The *Eighteenth Camel*: Mediating Mediation Reform in India

By Hiram E. Chodosh[*]

A. Introduction

In the western part of India, on the edge of the Thar Desert, a wealthy camel herdsman died, leaving his seventeen camels to his three sons. His final wishes distributed the camels to his heirs in specific proportions: one-half to the eldest, one-third to the middle son, and one-ninth to the youngest. The sons quickly appreciated the immediate obstacle to complying fully with their father's wishes. How could they make this specific distribution? They could not wait for the camels to breed; nor did they choose to sell them off and share the proceeds because herding camels was all they had ever known. Accordingly, they decided to consult their village leaders from the local panchayat. Seemingly uncertain of the appropriate solution, one of the five elders suggested that the boys accept a loan of one of his camels, go home, think it over again, and return the camel to him on the very next day. Disgruntled

[*] Dean and Professor of Law, University of Utah S.J. Quinney College of Law; J.D., Yale Law School, 1990; B.A., Wesleyan University, 1985. This essay has drawn upon several other writings, including MEDIATION IN INDIA: A TOOLKIT (United States Education Foundation in India, 2004, with Niranjan Bhatt and Firdosh Kassam); GLOBAL JUSTICE REFORM: A COMPARATIVE METHODOLOGY (NYU Press, 2005); *Local Mediation in Advance of Armed Conflict*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 213 (2003); *Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process*, N.Y.U. JOURNAL OF INTERNATIONAL LAW AND POLITICS (1998) (with Stephen A. Mayo, C.J. A.M. Ahmadi (Ret.), and Abhishek Singhvi); *Judicial Mediation and Legal Culture*, ISSUES OF DEMOCRACY (November 1999), *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL LAW REVIEW 351 (2002), and *Emergence from the Dilemmas of Justice Reform*, 38 TEXAS INTERNATIONAL LAW JOURNAL 587 (2003), as well as four months of research and presentations as a Fulbright Senior Scholar in India in 2003, and three regional, two-day workshops on Mediation in India sponsored by the United States Education Foundation in India, co-facilitated by Mr. Firdosh Kassam (Mumbai) and Mr. Niranjan Bhatt (Ahmedabad) (two of the leading mediation experts in the country), and hosted by the national law schools in Hyderabad and Jodhpur and the Bombay High Court bar associations in April 2003. The article is also informed by multiple visits under U.S. sponsored exchanges, including follow-up visits in August 2006, April 2007, and November 2007. The April 2007 program focused on the development and dissemination of a negotiation and mediation curriculum for Indian law schools. Materials for these sessions, HIRAM E. CHODOSH AND JAMES R. HOLBROOK, ADR EDUCATION IN LAW SCHOOLS (Mumbai, India: The American Center, 2007), are available from the author. The author is grateful for the influence of Mr. Gregg Relyea and his informative mediation materials prepared for Indian audiences in 2003.

by the ostensible futility of this advice, they returned to their tent, under their breath cursing the stupidity of the old man.

While shaking their heads over tea, the youngest quickly rose in excitement. "Brothers," he exclaimed, "we now have eighteen camels." "So?!?," the eldest mocked him, "we will have seventeen only tomorrow. What good will that do, you fool?!?" "But bhaya, with eighteen camels, we can divide them up according to the wishes of our papa: you get nine; our brother gets six; and I get two. That makes seventeen. We divide the herd, and give the eighteenth camel back to our elder!"[1]

Of the many anecdotes and fables that have informed over a decade of periodic work and observations on mediation reforms in India, the *Eighteenth Camel* stands out. First, it memorably illustrates the powerful technique of integrative bargaining.[2] Second, and more importantly, it captures one of the most important leadership goals of outsiders in controversial legal reforms: to become *essentially superfluous*. Engaged assistance in comparative justice reform teaches the "expert" to appreciate the frequently superficial nature of legislative pronouncements, the nearly insuperable obstacles to institutional reform, the conflicts within the legal and broader community about the nature of reform itself, the pressing need for applied techniques to help resolve that higher-level social conflict, and the necessarily limited role of foreign expertise in that domestic conversation. In my modest experience in India (and elsewhere), I have reached the conclusion that the optimal role for external expertise and coordination is to help supply, if not become, the proverbial *Eighteenth Camel*.

Accordingly, this essay seeks to draw lessons from my observations and experiences as an intermediary in the encounter between mediation and the Indian legal culture. Section B. summarizes the history of mediation reform in India, including a summary of the assessment upon which mediation reform proposals

[1] The story of the 18th Camel, a fable from the Middle East and adapted here is well known to the mediation community and many other areas of discourse. *See generally* LYNN SEGAL, THE DREAM OF REALITY (1986).

[2] Integrative bargaining involves the investment of external resources in the resolution of a conflict or solution to a difficult problem. Diverse examples are many. Parties to a breach of contract claim may seek financial assistance from a bank willing to lend money in support of a newly-mended business relationship. A wealthy philanthropist may donate money to provide an ailing hospital charged with malpractice with the necessary technologies to handle emergencies. The owner of a house with a recalcitrant tenant may convince a construction company to knock down the building and build a new one with more units for his growing family, as well as a new flat for the tenant who refuses to move, and a sufficient number of additional rental units to make a profit on his investment. The appeal of the camel story and its applicability to this diverse range of problems thus made it one of my favorite pedagogic tools in presentations on the application of mediation in India.

were initially based, a brief history of the legislation, and the Supreme Court's framework for exploring questions of implementation. Section C. explores the value of *specific* mediation negotiation and communication tools, draws attention to a daunting set of reform obstacles, and suggests some strategies for overcoming them. Section D. advances two critiques of foreign (primarily American) involvement in Indian mediation reform. The first critique focuses on a set of American conceptual assumptions about mediation that frustrate the adaptation of mediation tools to the Indian legal context. The second critique isolates special problems encountered by outsiders in the advancement of local reforms. Finally, Section E. illuminates an unforeseen application of mediation in India: tools that may assist in resolving conflict over the mediation reform itself. Based on this discussion, the Conclusion explains why the story of the *Eighteenth Camel* supplies an instructive metaphor for future forms of American (or other foreign) assistance in Indian and possibly other national justice reform efforts.

B. Origins of Mediation Reform in India

I. Introduction to the Indian Legal Process[3]

The Indian justice system resembles its common law counterparts of British origin. The system features a coordinate, pyramid structure of judicial authority, emphasizes formal procedural justice dominated by litigants of equal status engaged in adversarial processes, and provides binding, win-lose remedies. A politically independent judiciary applies both federal and state law under a unified federal system and administers the formal civil justice process. The Supreme Court sits at the apex of the federal system; the High Courts, one in each state, serve as the highest state *fora* in both civil and criminal matters. Every state is subdivided into several districts, each with a District Court (sometimes called a Sessions Court) designated as the principal civil court of original jurisdiction, under which sit a number of lower courts, including *panchayats*, whose powers differ greatly from state to state.

Generally, the Code of Civil Procedure of 1908 (itself a derivation of the British Judicature Acts) and subsequent amendments govern the civil justice process. A typical civil proceeding consists generally of several adversarial, party-controlled stages, including pleadings, a determination of jurisdiction, trial, judgment and decree, appeals (including revision and review), and execution.

[3] These parts A and B draw heavily on Hiram E. Chodosh, *Indian Civil Justice Reform*: *Limitation and Preservation of the Adversarial Process*, 30 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 1 (1998).

https://doi.org/10.1017/S2071832200006428 Published online by Cambridge University Press

II. The Assessment

Notwithstanding several salient strengths of the Indian civil justice system and its proactively independent judiciary, inefficient court administration systems, judicial passivity in an adversarial legal process, and limited alternatives to a protracted and discontinuous full trial frustrate several goals of the adversarial process itself. Inefficiency in court administration denies timely access to legal dispositions. Excessive party control places those seeking legal redress in an unequal position because respondents can abuse and delay the resolution procedures with impunity. Finally, the unavailability of alternatives to litigation clogs the system. Many cases awaiting judgment are no longer contentious and long-awaited judgments are often difficult to enforce.

As both a daunting symptom and aggravating cause, widespread and profound backlog and delay[4] currently undermine the fundamental priorities of a law-based society. Protracted delays erode public trust and confidence in legal institutions, and act as significant barriers to India's chosen path to social justice and economic development. The inability to enter final legal decisions within a reasonable time renders state action functionally immune, turns obligations to perform contractual duties into effective rights to breach with impunity, and devalues remedies eventually provided. In sum, the inability to resolve disputes in a timely manner eviscerates public and private rights and obligations.

In the daily operation of the civil litigation process, records of new filings are kept by hand, and documents filed in the court house are frequently misplaced or lost among other paper. Lawyers crowd the courtroom and wait for their cases to be called. Even when called, judicial attention is frequently deferred by innumerable adjournments: the witness is not available, the party is not present, the lawyer has not arrived, or a document is not yet available. When the case is heard, a judge orally summarizes testimony for a court reporter. There is little likelihood that this judge will be the same one to issue a decision because judges are transferred more quickly than legal dispositions are made. Judges are so under-paid and overworked that they often adjourn and delay the preparation of a case, if only to put off the demands of reaching a decision.

Streamlining procedures that enable the judge to frame the issues are rarely effectuated. Likewise, sanction power to impose costs for frivolous conduct is seldom

[4] *See* Robert Moog, *Delays in the Indian Courts: Why the Judges Don't Take Control*, 16 JUSTICE SYSTEM JOURNAL 19, 22-30 (1992). Moog cites various structural constraints, including a three-year judicial rotation system and an imbalance of power between judges and attorneys in favor of the attorneys, as the major impediments to case management approaches in India.

exercised. Interim injunctive relief is routinely granted, but long delays in hearing the contentions of those enjoined persist. Commonly made interlocutory appeals fracture the case into many parts and effectively stay the trial. The absence of alternatives to litigation makes a full, discontinuous trial necessary, regardless of how long a full trial may take. Once a judgment is reached, the truly hard work of enforcement and execution begins.[5]

III. Procedural Reform

These concerns were expressed first in a study conducted under the auspices of Chief Justice A.M. Ahmadi on the eve of his retirement in the spring of 1997, when Parliament promulgated (in 1999) several amendments to the Civil Procedure Code of 1908.[6] Among these many amendments, Section 89[7] and Order X (1A)[8] provided

[5] Adapted from Chodosh, *supra* note 3.

[6] The Code of Civil Procedure (Amendment) Act, No. 46 of 1999; India Code (1999).

[7] See INDIA CODE CIV. PROC. § 89(1)–(2), describing and directing court to utilize dispute resolution mechanisms, including arbitration, conciliation, judicial settlement, judicial settlement through *lok adalat*, or mediation:

(1) Where it appears to the court that there exists 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 or 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 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 under the provisions of the Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

for court-annexed alternative dispute resolution. Under the new provision, the court directs the parties to choose among several ADR mechanisms, including *lok adalat* (people's court), arbitration, conciliation, and mediation. Section 89 contemplates that the judge (presumably the judge assigned to the case) should first determine whether there exist "elements of a settlement which may be acceptable to the parties." If so, the court secondly "shall formulate the terms of settlement and give them to the parties for their observations." Third, "after receiving the observations of the parties, the court may reformulate the terms of a possible settlement" and refer the same for arbitration,[9] conciliation, judicial settlement, including through *lok adalat*, or mediation.[10] These provisions, drawn from the conciliation provisions of the Arbitration and Conciliation Act (1996),[11] are based on the UNCITRAL model law, itself derived mainly from European practice of conciliation.

---

[8] See INDIA CODE CIV. PROC. Order X, describing and directing court to utilize dispute resolution mechanisms, including arbitration, conciliation, judicial settlement, judicial settlement through *lok adalat*, or mediation:

Direction of the court to opt for any one mode of alternative dispute resolution.

1A. After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Appearance before the conciliatory forum or authority.

1B. Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Appearance before the court consequent to the failure of efforts of conciliation.

1C. Where a suit is referred under rule 1A, and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.

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

[10] *See* INDIA CODE CIV. PROC., *supra* note 7.

[11] *See* The Arbitration and Conciliation Act, No. 26 of 1996; India Code (1996), § 73 (using language nearly identical to Section 89).

Based on widespread opposition to the amendments from the practicing bar, the amendments were suspended indefinitely. In July 2002, however, Parliament decided to put the amendments, including Section 89, into full effect. Following the effectuation of Section 89, a bar association in Tamil Nadu brought a constitutional challenge in the case of *in re Salem Bar Association*. In a panel decision written by Chief Justice Kirpal in late October, 2002, the Supreme Court upheld the constitutionality of the law and established a five-person committee to study the reforms and to make recommendations on the need for any amendments or additional rules to facilitate implementation of the reforms.[12] The Law Commission conducted a national conference in 2003 and then promulgated guidelines for the use of mediation. The decision in *Salem Bar Association* was affirmed in 2005.[13]

Conflicts among and between the bar and the bench over the role of these reforms and the impact they may have on corporate or individual professional interests has substantially delayed wide-spread implementation. Even with strong initiative in several important pockets of the judicial system (including the Bombay High Court in particular), the judiciary and the bar were initially poorly prepared to move the reforms forward to meet the country's challenge. Until recently, no court in the country had implemented a formal Section 89 proceeding. In other words, for several years after the major anti-delay legislation in the country, no responsive changes had taken place. Only now with the express direction of the Supreme Court and responses from several courts in Chennai, Delhi, Ahmedabad, and Bombay beginning to implement rules is any observable activity taking place.[14]

---

[12] *See* Salem Advocate Bar Association v. Union of India, (2002) 8 S.C.C. 35, 146–52. ("With the constitution of such a Committee, any creases which require to be ironed out can be identified and apprehensions which may exist in the minds of the litigating public or the lawyers clarified.") Former Supreme Court Justice Rao and Chairman of the Law Commission chaired this committee, on which the former Law Minister Arun Jetley also served. The Supreme Court initially gave the Rao committee four months to seek comments and to report back. Chairman Rao drafted consultation papers, including rules on mediation and case management, and circulated them to the High Courts for comments; however, these papers did not reach the High Courts until late January, thus leaving insufficient time for adequate study and commentary. Chairman Rao asked for an extension of time until July, and organized a national conference on mediation and case management, in which most of the authors of this book contributed papers and gave presentations. The national conference involved Chief Justices of each of the High Courts, and two lower court judges, as well as prominent lawyers from the bar.

[13] Salem Advocate Bar Association II v. Union of India, (2005) 6 S.C.C. 344 (including the Civil Procedure ADR and Mediation Rules).

[14] J. Venkatesan, *Apex court for early clearance to national mediation policy*, THE HINDU, Jan. 7, 2007, *available at* http://www.hindu.com/2007/01/08/stories/2007010819041100.htm.

C. Mediation: Values, Obstacles, and Strategies

I. The Value of Mediation

An evaluation of the usefulness of mediation[15] in light of its core objectives presupposes an awareness of what it is and the specific value it offers. Furthermore, an effective adaptation of mediation to a set of new conditions first counsels separate treatment of a wide variety of features clustered under the mediation rubric. Separate treatment of these processes and techniques underlines the view that many, if not all, of these features are severable from the rest. Severability allows for more creative designs and experiments to overcome problems encountered in the application of mediation to Indian legal disputes (including in particular mediation practices and theories developed in the U.S. as applied to the Indian context).

Mediation is facilitated negotiation. Facilitation includes the establishment of joint communication, neutral reframing, agenda setting, acknowledgment and several other important communication strategies and tactics. Negotiation tools include distributive, interest-based, integrative, and other strategies. Specific attributes clustered together in mediation systems vary greatly. The result is always consensual, the facilitator is neutral, and the process is usually (but as discussed before not necessarily) confidential, jointly participatory, interest-based, future-looking, and aimed at a durable, win-win solution. Initiation of mediation may be voluntary or compulsory (usually as one of several constrained options of other ADR techniques), court-annexed or private, position-based, or interest-based, facilitative or evaluative, and free of charge or fee-for-service.

Mediation does not come as an unchangeable recipe or rigid system. Indeed, one of its most attractive features may be its flexibility (and thus its consequential adaptability). Overly prescriptive or doctrinaire views about the *essentials* of mediation risk undermining this important feature. Furthermore, rigid recipes may preclude experimentation with independently fruitful communication and negotiation tools that may be incorporated into an emerging, Indian mediation process.

Each tool may have its own considerable value or application. A brief description of available techniques will help to illustrate their independent usefulness.

---

[15] The global interest in mediation is growing substantially. See for example details about the newly formed International Mediation Institute at http://www.imimediation.org/?cID=about_imi.

1. Negotiation Techniques: The Intellectual Technology

a) Position-Based Bargaining

As one example of an overly prescriptive view, many mediation experts stress the negative consequences of position-based or performative bargaining and urge that mediations should focus primarily (if not exclusively) on a determination, prioritization, and maximization of the parties' interests. Indeed, the first chapter in the seminal book, *Getting to Yes*, begins with the mandate: "Don't Bargain Over Positions."[16] For reasons advanced here, particularly in the early stages of developing mediation practice, such advice may be misplaced. Performative or position-based bargaining is a frequent starting point for giving full expression to the conflict, and premature interventions to divert the emotional impulses that support it may not be productive. Furthermore, position-based bargaining can help the parties to reach a more realistic view of the settlement value of their claims and defenses (thus narrowing their differences) and to take that settlement valuation into account as one of their many *interests*.

Let's suppose that the plaintiff and defendant are equally and completely confident of the merits of their claims and defenses. Let's further assume that the claim is for $100,000. As for settlement positions, the defendant's first position is that he owes nothing, and the plaintiff's first position is that she is entitled to $100,000. In conducting position-based bargaining, a mediator may point out to the parties that they cannot both be completely correct in their insistence of a certain result in their favor. They may begin to see that there may be a modest weakness in their positions. If that weakness can be quantified as a twenty percent weakness, the settlement values can be recalculated.

If the parties can be convinced of a 20% weakness in their positions (a modest proposition), the settlement values to each may be recalculated as follows: plaintiff's claim has an $80,000 value (100 x 80%); and the settlement valuation for the defendant is $20,000 (100 x 20%). With this simple operation, the difference between the two parties' settlement valuations (from $80,000 to $20,000) has been reduced by a difference of $40,000 from $100,000 to $60,000.

Beyond recognition of weakness is further sensitivity to the uncertainty of the process and the determination on the merits. Even with the most predictable legal process there are uncertainties in realizing the expected result. If there is an additional 10% uncertainty (or chance from one party's perspective that the court

[16] *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 3-8 (1983).

https://doi.org/10.1017/S2071832200006428 Published online by Cambridge University Press

will be in error), the parties' settlement valuations will come even closer to one another: $70,000 for the plaintiff, and $30,000 for the defendant. With these calculations, only $40,000 separates the parties' settlement estimates.

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

Finally, especially in a system burdened with protracted delays, the time value of money may dramatically discount the settlement value to the plaintiff. If under the best of circumstances a plaintiff will not recover the full amount due for a period of ten years; if the cost of an unsecured loan is fifteen per cent (nine per cent greater than the maximum prejudgment interest rate that might be applied (e.g., six per cent), then the time value of money will reduce the present value of a $100,000 claim to approximately $40,000 (or 40% or its original value). This economic reality, though an unfortunate consequence of delay, may provide a more realistic picture for the plaintiff of the settlement value of their claim, and this means that the quantifiable differences in the parties' settlement valuations are even smaller (40% of $40,000 in our example equals $16,000) (and thus the proportionate cost savings even greater).

b) Interest-Based Bargaining

The foregoing discussion took a modest step beyond the conflicting views of the parties on the legal merits of their positions. A more realistic settlement value based on weaknesses in their positions, uncertainty, hidden costs, and the time value of money may be helpful in bringing the parties closer together, if not in settling the matter altogether. Surely some cases will settle with the help of these tools, alone; others will not. For this latter subset of conflicts, effective mediators explore the parties' interests (beyond their legal positions).[17] For example, a

[17] To go beyond the positions of the parties does not mean that they are no longer relevant. Experts speak in terms of knowing the best alternative to a negotiated settlement (BATNA), the worst alternative to a negotiated settlement (WATNA) and the most likely alternative to a negotiated settlement (MLATNA) (similar to BATNA, but including a factor of probability in the calculation) (together

https://doi.org/10.1017/S2071832200006428 Published online by Cambridge University Press

plaintiff injured by an allegedly defective or harmful product may have interests beyond the $100,000 requested for (i) continuing health care, (ii) schooling for her children, (iii) a job lost as the result of an injury, or (iv) a concern about preventing similar injuries to others. (This is but a small list of examples.) Commercial parties in a contractual dispute may have interests in a continuing business relationship. (Mediation may also be effective in helping to form new relationships from a conflict or severing *lock-in* relationships where exiting them is in the interest of the parties.) A separated couple has a shared interest in the best situation for their children. A family torn apart by a property partition has an interest in continuing their business investments that may have been stalled by severed communication in the wake of the conflict. These interests provide potential resources for settlement that tap the additional dimensions of relationships (one legal and others not), and provide the basis to settle conflicts in the interest and according to the determinations of the parties.

This requires an exploration of why conflicting parties are fighting over limited resources and whether there are benefits of particular terms of settlement that override those of even the most favorable legal outcome. Two people arguing over the proper ownership of a goat, for example, presents the adjudicator with the task of finding a rule of decision: who had it first (property); who purchased it (contract); who needs it more (equity)? The arbitrator, (upon failure to find a rule of decision), might split the difference, awarding half to each person, and ordering the goat to be slaughtered. Obviously, this may be in neither party's interest if they rely on the goat for milk. The mediator, however, will ask the parties why they each want the goat. If one wants the milk and the other wants the goat for breeding purposes or to consume brush in effort to prevent fire, the parties may agree to hold equal rights in the goat and distribute the benefits accordingly. This process of interest identification and accommodation creates a win-win outcome of mutual gains for both parties, and they are unlikely to continue fighting over the distribution after it is made (both because it is consistent with their interests and because they were involved agreeing to the particular outcome). Not every case, perhaps not even most, will resolve this easily, and may require other distributional bargaining strategies, but the exploration of interests (beyond positions) provides a

---

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

powerful negotiation strategy for creating durable settlements of seemingly unreconcilable conflicts.[18]

c) Integrative Bargaining

If the parties cannot agree on how to share or cooperate, an effective mediator may explore integrative bargaining strategies. Integrative bargaining explores the investment of resources *outside* those at stake in the controversy. The *Eighteenth Camel* provides a wonderful illustration of integrative bargaining. Resources external to the dispute (in this case, one camel) are invested, the problem is solved, and the resource is then returned.

Examples of integrative bargaining applied to legal conflict are many: convincing a bank not party to the dispute to finance a new business arrangement formed from a breach of conflict claim; a wealthy malpractice claimant promising to donate money to the retraining of doctors in the relevant area of practice; a landlord-tenant family repossession case where the owner gets a contractor to knock down the building and build more units for a growing family and provides a new flat to the recalcitrant tenant, or an unenforceable maintenance award in a divorce proceeding where the broader community pays the maintenance (thus alleviating the underlying source of conflict, e.g., financial pressure) and eventually bringing the couple back together.

2. The Value of Neutralizing Communications Skills

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

a) Establishing Joint Communication

Mediations reestablish joint communication between the parties in three significant ways. First, particularly in private mediation, the parties may have to communicate about logistics for the mediation itself (e.g., timing, exchange of

[18] *See generally* FISHER & URY, *supra* note 16.

documents, confidentiality agreements, etc.). Second, the mediator brings the parties together and in the first joint session, they hear from one another their varied points of view (and often those of their attorneys). Third, the parties frequently begin to speak directly to one another. Joint communication of each varied kind is obviously no guarantee to settlement; however, this one factor may be key to bringing parties together where resistance to communicating with one another further escalates the conflict.[19]

b) Establishing Tone

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

c) Active Listening

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

[19] A lawyer from Hyderabad relayed a story about a married couple engaged in a serious conflict. The husband had decided to donate one of his kidneys to his ailing mother, without having consulted with his wife. The wife, who had no substantive disagreement with his decision, was offended by her husband's failure to confer in advance of such an important decision. The couple grew estranged and could not speak to one another as a result of the conflict. A family lawyer asked them to come to his house. He placed them in a room together and then abruptly left. The couple sat silent for a long time, then began to yell at each other, and after some time began to talk (and listen). Finally, they were able to overcome their conflict. This was no mediation. The lawyer only facilitated the meeting of the couple, their joint presence, short of communication, which only came later. However, this anecdote shows that even the establishment of a meeting (nothing more) can help to bring parties together to resolve their disagreements.

d) Acknowledgment

Acknowledgment is one of the most important communication skills in effective mediation.[20] As emphasized by Albie Sachs of the Constitutional Court of South Africa, an architect of the Truth and Reconciliation Commission,[21] acknowledgment may be the most critical means to breaking the vicious cycle of human conflict. To acknowledge the views of one party or another is not to express any judgment (either positive or negative) but to register that the view has been heard and understood. Acknowledgment of one party by another (without apology) often defuses a conflict by allowing the combating parties to feel that their voice has been heard.

e) Neutral Restatements, Summaries, and Word Changes

Mediators listen to and use language effectively to take the edge off volatile statements and words.[22] They may reframe a statement as neutrally as possible without trivializing the viewpoint of the speaker.[23] Parties often describe the factual background in a disorderly fashion, and a mediator's role is to bring some order to confusing statements.[24] Finally, an effective mediator will be careful in the choice of words. "Damages" may become "bills or expenses." "Liability" may become "responsibility." "Your side of the story" may be restated as "factual background." Again, here, by rephrasing more neutrally, the mediator defuses the language of its explosive impact without changing the core meaning. By doing so, the mediator may encourage the parties to speak with fewer offensive or conflictual phrases and words that put the other side on the defensive.

---

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

[21] *See, e.g.*, ALBIE SACHS, SOFT VENGEANCE OF A FREEDOM FIGHTER (2000).

[22] *See* Gregg F. Relyea, *The Critical Impact of Word Choice in Mediation*, 16 ALTERNATIVES 9, 1 (1998). The author is particularly grateful to Mr. Relyea for sharing his mediation materials prepared for Indian audiences.

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

[24] For example, if the litigant exclaimed: "And then she left for the hospital, but before she got back she took out money from our joint bank account, which did not belong to her, and then she went shopping with it, for shoes, but that was before she went to the hospital or so she said; she is always doing stuff like that, lying, taking money, not going where she says she's going." An effective mediator might reply, in a more neutral and structured summary: "So you appear upset about two things: First, you feel that your wife should not have taken money out of your joint bank account; and second, you feel that she does not tell you what she's going to do."

f) Sequencing: Agenda Setting; Deferring; Redirecting

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

g) Changing the Messenger

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

II. Obstacles to Mediation Reform

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

Judges and lawyers harbor understandable apprehensions about the relationship between mediation and the formal judicial process and deep skepticism over the application of mediation to a wide variety of Indian legal disputes (particularly outside the commercial area). The courts are still in search of an operational case

management trigger, (e.g., under Section 89 or Order X of the CPC),[25] for referring cases to mediation. The explicit terms of Section 89, (calling for a form of judicial conciliation by the trial judge), may be incompatible with subsequent referrals to mediation under that provision. Trained mediators in most courts are not yet available. In advance of a more comprehensive exposure and engaging national debate over these important concerns, some opinion leaders have formed prematurely strong opinions about the limited role of mediation. Finally, notwithstanding these obstacles, a series of short-term incentives, (judicial evaluation schemes, lawyer compensation methodologies, litigants in defense of dispute resources), further motivate resistance to mediation, thus producing a social dilemma in which critical actors view their professional or personal short-term interests as potentially inconsistent with the system's long-term objectives.

How can these issues and perceived threats be persuasively addressed?

1. Judges

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

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

[25] *See* INDIA CODE CIV. PROC., *supra* note 7; INDIA CODE CIV. PROC., *supra* note 8; *Salem Advocate Bar Association*, *supra* note 12; *see also* Law Commission Consultation Paper on ADR and Mediation Rules (2003) 1 (calling for a Section 89 proceeding "after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X"); Law Commission Consultation Paper on Case Management, Rule 4, at 9 (2003).

performance can be adjusted to take the relative value of settlements into account, if that is an additional disincentive that impedes support for mediation.

2. Lawyers

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

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

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

Second, the time value of money dramatically discounts the *actual* value of claims filed in the courts. From an economic perspective, legal fees are a function of the difference they make in extracting social or economic value from the legal process. If delays in the system discount this value, the fees that lawyers can charge will be significantly less. Consider the following example. If a litigant approaches a lawyer who suggests that he or she can make on average a 20% difference in the outcome of the litigation, and the litigant and the lawyer agree to split that value between them, the lawyer would be justified economically in asking for approximately 10% of the value of the case in fees. If, even under the best case scenario, an injured party cannot collect a claim for ten years (especially when both observations of delays are much more devastating, e.g., fifteen years in Ahmedabad to twenty-five years in Mumbai), the difference between the cost of money for an

unsecured loan (e.g., 15%) and the highest prejudgment interest rate (6%) may discount the value of that claim by some 60%. That is, a claim for $100,000 may be discounted to a value of $40,000. With these calculations, a plaintiff (economically) would be justified in paying the lawyer $4,000 (not $10,000) in fees. This means that a more economically efficient system may translate into higher legal fees for lawyers. If the value of their service to the client increases by virtue of the results they can achieve, their fees may rise accordingly.

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

3. Private and Public Litigants

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

First, mediation will not frustrate the preferences of such litigants; indeed, their right to trial is fully preserved under the Indian reforms. Furthermore, an effective mediation process can quickly allay these fears. Litigants involved in the process are much less likely to be exploited. They will quickly understand that the mediator has no power or social control over them or their resolution of the dispute. Second, effective mediators will gain their trust over time. Third, if the parties still feel the need for an evaluation of the legal issues, the mediation can be accordingly designed to deliver that service. At times, litigants can better save face with members of their family, community, or organization, if they can cast responsibility for the result on a neutral third party, and for this group, a strong evaluative process may be appropriate. Surveys of litigants find that mediation receives the highest satisfaction ratings of any dispute resolution process, and the reason for that high rating rests in the valuable features of the process explicated above. For vexatious litigation, unlike trial, mediation has the ability to get beneath the surface of the filed dispute to address the underlying conflict that motivates a frivolous lawsuit.

Finally, the conventional view that incentives for settlement for one of the parties will be low, thus frustrating the likelihood that mediation will succeed, carries an

unexamined and false assumption. Naturally, the defendant in the example of the $100,000 claim has a weak incentive to settle the claim *for that amount*. Indeed, the claim by the plaintiff does not represent its real present value, if the defendant can delay for fifteen years before facing his responsibilities. Once the plaintiff realizes that the true value of that claim may be as low as one-tenth of its stated value, the defendant's incentives to settle the case with a more realistic plaintiff will suddenly become stronger. Please note that it is not the availability of mediation that reduces the value of the claim but delays in the formal system. Settlement negotiations merely take realistic account of that unfortunate reality.

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

4. Concerns about the Statutory Framework of Section 89

In addition to the foregoing questions about the acceptance of mediation by different actors in the legal process, many concerns arise from a critical reading of Section 89.[26] As summarized above, Section 89 contemplates that the judge (presumably the judge assigned to the case) should first determine whether there exist "elements of a settlement which may be acceptable to the parties." If so, the court secondly "shall formulate the terms of settlement and give them to the parties for their observations." Third, "after receiving the observations of the parties, the court may reformulate the terms of a possible settlement" and refer the same for

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

arbitration,[27] conciliation, judicial settlement, including through *lok adalat*, or mediation.[28]

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

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

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

---

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

[28] *See* INDIA CODE CIV. PROC., *supra* note 7.

[29] *See* Arbitration and Conciliation Act, *supra* note 11 (using language nearly identical to Section 89).

[30] Order X may solve this and other problems raised in the context of Section 89, including the question of timing. *See, e.g.*, INDIA CODE CIV. PROC., *supra* note 8, at 1.A. ("After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89.").

the court and ensuring the confidentiality of the party observations may help to alleviate these concerns.

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

5. Adaptation Concerns

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

6. Building Capacity: Next Steps

The foregoing sketch of issues is far from exhaustive. A number of implementation questions will be raised and addressed: how to make mediation economically

desirable, how to cultivate a larger number of mediators available to the courts, how to promote and improve educational exposure and training methodologies throughout the country, including those under the direction of the High Courts.[31] These capacity-building issues also demand attention and intellectual investment.

Finite answers to these several important questions would be premature. How should mediation attract litigants from a purely economic point of view? Who will serve as neutrals in mediation? How will mediation be initiated (for which cases) and concluded? Which attributes of mediation are most likely to be effective in different litigation contexts? How should the courts establish quality controls (including ethics and discipline) over the emerging practice of mediation? How should the courts build both internal and external capacity without incurring unaffordable costs? How should negotiation and mediation be taught in Indian law schools? Practice and experience will guide the emerging response.

III. Available Strategies

The foregoing concerns and questions may give the understandable, yet potentially false, impression that mediation reform is doomed to failure in India. Troubling issues and perplexing questions may be solved or answered, however, through a set of creative approaches. Here are some preliminary starting points.

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

Second, the potential pool of mediators should be as large as possible, so as not to foreclose the application of invaluable human resources, even from unexpected subsets of professionals. In addition to judges (as specialists within court), retired judges, lawyers (both junior and senior), and academic experts in ADR in

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

collaboration with law students in legal services clinics, non-lawyers (including doctors, accountants, engineers, family psychologists) should be considered as well.

Third, coordination of the mediation process with the trial system will need to be developed further. In particular, the specific trigger for mediation will need to be chosen. Court-annexed mediation through Section 89 or Order X requires a case management event to give life to the rule. The chief judges of courts will have to designate the official responsible for triggering the process (whether a judicial officer, registrar, or special administrator), and case event tracking mechanisms must ensure continuing oversight of the annexed ADR process to ensure that unsettled cases return to the trial track without undue delay (e.g., within two months) or are dismissed upon full settlement. Ways in which to capture the benefits of "unsuccessful" mediation by allowing the parties to narrow the issues clarified by the mediation can also be explored.[32] Whether the choice of ADR technique is obligatory or voluntary, the specific timing of that choice, and the cases subjected to the process (old or new, family or commercial) are additional questions to be resolved.

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

Fifth, ways to achieve oversight (without excessively regulating and thus stiffening mediation) will be equally important. Evaluating mediators through surveys of litigants and lawyers, continual review of panels and periodic retraining will be critical to the integrity of the system. Additionally, the determination of ethical norms (self-determination, impartiality, disclosure of conflicts of interest, competence, confidentiality, and overall quality of service) and disciplinary

[32] *See, e.g.*, Chodosh, *supra* note 3, at 9.

systems (ethics hotlines, calibrated sanctions) to enforce them are a few of the available tools of effective oversight.[33]

Sixth, Indian law schools, which are required by the Bar Council to teach ADR, only have the capacity to teach arbitration as part of the required curriculum. Mediation programs are sprouting; however, they are almost always special certificate courses outside the formalized degree programs. Furthermore, the tools for teaching negotiation and mediation are limited by class size, lecture-orientation, and limited training in interactive and simulation methods. To overcome these hurdles, the addition of negotiation and mediation to the basic curriculum must be studied by the bar council and materials, interactive videos, and in-class pedagogies must be developed.[34]

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

D. The Limits of Foreign Expertise

I. Foreign Nature of External Expertise

With these conditions in mind (the value, obstacles, and available strategies), is there any role for American assistance in the development of effective mediation systems?

The large industry that now supports rule of law or access to justice reforms abroad risks overlooking Professor John Henry Merryman's admonishments of forty years ago. He wrote then what is disturbingly apt today: American reformers tend to be unfamiliar with foreign systems, lack a respectable theory, are unaccountable to the consequences of reform failure, and have a tendency to impose their uninformed

---

[33] *See generally id.* at 6-13.

[34] *See* HIRAM E. CHODOSH AND JAMES R. HOLBROOK, ADR EDUCATION IN LAW SCHOOLS (Mumbai, India: The American Center, 2007).

views and foreign values on legal communities in distress.[35] Without attention to Merryman's lessons and the exploration of reconstructive responses, reformers may fall victim to an inescapable intellectual pendulum. The folly of the imposed approach is intermittently exposed and then quickly forgotten.[36] Consequently, U.S. reformers appear to swing back and forth between arrogance insulated by ignorance, on one extreme, to embarrassment, disillusionment, and self-criticism, on the other extreme. The choice between equally undesirable starting points is unsatisfactory: either foreign assistance is indispensable or it is useless. Reaching a different plane of interaction will require both candor about the limitations of the reforming system and creativity to find new starting points for reform-directed, cross-national relationships.

1. Unfamiliarity

For American experts engaged in mediation reforms abroad, unfamiliarity with local conditions can be fatal to the benefits of their advice. To take India as one example, insistence on purely facilitative forms of mediation may underestimate the need for independent evaluations from well-respected sources of authority. Proposing mediation as a fully continuous process (*i.e.*, one sitting) may undervalue the need for individuals to consult people not involved in the dispute (*e.g.*, an older brother or patriarch) for their approval of the settlement. Advising that the judge who conducts mediation should not be the same judge as the one in charge of the trial ignores the fact that many local courts in the country have only one judge in each rural district. Mediation processes derived from or designed for complex commercial disputes in which the participants have full settlement authority may not be as effective in suits against the government, in which officials are extremely reluctant to settle cases for fear of allegations of bribery, concern about making inconsistent policy decisions, or insecure authority in the chain of command.

The practical operation of legal systems is complex, and an understanding of legal process dynamics, including the incentives and behavioral responses to them, is

---

[35] *See* John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AMERICAN JOURNAL OF COMPARATIVE LAW 457, 481 (1977). For a more recent critique of U.S. foreign assistance, see generally THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999) (noting a lack of humility, superficial assessment, simplistic modeling, misplaced emphasis on ends instead of process, and weak evaluative tools and commitments).

[36] *See generally* David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WISCONSIN LAW REVIEW 1062 (1974).

elusive, even with prolonged study. Therefore, any foreign advice carries a very high probability of error. Errors derive from false assumptions about what is happening and why. In addition, faulty reform proposals may rely on simplistic comparisons between different social contexts (*e.g.*, between the United States and the foreign country or between dramatically contrasting rural and urban contexts within a single national jurisdiction).

2. Questionable Theories

The proper role of mediation in the legal system is hardly a matter of empirical proof or settled theory. For example, the most frequently pronounced justification for mediation is the reduction of backlog and delay, but this asserted purpose is based on a questionable, and particularly instrumental, theory. First, there is still little empirical evidence that mediation alone has a substantial effect on the reduction of backlog and delay. It is hard to determine, for example, whether reforms that set predictable, early trial dates have had a greater impact on settlement than those that supply rigorous mediation services.

Second, attempts to reduce backlog may paradoxically increase them. Throughout most societies, many people have legally cognizable claims they do not bring to court because they have no expectation of getting justice. Often this occurs when the price of justice in time and money is more than they can afford. If that category of potential litigants gets the signal that there is now a chance to extract some value through partial settlements of their claims, a larger number of them may file suits, thus increasing the number of cases to be managed by the courts. For example, highway expansions aimed at reducing traffic in densely populated areas may actually increase traffic. Bringing more people with unattended claims into the courts is not necessarily a bad thing, depending on the available alternatives that aim to prevent the conflicts in advance; however, attempts at diversion or expansion of court services does not necessarily translate into a reduction of backlog and delay.

Finally, if too narrowly or exclusively drawn, instrumental theories of this kind can distract attention away from and thus stunt intellectual investments in exploring the intrinsic value of mediation processes. Furthermore, an emphasis on the internalization of neutralizing communication skills or interest-based bargaining may actually achieve more to relieve the underlying causes of an overburdened system by placing a set of conflict-prevention tools in the hands of society, instead of forcing society to seek access to remote and expensive public processes.

3. Unaccountability and Conflicts of Interest

Determining the role of mediation in society is the responsibility of the reforming community. Foreign experts do not suffer the consequences of bad decision-making and are, thus, ultimately unaccountable for their influence. The aggressive posture of foreign experts or foreign or international organizations can also backfire by giving the appearance that the reforms are motivated by values or interests external to, and potentially inconsistent with, those of society. Foreign experts carry the affiliation of their sponsor or source of funding (*e.g.*, a foreign government or international institution). This affiliation reflects, and sometimes even commands, institutional influence, ranging from mild allegiance to contractual obligation. Depending on the reputation of that foreign or international entity, the credibility of the expert may be undermined by this affiliation.

Also, foreign experts often suffer conflicts of interest that are difficult to manage. Nonprofits, for example, are necessarily interested in their own survival as well as their service mission. When presented with a conflict between the constraints of available funding sources and what is truly best for the society in which they work, they may struggle to prioritize the latter when their financial livelihood is at stake. Consultants, too, often see a conflict between their own self-interest in the continuation or expansion of their assignments on the one hand and their willingness to critique or publish their work on the other. This is not a purist attack on mixed motives for there is nothing wrong with paying experts for their expertise. Recognition of limits imposed by the business models of foreign experts working either as corporate entities or individuals, however, is an important aspect of developing a more effective and ethical role, if any, for outsiders. Ultimately, only national decision makers can resolve the important policy questions raised by mediation reforms.

4. Imposition of Values

Foreign experts are also unaccountable for the implicit valuations they express in promoting the use of mediation in particular forms. As one example of this common tendency, many U.S. proponents of mediation working abroad emphasize settlement. I recall my astonishment several years ago when one of America's most experienced advisers declared: "A bad settlement is better than a good judgment."

What is troubling about this view? In a word, it is packed with value judgments about the purpose of the judicial process and its more consensual complements.

First, emphasis on settlement alone may be inconsistent with justice and other aims. Knowing *only* that a case settled is hardly a source of comfort. The fact of disposal

indicates nothing about the terms upon which the case settled. Did the parties actually maximize their interests and at what benefit or cost to their legal rights and obligations? Did they preserve and enhance their relationship, internalize the healthy process of direct communication, or get a sense of deep satisfaction from the participatory process? The limited fact of settlement sheds no light on these important considerations. Indeed, political pressure to settle large numbers of cases, which has occurred in the *lok adalat* movement in India, leads to coercive activities, such as judges pressuring lawyers to settle and encouraging fraud on the numbers. An example of this type of fraud is the manipulation of cases that would settle on their own, by putting them into the favored and promoted *lok adalat* system. Alternatively, some courts may count as settlements technical, unilateral dismissals of cases that are then subsequently re-filed. Furthermore, without properly trained mediators and the incorporation of legal advice, settlements may be unjust; a fact that might be compounded by the lack of recourse to subsequent challenge or review. Finally, an absolute emphasis on settlement may undermine two important purposes of the justice system: publicity and normativity. Settlements are confidential, and thus, people who violate their obligations can keep such violations out of the public's view through settlement. Settlements also produce no normative pronouncement upon which others in society can order their behavior.

Second, the embedded assumption that mediation is cheaper and quicker, and thus better or more efficient, is not necessarily correct. Mediation in routine cases may surely be speedy and inexpensive, but so would many other techniques. Mediation in the most difficult cases (*e.g.*, complex family or business disputes, high stakes intellectual property claims, or cases against the government) may be both costly and time-consuming, particularly when done properly. The issue of efficiency is not one of speed or cost alone, but whether the time and resources invested in a particular dispute are worth it, measured by the social product generated by the process employed. Thus, even if one process is quicker and cheaper than another, the social outcome must be evaluated before arriving at any particular conclusion on the efficiency of the process. Therefore, the role of mediation and the policy issues it raises require a substantial set of value choices by the society in which it is to operate.

II. Inapplicability of Foreign Assumptions

How does the experience of foreign mediation experts in India reflect these common propensities? In particular, what are the ways in which foreign expertise can actually inhibit the growth of mediation in India?

https://doi.org/10.1017/S2071832200006428 Published online by Cambridge University Press

Having delivered and participated in innumerable programs on mediation in India, including in particular presentations by U.S. mediation experts from areas of the country that have particularly evolved forms of mediation practice, I have identified a set of commonly expressed postulates about mediation that may hinder its development in India.

The first postulate is that mediation is a *system*. In the United States, the United Kingdom, and Australia, where mediation has grown within legal processes similar to that of India, mediation has developed into a complex system of court-referred or annexed mediation and private mediation (often conducted by mediation companies, some even publicly traded on the open stock market). The sophistication and regularity of mediation processes have produced an alterative to the court system that is well financed and structured. Presentations on mediation from these contexts frequently focus on the administrative foundation of these systems: the procedure for court referrals or judicial mediation, the training and certification of mediators, the integration of mediation into case management, the ensurability of confidentiality, and more recently the growth of mediation ethical systems. This emphasis on mediation as a system, while well intended, poses difficulties (both intellectual and political) for Indian reformers.

First, understanding such a system requires a great deal of empirical exposure to mediation systems as they operate abroad. This exposure is certainly useful in cultivating a vision of what an advanced mediation system would look like, but the intellectual investment in understanding the complexity of the system is costly and that expense may not be well placed. For the cost of a couple of senior Indian judges traveling to the U.S. for a week to gain this systemic understanding, a local mediation center in a mid-sized city may be operated fully for a complete year. Time spent on the administration of a mediation system is time unspent on the intrinsic (or arguably instrumental) values of the specific tools falling under the mediation rubric. Therefore, focusing on mediation as a system (and its consequential and opportunity costs) takes needed attention away from core issues of how mediation will be practiced in different contexts with potentially diversely adapted features.

The second common view emphasizes that mediation is not position-based, but instead is exclusively *facilitative*. Facilitative mediation may arguably be optimal in theory; however, it is important to acknowledge that even *facilitative* mediation involves evaluations by the mediator, including settlement valuations that the parties themselves solicit. Beyond the false claim of absolute facilitation in well developed systems, litigants involved in newly developing mediation processes are likely to seek the opinion of the neutral rather than presume that they are capable of coming to their own resolution of the controversy on a consensual basis.

Third, many foreign experts emphasize that the mediator exercises *no control* over the outcome of the dispute. Even the most facilitative mediator surely exercises subtle influences over how the dispute is resolved. Mediators are trained to make decisions about the process itself that facilitate settlement (itself a value judgment about what the parties should do). In generating options, making suggestions, admonishing parties that certain ways of proceeding, thinking, or acting may not be in their interests, mediators get intimately involved in the outcome. Such involvement is arguably necessary, even potentially positive; however, to pretend the lack of any impact is to relieve the mediator of any ethical obligation to exercise care in the nature of the influence that is exercised.

Fourth, to reinforce the needs for the independence of any dispute resolution process, experts stress that mediators are necessarily *impartial* (free from favoritism, bias, or prejudice). A pre-existing relationship between the parties and the mediator, however, is just one example of evidence of potential bias in mediation proceedings. In well developed systems, mediators chosen by repeat players have to counter the perception and leanings of any favoritism against single players. In newly developing processes, where trust between the parties and the mediator is critical and may be frequently based on a prior relationship, it may be harder to insist on norms of social neutrality.

Fifth, many mediation experts create the impression that mediation necessarily involves private caucusing. This is a problematic tenet in legal cultures exhibiting widespread corruption. Where levels of trust are low, seemingly authorized *ex parte* communications may actually corrode trust. Also, it is unlikely that governmental officials will subject themselves to the claim, however false, of impropriety during the private caucus.

Sixth, mediation experts presume that the process is necessarily *confidential*. Here, too, this feature, if universally observed, would eliminate the opportunity for *public* mediation, which itself may be necessary in claims against the government to alleviate some of the obstacles in settling such cases.

Seventh, many foreign mediation experts advise that mediation should be conducted in a *continuous* process and involve only parties with the *authority to settle* the case. This presumes that litigants are necessarily autonomous in their decision-making, an assumption that can be misleading in certain social settings. Many litigants have to consult a parent or elder brother or sister before they would decide on the settlement of a law suit. Thus, they often lack the full autonomy necessary to finalize the settlement in one continuous session. Mr. Firdosh Kassam,

who has conducted more mediation proceedings in India than any other professional, often takes several sessions to complete a mediation.

Finally, as an instrumental justification for mediation, many experts claim that it *reduces backlog and delay*. As pointed out above, aside from the normative objection to mediation as a docket-clearing device, if mediation is really successful, more people may flock to the courts in search of some measure of justice for which they deem the current process futile. This can put unforeseen pressure on the court that is positive in bringing more justice to society, yet potentially "*unsuccessful*" in reducing congestion.

III. Conclusion

In sum, there are two common limitations of foreign experts. First, their substantive theories on mediation itself may not be as strong as they might presume. And second, their expertise is, in a word, *foreign*. They may have expertise in mediation within their own system, but this does not mean that they have expertise in how best to communicate the value of their experience in different environments. They may be proud of their own achievements, yet very unaware, if not entirely ignorant, of the host system.

Notwithstanding this critique, is there any role for U.S. assistance in foreign mediation reform? If so, what would it be? How would reformers overcome the problems Professor Merryman identified long before mediation was considered an American export? Candor toward the limits of foreign assistance is surely a solid first step, but where can we find creative approaches to manage, if not surmount, these limitations?

Beyond the dizzying array of American interventions in foreign legal cultures (*e.g.*, conditionality, aid, technical assistance, and exchange), a process of self-training and engagement may help to transcend these various impediments. By self-training, I mean to suggest that those of us engaged in institutional justice reform abroad take stock of our ignorance, manage it well, and try to overcome it by both educating ourselves about the assumptions we carry and thinking hard about why they may be falsely applied to contexts we do not fully understand. By engagement, I do not mean the mere exchange of information, foreign visits, recitation of theory, provision of funds, or the suspension of competing values. Engagement means a process of intense social interaction between foreign and domestic legal communities, experts and non-experts, proponents and opponents, top officials and lower-level actors, leaders and followers. This interaction seeks to gain insight into the nature of the problems, the value of the specific tools, and the applicability of those tools in different combinations to identified problems. Insight

necessitates asking before telling, explaining before advising, considering tradeoffs before determining, experimenting before insisting on proof, and challenging before accepting assumptions. Engagement therefore requires an intellectual investment in getting familiar with the legal system and the society in which it functions, thinking deeply about the embedded comparative theories in alternative reform proposals, explicating interests when they may conflict, and transparently deliberating over value choices that underlie support or rejection of a specific technique or proposal.

As the group of Americans involved in the development of local rule of law or justice reforms grows, we should all recall the story of a British expert in East Africa. He traveled every year to a village that was having trouble with land erosion. For over ten years, he advised the villagers that they had to plant trees. Each year he returned to find that they had not followed his advice. This motivated him only to make his pitch more strenuously. Upon each annual return, however, he suffered the same disappointment. Eventually, his posting took him elsewhere, and twenty years later, he returned for a visit. Happy to see their old friend, the people took him to a special place where there was a single tree and a bench with an engraving of his name. He inquired about the meaning of this special gesture. They explained that they had planted a tree in his honor to thank him for all of his concern for their village and its problems. But why, he asked, had they not followed his advice. Reluctantly, one of the village elders explained that they could not plant trees for they had tried this many times before his first arrival. The trees attracted birds, and the birds ate their crops.[37]

My hope is that we can learn and retain the lesson of the British expert. He never asked his hosts why there were no trees or which birds ate which crops. Thus, he could never explore the alternatives that might have both protected the crops and prevented erosion. Had he tested his assumptions against the realities of their environment and engaged his values with their sensibilities, I wonder how many more mouths he might have helped feed.

[37] I first recounted this story in *Local Mediation in Advance of Armed Conflict*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 213 (2003). It was narrated to me by one of the leading figures of international social work, Dr. Herman Stein, the John Reynolds Harkness Professor Emeritus of Social Administration at the Mandel School of Applied Social Sciences. Dr. Stein was formerly Dean, and two-time Provost, of the Mandel School of Applied Social Sciences and holds the title of professor at Case Western Reserve University.

E. Mediating Mediation Reform in India

I. Mediating Mediation

In making critical choices on how best to navigate around these obstacles, issues, and tradeoffs, which inhere in India's attempt to adopt mediation, India is engaged in a set of national deliberations that seek to resolve conflicting views and positions on mediation within the Indian justice system. Indeed, in this sense, given the conflicts yet to be resolved over the scope, substance, and speed of mediation reform in India, the facilitated negotiation over these issues is a kind of mediation itself.

II. The Eighteenth Camel

During the last several years, in particular during the spring of 2003, I had the unusual experience of participating in this national discussion. As an outsider, for the reasons outlined in the preceding section, the role of participant is an awkward one. Although I am a student of the Indian civil justice system, unlike my Indian colleagues, I am no expert. Although I am an academic with special interest in conflict resolution and justice reform processes, unlike my Indian friends, I am neither a judge, nor (any longer) a practicing lawyer. Although I have a strong emotional and personal connection to the country through my wife's family, unlike my Indian relatives, I do not work and live in the system. The ultimate determinations of these difficult issues are thus beyond my full competence, experience, or privilege. So what role could I possibly pretend to play in this process?

I came to the answer suddenly in May of 2003 in Jodhpur, where I was conducting a two-day workshop with my dear friend, Niranjan Bhatt, a trial lawyer with over forty years of experience in the city civil court of Ahmedabad, Gujarat, and the founding trustee and director of the Ahmedabad Mediation Center. I told Niranjan of my discomfort with my own role (as an outsider), and as we were reflecting on this strange state of affairs, I realized that in conducting workshops and engaging the stakeholders we were playing the role of mediators: establishing a tone conducive to settling the issues, acknowledging conflicting viewpoints, reframing them more neutrally, and helping judges, lawyers, businesspeople, government officers, and civil leaders bargain over them. Then it struck me: "I'm just trying to become the eighteenth camel."