't need a legal precedent over the legal aspects of the dispute?

Are you looking for an apology from the/one of the counterparts?³⁴²

2. MODELS OF MEDIATION

The models or main styles of mediation are as follows:

Facilitative Mediation

In the 1960's and 1970's, there was only one type of mediation being taught and practiced, which is now being called "Facilitative Mediation". In facilitative mediation, the mediator structures a process to assist the parties in reaching a mutually agreeable resolution. The mediator asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome.³⁴³

Court-Mandated Mediation

Although mediation is typically defined as a completely voluntary process, it can be mandated by a court that is interested in promoting a speedy and cost-efficient settlement. When parties and their attorneys are reluctant to engage in mediation, their odds of settling through court-mandated mediation are low, as they may just be going through the motions. But when parties on both sides see the benefits of engaging in the process, settlement rates are much higher. In India, court mandated mediation is mainly undertaken by court annexed mediation centres under Section 89 of Code of Civil Procedure, 1908.

Evaluative Mediation

Standing in direct contrast to facilitative mediation is evaluative mediation, a type of mediation in which mediators are more likely to make recommendations and suggestions and to express opinions. Instead of focusing primarily on the underlying interests of the parties involved, evaluative mediators may be more likely to help parties assess the legal merits of their arguments and make fairness determinations. Evaluative mediation is most often used in court-mandated mediation, and evaluative mediators are often attorneys who have legal expertise in the area of the dispute.

³⁴² Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Back Bone*, LexisNexis (2015)

³⁴³ Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, available at <https://www.mediate.com/articles/zumeta.cfm>

Narrative Mediation

Narrative mediation is a relatively new style of mediation that focuses on creating a new “story” or a new “narrative” to understand and reshape the conflict. Often narrative mediators will have a mental health background. Narrative mediation is a very specific method of mediation so be sure to ask if your mediator has training in the narrative style.³⁴⁴

Transformative Mediation

In transformative mediation, mediators focus on empowering disputants to resolve their conflict and encouraging them to recognize each other’s needs and interests. First described by Robert A. Baruch Bush and Joseph P. Folger in their 1994 book *The Promise of Mediation*, transformative mediation is rooted in the tradition of facilitative mediation. At its most ambitious, the process aims to transform the parties and their relationship through the process of acquiring the skills they need to make constructive change.

Med-Arb

In med-arb, a mediation-arbitration hybrid, parties first reach agreement on the terms of the process itself. Unlike in most mediations, they typically agree in writing that the outcome of the process will be binding. Next, they attempt to negotiate a resolution to their dispute with the help of a mediator. If the mediation ends in an impasse, or if issues remain unresolved, the process isn’t over. At this point, parties can move on to arbitration. The mediator can assume the role of arbitrator (if he or she is qualified to do so) and render a binding decision quickly based on her judgments, either on the case as a whole or on the unresolved issues. Alternatively, an arbitrator can take over the case after consulting with the mediator.

Arb-Med

In arb-med, another among the types of mediation, a trained, neutral third party hears disputants’ evidence and testimony in an arbitration; writes an award but keeps it from the parties; attempts to mediate the parties’ dispute; and unseals and issues her previously determined binding award if the parties fail to reach agreement, writes Richard Fullerton in an article in the *Dispute Resolution Journal*. The process removes the concern in med-arb about the misuse of confidential information, but keeps the pressure on parties to reach an agreement, notes Fullerton. Notably, however, the arbitrator/mediator cannot change her previous award based on new insights gained during the mediation.

E-mediation

In e-mediation, a mediator provides mediation services to parties who are located at a distance from one another, or whose conflict is so strong they can’t stand to be in the same room, write Jennifer Parlamis,

³⁴⁴ Mediation Styles, available at <https://www.keepoutofcourt.com/mediation-styles/>

Noam Ebner, and Lorianne Mitchell in a chapter in the book *Advancing Workplace Mediation through Integration of Theory and Practice*.

E-mediation can be a completely automated online dispute resolution system with no interaction from a third party at all. But e-mediation is more likely to resemble traditional facilitative mediation, delivered at a distance, write the chapter's authors. Thanks to video conferencing services such as Skype and Google Hangouts, parties can now easily and cheaply communicate with one another in real time, while also benefiting from visual and vocal cues. Early research results suggest that technology-enhanced mediation can be just as effective as traditional mediation techniques. Moreover, parties often find it to be a low-stress process that fosters trust and positive emotions.³⁴⁵

3. ROLE OF MEDIATOR

Mediators are certified, neutral, third parties, often with a background in law, economics, communications, or business that have formal training in dispute resolution. Interpersonal skills are an important trait for mediators since they manage and facilitate the interaction between the disputants. The mediator does not render a decision like judge. The mediator must at all times be independent, neutral, and impartial. The mediator's job is to get negotiating parties to understand themselves and one another better, develop options to address the disputed issues, and agree to terms that resolve their controversy.

The mediator assists the parties in determining their true interests and needs in order to develop different options to reach an agreement. All parties and the mediator must maintain confidentiality throughout the mediation process and thereafter.

The role of the mediator is to be a middle person intervening between the disputants but without making any personal suggestions on how he thinks the dispute ought to be resolved. The mediator therefore plays the role of a 'dispute doctor' initiating the healing process.

In the process of selecting a mediator, each party should consider what role they want the mediator to play- a more facilitative role or evaluative role. Parties also need to choose if they want a mediator with a specific training and experience for instance an engineer in construction matters or a chartered accountant in financial matters. It is important to remember, however, that the mediator can only assist the parties in reaching an agreement and forming a contract without imposing or suggesting any of the terms to be incorporated in the agreement.

Thus, a mediator is a neutral intervener who operates as a coach. The mediator enjoys enormous freedom in persuading disputing parties to pay attention to each other's interests and to consider the elaborate

³⁴⁵ Types of Mediation: Choose the Type Best Suited to Your Conflict, Program on Negotiation, Harvard Law School Blog available at <https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/>

range of possible settlement options. Although an individual's own values might lead to refusing to serve as mediator in certain disputes, a person must acknowledge that power and effectiveness as a mediator originate from a steadfast commitment to neutrality- to helping the parties develop settlement terms that they find acceptable, even if the mediator finds those terms objectionable.

For a mediator, it is easy to just say that the parties' preferences shall prevail over his own perception of the dispute. It is very difficult to act according to that precept. Most of us like to give orders. In our various roles as parents, spouse, friends, supervisors- workers, colleagues, or citizens, we are always ready to dish out advice based on our long experience. For mediation to be effective, the mediator should shed his authoritarian and paternalistic instincts. It compels the mediator and the disputing parties to take seriously our commitment to democratic decision- making in our homes, businesses and communities.

Case Study: The Reliance Partition

When it came to the feuding Ambani brothers, Kokilaben had no other option but to resort to distributive bargaining of dividing equally the fortunes of the humungous empire of the Reliance Group which was built under the leadership of late Dhirubhai Ambani. In June 2005, Mukesh and Anil Ambani signed a MoU to reorganize Reliance Industries, in order to take over reins of different assets and businesses of the group under their individual domain.

The most significant aspect of the MoU was that RIL promised to supply 28 million cubic meters of gas for 17 years at \$2.34 mm Btu to Anil Ambani's RNRL. However, the MoU came under dispute subsequently in 2007 on government setting up a price of \$4.20 mm Btu for gas contracts in the KG Basin fields.

The core business of the group in the form of energy and petrochemical business was pocketed by Mukesh Ambani, while the junior Ambani inherited Energy, Financial services in form NBFC business and a newly developed but fast emerging Telecom business of the Reliance Group. At this point in time, during the process of de-merger, the fortunes of the group were distributed equally between the two estranged brothers.

Anil who had finance-related acumen was more than content while inheriting business of Reliance Capital, apart from group subsidiaries such as Reliance Infrastructure (Power business), Reliance Communications (Telecom business) and not to mention RNRL- somewhat a shell company with interests in marketing of natural gas. On the other hand, Mukesh Ambani was happy with the group's core business of Petrochemicals where Mukesh excelled in terms of technical know-how and interests.

Both the brothers made efforts to expand and diversify their businesses post de-merger. Anil Ambani had dreams to construct a mega Rs.28000 crore power project at Dadri powered by a cleaner fuel in form of

gas, in contrast to coal fuelled projects under the portfolio of Reliance Power. Anil also diversified with mega-infrastructure projects including metro rail projects under the portfolio of Reliance Infrastructure. The Junior Ambani also became active in the space of Media and Entertainment by acquiring Ad-labs Films Ltd.

Mukesh Ambani moved along the lines of his traditional strength of Petrochemicals business. He came up with a new company in the form of Reliance Petroleum (RPL) and created the world's most envied Petroleum Refinery in Jamnagar. Later, this company was merged with the parent company Reliance Industries. Mukesh also came up with subsidiary involved in new-age concept of Retailing under Reliance Retail, Reliance Trends, Reliance Gems & Jewels and Reliance Digital.

At the time of de-merger, both the brothers departed amicably with equal distribution of the Group's fortunes between the estranged brothers. From here, it remained on both the brothers as to how they expand their individual empires along with the crucial support of their shareholders and other stakeholders. Even as both the brothers started off as equals, their groups under the leadership of individual Ambani brothers have moved forward in their respective line of businesses but in different directions of claiming fortunes.

However, even after enforcing the mother of all settlements between her sons, Kokilaben still controls 40% of the family's share in the Reliance group, including her two daughters'. She can use her stakes as carrot-or-stick to prevent the brothers from fighting again.

What do we learn from Kokilaben's solution? Think of her as a mediator who resolved a dispute. The answer is on the next page.

Reference: <http://trak.in/tags/business/2010/05/11/reliance-ambani-brothers-past-present-future/>

as accessed on 29th March 2015

The Different Hats of a Mediator

The mediator is not a judge and does not render a decision or impose a solution on any party. Rather, the mediator helps those involved in the dispute talk to each other, allowing them to resolve the dispute amongst themselves. The mediator manages the mediation session and remains impartial.

People famously say that a woman is not just a woman. She takes on various important and life changing roles in her life. She is a daughter, mother, wife, daughter in law, sister, niece, grand- daughter and in the present day a successful professional. Like a woman, a mediator is also not 'just a mediator'. At every stage of the mediation process, the mediator assumes significant and varied role plays to facilitate a resolution between the disputants.

Communicator: We often do not listen to what others are saying to understand them. We listen to them only to prepare our reply to counter what they are saying. This is very common between disputing parties. They have made up their mind and they are reluctant and almost unwilling to change their perception about each other. In such a situation, the mediator must transmit positions, ideas, emotions and convictions in such a way that they understand each other. Mediators must also realize that people frequently communicate indirectly.

Parties sometimes fail to reach settlement not because what is said is objectionable but because the language in which statements and proposals are couched triggers fear or automatically generates another negative response. The mediator's function in such a situation is to reframe communications into language that increases the probability of a favourable response and understanding instead of retaliation. The mediator never camouflages or eliminates information when translating; the task is to reduce the sting of ill- chosen words.

What do we learn from Kokilaben?

As a true mediator, Kokilaben identified the strengths and weaknesses of each party. She understood the underlying interests of both disputants- both Mukesh Ambani and Anil Ambani sought individual recognition for their abilities and absolute control over their domains. Kokilaben achieved this by dividing the empire based on the expertise and personality of each brother. Both were given equal potential to prove their talents and equal potential to grow. However, the final settlement was futuristic. It did not leave anything to chance. Kokilaben retained mammoth control to diffuse any dispute which may arise in the future.

Chairperson: Every mediation session is as important as a scheduled business meeting. The mediator must structure this meeting to facilitate discussion on contentious issues in a time bound manner. The mediator is responsible for working with the parties and their representatives and scheduling the number, time, and place of meetings, for establishing the format of each meeting and the number of persons who participate, and for arranging for making computer, photocopying, telephone, and other support services available for the parties. Substantively, the mediator is responsible for focusing the discussion to the disputed issues, controlling participant behaviour and sustaining a positive conversational dynamic throughout the meeting between the disputing parties. A mediator performs this function in every dispute, although the extent to which it applies varies with the situation.

Stage Manager: This is one of the most modern styles of mediation. When the parties are clueless about the undercurrents of their dispute, the mediator asks many questions about the facts and evidence in the case. The mediator then uses these questions to probe the parties' perceptions and positions. The mediator primarily focuses on the process and induces the parties to talk about liability, costs, damages, verdicts in

the area, risks, high-low average values for the case, perceptions of the society, for example drunk driving. The mediator then employs multiple joint sessions, assists and encourages the parties to communicate directly and be their own solution finders. Like a stage manager, the mediator works behind the stage outside the sight of the audience and sometimes even the actors (in this case the disputants). The mediator should not use coercion or 'arm twisting' to force settlements. If he cannot mediate a settlement, he will mediate the process so you always obtain some results from the mediation.

Clown: Many times, the temperature in a mediation room reaches peak and the parties to a dispute may come to a breaking point. At such tense moments when the emotions of the parties are scattered all over the mediation room, the mediator diffuses the tension. Many times, the mediator acts as a clown and brings eternal optimism in the face of failure or emphasizes on the need to living life to the full in a society that praises efficiency, success, achievement and productivity. The mediator, like a clown, requires the skill of improvisation on the spot. No matter how much a mediator prepares, you never know how the disputing party will react and how the situation will have to be countered and improvised to act as a tool and not a hurdle in the mediation process. Like a clown, sometimes a mediator has to be therapeutic and bring a smile on the face of a disputing party who sees no light at the end of the tunnel.

Educator: The mediator must understand the technical aspects of each proposal and empathize with the aspirations of the parties. Like an educator who must understanding the comprehension capabilities of its class, the mediator must be able to effectively convey that information- using language, descriptions and explanations parties understand and enable parties to act based on their enhanced understanding.

A mediator also teaches and models negotiating behaviour. Sometimes parties assume that negotiating requires certain types of conduct, such as shouting, lying or belittling an individual, or simply demanding a proposed solution without providing an explanation. A mediator, as a coach, educates participants- both parties and their representatives- about constructive negotiating behaviour.

Translator: When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

Agent of Reality: If a party's proposal appears impractical or inflated, the mediator must help test its viability and ultimately emphasize that in light of the discussion the proposal appears unobtainable. The mediator must be able to identify for each party what is doable in light of the interests and resources of the other parties to the discussion.

The mediator should not reduce the reliability of the process by exploring proposals that are impossible or outrageous. The mediator should not be so thorough as to believe that the parties ought to consider in detail every suggestion or offer that is made. Many times, the parties get stuck on events that have

happened in the past and cannot be reverted or nullified. The mediator serves the parties well by eliminating fruitless discussions that will never advance a negotiated agreement.

Guardian of Durable Solutions: Even in our personal capacity of a friend or family, we have a tendency to think that we can offer an instant solution to a person's problem. However, we tend to forget that what works for us may not work for the other person. The mediator should not impose on the parties his own judgment or preference as to how a problem should be resolved. But the mediator must consider the consequences of what people are agreeing to and try to ensure that the agreement they develop will last.

Questioner and Clarifier: The mediator explores issues between the parties and confirms each other's understandings to ensure that the participants and the mediator are on the same page in relation to the dispute.

Resource Expander: A mediator must increase the range of resources that parties use to resolve their dispute. She can do this by generating additional information germane to the controversy, suggesting new ideas for settlement when the parties are stuck, setting up meetings between the parties and individuals to whom they had previously lacked access, and leveraging other services that can help the parties resolve their concerns.

Scapegoat: The mediator can be the lightning rod for the parties' frustrations and concerns. The mediator sometimes serves as the post on which disputing parties hang and even overburden excuses. The parties tend to vent out their frustration or blame the progress in a mediation on the mediator. This can however also help the party re-direct the vengeance they feel towards each other.

Protector of the Process: The mediator is responsible for protecting the integrity of the mediation process as a useful vehicle to help parties resolve disputes. Sometimes a party has no genuine interest in talking with others about what she is doing or planning to do, but is merely using the mediator and the process as a tactical decoy to help achieve an end. The mediator must promptly quash any such effort.

These ever-changing hats constitute the mediator's job through the mediation proceedings. They make a mediator's presence a value done, although they certainly are not designed to help win a popularity contest. At the end of the day, what is important is that the parties must live with the agreement, not with the mediator. The mediator is a catalyst in the mediation reaction. A mediator's participation affects the dynamics of how disputants interact with one another. The mediator cannot be negligent in executing his tasks. The mediator's disinterest can increase tension, antagonize parties, and shatter the possibility for agreement. Another words, a mediator can do permanent harm to the disputing parties' relationship. The mediator must perform the job conscientiously and constructively to help parties reach acceptable terms of settlement.

Qualities of an Effective Mediator

A mediator is the mascot of the mediation process and must symbolize all that mediation stands for and claims to cater to. Hence, the mediator must have all or substantially many of the following qualities:

Neutral: The mediator helps parties identify solutions that they find acceptable without ganging up on anyone. A mediator should have no preference that the dispute be resolved in one way rather than another. Every disputant would prefer to have a mediator who always supports her viewpoint. But since a mediator cannot do that for everyone, each party wants someone who at least is not working against him. If a mediator is not neutral, then there is no reason for the disputants to trust him.

How the First Genocide of the World was averted by a Mediator

The sequel to Mahabharat is the story of Parikshit, the grandson of the Pandava's. He was the son of Abhimanyu and the grandson of the great archer Arjun. Parikshit's son Janmejaya was curious about the way in which his father had died. Once, he enquired his ministers of the events that led to his father's death. Then the ministers told him the story of Parikshit's life and his achievements till the day he died. The ministers told Janmajeya that Parikshit was a just and noble king, an administrator who looked after his kingdom well. Parikshit had inherited his goodness from Yudishthir and valour from his forefathers Abhimanyu and Arjun. Parikshit did not have enemies and did not feel the baser instincts of greed or jealousy towards other rulers. The great archer Guru Kripacharya was his guru in archery. He was a favourite of Lord Krishna. He ruled for sixty years before his death and left Janmejaya as his successor to the throne. Janmejaya was still not satisfied and told his ministers that they had not answered his question, which was how his father had died.

He said that all the rulers of his clan had been noble and just and were devoted to the personality of godhead. However, what he wanted to know was how his father was killed.

The ministers explained that in the fag end of his life, Parikshit handed over his throne to his son Janmajeya. He locked himself in a tall tower and isolated himself from the rest of the world. For some unknown reasons, he was terrified, unable to sleep and eat. To allay his fears, he listened to the discourses of Sage Suka, the son of sage Ved Vyas who wrote the Mahabharat. On the seventh day, Parikshit bit into an apple out of dire hunger. The Naga Takshak who was hidden inside the apple in the form of a worm came out, instantly transformed into a serpent and bit Parikshit. As predicted Parikshit died instantly of snake bite.

Upon hearing the story, Janmejaya went mad with rage. He was filled with a desire to avenge his father's death. He decided to do something to punish the snakes for having killed his father. He ordered all the priests of his kingdom to perform the Sarpa Satra, a yagna which had the power to kill and annihilate all

the snakes from the world. As the priests started the yagna fire and started chanting mantras, the snakes started feeling weak and burning.

Vasuki, the king of snakes was very worried at the turn of events. He knew about the death of Parikshit and he also knew that annihilating the Nagas from the world would not make the situation better. Besides, there was a reason behind Parikshit's death. He sent his nephew Astika to speak to Janmajeya.

When Astika reached the venue of the Sarpa Satra, he requested Janmajeya to stop the yagna. Janmajeya asked him who he was. Astika told him that he was the nephew of the Naga king Vasuki. Janmajeya was further infuriated. He told Astika that he would not stop the yagna at the behest of one of the people who had killed his father.

At this Astika told him the story of his birth. Astika explained that he was not a Naga himself. In fact, he was born to Rishi Jaratkaru, a human like Janmajeya himself and to a Naga woman, a Naga like the once dying in the snake sacrifice. Hence, he was a neutral person.

Upon this Janmajeya was convinced of Astika's credentials. Astika told Janmajeya the full story of his father Parikshit's death. Astika told him that Parikshit, like his great-grandfather Pandu, was very keen about hunting. Once, Parikshit was chasing a deer through a forest. Every time he aimed at the deer; it would manage to escape. As the chase became more interesting, Parikshit left his hunting party behind and followed the deer deep into the forest. Once deep inside the forest with no sign of the deer, Parikshit felt tired and thirst. He came across a sage in deep meditation. The sage had taken the vow of silence. However, Parikshit did not know this. He asked him again and again where he could find water to quench his thirst and some food. The sage did not answer him back. To insult the sage, Parikshit picked up a dead snake and placed the dead snake on the shoulders of the silent sage.

A student of the sage saw the insult done to his Guru. He cursed Parikshit that he would die of snake bite. Astika concluded the story by telling Janmajeya that his father's death was caused by his own actions. But Janmajeya was not satisfied. He asked Astika why Naga Takshak agreed to take upon this dreadful task and kill his father.

Astika explained that long ago, Janmajeya's grandfather Arjun had burned the forest Khandava Prastha to the ground to build the city Indraprastha, the capital of his kingdom. The forest was home to many Nagas. Consequently, many Nagas died when the forest was burned. At that time, Takshak had sworn that he would kill Arjun or one of his descendants to avenge the death of the Nagas. The killing of Parikshit was his revenge for the thousands of Nagas burned with the Khandava Prastha forest.

Janmajeya was silent. He contemplated over what he had heard. He ordered the priests to stop the Sarpa Satra immediately.

³⁴⁶*Impartial:* The mediator should not develop bias in favour of any one party. There is a ground rule of mediation which many times mediators do not follow. This is one of the reasons mediation sessions should be begun with a joint mediation session rather than private caucus with only one party. Sometimes a disputing party may request the mediator for a private conversation in the beginning of the mediation. As a rule of thumb, the mediator should avoid a private conversation before establishing the facts of the case through joint discussion. This helps the mediator maintain a balanced view of the problem. Similarly, the mediator cannot convene meetings at sites that are inconvenient to some but advantageous to others, persistently encourage parties to consider settlement terms that benefit one side only, address some persons informally but others by title, ignore the special needs of parties with disabilities or overtly treat parties with disabilities differently.

Flexible: A mediator must promote, not reduce the fluidity of the discussions and the possibilities that can emerge from the discussion. If a party makes a casual remark indicating a change of position on an issue but the mediator refuses to discuss it until the current agenda item is resolved, the mediator's rigidity becomes the source of the lack of progress. The mediator must manage the process and chair the discussions, but she must not do so in a manner that restricts the scope of dialogue between the parties. The mediator must not reject solutions solely on the grounds that he thinks they are not sustainable or not 'good enough'. The mediator must not evaluate the party based on his standards of how a dispute ought to be settled.

Objective: A mediator must be able to surpass the eloquent speeches and strong emotions of the parties. The mediator must analyse proposed solutions with detachment to assess their strengths and weaknesses accurately. The mediator should not be influenced by his own past experiences to decide what the parties should decide for themselves. The mediator should also assist the parties to develop a more objective view of the situation.

Imaginative: The parties come to a mediation session because they have been unable to negotiate a sustainable solution for themselves. Disputing parties can get so wrapped up in arguing over trivial matters that they overlook obvious solutions. So, in a way mediation is artistic negotiation. If a mediator cannot generate innovative ideas and positive perspectives, the mediator will get entangled in what the parties say instead of what can be made out of the problem.

Articulate. A mediator must be verbally astute to communicate the thoughts, perspectives, and proposals of one party to another. A mediator must choose her words wisely. People grow weary of listening to mediators who cannot state matters clearly and intelligibly.

³⁴⁶ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation- Wishbone, Funny Bone and a Back Bone*, LexisNexis (2015)

Intelligent. Parties are looking to the mediator for assistance. Although parties must educate the mediator about the specific problem, they do not want to be handicapped by a mediator's slowness of mind.

Empathetic. We have already discussed the difference between empathy and sympathy in Chapter II. For a mediator being empathetic is of utmost importance. The mediator must be able to appreciate the perceptions, fears, thoughts, history, social and familial pressures that underlie each party's proposals. Parties do not need someone to tell them to love one another, but they do need to feel understood. They want help resolving their practical concerns in the real world of power, rights, obligations, and possibilities- not in some utopia. The mediator's capacity for empathy gives them confidence that the alternative solutions they are exploring with the mediator will not ignore their needs.

Effective Listener: Most disputes arise because the disputing parties are not effectively listening to what each other conveyed at one point or the other in their relationship. A mediator must not just hear but also comprehend and analyse the concerns of all parties. If a mediator is constantly talking or asking questions, the parties will not believe he is interested in understanding their problems as they see them. A mediator should not be distracted when parties talk. Use of electronic devices inside the mediation room should be strongly discouraged not just for the disputing parties but also for the mediator.

Persuasive: A mediator must be forceful enough to convince disputants to be reasonable, flexible and to give the other disputing party a fair chance to express itself. Parties do not want a compliant mediator who merely accepts on faith the claims of the disputants and then exhorts them to find a way to resolve their difficulties.

Respected: A mediator need not be famous or from some authoritative background. However, a mediator should be able to generate respect for himself in the minds of the disputing parties. At the very least the mediator should be a capable individual whose presence does not constitute an insult to the parties. Respect is of course often confused with fear or compliance in India. It is also wrongly assumed that a person who has held an important government position will automatically be respected by the parties. A mediator must earn his respect not based on his illustrious past but through his present conduct during the course of the mediation proceedings.

Honest: The mediator's integrity must be beyond reproach. Since the parties do not always trust each other, they must be able to trust the mediator. No one will trust someone who misleads or deceives. It is also the mediator's job to help the parties get a reality check. He must not be afraid to the disputing party a mirror and confront the truth.

Sense of Humour: A mediator must be able to smile and laugh, both with others and at himself. The skilful use of humour can put people at ease, relax tensions, or make a point in a subtle way. Since the

number of people who bring a smile on other's face decreases day by day, a mediator with a sense of humour can develop a better connect with the parties. This can help put the party at ease and discuss its underlying doubts and fears more freely. However, a mediator should not make an individual party the object of ridicule or the victim of one-liners, nor should humorous remarks be at the expense of particular groups or classes of people. The mediator should avoid using cultural stereotypes as a joke. The mediator should not make the mistake of believing that serious business cannot be conducted with some laughter.

Reliable: If the mediator says he will do something, for example, gather certain information, contact particular individuals or prepare a draft of the agreement, the mediator should deliver his commitment. Parties do not need a mediator who promises but does not deliver.

Skeptical: The mediator must be comfortable operating in an environment where he entertains all information provided but remains healthily sceptical of its accuracy. Conflicting accounts are the norm in mediation.

Patient: Every mediator knows that the shortest route to a settlement is not a straight one. A mediator must be prepared to manage the discussion through all the side streets and one way that lead eventually to that destination. The disputing parties are generally looking for someone who will assist them no matter how long it takes. They do not want a mediator to tell them that their matter must be resolved in twenty minutes because he has to leave for a business meeting or tennis date. They do not want a mediator who acts like a paid administrator who simply processes their dispute along with hundreds of others without any special consideration and sometimes without even a minute of serious thought. They want to be heard. They want to express their concerns in their own language. Disputing parties come to mediation because they are not effective communicators and the miscommunication has led to the dispute. Sotheyby want to tell the mediator what they believe is relevant to their dispute, rather than being restricted to responding to questions on a form. All this takes time, and while no one's patience is inexhaustible, the mediator should be the last person to lose it. The mediator operates knowing that it often takes the first 90% of the total discussion time to resolve 10% of the issues and the final 10% of the time to solve the remaining 90%. The lesson is clear- the mediator cannot force a settlement; he must be prepared to take the time to listen to concerns and move the disputants toward agreement at a measured pace.

Non- defensive: A mediator must be able to absorb a party's venting frustration and criticism of the process or of the mediator. No apologies are required for best efforts, but the mediator must know when to take abuse and blame without comment and when to confront it.

Able to gain access to resources: A mediator must have sufficient energy and stature to gain access to those resources that are necessary or helpful for resolving the dispute. The parties might need to convey their concerns to the company president, mayor, governor, school superintendent, or some other official

with significant power to influence the outcome. If the parties themselves do not have access to such resources, the mediator must fill the gap.

Persevering: The mediator must have immense hope and perseverance. This does not mean however, that a mediator must be naïve and not recognize if there is no sign of progress. The mediator must be intrinsically prepared that every discussion which may last for either three minutes or three months proceeds by spits and spurts. Each discussion starts and stutters. It is likely that the disputing parties will become exasperated when they will feel that they take three steps backward for every two steps forward. Sometimes when the disputants will feel that the agreement is within their grasp, something may happen which will set back the prospect for settlement. But in all these situations, the mediator cannot quit. The mediator must go beyond the exasperation born out of fatigue and continue to press the disputants to clarify details or re-examine the strengths and weaknesses of their proposals. He must be prepared to go the distance without really knowing how far that is.

Optimistic: A mediator must always be upbeat and enthusiastic of the outcome. The mediator must have internal positive energy which should charge the discussions with an electricity which gives people hope and confidence that it is possible to resolve their concerns. He must inspire them to believe in their ability to shape their own future. Consider a mountaineer who must cross a crevasse if he wants to survive and see the light of next day. Is it possible? If we go by only the objective facts available, the picture is not very encouraging. To accomplish the task, the mountaineer must cover a greater- than normal distance wearing heavy boots in inclement weather. But these ‘facts’ do not factor in the climber’s will power and his belief that he can achieve the feat. Surely, the success of the leap will be propelled by the mountaineers will power and belief that success is likely. A mediator must provide this positive element to the dispute settlement discussions. But a mediator does not serve the parties well if he is a naive optimist. The mediator must be hopeful but realistic and candid with all parties about the likelihood of success and the big role the parties will have to play for the mediation to succeed. Also, the mediator should not confuse being realistic with being an automatic ‘this-is-not-possible-man’. Nothing is more discouraging to disputants than always to be told why something cannot be done or is not possible. Most people dislike the idea of being involved in a dispute. They want it resolved, gone from their life and forgotten like a bad dream. On top of being embroiled in a dispute, the disputants do not need in addition someone to reinforce their misery by reminding them of the hopelessness of their situation.

4. STAGES OF MEDIATION

Mediation is divided into three phases, Pre-Mediation, Mediation, and Post-Mediation. The second phase, which is the actual mediation process, comprises of five stages.

Phase I: Pre-Mediation

Setting the room: Ensure that the parties are facing each other and that the mediator's chair is positioned between both the parties.

A mediator must try to make the physical environment in which the discussions occur as conducive to constructive dialogue as possible. The mediator does not always have control over whether the sessions are held in a comfortable room with decent circulation, heat, or air conditioning. One can easily imagine, though, how much more difficult it becomes for the mediator to resolve a dispute if the parties are shivering in a cold room. Finding an adequate, though not necessarily luxurious, setting helps to put people in a more positive frame of mind. The mediator can almost always make sure the meeting room is clean and orderly before the parties enter.

The mediator should control where various persons are physically situated with respect to one another so that she helps advance communication, safety, party equality and mediator neutrality. Two principles guide her decisions:

1. Each distinct party to the discussion should have a separate, equal spot in the room. Their position should facilitate conversation among group members, as well as communication with other parties.
2. The mediator's position, insofar as possible, should be between the parties, equidistant from them, and closest to the exit door.

The second principle is important in two ways. First, putting the mediator between the parties and in the middle reinforces the perception that she is neutral. If the mediator is sitting next to party A on one side of the rectangular table and party B is sitting alone across from them, then party B will quickly conclude that the mediator favours party A. The mediator must place herself equidistant from the parties and close enough so that everyone can speak comfortably and be heard. Second, by sitting closest to the door, the mediator can unobtrusively prevent a party's frustration, anger, or impatience from derailing a session.³⁴⁷

Review the case material: The mediator must prepare and read the case file or information sheet about the dispute so that he is familiar with the names of each party, contended facts by each party and all preliminary background information required to have a grip on the basics of the case.

Appropriate appearance: The mediator's appearance, manner and clothing must show respectability, leadership and capability to control the environment of dispute resolution between the parties.

Confirm the attendance: The parties must be given sufficient notice of the date, time and venue of mediation proceedings. The parties must be given a reminder message a day before the proceedings and

³⁴⁷ Joseph B. Stulberg and Lela P. Love, *The Middle Voice: Mediating Conflict Successfully*, 2nd Edition, 2013

their attendance confirmed. If one of the parties is unavailable, the other party must be informed reasonably before time.

Phase II: Mediation Process– Five Stages

Stage 1: Introduction

In this stage, the mediator must focus on establishing a structure to the mediation and ground rules.

Objectives

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process³⁴⁸

The mediator must take the following steps:

1. Welcome the parties
2. Introduce yourself as the Mediator
3. Explain the mediation process
4. Describe the mediator's role and the parties' role
5. Affirm that the mediator is a neutral party
6. Emphasize that the process is completely confidential and that the parties are bound by confidentiality
7. Establish basic ground rules
8. For commercial disputes, verify whether the person representing the corporation has been duly authorized for the purpose.
9. Clear any doubts which the parties may have
10. Ask the parties how they would like to be addressed.

³⁴⁸ Handbook on Mediation issued by Supreme Court of India, available at <http://supremecourtfindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>, last accessed on 15th June 2016

Stage 2: Joint Session

It is an open discussion where each party is allowed to narrate their side of the story without being interrupted by the other party or the mediator. It is time for the mediator to study the body language of the parties, explore the information being provided by the party, understand their perceptions and feelings.

Objectives

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

In a joint session:

1. The mediator must attempt to gather as much information as possible in order to understand the conflict.
2. The mediator must attempt to identify the underlying issues and critical interests to the dispute.
3. The mediator must keep the environment of the mediation controlled through specific techniques of communication.
4. The mediator must make a list of all the critical issues for discussion.
5. The mediator must create a common ground for assisted negotiation between the parties.
6. The mediator must begin to brainstorm possible solutions which can be discussed with the clients.

Stage 3: Caucus

The mediator should try to discover hidden issues, interests and individual goals of each disputing party. Caucus is where the mediator meets each party separately to extract confidential information, underlying issues and interests. It provides a safer, less stressful environment for the parties. The mediator must try to gain confidence of each party by reaffirming that he is bound by confidentiality. The mediator must make the party feel comfortable so that they begin to freely communicate with the mediator and express their real concerns and priorities.

Objectives

- Understand the dispute at a deeper level

- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

The mediator must not share any confidential information obtained through caucus with the other party unless there is voluntary consent. He must encourage the parties to think creatively. The mediator must work on future interests. He must evaluate and define alternatives and explore their consequences.

Stage 4: The Agreement

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. When the parties are ready to settle after carefully evaluating alternative solutions to the conflict, the parties get together again to clarify the terms of the agreement. The terms of the agreement must be clear, precise yet comprehensive and cover all eventualities and underlying interests. The agreement must specify dates of performance of milestones and prescribe liquidated damages for non-performance.

Stage 5: Closing

The mediators must ensure that the parties understand the terms of the agreement and are satisfied with the conditions, timelines and issues covered under the agreement. If the agreement is short, the mediator must read it out aloud. If the agreement is long, the mediator must summarize each sub clause of the agreement before the parties.

The agreement must be finalized and signed by the parties. To maintain authenticity and validity of the agreement, it must be executed on requisite stamp paper. If the agreement pertains to immovable property, it may also be registered.

In case of court annexed mediation, the original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator. In case of mutual settlement through mediation, the court fees paid by the parties to the judicial forum is refundable.

However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court in court annexed mediation. **If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any**

reason for non-settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.³⁴⁹

In case of failure of private mediation, the mediator or the parties through written communication shall terminate the mediation. If the agreement to mediate between the parties provides for a specific process of termination, the same shall be followed.

After the parties have signed the agreement, the mediator will:

1. Compliment the parties on their hard work, creative thinking, willingness to collaborate and concede candidly.
2. If the parties do not come to an agreement, review any progress and terms of the agreement they did reach.
3. Ask them if they want to meet again.
4. Thank the parties for their participation.

Phase III: Post-Mediation Phase

Mediator follows up with the parties and:

1. If only partial agreement, ask to reschedule a follow up to complete the mediation.
2. If the agreement is not accomplished by one of the parties, the other party can ask the mediator to talk to the defaulting party.
3. If any of the parties have any questions about the agreement, they can contact the mediator.³⁵⁰

BADGER

Badgers are found living in burrows in the forests of Europe and western Asia, scavenging for roots and berries as well as worms and insects.

The word badger is said to derive from the French ‘bêcheur’ meaning ‘digger’. While a badger digs the earth to find its food, the role of the mediator is to dig for information and interests of the parties.

³⁴⁹ Handbook on Mediation issued by Supreme Court of India, available at <http://supremecourtindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>, last accessed on 15th June 2016

³⁵⁰ Anuroop Omkar and Kritika Krishnamurthy, The Art of Negotiation and Mediation, LexisNexis Publications (2015)

Badgers have a keen sense of smell and can dig down for rabbit nests and grubs under the surface. A mediator should have a keen sense to smell the emotional changes and body language of the parties.

Because they have very thick skin and long claws, they are one of the species that can kill and eat hedgehogs! A mediator should have a thick skin like the badger. He should be immune to the distress and anger of the parties and in fact, offer himself as a scapegoat to parties for venting out. A mediator should also not be affected by the outcome of the mediation.

According to Stulberg and Love (2013), the mediation session consists of six distinct components:

B	Begin the discussion
A	Accumulate information
D	Develop the discussion strategy
G	Generate Movement
E	Elect Separate Sessions
R	Reach Closure

Begin the Discussion

There are two aspects to beginning the discussions. The first involves taking care of the necessary procedural arrangements. The second deals with starting the actual meeting.

Where will people meet? How many will be there? When will they meet? How long will the session last? Will there be food? Who will talk first? Who will sit where?

The mediator wants to ensure that meeting arrangements and procedures do not disrupt the discussions. She wants them handled well so that people feel comfortable as they start to talk with one another.

These are procedural matters that the mediator must regularly handle:

- Date of the meeting
- Time and length of the meeting
- Place of the meeting
- Number and identity of participants
- Information exchange or material provided to the mediator ahead of time (in some cases)
- Role of observers or interested groups
- Room arrangement

- Refreshments and meals
- Rules of protocol (order of speaking, formality of discussions, record keeping, status of outcomes)

At the actual meeting itself, the mediator is there to assist all parties to talk about their concerns, come to a better understanding of one another, and work toward an agreement. But she doesn't want them to start to do that too quickly. Her contribution involves helping the parties discuss those matters in a way that differs from the way they have done so in the past. The mediator will not help by having them replay the same anger and shouting that have been part of their previous, unsuccessful efforts to resolve the issues. She must first help them re orient the way they look at their situation.

The mediator wants to establish an appropriate tone for the discussion. She wants people to feel comfortable so that they can deal constructively with their concerns. She wants to establish appropriate expectations about what can and cannot be done, torpedo the gamesmanship that comes when one party tries to gain an advantage by talking first, and get the parties to have confidence in her ability to assist them. To achieve these objectives, the mediator should begin the session by making constructive opening remarks. In formal settings, the mediator introduces herself, disclaims any bias in the matters to be discussed, explains the mediation process, and identifies the ground rules that will govern the discussion. In surroundings where everyone knows one another, the person in charge can modify these opening remarks accordingly. However, the mediator starts, she must make certain the participants understand the goal of the process, everyone's role in it, and how the discussion will proceed.

Accumulate Information

My high school assignment was to ask a veteran about World War II. Since my father had served in the Philippines during the war, I chose him. After a few basic questions, I very gingerly asked, "Did you ever kill anyone?"

Dad got quiet. Then, in a soft voice, he said, "Probably. I was the cook."

The parties have lived with their conflict. They are familiar with its dynamics and tensions. They feel its pressure. The mediator must learn this history as rapidly as possible.

The mediator gathers information with a purpose. He wants to understand the dispute- how the parties experience the "story" they tell. He wants to know what concerns, both substantive and emotional, must be addressed for all parties to settle their dispute. The mediator will not learn everything there is to know about the people he is serving. His interaction with the parties is relatively brief; he will get a glimpse of only a small slice of their lives. So, he focuses on discovering information that will further a constructive dialogue. He prompts parties to describe the situation as precisely as possible so that everyone- most importantly, the other side- has a full understanding of the challenge. He targets the concrete matters in which they are entangled— the issues. He elicits common interests. He extracts rules, principles, values,

law and customs that are important to the parties. He strives to have the parties articulate their feelings and identify their options if the dispute does not settle. To accumulate information effectively, mediators must do the following things:

Listen Carefully: Listening effectively to what someone is saying consists of more than just hearing sounds. One listens to understand the message the speaker is trying to communicate. To listen well is to capture the entire message. Listening skills prevent one from short-circuiting or contaminating that message-sending process.

Record Notes Selectively: While listening attentively, it is appropriate for a mediator to take notes. But they are for his purposes only. Any final document reflecting the agreement of the parties will be separate. That fact clarifies the purpose of a mediator's note taking: he records only information that will be useful in helping the parties understand one another better, structure the discussion, and capture proposals and agreement terms. If the mediator's memory is so keen that he can remember everything that was said and by whom and when then he has no need to take any notes at all.

Start-up Questions: How can a mediator get people talking, particularly if someone is reluctant, uncomfortable with language, hesitant, nervous or shy? He asks questions that invite the party to discuss specific events or situations with which the party is familiar. These are questions that should be easy for her to answer in the sense that the party knows the information to share.

Open ended questions: Open-ended questions let the party respond by elaborating on a subject in his own words. Questions that include what, as well as phrases such as tell me more, generate this response. Open-ended questions elicit the most information in the shortest amount of time. The parties know best what has happened, or at least what they believe has happened. The mediator's task is to get them to describe it. Using open-ended questions accelerates that process.

One-way people reveal their priorities are through their choice of words and topics and the emotions they use to express themselves. The mediator cannot learn whether someone is angry, upset, committed, or nonchalant if all the person does is answer "yes" or "no". Open-ended questions also serve the parties' interests in having the mediator treat them in a dignified, respectful manner, as questions in this form give people a chance to explain the dispute in a way that is most comfortable for them.

Leading Question: A leading question has two components: first, the answer is contained in the statement of the question; second, the person who is asked the question can respond only by saying "yes" or "no." Here are some examples:

- You were late in submitting the report, weren't you?
- When you leased the apartment to Mr. Domrin, all the appliances were in working order, weren't they?

A person who asks a leading question accomplishes one of two goals: either he makes the person to whom the question is put defensive, flustered, and uneasy, or he makes sure that he, the questioner, tells the “facts” rather than allowing the person being questioned to do so.

One can readily understand why a lawyer conducting a cross- examination asks leading questions. The questions contain conclusions and are accusatory in tone. They are not designed to foster discussion. They do not generate new ideas. They are designed to establish the anchor points around which all consequences must pivot. As a rule, a mediator should not pose leading questions. It is a mistake for a mediator to believe he can save time or focus discussion by asking leading questions. Parties to such a verbal onslaught become defensive, tense, and no longer consider the mediator neutral. Such a reaction impedes discussions rather than enriches them.

Reinforcement and Clarification: A mediator actively seeks to ensure he understands the parties’ communications and to demonstrate that understanding to them. In doing so, he displays a level of interest and respect that encourages disclosure and further communication. He does this by affirming that he is listening by saying “Hmm” or “Okay”, nodding his head and summarising what a party said where required and neutrally reframing the party’s statements appropriately.

Patience: A mediator communicates the need for patience by not interrupting others. If he stands up while the parties are sitting and tells them not to interrupt each other again, he signals forcefully to the parties that their verbal exchanges have exceeded acceptable limits. He communicates a sense of urgency by glancing down at his watch before asking a question.

Dig for underlying information: While listening to the parties, the mediator should also know what he is looking for. Some of the key things the mediator should keep his ears open for are as follows:

Interests	The silent, powerful movers behind positions that parties take. There will be no resolution if someone believes that his primary interests have not been respected, secured, or advanced.
Negotiating Issues	Those distinct matters or behaviors that frustrated a party's interests and resulted in the need for mediation. The issues become the subjects around which an agreement is built- if the parties want an agreement. Issues constitute the bargaining agenda.
Proposals	Suggestions or offers for the resolution of issues. Like interests and issues, proposals can be hard to hear if they are embedded among threats and insults.
Principles, Values & Rules	Most people are governed by values, principles and rules that guide conduct. Laws (and our understanding of them) also provide an important guidepost. The mediator listens carefully to learn the parties' central tenets. The principles each party holds dear will need to be reflected in the resolution.

Develop the Discussion Strategy

The parties to a dispute have clashing ideas regarding what has happened or what they should do. Once they describe their dispute, the mediator must manage the discussion in a way that does not simply reinforce their differences. She must take the content of what each party has said, rearrange and reshape it, and then get parties to look at this new phenomenon in a structured way.

Identify Common Interests

She does so by first identifying and exploring the parties' common interests. As the parties present their concerns, the mediator is listening for interests. Interests are basic human motivators, the underlying needs that drive parties. They include: respect, recognition, reputation, financial stability, freedom, fun, shelter, security, safety, love, control, and health. In many situations' parties share an interest in re-establishing control over their lives. Usually, both landlords and tenants want a safe, clean and secure building. Even in the midst of a divorce, both parents usually want a happy childhood for their children. Management and labor share an interest in a thriving business. Normally, neighbours want their environment to be cordial and comfortable. These powerful common interests are often lost sight of in the heat of conflict. If the mediator begins the discussion by extracting the common interests and generating agreement on the large targets for the mediation, the conversation has a goal— securing or advancing the

common interests— that can draw parties towards collaboration. The next step is to crystallize the bargaining agenda itself— the issues.

Identify and Frame Issues

As the mediator listens to each side talk, she distils a series of negotiating issues. Once the parties explore and resolve the issues, they will have resolved their dispute. The sum of the issues comprises the bargaining agenda.

A mediator wants to help parties identify negotiating issues and then focus discussion on them. A helpful way to identify a negotiating issue is to ask: what did one party do to drive the other party crazy? Label that action or practice, and one has just identified a negotiating issue.

It seems sensible to identify negotiating issues precisely and label them in neutral language— i.e., in language that does not favour or antagonize any party. The reason it is important for the mediator to do this— and why she makes a significant contribution to resolving disputes in doing so— is that parties often neglect to do it. They are understandably wrapped up in the matter. Frequently, they see only their own concerns and have no patience to listen to the concerns of others. When they talk, they hurl accusations and blame at each other. The mediator's job is to build a structure within which the parties can channel their remarks. From the information that she accumulates, the mediator sorts out the parties' negotiating issues and uses them to build the bargaining agenda.

Develops a Bargaining Agenda

The mediator plays an important role in establishing the order in which the negotiating issues are discussed. She must be certain that the parties have provided sufficient information so that she can identify and frame all the negotiating issues. (Remember that a mediator's notes should be limited to recording and labeling interests, negotiating issues, and proposals, rather than the facts. Such notes will be a valuable aid in completing this next step.) From that foundation, the mediator develops a bargaining agenda, governed by one overriding concern: discuss the negotiating issues in the order most likely to result in the parties coming to better understandings and possible resolution of all issues. The creation of an agenda takes the dispute from a relatively chaotic jumble of accusations, hurt feelings, and blocked interests to an organized group of topics that the parties can address. A simple, elegant and logical agenda boosts confidence that the dispute may be manageable after all.

For this:

- Highlight the common interests of the parties to show the parties that they have common goals and pull the parties together;

- Discuss first the negotiating issue that the mediator believes will be the easiest for the parties to resolve. That way, the parties experience success, generate forward momentum, and have something to lose if their talks break down— they have an investment in the mediation. A mediator wants to get parties to agree about something, however trivial, so that they have a template for movement once they get to harder issues. This simple principle does not always govern, but it should always be considered. Usually, the easiest negotiating issue to resolve is also the least important to the parties. Occasionally, a mediator will get lucky and find that the easiest issue to resolve is also the most important to the parties (for instance, two teenagers might agree quickly on which weekend evening each one will use the family car, but disagree about who must chauffeur their parents to the golf course each afternoon so that the car is available for use).
- Some issues must be resolved by a particular deadline if parties want to avoid potentially more costly or undesired consequences. Other issues don't involve the same time pressure. The easiest issue to resolve normally is the most pressing one, because all parties feel the need to resolve it.
- In ordering an agenda, the mediator must be aware of the possible impact of choosing an issue of one side first—the other side might feel that the mediator is not neutral. Consequently, where there is an issue of mutual concern, that issue might be discussed first. If the mediator then proposes an issue that is associated with one party next, she could subsequently alternate issues between the parties.

Generate Movement

Inertia comes to humans naturally. If we are relaxing, we do not wish to move and do work. If we are in a dispute, we form a notion of what we want from the other party and refuse to budge from our position, sometimes, even when we know agreeing to the proposal is more beneficial just out of vindictiveness. In such circumstances, the mediator has to act like a lever and move the parties from the position that put them in the dispute to a position where they can see the dispute resolution terms more objectively and logically.

Highlight interdependence: Everyone wants to win. But the goal of mediated discussions is not for any one party to win. Rather, it is for all parties to develop a shared view of their problem so that they can solve it to their mutual satisfaction. The mediator emphasizes the reality that one party's ability to achieve its objective depends on securing the freely granted cooperation of others; gaining that cooperation requires that each party believe it will be no worse off after accepting the proposed settlement terms than it was before the discussions began.

Identify joint or shared interests: When parties to a conflict become preoccupied with getting what they want or piercing the other's obstinacy, they often forget that they have joint interests. A mediator must develop and repeatedly remind the parties of their shared needs. Appeal to commonly held principles. Disputants can usually agree on general principles. It's their application—the specifics—that creates the

controversy. A mediator wants to make sure that parties realize they can agree on something, and he can best accomplish that by getting parties to agree on principles. These principles might be simple guidelines: “Can we all agree that we will not interrupt each other or use disrespectful language during our discussions?” The goal of these appeals is identical: to get parties to agree to a principle or guideline that has some bearing, however indirect, on resolving the matters in dispute.

Call for a vision of the ideal: Disputants can sometimes agree on what an ideal relationship should be between business partners, employees, parents, neighbours, landlords and tenants, and nations. The vision of the ideal then becomes a target in working out the specifics to achieve it. In expressing the ideal, parties often feel stronger and are pleasantly surprised by commonalities.

Emphasize trust- building dimensions of conduct: Conflicts erode trust among people, and that loss of trust leads them to demand burdensome settlement terms for fear that any less demanding an arrangement will be exploited. The mediator must get parties to do things for each other that help restore a sense of trust. These gestures need not be dramatic; there is no quick fix to rebuild a person’s confidence in another’s reliability. But if parties can demonstrate their ability to comply with agreed- on terms, then that conduct serves to restore the credibility of their word, so that a more confident, less regimented relationship can develop thereafter.

Dig for and provide new information: People often change their mind with new information. A mediator is interested in two things: what people know and what they don’t. He wants to use both dimensions to move the parties toward agreement. A mediator cannot become too preoccupied with establishing facts, for that can lead to a paralysis of action; but neither can he ignore facts. A mediator wants to get people to agree to do things; new information often triggers new ideas for possible action.

BATNA and WATNA: Lastly, help parties identify their BATNA and WATNA to show them what will happen if they fail to resolve the dispute.

Elect to Caucus

A mediator chooses to meet separately with the parties— to caucus with them— because she believes that doing so will contribute to understanding and settlement. A caucus allows the mediator to obtain information and insights and impart information and encourage insights privately that a mediator does not believe can occur— or occur constructively— in joint discussions.

There are both psychological and strategic reasons to use a caucus. Some persons are willing to share information, insights, and aspirations with the mediator as long as others do not hear what they say. Some parties will simply not share certain critical information in front of their negotiating counterpart. When

the mediator develops a feeling that there is an important piece of the story missing, a caucus might help to provide it. In this case, meeting first with the party who is mysteriously reticent makes sense.

At some point in the discussions, a mediator knows that someone must change her position on a specific issue to advance settlement. In caucus, the mediator forcefully explores the costs of continued recalcitrance— the risk of losing at trial or in arbitration, the loss of a valuable relationship, the aggravation of having the matter unresolved, the possible reputational costs, and so on. Parties miscalculate how their conduct affects others. They misread or are oblivious to people's reactions to their bargaining demands, language, or behaviour. The mediator must address those situations.³⁵¹

In a caucus, the mediator can also guide the party to evaluate the situation more objectively. If required, the mediator can ask series of helpful questions for the party to have a reality check of the situation.

Reach Closure

All mediated discussions must eventually end. When they do, the parties should have a clearer understanding of their situation and, in many cases, an agreement that promotes their interests. Sometimes no mutually acceptable resolution emerges from the mediation; the parties, however, may be better positioned to develop a resolution at a later time or to move on to some other dispute resolution process. Where resolutions are reached, the mediator wants the agreement— whether it is written or oral— to be as doable and durable as possible to prevent future disputes. An agreement that is both appealing and clear, in addition to being interest satisfying for each party, is most likely to be successful.

Whatever the outcome, the mediator plays an active role in staging the final act. He wants the close of the session to be as constructive as possible. He wants to minimize harm and maximize benefit from the mediation.

TECHNIQUES OF MEDIATION

Separate the Person from the Problem

It is generally difficult to deal with a problem without people misunderstanding each other, getting angry or upset, and taking things personally. When corporate and international transactions turn into disputes, it is easy to forget that you are dealing with human beings and not with abstract representatives of the 'other side'. It is important to keep in mind that the representative on the other side is not an artificial person like the company he represents but in fact has an individual personality, emotions, deeply held values and different backgrounds and viewpoints. Just like all human beings they are unpredictable too.

³⁵¹ Joseph B. Stulberg and Lela P. Love, *The Middle Voice: Mediating Conflict Successfully*, 2nd Edition, 2013

The process of working out an agreement may produce a psychological commitment to a mutually satisfactory outcome. On the other hand, people get angry, depressed, fearful, hostile, frustrated, and offended. They have egos that are easily threatened. They see the world from their own personal vantage point, and they frequently confuse their perceptions with reality. Routinely, they fail to interpret what you say in the way you intend and do not mean what you understand them to say. Misunderstanding can reinforce prejudice and lead to reactions that produce counter-reactions in a vicious circle; rational exploration of possible solutions becomes impossible and a negotiation fails. The purpose of the game becomes scoring points, confirming negative impressions, and apportioning blame at the expense of the substantive interests of both parties.

Separate the people from the problem by pointing out to disputants when they are taking their positions and terms of settlement personally. It is important to point out that making concessions during mediation shall not hurt their personal ego. It is important to emphasize that the disputant himself is not the problem. It is the problem which is the real 'problem'.

For example, in a family situation, a statement such as "The kitchen is a mess" or "Our bank account is low" may be intended simply to identify a problem, but it is likely to be heard as a personal attack. Anger over a situation may lead you to express anger toward some human being associated with it in your mind. Egos tend to become involved in substantive positions. As a consequence, the relationship tends to become entangled with the problem and we are likely to treat people and problem as one. In dispute when one party takes a firm position because it thinks it is being treated unfairly, it is easy for the other party to take offence and conclude that the first party does not value their relationship.

Separating the people from the problem allows you to deal directly and empathetically with the disputants as neutral human beings, thus making possible an amicable agreement. Although we have become a highly technical world, human beings, no matter what they portray, are not machines. We are creatures of strong emotions having radically different perceptions from each other and with a genuine difficulty of communicating clearly. When evaluated objectively, we will realize most of the times that emotions of a disputant generally become entangled with the objective merits of the dispute. Hence, before working on the substantive problem, the 'people problem' should be disentangled from it and dealt with separately. Figuratively if not literally, the participants should come to see themselves as working side by side, attacking the problem, not each other.

In negotiating it is easy to forget that you must deal not only with their people problems, but also with your own. Your anger and frustration may obstruct an agreement beneficial to you. Your perceptions are

likely to be one-sided, and you may not be listening or communicating adequately. The techniques which follow apply equally well to your people problems as to those of the other side.³⁵²

A tale is told about the Buddha, Gautama (563-483BC), the Indian prince and spiritual leader whose teachings founded Buddhism. This short story illustrates that every one of us has the choice whether or not to take personal offence from another person's behaviour.

It is said that on an occasion when the Buddha was teaching a group of people, he found himself on the receiving end of a fierce outburst of abuse from a bystander, who was for some reason very angry.

The Buddha listened patiently while the stranger vented his rage, and then the Buddha said to the group and to the stranger, "If someone gives a gift to another person, who then chooses to decline it, tell me, who would then own the gift? The giver or the person who refuses to accept the gift?"

"The giver," said the group after a little thought. "Any fool can see that," added the angry stranger.

"Then it follows, does it not," said the Buddha, "Whenever a person tries to abuse us, or to unload their anger on us, we can each choose to decline or to accept the abuse; whether to make it ours or not. By our personal response to the abuse from another, we can choose who owns and keeps the bad feelings."

Focus on interests, not positions

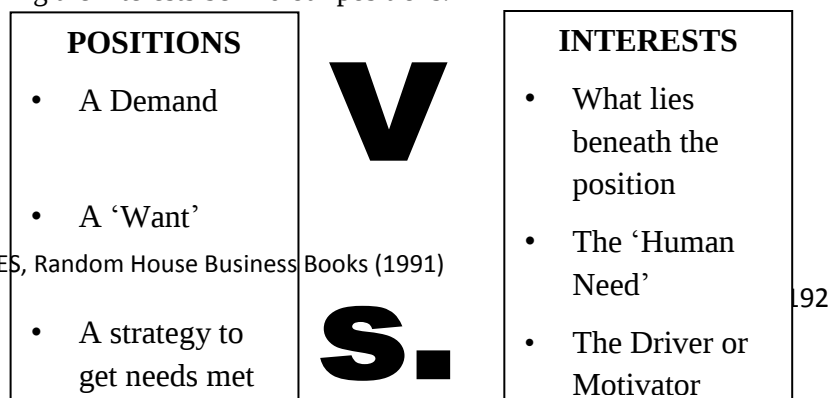
Interests are the silent, powerful movers behind positions that parties take. There will be no resolution if someone believes that his primary interests have not been respected, secured, or advanced.

This principle is designed to overcome the drawback of focusing on people's stated positions when the object of a negotiation or dispute resolution process is to satisfy the underlying interests of the participating parties and not 'getting them what *they think* they came to the mediation for'. As Nelson Mandela once said, "conflicts are resolved through shifts that were unimaginable at the start". A negotiator/mediator should help the parties prioritize their interests and set realistic objectives.

Understanding the difference between interests and positions is important for a successful negotiation. A position is a stand taken by a party that he or she feels will satisfy his interests. But the interests of a party are the needs, concerns, goals, hopes and fears that motivate parties to negotiate. In a negotiation or a conflict, we often protect our interests and do not let the other side know what we want. As a result, we end up arguing positions rather than sharing the interests behind our positions.

Disputants often describe a conflict in very simple terms. These often take the form 'We

³⁵² Fisher, Ury and Patton, *Getting to YES*, Random House Business Books (1991)



want this, but they want that,’ or ‘I want this, and he wants it too (but we can’t both have it).’ These simple statements about what people do and do not want are what conflict professionals call ‘positions. (The term relates to the political notion that a politician will have a ‘position’ on a particular issue--he will favour it, or he will be against it.) When people define the conflict in terms of positions, the conflicts often appear to be highly intractable, since one side wants something the other completely opposes, or both sides want something that cannot be shared. In democratic politics, this problem is "resolved" with a vote. But when voting is not possible, or appropriate, arguing over positions can be very ineffective, and even destructive. Parties can get more and more entrenched in their positions, and positions will often move farther and farther apart, as disputants make ever-more extreme statements in an effort to win support for their side.

While some conflicts are really structured a win-lose way, many conflicts which are thought to be unavoidable win-lose situations are more manageable when redefined (or reframed) in terms of underlying interests. Unlike positions, interests are the reasons why people want things.

Compatible and shared interests as well as conflicting interests hide behind opposed positions. When we undertake the process of identifying interests’ real disagreements usually get clarified and since some interests will be complementary or shared, the battleground of the dispute will shrink automatically. Showing courtesy, listening with respect and emphasizing concerns to meet the basic needs of the other person directs the focus to interests.

Discovering interests confers many benefits. Positions may still be taken, but now you have many possibilities that can still satisfy interests. Battles may still be fought, but now the loser has choices in defeat to retreat to a lesser position or negotiate a settlement that ends the war. The all-or-nothing, do-or-die approach of positional battles can be also replaced with variable feasts that seek peaceful solutions from the start, preserving the relationship and expanding the pie so both parties can satisfy most of their interests. In addition, people applying this method try to be specific about their own interests and how important they are to them. The goal is to frame a joint attack on the difference or problem that will accommodate the interests of both parties.

Generate a variety of possibilities before deciding what to do

When using the principled negotiation method, generating options for action can often be the hardest step to get partners to participate in. There are four particular obstacles to this: premature judgment, searching for a single answer, assumption of a ‘fixed pie’, and thinking that no-one else is able to assist in problem solving.

The temptation to leap to a solution before considering the options is often coupled with the assumption that there is only one ‘right’ answer, rather than an appreciation that there are generally many ways in

which interests can be met. Further, it can also be a trap to assume that there are no additional resources that can be brought into play (a 'fixed pie'). The key is to see the areas of difference or conflict as shared problems requiring shared solutions. Seeing them as simply the partner's problem can result in the partner developing solutions that do not take our interests into account.

The most widely used method for generating a variety of possibilities is brainstorming, in which participants are encouraged to rapidly put forward ideas, while at the same time withholding judgments on their merits. Encouraging interaction at speed, without in-depth discussion, tends to circumvent narrow thinking and opens up the possibility of creative solutions. The idea is to search for mutual gains, to dovetail different interests and, if necessary, to give all partners an easy way of backing away from previously stated positions. It is essential to look forward and to leave past disagreements to one side.³⁵³

Writing down what you think can be the possible solutions to the dispute at every stage of the mediation can be a helpful practice in the beginning. Identifying any criteria already suggested as a basis for agreement also helps. At the joint discussion stage, both parties can jointly generate options that are mutually advantageous and seek agreement on objective standards for resolving opposed interests.

Insist that the result be based on some objective standard

Sometimes a mediator or negotiator may be faced with a party who is plain stubborn and unwilling to accede his original position and consider his underlying interests. Submitting to the whims and fancies of a stubborn party may lead to illogical or impractical results which will not resolve the dispute finally. Such a stubborn party can be countered by insisting that his single say-so is not enough and that the agreement must reflect some fair standard independent of the will of either side. Some fair standards adopted in business practices are market value, expert opinion, custom, or law governing the trade. By discussing such criteria rather than what the parties are willing or unwilling to do, neither party need give in to the other while still arriving at a fair and satisfactory solution.

This method saves time and energy by cutting out posturing. It also generally leads to better working relationships and mutual benefits in the future.

Most business negotiations are neither purely distributive nor purely integrative. Business negotiations generally have entwined competitive and cooperative elements. Negotiators face a dilemma in deciding whether to pursue a cooperative or a competitive strategy at a particular time during a negotiation. At the core of the negotiator's art is knowing whether to compete where interests conflict and claiming more

³⁵³ Principled negotiation: integrating interests,
http://press.anu.edu.au/dialogue_methods/mobile_devices/ch04s04.html as accessed on 28th March 2015

instead of less or to create value by exchanging the information that may lead to mutually advantageous options.³⁵⁴

IMPASSE

Often, the mediation will run into a block with no progress being made, people feeling that they are stuck, one or more parties refusing to budge from a position. Such a situation could come about from various reasons. When parties reach impasse, their thinking runs as follows:

- This is too difficult a case to settle. Previous attempts have not worked. Mediation cannot help
- We are being asked to give up too much. The other side is not conceding anything. If we continue, they will succeed and we will fail.
- The other side is not bona fide. They are using mediation to delay or fish for information.
- The mediation is not working. The mediator is not responsive to our concerns.
- We cannot move from this stand which is most important to us
- No progress is being made. Everyone seems to have run out of ideas. We are tired/angry/frustrated. It is better to pack up and go home.

Expect Impasse

Mediators must expect impasse. It is a rare mediation which does not run into blocks and obstructions. Smooth sailing should not be expected. If it is all that easy, the parties would not have come to mediation.

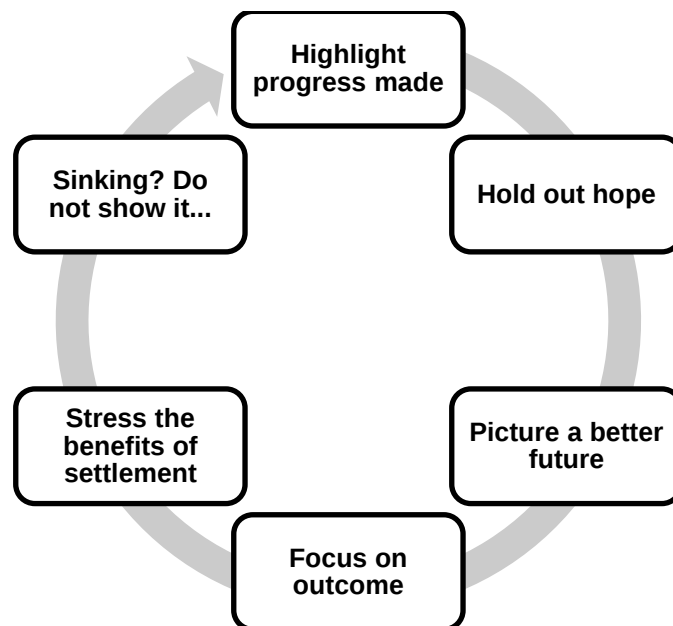
Second, expect impasse at any point. It may come right at the beginning when one party says that it will not sit in the same room as the other. Of course, impasse will be evident when the facts and issues make it clear that the parties are poles apart. One would logically expect that as the mediation proceeds, and the parties focus on their interests and possible solutions, impasses are less likely to occur. However, mediation does not flow on such logical lines. An impasse may occur at any time during the process and it may do so more than once. There may even be a deadlock right at the end when the mediator believes they are at the verge of settlement, till one party says 'I am not going to budge on this' (a small gap) and the other says, 'Well, I won't either' and the whole thing starts to unravel. Or, when the agreement is all done and one party has signed it and the other stops and says: 'There is this one small point that we have not discussed.'

Be Positive

The mediator sets the tone of the mediation. He has the power to influence the moods of the parties. If you continue to present an optimistic outlook, the disputing parties will catch on to it. Conversely, your

³⁵⁴ Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation*, LexisNexis Publications (2015)

despair is likely to be sensed by the parties and is likely to affect the outcome. If the impasse is caused due to flagging morale, this could help.



Persevere

Perseverance, more perseverance and even more perseverance are said to be the three foremost skills of a good mediator. Mediators should not give up unless they are absolutely convinced that nothing is going to work and that all their strategies have been tried without success. When they reach this stage, they should try some more. Just as much as an agreement can unravel at the last point, it can come into being at the last minute before breakdown of talks. Mediators should remember that the parties are probably in a defeatist mood; all this fighting among themselves would have arrested expectations of a settlement; out there, it is the mediator who has to keep that flag of hope and possibility flying.

Spot the Block

When impasse has set in after some progress has been made, a mediator can well point out to the resisting party the ground that has been covered and simply ask: ‘What is holding you back/ preventing you from moving ahead? Can you identify the block so that we can see how it can be removed?’ This way the party is made to turn inward, to move from mere resistance to examining the reason for resistance. Only then it is possible to tackle the obstacle and move forward.

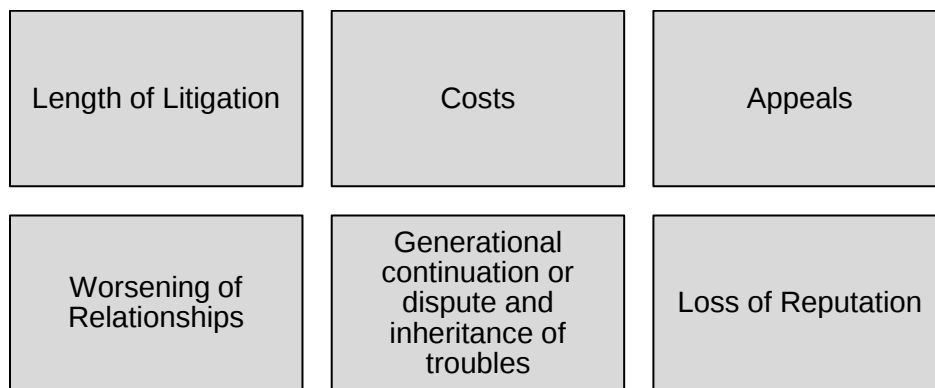
Encourage Venting

If feelings and emotions have not been vented fully and parties have not had the chance to have their say, impasse may occur more readily. Mediators must check that people have said what they need to say. If not, the block may not be articulated.

BATNA and WATNA

Here mediators ask each side to develop its BATNA (Best Alternative to a Negotiated Agreement) and their WATNA (Worst Alternative to a Negotiated Agreement). This will act as a guide to parties to weigh their options and see if the balance lies in favour of settlement. It is also a strategy to move parties away from positions and orient them towards thinking about options that would meet their interests. The parties need to realize that the proper evaluation is not the difference between their original demand and what they can get in mediation instead; it is the comparison between what they are getting in mediation on the one hand and their situation if they fail to settle in mediation on the other. BATNA and WATNA are excellent guides for such decision making. A realistic appraisal of alternatives- asking ‘If you do not settle in mediation, what is the alternative you are looking at?’ - is often a sobering exercise. WATNA, of course, is an even more grim contemplation than BATNA. A midway estimation is MLATNA- Most Likely Alternative to Negotiated Agreement- this would provide the most realistic alternative.

Some consequences for the parties to dwell on are:



Use Experts

If the impasse is over the value of an item, property or shares of a company- for instance, parties have agreed to sell and buy stake in a company, and have a dispute about the valuation and share premium- an expert valuer can be appointed to give a figure. It may be cast as recommendatory, in which case the parties will be guided by it, but reserve their right to bargain some more. The expert’s view shall have an ‘anchoring effect’ on the parties and if a figure is pitched at the parties, the likelihood that the settled valuation shall be in and around that figure shall increase. A variation of this is for the parties to agree on a band beyond which the expert cannot go higher or lower and to accept his figure.

5. MEDIATION AGREEMENT

Companies operating in jurisdictions where mediation is a dispute resolution of first resort generally have a company policy to attempt to resolve a dispute through mediation before attempting any other form of dispute resolution. But mediation differs from arbitration because parties may opt for mediation even without a written mediation agreement in place.

Parties who wish to opt for mediation have two options. The mediation clause can either be made part of the dispute resolution clause of an existing contract. A sample med-arb clause prescribed by Centre for Mediation and Conciliation, Bombay Chamber of Commerce and Industry is as follows:

In case of any dispute arising out of or relating to this Agreement, including the alleged breach, termination, validity, interpretation and performance thereof ("Dispute"), the parties agree first to try in good faith to settle the Dispute by mediation under rules of an institutional mediation service provider such as Centre for Mediation and Conciliation (CMC), Mumbai, before resorting to or during arbitration, litigation, or some other dispute resolution procedure. The Dispute shall be referred to mediation within 30 days of issue of first notice of claims related to the Dispute by either/any party. In the event that parties are unable to agree on a mediator, a mediator shall be appointed by the institutional mediation service provider. The process shall be confidential as per the rules and protocol of institutional mediation service provider or any other more stringent confidentiality obligations mutually agreed to by the parties. Alternatively, the parties may mutually agree to undertake conciliation as per the rules of any institutional mediation service provider, such as the CMC, Mumbai, so that the settlement agreement is enforceable as an arbitration award under Arbitration and Conciliation Act, 1996. Unless otherwise agreed between the Parties mutually and in writing, on the expiry of sixty days from the date of first meeting between the parties with the mediator, the mediation shall stand terminated.

In case the Dispute could not be settled between the parties through mediation, the same shall be settled through arbitration in accordance with the Arbitration and Conciliation Act, 1996 by a sole arbitrator appointed jointly by both Parties. The place of arbitration shall be _____ and the language of the arbitration shall be English. The arbitrator's award shall be substantiated in writing and the award shall be enforceable in any court having jurisdiction, subject to the laws of India. The award of the arbitrator shall be final and binding on the Parties.

Parties may enter into a mediation agreement at the time of appointment of a mediator which summarizes the basic principles of mediation such as voluntary nature of process, confidentiality, facilitative role of mediator and other terms of his appointment.

6. MEDIATION SETTLEMENT

A mediation settlement records the terms of settlement that the parties agree to in the event the mediation is successful. The mediation settlement generally follows the structure of any other commercial settlement agreement. If the mediation is referred by a court or in relation to a dispute that is ongoing before a judicial forum, the mediation settlement is generally submitted to the court and may be recorded in the form of a court order. A mediation settlement under Section 12A of Commercial Courts Act, 2015 or a conciliation settlement under Arbitration and Conciliation Act, 1996 have the enforceability of an arbitration award passed with consent of the parties and has very limited scope of appeal.

Even otherwise, parties shall not execute a mediation agreement unless they think the terms of settlement are beneficial for them. Hence, a good mediation settlement enforces itself through party adherence because the parties know that the BATNA to non adherence of the terms of settlement is less beneficial for them.