LexisNexis **Student Series**

ALTERNATIVE DISPUTE RESOLUTION

NEGOTIATION AND MEDIATION

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LexisNexis®

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The following check-list of factors may be relevant in the diagnosis stage of any classification system to determine which cases may be appropriate.

(1) Whether the matter is complex or likely to be lengthy;
(2) Whether the matter involves more than one plaintiff or defendant;
(3) Whether there are any cross claims;
(4) Whether the parties have a continuing relationship;
(5) Whether either party can be characterised as a 'frequent litigator' or there is evidence that the subject matter is related to a large number of other matters;
(6) Whether the possible outcome of the matter may be 'flexible' (in this regard poor compliance rates in similar types of matters could be considered);
(7) Whether the parties have a desire to keep the matter private or confidential;
(8) Whether any party is a litigant in person;
(9) Whether it is an appropriate time to refer a matter;
(10) Whether either or both parties express a desire to mediate;
(11) Whether the dispute has a number of faecets, which may be litigated separately at some time.

Depending on the answers to above questions, the method of resolution has to be adopted. The disputant should be conscious of the goal, to follow the appropriate means. Thus creating sufficient awareness about the various alternatives is essential. ADR is not isolated from law and justice. It is just another means to achieve it.

CHAPTER 5

State Authorities of ADR: Lok Adalats and Legal Aid

LEGAL AID AS HUMAN RIGHT

The need for helping litigants in resolving disputes is recognised as one of the significant social services. Legal aid is a kind of human right in the context of conflicts and contradictory interests. The Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of United Nations Organisation[1] imposes an obligation on states, which ratified the resolution, to strive, by teaching and educating, to promote respect for rights and freedom and by progressive measures, national and international, to secure their universal and effective recognition and observance, among the people of territories under their jurisdiction. This insists on free and full development of every personality.

Article 14 of the International Covenant on Civil and Political Rights 1966[2] provides that in determination of any criminal charge against him or of his rights and obligations in a suit of law, every one shall be entitled to a fair and public hearing of a competent, independent and impartial tribunal established by law. This article also deals with fundamental rights of accused to be presumed innocent until proved guilty, to be entitled to minimum guarantees in full equality, such as

(a) to be informed promptly and in detail, in a language which he understands, of the nature and cause of the charge against him;

1 General Assembly of United Nations Organisation, Resolution 217A (III), 10 December 1948.
2 Adopted by the General Assembly of United Nations on 16 December 1966.

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require; and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have free assistance of an interpreter if he cannot understand or[3] speak the language used in the court;
(g) not to be compelled to testify against himself or to confess guilt.

The above mentioned 'right' talks about legal aid to be provided to the needy. In more than 132 nations, out of 192 UNO member states, provisions for providing legal aid to needy and indigent persons, particularly in criminal trial has been made. In United States, legal aid is provided, as of right, to needy and deserving persons facing criminal trial. The Legal Aid Corporation has been constituted, which is manned, managed and monitored by the American Bar Association and many other American Law Societies or organisations provide the services of attorneys.

The right to counsel in criminal courts, by the accused, is very important and has been considered so fundamental that many countries have incorporated it in this Constitution or the Bill of Rights. Most of the countries in the world have made it a constitutional right to have the assistance of a lawyer or a counsel in criminal proceedings. In short, it can very well be said that the proposition is clearly established, that no person can be condemned without being heard. In United States, this right of an indigent accused, in a criminal trial, to the assistance of a counsel is guaranteed by the sixth amendment and is applicable in all states. This amendment provides that 'in all criminal prosecution, the accused shall enjoy the right...to have the assistance of counsel for his defense.' Traditionally, the courts had interpreted this right to mean that indigent individuals charged with federal criminal offenses were entitled to be provided with services of a counsel unless the rights were competently and intelligently waived. At the same time, however, the court had not established a similar rule for criminal defendants charged in state courts. In *Gideon v*

3 *Dineshbhai Dhemenrai v State of Gujarat* (2001) 1 GLR 603.

Wainwright,[4] the court adopted a rule requiring the appointment of a counsel for every indigent criminal defendant accused of a felony in state courts. The court reasoned that the ideal of a fair trial before an impartial tribunal in which every defendant stands equal before the law 'cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him'. The assistance of counsel will best avoid conviction of the innocent.

Section 1 of the 14th Amendment declares that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.

In India around 91 per cent of cases instituted in the courts go for trial and only 9 per cent of cases are settled without judicial agitation, while in the United States more than 90 per cent of cases involving legal disputes are settled before they go for trial.

Under section 2(c) (ii) of the Canadian Bill of Rights, it is stated that:

> No law amended shall be construed or be applied so as to deprive assistance to a person who has been arrested or detained and instruct a Counsel without delay.

The Japanese Constitution and International Covenant on Civil and Political Rights are instances, where right to counsel is recognised. In England although there is no such right in the Common Law, instruments like 'Poor Persons Defence Act 1930' and 'Legal Aid and Advice Act' provide legal aid to poor at public expenses. Under the chairmanship of Lord Widgery CJ, the Widgery Commission constituted in 1966 considered question of legal-aid in criminal proceedings. However, its report was considered not satisfactory by the government. A special committee, known as 'Justice in 1970', was appointed, which submitted its report in 1971. It highlighted the situation that in magistrate courts the legal aid system was not practiced and accused were unaided or unrepresented. Thereafter, a 'duty solicitor system' was introduced where a solicitor appointed from the legal aid panel, attended court, prior to the court-sitting and interviewed the accused, coming before the court for the first time. He would tender advice as to which plea should be taken by the accused and also applied for bail or for adjournment, if necessary. He could also advise him on the need for applying for legal aid. In China, right to free legal aid in a criminal trial has been made statutory and mandatory.

4 372 US 335 (1963).

Foundations of Legal Aid

The state is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for the purpose has to be done by the state. The state may have its financial constraints and its priorities in expenditure, but the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty.[5] 'Human considerations and constitutional requirements are not in this day to be measured by dollar considerations', observed the Supreme Court in *Khatri v State of Bihar*.[6]

Article 22 of the Indian Constitution provides several rights, which are important components of criminal justice. No person who is arrested, shall be detained in custody, without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied of the right to consult and to be defended by a legal practitioner of his choice. Section 303 of the Code of Criminal Procedure 1973 (CrPC) provided that any person, accused of an offence before the criminal court or against whom proceedings are instituted, may of right, be defended by a pleader of his choice.

Under art 21, no person can be deprived of his life or personal liberty except according to the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, it must be established procedure which is fair, reasonable and just.[7] Thus, a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would therefore, have to go through the trial without legal assistance, could not be regarded as 'reasonable, fair and just'. To have legal aid or service is an essential element of reasonable, fair and just procedure for a prisoner.

The Supreme Court, in *MH Hoskot v State of Maharasthra*,[8] pointed out:

> judicial justice, with procedural intricacies, legal submissions and critical examination of evidence leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law.

5 *Rhem v Malcolm* 377 F Supp 995.
6 AIR 1981 SC 928.
7 *Maneka Gandhi v Union of India* (1978) 1 SCC 248.
8 AIR 1978 SC 1548.

Constitutional mandate of providing for equal justice and free legal aid is incorporated in the Constitution[9] as a Directive Principle of State policy. The article says:

> 39A. Equal Justice and Free legal aid—The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Thus, free legal service became an unalienable element of 'reasonable, fair and just' procedure for without it a person, due to poverty or any other disability, would be deprived of the opportunity of securing justice. This is how the right to free legal service emerged as an essential ingredient of reasonable procedure only with which an accused loses the right to life or personal liberty. In view of interplay of art 21, the free legal aid does not remain a mere directive principle but becomes a fundamental right adjunct to the all-important right to life and liberty. It is settled law that free legal assistance at state cost is fundamental right of accused. The Supreme Court, in *Sheela Barse's*[10] case, observed:

> ...legal assistance to poor or indigent accused is necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundation of democracy and rules of law, because nothing rankles more in the human heart than the feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or myths intended to perpetuate the domination of rich and the powerful and to protect the establishment and the vested interests ..

Not only at the stage of trial but even at the stage when accused is first produced before the magistrate, the state is under an obligation to provide free legal aid. It was so stated in *Khatri v State of Bihar*[11] in 1981. However, the Supreme Court also rendered a caution saying that where the accused is involved in economic offences or offences against law, prohibiting prostitution or child abuse and the like, there social justice may require that free legal service may not be provided by the state.[12] It will be mockery of justice, and provision of free legal aid as a fundamental right, if it is

9 Constitution (Forty-second Amendment) Act 1976 art 39 A.
10 1995 (5) SCC 654.
11 *Khatri v State of Bihar* AIR 1981 SC 1068.
12 *Suk Das v Union Territory of Arunachal Pradesh* AIR 1986 SC 991.

made available only on a condition that the accused should make an application. The poor, ignorant and illiterate accused cannot ask for free legal service. There is a possibility that they would not know that this right does exist for them. Thus, the Supreme Court ruled that the magistrate or the sessions judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the state.[13] In the *Khatri* case the Supreme Court went in detail to tell that it was the duty of magistrate or sessions judge before whom the accused is produced to inform him of his legal aid right. The Supreme Court, while dealing with the blind prisoners problem in this case, lamented that, unfortunately the judicial magistrate failed to discharge this obligation in the case of blind prisoners and instead merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. Therefore, the Supreme Court chose to make a very specific direction that the magistrates and sessions judges in the country should inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the state. Unless he is not willing to take advantage of the free legal services provided by the state, he must be provided legal representation at the cost of the state.

Right to Counsel of Choice

Section 340(1) of the Old Criminal Procedure Code provided that 'any person, accused of an offence before the criminal court or against whom proceedings are instituted, under this Code or under any such Code, may of right, be defended by a pleader. Section 303 of the new Code retained the above language and added words 'of his choice' at the end, meaning that every accused has a right to have assistance of pleader of his choice.

In 1958, the Law Commission of India made certain recommendations for state legal aid and emphasised for the right to assignment of counsel at Government expense.[14] The report says:

> Unless some provision is made for assisting the poor man for the payment of court fees and lawyer's fees and other incidental costs of litigation, he/she is denied equality in the opportunity to seek justice.[15]

13 See *Khatri* case; *Suk Das* case; *State of Kerala v Kuttam Moharas and ors* 1988 Cri LJ 453.
14 Law Commission, 14th Report, Reform of Judicial Administration, 1958, vol I.
15 Ibid, p 487.

The Law Commission reiterated that representation by a lawyer should be made available at government expense to accused persons in all cases tried by a court of sessions.[16] Again in its 48th Report, the Law Commission suggested making of a provision for free legal assistance by the state for all accused who were not defended by a lawyer for want of means.

It was incorporated in s 304(1) of Code of Criminal Procedure saying that the state aid will be available only where the accused 'has not sufficient means to engage a pleader'. Section 304 reads:

> **304. Legal aid to accused at State expenses in certain cases:**—(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
>
> (2) The High Court may, with the previous approval of the State Government, make rules providing for-
>
> (a) the mode of selecting pleaders for defence under section (1);
>
> (b) the facilities to be allowed to such pleaders by the courts;
>
> (c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).
>
> (3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-section (1) and (2) shall apply in relation to any class of trials before the other Courts in the State as they apply in relation to trials before Courts of Sessions.

Thus, it is settled position that every presiding officer has to provide legal aid to the accused having no means, in all cases. It is further necessary that such lawyer should be of competence.[17] No counsel can be thrust upon the accused without ascertaining the wishes of the accused and without giving him any choice in selecting his lawyer.

Committee for Implementing Legal Aid Scheme (CILAS)

For providing legal aid as a fundamental right to the accused, the Government of India resolved to formulate the Committee for Implementing Legal Aid

16 Law Commission, 41st Report, 1969, vol 1, paras 24, 34–38.
17 *Ranjan Dwivedi v Union of India* AIR 1983 SC 624.

Scheme (CILAS) in September 1980. Justice PN Bhagwati was the chairman to monitor the programme in all states and Union Territories. Soon, it was realised that there should be state and district level authorities to render effective legal aid service to the poor. Therefore, the Legal Services Authorities Act 1987 was enacted to enable the constitution of Legal Service Authorities at national, state and district levels. The Act was brought into force with effect from 9 November 1995, ie, eight years after its enactment, and till then the term of the committee was extended.

The State Governments prepared schemes and programmes or rules to provide legal aid to underprivileged and disadvantaged sections of the society, while some states formulated legislations. State Boards, District Legal Aid Committees and *Taluka* Committees were also constituted.

Lok Adalat: As Center for ADR

The poor and resourceless persons need justice, they require for that, an access to justice. Mere recognition of rights do not help them, without providing for necessary infrastructure to secure them justice whenever needed. Even if the infrastructure is created, if he does not get 'legal aid' to reach it, the purpose of entire justice system suffers a defeat. One of the attributes of civilized society is accessible and available justice mechanism whenever rights are violated.

The Supreme Court observed:

> Today unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across 'law for the poor' rather than 'law of the poor'. The law is regarded by them as something mysterious and forbidding – always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is therefore necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services.[18]

The *lok adalat* was a historic necessity in a country like India where illiteracy dominated about all aspects of governance including judicial governance. In the backdrop ever increasing litigation, inordinate delay in dispensation of justice, the illiterate and poor were losing interest in their rights and belief in adjudicatory mechanism. The need to revive the confidence among

18 *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369.

the ordinary people was realised by the state bodies and judiciary, the result of which was the creation of *lok adalats*.

The concept of conciliated settlement of disputes is not alien to the traditional Indian culture and social life. *Nyaya Panchayat* and *Gram Panchayat* provided seats for resolving the disputes in rural areas on an immediate basis. Generally, any crime or civil dispute used to be resolved within the village itself. Either village elders or caste elders or family elders facilitated the resolution.

The *lok adalat* was introduced in 1982. The first *lok adalat* was organised on 14 March 1982 at Junagadh in Gujarat. Maharasthra commenced *Lok Nyayalaya* in 1984, and subsequently, and gradually the movement spread in Uttar Pradesh, Orissa, Assam, Kerala, Bihar, Haryana, Delhi, Pondicherry, Mizoram, Meghalaya, Jammu and Kashmir, Punjab, Goa, Sikkim and West Bengal. The *lok adalat* in Andhra Pradesh was first organised in Visakhapatnam on 15 December 1985.

Three significant reports advocating an informal system of dispute resolution including *Nyaya Panchayats*, legal aid camps, and mobile courts form the background of the *lok adalat*. They are Report of Gujarat Legal Aid Committee 1971, Report on Procedural Justice 1973 by VR Krishna Iyer J, Equal Justice and Social Justice Report 1977 by PN Bhagwati and VR Krishna Iyer JJ. Since *Nyaya Panchayats* and mobile courts could not be set up due to involvment of state support and infrastructural aspects, the two doyens of justice collected their strength from non-state organisations and social action groups to organise legal aid camps, which in no time spread all over Tamil Nadu, Kerala, Gujarat, Orissa, Uttar Pradesh, Maharashtra and Rajasthan and Andhra Pradesh. In these states, constitution of Legal Aid Boards marked the beginning of the movement.

The real impetus to this socially relevant programme of legal aid movement and *lok adalats* was made available when the Committee for Implementing Legal Aid Schemes (CILAS) was constituted under the chairmanship of PN Bhagwathi J, the then Chief Justice of India. *Lok adalat* is a better alternative for money suits and small causes suits. As *Nyaya Panchayats* failed to achieve the desired results, *lok adalat* was necessitated. CILAS evolved a model scheme for legal aid programme throughout the country by which several legal aid and advice boards were set up in the states and Union Territories. Then the need for creating a national level legal services authority was felt.

From the stage of being a concept, the *lok adalat* emerged as an institution with multiple actors involved in its mission. It was the conglomeration of concepts of social justice, speedy justice, conciliated result and negotiating efforts. It involved teams of sincere conciliators, experienced judicial officers,

public spirited advocates, academicians, non political social workers, women lawyers and women social workers etc. The Bench and Bar with litigants had to meet outside the court to have a coordinated effort to end the litigation. It was possible only in *lok adalat*, other than which there was no meeting point for them. Contentious issues, confrontational attitudes and conflicting interests result in clash of personalities before the courts, which is a state authority, where there is no scope for conciliatory cooperative resolution of disputes.

The state legal system has some inherent difficulties such as it is confined to urban and semi-urban areas, is inaccessible for rural masses and the language of law is complex and alien to a majority of people.

The success of the *lok adalat*, as a social institution, is no massive literacy programme in advance. The empowerment of people, awareness of rights and general consciousness are basic requirements for successful resolution of disputes without resorting to extensive expenditure and delay. It has emerged as a new system of dispensation of justice and received tremendous response and wide support from different sections of the society. It is visualised as an alternative dispute settlement mechanism, which takes justice to doorsteps of the poor, and gives speedy and cheap justice to those who cannot afford to fight the costly legal battle. There is conciliation, mediation, and negotiation besides counselling. There will be detailed discussion with parties about pros and cons of their dispute, examination of advantages and disadvantages of various options. It involves participatory justice, a unique feature of *lok adalat*. An informal discussion, friendly advice, settlement proposal, series of concessions reaching to a mutually agreed consent are included in it. In a compromise, it is a win-win situation, where none loses or what is lost is an agreed concession and not a painful extraction. *Lok adalat* mediates a dispute and hammers out the settlement, as consented to by the parties. It facilitates the warring parties to work out solutions, rebuild relations and bury enmity generated by the dispute in a conducive and harmonious atmosphere.

The *lok adalat* came into existence as part of CILAS, *niti melas* are organised for disposition of settlements in a summary way through a friendly process of negotiation. The organisers fix a date and place for resolution of disputes and give notice of the same to those parties fighting out for a long period through corridors of courts of law. The press and media play a major role in spreading the message of the resolution *mela*. Presiding officers of various courts are requested to look into the cases, which could be tried to be resolved with this consensual process. The judges identify disputes with the possibility of conciliation, which are scheduled for the fixed day. There are several pre-*lok adalat* conferences to motivate solutions. The

motivators include judges, lawyers, law teachers, social workers, volunteers and concerned officials and other responsible persons. Mutually acceptable solutions are worked out. Legal Aid Committee members, spirited public men act as mediators or conciliators inspiring parties to solve the problem, explaining advantages of settlement. Once the settlement is reached, members of the panel reduce it into writing which must be signed by the parties concerned and countersigned by *lok adalat* panel members. The compromise is taken to the court concerned which is expected to examine the fairness of agreement and endorse it as a decree along the lines of terms of compromise. The dispute is personally resolved by the parties and officially terminated by the judicial officer. As a para-judicial body prepares the background, the court of law concludes it with a legal sanctity by signing a decree. The *lok adalat* has proved to be a successful conciliatory agency.

According to an estimate 34 per cent of the world's total population is in India and more than a majority of them live below the poverty line. People living in 5,18,000 villages are poor and ignorant of their rights. The life span of a civil case is expected to range between eight and 12 years. The ratio of judges per million in India is almost nine, whereas it is more than 115 in USA. The ratio of advocates per population is also very much low in India compared to developed countries. There are around five lakh advocates for more than one billion population in India.

The programme, though widespread and widely appreciated, has not been consistently successful because of the following reasons:

(a) it is not institutionalised;
(b) concepts are not clarified;
(c) poor infra-structure;
(d) lack of training;
(e) absence of minimum standards.

It should appear fair and just in all aspects as *lok adalat* is supposed to be a substitute to judicial process. The *lok adalat* is a para judicial institution.

Legal Services Authority Act

The Legal Services Authority Act 1987, which received the assent of the President on 11 October 1987, was brought into force on 19 November 1995 after an amendment in 1994. The Jodhpur experiment could not be continued because of the 40 days strike by ministerial staff and subordinate judicial officers, which ended in settlement leading to suspension of *lok adalat* experiment till 1991. The need for institutionalising the *lok adalat*

and providing for legal sanctity and authority to continue the movement was felt and the Act of 1987 was passed.

Objective

The object of the Act, as stated in its preamble, is to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The Act also provides for organisation of *lok adalats* to secure that the operation of the legal system promotes justice on basis of equal opportunity.

Authorities under the Law

The Act created National, State and District Legal Service Authorities with the power to organise *lok adalats*.[19]

The Central Authority constituted by the Central Government is called the National Legal Service Authority (NALSA) and consists of the Chief Justice of India as the patron-in-chief, a serving or retired judge of the Supreme Court, as the Executive Chairman, and other members as prescribed by the Central Government. The Center can appoint member-secretary and other required number of officers and employees. The Central Authority or NALSA can constitute a Supreme Court Legal Service Committee.

Functions of NALSA

1. **Making legal services available**: The prime task is to lay down policies and principles and to frame effective and economic schemes for the purpose of making legal services available.
2. **Promotion of Justice**: It is the duty of the state to mitigate the sufferings of the poor and weaker sections that are deprived of all opportunity and elevate them to dignified levels. This is the concept of social justice. Social justice litigation or helping the poor and weak to secure the enforcement of their rights is the real legal aid. The Act requires the Authority to take necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections. There is a need for training the social workers in legal skills.

19 Under Legal Services Authority Act 1987, ss 3, 7 and 9.

3. **Spreading legal literacy and awareness**: Rule of law is meaningless when majority of the people are not aware of their rights. Ignorance of law is no defence and law presumes every one to know the law. But it is a reality that the people do not know the law, nor do they have any access to knowledge of the law. The Act requires the authority to take appropriate measures for spreading legal literacy and legal awareness among the people and more so among the weaker sections about their rights, entitlements, defences and privileges guaranteed by various laws and schemes. The Central Authority must organise legal aid camps for people in villages and labour colonies.
4. **Encouraging settlement of disputes by way of negotiation, arbitration and conciliation through Lok Adalat**: The very purpose of this law is to provide legal status to the institution of *Lok Adalat*, which is the facilitating center for conciliation or negotiation and arbitration, etc, to secure speedier remedy to their problems. *Lok Adalat* is a tool through which the poor can secure justice and relief without waiting for a long time and spending huge amounts of money. It is an effective alternative dispute resolutions agency.
5. **Promoting Research in the field of legal service**: It is evident that the present system does not provide for any kind of legal service to the poor and needy. Legal aid and *lok adalat* are new areas of legal service which came to stay as useful institutions. There may be further scope for inventing new methods of legal service. The Authority must promote research into this aspect. Simplification of law, easy spread of legal awareness, translating the law into regional languages, using information technology to spread legal literacy, introducing court annexed dispute resolution processes, plea bargaining in civil cases, assisting the parties to compound and settle certain criminal offences which are compoundable in nature are the areas where the focus of study is required.
6. **Funding specific schemes to various voluntary social service institutions**: The Central Authority must provide grant-in-aid for specific schemes to various voluntary organisations in the field of social service, and provide funds to the state and district level authorities.
7. **Enlisting the Support of Voluntary Social Welfare Institutions**: People's participation is very important for success of such programmes. One way of involving the people is enlisting the support of NGO's and other social welfare institutions.

8. **Formulating norms to guide the State in encouraging voluntary organisations:** So far the courts laid down certain norms for legal aid programmes. The Authority has to work on this aspect exclusively and evolve the rules and norms to guide the state in encouraging voluntary organisations.
9. **Doing every thing necessary for ensuring commitment to fundamental duties of citizens:** On the lines of Universal Declaration of Human Rights, which listed out certain duties, the Constitution (42nd Amendment) Act 1976 created fundamental duties, which are generally not enforceable. The Legal Services Authorities Act envisages a duty on the Authority to do necessary things to enforce these duties. Abiding by the Constitution, following the noble ideals of freedom struggle, defending the country and rendering national service, protecting integrity, sovereignty, promoting brotherhood, renouncing the practices which are derogatory to the dignity of women, preserving the rich heritage and culture, protecting the environment, abjuring violence, and striving towards excellence in all spheres of individual and collective activities so that the nation constantly rises to higher levels of endeavour and achievement are the fundamental duties of citizen.
10. **Utilisation of funds:** The Authority has to supervise the proper utility of the funds for given purposes through state and district authorities.
11. **Performing the function of coordinator and monitor:** The Central Authority has to act as coordinator and monitor functions of state and district authorities, Supreme Court Legal Services Committee, the High Court Legal Services Committees, *Taluk* Committees and voluntary social services agencies.

State and district authorities have been provided by s 7 of the Act with almost similar functions within their sphere of power and scope of territorial limits. One of the specific functions is to conduct the *lok adalats* including *lok adalats* for high court cases, to undertake preventive strategic legal aid programmes. Similarly, the authorities at district and *taluk* levels also have to organise the *lok adalats* and perform other functions.

Each *lok adalat* has to be presided over by judicial and non-judicial members. The award of *lok adalat* is deemed to be a decree of civil court and without provision for appeal. For the purpose of determination, the *lok adalat* will have powers of civil court and its proceedings are deemed to be judicial proceedings within the jurisdiction of civil and criminal courts, revenue courts or any tribunal. At the national level, the National Legal Services Authority decides the policy for the nation, while at state level,

there is State Legal Services Authority. The Supreme Court Legal Services Committee and High Court Legal Services Committee will promote the *lok adalats*. Provisions are made to constitute Legal Services Committees at district and *taluk* level as well.[20] All these authorities are empowered to organise *lok adalats* to determine and arrive at a compromise or settlement between the parties to a dispute in respect of cases pending before or falling within the jurisdiction of the respective courts.

Eligibility

Section 12 entitles every person,

(a) who has to file or defend a case to legal services, if that person belongs to Scheduled Caste or tribe,
(b) a victim of trafficking in human beings or beggar,
(c) a woman or child,
(d) a person with disability,
(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster, or
(f) an industrial workman,
(g) in custody, including custody in a protective home, juvenile home, psychiatric hospital or psychiatric nursing home, or
(h) a person who has in receipt of annual income less than Rs 9000 if the case is before Supreme Court, and if the case is before a court other than the Supreme Court and less than Rs 12000 or such other higher amount as prescribed by the government.

In cases before the Supreme Court, the Center, and in cases before other courts, the state government may prescribe a higher amount as eligibility criterion to receive services under this Act. One of the main eligibility criterion is that the persons mentioned under s 12 should have a prima facie case to prosecute or to defend and the authority must be satisfied about that factor according to s 13. The income criteria can be satisfied by an affidavit from a person seeking legal service.

In a significant decision, the Gujarat High Court in *Prafullaben Dhirubhai Kanjiya v Dhirubhai Kachrabhai Kanjia,*[21] held that it was the duty of the advocate and the court to advice a woman seeking maintenance from her husband to approach Legal Services Authorities. In the abovementioned case, a wife filed an application to permit her to file suit as indigent person.

20 *Taluk* level committee under s 11A was envisaged by 1994 amendment.
21 AIR 2001 Guj 157.

The court instead of permitting her to file as indigent person, granted interim maintenance. When that order was challenged in revision petition, the high court was shocked to observe that the provisions under s 12 of Legal Services Authorities Act 1987 were not resorted to. The high court observed:

> when a woman is entitled for free legal aid, I fail to see why this application is still pending. This shows that how the courts below have been ignorant of this beneficial piece of legislation.

It is further observed:

> Because of the ignorance of this lady, she has permitted her advocate to file the suit as an indigent person and which results in delay in proceedings. Moreover, it unnecessarily consumes the Court's valuable time also in a matter where otherwise it was not called for. The advocate who is appearing for the petitioner has also shown total and scant disregard to the provisions of the Legal Services Authorities Act, 1987. He should have advised the litigant to go to the legal services authority or Committee, as the case may be, and if it would have been advised so, she would not have filed the suit as an indigent person. It is equally the duty of the advocate to see that this class of litigant is made known of his right. Recipient of these benefits invariably is being made known of these by the advocates as well as the Courts.

No Legal Services in Certain Cases

Regulation 14 of the Supreme Court Legal Services Committee Regulations 1966 lays down that, free legal services shall not be given in the following cases, namely:

(1) Proceedings wholly or partly in respect of
  (a) defamation; or
  (b) malicious prosecution; or
  (c) a person charged with contempt of court proceedings; and
  (d) perjury.
(2) Proceedings relating to any election.
(3) Proceedings incidental to any proceedings refered to in sub-regulations (1) and (2).
(4) Proceedings in respect of offences where the fine imposed is not more than Rs 50.
(5) Proceedings in respect of economic offences and offences against social laws, such as, Protection of Civil Rights Act 1955, and the Immoral Traffic (Prevention) Act 1956, unless in such cases the aid is sought by the victim, provided that the Chairman may, in appropriate case, grant legal services even in such proceedings.
(6) Where a person seeking legal services
  (a) is concerned with the proceedings only in representative or official capacity or

  (b) is formal party to the proceedings and his interests are not likely to be prejudiced on account of the absence of proper representation.

Withdrawal of Legal Services

According to Regulation 18 of the Supreme Court Legal Services Committee Regulations 1966, the committee may either on its own motion or otherwise withdraw the legal services granted to any aided person, if found that he possessed sufficient means or he obtained legal service by misrepresentation or fraud, if there is a material change in the circumstances, misconduct, misdemeanour or negligence on the part of aided person, or when he is not cooperating, or when he engaged a legal practitioner, or when the legal service is found to be an abuse of the process of law or legal services; provided the legal services shall not be withdrawn without giving due notice thereof to the aided person or his legal representative in case of his death, to show cause as to why the legal service should not be withdrawn. The committee is entitled to recover the amount of legal service from the aided person.

Modes of Legal Service

The legal services include the following:

(a) payment of court fees, process fees and all other charges;
(b) charges for drafting, preparing and filing of any legal proceedings;
(c) cost of obtaining and supply of certified copies of judgments, orders and other documents in legal proceedings;
(d) Cost of preparation of paper book and expenses incidental thereto for use in legal proceedings.

According to s 13, persons who satisfy all or any of the criteria mentioned in s 12 shall be entitled to receive legal services subject to the satisfaction of concerned authority that such person has a prima facie case. An affidavit made by a person as to his income may be regarded as sufficient evidence for making him eligible to the entitlement of legal services under this Act unless the concerned authority has reason to disbelieve such affidavit.

Legal Aid Fund

The National Legal Aid Fund was created under s 15. Similarly, the state fund was created under s 16 and district fund under s 17.

Constitution and Jurisdiction of Lok Adalat

Every *lok adalat* shall consist of such number of serving or retired judicial officials and other persons specified by the state or district authority or Supreme Court Legal Services Committee or as the case may be the *Taluk* Legal Services Committee, organising such *lok adalat*. Central Government, in consultation with the Chief Justice of India, has to prescribe qualifications for those persons to be judges of *lok adalat*.

Section 19 states that every authority is empowered to organise *lok adalats* at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. The *lok adalat* consists of serving or retired judicial officers and other persons on its bench. The *lok adalat* shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of, any case pending before or any matter which is falling within the jurisdiction of and is not brought before any court for which the *lok adalat* is organised. It has no jurisdiction in respect to an offence which is not compoundable under any law.

Section 19(3): The lok adalat shall have jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal or revenue court or any tribunal constituted under any law for the time being in force in the area for which the lok adalat is organised.

The *lok adalat*, under s 20 of the Act, can take cognisance of the case referred to, if the parties agree, or one of the parties thereof makes an application to the court for referring the case to *lok adalat* and if such court is prima facie satisfied that there are chances of such settlement; or the court is satisfied that the matter is an appropriate one to be taken cognisance by the *lok adalat*. Reference of any case to *lok adalat* by the court can be done only after a due opportunity is given to the party, which has not applied for reference. After such reference is made, the *lok adalat* has to proceed to arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal or revenue court or any tribunal constituted under any law for the time being in force in the area for which the *lok adalat* is organised. It has to be done with utmost expedition and guided by the principles of justice equity, fair play and other legal principles. If the compromise or settlement could not be arrived at, the case will return to the court.

Thus,

Jurisdiction is: Civil, Criminal or Revenue disputes, or disputes that could be tried by any tribunal under any law.

Procedure is: Guidelines based on the principles of justice, fair play and other legal principles.

Result: would be most probably settlement or compromise.

Judges: Any judicial officers of the area specified by the State or District Authorities.

The territorial and subject matter jurisdiction of *lok adalat* is same as that of the court in relation to which the *lok adalat* is organised. With regard to criminal matters, the limitation would be the proviso to sub-s (5) on non-compoundable offences, which means those crimes involving compoundable offences only can be brought before the *lok adalat*. The limit and extent of jurisdiction that was created by sub-s (3) of s 19 in a *lok adalat*, is purported to empower the *lok adalat* to deal with and bring about a compromise or settlement of any dispute within the limitations of the courts under which it was organised. Thus, the jurisdiction of the *lok adalat* is coextensive with that of the court of those disputes which might be referred for settlement. Prior to the amendment in 1994, the wording of the section offered unlimited jurisdiction, which was undesirable. The amendment limited to the extent of the court for disputes of which the *lok adalat* is being organised.

Lok adalats have jurisdiction to settle disputes between parties to a dispute arising out of two situations. First, from a case pending before any court of the area for which *lok adalat* is organised, and the second, in respect of a dispute arising from any matter falling within the jurisdiction of such court, but is not instituted before it. Section 19(5) limits the jurisdiction in respect of *lok adalat* by explicit and clear definition by sub-s (5), which excluded non-compoundable offences.

Whether the dispute is in the shape of a case before the court or not, the *lok adalat* is empowered to decide it. This part of the section is well in consonance with the objects of the Act and art 39-A of the Constitution of India. Generally, *lok adalat* picks up disputes pending before the court for settlement. The parties in dispute have a right and opportunity to seek resolution before *lok adalat* through ADR methods. This part of the law has not received required attention of the people and thus the disputes before it becomes litigation.

Limitations

1. Transgression of Limit

The Act through various provisions explain that the jurisdiction is limited

to making an effort to bring a settlement between the parties to the dispute with the object of disposing of the case finally, so that the parties do not prefer a litigation. Section 19(5) limits the jurisdiction 'thus far' and 'no further' and any transgression of this limit by the *lok adalat* would render the proceedings a nullity.[22]

2. Consent as Basis of Jurisdiction

There is an over all limit 'to determine and arrive at a compromise or settlement'. Compromise or settlement would be possible only when parties are agreeable. The unwillingness of the parties will operate as a major hurdle to jurisdiction. It is basically a consensual process, and jurisdiction of *lok adalat* emerges on the foundation of willingness of the parties.

3. No Criminal Offences

Lok adalat has no jurisdiction in respect of cases pertaining to non-compoundable offences. In certain, less serious, offences the victims can excuse the offenders. Such an excuse is possible on several terms including the payment of a sum of money as compensation or damages. Those offences are classified as compoundable offences by s 320 of CrPC. Some of the offences are compoundable with the consent of the magistrate and some without. The *lok adalat* can also initiate negotiations and conciliate to help the victim compounding the offences. Offences like murder and rape are not compoundable. Only those cases of causing injuries, marital offences, reputation related offences, can be compounded. Cases involving non-compoundable offences cannot be referred to *lok adalats*. Section 320(1) pertains to compounding of offences, which are not of serious nature while s 320(2) can be compounded only with the permission of the court. Under sub-section (4)(a), when a person who would otherwise be competent to compound an offence under s 320, is under the age of 18 years, or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the court, compound such offence. Sub-section 4(b) provides that when a person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the CPC, of such person may, with the consent of the court compound such offence. An offence which law declares to be non-compoundable even with the permission of the court cannot be compounded at all.[23] When a rape case was being tried, upon a private

22 *Commr KSP Instructions v Nirupadi Virbhadrappa Shiva* AIR 2001 Kant 504.

23 *Ram Lal v State of Jammu and Kashmir* 1999 Cr LJ 1342 (SC).

complaint, the parties filed a withdrawal application claiming a compromise. As the crime under s 376 is not compoundable, the application was rejected in the absence of application from public prosecutor for withdrawal.[24]

Offences like causing hurt (ss 323, 334), uttering words to injure religious feelings (s 298), wrongful restraint (ss 341, 342), assault or use of criminal force (ss 352, 355, 358), mischief (ss 426, 427), criminal trespass (s 447), house trespass (s 448), adultery (s 497), enticement (s 498), defamation, (s 500), insult intended to provoke breach of peace (s 508), criminal intimidation (s 506) are compoundable, without requiring permission or consent of the court. The victims of hurt, assault or damage have the authority to compound the offences. For instance, in a crime of enticement of a married woman, the husband of the woman can compound offences. A defamed person can compound the offence of defamation.

Offences, mentioned below, which are more serious than the above-referred offences are also compoundable with the permission of the court, according to s 320(2):

(a) offences of causing hurt by dangerous weapons (s 324),
(b) causing grievous hurt (s 325),
(c) wrongful confinement for three or more days (s 343),
(d) criminal breach of trust (s 407),
(e) cheating (ss 417–422),
(f) fraudulent execution of deed of transfer of property containing false statement (s 423),
(g) using false trade mark (s 482),
(h) counterfeiting a trade or property mark used by others (s 483),
(i) knowingly selling or exposing or possessing for sale or for manufacturing purpose, goods marked with a counterfeit property mark (s 486),
(j) marrying again during life time of husband or wife (s 494)
(k) defamation of President or Vice President or the Governor or a Minister (s 500).

Section 20 deals with the cognisance of cases by *lok adalat*, by prescribing the manner of references of disputes to *lok adalats* and enumerate the circumstances in which *lok adalats* could take cognisance of any case for compromise or settlement at its proceedings. The court, in relation to which the *lok adalat* is organised, may send the reference in pending suits, if the parties request the court to send the case to *lok adalat* for settlement. If only one of the parties wants the court to send the case to *lok adalat* for settlement, the court after hearing all parties, can do so if the court is

24 *Sindhi Das v Kalzar Debbarma* 2001 Cr LJ 20 (Gau).

prima facie satisfied that there are chances of settlement. Even in cases where the parties have not made any application for referring the case to the *lok adalat*, the court before which the case is pending can suo motu send the case to *lok adalat* if the court is satisfied that the matter is the appropriate one to be taken cognisance of by *lok adalat*. In addition to the references from the court, the *lok adalat* can receive references for settlement from the parties routed through the authority or committee organising the *lok adalat*.

Sub-sections (3) to (7) lays down the manner and procedure for *lok adalat* to deal with a case of which cognisance was taken by it in accordance with sub-ss (1) and (2) of s 20. When the matter is referred to the *lok adalat*, it is expected to look into the question whether all the parties to the suit are entering into settlement or compromise, because if all parties to the suit or dispute do not enter into compromise or settlement, then no award can be made on the basis of any compromise or settlement entered between some of the parties only to the suit. It is essential that the parties to the litigation should agree, or one of the parties makes an application to the court for referring it to the *lok adalat*, and if such court is satisfied prima facie that there are chances of settlement, or when the court is satisfied that the matter is an appropriate one to be taken cognisance by the *lok adalat*, the court shall refer the case to the *lok adalat*. A reasonable opportunity of being heard shall be given before referring case to the *lok adalat*. In a case referred to *lok adalat* by courts, if the *lok adalat* fails to make an award, the case is sent back to the referring court for further steps from the point at which the case was sent to *lok adalat*. If it succeeds in settling the case and making the award, the parties are granted the authenticated award, which they can execute in the same manner as a decree of the civil court. Where the *lok adalat* fails to record an award, the parties must seek remedies as available to them under the law.

Thus, the *lok adalat* can take cognisance of a dispute on transfer, when:

(a) both the parties make a joint application seeking transfer of case from the court to the *lok adalat*,
(b) all parties file a joint application indicating their intention to compromise,
(c) when some of the parties to the suit make a joint application while others do not, there is no jurisdiction to transfer the matter to the *lok adalat*. But the authority may, on receipt of such application from any person that any dispute or matter pending for a compromise needs to be determined by a *lok adalat*, refer it to *lok adalat*,

(d) application for reference of the case to *lok adalat* by either party to the dispute under s 20(1)(i)(b),
(e) court may, in exercise of its discretion, either allow or reject the application, though it is not under a legal obligation to refer the case to *lok adalat*,
(f) court has the power to refer a case, suo motu to *lok adalat* under cl (ii) of s 20(1), which power can be exercised if the court is satisfied that the matter is appropriate for the *lok adalat* to take cognisance of, the court is not required to investigate whether there are chances of settlement,
(g) court can refer to the *lok adalat* under s 89 of CPC,
(h) *lok adalat* cannot take cognisance without reference.

Section 20(1)(ii) enables the court to refer the case to the *lok adalat* on its own if it is satisfied that the matter is an appropriate one to be taken cognisance of by the *lok adalat*. The condition is not being asked by either one or two parties of the dispute, but that the court should satisfy itself that the case was appropriate to be referred to *lok adalat*. Before such reference, the court must give the parties reasonable opportunity of being heard. The court need not investigate thoroughly to establish the chances of settlement, but must explore the possibility of conciliation with the mediation of an independent agency, which has the expertise in that behalf and statutory backing for its decision. The purpose is conciliation. Generally, in matters concerning the family, it will be the bounden duty of the court to first explore the possibility of settlement, which is the intent of the Legal Services Authorities Act and other legislation. Sometimes, the litigants can be very adamant and not amenable to any conciliation either because of their emotional and rigid stand or lack of knowledge about the possible benefits of conciliation. They have to be educated about new perspectives of litigation and resolution of dispute in a different way rather than taking an adverse stand at adversarial litigation. Thus, initially the litigants must be educated about the alternatives and motivated to look forward for a friendly resolution so that *lok adalat* can be used as a forum for conciliating the dispute.

The disputes between family members can be persuaded to be amicably settled. Order XXXIIA of CPC, which is added by 1976 amendment, mandates such an effort to persuade the parties to explore a settlement before the ordeal of trial begins. Rule 1 thereof provides for different categories of disputes in which the court is duty bound to make efforts for settlement. Court is empowered to refer entire matter for settlement to *lok adalat*. The Legal Services Authorities Act and CPC provides for such a

conciliatory approach. It cannot be said that matter between brothers or sisters would not qualify for the definition of the family as found in r 6 of o XXXII-A. It is not strictly required by r 6 that the dispute should be between husband and wife only, for the court to resort to conciliation. Even disputes between brothers and sisters and or mother can also be dealt in a conciliatory manner. The Bombay High Court held that such a case would be an appropriate case to be referred to *lok adalat* and the objections by one of the respondents was rejected in *Pushpa Suresh Bhutada v Subhash Bansilal Maheswari*.[25]

With the insertion of s 89 by the Code of Civil Procedure (Amendment) Act 1999 providing for settlement of disputes outside the court, the *lok adalat* and other ADR assumed further legal significance and enhanced the role of courts in pursuing ADR.

The *lok adalat* cannot take any case otherwise than by a reference as per s 20. It should be either referred by the court in the manner provided under s 20(1) or when the case has been referred to it by the concerned authority or committee organising *lok adalat*, in the manner prescribed under s 20(2) and in no other manner.

The *lok adalat* has no power to receive a petition to resolve a dispute, independently. Generally, only the cases already pending can be referred to it.

Section 20(4) stated that every *lok adalat* shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.[26]

Section 20(5) also states that the *lok adalat* is not in a position to make any award or judge the matter. It has to explore the possibilities of settlement, which if found impossible, return the case to the court.

Utmost expedition and settlement are the mandatory words for the *lok adalat* ordained by s 20(4). It is a general and open provision leaving large scope for the *lok adalat* to do whatever possible to settle within the broad norms of natural principles of justice. This is the dynamic part of the activity. The success or failure of the effort is proved by this activity only. Every case and the characters involved in it can make the *lok adalat* resort to a course that would be most appropriate. There are no hard and fast rules and regulations for this dynamic function, because it is not amenable for such regulations or rules. It is for the people manning *lok adalat* to be innovative and to motivate the parties to reach viable solutions.

25 AIR 2002 Bom 126.

26 *Punjab National Bank v Laxmichand Rai* AIR 2000 MP 301.

Refund of Court Fee

21. Award of Lok adalat—(1) Every award of the *lok adalat* shall be deemed to be a decree of a Civil Court or, as the case may be an order of any other Court and where a compromise or settlement has been arrived at, by a *lok adalat* in a case referred to it under subsection (1) of Section 20, the Court fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870.

(2) Every award made by a *lok adalat* shall be final and binding on the parties to the dispute and no appeal shall lie to any court against the award.

Section 21 is a significant provision as it accords status of decree to the award of *lok adalat*, and legal sanctity for the proceedings before it. Every award of the *lok adalat* is deemed to be a decree of a civil court, and the court fee paid shall be refunded in the manner provided under the Court Fees Act. The abovementioned section provides that every such award shall be binding on all the parties to the dispute and no appeal shall lie to any court. Refund of court fee is an incentive for parties to negotiate for settlement. The *lok adalat* is vested with powers of civil court, with powers to summon and enforce the attendance of any witnesses, for discovery and production of any document, the reception of evidence in affidavits, to requisition any public record from any court or office, etc. It can specify its own procedure for determination of any dispute coming before it. All the proceedings before it shall be deemed to be judicial proceedings, and *lok adalat* shall be deemed to be a civil court as per s 22. All the officers and persons concerning the *lok adalat* and authorities are regarded as public servants as per s 23 which was substituted by the 1994 amendment. While conducting the proceedings, it acts as a conciliator and not as an arbitrator. It has to deal with the issues before it as differences, which have to be narrowed and resolved, and they cannot be treated as disputes for adjudication. *Lok adalat*'s emphatic role is to pursuade the parties to hammer out a solution and help in reconciling the contesting differences. As a conciliator it proposes its own terms of compromise to the parties, who have to arrive at a settlement. *Lok adalat* cannot decide the issues nor can it influence or force the parties to decide in a particular way. It encourages consensual arrangements. After arriving at a settlement, the statement of settlement or compromise is recorded. It is not possible for *lok adalat* to decide upon any issue not acceptable to any of the parties. Sub-section (5)

of s 20 makes it clear that where no award is made by the *lok adalat* on the ground that no compromise or settlement could be arrived at between the parties, the records of the case shall be returned to the court for adjudication. If successful, the award becomes authenticated and can be executed like a decree.

It cannot be said by implication that an appeal under s 96 of CPC would lie against the award of *lok adalat*, in view of the fact there is specific prohibition contained under s 21(2). Section 25 of the Legal Services Authorities Act provides a non-obstante clause and gives the Act an overriding effect on any other law. It overrides s 96 of CPC. When the *lok adalat* is conducted under an independent enactment and once an award is made by it, the right of appeal shall be governed by that enactment only, and thus the specific bar on appeal under s 21(2) would apply.[27] It is important to note that CPC also does not provide for an appeal against a consent decree under s 96(3) in order to ensure that the decree is final.

Furthermore, the award is binding on parties to the dispute who have compromised and does not bind those parties who did not enter into any kind of compromise.[28] In order to be effective, all the parties concerned and affected are supposed to enter the settlement to put an end to the litigation by a binding award with a value of decree.

Powers of Lok Adalat

According to section 22, *lok adalats* have been conferred power of the civil court under the CPC in respect of matters such as:

(a) summoning and enforcing the attendance of any witness and examining him on oath,
(b) discovery and production of any documents,
(c) reception of evidence on affidavits, (i) hearing of the suit and examination of witnesses, (ii) affidavits: power to order any point to be proved by affidavit as per o XIX of CPC,
(d) requisitioning of any public record or document or copy of such record or document from any court or office and such other matters as may be prescribed,
(e) court may send for papers from its own records or from other courts,
(f) *lok adalat* can specify its own procedure under s 22(2).

Lok adalat is conferred the status of civil court while trying the suit in

27 *Punjab National Bank v Laxmichand Rai* AIR 2000 MP 301.
28 *Kishan Rao v Bidar District Legal Services Authority* AIR 2001 Kant 407.

respect of the matter provided thereunder. Section 22(2) vests in *lok adalat* the power to specify its own procedure for the determination of any dispute before it. Sub-section (3) declares that all proceedings before the *lok adalat* shall be deemed to be judicial proceedings within the meaning of ss 193, 219, 228 of IPC and every *lok adalat* shall be deemed to be a civil court for the purposes of s 195 and ch XXVI of the Code of Criminal Procedure 1973. All relevant orders and rules of civil procedure, such as o 16, 11, 18, 19, are applicable for exercise of powers by *lok adalat*.

If any witness or party or any person gives false evidence to the *lok adalat*, such person can be prosecuted under s 193 of IPC, as s 22(3) equates it with a court of justice. Similarly, a public servant, in judicial proceedings, making a false report contrary to law under s 219 of IPC, or intentional insult or interruption to public servant sitting in judicial proceeding under s 228 of IPC, contempt of lawful authority of public servant for offences against public justice and offence relating to documents given in evidence under s 195 of Cr PC can be prosecuted if committed with reference to *lok adalat*.

Procedure to file complaints regarding the above referred offences, as provided under Cr PC can be followed for committing those offences under s 340, appeal under s 341, power to order costs under s 342, power of magistrate taking cognisance, under s 343, summary procedure for trial for giving false evidence under s 344 are applicable. Procedure prescribed under ss 345 to 352 in Cr PC for certain cases of contempt is applicable in cases before the *lok adalat* as well.

Power of Judicial Review

Award passed by *lok adalat* under s 21(2) of the Act, when all parties to the suit have not entered into a compromise or settlement, is bad and illegal for not being in accordance with the requirements of law under s 20 of the Act, and therefore such an award is not binding and is not effective. Further, where no notices have been given to all the parties to the suit when the matter was transferred to a *lok adalat*, the award as such, can be said to be illegal, null and void and inoperative to determine the dispute between the parties. Whether such an order be nullified by the high court under arts 226 or 227 of the Constitution. The high court held that the power of judicial review is implicit under the Constitution unless expressly excluded by a provision of statute. Discretion exercised by a statutory authority would be well within the reviewable discretion of the high court. This power is available to correct any order passed by a statutory authority.[29]

29 *Commr KSP Instruction (Education) Bangalore v Nirupadi Virbhadrappa Shiva* AIR 2001 Kant 504.

Permanent Lok Adalats

Lok adalat is a very useful experiment that succeeded in clearing long pending cases. That success is one of the main reasons for contemplating to transform occasional, specific or special *lok adalats* into a permanent institution. With the character of court-annexed alternative dispute resolution center, providing for consensus dispute resolution process, the Permanent Lok Adalats (PLA) would be a welcome step. The Legal Services Authority Act was amended in July 2002 and the Supreme Court found its earliest opportunity to hold it constitutionally valid. The Bar Council of India opposed this change and the structuring of the PLA. The Legal Services Authority Act was passed in 1987 to provide free legal services to weaker sections of society and to ensure that they are not denied justice by reason of economic or other disabilities. Under ss 19 to 22 of the NALSA Act, any matter pending before any court or tribunal may, if the parties make a joint application indicating their intention to compromise, be transferred to a *lok adalat*.

To tackle the baffling figures of pending cases, the judiciary and legislature are making all possible efforts and reforming the law. The Civil Procedure Code was drastically amended despite the fundamental objections raised by the legal community. The state is also promoting alternative dispute resolution mechanisms by all means. The changed CPC makes it an obligation of the courts to refer to ADR methods before it finally decides to adjudicate upon.[30]

Object of the Amendment 2002

Chapter VIA of The Legal Service Authorities (Amendment) Act 2002 provided for establishment of Permanent Lok Adalat (PLA) in the name of providing for 'pre-litigation conciliation and settlement'.

The amendment which inserted the new chapter VIA with the objects as provided under the Statement of Objects and Reasons:

> .. the system of *lok adalat*, which is an innovative mechanism for alternate dispute resolution, has proved effective for resolving disputes in a spirit of conciliation outside the courts.
>
> 2. However, the major drawback in the existing scheme of organisation of the *lok adalats* under Chapter VI of the said Act is that the system of *lok adalat* is mainly based on compromise or settlement between the parties. If the parties do not arrive at any compromise or settlement, the case is either returned to the court of law or the parties

30 Code of Civil Procedure 1908, s 89.

> are advised to seek remedy in a court of law. This causes unnecessary delay in the dispensation of justice. If *lok adalats* are given power to decide the cases on merits in case parties fail to arrive at any compromise or settlement this problem can be tackled to a great extent. Further, the cases which arise in relation to public utility services such as Mahanagar Telephone Nigam Limited, Delhi Vidyut Board, etc, need to be settled urgently so that people get justice without delay even at pre-litigation stage and thus most of the petty cases which ought not to go to the regular courts would be settled at the pre-litigation stage itself which would result in reducing the workload of the regular courts to a great extent. It is therefore, proposed to amend the Legal Services Authority Act 1987 to set up Permanent Lok Adalats for providing compulsory pre-litigation mechanism for conciliation and settlement of cases relating to public utility services.

Permanent Lok Adalat is headed by either former or sitting district judge or additional district judge or officer of rank higher than district judge. It will have two members having 'adequate experience in Public Utility Service'.

Salient Features of the Amendment

1. Providing for PLA consisting of a chairman who is or has been a district judge or additional district judge or has held judicial office higher in rank than that of the district judge and two other persons having adequate experience in public utility services;
2. The PLA shall exercise jurisdiction in respect of one or more public utility services such as transport services of passengers or goods by air, road and water, postal, telegraph or telephone services, supply of power, light or water to the public by any establishment, public conservancy or sanitation, services in hospitals or dispensaries and insurance services;
3. The pecuniary jurisdiction of the PLA shall be upto Rs 10 lakhs. It can be increased by the Central Government. It shall have no jurisdiction in respect of any matter relating to an offence not compoundable under any law;
4. It also provides that before the dispute is brought before any court, any party to the dispute may make an application to the PLA for settlement of the dispute;
5. Where it appears to the PLA that there exists elements of a settlement, which may be acceptable to the parties, it shall formulate the terms of a possible settlement and submit them to the parties for their observations and in case the parties reach an agreement, the PLA shall pass an award in terms thereof. In case parties to the dispute fail to reach an agreement, the PLA shall decide the dispute on merits; and

6. Every award made by the Permanent Lok Adalat shall be final and binding on all parties to thereto and shall be by a majority of persons constituting the Permanent Lok Adalat.

The judicial chairperson and two experts with experience in public utility services will hear the cases and decide the case by majority. Public Utility Service means any transport service, postal, telegraph, or telephone, power supply, public conservancy or sanitation, hospital or insurance service agency. These PLAs can take up any matter where the value of the property in dispute is upto Rs 10 lakhs. The PLA must conduct conciliation proceedings or decide a dispute on merit and be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound under the CPC and the Evidence Act.

Scope for Consensual Process

Before this Amendment the two disputants had to a institute joint application seeking resolution of dispute before *lok adalat*. Where only one of the parties made an application to the court to refer the case to *lok adalat*, the court could do so if it was satisfied that there were chances of settlement. Before such reference, the court was obliged to give a reasonable opportunity to the party, which did not agree to refer the dispute to *lok adalat*. Though the conciliation or mediation was a consensual process, the court could still impose the process based on its satisfaction that there was an element of settlement in the dispute.

However, after the amendment the permanent *lok adalat* can take up the case even if one of the disputants applies for settlement before it. Another major change brought in is that the resolution process need not be consensual. It can be imposed by the PLA. If the disputants could resolve the dispute by conciliation process, there is no problem. But when they fail to resolve in consensual process, the PLA has the authority to decide case on merits without applying CPC and Evidence Act, and impose it on them. The parties have no authority to take it in appeal. Which means, one of disputants can seek resolution by PLA, even if they fail to arrive at, he may have to accept the decision even when it was decided by majority of non-judiciary members and be satisfied with its decision which has the legal value of decree without having any scope for appeal.

Disputes worth Rs 10 lakhs concerning a public utility dispute have to be resolved, undoubtedly, either by ADR or adjudicatory processes in reasonable speed. If the public utility service like RTC seeks a dispute, which is worth Rs 10 lakhs, PLA decides to initiate conciliation proceedings. If that person and RTC fail to conciliate, PLA's non-judicial members decide

the case for RTC with 2-1 majority (even if judicial member who is also a chairman decides in favour of individual against RTC), the individual must treat it as a final settlement, and cannot go in appeal. Hence, s 21 (E) (1) makes the award of these PLAs final and no appeal lies.

Permanent Lok Adalat should have been provided a consensual process, or the adjudication by natural principles of justice, and appointed a bench of three members including one public utility service member with scope for justice and justice based majority, instead of such a unjustified composition of permanent *lok adalat* as provided by the amendment. It is surprising that this provision against natural principles of justice which may even lead to serious unconstitutionality was not effectively noticed.

Either Union or the state government can declare, in public interest, any service as public utility service. The moment such declaration is made, all the disputes in such a service, not exceeding Rs 10 lakhs, would be made to PLA. Another major objection raised by the advocates is that the very purpose of Legal Services Authority Act is to provide legal services to weaker sections of society, whereas the new amendment makes no such discrimination, and every litigant in dispute with any public utility service would get the 'benefit' of quick disposal. Every dispute except non-compoundable offences, and disputes beyond value of Rs 10 lakhs, every other civil or criminal case can be decided by PLA. There is no qualification prescribed for being appointed as the non-judicial members of PLA. Because of these reasons the Bar is opposing the amendment saying that the government has introduced innovative alternative justice redressal system forgetting the fact that litigants approach the courts for getting justice, and not for mere disposal of cases.

The Supreme Court has validated the amendment and the constitution of Permanent Lok Adalats as prescribed under the new amendment to LSA Act.

In a decision dated 28 October 2002 in *SN Pandey v Union of India*, the Supreme Court observed that a new chapter 6A had been inserted in the LSA (Amendment) Act relating to pre-litigation conciliation and settlement, and it was enacted as complementary to s 89 of amended CPC, which was implemented from July 2002. The court said:

> we have gone through the provisions of the said chapter which contemplate the setting up of Permanent Lok Adalats for deciding disputes in which public utility services is one of the matters involved. It is quite obvious that the effort of the legislature is to decrease the workload in the courts by resorting to alternative dispute resolution. Further the *Lok Adalat* is a mode of dispute resolution which has been in vogue since over two decades and hundreds of thousands of cases have been settled through this mechanism and is undisputedly a fast means of dispensation of justice.

CHAPTER 7

Negotiation

NEED FOR NEGOTIATION

Dispute management processes, which are participatory, responsive and concerned with preserving relationships, are needed as an alternative. According to WL Ury, JM Brett and SB Goldberg,[1] disputes can be resolved at three levels, namely, power level, rights level, and interests level. The power level reflects the 'might is right' phenomenon prevalent in early society, where the disputants engage in a contest of strength through political process, industrial action or armed conflict, and the result goes in favour of the powerful party. At the rights level, an authoritative person, decides the disputes on the rights premise and lawful base and the party who has law and social standards on its side wins. At the interests level, parties in conflict, either on their own or with varying degrees of assistance, negotiate their way to an agreed settlement. The alternative dispute resolution reflected by interests level is less costly, and more beneficial for disputants than a rights approach, which in turn is less costly, and more beneficial than a power approach.

Negotiation is the dominant element in the mediation process, and almost of every other dispute resolution processes. Negotiation, the important component of which is dialogue, is seen as one of the important legal methods of resolving conflicts at any level, especially when alternative dispute resolution methods are being applied in settling international disputes.

1 WL Ury, JM Brett and SB Goldberg, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict, 1986, pp 3–10.

Discussion: A Virtue and Essential Component of Indian Culture

Discussion is the virtue of a democratic life and symbol of civilian attitude. Debate or discussion delays the conflicts and inspires new thoughts, besides establishing communication. The culture of discussion or intellectual discourse is virtue of a developed society and encompasses methods of negotiation for resolution of conflicts.

The value of dialogue was well recognised in the traditional society as well. Lord Krishna in the battlefield of Kurukshetra, the great dialogue of Socrates, the inquiry of *Upanisadic Brigu*, the seeker of Nachiketa's celebrated dialogue with death, are some of traditional examples of dialogue culture. Sachidananda Mohanthy[2] laments that 'as modernity advances with its ruthless and unbridled individualism, dialogue increasingly takes a back seat. Modern society extols the cult of monologue'. The tradition of dialogue teaches us the value of mediation, and mediation ensures continuity in civilisational flow. Its absence can only generate violence and vandalism.

Meaning of Negotiation

Negotiation is primarily a common mean of securing one's expectations from others. It is a form of communication designed to reach an agreement when two or more parties have certain interests that are shared and certain others that are opposed.[3] Ginny Pearsom Bames says negotiation is a resolution of a disagreement using give and take within the context of a particular relationship. It involves sharing ideas and information and seeking a mutually acceptable outcome.[4]

The Pepperdine University of USA has developed an explanatory definition for 'negotiation':

> Negotiation is a communication process used to put deals together or resolve conflicts. It is a voluntary, non-binding process in which the parties control the outcome as well as the procedures by which they will make an agreement. Because most parties place very few limitations on the negotiation process, it allows for a wide range of possible solutions maximizing the possibility of joint gains.[5]

2 Sachidananda Mohanthy, 'The Culture of dialogue', *The Hindu*, 30 July 2001, p1.
3 Roger Fisher, William Ury and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In, 1992, p xiii.
4 Ginny Pearson Bames, Successful Negotiating, p 14.
5 Institute for Dispute Resolution, Pepperdine University (USA), Mediation: The art of facilitating the settlement.

M Anstey[6] explains core elements of negotiation as follows:

a) a verbal interactive process;
b) involving two or more parties;
c) who are seeking to reach agreement;
d) over a problem or conflict of interest between them; and
e) in which they seek, as far as possible, to preserve their interests, but to adjust their views and positions in the joint effort to achieve an agreement.

Essentials of Negotiation

From the perusal of the aforesaid definition, one can derive the following essential elements of Negotiation:

1. It is a communication process;
2. It resolves conflicts;
3. It is a voluntary exercise;
4. It is a non-binding process;
5. Parties retain control over outcome and procedure;
6. There is a possibility of achieving wide ranging solutions, and of maximising joint gains.

Phases of Negotiation

There are four phases of negotiation, and all negotiations are generally characterised by these four phases. They include: preparation, opening, bargaining, and closing. The preparation involves information collection. The opening phase of a negotiation involves both sides presenting their initial positions to one another. The third phase, bargaining, aims to narrow down the gap between the two initial positions and persuade the other party to accept less than they expected since their case is weaker. Lastly, the capitalisation of the work done reflects in closing phase.

Characteristics of Negotiation

By nature it is a voluntary communication process. Its purpose is to achieve a deal or agreement, or to resolve conflict. Its procedure is as evolved by the parties. The basis of negotiation is agreement, or consensual, or voluntary

6 M Anstey, Negotiating Conflict, 1991, pp 91–92.

understanding of the parties. The parties retain control over procedure and outcome. The solutions are neither fixed, nor limited, they are of wide range. And the result is possibility of maximising joint gains.

The principle adopted is that 'nothing is beyond negotiation'. One can pursue an established course or negotiate a change based on reasoned argument, and sustained efforts or offering concessions. Thus, negotiation operates as primary device to resolve any problem, conflict or court litigation. It may or may not be quick, depending upon the commitment and conditions of negotiated subject, but it is inexpensive, private, and less complicated than any other dispute resolution process.

However, there are certain prerequisites for negotiation. These can also be considered as its limitations. The process of negotiation works only when:

a) The parties are willing to co-operate and communicate to meet their goals;
b) The parties can mutually benefit or avoid harm by influencing each other;
c) The parties know that they have time constraints;
d) The parties realise that any other procedure will not produce desired outcome;
e) The parties can identify the issues required to be sorted out;
f) The parties also agree that their interests are not incompatible to each other;
g) The parties knew that it is preferable to participate in private co-operative process, rather than go through severe external constraints like loss of reputation, excessive cost, and possibility of adversarial decision.

Ranging from a domestic dispute, to commercial issues, political problems, to monetary difficulties, any issue is amenable to negotiation, save and except non-negotiable matters like life, security of nation, etc.

Negotiation, therefore, depends on the following factors:

1. Goals and interests of the parties;
2. Perceived interdependence between the parties;
3. History that exists between the parties;
4. Personalities of the people involved;
5. Persuasive ability of each party.

Negotiation Power Sources

According to Roger Fisher,[7] the six power sources that influence negotiation are:

7 Roger Fisher, Negotiation Power, 1983.

1. Skill, knowledge and preparation;
2. Viable alternatives;
3. Satisfying solutions;
4. Legitimacy/credibility;
5. Commitment;
6. Good Relationship.

P Gulliver has explained it in simple terms:

> As a first description, the picture of negotiation is one of two sets of people, the disputing parties or their representatives, facing each other across a table. They exchange information and opinion, engage in argument and discussion, and sooner or later propose offers and counter offers relating to the issues in dispute between them, seeking an outcome acceptable to both sides.[8]

Negotiation is generally a thinking process. A change in approach, or thinking process opens up new ideas and new solutions. Changed thinking is parallel thinking, or an alternative thinking. Traditional thinking in a rapidly changing world will fail, as a changing society needs a thinking, which accommodates the change.

Parallel thinking is a practical thinking system. In different ways it is already in use, and has been for some years. The essence of parallel thinking is to move forward from possibilities, in contrast to exercising judgment at every moment. Traditional thinking is also referred to as 'Socratic method' or 'traditional western thinking'.[9] The adversarial trials adopt Socratic method, which is 'an endless search for the truth through asking questions'. Proper thinking, and not judging, is essential for innovative initiatives in resolving the disputes and avoiding difficulties, especially making joint decisions instead of submitting to some authority to decide their dispute.

Parallel thinking is a broad term that covers the alternative thinking method that Edward de Bono proposed as a replacement for the traditional Socratic method. Parallel thinking simply means laying down ideas alongside each other. There is no clash, no dispute, no initial true/false judgment. There is instead, a genuine exploration of the subject, from which conclusions and decisions may then be derived through a 'design' process. At no point there is an attempt to disagree, to challenge or to dispute a point. Statements and ideas are put down in parallel, alongside each other. Everyone is focused in the same 'direction'.

8 P Gulliver, Disputes and Negotiations: A Cross-Cultural Perspective, 1979, pp 3–7.
9 Edward de Bono, Parallel Thinking—From Socratic to de Bono Thinking, 1994, p ix–x.

Joint Decision

In contrast to adjudication, the parties take the decision in a collaborative effort, and thus it is called a joint decision process. Each party begins with some differences, which is the origin of dispute, but at some point their communication is to take them to a converging point. Either both parties, or at least one party has to make a conciliatory move, and reach a compromise. A party may either walk into other's position, or there can be a joint or integrative creation of a new solution acceptable to both the parties. In the process of seeking a joint decision, the parties to dispute generally depend on each other. One influences or coerces the other. For doing so, it is inevitable to have exchange of information, stated facts, alleged controversies, preferred interpretations, arguments, appeals to technical requirements, challenges to the authorities, egoistic stands, demand for values, threats, promises, demands, offers, counter offers, etc. Pursuant to this exchange between parties, each understands the other's perspective, the deficiencies in their respective positions, strengths, attitudes, perceptions, etc. This helps in learning mutual requirements, and then reaching joint decisions.

Negotiation is bound to succeed if the parties are willing initially, and thereafter, continuously, interact, co-operate, collaborate, concede and consider the interests of other. Otherwise, negotiation merely becomes a delaying step, before initiating litigation. Negotiation is an independent process; independent of others, including any third party, or state, or court of law, or any powerful member of society or business or caste or association. Where parties prefer third party, the process assumes shape of mediation, and parties have to delegate some power to the mediator, though not the power to settle a dispute as that happens in arbitration. The mediator is expected to help swerving parties to come back on the track of resolution, and that is why mediation is called an 'assisted negotiation'. Despite the presence of a mediator, independence of the parties to a dispute remain unchanged and they could still be ultimate decision makers, if they join together.

The crucial distinction between adjudication and negotiation is that the former is a process leading to unilaterally imposed decision, by an authoritative third party, not by choice of the disputing parties, whereas, the latter is a process leading to a joint decision making by the disputing parties themselves as a result of culmination of an interactive process of information exchange and learning. Independence of process, choice of decision, integration of information and learning, no strict adherence to formal rules of law, are some of the vital factors which make negotiation process simple, while lack of which make adjudication a complex process.

Negotiation as Mixed Motive Exchange

Negotiation, being a complex communication process, is characterised as a mixed motive exchange. The motives of both the parties are mingled and are proposed to be exchanged. Interests are to be combined and addressed together. First the parties to the dispute define the problem and interests and sit together to resolve the dispute with an intent to maximise benefits. That is why in negotiation there is a process of mixed motive exchange.

The concept of mixed motive exchange, as basis of negotiation, can be explained with following propositions.

1) There are two options for bargainers to choose from—either to compete or cooperate. The competitive bargaining may be required to avoid exploitation, while the method of cooperation is needed to maintain relationships. If the bargainers consider avoidance of exploitation as the most important priority, then they may begin with the competitive attitude. However, if they consider that good relationships are essential to build long-term contracts and business along with peace, the cooperative attitude alone is preferred.
2) The competitive negotiator may require or drive for an individual win, the existing value is claimed here by the parties.
3) The cooperative bargainer is different. He prefers joint gain, in addition to existing value, an additional value is created in cooperation.

Power of Control

One of the most important elements in bilateral mode of decision-making is that control over the outcome lies with the parties themselves, which is then informed only to those concerned and not to others. Power plays a major role in negotiation. In the context of imbalance of power, the weaker party has to give in to the stronger party. But what has to be understood is that negotiation is not just 'bargaining' alone. Bargaining could be one essential component of the process, but that itself is not negotiation. In a dispute bargaining coupled with, or based on, the information received, perceptions formed, options studied and conclusions reached, etc, constitutes the wide spectrum of negotiation.

Negotiation as a Compromise

Negotiation may lead to a compromise, but it cannot be equated with a

compromise. Often in a compromise neither party may get what they desire. However, the scope of negotiation is wider and deeper in comparison with the limited field of compromise. Compromise is the mid-point between extreme positions and can lead to an outcome where neither party to the dispute is satisfied. Compromise may result when both the parties, under pressure or urgency, decide to end the dispute and accept the solution, which otherwise may not have been acceptable. It could be that negotiation that precedes a compromise may not be as comprehensive or intensive, as it should be. Good negotiators aim at collaboration, in which both parties pool their resources to solve a problem to the best of their advantage. It is much better than a compromise, because it involves a positive effort to enhance joint gains.

Two areas where effective negotiation process takes place are politics and diplomacy. Even amidst adverse and conflicting situations, effective politicians can bring out workable solutions, which may be temporary and may also be termed as opportunistic. Compromise is just one of the by products of negotiation, whereas, there are several other fruitful results possible in negotiation, if used effectively.

The Egypt-Israel Peace Treaty, negotiated between Egyptian President Sadat and Prime Minister Begin facilitated by American President Carter, is an example of going beyond a compromise. Egypt wanted the entire territory of Sinai occupied by Israel during the six day war of 1967. Israel wanted to retain some of the Sinai territory. When the underlying interests of both the parties were closely examined, it was found that Egypt's interest was in retaining its sovereignty over Sinai, while Israel's underlying interest was to ensure that Egypt's armies were not poised near the Israel border. Having discovered the underlying interests, the solution proposed by America was for Israel to hand over the entire Sinai territory to Egypt on the condition that Egypt would keep a substantial portion of Sinai as a de-militarised zone. This solution completely met the needs of both the parties, while the solution proposed earlier might have led to a war between the two.[10]

However, the negotiation process is completely individualised and depends upon the attitude of the party to the dispute or any other matter that has been brought before the negotiating table. It can be said that negotiation is one of the best resolution processes.

10 Roger Fisher, William Ury and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In, 1992, p 42.

Negotiation as an Exchange of Information

Negotiation encompasses any exchange of information made by two or more parties in search of an agreement to do or refrain from doing something. Negotiation occurs when suggestions, proposals, solutions, offers, counter-offers, concessions, positions or arguments are shared.[11]

In a dynamic society deal making and dispute resolution negotiations are needed at every step in almost all contexts. For eg, a company and a trade union may negotiate to reach a new labour management contract and try to end a strike or lock out. Negotiation is not circumscribed by any hyper technical procedural rules, strict evidence statutes dwelling on admissibility, relevance and acceptability of each piece of information, and accepted notions of behaviour that generally govern litigation and are often the cause of delays. This makes the process of negotiation hassle free. However, litigation as a system is still required for sound administration, but it is suitable only in those cases where ascertainment of rights amidst contentious claims are involved and interpretation of law is expected, while all other personal, emotional, family related and commercial disputes can be easily settled with a creative outlook and innovative approach towards the conflict.

Communication

In any dispute the parties often fall out with each other and snap communications at the first instance which often aggravates the problem further. As an alternative to court battle, the parties can try to talk to each other and make an attempt to end the conflict in an amicable manner. First step in that direction could be towards establishing communication between the parties. They vary from one culture to another.

Essential Skills

To have a favourable outcome in a negotiation or take the other party to a consensual situation, communication between the two disputing parties is important. The party has to state the case in an appropriate manner, organise facts well, control the timing and place of the talks, identify and assess the needs of the other party properly and reconcile them with one's own interests, and finally find a mutually convenient way of fulfilling both. Everything is negotiable and the goal is to reach a favourable conclusion.

11 Don Peters, Negotiation Theory and Skills: An introduction for Teachers and Students, Clinical Legal Education, 1998, p 117.

Essential skills that a negotiator requires can be concretised into the following:

a) Ability to prepare and to plan;
b) Set objectives and assess them constantly;
c) Research and collect details;
d) Devise appropriate concessions;
e) Perform under pressure;
f) Be sensitive to the opposite parties needs.

For all these skills good negotiators should have effective communication skills, which is the central issue in negotiation. That means the communicator should have complete control and use it as the occasion demands.

A good negotiator should know his subject intimately. Negotiation is a combination of certain skills, and continuous practice of those skills.

Do's

The do's for the negotiator are as follows:

a) Be aware of what solution is required for the dispute.
b) Check assumptions-are they wrong?
c) Stick to facts, research and collect data.
d) Define the issues concretely and decide position.
e) Determine opponent's needs and then determine the strategy.

How to Make Concessions

Though negotiation means series of concessions and mutual respect of interests there is a method for making those concessions. They are:

a) To take a conciliatory stance eventually, commencement rather than the at start of the negotiation process;
b) Restrict concessions given to the opponent;
c) Avoid making frequent concessions unless it is absolutely necessary;
d) To maintain a distance with the parties;
e) Retain sufficient ground for a final commitment.

Tactics used by Negotiator

The whole success of negotiation depends upon the skill of the negotiator to adopt appropriate strategies, tackle the other party's interests, etc. A skilled negotiator constantly improves upon his strategies. A good negotiator should be able to plan the course of negotiation and visualise the end result and at the same time anticipate the moves of the opponent.

Thus a good negotiator would be one who is an effective communicator

and combines the skills of comprehending the whole problem as well as including the interests of the opponent. However, the course that an effective negotiator needs to take varies from culture to culture, issue to issue and person to person.

Right Place and Environment

The negotiator has to choose the right environment to hold a negotiation.

Power and Leverage

Negotiation process involves creating confidence in the parties at every stage. A good negotiator has to ensure that he not only looks at what is being said expressly but what is being indicated via facial expressions, body language, and intonation to know what the other communicator really means. It means gaining an edge over opponent, which can be done by more information and data.

Negotiation-Dialogue

Dialogue is an important component of negotiation. In the process of dialogue there will be a major aspect, which is called the 'MINIMAX'[12] the interpolation of minimum and maximum objectives of two sides. It begins with non-binding voluntary communication process. This involves that the parties should be willing to cooperate first and then reach binding agreements on friendly terms. Throughout the process, the dialogue continues to be instrumental in reaching a solution and the willingness of parties to cooperate is the foundation of that dialogue.

Competing, accommodating, collaborating and compromising are the other tactics that follow the initiative generated by flexibility.

Information, a Dynamic Necessity

Whatever may be the style or strategy, negotiation being primarily a communication process, finding relevant information, collecting it and sending it are the most important aspects. It involves providing proposals, options or solutions for other parties considerations. In adversarial positions or concessions, or unilateral problem solving disclosures or persuasive disclosure, the information methods count the most.

Questioning as a tool

For getting the information the negotiator may have to adopt effective questioning methods and be an active listener.

12 Term coined by Institute for Dispute Resolution, Pepperdine University (USA), Mediation: The Art of Facilitating Settlement.

Do you guard or disclose?

Another consideration that is important is whether to retain the information so collected as confidential or to disclose it. Sensitive information needs to be guarded, and the decision to disclose, to a very large extent, depends on the dynamics of the situation.

Operating Strategies

Following are some of the operating strategies:

a) Breaking the impasse is the first operative strategy. Therefore, the first operative strategy is one of cooperation;
b) Retaliation;
c) Reach a compromise;
d) Clarity and Consistency.

Negotiation Styles

There are different styles of negotiation. Style of negotiation is also a strategy. In some occasions the style reflects the attitude of the party and an experienced negotiator can guess the result from such a conduct of the party as becomes evident by the 'style'. Negotiation style is reflected in communication skills, interpersonal behaviour of negotiators, language, voice tones, choices, listening behaviour, non-verbal gestures and judgments.

Cooperative Style

Negotiators adopting a cooperative style are mutually respectful in their choice of language, place, listening and non verbal interaction and they prefer positive interactions which promotes understanding and a culture of working together.

Competitive Style

This style, in contrast, attacks others, seeks to create coercive or tense interpersonal dynamics, uses aggressive language, listening and non-verbal actions and prefers to unnerve or coerce others. It seeks substantive concessions for maintaining relationships and wants to induce emotional reactions. It also tend to create tension, distrust which may lead to retaliatory actions, hostility, and even result in deadlock.

Five Kinds of Approaches to Negotiation

The attitudes of negotiator were classified into five categories by the Pepperdine University Institute of Dispute Resolution. This classification explains the possible ways of approach and their consequences in a very imaginative manner. The five attitudes are:

a) Avoiding;

b) Accommodating;
c) Competing;
d) Compromising; and
e) Collaborating.

M Anstey[13] explains five approaches to negotiation in following terms:

a) Concessional;
b) Problem-solving;
c) Distributive;
d) Avoidance; and
e) Positional.

Approaches to Negotiation

There is a definite link between the purposes and strategies of negotiation. The negotiator should keep in mind the purpose and aims of his effort so that he adopts an appropriate strategy. However, there is no strict rule or requirement as to a particular form of strategy to win over the other party depending upon a fixed purpose. Generally the disputants are expected to protect their relationships. If that is the aim of negotiation, the disputants have to place a high value for retaining the relationship. The other contradistinctive extreme position is securing the fulfillment of his own interests at the cost of losing the relationship. Disputants who give more value for justice, issues and own interests may have to sacrifice the relationship. Valuing the relationship, placing importance to compassion towards others and positively responding to the other's interests may sound as ideal situations and also may not be preferred by any of the parties. If anyone chooses to have these aspects in priority, their strategy would be to accommodate and collaborate, rather than avoiding or competing. Though compromise signifies the mid-path, it is not always ideal.

13 M Anstey, Negotiating Conflict: Insights and Skills for Negotiators and Peacemakers, 1991, p 113.

The figure below represent the approaches and their effect in both adversarial and cooperative strategies, suggested by Edward de Bono.[14]

Figure 7.1

Adversarial

Cooperative

According to Anstey, avoidance is said to be 'inaction' where there is no win situation at all, and persons who prefer inaction do not mind losing. Yielding to the interests of the other party is another approach where negotiator allows the other party to win. In negotiation compromise is the midpoint wherein each party wins as well as loses. Anstey stated that problem-solving approach to negotiation alone provides a win-win situation, facilitating both the parties receive beneficial results. Positional bargaining is also known as adversarial negotiation, competitive bargaining or distributive bargaining.

1) Avoidance.

For some, dispute is a risk to be avoided under any circumstances. The negotiator who avoids conflict loses his claim for value in preference to maintaining valuable relationships, he positively responds to the interests

14 Reprinted from Edward de Bono's, 'Parallel Thinking from Socratic to de Bono Thinking' with the permission of the McQuaig Group Inc, copyright 1994. All right reserved.

and concerns of the opposite party. Thus the disputant is not assertive in such a case. He is also not interested in cooperating with the other. He neither pursues his interest nor the interests of the other. In this process issues are not at all addressed, they are either ignored or postponed or the party simply withdraws from the conflict. This approach is adopted by people who want to avoid risks.

2) Accommodator

The disputant who decides to sacrifice his interests in favour of the other party is called accommodator. He does not assert like the avoiding disputant but is cooperative.

3) Competitor

As negotiation is a mixture of competing interests, the party in dispute who wants to protect his interest through negotiated means is called competitor. A competing negotiator is opposed to an accommodating negotiator. He always ascertains his rights and interests at the cost of that of the opponent. He exerts all means for achieving his purpose even at the cost of the other's interests, rights and benefits.

4) Compromiser

A negotiator who has a compromising nature is interested in finding out some sort of solution. The compromiser is placed 'somewhere between assertive and cooperative' parties. He values expediency and may be willing to accept partial solutions so long as both sides are at least minimally satisfied. This often results in splitting the differences, exchanging concessions or seeking middle ground rather than spending time and effort necessary to discover solutions that better meet the needs of all sides. In the order of preference, he is placed in the middle. This indicates that the negotiator is at times competitor, works also as accommodator, collaborates to some extent and then avoids the dispute at a particular point of time. He equally values issues, justice and his own interests, placing importance to the response to other's interests. He is in the middle point of every kind of negotiating strategy and mostly successful as he imbibes in himself every kind of strategic negotiating quality. The compromise, as such, reflects a weak settlement, but viewed from a different angle, it operates as a successful measure when every other method fails.

5) The Collaborator

Collaboration is the most useful strategy. Collaboration leads to a real

win-win situation for both the parties. The Pepperdine University accorded collaboration, as the most successful among all strategies. Collaborator is one who gives as much importance to the issue and his own interests as that of the other. How can all these interests work together? Can they be addressed together at least? It may seem impossible to reconcile all the seemingly conflicting interests, however creative thinking and constructive effort may make collaboration possible. During discussion and solution, solutions may emerge that fully satisfy both the parties.

The collaborator works with the opposite party to find ways by which both parties can achieve their goals. In pursuance of these goals one has to look beyond the issues and limitations within which generally every negotiator works. They have to brainstorm new ways. This strategy requires a lot of hard work, exercise, patience, deep insight and creative thinking to solve the problems in an unusual way where gains are improved beyond forseen results.

The Summary of Five Approaches

The comparative importance and potentiality of each strategy can be finally summed up in the words of Pepperdine Institute, as:

> Thus, the greater a disputant values the issues being bargained, the more likely that party will be perceived as competing rather than avoiding. Similarly, the more value a party places on the disputant's relationship, the more likely that party will be perceived as accommodating. The disputant who places moderate value on both the issues and the party's relationship will likely be perceived as compromising. Finally, the disputant that places a high value on both the issues and the relationship may be described as collaborating.

Though the above five categories explain the possible attitudes that confront the parties in dispute, the strategy required for negotiation is a 'problem solving strategy'. Any dispute management is aimed at resolving the dispute. Disposal of the dispute is different from solving a problem. Negotiation or any other kind of dispute management might put an end to the dispute and satisfy the party. But resolving the problem peacefully, in a constructive manner, that works out to be more beneficial than any other method of resolution is called 'problem solving'. The problem solving negotiation strategy signifies and reflects the positive purpose of the entire process of negotiation.

Positional bargaining is the traditional approach to negotiation. In this method parties make extreme claims at the start of the dispute resolution process and try to persuade, coerce or trick the other side to move closer to

their initial position. Every day transactions such as buying a car or making an insurance claim involve positional bargaining. The parties generally move from their initial and subsequent positions in order to find a compromise. H Raiffa referred this to as the 'negotiation dance'.[15] Positional bargaining is also known as adversarial negotiation, competitive bargaining or distributive bargaining.

Thus the discussion so far culminates into the following conditions, which are necessary for negotiation:

1. Finding some medium of communication to facilitate exchange or flow of information between parties, which was otherwise, totally disrupted, though the information exchanged may not be acceptable mutually.
2. Parties must successfully communicate to each other their goals, perception of goals, contemplated solutions and expectations.
3. In the light of the information made available, the parties must identify and evaluate the options available to them, leading to greater understanding resulting from an exchange of information which might reveal convergence or compatibility of goals, most probably leading to an agreeable solution, accommodating the interests of both the parties.

Model of Developmental Process

Several authors formulated a model of developmental process for negotiation which involved different phases that it has to pass through. As Gulliver explained, that it begins with a cyclical process comprising repetitive exchange of information between parties, its assessment, and resultant adjustments of expectations and preferences, and proceeds on to developmental process involving movement from the initiation of the dispute to its conclusion. The model comprises a series of overlapping sequences such as:

a) Search for an arena for negotiations;
b) Formulation of an agenda and working definitions of the issues in dispute;
c) Preliminary statements of demands and offers and the exploration of the dimensions and limits of the issues, with an emphasis on the differences between the parties;
d) Narrowing of differences, agreements on issues and the identification

15 H Raiffa, The Art and Science of Negotiation, 1998, pp 47–48.

of the more obdurate ones;
e) Preliminaries to final bargaining;
f) Final bargaining;
g) Ritual confirmation of the outcome and in many cases;
h) Implementation of the outcome or arrangements for that.[16]

An Arena

It indicates that parties need to find some common understanding and a medium of communication that will enable messages to pass backward and forward between them.

Agenda Formation

What they seek to achieve has to be first decided. In doing so, the parties will get a clear picture of their area of operation.

Exploring Limits

Parties decide boundaries of the field within which negotiations can be extended. This is crucial and complex, as all antagonism and conflicts are confronted and resolved. All demands and contradictory claims with their differences are expressed before they are articulated.

Narrowing Differences

From a whole lot of issues and conflicting claims, the basic areas of differences can be culled out. These reduces the differences and focuses the process on conflicts that have been identified and narrowed down on. The process of narrowing down differences solves many other small and peripheral problems which are removed from the area of negotiation and leave core issues for final resolution.

Bargaining

Core negotiation begins after all the above mentioned phases have taken place. Before the final bargaining is done, parties have to go through preliminary bargaining, prior to which each party fixes a frame of reference based on his perceptions and expectations.

16 P Gulliver, Disputes and Negotiations: A Cross-Cultural Perspective, Academic Press, New York and London, 1979, p 82.

Agreement

If the negotiation does not end in impasse or breakdown, an agreement is considered to be reached. A negotiation that leads to a proper agreement being reached at leads to re-establishment of ties between the disputing parties.

Strategies of Negotiation

Broadly there are two principal theories and strategic approaches to negotiation:

- competitive or positional negotiation;
- integrative or problem-solving or interest-based negotiation.

Positional bargaining or adversarial strategy is usually in vogue. In positional bargaining, the disputing parties find it difficult to come to an agreement.

A viable and advisable alternative to adversarial strategy is the interest-based bargaining or problem solving method. These two types of negotiation processes differ fundamentally in their approach and in the relative prospects for the stability of the agreement that is reached.

The first strategy is also called distributive or win/lose approach, hard negotiating or competitive strategy, where both parties try to reach a conclusion that is in their favour. The second is integrative approach.

A. Adversarial Strategy

This win-lose approach occurs when someone intends to achieve his objective at the expense of a perceived adversary.[17] The participants are viewed as adversaries and the goal is victory for each party. A good negotiator is hard on the problem and on the person. The negotiation strategy is to distrust others, dig-in the negotiator's bottom-line, demand one-sided gains as a price of agreement, search for single answers acceptable to the negotiator, insist on the negotiator's position, try to win the contest of will, apply pressure.[18] The negotiator takes extreme initial positions. He has limited authority for giving concessions. He uses various tactics including emotional maneuvers. He is reluctant in giving concessions, and generates maximum pressure on the other side.[19]

17 Herb Cohen, You Can Negotiate Anything, p 120.
18 Roger Fisher, William Ury and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In, 1992, p 9.
19 Herb Cohen, You can Negotiate Anything, p 120.

Wordplay mechanism in adversarial arguments is a method of tackling disputes.

Though there are a few deficiencies and limitations in adversarial strategy still it is not an unwanted strategy. A rigid style of negotiation is also needed in certain circumstances. Depending upon the attitude of others, the disputant may have to choose a different kind of strategy to match the need of the dispute. The purpose and characteristic of the adversarial strategy can be explained as follows:

a) Seeks to maximise gain without regard to how other participants fare, to win as much as can be won by agreement;
b) Convert all interests into tangible, measurable terms, typically money or units of production;
c) Conflict over limited resources.

(i) Making Adversarial Negotiation

The other method of dispute resolution is adversarial negotiation. To be adverse means being competitive. It has its own advantages and strategic applications. A disputant may make effective initial offers and stick to the stand taken by him in the beginning itself. Any number of offers or counter offers may be made only to justify his initial position and keep him in competition with others. The disputants try to justify the initial concessions announced and may not alter their frame of reference even under severe pressures of negotiation from the opposite direction. This method limits the options which are otherwise numerous and imaginative. The result may be both ways, it could be positive or totally out of reach for the competitive party. If settlement is not reached, it may lead to an impasse or there may be a failure to reach agreement.

In comparison to the problem solving approach, there may be several adverse effects of adversarial negotiation. It may possibly generate competition, there may be a very little room for genuine concern for others, and in order to justify the parties may communicate firmly, which could reflect inflexibility. In this process the party will try to conceal adverse information to manipulate perceptions and resort to deceptive concealment as well. The disputant will justify one's position and attack others. Where a disputant is on a strong and powerful ground, he would prefer the adversarial strategy to manipulate everything to his advantage. For instance, management of a factory may exploit their trade union,if the latter is weak, based on their need to protect employment. Or a strong trade union may exert unbearable pressure on a weak management to extract the necessary concessions. Collective bargaining is always powerful.

While problem-solving method is workable where the parties to a dispute stand in an equal footing and there is a level playing field, the adversarial

practice, in negotiation, reflects a greater imbalance of powers between the two opposite parties. A party assuming powerful controls will try to enhance benefits for him at the cost of the other party. In a problem solving method there is a possibility of enhancing the benefits of both the parties. Thus, whether it is adversarial or problem-solving approach, it would be, basically, a strategy and the success of such strategy depends upon the circumstances and peculiar situations of each and every dispute.

(ii) Retaliation as a Strategy

In an adversarial strategy and competitive style, the parties generally adopt a retaliative policy to gain a level playing field for taking the negotiation process on expected lines. This process is useful in negotiating substantive issues. But at the same time they may cause breakdown while bargaining issues. If there is no reciprocity, it results in one-sided understanding. In non-substantive issues, the competitive moves do not yield the required results and are thus not advisable.

(iii) Bargain to Distribute

Depending on approach, style and strategy, bargaining takes a definite shape. Bargaining for the value that is fixed and perceived as available is one level, making a sincere effort to enhance the value and aim at more value than what could be expected under ordinary circumstances is the next level. The former is considered as 'distributive' and the latter 'integrative' bargaining. As the expressions suggest, parties share what is available in the first, whereas, they collaborate in action, integrate the interests, increase the possible benefits, wait for right opportune moment and stake claim for enhanced benefits, in an imaginative manner in the later. If distributive bargaining reflects the haste of the parties to settle and close the dispute with whatever is available as benefit, the integrative bargain represents a cool or patient approach for maximising gains, which, of course, consume a lot of time. If it is claiming value it is distributive bargaining or if the purpose is creating value it is possible through integrative bargaining. Some negotiations can be completed by using distributive bargaining only while some are completed by integrative strategy and at times both strategies can be involved in tackling one issue.

If the issues are not substantive and parties do not attach great value to future cooperative relations, distributive bargaining is the best method. Whereas, for the parties who need further cooperation and have enough courage to continue to forge alliances with the opposite party, with a clear vision for future prospects, integrative bargain works out best.

It does not mean that a negotiator should assume that distributive

bargaining is bad and integrative is always preferable. Both are effective methods to be used at different levels for different purposes. Distributive is also known as competitive by nature of attitude of the parties who distribute the substance over which they are bargaining.

The opening offer is decisive and strategic in any kind of negotiation. It is a long drawn process, where patience and steady building of favourable situation matters the most. This process cannot be hurried because of urgency or for any other need.

Another significant rule of distributive bargaining is that 'the right offer at wrong time may become wrong offer'. Distributive bargaining encourages aggressive style, it also tends to motivate competitiveness, and adopt concealing information or other tactics to over power opposite party, which may harm relations between the disputing parties.

(iv) Significance of Opening Offer in Negotiation

As the opening offer is a significant phase that sets stage for ultimate settlement, the parties either try to make a calculated move or allow the other party to make it. In distributive bargaining, who opens first is also decided at the initial stages, as this decides the offer of the defendants' . An experienced negotiator can guess the result and its utility from the 'first' move of the other party. Then begins the settlement continuum, the range within which there is possibility of a solution. Each party has his own range of success within which he wants to locate his settlement, which is called 'reservation figure'. This denotes the range of each bargain according to his own estimate.

(v) Negotiation Dance

When series of concessions, offered by each party in the negotiation, reach reasonable proximity, with a hope of meeting point, the 'zone of agreement' begins. The 'zone of agreement' is a range where the possibility of agreement between two parties, according to their own estimates, is denoted. This can be well illustrated by a negotiation for purchase of a second hand car. Suppose the value of the car is Rs 2 lakhs and the seller wants to gain maximum Rs 2.15 lakhs while the purchaser is trying to get it for just Rs 1.75 lakhs. *A*, the seller, opens the offer with Rs 2.25 lakhs, which he knows, will not be accepted immediately. He has at least 1.90 lakhs or 2 lakhs as the minimum limit below which he does not want to go. *B*, the purchaser makes an opening offer of Rs 1.50 lakhs. In this negotiation dance, series of concessions come out, which means the seller will be cutting his price while the buyer raises the bid. The zone of agreement can be somewhere between Rs 1.70 lakhs and Rs 2.00 lakhs or around it. Even

after reaching a decisive stage of agreeing on wider 'agreeable zone' the negotiation may be delayed or postponed or failed.

Both may consider that a chance to open first would go to his advantage. Because, by doing so, this party puts the opponent in a higher range of proposals. He will set the 'zone of agreement'. He wants to have the first opportunity to affect expectations of opponent. Or sometimes, allowing, opposite party to open also works out as a strategy.

(vi) Zones of Assessment

According to assessment of the parties, the opening offer puts every 'solution' at a zone, which could be impossible zone breaking the process at initial level itself, or reasonable zone or negotiable zone, or zone of agreement etc. Thus, the opening offer may fall in different zones, depending upon its nature. The offers may be reasonable, credible or unfavourable. An offer in the zone of agreement means that it is acceptable to both the parties. The most unreasonable offer in the opening stage may end the negotiation at an unfavourable note.

(vii) Opening Offer Acts as Anchoring

A party enters negotiation zone with a frame of reference. The frame of reference is the psychologically settled area of decision. For negotiation to go on, there will be always an effort to change that frame of reference. Without altering the frame, there is no progress in the process of bargaining. Negotiator should affect the frame of reference of opponent by emphasising how the opponent will gain by settling. Creating or altering opponent's frame of reference is called anchoring or establishing a point to which the opponent is tied. Opening offer acts as an anchor. Good negotiator should know the frame of reference of opponent in which he is operating and ways to alter it.

Negotiation is a mind game and anchoring reflects mindset of one party with which he tries to read the mind of the other party. Then the strategy would be to have a very positive frame of reference and of course, the anchors are important tools to encourage settlement. The negotiator must continually monitor his own frame of reference as well as strategically reframe it to suit the changing frame of the opposite party. One must be ready to abandon discredited path, evaluate alternate paths in terms of future costs and not the past, and should never justify past actions.

(viii) Winner's Curse

Pepperdine University model[20] dealt with this situation with another

20 L Randolf Lowry, *Mediation*, Pepperdine University Institute for Dispute Resolution, Reading material of ICADR, 1995.

significant term denoting a common phase in bargaining negotiation—the winner's curse. It occurs when the opponent quickly accepts an offer. The person who made the offer could regret having made it and repents then fact that it had been accepted. Hence, before an offer is made the negotiator has to be aware of the consequences of its acceptance and then proceed. Negotiator should include all potential issues within a bargaining frame of reference. The linking issues results in multiple simultaneous distributive negotiations.

(ix) Tactics of Negotiation

Negotiation is a matter of strategy. The opening offer sets the course for strategic moves of each party. Manipulating an opponent's frame of reference is an example of a negotiating tactic that increases the success range. Bargaining theorists identified a wide variety of tactics, which are enumerated below.

One such interesting strategy is opening the deal with a big demand, ie, making an extreme opening offer, reflecting the tough stand with high expectation and indicating that nothing short would be acceptable. The party taking such a stand exhibits hostility and is intolerant to delay and is intimidating with a sense of urgency. The tough negotiator in his competitive moves sends the message if his offer is not accepted the other party would, forever, lose the opportunity to settle the issue, which is nothing but an ultimatum.

Another level of toughness is taking an aggressive stand and stall the entire process and withhold concessions offered and working till then. Even when he can finalise the deal, a negotiator tries to gain time to initiate a different strategy to avoid accepting, what is otherwise reasonable.

(x) Mind Game in Positional Bargaining

After understanding the impact of moves and counter moves, the negotiator may or may not continue the process till he feels that he achieved satisfactory result.

(xi) Merits and Drawbacks of Adverse Negotiation

Thus positional bargaining, that is adverse negotiation, has advantages as well as short comings. It is compatible with other competitive activities and does not require much preparation. Being an easy process coupled with the fact that outcome can be predicted, with some degree of accuracy, it can be adopted on a day to day bargaining. But it may overlook certain needs and interests which are not reflected in original claims of parties. The substantial issue, in positional bargaining, is usually money, it concentrates on distributing it, and there is less possibility of addressing

other concerns of the disputants. If positional bargaining is accompanied with threats and aggression, it may give rise to further conflicts and future relations of the disputing parties might get adversely affected, thus affecting the negotiation process. There is no surprise if such a situation leads to retaliations. It is also susceptible to such tactics as use of extravagant claims at the beginning of the negotiation process, and to other expressions of power, such as threats, etc.[21] This kind of negotiation may lead to short term victories and solutions, but where multiple issues and concerns conflict each other, the positional bargain has limited approach and provides restrictive options. If the dispute is about mere sharing of existing value, all strategies involving pressures are not necessary. There are several other interests involved in a dispute which have to be addressed in an integrative mechanism. Thus within the alternative approach to dispute resolution, the need for finding an alternative to positional bargaining was felt. This led to the usage of problem solving approach.

The court procedure in India, as well as in many other countries, is based on the adversarial system. This system motivates exploration of a subject. Because both parties are part of a debate, they indulge in thorough examination of the subject. In addition, the adversaries have to watch carefully what they are saying, for fear of being challenged. However, the problem with adversarial argument is that the motivation to explore the subject declines as that of winning the debate rises.

Edward de Bono[22] says:

> Argument freezes people into positions, and then they are imprisoned by those positions. Argument encourages cleverness at the expense of wisdom. It is very difficult to imagine a clever person arguing:
>
> 'You are right under those circumstances',
>
> 'That may well happen some of the time'
>
> 'That fits with the definition you hold'
>
> 'If you choose those values you are right'.
>
> Wisdom is more concerned with genuine exploration and has no need for the absolutes of hard-edged righteousness. If argument is so appalling a system—and I believe it is appalling—what can we do about it? In the matter of criticism, I suggested that it has a high value but that we should not be obsessed by it and should not feel that removing the bad is sufficient. In the matter of argument, I feel we should simply drop the method entirely, because it is not only a poor way of exploring a subject but also locks us into dangerous and unproductive polarities.
>
> Many developed countries ban cockfights and dogfights; I suggest we do the same with adversarial argument. So what are we going to put in the place of adversarial argument?

21 Boulle, Jones and Goldblatt, Mediation, Principles, Process, Practice, 1998, p 49.
22 Edward de Bono, Parallel Thinking, 1994, pp 34–35.

There have always been court systems in some countries that use the exploratory 'inquisitorial' method rather than the adversarial.

Saying so, Edward de Bono wanted adversarial mechanism to be substituted by parallel thinking.

Manipulative Approach of Competitive Strategy

Competitive negotiation strategy is, essentially, a manipulative approach designed to intimidate the other party to lose confidence in their own case and to accept the competitor's demands. This approach is characterised by the following features:

- High opening demands;
- Threats, tension and pressure;
- Exaggerating the facts;
- Rigid positions;
- Being inflexible;
- Desire to outmaneuver the other side; and
- Desire for clear victory.

For a competitive negotiator a good agreement is reached when the same is 'better than fair.'

General Assumptions

- There are certain assumptions, accepted in the course of practice the world over, that lie behind the competitive approach to negotiation. This 'distributive' world view includes the following assumptions: Negotiation is the division of limited resources;
- One side's gain is the others sides loss and;
- A deal today will not materially affect choices available tomorrow.

Problems Involved in the Competitive Approach

Generally the competitive negotiation tactics are effective in 'claiming' already defined values. But there are also certain problems as well. It may damage the negotiating relationship and it may also hamper the likelihood of reaching an agreement. The tough and hard strategies involved in competitive style may lead to the following disadvantages:

- Parties may make their stand rigid because of opponent's confrontationist approach;
- In the process of competition the scope for analysis of merits of dispute and relevant criteria for resolving issues will be reduced;
- Concentration on development of alternative solutions will be reduced;

- As the rigidity may lead to break down of negotiations, it is hard to predict the outcome of the competitive approach or to control the process;
- Competitors are generally blind to joint gains;
- Competitors threaten their future relations between parties; and
- Competitors are more likely to have impasse and increase costs.

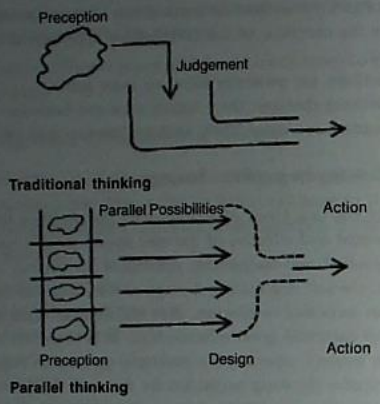
B. Problem Solving Negotiation Strategy

The second of the two kinds of strategies ie, the problem solving strategy, is more influential and effective of the new approaches to negotiation. It is also called interest-based bargaining, principled bargaining, or 'negotiating on the merits', the soft negotiating strategy or the accommodative approach. The aim is an amicable resolution, and the strategy adopted is to make concessions, to maintain good relationships. It is based on the concept of exploring the subject, opening up multiple options as suggested by the concept of parallel thinking explained by Edward de Bono. He says the possibility may be the most important word in thinking. It is the power of 'possibility' that gives rise to all technological and scientific progress, cultures and several other social evolutions. This is not easily achieved by the argument system.

One has to begin by the surmise that every problem can be solved by identifying the cause and then taking appropriate action to resolve it. However, when there are multiple causes, not all that can be identified, then alternative methods have to be evolved to find a solution constructively.

Perception leads to judgment and leads the parties to take action. This is the traditional approach to solving a problem. Studying different perceptions and multiple possibilities and having a design instead of judgment and then proceeding to act is an example of parallel thinking. This is graphically explained by Edward de Bono[23] as follows:

23 Reprinted from Edward de Bono's, 'Parallel Thinking from Socratic to de Bono Thinking' with the Precession of the McQuaig Group Inc, copyright 1994. All right reserved. Edward de Bono, Parallel Thinking, 1994, p 89.



The essential difference is that in the traditional method judgment is the key-thinking step. In parallel thinking 'exploration' is the key thinking operation.

Four Defining Aspects of Interest Based Model

a) Separating people from the problem—Negotiator has to take a principled stand on the substantial interests but must have an easy approach towards the people involved in it.
b) Parties focusing on the underlying needs: and interests than on positions of the people. Negotiator has to separate the interests from issues and concentrate on them.
c) Parties should consider wide range of options to address mutual interests.
d) Objective criteria and subjective wills should occur independently—Negotiator has to effectively evaluate potential solutions

Separation of People from Interests

Separation of issues or interests involves a complex exercise. Despite problems and controversies or differences with others, the disputing parties must learn to maintain working relations, which is possible only when individuals are separated from issues. A constructive and positive attitude towards opposite party creates this approach rather than emotional and retributive

attitude. For that, one should identify real interests, which are generally unstated.

Identification of Real Interests

The process of identifying interests is broad enough. Without discovering real interests one cannot proceed to negotiation.

Design Trading and Bridging Options

As negotiation is essentially an exchange of information and extension of concessions, the design trading and bridging options constitute another essential element.

Preparing List of Interests

After finding the interests of each party to the dispute it is important to prepare a list of interests.

Valuation of Interests

Negotiator has to evaluate the legitimate interests of the parties to further the bargain.

Solutions

There are multiple solutions out of which one has to find a fair one. The negotiator has to seek fair solutions that promote mutual gain.

Prevention of Coercive Dynamic

It will prevent coercive dynamic, where one has to give in to others, which undercuts durability of agreements.

As the process is basically intended to remove the problem by solving it, the problem solving strategy has to necessarily promote mutual gain.

Physical or Economic Interests

Physical interests such as food or shelter, or any other pecuniary interest on par with economic issues.

Emotional and Psychological Interests

Even moral aspects can be included in this category. Most of the times the disputes are complicated because of emotional issues wherein exactly no pecuniary interests are involved. 'If you are angry you will look at things in a different way from when you are pleased,' says Edward de Bono.[24]

[24] Edward de Bono, Parallel Thinking, 1994, p 42.

Unstated Interests

It is difficult to understand the hidden political interests and other interests including unstated ones.

Identify Issues-the four core Areas

- People

  Separate the people from problem.

- Interests

  Focus on interests, not positions.

- Options

  Generate a variety of possibilities before deciding what to do.

- Criteria

  Insist that the result be based on some objective standards.

Focus of Negotiation

A good negotiator should ensure that the focus of negotiation remains the substance. The negotiator should:

1. Recognise when the focus is shifting;
2. Deliberately steer back to substance;
3. Deal with problems.

Issues, Interests and Positions

Pepperdine model used three expressions, which are pertinent in negotiation. They are issues, positions and interests.

Issues are identifiable and concrete concerns, which are tangible and measurable. They usually set the agenda for negotiation. In any bargaining process all issues should be addressed before bargaining is complete.

Positions are parties' definable perspectives on the issue of negotiation. It is the stand taken by any party.

Interests are of many types, such as process interests, substantive interests, relationship interests or interests in principles. Bargaining on merits is possible if real interests are understood and superficial, legally defined, or emotional issues are separated.

Interests lead to position being defined and concretised.

Types of Interests

a) Process interests: these are defined as fair procedure acceptable to all parties.
b) The subject matter of dispute will be the other substantive interest, which relates to issues.
c) Relationship interests: Interests concerning future relationships between the dispiting parties.
d) Interests in principles: Another important area of interest is related to ethics, beliefs, morals and sentiments which have serious impact on agreements.
e) Hidden interests: Interests which are not explicitly stated.

Inquiry

It is the responsibility of the negotiator or the party to dispute to have a comprehensive inquiry to get to know the interests of all parties, which may reveal compatible interests.

The disputant-negotiator must be aware of these interests to generate fluid and flexible discussions to identify needs and redefine solutions.

Bridging

Once the disputing parties come to know the differences between them as a result of inquiry they are can bridge the same.

Negotiation depends upon the positive outlook and sincere efforts of the disputant-negotiators to achieve a consensual solution to produce joint gains.

Common Obstacles to Bridging

Negotiation can be a long drawn phenomenon as well as problematic. There are certain obstacles to the bridging process such as:

a) Premature criticism;
b) Premature closure;
c) Preoccupation with self-interest to the exclusion of interests of others;
d) Search for more options.

The negotiator must think of and consider options that have potential for mutual gain, and then deliberate over those multiple options and reach at a solution.

Methods for discovering more options are brainstorming, broadening the horizon, changing the frame of reference, identification of shared interests and looking for mutual gains, introducing more variables etc.[25] He has to compare, contrast, refine these solutions to reach realistic and mutually gainful outcomes. One of the best methods is to hypothesise outcomes, imaginable possibilities, alter frames of references, look at different vantage points and create new vantage points.

Develop new Options

New options develop out of new possibilities and the approach of people towards thinking about that possibility.

Sometimes it so happens that all the options discussed may not be useful for the parties and for the dispute before them. The parties have to develop new options so that every party gets some kind of share in the benefit of negotiation. Then, one has to re-alter potential agreements.

The negotiator has to:

a) Identify match shared and dovetailing interests;
b) Treat agreements as tentative and subject to improvement until the best is found;
c) Invent and develop options, evaluate them and reinvent options based on evaluations. Negotiator should think beyond narrow legal remedies to the imaginative use of resources and to incorporating future interests.
d) Subjective wills and Objective Criteria.

Criteria must be objective and subjective will must have no place. Negotiation should proceed independent of subjective wills of the parties and, wherever possible, evole in terms of objective criteria. Objective criteria could comprise market values, an expert opinion, standards in comparative industries, or common understanding in business. Because parties will not be interested in conceding the demands of the other party, but prefer to accept market needs, values and prevalent situations.

Concession Strategies

Negotiation is generally an offer of mutual concessions. Negotiation is called an art of knowing how to exchange concessions. Concession trading must be a strategic one and be taken up keeping in mind the series of

25 Matteck and Ehrenborg, How to be a Better Negotiator, p 130.

follow-on concessions. Best strategy would be to make few concessions in the beginning to reduce hostility. If the other side refuses to make any significant concessions then this may indicate that they are not negotiating in good faith. The size, timing and priority of concessions should be planned and in tune with the pace of negotiations. Concessions made under pressure will weaken the position of party.

One should identify a negative trend during the process of negotiation and avoid it. If negotiations are derailed one should explore the possibility of dealing with the deadlock. There are three ways of dealing with a negative trend or deadlock in a negotiation process.

- Defer the discussion for some time,
- Shift the focus,
- Trading a concession.

Dead lock or reaching a stage of impasse is common in any negotiation style, which may lead to parties breaking their communication and stalling the progress. Fractioning is the method to reach agreement on a contentious issue by breaking down the issue into smaller parts and trying to reach an agreement on the smaller parts.[26]

Best Alternative to Negotiated Arrangement (BATNA) and Worst Alternative to Negotiated Arrangement (WATNA)

A good negotiator should know the best and worst alternatives for the process of settlement he is striving to achieve. The Best Alternative to Negotiated Arrangement (BATNA) and the Worst Alternative to Negotiated Arrangement (WATNA) are significant points a negotiator is supposed to find out and discuss at every level of discussion. If not discussing, he should be conscious about it. Such an understanding will guide him properly to steer through the difficulties. BATNA and WATNA are best methods of evaluating the outcome.

BATNA takes account of risk factors involved in examining the present option, which include costs, time, relations, etc. If BATNA is available somewhere, the party has to discontinue the process of negotiation. If all other options are established to be WATNA, negotiated settlement is best to pursue. BATNA examination offers a right thinking on adopted formula in comparison with better alternative if any.

Enhancing the Choice of Settlement in Integrative Bargaining

As adversarial negotiation is aggressive and competitive, the integrative

26 Mattock and Ehrenborg, How to Be a Better Negotiator, p 65.

method is cooperative and collaborative leaving a lot of scope for problem solving techniques. When options are limited, scope is exhausted, strategies have failed, negotiation may either fail or fall apart. Or in the alternative may try to integrate all resources and enhance the chances of resolution in a different and imaginative manner. All the above strategies are only to share the existing value.

The best alternative choice is to enhance the choices of settlement, inculcate newness in resolution, expansion of the value, which was being negotiated to distribute with great effort. Every negotiation is a mixed motive exchange either in cooperation or competition, some negotiations can be completed using only distributive strategies. But there are integrative methods. Most negotiations involve elements of both strategies, ie, distributive and integrative.

Integrative method is described as cooperative or problem solving or principled or collaborative or integrative distributive strategy. Unlike competitive dispute bargaining, the integrative distributive strategy does not assume the value as fixed. In distributive dispute strategy, one loses while other wins it. While in the integrative distributive strategy resolvers seek ways to see both sides gain with little cost to other side.

Benefits of Integrative Compared to Distributive Bargaining

Integrative bargaining, if it results in success, provides innumerable benefits. Integrative bargaining has many benefits over distributive bargaining.

First, it is more efficient; in distributive bargaining, parties take extreme positions, whereas in creative process, the negotiators, by focusing on interests avoid loss.

Second, it results in better agreements. Third, it preserves good relations between parties; an efficient bargainer can clear many hurdles in negotiating agreements quickly.

Fourth, it reduces the danger that agreement will be repudiated. Fifth, it will result in improved organisational effectiveness.

The strengths of problem solving approach are, it deals with actual conflict and tries to find needs and interests of the parties, it is efficient as multiple options are brought forward with full concern for future interests, preserves relationships and provides legitimate standards for evaluating and accepting options of solution.

There are many deficiencies as well. It is based on a presumption that both parties would have a creative approach towards the problem, positive attitude towards interests of all, which may not be the reality. Some parties use it as a strategy to satisfy their ulterior motives, like exacting revenge, to

secure more information, etc. It proceeds on an assumption that both parties are equal in dispute, which is not always correct.

Depending on the nature of circumstances, facts of dispute, interests of parties and their strengths, integrative bargaining has to be used as a strategy. If this does not happen the parties have to look for alternative strategies, including adversarial approach.

It is not proper to assume that a particular strategy is always fine and universally applicable. Integrative bargaining is not always good, and adversarial cannot be considered bad for all purposes.

However, the interest based negotiation and mediation is discussed in almost every alternative dispue resolution interested community. New Zealand Law Society preferred it as facilitative and some others have called it therapeutic model or evaluative model and appreciated it as one of the positive and constructive methods of approach for mediation.

Approach and Personality

There may be some correlation between negotiation approaches and personality style, but the two theories of negotiation do not necessarily go together.

Best Negotiators with Both the Skills

Situations differ and skills must also differ. The best negotiator may need to possess both the skills to meet any situation. The most effective negotiators will have a wide array of negotiation skills, both competitive and problem-solving, and will effectively mix and match these approaches depending upon what the negotiator believes will work best with a particular 'negotiating partner' depending on the specific issue being negotiated and depending on the nature of the overall negotiating relationship. The strategy will not be the same for one-time transaction and continuing relations.

Dispute Negotiation and Transactional Negotiation

The negotiations may be divided into two types:

1. Dispute negotiation, focused on resolving past issues; and
2. Transaction negotiation, focused on reaching agreement for the future.

While it is often helpful to appreciate this difference between dispute negotiation and transaction negotiation, it is also beneficial to appreciate that many negotiation situations involve the resolution of both past issues as well as planning future relations.

on principled negotiation in a way that is most acceptable to the competitor. The principled negotiator might ask about the competitor's concerns, show that he or she understands these concerns, and, in return, ask the competitor to recognise all concerns. According to Fisher and Ury after all interests have been considered, the competitive negotiator should consider all options and think in terms of objective criteria for decision making.

Negotiation Power

Negotiation power can be defined as 'the ability of the negotiator to influence the behaviour of another'. Commentators have observed a variety of aspects and qualities of negotiation power. A number of aspects and qualities of negotiating power that have been identified are:

1. Negotiating power is relative between the parties,
2. Negotiating power changes over time,
3. Negotiating power is always limited,
4. Negotiating power can be either real or apparent,
5. The exercise of negotiation power has both benefits and costs,
6. Negotiating power relates to the ability to punish or benefit,
7. Negotiating power is enhanced by legal support, personal knowledge, skill, resources and hard work,
8. Negotiating power is increased by the ability to endure uncertainty and by commitment,
9. Negotiating power is enhanced by a good negotiating relationship,
10. Negotiating power depends on the perceived BATNA, and
11. Negotiating power exists to the extent that it is accepted,
12. Overall Problem-Solving Negotiation Structure.

As an overall model for effective problem-solving negotiation, the following can be taken into consideration:

1. Informed consent as to process (the process is always negotiable),
2. Sharing perspectives (separate relational issues from substantive issues),
3. Remember the common ground (common interests, interdependence and easy points of agreement),
4. Establish a problem-solving agenda (questions seeking solutions: 'How can we best...?' or 'What is the best way for us to...?'),
5. Identify desired information and documentation clarify desired outcomes, interests and positive intentions develop options (develop options based upon outcomes, interests and positive intentions),
6. Select from options (easy agreements and package deals),

7. Integration and finalisation (Any possible improvement? What else needs to be done?).

Impediments to Settlement

Achieving solutions is always confronted with several impediments. To find out an amicable solution with enhanced satisfaction to each and every disputant is a complex exercise and can have a lot of impediments. Negotiations may be unsuccessful because of the following reasons:

(1) **Communication Failure:** A skilled person may be needed to restore the broken communication.
(2) **Poor Negotiating Skills:** Even in this occasion parties need the assistance from a person having a neutral approach to couch skills; additional training may also be needed.
(3) **Lack of Information:** Accurate information helps to overcome obstacles actual or illusory.
(4) **Differing legal Perspectives:** The parties differ not on issues but on their understanding of the problem.
(5) **Inappropriate Representatives:** In case of a personality conflict, that cause failures, the remedy is to change representatives.
(6) **Need of Authoritative Ruling:** where ever precedent set by an authority is required, there negotiation may not work, hence, it should be avoided.
(7) **Negotiator's Reluctance to Agree:** Negotiator may be reluctant to reveal a bargaining position, or party might have made unreasonable demands.
(8) **Unwillingness to Concede:** if negotiator feels that he would lose negotiation, then he might defer it or extend it.

How to turn a favourable situation into a win?

To achieve a win-win situation effective negotiation is the only means. The author of 'Art of Negotiation', and later known as the 'Father of Negotiation Training' Gerald Nierenberg and his wife Juliet researched into this aspect of negotiation for several years and found a solution.

In the early 1960's, a successful New York attorney, Gerards Nierenberg, realised that 'negotiating ability' was one of the key element resulting in his success. He conducted a research in which he found that society looked upon and expected a lawyer to be a good negotiator, when in reality, lawyers had absolutely no training in that process. In 1966 he created an educational non-profit institute in New York named 'Negotiation Institute Incorporated'. By 1968, he completed his research published his first book 'Art of Negotiation'. For the first time, he had identified and structured the

negotiating process allowing it to effectively practiced and taught. His efforts were recognised when Forbes magazine gave the title of 'The Father of Negotiating Training' to Gerard Nierenberg.[28]

Two Roles of Negotiation

Negotiation has two roles; one as an independent method of dispute resolution; two as an important component of other dispute resolution processes.

It has been primarily a dispute resolution process that a party can straight away adopt to address their problems. Negotiation is one of the favoured problem solving methods that can be adopted in case of a dispute.

It could be without assistance or with support from experts. It could be based on a primary assessment or evaluation or a well considered opinion. Assisted negotiation becomes mediation.

Influencing Factors

a) Negotiator: Negotiation process is influenced by various factors. The first such factor is the communication skill and ability of negotiator, his character and credibility. Another ability, which is a major factor in negotiation, is that the negotiator should keep control over the process. A negotiator should review the progress of the negotiation process, time and again and endeavor to build bridges between the parties. He should try to create a positive attitude towards agreement. A great deal of skill and experience are necessary to control the entire process of negotiation, which can be gained by keen observation of strategies adopted by other parties, past experience and studying the best negotiation processes in the contemporary world.

b) Parties: Parties are a major influence on the negotiation process. The parties, their interests and the way they react and respond decide the process.

c) Communication: A good negotiation process depends on effective communication. Parties to a dispute have their own mindset when they come to a negotiating table. Such communications, if biased, can become impediments and halt the progress.

Negotiation is a process of sorting misunderstandings and of paving the way for a positive approach towards issues and impediments involved in resolution. Bad communication would only be an additional burden to

28 See http://www.negotiation.com/negotiators_specialists, html#juliet as on 17 September 2005.

the problem. Communication based on right perception is the first and foremost factor influencing the process of negotiation.

The following indicate initial, middle and end level of perceptions:

d) Psychology in negotiating: Psychology of the negotiators, as well as the parties play an important role in the activity of negotiation. The people involved in the process work with different attitudes, approaches and activities. According to Maslows' 'Need Hierarchy Theory', behaviour of people is influenced by their needs.

People's needs are classified by him into:

(i) physical and survival needs;
(ii) security and safety needs;
(iii) social needs;
(iv) ego needs; and
(v) self realisation needs.

This theory places need to survive as the first and foremost need. A man's thoughts and energies will be directed towards satisfying survival needs, after which he will look towards fulfilling other needs like security, and thereafter, social needs. The need for self-realisation is last, which is considered a creative need where he aims at becoming the best self and realise his capabilities to the fullest. The successive levels of needs can be shown as follows:

The negotiators while achieving the level of creativity, which is a higher need according to Maslow, should take care of the rest of the four levels of needs. This theory indicates how a negotiator generally prioritises the needs. When the higher need of achievement is acquired the other levels of needs are also taken care of. A negotiator is looking for the best share he can get out of the deal.

e) Power and leverage: Power is the ability to control people and events. Negotiations are greatly influenced by the power of parties and the negotiator. Power is largely based on perception, of self and others and is dynamic.

Leverage is the power in operation. It means gaining an edge over the opponent. It is developed from three principal sources—power, rationality and influence. If a negotiator feels that power is the source of leverage then, he will try to use the same. If the opponent rejects the negotiators case, willing to risk sanctions, then the negotiator using the power as leverage will damage the entire case. Finally, if the negotiator feels that influence is

the source of leverage, then he will base his negotiations on values, beliefs, norms and attitudes.

Some more physical factors:

Selection of the team: The team of negotiation should be selected basing on case and circumstances, so that each member contributes towards achieving the goal with productive working.

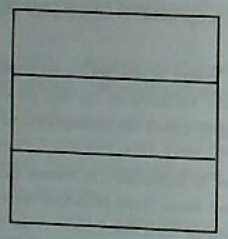
Layout of the room: The layout of the room has an influence on the conduct of the negotiation to some extent. Ideally the layout should be chosen taking into consideration the circumstance in which the parties operate. For example, if the negotiation is with regard to any industrial dispute, negotiators should ensure that the distance between the parties is not too much. The seating arrangements should be such so as to encourage a relaxed mood The design of layout should reflect attitudes and perceptions and issues being discussed in negotiation.

Place of Negotiation: Sometimes the place of negotiation matters. Unfamiliar surroundings may cause stress to the opposite party in comparison to a familiar place.

Given below are the figures showing the different perceptions, their overlapped picture and finally the negotiated perception.

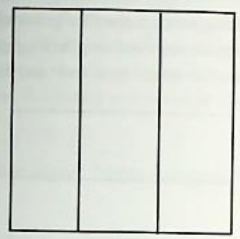
Perception 1

Perception 1 is the indication of a kind of understanding (horizontal lines) of the issue or problem by one party, either negotiating himself of with assistance of a negotiator.



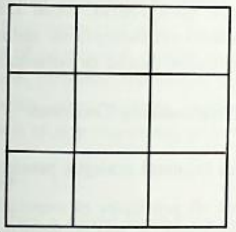
Perception 2

Perception 2 is the picture of the other party having a totally different perception about the problem indicated by vertical lines, ie, diametrically opposite to perception of the first party.



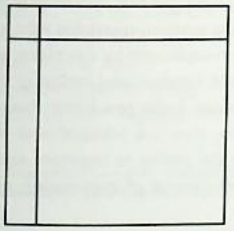
Mixture of perceptions 3

Mixed perception 3: The third is the picture that emerges out of mixing two different perceptions, which is like a crossword puzzle. Each negotiator should have some idea of the picture of mixed perceptions, so that he can try to remove the confusion or overlapping and narrow down the differences.



Negotiated perception 4

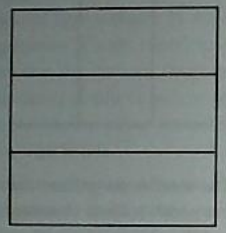
Negotiated Perception: Negotiated perception is the picture that emerges



after a successful instalment of communication. It indicates that some overlapping issues or misconceptions or conflicting interests were cleared or narrowed down and there are some more left to continue the process.

Achieved perception 5

Clear perception: The fifth picture is the finally concluded square indicating cleared misunderstandings or resolved conflicting perceptions, etc, where both the parties can share the result in a free and fair atmosphere.



d) Cultural Difference

The difference in culture, background, social atmosphere and different values make a serious impact on perceptions, communications and finally negotiation. A good negotiator should be conscious of these factors.

Negotiation Between Neighbouring Countries

A study of Indo-Pakistan bilateral dialogue process

It is difficult to practice all principles of negotiation in a real situation. Negotiation is a dynamic function, which depends on prevalent necessities and urgent requirements of different parties working under different circumstances and with conflicting interests. Best example of perfect negotiations would be prolonged but continuous discussions and dialogue between two neighbouring nations, entangled with a very serious controversy over a big piece of land complicated by emotions, past history and political interests under pressure of international lobbying. India and Pakistan stand out to be such negotiators. India proclaims that, whatever was the issue between these countries, they are bilateral and mediator has no role to play. It is essentially for the parties to negotiate and not for third parties to assist, impose or dictate process of negotiation or resolution. This stand

also indicates how parties regard assistance as intervention and uncalled for. Such a situation reflect the importance of the element of negotiation as one of the foremost method of resolving a serious kind of dispute.

The dialogue process initiated by Indian Government under the leadership of Atal Behari Vajpayee, starting with the Bus *Yatra* to Lahore in Pakistan, was the beginning of negotiation process which has eased the tensions to a great extent . The goodwill generated by the summit of leaders of both the nations averted the danger of an impending war, which can be rated as one of the most successful outcomes of negotiation at international level.

Non-binding Communications: Simla Agreement and Lahore Declaration

As it is well proclaimed, negotiation is a non-binding voluntary communication process used to put deals together or resolve conflicts. The non-binding nature can well be understood from the value being attributed to Simla Agreement and Lahore Declaration, signed by top leaders of two South Asian Countries. While the government of Pakistan contended that these two agreements took the process of peace nowhere, India reiterated that those agreements formed foundation for further de-escalation of tensions between neighbours. The contentious sides, India and Pakistan have total control over the process of negotiation despite their domestic compulsions and international pressures. However, the success depends on the willingness of the parties to cooperate, communicate, collaborate and compromise, which are essential aspects of any consensual process of conflict resolution.

Mixed Motive Exchange

Negotiation always involves a mixed motive exchange.[29] India wanted to achieve peace across the border, if not to stop the fanning of flames of terrorism, as their bargaining goal. Pakistan, too aspires to free Kashmir from India, and increase military pressure till it is achieved. Both want to avoid any possible exploitation from the other side out of political necessities. This is the mixed motive exchange with which the Indian Prime Minister and the Pakistan President met at Agra.

Much preparation is required before going to the negotiating table to resolve such deep conflicts. In fact, Vajpayee kept aside negative stand of

29 Facilitating a Settlement, Pepperdine University Institute for Dispute Resolution, extract from The Evolution of Cooperation, New York Basic Books Inc, 1984, quoted by ICADR, New Delhi, p 3.

BJP on Article 370, which accorded special status to Kashmir, released Pakistani fishermen, relaxed visa rules, and accepted to open more spots of ingress and egress in between nations.

There are five rules of negotiation, as analysed by the Pepperdine University Institute for Dispute Resolution and applied in the context of Indo-Pakistan negotiations as follows:

1. **Beginning with prompt and polite manners, sending a cooperative message without jeopardising major issues.** An open invitation was given by Prime Minister Vajpayee to President Musharaff to visit India for discussions, with a rider that Kashmir, which is indivisible and integral part of India, is not the core issue, but a dispute that can be talked about along with cross-border terrorism.
2. **Retaliate in case the other side is competitive:** India repelled the Pakistan intrusions in Kargil and other sectors in Kashmir, developed nuclear power, reciprocated by the hostile neighbour.
3. **Forgetting and Forgiving:** India forgot the invasion in Kargil and extended invitation, which was not welcomed by hardcore elements within, released fishermen, war prisoners, relaxed Visa regulations and offered cultural exchanges.
4. **Clarity and Consistency in approach and Predictability:** Both India and Pakistan are clear and consistent in their approach and predicted the outcome, depending on their own political compulsions and necessities of Sovereignty and Integrity. Their goals, which are internal, are clear and consistent.
5. **Flexibility:** In the process, two countries exhibited flexibility to ignore political egos and religious stance, at least to some extent, and prepared to shake hands. As they understood that competitive tactics would not be of any use every time, there was anxiety to bargain for relationship, which was snapped after the armed conflict, on either side.

Both the leaders came out of negotiators dilemma that is to decide between avoiding exploitation or maintaining working relationship. Protection of relationship was preferred to, in addition to claiming a value by bargaining for gain as far as possible. One can see the strategies like, extreme opening offers, using threats, rudeness, hostility, rigidity, intolerance, intimidation, tactic silence, issuing ultimatums, stalling the process, withholding concessions, stretching facts, being adopted from two sides.

Either side is busy in pursuing all the four processes available in negotiation, ie, competing, accommodating, collaborating and trying to

compromise. In effect, however, there was neither any accommodation nor a compromise, as several hours of discussions did not lead at least to a joint statement. Yet it laid solid foundation for efforts to reduce tensions and possibility of armed conflicts. If a possible armed conflict escalated during 2002 is diffused, it could be because of the foundations laid during Agra summit in 2001.

Body Language

The smile, mood and a strong hand shake constituted the body language, which communicated a good will across the table. The live telecast of this major event presented the moods of the leaders to their people. Commentators compared the mood of General Musharraf to that of Nawaz Sharif, when they met Atal Behari Vajpayee at New Delhi and Lahore respectively.

A Benign Smile, A Spark in the Eye and A Warm Hug

Kenneth Burke, the author of 'Language of Gesture', expounded his concept of words, spoken or written, as forms of gesture. He recognised the 'potency of gesture as a visible mode of communication with its own Morse key, as it were. Often, when rhetoric lapses into the gray areas of ambiguity and prevarication, a sparkle in the eye, a gentle vibration in the voice, a warm hug or handshake, may reveal the inner posture of the mind'. Professor Shiv K Kumar found an instance for this statement in Agra Summit. He says, 'the telecast of the ceremonial welcome at Rasthrapathi Bhawan, showed Mr Atal Behari Vajpayee lending himself rather niggardly, to a handshake with President Musharraf who looked cold and stern. At that moment, the Prime Minister may have recalled the fervent hug he received from the former Prime Minister of Pakistan, Mr Nawaz Sharif, at the Wagah border, which later blossomed into the Lahore Declaration. But when the General was shown, at his ancestral home in Neharwali haveli, hugging Anaro Devi (Who recalled him as a four-year-old mischievous boy), with a benign smile, he revealed a different facet of his personality- a sensitive, warm-hearted human being, susceptible to emotion'.

Professor Kumar says that General Musharraf might have been influenced by the magnificence of white marble Taj Mahal and let his body language come into free play. Then he imagines the reason for the outcome as follows: 'It is possible to imagine how, during the course of his last round with Mr Vajpayee, he'd have spoken with a tight upper lip, and his hands clasped in his lap'.[30] However, at a later stage, when both the leaders met at a

30 Shiv K Kumar, Kinesics at the Agra Summit, *The Hindu*, 29 July 2001, Sunday Magazine, Page IV.

different forum, they did not see eye to eye. Eye contact was deliberately avoided, though there was a lifeless shake hand. This represented again the communication of adverse atmosphere prevailing over in between the two Asian neighbours.

Verbal Language

Following are certain expressions used in the process of talks between Indo-Pak leaders, which are the key words in negotiation during Agra Summit.

Minimal Expectation: As the issue of Kashmir is on the top of heaped up hostilities, Indo-Pak leaders had very minimalist expectations[31] from the summit. Minimalist expectations of Pakistan could be increasing pressure to provide self-determining choice to people in Kashmir, and for India, it could be immediate stoppage of sponsorship of terrorism in Jammu and Kashmir. For both, minimal expectations could be retaining the same positions with possible additional pressures.

Avoider: India and Pakistan, do all to avoid the major disaster of either a nuclear conflict or any other war.

Glitches and Hitches: The aim must be to achieve a break through by passing over the inherent impediments in between.

Key differences: For the sake of protecting relationship, through which any time in future, a dialogue process could be initiated to resolve real issues, the key differences are not proposed to be touched upon. That is the reason why the leaders met without any specific agenda.

Logjam: Undoubtedly, both the parties are not in talking terms after the Kargil armed conflict a couple of years ago. There is a logjam in bilateral relationship. A talk is an effort to help each other to break the logjams.

Core political concerns: Both are not prepared to touch the core political concerns because of either domestic pressures or international image building.

A non-coercive interaction: It is quite visible that it is a non-coercive interaction and that is the reason why there was no significant break through.

Apology: Expression of apology from one side to the other, indicate concern for feelings and interest in protecting the relationship. The Government of Pakistan apologised to External Affairs Spokesperson, Nirupama Rao, who was heckled by a group of journalists from Pakistan soon after short midnight briefing on the outcome of the summit.[32]

31 It is part of the minimax concept in negotiation process. Minimum objective indicates the baseline below which parties do not want to go.

32 Pak apology, *The Hindu*, 19 July 2001, p1.

Power, Culture and Gender as Strategies

Power, culture and gender are the strategic areas, which operate from different angles to bring about the unity between the contentious parties.[33] With nuclear tests, increased expenditure on defence and history of several armed conflicts, India and Pakistan established their power equations. Equality is one of the important factors that bring them to negotiating table. When they become willing partners to cooperate, the cultural atmosphere helps to build a congenial atmosphere. Sprucing up the Neharwali Haveli in Old Delhi, where Musharraf lived fifty years ago, and arranging a very cordial welcome with the old woman who looked after the President in his childhood are rare gestures of building cultural atmosphere. Selecting Agra, the place of love symbol the wonderful Taj Mahal was yet another cultural strategy. Invitation to Mrs Sehba Musharraf, is the gender angle of the effort.

Confidence Building Measures (CBM)

This is another expression frequently used in every aspect of management and conflict resolution processes. In fact it is the real agenda of Agra Summit and the agenda for any negotiation. Pakistan Leaders say that finding a way out to core issue of Kashmir alone could work as real Confidence Building Measure.[34] There were similar observations from Indian side saying that allowing Kashmir people to be with India as per their wishes manifested by history and frequent elections, including recent election in 2002 wherein Mufti Muhammad Sayeed became Chief Minister heading a coalition of Peoples Democratic Party and Congress, replacing the National Conference Party of Dr Farooq Abdullah. The measures continued even after there was a change over in Government of India. When the present Prime Minister Manmohan Singh visited Pakistan, General Musharaff presented him his bona fide certificate indicating his study at a primary school now part of Pakistan. The Pakistan Government has renamed the school after Indian Prime Minister, indicating the respect and further confidence building.

Cordial and Constructive

The official spokesperson of Indian External Affairs Ministry said the talks were very cordial and constructive.[35] Her sentiments had the rare approval

33 Henry J Brown, Arthur L Marriott AC, ADR Principles and Practice, second edn, 1999, p 113.

34 CBMs alone won't do, says Musharraf, Report from Islamabad, *The Hindu*, 13 July 2001, p 1.

35 Positive signals, yet hurdles remain: Cordial, Constructive talks on day one at Agra, *The Hindu*, 16 July 2001, p 1.

of Pakistani Foreign Office. While Indian side described the mood as 'upbeat', General Musharraf confirmed the mood and said the talks were 'fruitful', which has built enormous hope and confidence. However, that confidence could not be translated into a joint declaration that would have gone a long way in international relationship.

Cautious Optimism

In an effort to bring two contentious parties together to arrange for meeting of minds over a seriously fought over issue for over a period of half a century, it is difficult even to have any hope. So it was rightly said that the attitude should be cautiously optimistic. This is yet another jargon of negotiation.

Batna and Watna

Best Alternative for Negotiated Agreement (BATNA) and Worst Alternative for Negotiated Agreement (WATNA) are supposed to be in the comprehension of the parties getting into negotiation like that of Agra Summit. There is no doubt that a Negotiated Agreement between India and Pakistan would save two large humanities from the disasters of war and help them survive, not to starve and develop, reduce international tensions and both the countries will cease to be market places or play grounds for western weapon dealers. To achieve this great peace ideal, the two sides should have understood the best, if any, and worst alternatives. For Pakistan, BATNA could be separation of Kashmir to wreck vengeance against India, for it helped separation of Bangla from Pakistan in 1971 through an armed conflict in which 93,000 Pakistan soldiers surrenders with rank and file of military hierarchy. This is considered to be a historical insult to Pakistan, which is impossible to digest. Recently, the Deputy Prime Minister of India LK Advani said that, as Pakistan could not reconcile to the fact of surrender of its 93,000 soldiers, it is promoting cross border terrorism in Indian soil. The WATNA for Pakistan could be losses in sar and complete loss of control over Pakistan Occupied Kashmir (PoK). And BATNA for India could be reclaiming of PoK and eternal peace, while worst could be to continue with terrorism resulting in killings in temples and other civilian areas or losses in war, like losing some more territory, etc. WATNA for both could be nuclear disaster, unnecessary war, and continuous loss of innocent human beings, and total diversion of huge funds for defence while millions are suffering from hunger and malnutrition. As the best alternatives can be mere dreams for the present, it is the obligation of both the leaders to

avoid the worst alternatives. Such a concern alone can drive the contentious parties to the negotiating table. From the point of view of India, in the short term the prospects of re-engaging with Pakistan looks good; and from the long term perspective, India, by engaging with Pakistan in negotiation, will be able to get out of the trap being laid by others. It will also help in keeping some parts of the peace talks going; entice the Kashmir into the political process, make Pakistan nervous that the peace process in Kashmir will move forward without it's involvement and allow India to stay in driver's seat. However, a broader vision and willingness to make compromises is needed.

Generating Good will

In this kind of a complex exercise, there could be a win-win situation for both, whether they hammer out a joint statement or declaration or not. The loss or defeat is just impossible to imagine. In the words of Musharraf, the whole effort produced tremendous good will. It forced him to reciprocate with the invitation to Indian Prime Minister and External Affairs Minister, and making a public statement stating that he is waiting to accord similar warmth and affection to the leaders. It is a treat to listen from the chief of a hostile nation saying words praise of like 'Indian Prime Minister is a great statesman' etc. To quote the statement from one of the parties to the negotiation, which was not denied by the other, ' both were found willing to find a way to begin a new chapter in bilateral relationship'. Musharraf said that process of dialogue was initiated and none could stop it. In response, he released some of the prisoners and ordered probe into the Indian claim about existence of several prisoners of war, after being moved by the fervent appeal from the relatives of those prisoners who were languishing in Pakistani jails for more than three decades.

The mega-effort was watched by the entire world with great interest. Some described it as a major media event involving heavy expenditure.

Assessment of Result: Another Language Exercise:

Seeing the body language and hearing the communications, the conclusion requires to be expressed in a particular language, which would be conducive for future relations and could make use of the good will generated. After the meeting was ended without any joint declaration, any observer could find optimism as the media responses from two countries were clothed in cautious language without giving up their stance on the point. 'India

signaled its determination to stay the course and seek peace and reconciliation with Pakistan. India might have been disappointed but not disheartened and India would continue to engage Pakistan at many levels,' stated the Indian External Affairs Minister. External Affairs Minister blamed the 'complexity of the negotiations' for the stalemate. The inability to finalise the 'Agra Declaration' was because of 'the difficulty in reconciling our basic approaches to bilateral relations, Mr Singh conceded. 'Narrow, segmented or unifocal approaches will not simply serve.'[36] The Pakistan External Affairs Minister also did not agree that the summit was a failure. Pakistan claimed that the process of the normalisation of relations initiated at the historic city of Taj Mahal was alive and kicking. However, the differences with regard to reference to 'disturbance in Kashmir' continued. While India maintained it as 'cross-border terrorism', Pakistan described it as 'indigenous struggle'. Abdul Sattar, the Foreign Minister said, 'the summit had achieved valuable progress on evolving a structure for a sustained dialogue. He says General Musharraf and Mr Vajpayee share a common vision of peace, progress and prosperity for their peoples in the 21st Century. The President has complimented Mr. Vajpayee for the gracious initiative to invite him for the resumption of dialogue between the two countries after a hiatus of nearly two years'.[37]

India described it as 'new journey has begun, destination not reached'.[38] according to former Prime Minister Chandrasekhar, sustained and sincere negotiation alone can achieve the peace.

The results of the new journey was consolidated when Manmohan Singh, Prime Minister of India went to Pakistan and General Musharraf arrived in India, to extend the dialogue. Musharraf said he came with a changed heart. When LK Advani, leader of opposition and the president of right wing BJP, visited Pakistan, there was a new wave of friendship, though created some internal problems for Advani. In fact, Pakistan invited him to lay the foundation stone for renovation of some historic temples of ancient times in their territory. The bus journey, issue of study certificates, visit to temple, being chief guest at renovation of temple are confidence building measures and they have resulted in building confidence between two people and nations.

The process has been continued in the context of international development and pressure from within and without and the changes in

36 Ready to pick up the thread, says Jaswant Singh, *The Hindu*, 18 July 2001, p1.

37 Summit inconclusive, not a failure: Sattar, report from Islamabad, *The Hindu*, 18 July 2001, p 1.

38 Kashmir, Cross-border terrorism derail talks, *The Hindu*, 17 July 2001, p1.

political and power equilibrium. General Musharraf, in changed circumstances of Pakistan and a new government in India in coalition culture, understood the need of peace and welcomed the growing opinion of the people of two nations to promote friendship. The relations were strengthened through sports as well. For the first time, a new option, ie, of sports was worked out as a strategy to unite the people and their leaders in different neighbouring countries. The sport of cricket between two equally talented teams, intertwined with zeal to win and enthusiasm to play, has brought enormous interest for peace. In fact, the sport was also a tension-generating event because of hostilities based, religion. Both countries have also brought forward development issues like combined gas line project which created a necessity for renewed friendship. Once the future relations are kept in view and integrative dialogue mechanism is put in place, it will generate such an amount of goodwill that it can stall the war and terrorism too. Indo-Pak dialogue stands out to be one of the fine examples of continuing negotiation and multiple options brainstormed to maintain a working friendship atmosphere.

Protecting relations and initiating dialogue are the achievements of any negotiation. Process of peace is complex and difficult. To achieve peace, negotiation is the peaceful process. There is a need to promote a new mindset and a new education that respects the culture of dialogue and negotiation to address an individual problem or an international conflict.

Domestic Disputes and Tool of Negotiation

Best strategy to resolve domestic disputes will be undoubtedly negotiation between the parties directly. The reason being that almost all domestic problems reflect generation conflicts and ego clashes. Conciliation and settlement are statutorily recognised remedial mechanisms in family disputes long before part III of Arbitration and Conciliation Act 1996 was enacted.

The Hindu Marriage Act 1955 and the Special Marriage Act 1954

These two Acts impose a duty on the court, in the first instance, to make every endeavour to bring about reconciliation between spouses in any matrimonial suit before proceeding with hearing.[39] If the parties desire or

39 Hindu Marriage Act 1955, s 23; Special Marriage Act 1954, s 34G.

the court deems proper and just, adjourn proceedings to facilitate negotiation or conciliation between the disputing parties. The court can also refer the dispute for reconciliation to any person as desired by the parties or named by the court itself. The court can direct the named conciliator to report back whether reconciliation has been effected or not.

Code of Civil Procedure 1908

The court is expected to make all efforts, where possible, keeping in mind the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit relating to family matters.[40] If in any such suit it appears to the court that there is a reasonable possibility of settlement between the parties, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such settlement. If there is a possibility, the court renders a facility and time for settlement. It is for the parties to evolve a possibility and settle, if not, the courts efforts may not succeed. Divorce by mutual consent is another peaceful solution.

Family Courts Act 1984

The Family Courts Act 1984 applies to all suits and proceedings concerning family matters like marriage, guardianship, adoption, legitimacy and maintenance. The preamble of the Act refers to the obligation of court to endeavour to effect a reconciliation or settlement between the spouses. The statement of objects and reasons of the Family Courts Bill 1984 is reproduced as below:

> Several associations of women, other organisations and individuals have urged from time to time, that the Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family, the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the Courts in adopting this conciliatory procedure and the Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

40 Code of Civil Procedure 1908, o XXX11A, r 3.

Section 9 of the Family Courts Act obliges a family court to persuade the parties to arrive at a settlement by conciliation.

The Legal Service Authorities Act 1987 and Arbitration and Conciliation Act 1996 further consolidated and formalised the informal character of dispute resolution by the reference of courts and by the consensual process.

Generally, in family matters, the parties seek adjudication of several rights.

Negotiation and Trade Unions: Collective Bargaining

Problems between groups or associations have to be tackled by collective bargaining mechanisms. The conflicting interests of trade union members and management of industries can be better reconciled by talks between their representatives under threat of strike, a pressure tactic, to bring down the powerful parties to discussion on the problems or demands.

Strike is a legal or social weapon a trade union may resort to, to exert pressure on the management while the management also has equal, power of lock out under Industrial Disputes Act 1947, which bring both the parties to the table of 'negotiation'. There are several instances in the history of industrial relations where talks averted the strike and resulted in joint agreement. The industrial peace prevailed without detriment to interests of working masses only because of their collective bargaining power.

Strength of bargaining agent matters the most. The union, or organisation with or without political backing is the bargaining agent. With commitment and determination the unions like All India Trade Union Congress or Indian National Trade Union Congress or Hindustan Mazdoor Sabha play a major role in advancing the cause of collective bargaining. The justice they achieve through negotiations is much faster, certain, consolidated, and far reaching than the justice that is expected to be delivered after a prolonged litigation and vexatious adjudication of claims on the litmus test of law and actions.

Collective bargaining cannot exist without the right to strike and power to lock out. The resultant agreement will contain the subsequent interpretation and administration of the agreed terms as well.

5. Enlarging the scope of compounding of offences by redrafting s 320, CrPC with thorough reforming of the two tables of offences compoundable with and without permission of the courts.
6. Encouraging victim-offender mediation in limited offences
7. Insisting on conviction in non-serious offences on voluntary plea of guilty by accused, and finally
8. Recognising the right to be convicted on plea of guilty as fundamental right along with right to speedy trial under art 21.

CHAPTER 9

Mediation and Conciliation

A. MEDIATION

Introduction

The failure of regular methods of dispute resolution has led to the search of alternative methods of conflict resolution. One of the methods is handling human relations in a responsive and positive manner for the good of the people involved and for the betterment of the community.[1] DK Sampath in Mediation states the context of conflicting social behavior has to be appreciated and mediation has to be seen as a part of program of empowerment of the poor which again is part of the plenary legal aid ideology.

In ultimate analysis, the concept of mediation is based on an innate sense of decency and an acceptance of shared values in the community, even as they are imperiled as a result of the conflict.[2] Referring to half-hidden aspects of Indian social justice, Krishna Iyer says:

> it may sound cynical to say that the judiciary as a class, the bar as a profession, the Government as an instrument and the political echelons as power-wielders are still half-informed about plenary legal aid ideology and half afraid of legal aid potential and half hostile to radical legal services program.[3]

WHY MEDIATION?

DK Sampath in his book Mediation states:

1 DK Sampath, Mediation, NLSUI, 1991, Foreword, p viii.
2 DK Sampath, Mediation, NLSUI, 1991, pp 1–2.
3 VR Krishna Iyer, Some Half-hidden aspects of Indian Social Justice, EBC, 1980, p 117.

The poor lose in a conflict, because they have nothing, no resources, no will to fight to the finish, no stamina to sustain the fight and no ability to take advantage of the system even when facilities are made available. Thus they are the losers in terms of anticipation, skill, tactics and strategy. All these rate high in an adversary system. So the poor gain by annulling these potent advantages of the opponent bypassing the system and by opting for mediation.[4]

Meaning of Mediation

Mediation is essentially a search, for a solution, by the parties to the dispute, themselves, under the guidance of a third party. Mediation is a process, facilitation, an empowerment. The basic underlying motive of mediation is to provide the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, the mediator, to exhaustively determine if a settlement is possible. The common factor of negotiation and mediation is that both are based on consent of the parties.

Mediation may be thought of as assisted negotiation. Negotiation may be thought of as communication for agreement. Hence, mediation is assisted communications for agreement.

Central to mediation is the concept of informed consent. So long as participants understand the nature of a contemplated mediation process and effectively consent to participate in the described process, virtually any mediation process is possible and appropriate.

Mediation is an informal process in which a trained mediator assists the parties to reach a negotiated settlement. The mediator does not decide who is right or wrong and has no authority to impose a settlement on the parties. Instead, the mediator helps the parties to jointly explore and reconcile their differences.

Determination of Interests

Mediation involves a determination of interests of the parties. Mediation provides a forum for principled negotiations. Principled negotiations stimulate exploration of settlement alternatives and an opportunity to evaluate those alternatives, weighing them against the likely outcome of going to trial and viewing proposals through the lenses of reality. Mediation, compared to litigation, trial and appeal, is an efficient and fast process to a final decision. Mediation does not fail if a settlement is not reached. Rather, the process fails when parties are not given every possible opportunity to be heard and explore settlement alternatives.

4 DK Sampath, Mediation, NLSUI, Bangalore, 1991, p 6.

Techniques of Mediation for Conflict Situation

In, *Mediation: Concept and Techniques,* DK Sampath[5] observes:[6]

Dispute Resolution can be attempted through persuasion, consensus building, voting, negotiation, litigation, etc. Thus mediation is only one of many forms of dispute resolution. In fact no particular form will cater to the needs of all types of conflicts. Viewed from the point of view of participants, there are simple conflicts in which parties act for themselves, group conflicts involving 'a process of powers, meeting and balancing', a clash of powers. Many conflicts are aborted even before they are activated. Such avoidance is a useful technique in cases of continuing relationship. Latent conflict, the initiation of a conflict, the balancing of the power and the disruption of equilibrium constitute a cycle of conflicts. For example, the interests of prawn culture in backwaters in Tamil Nadu are opposed to those of conservationists. Hence, conflict is inherent when those engaged in this venture acquire mangrove lands on seashore. Phase 2 arises when purchasing company sends a team of workers to clear the mangrove vegetation. A conflict surfaces. Phase 3 sees the conflict area shifting if an injunction is obtained from a court by the conservationists. That is play of power. An attempt at resolution through litigation or mediation would be phase 4. Thus the conflict unfolds itself through successive phases triggered by certain events. With the awareness of 'the incompatibility of potential future positions', a process of powers meeting and balancing emerges....

...Mediator's agenda is only to promote the prospects of settlements by developing options. The exercise is participatory in character. Parties involve themselves in mutual give and take, which is the essence of negotiation. Negotiation involves exchange of information before bargaining commences. Information improves access to justice. Bargaining is a process of exchange of demands or offers for counter demands or counter offers. The needs of both are in focus. To win at the expense of party is exploitation and it is not the objective of mediation. The ethics of challenge, which informs the adversarial proceedings in court litigation, is totally eschewed in mediation. Often creative bargaining in mediation enlarges the parties to achieve satisfaction. The mediator may identify alternatives and move the parties in the direction of a solution when they are stalled. He is, in short, a catalyst. He does not dictate solutions. He does not even pressurise the parties to prefer conciliation to conflict. That is a value, which the parties have to bring to the negotiating table. Otherwise, mediation would be a non-starter...

Exploratory Stage

The mediator may explore as to what attitude the party is likely to take on a particular aspect, but he need not encourage the party to make it clear at the exploratory stage itself. If he does that, it becomes non-negotiable right at the outset. The mediator can adopt various strategies to seek

5 DK Sampath is a leading advocate and legal aid activist, who pioneered Rural Conciliation Programme by setting up several centers in Tamil Nadu and is an honorary visiting professor of National Law School of India University, Bangalore.

6 DK Sampath, *Mediation: Concept and Techniques,* Clinical Legal Education, EBC, Lucknow, 1998, pp 152–159.

information at appropriate stages or ensure party's commitment to the consensus.

There may be situations where one party may not have at his command all the ingredients for a viable solution. Either party may have few ingredients at hand. A mediator has to separate the negotiable from the non-negotiable. The basic interests of each party have to be identified to enable the mediator to have a framework of negotiations.

When further progress is stalled by either party, the mediator has to think of alternative solutions favoring a mix of benefits to both parties.

From the exploration stage, the parties have to reach a formulation stage. Sometimes, offers are made by a party more as a feeler than as a concession. The mediator has to watch out for the reaction if he is to use it as a diagnostic tool. New implication may emerge and parties may even change their position as a consequence. Such a watchful attitude may enable the mediator to garner points for a brief and tentative formulation of a feasible solution.

Follow-up

The follow-up of a settlement by the mediator is very important. Mere paper settlements are of no benefit. The performance of what is promised may bristle with problems. Questions of prestige as to who should do what and in what order may sabotage the whole settlement. The mediators with little imagination should be able to foresee some of these difficulties and sequence the obligations under the compromise, step-by-step, matching one performance with the next. Even then, complaints and dissatisfactions may surface. Mediator continues his good offices by smoothening the ruffled features and by guiding the parties, the initial stages may itself carry the parties forward. The mediator should be unsparing in his praise for the performance completed, thereby motivating further cooperation in implementation of settlement. Even if a final step or two defies performance, their implementation can be deferred for a while and the parties themselves would see the logic of completing their implementation later.

ADR in UK

ADR developed in UK partly because of problems due to unwieldy and expensive process of civil litigation and partly due to lawyer dominated arbitration. International mediation, with standard formats, mini-trial/ Executive Tribunal, converting adjudication/mediated settlement into a consensual arbitration award, med-arb, rent a judge, are some methods

that are widely used in UK. Center for Dispute Resolution (CEDR), is established as an institution offering mediation services to business in the UK.[7] CEDR successfully settled international disputes from various countries, to name a few, Africa, the US, Sweden, Belgium, France, Sri Lanka, Russia, Egypt, Hong Kong. Mediation is now established in many parts of the world, in particular the US, UK, Australia, and the Pacific Rim. Except in the UK and Hong Kong, the main emphasis has been towards settling domestic disputes. In UK, CEDR is the leading provider of mediation services to businesses in the UK. Within first five years of its establishment, ie, 1990, the CEDR has handled over 1.5 billion pounds in case value. In 1995, alone, claims totaling 300 million pounds, were successfully mediated, sometimes involving disputants from several countries at once. Savings in costs are estimated to range from 50,000 to over 250,000 pounds per party.[8]

Court Annexed Process in US

As early as in the year 1768, arbitration as a well-established alternative, was made available in New York, and thereafter in other cities, to settle disputes in the clothing, printing and merchant seaman industries, by setting up arbitration tribunals. In 1920 New York passed the first state law recognising voluntary arbitration agreements. The community dispute resolution movement spawned from the social activism of the 1960s and helped to propel the ADR movement. With the promulgation of Civil Rights Act in 1964 came the creation of the Community Related Services (CRS), which utilised mediation and negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. During 1960s the CRS helped resolve numerous disputes involving schools, police, prisons and other government entities. In 1970s, broad based advocacy, for increased use of ADR techniques emerged, which trend acquired the name of Alternative Dispute Resolution. It was officially recognised by the American Bar Association in 1976, which has a Dispute Resolution Section as of today. In the late 1960s and early 1970s, the federal Law Enforcement Assistance Administration (LEAA) funded both an arbitration program and a mediation program, which helped to settle thousands of cases. By 1980 more than eighty community based alternative dispute resolution centers were in operation which grew into more than 400 local community justice centers throughout United States.

7 Karl Mackie and Edward Light Burn, *International Mediation—The UK Experience*, ADR, What it is and How it works? 2002, pp 137–142.

8 Ibid.

Since the enactment, in 1990, of the Civil Justice Reform Act (CJRA) it has become the duty of every federal district court to implement a civil justice expense and delay reduction plan, which further led to increased use of ADR. Almost all federal district courts had authorised to form ADR programs. District of Columbia introduced a voluntary mediation program in 1989 and achieved resolution of a minimum of 10 per cent load of litigation and 50 per cent settlement rate.[9] The mediation programme is supplemented with case management plan, wherein the staff in appellate courts select some cases for mediation, while it is strictly voluntary in District Court Program. In 1988, Congress formally authorised ten pilot courts to conduct mandatory court-annexed arbitration programs.

In California the legislation which came into operation from 1995 requires Los Angeles Country Judges to order non-binding mediation of all cases in which the amount in controversy is $50,000 or less.[10] Later it spread to Connecticut, Minnesota, New Jersey, North Carolina, Texas etc, as court-annexed-process. In addition to these state programs special business courts offering relatively expeditious processing of commercial disputes, have been set up in three major cities—New York, Chicago (Illinois) and Wilmington (Delaware). The commercial division of the New York State Supreme Court is exclusively devoted to commercial disputes, committed to expedited processes and encouragement of settlement. Four judges hear the cases in this court from beginning to end.

The Alternative Dispute Resolution Act of 1990 (ADRA) and the Negotiated Rulemaking Act of 1990 helped in increased use of ADR in federal agencies, where a dispute resolution officer is designated and ADR training imparted. ADRA expired in 1995, but by executive orders the government agencies were authorised to use ADR. The idea of multidoor courthouse, ie, a comprehensive dispute resolution center, with each door representing a process to which any particular case might be referred, was implemented. The multi-door approach was one way of institutionalising a multifaceted approach to dispute resolution. The American Bar Association has been instrumental in initiating pilot experiments in Tulsa, Oklahoma, Houston, Texas, and Washington DC. In Houston and Washington these experiments became and still are permanent features of the dispute resolution landscape, financed in Washington as part of the regular court

9 Dana H Freyer, *The American Experience in the field of ADR*, ADR, What it is and How it works? 2002, pp 108–9.

10 Source: 'California Courts Encourage Early ADR Use' , 12 Alternatives 116 (September 1994).

budget and in Houston through funds accumulated from an ADR surcharge on the regular court-filing fee.[11]

The American Courts, the American Bar Association and other agencies operate mediation as a court-annexed-process and mostly this method is found to be an effective tool in deciding different types of cases including simple money claims, sexual harassment complaints, and disputes regarding custody battles in case of couples who have filed for divorce.

Conciliation as a Pre-trial Process

Conciliation is used as a pre-trial process as well. The existence, description, nature, custody, condition and location of documents, books and other evidence is expected to be discovered via conciliatory methods. The process is also helpful in discovering the identity and witnesses. These processes are helpful in making adjudication a comprehensive and practical process. After this process, the judges call for pre-trial conference where parties and their lawyers are present to:

a) simplify issues,
b) secure agreements of facts,
c) to give yet another opportunity to settle before trial.

Even if mediation is not resorted to and settlement is reached, the process helps in cutting the time of trial, case is well prepared and quality of justice improved. Some times the pretrial cause more delay and more congestion in courts and it may not be useful in all cases. It is more a case management mechanism than mediation, but it may lead to mediated settlement.

Counselling

Counselling process can help in various kinds of disputes such as marital discord.

US: Mediation by Equal Employment Opportunity Commission (EEOC)

Mediation as a form of ADR is offered by the US Equal Employment Opportunity Commission (EEOC) The decision to mediate is completely voluntary for the the employer as well as the employee. Mediation gives the parties an opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns,

11 Frank EA Sander, *Dispute Resolution within and outside the Courts–An Overview of the US Experience*, ADR–What it is and how it works, 2002, pp 123–133.

find areas of agreement and, ultimately, to incorporate those areas of agreements into resolutions. A mediator does not resolve the charge or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. The mediation process is strictly confidential.

How Mediation Works in case of EEOC

An EEOC representative contacts the employee and employer to find out whether they would participate in the Mediation process. If both parties agree, a mediation session conducted by a trained and experienced mediator is scheduled. While it is not necessary to have an attorney in order to participate in EEOC's Mediation Program, either party may choose to do so. It is important that persons attending the mediation session have the authority to resolve the dispute. If mediation is unsuccessful, the charge or issue is investigated like any other charge.

Mediating EEOC Charges/Issues

Only mediators who are experienced and trained in mediation and equal employment opportunity law are assigned to mediate EEOC charges or issues. EEOC has a staff of trained mediators. EEOC also enters into contract with professional external mediators to mediate charges/issues filed with EEOC. All EEOC mediators, whether internal staff or external mediators, are neutral unbiased professionals with no stake in the outcome of the mediation process.

Administrative Process in EEOC Mediation

Mediation usually takes place early in the process, prior to an investigation of the charge. This conserves Commission resources by avoiding the investigation of a charge that could be appropriately resolved through mediation. In addition, mediation prior to an investigation prevents the hardening of positions that can occur during a lengthy investigation.

Mediation During an Investigation or During the Conciliation Process

In order to increase opportunities for mediation, the EEOC included more charges that could become eligible for mediation. Now in appropriate cases mediation is available at the conciliation stage, however, after a finding of discrimination has been issued.

Differences in Mediation at the Conciliation Stage

If mediation occurs at the conciliation stage, EEOC sits as a participant—along with charging party and respondent—with an independent mediator serving as a neutral.

Mediation at Party's Request

Either party can request mediation without an offer from EEOC. As long as both parties agree to participate, EEOC will consider the charge for mediation.

Confidentiality

The EEOC maintains strict confidentiality in its mediation program. The mediator and the parties must sign agreements that they will keep everything that is revealed during the mediation confidential. The mediation sessions are not tape-recorded or transcribed. Notes taken during the mediation by the mediator are destroyed. Furthermore, in order to ensure confidentiality, the mediation program is insulated from the EEOC's investigative and litigation functions. EEOC mediators only mediate charges. They are precluded from performing any other functions related to the investigation or litigation of charges.

Attendance at a Mediation Session

The charging party and a representative of the employer can attend the mediation session. The person representing the employer has to be familiar with the facts of the charge and have the authority to settle the charge on behalf of the employer.

Attorney's Assistance

While it is not necessary to have an attorney or other representative in order to participate in EEOC's mediation program, either party may choose to do so. The mediator will decide what role the attorney or representative will play during the mediation. The mediator may ask that they provide advice and counsel, but not speak for a party. If a party plans to bring an attorney or other representative to the mediation session, he or she can discuss this with the mediator prior to the mediation session.

Time of Mediation

Mediation is a very efficient process that saves time and money. According to a study conducted by the EEOC, mediations usually last for approximately 3-4 hours. However, this may vary from case to case. Successful mediations avoid time consuming investigation and achieve a prompt resolution of the charge.

Deciding Issues or Charges for Mediation

EEOC evaluates each charge to determine whether it is appropriate for mediation considering such factors as the nature of the case, the relationship of the parties, the size and complexity of the case, and the relief sought by the charging party. Charges that the EEOC has determined to be without merit are not eligible for mediation.

Charge not Resolved

If a charge is not resolved during the mediation process, the charge is returned to an investigative unit, and is processed just like any other charge. And there is no fee for the mediation.

Enforceability

What happens if a party does not comply with an agreement reached in mediation? An agreement reached during mediation is enforceable in court just like any other settlement agreement resolving a charge of discrimination filed with the EEOC. If either party believes that the other party has failed to comply with a mediated settlement agreement, he or she would have to contact the ADR coordinator.

Success in Mediation

Participants in the EEOC's mediation program have indicated a high degree of satisfaction with the program. It is a fair and efficient process that can avoid a lengthy investigation and the possibility of unnecessary litigation.

Since the entire mediation process is strictly confidential, information revealed during the mediation session cannot be disclosed to anyone including other EEOC personnel. Therefore, it cannot be used during any subsequent investigation.

Benefits of Mediation

One of the biggest benefits of mediation is that it allows the parties to resolve the matters in dispute in a way that is mutually satisfactory to

them and meets their needs. In addition, mediation is faster than the traditional investigative process. For instance, in fiscal year 2003, mediated cases were resolved in an average of 85 days in comparison to the 160 days it took for a cases to go through the traditional investigative process. The process may also allow the parties to preserve or repair the employment relationship. If a resolution is not reached, the charge will be investigated like any other charge.

Mediation provides a neutral and confidential setting where both parties can openly discuss information about the underlying dispute. Through enhanced communication, mediation can foster improved working relationships and a better understanding of factors which may be affecting the overall workplace.[12]

Universal Agreements to Mediate (UAMS)

A Universal Agreement to Mediate is an agreement between EEOC and an employer to mediate all eligible charges filed against the employer, prior to an agency investigation or litigation. A UAM substitutes for the individual agreement to mediate which the parties sign prior to a mediation being conducted. Because mediation is voluntary, the employer or the charging party may opt out of mediation on a particular charge even though a UAM has been signed.

UAMs may be local, regional, or national. Local UAMs are agreements that exist between an employer and a particular EEOC field office to mediate eligible charges filed against that employer within the field office's geographic jurisdiction. Regional and national UAMs are agreements between an employer and the EEOC to mediate all of an employer's eligible charges in a multi-state region or on a nationwide basis.

Benefits of UAM?

A UAM demonstrates from the outset a company's willingness to mediate on cases eligible for mediation, this may contribute to the ultimate satisfactory resolution of a matter.

With a UAM, the initial step of contacting the employer to see if they will mediate a particular charge is shortened or eliminated. A UAM establishes a point of contact for the employer, thereby expediting the flow of information between the EEOC and the employer. Fast tracking the information through established contact points expedites the scheduling

12 Source: http://www.eeoc.gov/mediate/facts.html; EEOC's ADR coordinators or EEOC's National Contact Center, EEOC has toll free numbers 1-800-669-4000 (Voice) or 1-800-669-6820 (TTY) for additional information.

of a mediation session. UAMs are flexible. They allow parties to opt out of mediation on a case by case basis if either believes the claim is not appropriate.

Conciliation in Japan

Japan experimented with the conciliation process and resolved millions of disputes in the shortest possible time and at lower cost. The parties offer mutual concessions through the conciliation committee, consisting of one judge and two conciliation commissioners, who are people with no specific qualifications. Japan's experiments with conciliation started in 1922, when it applied this method to resolve cases of land disputes, as well as house lease disputes. Now it is extended to all kinds of civil disputes on (1) application of parties and (2) suo motu reference to Conciliators Commission. It is left to the discretion of the court to direct the disputants before the Conciliators Commission. The Conciliators Commission has to persuade the parties to make concessions or suggest a conciliatory settlement.

The courts summon the parties and direct them either to concede some of their rights or suggest conditions for settlement. Such terms of conciliation would have force and effect of finally binding judgment. If conciliation led to settlement, it would be reduced to a written 'Protocol', which is equivalent to decree.

The state provided for regular adjudicatory mechanism in case the parties fail to resolve the dispute through conciliation.

Conciliation Council in Norway

Norway, which is the seat of conciliation between Sri Lankan Government and the Tamil Tigers, was a pioneer in conciliation process, with State prohibiting any case being brought to court without resorting to settlement through mediation by Conciliation Council, consisting of three members elected by town or rural councils, which hold a term of four years. The State provided either one or more Conciliation Councils in each municipality. In 1957, 750 Conciliation Councils were formed. Here the lawyers were not permitted to appear before the Conciliation Councils. A very small fee was fixed as a salary for the conciliator. However, there is no mediation in the Conciliation Council in the disputes concerning matrimonial matters, or claims against the State, municipality, etc.

ADR Experience in Australia

Australian experience in ADR involves examination and use of four different

programs established in US in an appropriate manner. The new wave of dispute resolution theory has resulted in the emergence of a vast array of dispute resolution mechanisms without affecting the traditional adversarial methods. The traditional adversarial court system has adopted many of the techniques of ADR.[13]

ADR has become part of the mainstream legal practice in US and Australia.

Mediation Boards in Sri Lanka

Amicable settlement of disputes had been the norm in Ceylon since ancient times. The Conciliation Boards Act 1958 consolidated ADR by institutionalising it and provided for community level resolution of minor disputes at the pre-trial stage. Because of deficiencies in this Act, it was repealed in 1977. In 1988 a new Act, namely, the Mediation Boards Act 1988 was introduced with better mechanism of mediation for minor disputes.

Mediation boards are appointed at community level, its members comprise of people of the community and enjoy territorial jurisdiction, which extends to a defined administrative area. These Boards are empowered to resolve disputes by the process of mediation, referred to it by disputing parties as well as, in certain instances, by the courts. Mediators are appointed by an independent commission consisting of five members appointed by the President, three of whom are required to be retired judges of the Supreme Court or Court of Appeal. The Act specifically requires that only organisations of an a political character can nominate persons to be appointed by the commission, to mediation boards, and all nominated persons are required to undergo a training course in mediation skills and techniques, at which, the aptitude of the nominees are assessed and the commission appoints as mediators only such persons as are reported to possess the required aptitude, skills and techniques. There is a permanent cadre of mediator trainers. Where an application is made by one party, the mediation board is required to request the attendance of both so as to attempt mediation. The party is free to reject as there is no power to compel the party. The board has to function in an atmosphere which is entirely informal.

13 Tania Sourdin, *Matching Disputes to Dispute Resolution Processes-The Australian Context*, ADR: What it is and how it works, 2002. The four models-the Hawaii program, the District of Columbia Multi-Door Courthouse program, The Florida criteria and the New Jersey Guide are analysed in Australian context by Tania Sourdin in his study in methods of classifying disputes vis-à-vis their suitability for mediation.

There are no regulated procedures or technical requirements to be complied with at any dispute hearing.

It was reported that the success rate of this process is 61 per cent. The submission to settlement is totally voluntary and the settlement arrived at by the parties is not one which is enforceable in a court of law. A breach of the settlement entitles the aggrieved party to seek recourse from the mediation board once again or to obtain a certificate of non-settlement, which would enable him to file action in court.[14]

The Supreme Court of Sri Lanka incorporated, in their Rules of Court, a novel experiment in institutionalising mediation at appellate stage. The Chief Justice or the President of the Court of Appeal, the apex court of Sri Lanka may decide such categories of appeals as may be referred to mediation. Appeals against conviction or sentence made by a court of criminal jurisdiction cannot be so referred for mediation. A judge will be acting as a mediator to whom the appeal is referred. The rule also provided that the settlements arrived at such mediation is binding. Unfortunately the rules were not brought into operation. As there is an increasing dissatisfaction with the traditional methods of dispute resolution, it is imperative to activate and energise the mediation boards.

Conciliation Courts in Pakistan

The Government of Pakistan brought out an Ordinance in 1961 constituting conciliation courts to deal with minor civil cases and petty crimes, which are compoundable in nature. Whenever a dispute arises, the Chairman has to constitute the court and parties have to nominate two conciliators each, out of which one has to be member of Union Council. The constitution of court varies with each case. Pakistan Law Reforms Commission in its report in 1969–70, on working of conciliation courts, stated that most of the people were satisfied with the process as it generated a sense of participation, leading to quicker and cheaper justice relieving the courts of its major burden. The clients saved money, which they would have spent on litigation and lawyers fee. The methods resorted to by these courts is that of mediation or compromise. Conciliation is the primary function of these courts and not adjudication as it was in adversarial mechanism.

14 Dhara Wijayatilake, '*Mediation and Arbitration as alternative methods of Dispute Resolution in Sri Lanka*', ADR: What it is and how it works, 2002, pp 182–185.

Hong Kong Dispute Resolution

The International Business Center, Hong Kong, has institutionalised the process of arbitration, according it the status of commercial court. In 1985 Hong Kong International Arbitration Center (HKIAC), was established, to assist parties to resolve their disputes not only by arbitration but by other means as well, such as mediation. HKIAC is a non-profit company, funded and organised by the business community and operating under control of council, composed of business and professional people of different nationalities and with a wide diversity of skills and experience. The mediation scheme is administered by HKIAC. Many construction disputes are resolved by mediation in Hong Kong and the success rate has been extremely high.

Conciliation as an Experiment in Himachal Pradesh, India

Two significant developments, however, gave the needed impetus to recognising mediation/conciliation as a useful alternative for dispute resolution, as compared to the court system, in Himachal Pradesh, India. In 1984, faced with the problem of mounting arrears in subordinate courts, the Himachal Pradesh High Court evolved a project for disposal of pending cases by conciliation, insisting on pre-trail conciliation in fresh cases. The experiment was in the nature of the Michigan Mediation, tried in Canada in a few pending litigation cases though not on the scale practiced in Himachal Pradesh.

In the matters of rent control, marriage and family disputes, claims for maintenance by dependents under s 125 of code of Criminal Procedure 1973 (Cr PC), water disputes, easementary rights or Motor Vehicle Accident claims, the conciliatory efforts made by senior sub-judge yielded unprecedented results. Each court spent four to six days in a month on conciliation to compile all those cases, which could be settled. First the sub-judge had to sort out the oldest cases of selected categories and refer them to the district judge to transfer to conciliation courts, where the district judge formally sought opinion of the counsels. Any court with original jurisdiction could initiate conciliation. The conciliation court evolved a just and fair formula for amicable settlement. It was asked to either adopt conciliation or hear the case on merits. Once settlement was achieved it had to be recorded according to o 23 Code of Civil Procedure 1908 (CPC) (compromise of suit) or o 32 CPC (agreement or compromise by next friend or guardian for the suit). Parties were asked to give undertaking that they shall abide by settlement and foreclose future litigation.

In cases relating to motor vehicle claims, the cases that could be resolved through conciliation were selected and sent to insurance companies, which had to study the claims and report back in a week with offers of amounts and possibility of conciliation. After hearing both the parties a settlement level brought about, which was recorded and the amount is deposited by the insurance company. The success of the experiments conducted in Himachal were widely welcomed.[15]

The Himachal experiment of dispute resolution by conciliation gave a new dimension to the concept of conciliation in India. Instead of the disputing parties willingly coming together with the aim of arriving at a mutually agreeable settlement of their dispute with the assistance of a neutral third party, mutually chosen, the conciliation process based on the Himachal conciliation process was a court-induced conciliation, making it mandatory for the parties to attempt a conciliation for settlement of their dispute and approach the court if conciliation fails. Once the advantages of conciliation became evident, more and more disputing parties were likely to take recourse to conciliation as a mode of settlement of their disputes.

Advantages of Mediation

The freedom and other process of certain qualities of mediation help the acheivement of results based on sincere efforts of the disputants. However it is required to know that mediation cannot guarantee specific results.

1) Free

The first advantage is that Mediation is available at no cost to the parties. However, as the mediation process is now being institutionalised and made professional, requires expenditure of a minimum amount of money. Comparatively, it could work out to be much cheaper, in cost, than arbitration. It is advised that the parties and mediator arrive at a decision, at the outset, regarding the cost and fees, so that it does not become a cause of fresh dispute. Legal or other representation is optional but not required. Mediation is generally less expensive as compared to the expense of litigation. Mediation often provides a more timely way of resolving disputes.

15 The Law Commission of India in their 77th and 131st Reports, the Conference of Chief Ministers and Chief Justices in their resolution of December 1993 and the Calcutta Resolution of the Law Minister and Law Secretaries Meetings in 1994 commended other states to follow the Himachal Project in their subordinate courts.

2) Fair and Neutral

Being a joint decision the parties have an equal say in the process and decide settlement terms, not the mediator alone. There is no determination of guilt or innocence in the process.

3) High Rate of Compliance

Compliance to agreement reached in a mediation process is largely because of the workable and implementable nature of those decisions as well as the fact that the same includes the interests of both the parties.

4) Comprehensive and Customised Agreements

Mediated settlements are able to address both legal as well as other related issues to the dispute. Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions.

5) Confidentiality

The Arbitration and Conciliation Act specifically provide for confidentiality of information disclosed during the mediation process. All parties to the dispute sign a confidentiality agreement, Even otherwise parties may agree on privacy and confidentiality of the process and result.

6) Avoids Litigation

Besides costing less than a law suit, the mediation avoids the uncertainty of judicial outcome.

7) Fosters Cooperation

Mediation fosters a problem solving approach to complaints and workplace disruptions are reduced.

8) Improves Communication

Mediation provides a neutral and confidential setting where both parties can openly discuss their views on the underlying dispute. Enhanced communication can lead to mutually satisfactory resolutions.

9) Tailor Made Solutions

A neutral third party assists the parties in reaching a voluntary, mutually beneficial resolution.

10) Personal Empowerment

People who negotiate their own settlements often feel more powerful than those who use lawyers to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence.

11) Preservation of Ongoing Relationship

A mediated settlement that addresses all parties' interests can often preserve relationship in ways that would not be possible in a win/lose decision-making procedure.

12) Everyone Wins

Several surveys and studies in US showed that almost all respondents and all disputant parties who used mediation would use it again if offered. Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker.

Essential Characteristics of the Mediation Process

Voluntary

It is voluntary process.

Collaborative

The disputant parties are encouraged to work together to solve their problem(s) and to reach, what they perceive to be, the best agreement.

Controlled

Parties have total command over process and decision. They have complete decision-making power and a veto over each and every provision of any mediated agreement. Nothing can be imposed forcibly on anyone.

Confidential

Mediation is confidential, to the extent parties desire and agree, be that by statute, contract, rules of evidence or privilege. Mediation discussions and all materials developed for mediation are not admissible in any subsequent court or other contested proceeding, except for a finalised and signed

mediated agreement. The mediator is obligated to describe any exceptions to this general confidentiality of mediation. Confidentiality in mediation may be waived in writing, although the mediator may retain his or her own ability to refuse to testify in any contested case. The extent of confidentiality for any 'caucus meetings' (private sessions or meetings between the mediator and individual parties) should also be defined.

Informed

The mediation process offers a full opportunity to obtain and incorporate legal and other expert information and advice. Mutually acceptable experts can be retained. Such jointly obtained expert information can be designated as either confidential to mediation or, as the parties desire, as admissible in any subsequent contested proceeding. Expert advice is never determinative in mediation. The parties always retain decision-making power. Mediators are bound to encourage parties to obtain legal counsel and to advise them to have any mediated agreement involving legal issues reviewed by independent legal counsel prior to signing. Whether legal advice is sought, is ultimately a decision of each mediation participant.

Impartial, Neutral, Balanced and Safe

The mediator has an equal and balanced responsibility to assist each mediating party and cannot favor the interests of any one party over another, nor should the mediator favor a particular result in mediation. The mediator is ethically obligated to acknowledge any substantive bias on major issues in discussion. The mediator's role is to ensure that parties reach agreement in a voluntarily and informed manner, and not due to coercion or intimidation.

Self-Responsible and Satisfying

Research has proved that having actively resolved their own conflict, the likelihood of compliance by the parties dramatically elevates due to the process of mediation.

The above qualities explain the role of the mediator, in settling the disputes, in a consensual and impartial manner. Mediation is accepted as the most viable process of resolving a conflict between two parties before any other legal process is opted for, for settling the dispute. As this is known as assisted negotiation or structured negotiation, it is basically a necessary assistance to the negotiators who are the parties themselves. The mediator facilitates, renders assistance, gives advise if necessary, presents

options available, analyses the strategies, suggests strategies to be adopted, details the issues to be settled, drafts the agreement sentences so that the parties do not find any difficulty in agreeing with them and finally authorises the settlement.

Convening for Mediation

The mediator may have to plan very carefully the best strategy to bring the parties to the table of discussion. If one of the parties is not ready to send the invitation to the other, it is for the provider to initiate an invitation to the parties. If the parties are rigid about not approaching the opponent, it is for the provider to find a suitable seat of negotiation in his presence or absence, which does not create problems for either of the parties.

Flexible Process

There is no rigid framework of rules for mediation. It is a very flexible process. A person who is acceptable to both the parties would serve as mediator. He is perceived as neutral capable of understanding the issues of their dispute and knowledgeable enough about the mediation processes along with an attitude to resolve problems.

It is important to decide on the cost of the mediation at the beginning itself. The mediator should indicate the possible cost and obtain the consent of parties to share the cost equally. If not the cost of mediation would become an issue of conflict to be mediated between the mediator and the party.

Issues to be Discussed

The parties should decide on the procedure of mediation. In this endeavor, the parties may state what issues need to be discussed and what should be avoided. There is also a need to decide about the privacy or secrecy or confidentiality of certain procedures or aspects of the negotiable issues of the dispute.

With the assistance or guidance or knowledge of the mediator, the parties should decide on what issues to be discussed what not to be.

Necessary Parties

The parties have to recognise all the necessary parties, who are either involved or interested or might be affected by the decision on the issues before

them. If a necessary party is not joined, the decision may not be binding on him and entire process may go waste. The persons who are capable of making commitments may be parties to the process. It is also necessary to decide in advance whether the parties will represent themselves or be represented by a counsel.

Initial Steps

The mediator has certain hard tasks before him at the initial stages of mediation. He has to contact the parties at and make them aware about, the uses and benefits of mediation, in comparison to other processes. Mediator has to build necessary credibility and atmosphere to say that he has enough courage and credibility to assist in resolution of the dispute. Besides this, mediator has to establish a rapport between the disputants. He has to exhibit his personal credibility, build institutional credibility, so that the parties are ready to establish a rapport between them.

Beginning

The beginning of a mediation session is very important. The atmosphere of the first session sets the necessary atmosphere for resolution.

Collecting and Analysing the Relevant Information

The mediator obtains necessary clues, of the issues, from statements of the parties and develops further information from there which helps him in establishing a focus and maintain a momentum of the resolution process. The opening statement, the circumstances in which the dispute arose, the sum and substance of the issues to be resolved are expected to be collected from the parties at the first or second phase of mediation.

Mediator has to strategically draft the list of issues, circulate it among the parties, collect their suggestions and finally secure the consensus in listing out and fixing the issues in list of priority, in order of their preference in the resolution process. If needed, he has to reframe the issues or reorient the list or reprioritise the issues. He has to see whether the interests and concerns of all the parties are reflected in the issues listed or not.

Communication Process

The next stage in mediation is the flow of communication between the disputant parties. The parties understanding of each other's perspective

and mediator's understanding of the issues and interests are important, which require perfect communication. The body language, restatement, paraphrasing, summarising etc, are the elements of communication. In understanding the communication, one has to cross the barriers of cultural challenges, gender, personality, and language and perception. Communication can be re-established with frequent meetings, and raising appropriate questions which are elaborate, clarificatory questions, confirmatory, confrontational, and hypothetical.

Meetings

The mediator has to decide whether to have joint sittings with the parties or individual caucusing. He has to choose whom to meet first. It is always important to retain the focus on interest and remind the confidentiality of the process and information to the parties. While the objective of initial meetings with parties and arranging meetings between them is to collect more information about the issues to be settled and increase the credibility and the bond of friendship between the parties. The information collected by this process of establishing communication and series of meetings help the mediator in evaluation of the case and possible settlement points. The mediator can also use these meetings for explaining the BATNA and WATNA for both the parties.

These meetings will facilitate the negotiation process between the parties. All those strategies of negotiation can be adopted, tested and the benefits realised.

Essential characters of Mediator

The mediator must:

- be neutral,
- have ability to understand the issues,
- have knowledge about the process of mediation.

The mediator has certain duties. Performance of those duties is his role. The mediator's ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

Convener

The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting.

Educator

The mediator educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, research, court standards, etc.

Communication Facilitator

The mediator seeks to ensure that each party is fully heard in the mediation process.

Translator

When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

Questioner and Clarifier

The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

Process Advisor

The mediator suggests procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

Counsellor

The mediator may exercise his or her discretion to play devil's advocate with one or both parties as to the practicality of solutions they are considering or the extent to which certain options are consistent with participants' stated goals, interests and positive intentions.

Catalyst

By offering options for considerations, stimulating new perspectives and offering reference points for consideration, mediator serves as a stimulant for the parties reaching agreement.

Responsible Record Holder

The mediator manages and keeps track of all necessary information, drafts the parties' agreement, and may assist the parties to implement their agreement.

Preparation for Mediation

In mediation it is more for the parties than for the mediator to settle the problem. Using mediation in litigation requires several generic steps, and includes some steps that apply to litigation even where no mediation occurs. The parties to the dispute need to be aware of various issues such as:

a) Details of the Case

In the context of preparing for a mediation session, 'know your case' means knowing and preparing the following elements:

a) Facts which are disputed and which are undisputed;
b) Facts which are critical and important;
c) Details of cause of action and facts of the case;
d) The damages the client may suffer or other relief desired. As a defendant or claimant, the party should first know what they really want. This will help the parties to focus on what they hope to achieve in mediation.

b) Counter-claims and Defenses

If the party is actively resisting the relief sought by the other, he should know the possible counter claims and defenses, the liability issues, disputed and undisputed.

c) Know Comparable Jury Verdicts

To assess the strength or otherwise, comparable jury verdicts are needed. This can be very important and helps in evaluating goals.

d) Awareness of Alternatives to Settlement

A perfect comparative picture can be arrived only after finding out the alternatives, so that a right choice is suggested and accepted.

e) Awareness of Risks

a) The alternatives in case the parties do not settle;
b) The cost of going to trial and the delay involved in the same;
c) Potential outcome in case the alternative of trial is adopted;
d) Be aware of the opposite parties options, if any, in case the mediation fails.

f) Educate the Parties to the Dispute

Mediator is like a team leader who has to make the parties to the dispute aware about the alternatives available to them as well as about the dispute. Mediator has to explain the mechanics of the system (especially how a mediation session goes), so that the clients understand the procedures and keep them from being surprised by the process.

(i) Explain the facts as the law sees them, so that the clients understand that what matters are not 'the facts' but the admissible evidence. This helps clients avoid trouble later.
(ii) Explain the law, as the State has created it, so that the clients understand that the result they will get will not necessarily be what they think is fair but what the law allows.
(iii) Update the status of the case so to help the client understand how much, or how little, time settlement can save.
(iv) Explain the status of negotiations (if any) to make certain that the client approves of at least where the negotiations will start.
(v) Determine and set the goals that the client is seeking from the dispute and the resolution process to make certain that you are headed in the right direction.
(vi) Define your client's objectives to get concrete goals.
(vii) Examine the alternatives to the client's objectives.
(viii) Explain to your client the alternatives to settlement (including risks, delays and enforceability of judgments, if any), to help the client realise that having a trial and receiving a verdict is not necessarily the end of the process.

g) Know how to validate opponent's file

(i) Review and make certain that the opposite party has all of the materials necessary to fully negotiate. Twenty per cent of all mediations that fail is due to the fact that one party did not prepare properly.
(ii) Both the parties should provide all the necessary details as well as evidence, related to the dispute, to the other party before commencing with mediation process.

Stages of Mediation

(1) First stage: Coming together of necessitating parties;
(2) Second Stage: Discovering all the facts of the case;

(3) Third Stage: Collection of pre-mediation briefs;
(4) Fourth Stage: Consideration of evidences and witnesses, corroboration of the same;
(5) Fifth Stage: Continuous effort by Mediator in convincing the reluctant party to agree for resolution;
(6) Sixth and final stage: Consolidating the gains of mediation into agreed settlement and follow-up till the parties realise the results.

Two Models of Mediation

Interest Based Mediation and Rights Based Mediation, are two models of mediation, as analysed by Pepperdine Institute of ADR.

In the Interest Based Model, the mediator is employed by parties, there is no pressure to settle, which is left to the parties themselves and they are prone to focus on underlying interests. In this model the mediator encourages creative problem solving. He primarily keeps parties together.

Whereas in Rights Based Model, the mediator is employed by state, there is pressure to settle, and the focus is on money or other pecuniary benefits based on the rights, the mediator here tries to extract concessions, and shuttles between the parties for that purpose and there is a possibility that mediator takes a stand as well.

Therapeutic Mediation

Stephen R Marsh, discussed various models of mediation.[16] In the class of therapeutic mediation, he explained Transformative Mediation. Mediation is a quasi-religious endeavor wherein participants are transformed in their human relationships by the dual processes of recognition and empowerment, which explains transformative mediation. The mediation process teaches the employees how to better relate to each other and to solve their own conflicts without recourse to a mediator. L Boule in Mediation (1996), refers to this as part of the sub-set of therapeutic mediation and there is an entire area of family counseling practice that is therapeutic use of mediation.

Facilitative Mediation

Another model of mediation explained by L Boule is Facilitative Mediation. It is basically a need based mediation, which is an analytical event where

16 Quoting L Boule, Mediation, 1996, Stephen R Marsh.

the parties explore their essential needs and how to best meet them rather than how to achieve realisation of positions. L Boule refers to this as facilitative mediation.

Evaluative Mediation

Mediation is a bottom-line evaluative process similar to non-binding arbitration. It is the most historically common practice being the model where there were three mediators, one a plaintiff's attorney, one a defense attorney, and one a lay person, who heard both the sides, evaluated the case, explained their evaluations to the parties, and then attempted to help the parties negotiate a final settlement based on the evaluations. This model is not being practiced now and condemned by many.

Directive Mediation

Mediation is a directive process. Without going into excessive detail, some cultural groups are incapable of perceiving mediation as anything else, regardless of what is really happening, even with scripted role-plays. Many consumers hope for this type of mediator, regardless of what their attorneys, scholars or others think they should need or want.

Classic Mediation

Mediation is a facilitative reconciling process whereby, in a face-to-face setting, with the help of a neutral, parties explore their conflicts and misunderstandings and come to reconciliation.

Pure Process Mediation

Mediation is a neutral intermediary process. This method is also known as Pure Process Mediation and the mediator's skill set and background knowledge are seen as generally inconsequential. It is what mediation has become in almost every arena where mediators are paid to mediate.[17]

Two Styles of Mediation

There are two styles of mediation; facilitative and evaluative. These are not

17 Stephen R Marsh, Models of Mediation, http://adrr.com/adr4/mediation.htm.

distinct and separate processes. It could be a mixed strategy also. A facilitative mediation is described as pure or interest based while the evaluative mediation is described as rights-based. In facilitative mediation, the neutral mediator focuses more on the process than on the content of the mediation. He facilitates more meetings, more communication and corrects misunderstandings. Evaluative mediator focuses on the substance of the case, studies the competing rights of the parties and opens up options for their decision.

Mediator's orientation is both evaluative and facilitative with both broad and narrow perspectives. Broad evaluative or narrow evaluative orientations deal with the problem in different perspectives. Depending on the definition of issues, by the mediator, the mediation process is either narrow or a broad facilitative mediation.

Thereafter the mediator has to take the parties close to agreement. It is the final and effective phase where settlement has to be found out, based on all those possible components of agreement. The agreement must be durable and result in satisfaction of all the parties. The well-settled agreement has to be binding, and immediately enforceable, to reap the benefits of the process of mediation.

Mediation Agreement

Successful Completion

At the end of a successful session of mediation, there may be a need for writing an agreement on the issues that were mediated upon. It is not necessary that every mediation would lead to a formal agreement. It is possible that parties enforce the result of mediation immediately after conclusion or that the parties may bridge their differences therefore ruling out the necessity of formal agreement. It is impossible to have a standard format for agreement, in a mediation process, which is dynamic by nature.

Michael Tsur,[18] states:

> A mediation agreement must stem from the mediation process itself. The operative term here is agreement, not contract. An agreement, reflects the joint effort of all parties. Based on the case studies and agreements in our hands, we can offer instructions to mediators how to ferret out the critical information, how to classify it and identify pivotal points. With the aid of these instructions, the mediation agreement will faithfully reflect the process that the parties themselves entered into.

18 Michael Tsur, 'The Art of Writing A Mediation Agreement', from articles listed on website www.mediate.com.

Referring to the need of including the interests of all parties in an agreement, Michael Tsur states that the agreement should be intelligible and credible to all parties and stand up to the hard experience of reality. The mediation agreement needs to respect the mediation process's dynamic and fundamental principles. Mediation agreement is a product of the interaction of two parties, who willingly come together to resolve their dispute, under the guidance of a skilled mediator. The parties come to understand and then accept their own needs, to protect their common interests, and to rebuild communication, after recognising that this is the key to effective and successful agreements, both in the short and long term.

The mediation agreement is fundamentally different in content, style and language from a legal (or any other) agreement. This is due to the unique nature of each agreement, since it is created by the parties themselves, as a result of their specific conflict and the mediation process, as they experience it. There is a lack of professional, academic and technical guidance in this area. The crafting of a mediation agreement is an acquired skill, sharpened and improved by continued involvement in the work.

Based on the experience the author has identified seven dimensions that reappear throughout the mediation process in different guises and forms and further states that 'embedded in these dimensions are the tools for writing the agreement'.

Negotiation is based on seven basic elements.[19] Often, when parties begin to stake out their positions in a negotiation process, the positions dissolve into conflict. Therefore, to identify and understand these seven elements is essential, since they organise the negotiation process.

Parallel to negotiation, the mediation process proceeds in seven stages[20] that builds a congenial atmosphere, trust, and addresses misunderstandings between the parties in such a way that it helps generate options for consensus and reach joint solutions. When writing mediation agreements, there are seven dimensions to be identified as well. The dimensions are presented sequentially, however, in reality they are employed in a more integrated manner.

The Seven Dimensions of Writing Mediation Agreements

1. Accurate identity of parties;
2. Reflecting the Framework of the Agreement;
3. Priority of Interests after Identifying Topics;

19 Roger Fisher and William Ury, *Getting to Yes*, New York Penguin Books, 1981.
20 Harvard University Model 1976.

4. Interim Agreement;
5. Revisions;
6. Reading the Agreement in open;
7. Ceremonial Signing.

1. Accurate Identity of Parties

The first of seven dimensions, identified by Michael Tsur, is identifying and naming the parties, which is a basic and essential requirement. It is important to distinguish between private mediations and those involving companies and institutions. In private mediations, such as those involving family conflicts, business disputes, partnership dissolutions, or conflicts between neighbors, the identification of the parties is relatively simple. The parties represent themselves and are identified as such by their own names in the written agreement. They obligate themselves to the agreement by signing it.

The mediator's obligation is, first and foremost, to clarify the capacity of the parties. A limitation in capacity may not reveal itself until a later stage in the mediation. Occasionally, such a limitation may warrant a brief hiatus in the mediation process.

For organisations and companies, represented by an employee in the mediation process, it is important to clarify the employee's authority. He may be a negotiator, without authority to make final decisions, and may need to check with a superior. In such a case, the mediator is obligated, at the outset, to identify the precise scope of the negotiator's authority. This must be done during the first meeting, diplomatically, by asking simple, direct questions.

The mediator must investigate this representative's position within and even prior to the conflict. Is the negotiator the sales person who reached an agreement? The CEO of the company? The legal counsel? All this will color the mediation process.

It is important to ask these questions in a straightforward, non-judgmental manner, as opposed to stating the questions in a manner that arouses suspicion. It is a good idea to precede, or elucidate the questions with a clarifying comment.

Empowerment is the sine qua non of a successful conclusion of the writing of a mediation agreement.

Including personal terms and notes in a mediation agreement can facilitate effective and productive negotiation

As an alternative, mediation is, intrinsically, less formal than more traditional processes. Within the context of each culture it is up to the

mediator and the parties to find appropriate means of creating a more relaxed and informal environment. Personalisation reinforces the obligation that the negotiators feel for any conclusions or resolutions. Personalisation serves to recall for the negotiator the experience, time, investment and spirit of the mediation process. The negotiator is an essential element in all that transpires, he influences the outcome, and is influenced by the others present; he is the one who agrees to all relevant settlements.

Thus, when the time comes to execute the terms of the agreement, first by presenting it to the relevant individual, in case of a company, the negotiator, personally, details all the negotiations that made the agreement possible, thereby committing him/her to the agreement.

Informal references, if any, in the language of the agreement make it unique. Mediation agreements belong to the parties, adding a new dimension to each of their original positions and attitudes. Mediation agreements should feel different from a labor contract, a real estate title policy, or a divorce settlement.

2. Reflecting the Framework of the Agreement

The agreement must reflect the essential elements of process that lead to a conclusion. A framework is necessary, not only in order to define the main points of the conflict but to maintain the relations between the parties. The framework contains the basic points of the dispute that created the need for mediation.

The framework must be introduced at the very beginning of the formulation of the mediation agreement. The purpose of the framework is merely to outline the central and relevant points in dispute, to highlight the mutual interest of both parties to resolve it, and to include a general statement that resolution has been reached. All this should be stated simply and factually without entering into the details of the conflict itself. To be omitted at this stage is the history of the conflict and all the details. It is valuable to be clear about what is being dealt with right at the beginning. This assures that the parties are aligned to the common goal.

The parties themselves define the framework of mediation. They are the ones who explain why the mediation is taking place, what the dispute is about, and what their respective interests are. They are the ones who clarify and decide the issue at hand. The framework arises from the details that unfold in the mediation process.

The framework is short and to the point, containing all the facts, to which both the parties already concur. The framework is separate from the complete agreement, which will emerge only as the mediation process continues.

a) The circumstance or catalyst of the present conflict. Often this is a misunderstanding or existing dispute;
b) A statement that both parties have a common interest in resolving the conflict;
c) A statement that the mediation agreement will be a by product of the present mediation process.

3. Priority of Interests after Identifying Topics

In a dispute, the issues must be put in context, not only of the parties and the mediators, but of the law and any existing practices. It is important to establish a hierarchy of points in the dispute (and also to prioritise the points of mediation agreement). When writing the agreement, the most difficult, more contentious, issues should be dealt with first.

In a mediation process, the mediator enables the parties to understand and realise their respective interests, it becomes the mediator's job to crystallise what is most important to them, in order to rank the points in the dispute. A ranking may become clear in conjunction with interim agreements, the parties themselves reach, as mediation proceeds.

A ranking of points in dispute responds to two questions. First, it assists in prioritising the issues for the disputant parties. For example, in a workplace dispute, an apology may need to precede any evaluation of the points in dispute, not to mention any decisions on financial compensation or other resolutions. Second, what do logic, law, and social norms say? For example, in a marital dispute governed by Jewish law, the actual granting of the GET (formal bill of divorce) may need to precede the resolution of matters of custody and property settlement.

It is important that the mediator responsibly balance and harmonise the party's needs and priorities with the legal system prevalent in the country or countries involved.

4. Interim Agreement

During the course of mediation, various solutions come up. These may reflect agreement among the parties themselves, or, the parties may express the ways in which they want the dispute to be resolved. All such suggestions and declarations should be agreed to in writing as they are vital. It is possible to configure a provisional agreement making use of them. They become the concrete material that the parties discuss as potential resolutions and are a powerful tool in furthering the resolution of the dispute.

A provisional agreement does not bind the parties once the time designated for a trial basis agreement ends. It makes no difference how

insignificant any interim resolution or concession may seem. It advances the process, cultivating receptivity towards a more conciliatory attitude, and can lead to further agreement. Provisional agreements are a fundamental tool of mediation. Just as the mediation process itself should endeavor to be as transparent as possible, so should the provisional, as well as, final agreement. With this in mind, the written language of the agreement should be simple, clear, detailed and progressive. Wherever possible this helps reinforce the party's connection and commitment to the agreement.

A provisional agreement helps clarify, for the parties, their actual goals in the mediation. This, in turn, enables them to consult with friends or legal advisors constructively. A provisional agreement to which details may be added to or subtracted from-gives the parties a sense of flexibility. This helps them embrace the process and may liberate them from rigid postures. This may also calm their fears of being coerced into agreeing to something they are averse to. A provisional agreement conveys the message that this is their agreement, that the decisions they reach are, in fact, their own thus increasing the parties sense of ownership of the agreement.

A provisional agreement builds or renews trust and gives a tangible indication as to whether a final agreement is really possible. Part of reaching the stage of drafting a provisional agreement is self-scrutiny by the parties themselves. What terms they can commit to writing and whether they have moved towards a resolution?

The ideal situation is for the final agreement to come from the parties themselves. Unfortunately, this does not often happen. This is the power of the provisional agreement, it gives the parties the tools with which to develop a final agreement that will satisfy them both.

5. Revisions

Revisions to a provisional agreement, requested by the parties, give the mediator an important tool, an understanding of the parties underlying intentions toward each other, and of how they feel about the mediation process thus far.

Throughout the drafting of the agreement it is important to constantly revise to view the agreement as fluid until it is final. Formulation of the revisions is best done at a separate meeting with each party individually. Only afterwards should both parties meet to decide which clauses should be incorporated into a final agreement.

Whenever a party expresses an interest in changing an agreement, it is important to understand whether it fundamentally changes or merely alters the agreement. Further, it is important for the mediator to know the source

of the proposed change. Does it express a fuller understanding of the agreement or does it pose a new problem, or reflect a change of mind? Is it an expression of fear of going through with the agreement? It is vital to understand a party's motivation for a revision does it advance the process or impede it? Another consideration, should a mediator attribute the revision to the party himself, or as a joint idea of the party and the mediator?

Addressing necessary changes and revisions in the agreement can alleviate fears for the parties. The possibility of revision shows that it is possible to alter that which has been set. This reinforces the notion that mediation is not coercive. Revision adds credibility to the process. Revision can also show whether the ultimate agreement will stand the test of time by unveiling a party's true intentions.

6. Reading the Agreement in Open

The mediator must be certain that each of the parties has read the agreement separately, if he deems it necessary. Subsequently, the agreement should be read while both parties are present, in order to confirm the accuracy of the settlements agreed upon. Moreover, during the reading, after each section, the mediator should affirm that both parties understand the provisions in the same way and that there is a meeting of the minds.

It should be clear to the parties that this is the critical time to decide whether they will terminate the dispute by agreeing to sign the final agreement and comply with it.

A provision should appear at the conclusion of every mediation agreement that provides for resolving any future conflict between the two parties. This clause should envision a possible change of circumstances that would make the present agreement obsolete, but that also commits the parties to attempt further mediation before taking legal action.

Since the mediators do not serve as advocates, for either party, but as neutral facilitators, that advance each party's interests, the parties should consult with their legal representatives prior to signing the final agreement. This helps ensure that nothing in the agreement violates or ignores their legal rights. The mediator should confirm that each of the parties has done this. Each party is encouraged to consult legal advisor of their choice, the mediation center's attorney need not be used, although it is an option for any interested party. When consulting a private attorney, it is important that the attorney be someone who understands and appreciates the mediation process. This is so he may effectuate and support the agreement, rather than sabotage the work that was accomplished during mediation, as is reflected in the resulting agreement. Nevertheless, the possibility of necessary legal revisions is normal, and should be expected.

7. Ceremonial Signing

This final step brings the process full circle and its purpose is twofold. First, the active signing on behalf of the parties is a declarative action of closure to all that transpired throughout the process in order to reach this point. Second, the signature of the parties attests to their understanding and recognition that this final written agreement is the product of a participatory process and reflects the best resolutions they have arrived at, in light of the contextual circumstances.

The party's signature to the agreement now ensures that the agreement's status becomes that of a binding legal document and can be approved by a court of law.

At this juncture, the mediator explains to the parties the significance of their signatures and various logistical details that attend to giving this agreement the force of judgment. Moreover, it is essential to clarify to the parties that while this agreement is meant to resolve the present conflict, they nevertheless have the option of returning to mediation should future conflicts arise.

On a more personal note, now is the time for the mediator to acknowledge the parties efforts invested in the process that led to this resolution. Furthermore, the mediator should express the hope that this experience and new found awareness of conflict resolution be internalised in such a way that will empower the parties with the skills and motivation to, de-escalate and resolve future conflicts that may arise within their lives.[21]

Mediation in a Commercial Litigation

Mediation is often the last chance to find a solution to the problem, that led to litigation, rather than place a monetary value on the injury. ADR is often the last chance to explore early resolution, correction of mistakes, and control of costs, if litigation cannot be avoided.

Importantly, commercial litigation mediation can focus on reducing costs in litigation or on picking neutral arbitrators to resolve important issues such as valuation. Mediation should be seen as a place to structure future relationships whether or not the litigation continues. The parties have to answer these question themselves, first, can they preserve or strengthen the business relationship that is being destroyed by the litigation? Second, can they find a business alternative to the issue underneath the matters resulting in the breach of contract or other commercial problem?

21 Michael Tsur, The Art of Writing A Mediation Agreement, from articles listed on website www.mediate.com.

Often there are hidden agendas, issues or hidden causes that the parties and the mediator need to look for. Third, can they evaluate various resolutions in light of the cost of discovery and other litigation costs including publicity, uncertainty, time and effort stolen by litigation?

Commercial litigation benefits more from early mediation, and from repeat, mediation sessions, than any other area. For comparison, personal injury cases generally settle in a single day or half day session and generally must have an adjuster's established file. Mediation gets used only after normal negotiation fails.

Commercial cases may have multiple sessions, each resolving one point, and can often start as soon as the parties have identified that a problem exists.

In commercial litigation, the sooner the case is mediated, the more likely a favourable solution can be worked out. lower the amount of damages to be worked out.

In the mediation process, the parties can agree on temporary restraining orders, which are known as TROs in commercial mediation context in Texas US. Especially in TROs covenants not to compete, contractual language disputes, trade secrets and employment litigation, early mediation, prior to heavy 'investment' in the lawsuit, is a successful method for resolving conflict. In Texas Federal Courts, all commercial temporary restraining orders have reportedly a 90 per cent success rate with early mediation. Further, early commercial mediation often results in additional business being worked out between the parties.

Mediation in Medical Malpractice

After societal conflicts, medical negligence is the dominant issue. Medical litigation issues include both personality problems and medical malpractice issues. They are different from the preceding types of cases in important ways. Mediation can help in settling the issue amicably without loss of time.

In the experience of Eric Galton,[22] and other successful mediators, there are two important observations involving medical malpractice cases:

a. One of the most difficult portions is the mediating that goes on between different defendants. Often the best method of handling this is to first have the defendants agree to a reasonable settlement range and then to have each put up an initial contribution to test whether the plaintiff can be convinced about that range.

22 Author of Texas Lawyer Press Mediation Manual.

Only after the plaintiff has moved into a reasonable range can the defendants agree to the necessary amounts to close the gap (between the initial offer amounts and the amount that is reasonable). Often a reasonable range figure provides an incentive, as does the possibility for partial settlements between the plaintiff and some defendants.

b. Cases seem to resolve more consistently if mediation occurs early. Unlike many defendants, most medical malpractice defendants are experts who can understand the risks and the theories. They may, very likely, have access to almost all the facts long before they come to the notice of the plaintiff.

Settlement works best when both parties are still able to communicate with each other.

Mediation is a preffered way of resolving disputes and many hospitals are focusing on maintaining inhouse mediation staff. Such programs have benefited, staff and patient relation problems, as much as litigation issues do. As a result, more and more hospitals are adding mediators to their Human Resources (HR) department.

Bankruptcy and Mediation

Mediation process has also being tried and followed in bankruptcy proceedings, with the agreement of the parties. Since bankruptcy often involves non-zero sum solutions, mediation has been growing in that area, solely as the result of successes, that the attorneys have had using this method.

Bankruptcy is one area where waiting to mediate, until counsel can determine if there is going to be a contest, may well be superior to immediately moving forward to mediation. As a result, instead of rushing to mediation, bankruptcy law calls for a wait and watch attitude.

Courts using bankruptcy mediators generally require that the mediators have at least 10 years of licensed law practice in bankruptcy and forty hours from an Massachusets Continuing Legal Education (MCLE) approved program providing instruction in mediation.

This is because bankruptcy appears to be an area where practice in the area of law mediated upon is important to the success of the process, and the mediator is often expected to have substantial input in suggesting alternatives under the bankruptcy code.[23]

23 Source: *http://adrr.com/adr1/essaye.htm*.

B. Conciliation

What is Conciliation?

A process that attempts to resolve disputes such as labor disputes by compromise or voluntary agreement. By contrast with arbitration, the mediator conciliator, or conciliation commissioner does not bring in a binding award, and the parties are free to accept or reject the recommendation. The conciliator is often a government official whose report contains recommendations and is made public. Conciliation is a prerequisite to legal strike/lockout action. The mediator is usually a private individual, appointed as a last resort, after conciliation has failed to prevent or put an end to a strike.

Conciliation is generally used as a synonym for mediation, though there is a slight difference between them. If a third party is involved informally but without, being provided by for any law that can be called mediation. Mediation may be called a non-statutory conciliation.

As already stated, conciliation even under the statute can be a non-binding process. Mediation is basically a non-binding procedure in which an impartial third party, the conciliator, assists the parties to a dispute in reaching a mutually agreed settlement. In USA the procedure is described 'mediation' in which, it is said that emphasis is, in comparison with conciliation, on a more positive role to be played by the neutral mediator in assisting the parties to arrive at an agreed settlement. Viewed from their outcome, conciliation and mediation are inter-changeable expressions. The dispute resolution process being the same, a successful completion of the proceedings, in both conciliation and mediation, results in a mutually agreed settlement.

Conciliation and mediation are generally interchangeable expressions. Wherever the statute provided for some sort of assistance to parties to a dispute, the name of conciliation has been used. Being an assisted or structured negotiation, the mediation offers a multifaceted pro-active role in understanding, focusing and finalising the issues and then providing all help for finding out a negotiated settlement. A third person, other than the parties involved in conflict, is expected to play an indefinable role with his fairness, objectivity, unbiased stand, neutrality and much needed independence. It is basically yet another non-binding process of resolution, yet more viable than any other method of ADR. Because, negotiation as a measure is totally dependent on willingness, initiative and efficiency of the parties or their representative negotiator, and arbitration is more akin to

adjudication process despite that being freed from rigid rules of CPC 1908 and Indian Evidence Act 1872. Mediation provides multiple options and multifarious means to achieve consensus between conflicting parties.

Statutory Conciliation

Conciliation is recognised by law as one of the best methods of dispute resolution and provides for it under various statutes. The CPC under o 32A provides for conciliation between the parties. Now s 89 provides a strong base for sponsoring the conciliation process with the support of a pro-active judge, who finds the conciliators and directs the parties to them, as a matter of statutory obligation. The oldest provision for conciliation is s 12 of the Industrial Disputes Act 1947 (ID Act). The ID Act also makes strikes or lockouts illegal if they are resorted to when the conciliation process is on.

This method is quite appropriate especially to tackle marital problems, where rights of parties take a secondary seat and the possible welfare of children and the need to protect the 'marriage' as an institution is given priority unless there are compelling reasons to dissolve the marriage. Even for a peaceful separation, conciliation, as a pre-condition for mutual consent divorce application, is a practical problem solving approach.

Generally arbitration continues to be a preferred option to litigation. With regard to contractual disputes, of commercial nature, conciliation was considered useful. Even in industrial disputes, conciliation is preferred before they are referred for adjudication. The process of conciliation received statutory recognition in the CPC (o XXXIIA r 3), in ID Act (s 12) and the Hindu Marriage Act 1955 (s 23), this is in essence similar to the American concept of court annexed mediation. However, there is no well-structured process backed by statutory sanctions. Thus, conciliation under these statutes, could not achieve the same degree of popularity as that in USA. Thus the laws that provide for conciliation are:

(1) Industrial Disputes Act 1947.
(2) The Hindu Marriage Act 1955.
(3) Family Courts Act 1984.
(4) Code of Civil Procedure 1908 as amended in 1976, 1999 and 2002.
(5) Legal Services Authorities Act 1987.
(6) Arbitration and Conciliation Act 1996.

I. Conciliation under Industrial Disputes Act 1947

India accepted the tripartite approach to labor problems when it became a

member of the ILO in 1919. After the Trade Disputes Act 1929 was amended in 1938, on the basis of the recommendations of the Royal Commission on Labor 1931 and the Bombay Trade Disputes Act 1934, the Government of India appointed conciliation officers to assist the workmen, as well as management, in resolving industrial disputes. In 1942, the government inserted r 81-A in the Defence of India Rules which provided compulsory conciliation and adjudication of industrial disputes besides a moratorium on strikes and lockouts.

The experience gained during the war period, in containing the industrial conflict, forced the government to continue, more or less the same policy and institutions of conciliation and adjudication. And in pursuance of five-year labor programmer, the Industrial Disputes Act 1947, incorporating the provisions of r 81-A of the Defence of India Rules 1942.

The industrial relation policy, in the planned era, in independent India, requires the state to intervene in industrial disputes, first with an offer of conciliation and compulsory adjudication, when parties fail to prevent and settle their disputes themselves. The labor policy, for the first five-year plan, laid down that the state has to step in with an office of conciliation when parties fail to reach an agreement and the dispute continues. Conciliation should be made available in all such disputes. The conciliation officer has an important role to play for which he should be adequately equipped and trained. For cases involving major issues temporary or standing, conciliation boards may be appointed. The board should be composed of an independent chairman and persons, in equal number, to represent the interest of the parties. Panels of non-official conciliation may be formed. Conciliation proceedings should be carried in a completely informal atmosphere and concluded as quickly as possible with a time limit.

Thus, the labor policy, for the first plan period, took into account two important aspects of conciliation, viz, the essential knowledge to be acquainted with the conciliation officers through training and other means, and the place of the distinguished outsider in conciliation.

The second five year plan, while laying emphasis on the method of conciliation in general, advocated preventive mediation, which is more common in USA. The plan observed that greater emphasis should be placed on avoidance of dispute at all levels, including the last stage of mutual negotiations, namely conciliation. In countries where the conciliation machinery has worked more successfully, than in India, efforts are made by the conciliator to keep in touch with the trade union leaders and employers, when there are no disputes, and to discuss matters which are likely to cause conflicts in future.

The principal approach of the third five-year plan, to industrial relations was moral rather then legal sanctions and the emphasis was placed upon labor management cooperation and voluntary arbitration.

Conciliation Machinery

The conciliation machinery as provided under ID Act is of two types:

(1) Conciliation officers, and
(2) Board of Conciliation.

The Government, by notification, appoints some officers as conciliation officers, entrusting them with the duty of mediating in and promoting a settlement of industrial disputes. A conciliation officer is appointed either for a specified area or specified industry, or for a limited period. He makes a preliminary investigation before commencing conciliation in disputes in non-public utility services. The preliminary investigation usually consists of examining

a) Whether the disputes falls under his jurisdiction or not?
b) Whether the grievances/demands presented to him constitute an industrial dispute or not?
c) Whether the demands are bona fide or vexatious?

After this the conciliator decides to intervene, he serves a formal notice to the parties intimating them about the date of commencement of conciliatory proceedings.

Section 4(1) and (2) of the ID Act deal with appointment of conciliation officer and his geographical area of jurisdiction. Section 2(d) and (c) refers to the conciliation officer and proceedings, and s 2(p) talks about settlement.

Arbitration under Industrial Disputes Act 1947

Section 10A deals with voluntary reference of disputes to arbitration before referring to labour court or tribunal, by a written agreement. The parties may also refer the matter to a presiding officer as per the agreement. The arbitration or arbitrators shall have to investigate the dispute and submit to the appropriate government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

Board of Conciliation and Reference of Disputes

The Board of Conciliation was in existence, as an investigation machinery,

to deal with the problems of industry since 1929. Section 2 (c) ID Act gave a statutory authority to this board, which is to be constituted by a notification. Section 5 says it will have a Chairman and two or four other members, as the appropriate government thinks fit. The chairman shall be an independent person and other members shall be persons appointed in equal numbers to represent the parties to the dispute and any person appointed to represent a party shall be appointed on the recommendation of the party. If any party fails to make a recommendation as aforesaid, within the prescribed time, the appropriate government shall appoint such persons as it thinks fit to represent the party.

Section 10 empowers an appropriate government to make a reference of disputes to the Board of Conciliation, courts or tribunals. The government, by order in writing, if it is of opinion that any industrial dispute exists or is apprehended, can refer the dispute to the Board for promoting a settlement thereof, or refer any matter appearing to be connected with or relevant to the dispute to a court for inquiry, or refer to a labour court for adjudication, or tribunal for adjudication.

Powers and Procedures

Section 11 deals with procedures and powers of conciliation officers, boards, courts and tribunals.

The Act empowers every Board of Conciliation with the powers of a civil court. Therefore every board shall have the powers to enforce attendance of any person and examine him on oath, compel the production of documents and material objects, issuing commission for the examination of witnesses, in respect of such others matters as may be prescribed. Every board proceedings shall be deemed to be judicial proceeding within the meaning of ss 193 and 228 of the Indian Penal Code 1860. All the members of the board shall be deemed to be public servants.

Duties of the Board of Conciliators

Section 13 prescribed certain duties for the Board. When a dispute is referred to the Board it has to try to achieve settlement and investigate the same. It has to induce the parties to reach an agreement. If settlement is arrived at, it has to send a report to the appropriate government with memorandum of settlement. If not, failure report has to be sent. It has to submit the report within two months. The report shall be in writing and signed by all members of the board.

Prohibition of Strike During Conciliation

Section 23 prohibits strikes and lockouts during the pendency of the conciliation proceedings before the Board and seven days after the conclusion of such proceedings. Strike commenced during such pendency and without notice is treated as illegal strike.

Investigation into facts: Enquiry Committees

The government may constitute enquiry committees to conduct investigation, either with the consent of parties or without it, to ascertain the problem and discover the facts. The appearance of witnesses before the enquiry committee is compulsory.

Court of Inquiry

Section 6 refers to Court of Inquiry to investigate facts and not to decide the course of settlement. The parties may, jointly or separately, refer any matter relating to dispute to a court of inquiry. Generally the whole dispute shall not be referred to the court of inquiry, only a related topic, which requires further investigation, as to facts can be referred. This court of inquiry was also given the power of entering any premises, enforcing attendance of any person and examining him, compelling production of document, issuing commission for examination of witnesses, reception of evidence taken on affidavit, appointing assessors and granting an adjournment. It has to find out certain facts and report within six months of appointment. Sections 22, 23 prohibit strikes and lockouts while the proceedings are before the Board of Conciliation, labour court or tribunal but not when the facts are being enquired into by the court of enquiry.

Conciliatory Officers Efforts

The Conciliatory Officer may hold a meeting of the representatives, of both the parties, jointly or of each party separately. In the first instance usually a joint meeting is held as it provides an opportunity to the parties to face each other and put forward their respective viewpoints on the general issues and merits of the dispute in presence of each other. At the first meeting, with the parties, the conciliation officer may make sure that the representatives of the parties, appearing before him, have been duly authorised. Section 36(1) of the ID Act, details the persons who are

empowered to represent the parties. No party to a dispute shall be entitled to be represented by a legal practitioner. A limited number of workmen may be permitted by the conciliation officer to attend the conciliation meetings apart from the union representatives. Presence of such workmen is usually helpful, particularly when union officials, who may be outsiders, are not fully familiar with the matters raised in the disputes. An employer, of workmen, may take a legal practitioner, to the conciliation proceedings, who will not act on their behalf but will be available for consultation and advice. The conciliation officer, can do all such things as he thinks fit for purpose of inducing the parties to come to a fair and amicable settlement of the dispute. When the settlement is reached, the conciliation officer is required to report the same to the appropriate government, and officers authorised in that behalf, along with a copy of the memorandum of the settlement arrived at. The conciliation officer sends a failure report, detailing the steps taken by him for ascertaining the facts and circumstances relating to the dispute and also for bringing about a settlement of the dispute, together with a full statement of such facts and circumstances.

Powers of Conciliation Officer

The conciliation officer is empowered to do all things as he thinks fit for the purpose of indicating to the parties to come to a fair and amicable settlement of the dispute. Section 11 enunciates certain powers and functions of a conciliation officer:

(1) A conciliation officer may for the purpose of inquiry into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates;
(2) A conciliation officer shall be deemed to be a public servant within the meaning of s 21 of Indian Penal Code 1860;
(3) A conciliation officer is not a labor court or tribunal. He has no powers of court. But he has certain powers of civil court under CPC for the following purposes:
    (i) He may enforce the attendance of any person for the purpose of examination of such person,
    (ii) He may call for and inspect any documents which he has ground for considering to be relevant to the industrial dispute;
(4) While the conciliation proceedings are pending before a conciliation officer, pertaining to a dispute between the employers and the employees, the conditions of service, etc, shall remain unchanged.

Section 33 of this Act provides this important right to the workers and power to conciliation officer;
(5) Section 33A empowers the conciliation officer to make a complaint in writing, in prescribed manner, to arbitrator labour court, tribunal or national tribunals, as the case may be, against an employer, who contravenes the provisions of s 33;
(6) No person employed in a public utility service shall go on strike in breach of contract, during the pendency of any conciliation proceedings before a conciliation officer and seven days after conclusion of such proceedings. No employer carrying on any public utility service shall lockout any of his workmen during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

Duties of Conciliation Officer

(1) The duties of a conciliation officer are not judicial, but are purely administrative. Where any dispute exists, the conciliation officer after giving reasonable notice under s 22, shall hold conciliation proceedings in the prescribed manner (s 12);
(2) It is the duty of the conciliation officer to induce the parties (employees and employers) to come to a fair and amicable settlement of the dispute. For achieving this object he must take all precautionary steps without any delay;
(3) The conciliation officer fixes a date and place, and sends the notice of the same to both the parties. If the parties participate in the conciliation, and arrive at a settlement, then it is called 'settlement of the dispute'. The conciliation officer shall send a report of the 'conciliation proceedings', which includes 'settlement of the dispute' and 'memorandum of the settlement signed by the parties to the dispute' to the appropriate government.
(4) If no settlement is reached between the parties, the conciliation officer shall, as soon as practicable, after the close of the investigation, send a full report setting forth the steps taken by him, facts, circumstances, his opinions etc, to the appropriate government;
(5) Section 12 (6) provides that a report under this section shall be submitted within 14 days of the commencement of the conciliation proceedings or within such a shorter period as may be fixed by the appropriated government. If the parties to the dispute request the conciliation officer for the extension of the time for submission of the report, the conciliation officer, may extend such time;

(6) The report of a conciliation officer is not a privileged or confidential document. It is a public document and any one can obtain a copy of it.

Problems in Conciliation

The conciliator may face several problems during the process.

(1) Problem of Integrating into the Dispute Situation

Conciliation is dependent upon how well the conciliator has been accepted by both the parties as 'one of us' and how well he has grasped the dispute and the parties themselves. In other words, the problem of conciliator is to win the confidence of both the parties and to establish himself as a neutral, objective and intelligent third party, interested in the settlement of the dispute.

(2) Problem of Ascertaining the Real Issues of the Dispute

This is another important problem of the conciliator, as the parties do not reveal their real positions. The conciliator will have to make efforts to deduce the real positions of both the parties. When he is able to ascertain the real positions of the parties and understand the issues involved in the dispute, the gap between the demands and the offer is calculable enabling the conciliator to bridge the gap and bring about an agreement.

(3) Temptation of Deciding for the Parties

Many a times, the conciliators are tempted to give a solution at an improper time. When such a thing happens the parties are likely to feel that the conciliator is imposing a settlement upon them. Such a feeling is against the principles of conciliation. The parties may accept the solution and sign the agreement, but they will brand the conciliator as an arbitrator and will not seek his intervention in future. Therefore, the conciliators should avoid the temptation of deciding for the parties or offering solutions in an improper manner. Instead, they may propose alternative solutions when the parties have reached an impasse in their negotiations in order to keep the negotiations moving.

In addition to this, keeping a constant touch with the parties, determining the strategic points in the process of negotiations for holding separate meetings, intelligent interpretations of the stands of either party to the dispute, are other problems of the conciliator. However, to improve conciliation, some more suggestions are made:

a) Separation of conciliation and labour enforcement of functions;
b) Appointment of right persons as the conciliation officers;
c) Greater number of conciliation officers;
d) Better formal status for conciliation officers;
e) Preparation and supply of a conciliation manual;
f) Small geographical jurisdiction for each conciliation officer;
g) Extension of statutory limit to three months;
h) Conciliation officers be provided with conveyance facility and adequately trained staff;
i) No investigation of the dispute through correspondence;
j) Legal practitioners be prevented from representing the parties in any capacity;
k) Conciliation officers should freely mingle with the parties so as to infuse confidence in them;
l) Conciliation officers should have sense of involvement;
m) Effective enforcement of labour laws;
n) Proper training to the labour leaders;
o) Conciliation officers be allowed to certify the documents to be produced by the employers to the adjudicators, or to enclose the copies of the documents supplied by the parties with the failure report.

Negotiation: Prime Method of Resolution

Negotiation is one of the prime methods to settle industrial dispute. The parties to dispute, employer and workmen are expected to negotiate to settle their problems without intervention of third party.

There must be a union representing the majority of workmen. The employer is expected to have an attitude of settling differences across the table with the union. The union is supposed to adopt a realistic and reasonable approach to solve the problems. Without these characteristic essentials, it is not possible to settle any problem by way of conciliation. Formalisation of process of conciliation through different provisions of law and rules such as ID Act is not enough to solve the problems.

The law provides for another mechanism for resolution of disputes in the form of works committee, which works for prevention of the problems instead of addressing them after developing into a problem. Its object is to preserve amity and good relations between employers and employees. In an industrial establishment, a works committee can be constituted to comment upon common matters and interests of concern and endeavour

to compromise on any material difference of opinion in respect of such matter. The government may, by order, require the industrial establishment to constitute a works committee in a prescribed manner. The committee will be constituted with the representatives of employer and workmen in equal number for each side. The committee has to ascertain the grievances and find out ways to redress the grievances. The works committee normally deals with conditions of work such as ventilation, lighting, temperature, sanitation, amenities such as drinking water, canteens, dining rooms, crèches, rest rooms, medical and health services, accidental prevention, adjustment of festival or national holidays, general welfare administration, educational activities, promotion of thrift and saving, implementation and review of decisions of previous committees. The works committee will not go into issues like wages and allowances, bonus and profit sharing schemes, other matters related to work load, standard of labour force, planning and development matters connected with retrenchment and lay off, victimisation, provident fund, incentive schemes, housing and transport services.

The National Labour Commission has gone into the functioning of the conciliation machinery set up by various governments. It found the proceedings to be disappointing in some states while successful in other. The reason is mainly the indifferent attitude towards conciliation on the part of labour, management and even the conciliation officers. Lack of understanding, delays due to excessive workload on officers, procedural defects, insufficient information, and adjournments are the main defects in the process of conciliation. The representatives sent by the parties, to appear before the conciliation officer, are generally officers who do not have the power to take decisions or make commitments, they merely carry the suggestions to the concerned authorities on either side. This defeats the purpose of conciliation.

To improve the performance of conciliation the following suggestions are made:

(1) Prescribing proper qualifications for a conciliation officer and improving his quality by proper selection and training,
(2) Enhancing his status to deal with the parties effectively, when they appear,
(3) Keeping him above political interference.

The commission recommended setting up of free and independent industrial relations commission, in place of existing government controlled industrial relations machineries. This commission is expected to infuse greater confidence in the conciliation officers.

Article 43A of the Constitution refers to securing participation of workers in the management of undertakings etc. Now this directive principle has lost relevance in view of globalisation. Industrial laws have also found a new orientation towards meeting the challenges of the changes. With corporate money dominating investments and size of the industry, the competitive market strategies totally changed the perspective of industrial disputes. Now the stress is on more production and amicable settlement of disputes not even by resorting to conciliation offered by the industries or labour departments but by their own initiatives like negotiation under the threat of strike or lock out.

II. Conciliation under Family Courts Act 1984

The Parliament passed Family Courts Act in 1984 to address the problem of domestic disputes, not to adjudicate the issues or to punish the culprits, but to achieve a settlement of the domestic problems. Section 9(1) says:

The family court shall endeavour in the first instance, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the proceeding, where it is possible to do so consistent with the nature and circumstances of the case.

Subsection (2) says: In addition to the general power to adjourn the proceedings, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect a settlement, if it appears to the Family Court that there is a reasonable possibility of settlement.

It is the statutory duty cast upon the part of the family courts to conciliate the problem and reconcile the differences and settle family problems to protect the institution of family.

Under o XXXIIA of CPC, the proceedings relating to matters concerning to family are to be held in camera and the court is to make all efforts in arriving at a settlement in respect of the subject matter of the dispute and the court is also entitled in such suits or proceedings to secure the services of any person or woman for the purpose of assisting the court. Before enactment of the Family Courts Act the suits and proceedings relating to matters concerning the family were provided for in by o XXXII-A of CPC and were to be dealt by regular civil court.

In camera proceedings are provided to help the settlement of disputes. Object of the Family Court is to decide the disputes relating to family without going into the technicalities of admissibility of evidence, rules of procedure etc. Some times the recording of evidence also may not be considered necessary for ascertaining a fact or even ascertaining a fact may not be essential for resolving disputes. However the parties must get a

chance to present their case and plead for their requirements. The family court has all powers and validity of a court, but the duties and performance approach will be slightly different only for the purpose of settling the issue.

Section 13 says that the parties to a dispute shall not have right to be represented by the legal practitioner. If the court considers necessary, in the interest of justice, the court may seek assistance of a legal expert as *amicus curiae*. Legal practitioners are not totally prohibited. Their necessity is reduced to facilitate face-to-face negotiations between the disputing parties. If the case requires or the party wants legal assistance from a practitioner, court may provide for it. The party will get an opportunity to apply for legal assistance and if the court grants it, the other party will get a right to be represented by a lawyer. The court has to strictly observe the principles of natural justice, if not the civil procedural rules. *Amicus curiae* is a friend of court who voluntarily helps the court or renders assistance on the instruction of the court with regard to doubtful or mistaken facts or legal issues. The Act tried to do away with the possible ills associated with paid legal assistance and provide a less problematic or less expensive, or less adversarial procedure to decide the issues of family relations.

The objects statement of the Act, emphasises on the need for conciliation to achieve socially desirable results and to avoid adherence to rigid rules of procedure and evidence. The Law Commission in its 59th report in 1974, stressed the need of adopting conciliatory approaches to make reasonable efforts at settlement before commencement of trial of family issues. The Commission was recommending an approach radically different from civil proceedings in family matters. Neither the regular courts nor family courts made better use of conciliatory approach in resolving disputes, mostly because of lack of time, preparation, motivation, on the part of courts.

Family court has to deal with matters relating to every matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person, the property of the spouses or of either of them, declaration as to the legitimacy of any person, guardianship of a person or the custody of the minor, maintenance, including the proceedings under ch IX of the Cr PC (s 7).

First and foremost obligation of the family court is to try for a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal, and the rigid rules of procedure will not apply.

Section 6 of the Act imposes an obligation on the state government to determine the number and categories of counsellors, officers and other

employees required to assist a family court in the discharge of its functions and provide the family court with such counsellors, officers and other employees, as it may think fit. Section 9 imposes an obligation, to persuade the parties, in arriving at a settlement for the dispute and for that purpose the court can adjourn proceedings. Section 10 relaxes the procedures considerably as far as the matters before the family courts are concerned. The confidentiality of the parties and procedure is protected by making the proceedings to be heard in camera under s 11. Section 15 reduces the rigidity of recording oral evidence (s 15) and permits adducing of evidence formal character by way of an affidavit (s 16).

The Andhra Pradesh Family Courts (High Courts) Rules 1995 enable the family courts to hold sittings outside normal working hours and holidays if the judge considers it necessary. Legal practitioner may be permitted appear as *amicus curiae* only and not as a paid *vakil* with *vakalatnama*.

However the government has not appointed any counsellor or conciliator or any other employee to assist the court.

III. Conciliation under Hindu Marriage Act 1955

Under amended Hindu Marriage Act 1955 (HM Act), the approach of the courts towards family disputes is different from that of other ordinary civil proceedings. Conciliation is preferred as the first resort by the courts. Another important feature is that speedy trial is prescribed as a preferred mode of resolution of disputes.

Section 23 (2) says that before proceeding to grant any relief under HM Act, it shall be the duty of the court, in the first instance, in every case where it is possible to do so, consistently with the nature and circumstances of the case to make every endeavour to bring about reconciliation between the parties. However, reconciliation cannot be resorted to when the relief of divorce is claimed, based on grounds of conversion, unsound mind, virulent disease, venereal disease, renouncing the world by entering religious order, missing for seven years, [s 13(ii) to (vi)]. These grounds are irreconcilable as per proviso under s 23(2) of the HM Act.

The HM Act 1955 was amended in 1976 wherein it provided for in camera proceedings, under s 22, if desired by the parties and imposed a prohibition on publication of family proceedings except the judgment of the high court or Supreme Court printed or published with the previous permission of the court. If any person prints or publishes any matter in contravention of the provisions of s 22(1) he shall be punishable with fine, which may extend to 1000 rupees. Section 21B is added to facilitate day-to-day hearing, of marriage disputes, for quick disposition. Six months is prescribed as time for conclusion.

Tackling Conflict and Emotional Stress

Any conflict produces emotional distress. This acts on the top of the pre-existing strain under which the poor live due to inadequate resources, even to find the basic necessities of life. Rational conduct often becomes well nigh impossible under such tension. Formal litigative proceedings were not concerned with these effects of conflict. Indeed, they added to it by the impersonal and uncaring way in which disputes are handled in such a system.

Unwinding tension: Mediator's Positive Role

The mediator, on the other hand, takes upon himself the task of eliminating the handicaps unwinding the tension, informing the ignorant and approximating their equality to the extent possible. The disparity in bargaining power arising from the handicaps due to poverty is tackled by the mediator as an immediate task.

Frustration disintegrates personality, tackle it

Resources are important in dealing with a conflict in terms of confrontation. The poor have no resources. As a consequence, they have no ability to use the facilities that are made available as a substitute for their own resources. They lack the will to sway the situation in their favour. This creates frustration when they are up against a problem. The poor cannot ride out the crisis. This frustration disintegrates their personality. They lack motivation, when it is needed most. This is evident when one sees how helpless poor suitors are, even when lawyers are allotted to them free by the legal aid boards. The tendered assistance is of no use to them unless it is absorbed. They do not have the self-confidence and faith in their own cause. To redress this is possible only in mediation, which is both informal and flexible. The approach of the mediator is not based on professional assessments about the nature of the problem. The intake of the dispute at the mediation center is not the beginning of the conflict, it is often the escalation. Something should have happened to trigger the visit to the center. The experience and perception of the people concerned should yield a definition of the problem.

Fixing Label on Problem is Bad

The mediator should resist the temptation of fixing a label on it as that would automatically attract a particular mould of solution. There would then hardly be any search for a solution. Mediation is essentially a search

for the solution by the parties themselves. When they define their problems, when they articulate it by choosing certain concrete situations, they make value judgments of preference. These choice situations have to be governed by their values. The mediator may help when information about rights is needed.

Mediation provides for a space to the parties to sit down and focus on what they really want, rather than what they think they need to seek or what the law will let them fight for.

In case of family disputes in addition to considering a typical litigation mediation session to settle significant issues, attorneys will often find that a non-lawyer facilitator/mediator (a specialised type of family counsellor who meets with the parties an hour at a time, from time to time) can often help make the process a much less stressful and unpleasant one for their clients.

Finally, increasingly mediators are mediating divorces, prior to the involvement of counsel, with good effect and increased client satisfaction.

Norman Pickell in his article on 'In Family Law, How is Mediation Different from a Settlement Meeting?'[24] says:

> Family mediation has the clients meet face-to-face, usually in the absence of their lawyers, with a trained family mediator present. Of course, this only happens after some pre-mediation screening has been done by the family mediator to make sure that the couple are suitable for mediation and that neither party is put in danger by such a face-to-face meeting.

Settlement meetings are intended for settling some immediate and current issues without having link with long term relations and needs. Generally the spouses can chose settlement meetings for isolated and small issues. But, Norman Pickell says:

> If the parties have children of any age, the parties must consider more than just reaching a settlement. The parties need to recognise that a relationship will exist between them after the divorce. This relationship will be tested time and again, even after the children have left the nest and are out on their own. There will be birthdays, graduations and other school-related activities, weddings, grandchildren, funerals and other important events that will require some contact between the parties. Co-operation between the parents will go a long way in reducing the stress and anxiety in the lives of their children. As parents cope better, their children do so as well. ... Constant fighting, arguing and blaming in a marriage or similarly committed relationship generally leads to more of the same while dissolving it. Unfortunately, the consequences of continuing this behaviour can be dramatic, including protracted litigation, escalating costs, and significant damage to the parties' children's emotional well-being. By the time the parties are in their lawyers' offices, they usually dislike each other, are very poor communicators, are highly distrustful, and are fearful of being hurt again.

24 Source: *http://adrr.com/adr1/essaye.htm*.

A few more pertinent points are made by Norman Pickell:

> The mediator sets the tone for the negotiations. Right from the beginning, the mediator tries to create an atmosphere conducive to discussion. In settlement meetings, there is usually a certain amount of posturing. On the other hand, the mediator will discourage intimidation, or threats. The mediator can remind the parties to take a more co-operative and less competitive approach. Because the parties have usually experienced a significant breach of trust, responding to which is the most challenging tasks for a mediator.

Family mediators consider the emotions and the feelings that the parties are experiencing which can be a significant obstacle to settlement.

Mediation does not mean giving in or giving up. Mediation clients are no better than the ones who go to court. The difference is the process, in a positive environment, the parties find practical solutions that work for both of them.

Mediation can be effective even when conflict and anger is high, and communication has broken down. Some people are concerned that they will not be able to negotiate effectively with the other party and then they will lose. But with a trained mediator, the parties can trust that they are not going to be abused or taken advantage of by the other party.

Communication

Settlement meetings do not usually involve communication directly between the parties. In mediation, on the other hand, the parties talk to each other, with the mediator present. Direct negotiation between the parties generally expedites the resolution of issues.

Exchanging Positions

It is important for each party to understand the position of the other, even if he/she does not agree with it. Therefore, in mediation, each party relates the issue as she/he sees it. The mediator probes into the underlying and often unspoken issues. The aim of settlement meetings is determination of rights. Usually a settlement is reached based on the law and the lawyers' interpretation of the facts. The law is not trying to have each side understand the position of the other. Very little is said in settlement meetings about underlying issues.

Exploring Interests and Needs

A position is what a party wants or demands. An interest is why a party has

taken a particular position. Much of the mediation process is devoted to exploring the parties' respective interests, rather than a positional approach to negotiation. The focus on interests in mediation changes the way in which the dispute is characterised, analysed and processed. An agreement is unlikely to result from a consensual process unless the discussion can be moved beyond positions stated in rights-based terms, and explore how the conflict arose, the expectations of either side, and uncover what is critical to each side in seeking a resolution.

Generating Options

Lawyers often excel in developing facts that support their positions, but lag behind when it comes to developing settlement options.

Mediation recognises that both parties have legitimate needs and helps develop options that will successfully reconcile those needs to the satisfaction of both parties. A mediator can explore suggestions as to available options that have not been previously considered.

Once the parties have identified their options, they can assess their merit and begin to negotiate their acceptance. Here the mediator often serves to facilitate communication, test realities and offers encouragement to the parties.

Children

In settlement meetings involving custody and access, for example, agreements generally focus on legal rights. Negotiations between lawyers do very little to clarify ongoing parental responsibilities. On the other hand, mediation provides a forum for parents to structure their own unique parenting plan.

While settlement meetings do not usually include the children, often the mediator will meet privately with the children (but only with the approval of both parents). Children may have their own questions and concerns, and have needs that are quite different from their parents' needs.

Mediation can also help the parties explain the situation of their separation to their children in a constructive fashion. This is not done in a settlement meeting.

UNCITRAL Model of Conciliation

The second fillip came from the statutory recognition accorded to conciliation, in the recent Arbitration and Conciliation Ordinance, which