

E-MEDIATION WRITINGS

September 2020

a gift by-all to all

Vol. 4

*"You can't always get what you want
But if you try sometime
You just might find you get what you need"*

Rolling Stones
(One World: Together at Home)



**Awakening Write-up
by BK Sister Shivani**

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An Internationally renowned speaker known
for the ability to empower people

Euphoria
**chit-chat
with our confrère**

FEATURING

Ms. Laila T. Ollapally

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Launching



Continuous Mediation Education

**e-magazine dedicated to mediation
write-ups, columns, articles, updates**

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Links of previous editions of
EMW

<https://bit.ly/EMW-1>

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Wishes from

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JUSTICE B. AMIT STHALEKAR



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21.8.2020

MESSAGE

Mediation is gradually becoming a very popular mode of dispute resolution among the litigants and disputants in India. It is important to have some quality reference books and journals in this field. "E Mediation Writings" is a very good effort in this direction. I have come to know about "E Mediation Writings" (in short EMW) an e-magazine, from the Mediators/Trainers of Allahabad High Court, who are associated with it as State coordinators. I congratulate the entire Team of EMW for the good work in bringing out this magazine.

"E Mediation Writings" is a fantastic effort by its team, in spreading awareness and knowledge about Mediation. I am sanguine that this magazine will be very useful for all the Mediators, Lawyers, Judges and upcoming young talents in this field. EMW is probably the first Pan India digital magazine on the subject of Mediation, a very unique concept of encompassing mediation with the digital platform. The authors of the various articles and columns published in the magazine are people who are domain experts, having vast experience in the field of Mediation. The readers, I am confident, will be benefitted from these articles and columns which are quite enriching and informative.

I convey my best wishes to the Team EMW for the great effort they have put in, in conceptualising and bringing out this magazine.

B. Amit Sthalekar
(B. Amit Sthalekar)



Wishes from

Hon'ble Mr. Justice Suneet Kumar

Judge, Allahabad High Court
Member, Committee for Mediation &
Conciliation Center, Allahabad

Justice Suneet Kumar



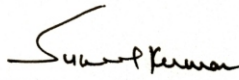
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MESSAGE

It is a pleasure to learn that the team associated with “E-Mediation Writings” is launching the 4th edition of E-Magazine in September, 2020. “E-Mediation Writings” is a great effort in spreading awareness and functional knowledge to all stake holders and experts about mediation through the digital platform.

I take the occasion to congratulate the members of the team of “E-Mediation Writings” for their endeavour, concept and contents of the E-Magazine.

My good wishes to the Editorial Team, State Coordinator of Uttar Pradesh and Coordinator-in-Chief.


(Suneet Kumar)



Wishes from

Hon'ble Mr. Justice Ashwani Kumar Mishra

Judge, Allahabad High Court
Member, Committee for Mediation &
Conciliation Center, Allahabad

Justice Ashwani Kumar Mishra



Dt. 24 August, 2020

It's heartening to note that E-Mediation Writings, the very first e-magazine dedicated exclusively to the cause of mediation is in circulation and is about to publish its (4th) September Edition.

We are presently in the midst of a pandemic. The existing pressure of litigation upon Courts is likely to increase in these turbulent times. Mediation with its flexible interpersonal format has tremendous potential to resolve such disputes. Importance of mediation as forum for alternative resolution of disputes has accordingly, assumed greater significance. E-Magazine published exclusively for mediation can, therefore, help the cause of mediation by providing a useful platform for exchange of views between the academia, legal fraternity including Judges and Lawyers and the end consumer.

I wish the very best to the editorial team and its Coordinator-in-Chief, Ms. Pusshp Gupta for a thoughtful initiative.

With best wishes.

(Ashwani Kumar Mishra)



Wishes from

Mr. Navin Sinha

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MESSAGE

"In vain you have acquired knowledge, if you have not imparted it to others"

Book of Deuteronomy

I would first like to extend my heartiest congratulations to the team, whose hard work and tremendous effort has come to fruition in the form of this first of a kind, pan-India digital magazine which focuses primarily on the subject of Mediation and all that it entails. In an age when the internet has revolutionized the way we communicate with each other and perform everyday rudimentary tasks, the shift to an online platform for the purposes of dissemination of knowledge was the logical next step and it brings me great joy to be a part of this progressive leap into the future.

The seminal effort of the E-Writings Mediation magazine to provide a credible online resource of material, information and knowledge relating to Mediation which is curated by some of the most influential names in this field is a truly commendable endeavor and will go a long way in spreading awareness about this means of dispute resolution. This effort will prove to be of significant help to not only those who are already a part of the field such as mediators, lawyers, litigants but also to the teachers and professors who teach the subject of Mediation as well as the students and other individuals who wish to pursue Mediation as a profession in the future.

I wish the Team of E-Writings Magazine all the very best. I hope they are able to achieve their goal of making this digital magazine an indispensable part of the practice of Mediation. God speed.

Navin Sinha
(NAVIN SINHA)



Wishes from

BK Sister Shivani

An Internationally renowned speaker known for the ability to empower people

Om Shanti Sister

Congratulations on the thoughtful initiative of bringing out a magazine. Yourself and your team are doing a wonderful seva. Emphasizing the importance of close emotional connections for health and happiness is critical in today's times. The theme and topics seem to comprehensively address various dynamics of relationships. So I am certain that readers will be inspired to dissolve conflicts, prioritize harmony, strengthen their bonds and thereby improve their quality of life.

In seva

B K Shivani

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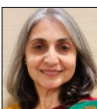


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Mediation Musings

Dr. Aman Hingorani



Glancing casually through quotes on mediation, I came across these ones:

10% of conflict is due to a difference of opinion. 90% is about the wrong tone of voice.

- *Conflict resolution is a first mindset and then a skill set.*
- *Dialogue is the most effective way of dealing with conflict.*
- *It takes courage to speak but also to listen.*
- *Most people don't listen with the intent to understand. They listen with the intent to reply.*
- *In the middle of difficulties lies opportunity.*
- *It is an attitude that damages or deepens the relationship.*
- *Can't we all get along?*
- *It is never too late to be who you might have been.*
- *If everyone is moving forward together, success can take care of itself.*
- *A good settlement is better than a good lawsuit.*

Mediation is about all this and much more. It is, indeed, heartening that over the years mediation has become popular, especially with our institutions. The Covid 19 pandemic is now driving the trend towards virtual mediation, with mediators having to use technology in order to transition from the physical setting to an online one.

Having taught mediation as adjunct faculty since 1998 in various law schools and other institutions, and has acted as a mediator for the same period, I, however, find that what we teach in mediation courses and how we teach in mediation courses is outdated and inadequate. It is imperative that we adopt better practices in mediation—both in terms of curricula and pedagogy.

Given the global reach of modern technology, should not mediation curriculum across India include, for instance, technology-based mechanisms, blockchains, and smart contracts? Where parties to a smart contract agree to give pre-determined access to the

Mediation Musings

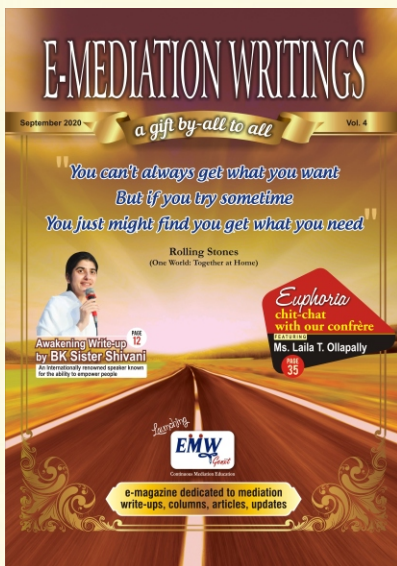
mediator in order to enable him or her to code/insert the settlement agreement into the blockchain which would automatically lead to the transfer of assets or monies of one party to another on the blockchain in terms of such settlement agreement, should not the mediator be at least familiar with these concepts? However, devising the curriculum to understand the kind of issues that could arise from smart contracts is a far cry when most existing modules in India do not even cover obvious subjects that ought to be an integral part of any mediation course, like restorative justice or models to analyze and rank the underlying interests of the disputants prior to commencing mediation.

Similarly, should not modern teaching methods be followed in order to effectively enable the mediator-trainee to acquire the requisite performance skills? Should not the pedagogy include, for instance, faculty demonstrations at every step of the teaching process? Further, the common teaching method used in India is “learning by doing” through a simulation exercise by the mediation-trainees, followed by a generalized discussion by the faculty. But then, the very purpose of a “learning by doing” session is lost if each trainee is not made aware there and then about the areas of concern in his or her individual performance and is not told how to address it. Should there not be an individualized, scientific, and structured feedback or review by the faculty on the performance of each trainee at various stages of the mediation simulation exercise? Should not such feedback at the time of the individual performance be supplemented through a video review of that performance? Again, should not the drafting of a mediation settlement agreement be viewed as yet another performance skill meriting an individualized and structured review by the faculty? In other words, the capacity and skills of the mediators need to be enhanced by affording them proper mediation training. And in order to do this, the mediation-trainers need to first themselves possess these skills as also the ability to give such feedback or review.

The purpose of mediation writings, like those contained in the e-magazine before you, is to provide a platform to discuss and debate these and other fascinating layers of the mediation theory and practice, so that a consensus can eventually be reached on what it will take to make mediation the preferred means of handling and transforming conflict.

Dr. Aman Hingorani

Advocate-on-Record & Mediator, Supreme Court of India, and was commissioned to prepare the ADR module for the All India Bar Examination conducted by the Bar Council of India as also the ADR Manual for FICCI as its National Consultant, and the Mediation Rules for the PHDCCI. He is Member, Board of Mentors, M.A. in Mediation and Conflict Resolution, MNLU, Mumbai.



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Chit-chat with our confrère
Ms. Laila T. Ollapally



BK Sister Shivani



Do you cherish that friend who gave you strength and support to tide over a difficult time? Don't you look up to that family member who accepted you unconditionally? Aren't you always grateful to a colleague who worked overtime just to help you meet a tight deadline?

Enriching relationships are a source of nutrition for the soul. How beautiful it is to spend life with someone who knows us like the back of their palm and someone who is always there. At every stage of life, we find ourselves nurturing one relationship or the other - Bonding with parents, growing up with siblings, cherishing friendships, socializing with relatives, working with colleagues, caring for spouse, parenting our children, tending to the elderly, and so on. Investing our valuable and limited resources of time, energy and money feels worthwhile. Yet, not all relationships seem fulfilling. From time to time, barriers of ego, conflicts, tension, resentment, pain of unfulfilled expectations somehow stand between us and the other person. But good news is that we are creators of our every relationship. And it takes only one person – not both of us - to harmonize a struggling connection.

Harmony in Relationships

If we turn our attention away from them to focus on ourselves, we can bring about a shift in our consciousness - a shift that will let mutual love and respect flourish.

Let's explore them -

1. Shift from Speaking well to Thinking well:

A relationship transcends words and behaviours. It is an exchange of energy at the level of thoughts first, followed by words and actions. Thoughts energy travels faster than words. Therefore, thoughts communication is faster and more powerful than our words and actions. This means how we think about someone while we are with them and while we are away from them, decides how strong our bond is. Our thoughts travel and reach the other person as vibrations, triggering similar feelings in them about us. We believed people know only what we speak and do, and will never know what we think. So we didn't pay attention to thoughts. So if our thoughts for them were judgmental, while words were polite and behaviour was perfect, that relationship stands on a fragile foundation.

2. Shift from Blame to Personal

Responsibility: Our deep-seated belief is that someone else is responsible for our thoughts, feelings, words and behaviours. So we say "They were rude, obviously I got angry." or "She cheated me, naturally I felt hurt." When we blame people and situations for how we feel, we will continue to feel that way 'till they change'. Truth is that no-one can make us happy or sad. People's behaviours are the

stimulus. How we think, feel and behave in response is always our creation, our choice. The more we blame people, situations, God or our destiny for how we feel, the more we will cross every scene unaware of our responsibility.

When we take personal responsibility for our state of being, attention will be only on our emotional creation. We can change our thoughts and feeling whenever we want. Let's shift from an automated way of reacting to an aware way of responding – with stability, compassion and love.

3. Shift from Expectations to Acceptance:

Expectation is an inner programming that says, “I want people to be my way. Only then I'll be happy. Else I get upset.” Most of us today are coming into relationships to experience happiness, love, respect, trust and appreciation. The other person also expects these from us. Both have forgotten that these energies are our internal creation. So we look for them outside from each other. Let's internalize that no two people can consistently meet each other's expectations, as they have been on a long journey of different lifetimes, situations and environments. Their perspectives, capacity and nature are bound to be different. Accepting people as they are is the secret to harmony. Acceptance doesn't mean we let people do what they want. It only means we do not get emotionally disturbed by their words or behaviours. We can request, instruct, advice or discipline people. But their meeting our expectation is a matter of their choice. Our stability radiates respect to people, strengthening relationships. Even if we need to take action externally to discipline them, important is to remain stable internally.

4. Shift from Holding on to letting go: Soon after a conflict or difference of opinion, most of us go into long periods of negative silence. We subject family or friends to a 'silent

treatment', not talking to them for hours, days or months. We believe it helps to make our point, to heal ourselves or to punish them in a subtle way. But the communication breakdown creates deeply negative energy as we cling on to negative and wrong thoughts. Our mind gets clouded by resentment and retaliation. It rewinds and re-opens even past emotional wounds as well. We create thousands of toxic thoughts, accumulate our pain and radiate vibrations of rejection to the other person. Let's say everything we need to say to them and thereafter, return to normal thoughts and behaviours immediately. They are after all, our loved ones and well-wishers. Their wellbeing is our priority. Resuming communication is the easiest way to save the relationship. It protects each other's happiness, health, and most importantly, creates the right culture at home or workplace.

5. Shift from Seeking to Giving: Reflecting on our past and present relationships shows that all discords are only because of unmet 'wants' which either of us had. Often, we start as 'givers' but gradually shift to the seeking side of things. Relationships are not a matter of 'give-and-take' between two people. Our role is always to take love, happiness, acceptance and power from God, and then give to other people. So it is take-and-give. Taking the energy from God and then radiating them to everyone, all the time. When we give something, we are the first person to receive its energy. Moreover, giving is our original quality. Let's re-enter our relationships with a consciousness of giving, not wanting. If we want love, we give love. If we want happiness, we give happiness. We shift from “Accept me, trust me, understand me” to “I accept, trust and understand you.” Radiating our love, power and purity makes us a master who gives, not a slave who is dependent on others.



Ruminations of a Referral Judge

By Ms. Giribala Singh*

Life is a many splendoured journeys. As we plod through uneven terrain, the travels and travails of the journey enable us to pick up new ideas, drop some old perceptions, and recreate space for further evolution of thoughts. If we were not programmed to do so, we would go through the motions of living but remain with fossilised and cluttered thoughts.

In the year 2008, when directions arrived for the forty-hour training in Mediation, it brought with it a plethora of emotions. The joy of looking forward to sharpening skills and catching up with the gossip of old colleagues was sprinkled with morose thoughts of eight hours of sitting at a desk for five days. We were filled with trepidation and wondered what lay in the simple provisions of Section 89 CPC which called for the five-day setup!

Soon we were face to face with our erudite trainers from MCPC, a strange combination of self-discipline, immaculate in the choice

and timing of words and above all equipped with the fine quality of bringing out the best in each of us.

As the saying goes, the receptacle must always have space to toss in some new ideas and the trainers sure enough deciphered that space. What had remained till then just another legal provision, assumed a new dimension beyond the pale of application of law to facts of a case, daily disposals and paper-work. They opened our minds to look at the law and its end users from a different perspective.

On our return to the humdrum of existence and official duties, the court and its entities wore a different look. The litigants seemed to have sprung alive from the parchment papers of the case record. The first instance of referral was involved in a partition suit between brothers. It had plodded on for years, taking its toll on the time and the scarce resources of the litigants. I glanced cursorily from the file looking for "elements of

[1] *AfconInfrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24
[2] *K. Srinivas Rao v. D.A. Deepa*, (2013) 5 SCC 226

settlement" so elaborately explained in the *Afcons(I)* judgment. **The parties stood apart in painful silence in one corner of the courtroom, woebegone, browbeaten, avoiding the sharp eyes of the clerk sizing them up.** The older had neither the style nor swagger so typical of the mustachioed, gun-toting denizens of the Chambal ravines while the younger had an air of defiant nonchalance; both seemed past the age reflected on the file, crushed under the weight of heaps of the case record. There can be no greater enemy than an estranged relative!

The matter had already traversed past the settling date and in fact was posted for the defendant evidence. However fresh from the training, I went on to start the preliminaries for a referral. At this point, smelling something unusual, the court clerk sidled forward and whispered under his breath with concern "Ye to adalati parinde hai, inka kya! Aapko purane case ke disposal mein adhik unit milenge." (*These parties are 'court birds' and are used to flocking the corridors! You would be earning units for disposal of an old case!*). His jaw fall open in disbelief as I quipped " sukoon se baithiye babuji, unit ka kya! Har mamale ka waqt hota hai aur inka shayad waqt aa gaya hai." (*Please rest, units are not an issue! Everything has a definite time and maybe their time has arrived!*).

There was no role-play of the training sessions to steer me through the modalities of the referral process. Never did the adage *Perplexity is the beginning of knowledge* seem more profound than on that first occasion when the parties listened wide-eyed trying to digest the full import of what was meant by the words that 'they themselves would be able to settle their dispute.' Whatever residual reservations they had, melted the moment I dilated that they had

nothing to lose and would probably end up saving time and resources. They had spent a decade spinning between courtrooms. I think at that moment they were able to understand that in a life with finite time, it made sense to value it!

In those early days, tackling the advocates when referring their parties for mediation was also a daunting task. They seemed to give the expression of one who is the victim of "cradle snatching". To dispel their doubts, a brief session was held separately with them wherein they were ensured that the result of the mediation would not adversely hamper anyone's interest, least of all their own! They were reminded that as the parties repose much faith in them, they had a sacrosanct responsibility to encourage them. And finally, I reminded them of Gandhi's talisman 'ask yourself, if the step you contemplate is going to be of any use to him [her]. Will, he [she] gain anything by it? Will it restore him [her] to a control over his [her] own life and destiny?"

The parties returned around 28 days after the referral. I could discern a remarkable change in each of them. The grey mane of the older party shone across his forehead like a silver lining and his hunchback seemed to have vanished. The younger stood behind him, in respectful silence but glowing with the radiance that comes with peace. Their joy of settlement rebound on my desk and also in two other courtrooms where connected matters were pending.

Another matter of distinct importance involved neighbours whose only dispute was shifting of a sewage pipeline. Under the belief that having a huge source of water on the 'Ishaan Kone' (North-East) signifies ill luck; their long-standing friendship was in the

dock. In the course of the referral proceedings when reminded that there cannot be a luckier charm than having a friendly neighbour, both parties immediately consented to proceed for mediation.

Soon word got around on the possibility of settlement of matters through mediation.

Although not a miraculous and 'one size fits all' solution, mediation does help parties to consider means for returning to normalcy. Often, despite there being elements of the settlement, things do not work, as the reality of one party does not match the expectations of the other. Building the proper balance depends on the factors involved as well as on the consensus or dissension generating factor with which the parties interact.

The courts must consider recourse to ADR process but actual reference to ADR in all cases is not mandatory, (*Paras 24 & 26 of the Afcons Judgment*). The successful outcome of mediation for parties will depend not only on good inputs given at the time of referral, but also of appropriate selection by referral judges. Placing the parties in the right frame of mind is much akin to a medical referral and explaining the multiple advantages of mediation reduces the pain of the litigant psychosomatically.

Certain queries are often raised on the question of consent of all the parties. Here it would be apt to clarify that to refer cases for conciliation or arbitration, the consent of the parties is mandatory whereas, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation,

Lok Adalat or Judicial Settlement. In the case of *K. Srinivas Rao Vs. D.A. Deepa (2)* the concept of pre-litigative clinic and mediation centres has been conceived even in non-compoundable cases. Despite this, the parties still retain the freedom to agree or not to agree for settlement in mediation and the absence of consent does not affect the voluntary nature of mediation (*relevant para 36 of Afcons Judgment*).

Gently motivating parties to an amicable resolution is a catharsis and every referral a metaphysical experience. When I analyze the matters where parties did not settle despite timely referral, I find a common thread of errors which point out that where referrals were made in a rush without remembering that it was not merely a case but also the persons with their entire bundle of emotions, I find myself lacking. Communication and body language at the time of referrals is also of relevance. The referral judge's own belief in the efficacy of the process, the hope it holds for all, and the valuable time saved must radiate with conviction.

Mediation is an idea whose time has come. I do foresee a day when people will flock to the court with a sense of positive hope and depart with a sense of satisfaction. In the final analysis, whether the outcome of the proceedings is successful or not, the process of referral and the process of mediation must always be carried out in true spirit of a sportsman:

For when the One Great Scorer comes to mark against your name, He writes not that you won or lost, but how you played the game! ■

*Author is M.Sc., LL.B (Allahabad University) and MIPL (Master of Intellectual property laws from IGNOU). Trained Mediator and Potential Mediation Trainer, MCPC. In 1990 joined Madhya Pradesh Judicial Services as a Civil Judge. Presently, in the cadre of District and Sessions Judge, on deputation as Member Secretary State Legal Services Authority.



Humour - the Elixir of Life
by **Mr. Man Mohan Sharma**

MUSINGS
by **Mr. Shiv Kumar**

Reflective Practice:
Observing & Learning from Others
by **Mr. Jonathan Rodrigues**



Humour *the Elixir of Life*

By Mr. Man Mohan Sharma*



“Mediation is a serious business, how can you, even in the wildest of your imagination, think of humour in it”, said one of my friends while we were discussing some nuances of Mediation. I replied, **“The only reason for the humour to be there in mediation is that it's a serious business!”**

Seriousness and humour are not the antithesis of each other—rather they complement each other. When one laughs, the lungs supply more oxygen to the body and oxygen is the food of the brain—the instrument with which (we think that) we think. Humor is, in fact, an exercise that relaxes the nerves and a relaxed mind thinks better. So, anyone who thinks that there is no room for humour in the mediation is quite likely to change his mind by the time he reaches the end of this write-up.

In one community mediation before me, the husband and wife had been negotiating over the parting package. The wife proposed her charter of demands—a three-bedroom flat, a car, and a hefty sum of cash. It was highly optimistic considering the husband's not so-brilliant financials. In any routine mediation, this could have made the roofs fly apart and the husband could have been furious like

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anything. In stark contrast, subtly, the husband gave the counter offer of a bungalow, a chauffeur driven car, and almost double the cash amount. The wife was taken aback and asked the husband if he was joking. The husband, in a composed manner, replied that she had started it. This made everybody laugh. The tension got dissipated and the mediation proceeded successfully.

Another instance is equally interesting but it requires know-how about a tradition mostly prevalent in the Northern part India. In this part of the country people usually get together on the night over the weekend for a prayer meeting where they sing hymns in praise of the mother goddess Durga. The head devotee time and again implores the congregation to hail mother goddess by his refrain "*awaz nahin aayi*" (he could not hear). The group of devotees responds by saying "*jai mata dee*" (Hail to the mother goddess). Due to the repeated use of the phrase "*awaz nahin aayi*" and the response in the above manner it has become so embedded in the psychology of people that hearing the phrase "*awaz nahin aayi*" usually invites a spontaneous and impulsive response of "*jai mata dee*."

The mediation before me was between two friends where one had lent some money to another and there were issues over the repayment. **One of the friends was a little hard of hearing. While they were discussing the matter one said something, which the other one, being hard of hearing, could not catch. So, he said, "*awaz nahin aayi*."** The other one instinctively replied, "*jai mata dee*". No

one could hold his laughter despite the best of the efforts. This, however, melted the hard feelings, and the duo reunited as friends. **One could discern their monetary dispute evaporating in thin air.**

Mediation is continuing education. Training, refresher, and awareness programs are organized periodically. I had an opportunity to be a Resource Person in many such events. The subject of discussion, in one such program, had been Section 89 of the Code of Civil Procedure and the five ADR methods (Conciliation, Mediation, Arbitration, Judicial Settlement, and Lok Adalat) it had to offer. **One of the participants was harboring some doubts about the solutions offered by Section 89 and because of his frequent questions, the subject was not making headway.** So, I decided to dispel his doubts by sharing an anecdote. It goes like this—

A patient, with complaints of cough, cold and fever etc., visited the doctor in a government dispensary. The doctor prescribed him a concoction/mixture. Handing over the prescription to the patient the doctor advised him to take the mixture from the Dispenser. When the patient handed over the prescription to the Dispenser, he without looking at the prescription handed over a bottle of a certain mixture to him. The patient requested the Dispenser to read the name of the mixture which the doctor had prescribed. The Dispenser casually replied, "Don't worry, we have only one mixture."

After sharing this anecdote, **I told the**

participant that this had been the same situation with courts before Section 89 came into being in its new avatar by way of amendments to the Code of Civil Procedure effective 1st July 2002.

Adjudication was the one and only one solution for any case. Now the Dispensary had five more mixtures. This sent the laughter waves across the conference hall which was too difficult to harness.

While discussing the subject of negotiations during mediation trainings, I often share one anecdote, which goes to show that many times there is much more than what is made to meet the eyes.

There was a farmer having a ranch near the railway lines. One of his bulls went missing and he brought a suit for compensation against the Railways. Soon the matter landed in mediation. The railway counsel had grave apprehension that if the matter went to trial the verdict might go against his client as the facts and circumstances were against it. The railway line was unguarded and unfenced. Though the dead bull could not be found, some blood had been detected on the tracks and it was suspected that the dead body might have been dragged away with the wheels of the train or devoured by the predators. In the settlement talks, the counsel for the railway negotiated very hard and achieved a settlement for his client at a very low price. When the settlement had been reduced into writing and the parties appended their signatures, the railway counsel could no longer hold his euphoria and stated to the plaintiff, the owner of the ranch, that it

was indeed a very difficult case for trial as the negligence on the part of the railway was writ large and all the circumstantial evidence was against it. As such, in all likelihood, the suit would have been decreed for the full sum with interest and costs. He summed up by saying that he had achieved the settlement at a very low price and boasted to be the proud winner talking high of his negotiation skills. The plaintiff said that in fact it was he who had got the best deal in the matter. “You know, just today morning, that darn bull had come back home”, said the plaintiff.

In negotiations, no one ever knows who will have the last laugh!

A very interesting story of mediation has been shared by one of my fellow mediator. It was a matrimonial dispute and after talking to the parties for quite long in the joint session, the Mediator decided to break out into a single session to figure out the root cause of the problem. During the joint session, it had been revealed that there had been constant bickering between the parties. In the single session, the husband labeled the issues between them and pointed out one of the issues as 'major religious differences'. When my mediator friend asked him to explain what were the religious differences between them, the man replied, “Well, she thinks that she is God...I don't.”

The **counsel representing a party in mediation** had a penchant for speaking in English. He had spent a great many years in law practice. He was blissfully ignorant that he used to pronounce the word

'embarrass' in the wrong way. **In his peculiar way, he used to pronounce the word 'embarrass' as 'embrace'.** In the course of mediation proceedings, after washing some dirty linen in the joint session, he was apologetic and asked me, **“I hope I did not embrace (embarrass) you.”** While he kept on repeating this sentence, my mind ventured into the situations as to what could have happened, had he uttered these words in front of a female mediator, or for that matter before a lady judge. The hilarious situations that my mind had imagined created a burst of laughter inside me. No longer able to contain myself, I excused myself from the mediation for a while and went to the washroom and had a heartful of laughter. Of course, I have said my prayers for him then, and now too before penning down this narrative.

There is no dearth of funny moments that happen day in and day out in mediation. They occur like a thundering flash and just fleet out of one's mind at the same speed. One may try very hard to recall them, but they just do not come back. Sometimes, they are found down

the memory lane. So much for those not so-forgotten moments, which my pen with its limited potential is unable to weave in words to convey the intensity of the moment. **It would be my endeavor to revisit this Column to share those rib-tickling moments, as and when the heavenly powers bless me to scribe them on paper.**

Many of my Mediator friends have shared the same platform with me on the point that **humour has been a very good technique to break the impasse or deadlock and open up the channels of communication.** It is no wonder that all of us, at one point of time or the other, have often used it with profit. **Nevertheless, the caveat is to use it with utmost care as many times it may hurt a party who may think that the humour is at his or her expense.** This may tend to shake the confidence of the party or compromise the neutrality of a Mediator. **Thus, the proverbial 'laxman rekha' is to be surreptitiously observed.**

At the cost of repetition, **I cannot resist saying that humour is all pervasive.**



MUSINGS

By Mr. Shiv Kumar*



I glanced at the names scribbled on the file. There was nothing unusual or familiar about them. As I waited for the husband and wife at the Mediation room, I began to idly speculate (as most of us do) about the nature of this couple, their appearance, how and what they would say, who had been cruel to whom, and how the mediation would pan out—all based on their names. Suddenly, a booming voice thundered. *“How dare you,”* it said, *“how dare you, a Mediator, be judgmental or form opinions or have preconceived notions about the parties or the dispute”*. Perplexed, I looked around but found no one else in the room. A moment later it dawned on me -- it was the voice of my Mediation Trainer chastising me for transgressing a cardinal rule of Mediation. Unnerved by the thought that Trainers had acquired the power of remote monitoring (through TOT's or otherwise), I sheepishly put away the file and the guilt feelings swore never to repeat the mistake and began a quick mental revision of the principles of Mediation.

Long after the scheduled time for Mediation, the parties and their Counsel

sauntered in. Not being keen to hear my Trainer scream at me again, I refrained from expressing, either verbally or through body language, my annoyance at their delayed arrival but welcomed them with a smile that would have launched a

thousand ships!! None of them seemed to notice or care but chose to respond with a stoic silence that was deafening. The much-flouted theory of *'Silence as a means of communication'* expounded with great proficiency by my Trainer, did not need any further validation. My enthusiasm turned to guarded optimism.

The husband was a double Ph.D. from two prestigious universities in the USA and a brilliant techie, earning a salary that most of us would consider obscene!! Short and lean, fair of skin, wearing old fashioned spectacles, a three or four-day old beard, uncombed hair, a variety of coloured threads on both wrists, and a large blotch of kumkum on his forehead. He was clad in a cotton dhoti that had not seen the insides of a washing machine for weeks and a T-shirt that had kept pace with the dhoti. He wore a pair of half-torn Hawaii slippers. **I began to typecast him as**

abnormal when the same voice growled and prematurely ended the errant behaviour.

The wife was petite, elegant, well dressed, composed and a soft-spoken woman very accomplished and of a charming demeanor.

The contrast was too stark, aggressive and visible to be ignored. As I began to admire her composure and sympathize with her for being saddled with such a man, the voice growled louder and more threatening than before, warning me to be neutral, empathetic and never to judge a book by its cover. I recognized how easily, though unintentionally, a Mediator could be carried away by superficialities and the need to consciously guard against it.

The joint session was comical...the husband sitting cross-legged on the chair and staring at the floor, the wife looking directly into the eyes of the husband, one Counsel, holding a highlighter, engrossed in his file and the other Counsel taking a quick nap. I had no clue who I was addressing the opening statement to. Nevertheless, **I dutifully made my opening statement, albeit to me, self-rated it as brilliant and asked if they required any clarifications. She confirmed that she had understood and was happy to participate in mediation. He continued looking at the floor** while she said *“Sir this is the problem. He does not talk or open his mouth except to eat”*. Despite

I dutifully made my opening statement, albeit to me, self-rated it as brilliant and asked if they required any clarifications.

my best efforts I could not suppress a smile as a few hours ago in another mediation the complaint of the wife had been entirely to the contrary!!!! One more paradox of Life.

The private session with the husband was disaster simpliciter. He refused to talk except occasionally in monosyllables, refused to look up or respond to open-ended questions. In an attempt to break the ice, I asked when they were married.

He responded, *“That data is in the laptop”*. Laughing would have been justified but cruel!!

The session which lasted close to three hours was an uninterrupted, clear, lucid and impressive monologue by him on software programming, while staring at the floor. He ended very wistfully, did not look up and said *“Sir I feel as though*

I am actually married to the computer. I can converse with it; I can relate to it; I am in love with it and I can feel its response”. I was too dumbstruck to respond or to visualize any strategy to move forward or to encourage him to generate proposals for resolution. **Suddenly, I recalled my trainer's profound observation that an effective mediator will convert adversity into opportunity.** Drawing inspiration from my trainer and believing that I was being smart, I asked him if he thought that he could replicate these sentiments for his wife as she loved him. In a matter of fact,

the tone and with a deadpan face he replied, “*Sir she is not a computer, but I still love her*”. I thought this was a confused but reasonably encouraging response and therefore, nudged him on.

A little later, cautiously and with trepidation, I asked him if he had ever told his wife that he loved her. **His reaction was incredible – he went flaming red in the face, looked up at me in horror, eyes wide open, stared at me and said nothing. This non-verbal communication of silence and staring continued for three or four minutes and as I was preparing to gently prod him on,** he stunned me with his first question “*Sir*” he asked, “*is it necessary to tell her that I love her?*” I was tempted to tell him that I would happily tell his wife that I loved her, but that it would be inappropriate as she was his wife, but I remembered the voice and refrained. Then came the next question. “*Sir, Can I send her a mail or text her instead?*”

Before I could recover came the next question. “*Sir is it OK if I asked my colleague to tell her that?*” Followed by another question “*Sir, but how is that too said?*” I was not sure if this guy was naïve or plain stupid. After prolonged silence and deep thought, I decided to educate this young man in the nuances of romance, love, caring, affection, sweet noting and joys of marriage et al that I had accumulated in 70 years of my life. What followed, in conversation mode, was (even if I say so myself) a brilliant comparative study and exposition of kinds of love, an analysis of the love, caring and affection for

a computer versus for a human being, love for a wife, demonstrative love and all other possible dimensions of love. **It ended with him asserting, with immense confidence and self-assurance that he had clearly understood all that was said; that he had identified the problem in his marriage; that he fully understood his shortcomings; that he recognized that his wife's desire to be told that he loved and cared for her was justifiable and that it was not abnormal to speak with his wife or spend time with her.** As he got up to leave he added (in an undertone) perhaps to himself that he would try to be a different person, **assured me that he would tell his wife he loved her and thanked me profusely.**

I heaved a sigh of relief, congratulated myself and was proud that I had succeeded in mending a relationship. Smiling, beaming and contented, I opened my diary to note the date for the next session. **While I was writing, this young man stopped at the door, turned to me and said “*Sir, can I ask you a question?*”** I was in a happy and congenial mood, glowing in my own perceived success. I said “*Certainly.*” He looked at me squarely in the eye, adjusted his spectacles, tugged at his T-shirt, waited for about 30 seconds and said, “*Sir How many times do I have to tell her that?*”

I put my hands on the table, hid my face in my palms and wept.....

Long Live Mediation !!!!

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Reflective Practice: Observing & Learning from Others

By Mr. Jonathan Rodrigues *



If you read the above phrase again, you will notice my 'alliteration addiction' has spilled onto my writing and I have noticed this habit of sentence structuring getting out of control, even in my spoken English. It might seem like a trivial matter to most readers, but if you add up the minutes wasted on this obsession-compulsive habit, it makes for an unproductive desk day.

So, why did I invite you to indulge in my personal problem, which will have absolutely no relevance to the rest of this article? – To highlight the importance of being aware and accepting of our limitations, no matter how trivial they could be. Reflecting on our smallest behaviours gives us insight into how others might perceive us as mediators. Micheal Lang has spent years making a rich case for Reflective Practice and the significance of “reflective practice groups” towards professional growth.

Pursuant to my LL.M. studies in Mediation and Conflict Resolution at the University of Strathclyde, I am convinced that a reflective mediator doesn't only benefit from analysing his or her own behaviour, but also benefits immensely from observing others engaging in their practice. Playing the role of an observer at mock mediation simulations on an 'Intensive Training Weekend', I was fortunate to witness a few striking mediation moments, while my peers were at work. This article focuses on three very ordinary moments that could have disappeared into thin air, had they not struck me personally.

MOMENT ONE – “What would you like to share with us, today?”

After completing her mediator's opening remarks, a colleague looked at one of the mediating participants and said, “What would you like to share with us, today?” As simple as it sounds, this is such a welcoming approach. For starters, it's an invitation, which means the participant can refuse to share or choose to share what he / she wants at this stage – very important, as the conversation is still in first gear and most participants are

The art and craft of mediation, like many other skills, mainly matures from the myriad mistakes mediators make on their way to meticulously mastering the process.



cautious. This is also relevant to understanding how to engage introverts in a mediation setting. Some participants tend to feel less comfortable speaking in stranger environments or when put on the spot, and therefore, it is important to make them feel safe right at the beginning.

Secondly, it has an underlying tone of 'privacy', as sharing is a choice and you share your real interests only when you trust the people and surroundings. We often take it for granted that everyone who opts for mediation is raring to go hammer and tongs at the table. Expecting and demanding participants to speak in mediation can be catastrophic to the process – the mediation could abruptly end and the beleaguered participant would have had a bad impression of mediation.

Blogging about the Art of Conversation, Katherine Triantafillou says, “What brings people to mediation is that they have a conflict that they wish to resolve and don't feel able to have that conversation alone or among themselves”. So, if that's the case, we want to make sure we gently nudge them towards a dialogue. Setting the tone is very essential, and the words we use determine the approach of the participants. If we make it sound like they are presenting their case like at court or a tribunal, then it will sound more like a 'monological' trial court hearing and less like an opening to a dialogue. I have heard many mediators turn to either participant and say, “You may now present your case” – blasphemous to my ears.

Thirdly, it's extremely empowering for the participant as he/she is given the opportunity of being heard, without any interruption or time restrictions. As discussed earlier, not every participant enjoys the spotlight early on, but there are some who do, and this serves as a stage for them to articulate with freedom. Professor Sherry F. Colb, who speaks of Mediation as a different kind of conversation, admits that she

can't help but think that though interactions are technically taking place between the disputing participants, “it is easy to imagine that each one has in his or her imagination a neutral judge or jury that he or she is addressing and before whom he or she is building a case.” This observation calls for a prudent and conscious use of vocabulary and sentence structuring at the beginning of the mediation.

MOMENT TWO – *“Annie, Micheal, I believe I must interrupt...”*

In another simulation, when a mediation session got a little tense and the participants began speaking over each other, a mediator colleague looked straight into their eyes and called them out by their names. “Annie, Micheal. I believe I must interrupt here as we are speaking over each other and not listening, and therefore losing out on some important communication,” she said. Once again, seems like a very simple sentence. However, the authority wrapped around that simplicity is profound. That strategy of calling them out by their names had a subtle hint of a disciplinary action, and yet, was calming and polite.

The participants immediately stopped rambling at each other, as they heard the sound of their names called out. It almost felt like they were two kids quarrelling on a playground and the teacher reprimanded them for bad behaviour. How much does the sound of one's name affect their openness to listen? As Joyce Russel writes in the Washington Post, “It is one way we can easily get someone's attention. It is a sign of courtesy and a way of recognizing them.” Additionally, I would argue that it serves as a spark of consciousness, reminding participants of their identity, their values and their perceptible personality.

I suppose that calling participants by their name would also humanize the conflict and

despite their differences, might lead them to accept and respect each other's identity. Dan Simon, representing the Institute for the Study of Conflict Transformation, writes about the “healthy habit” of Name-Calling in mediation. Some would argue that such practice is risky, and so it may be, but drawing inspiration from Dan's advice on freedom of expression, a mediator would do best to keep reminding the participants of who they really are, by regularly saying their name (with title or surname, if requested by participants) out loud.

MOMENT THREE – *“Stop arguing! Let's try and split this”*

In another simulation, the mediating participants kept bringing up an estranged relationship with their respective spouses and the mediator kept ignoring this issue, while diverting attention to the shareholding in the property (which seemed like the priority among interests set out on the agenda). The participants would steer every conversation to this deteriorated domestic bond, with their language clearly fanning the antagonism. Running away from the developing tension, the mediator began pushing the participants towards settlement. “Stop arguing! Let's try and split this,” he said, at one point, nearly scandalizing the participants – who literally had the “Are you even listening to us?” look on their faces.

The mediator in this case wasn't helping himself, as he seemed a little temperamental and self-conscious of the raging impasse, and didn't address what was keeping the parties on the edges of their seats. With reference to the work by Kenneth Kressel and James Wall, where the duo speak about mediator styles, the

mediator in this simulation was neither employing the “relational style” by easing communication and speaking about less tense matters, nor was he engaging the “pressing style” by taking measures to move the disputants from their positions and towards each other.

Shockingly, the mediator was bordering the arbitrary line with that single statement he made, which could easily translate to “I am not interested in listening to your quarrels, let's get this done with.” And, if this is the message heard by the participants, then it's a tragic failure of the process. We all know it's important for the mediator to keep calm in tense moments and be confident of his or her presence in the room.

Escaping tense moments by demanding that the participant stake the problem-solving approach and make offers is not appropriate. This observation would fuel the debate in support for an eclectic approach towards mediator styles – but, I will park this for another time. Rick Weiler suggests an interesting three-step strategy of “asking, listening and telling” in overcoming impasse in mediation.

Tenacity is crucial, as Hilary Linton explains, to opening up roadblocks faced by participants – but, so is tact. It personally benefited me to revise a few tips from Kate Otting on how to stay calm when mediations get nerve-rackingly intense. What we say, as mediators, is crucial to shaping the dialogue at the table. A wee word or a singular sentence has the potential power to build or bulldoze an open-ended conversation – Ah! The alliteration addiction kicked in again!

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INTERNATIONAL DESK

Mediation landscape in Nepal
by **Mr. Mukti Rijal**

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Mediation landscape in Nepal

By Mr. Mukti Rijal*

Nepal is transformed from a Centralized Unitary State into a Federation in 2015 AD. **The Constitution enacted by the Constituent Assembly and promulgated by the President of Nepal introduces the system of federalism in place of centralized unitary structures.**

Moreover, Nepal abolishes around two hundred and fifty-year-old monarchy and becomes a democratic republic subservient to the provision of the federal republic constitution. **The Constitution of Nepal is historic in the sense that it makes a radical break from the past. It creates a three-tiered federal structure with each tier vested with competence to exercise state authority.** The federal structure in Nepal is envisioned as cooperative with each tier guided by the principles and values of cooperation, co-existence and interdependence. The Constitution articulates mechanisms for

intergovernmental relationships and conflict resolution. Besides several mechanisms to discuss and resolve intergovernmental issues like the interstate council, inter-provincial coordination council, **Article 217 of the Constitution** mentions about judicial committee which is entrusted with competence to resolve neighborhood disputes at the local level. Local Government **Operation Act enacted in 2017**, by the Parliament of Nepal under the provision of the federal constitution provides an elaboration to the constitutional provision regarding local dispute resolution. The Act lays down arrangements to assist the process of dispute resolution by the trained community mediators at the local level under the overall tutelage of the judicial committee.

Nepal's federalism is heavily biased in favour of the Local Governments- Gaupalika (Rural Municipality) and Nagarpalika (Urban Municipality). And the federal constitution endows them with exclusive and concurrent functional jurisdiction listed in the schedules of the basic law of the land. Of the three tiers - federation, province and local, local governments are mainly responsible for regulating and delivery of public services like health, education, agriculture, rural infrastructures and so on. Currently, the total number of local governments comprising both rural and urban municipalities is 753. The local government restructuring commission 2017 had rationalized, trimmed, and brought their number from around 3230 down to 753 with the objective of, among others, enhancing administrative ease, the scale of

economy and strategic capacity. It is a mere coincidence that 700 deputy mayors out of 753 at the local level are women elected in the multiparty competitive democratic local polls held at 2017.

Schedule 8 of the Constitution lists exclusive mandates of the local government. One of the mandates listed in Schedule 8 of the constitution is the provision relating to dispute resolution at the local level through interest-based mediation, among others. To deliver dispute resolution services at community neighborhoods, mediation centers are established in the wards within several local governments in line with the provision of the above said Act.

According to the provision of the Act, the local governments constitute three members judicial committee headed by deputy mayors in which the other two members are elected from among the municipal councilors. **The ward mediation centers function under the overall purview of the judicial committee.** Presently, the number of wards as sub-administrative political units is 6344 whose number varies depending upon the geographic and demographic size of the local government. Though at least one mediation center at the minimum needs to be established to deliver mediation services, reports state that not all local governments have established such centers.

Local governments face difficulties in the sense that so provided centers need not only to have a corps of trained skillful community mediators in their rosters but also allocate separate facilities and logistics, operational expenses to deliver

mediation services. Not all local governments in remote areas could afford it. However, during the recent visit to some of the municipalities in Chitwan, Tanahun and Rupendehi districts, where the author had helped to convene basic and advanced mediation training courses for mediators over the previous years, almost all rural and urban municipalities have set up and operated ward-based mediation centers and arranged separate facilities and logistics for their operation. **Community people go to the ward mediation centers to file their applications (Nibedan Patra)** in case they feel that they are meted out with injustices by the second party in the neighborhood. They choose mediators of their choice from the photo list displayed in the ward mediation office for resolution of disputes. **The composition of mediators is generally so made as to be inclusive with women and the dalits included with priority.**

The local governments are mandated two types of jurisdictions. *The first type of jurisdiction* is related to settling disputes using mediation-arbitration (med-arb). In exercising this jurisdiction, the judicial committee uses mediation to resolve disputes to the possible extent through mediation centers based on suitability, ease and convenience. In case, attempts to mediate fail at ward mediation center and committee level, the dispute is settled through verdict. Since giving awards is risky to judge right and wrong, guilty and innocent, judicial committees are generally found limiting to mediation only. Judicial committees refrain from giving awards for the closure of disputes.

The second type of jurisdiction is related

to mediation only through the exercise of mediation centers, using mediation skills to help the parties to resolve and determine the outcomes of the dispute, it satisfies their needs and interests. Moreover, the relationship is restored and post-mediation ties between disputants are found to be amicable and harmonious. Community mediation services are being used by women, and the marginalized groups and they benefit immensely from it.

Matrimonial disputes, alcoholic abuse, petty transactions, loan default, petty offences like theft, verbal abuse, issues relating to family maintenance, land encroachment and easement are some of the disputes that are brought for mediated settlement at the mediation centres and judicial committees.

The Deed of Settlement (Sahamati Patra) concluded at the Mediation Centres are authenticated and attested to by the office of Judicial Committee (**Nayayik Samitiko Karya Laya**) at local government. In some disputes as mentioned above, the Act authorizes the Judicial Committee to switch on to arbitration in case mediation fails. However, reports say that the disputes are mostly resolved through mediation, without resorting to an arbitral decision, which is not very appropriate for popularly elected deputy mayor and representatives, who are the constituents of the judicial committee.

Besides the local government, the

Operation Act as mentioned above provisioning the local government-led mediation, the **Mediation Act enacted in 1968 offers umbrella legislation for the institutionalization of mediation in Nepal**. The Act sets forth a legal framework for regulation, credentialing and accreditation of mediators in Nepal. It also sets training curriculum and sets standards for training curriculum under the aegis of the mediation Council led by the senior sitting justice of the Supreme Court of Nepal.

The court-annexed and referred mediation is also promoted through Judiciary in Nepal. This is actively promoted in the District Courts, High Courts and Federal Supreme Court of Nepal.

A study report shows that almost twenty percent of cases filed in the court are referred to mediation during the trial phases. Each court maintains the roster of mediators, litigating parties select mediator from the roster of mediators maintained in the court. **A big majority of mediators in the roster represent the practicing lawyers in the court**. Voices have been raised that mediators should also come from the non-legal field as the mediation does not need the knowledge and skills on the core ideology of law. Thus mediation has become very popular in Nepal as an appropriate mechanism for dispute resolution. ■

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SUGGESTIVE DESK

Reforms for the success in Mediation
by Adv. (Dr.) Santosh Shah

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Reforms for the Success in Mediation

By Adv. (Dr.) Santosh Shah*



Alternative Dispute Resolution Mechanism seems to be taking roots in this country. Arbitration is an already widely used mechanism in the corporate world. Mediation is now being promoted through legislative and judicial efforts. Lawyers, litigants, and other stakeholders in the system are also being encouraged to make mediation a successful method of dispute resolution. **This article aims at suggesting certain reforms for making mediation successful in dispute resolution for different stakeholders:**

A. Lawyers:

The first and foremost need is to involve lawyers in the mediation process. For this purpose the following reforms need to be considered:

1. Mediation must be made remunerative for lawyers as there is a limit to lawyers looking at it as a means of social service.
2. The present rules relating to mediation require professionals with certain years of standing for being appointed by courts as mediators in court-annexed mediation. This rule needs to be abolished as there is

no reason to put a requirement of practice in a particular profession as a prerequisite for being a mediator. On the contrary, many of the seniors with good practice in litigation may not at all be interested in mediation. Instead, therefore, training in mediation, the experience of mediation should be the prerequisites.

3. Lawyers should be encouraged to put a clause relating to mediation in their notices and contracts.

B. Judges: It is always observed that a word coming from bench carries great weight in the minds of litigants. To make mediation successful amongst the Judges, following reforms need to be considered:

1. It is necessary to give incentives to judges in the form of points, increments, promotions, etc for their work in mediation.
2. There is a necessity of inclusion of clause relating to mediation in a court summons.
3. Judges would be expected to be more

inquisitorial and participative in the handling of litigation before them. This will enable them to suggest alternatives and options to the parties for dispute resolution. If necessary the judges can transfer their cases to each other so as not to take up the matter in case mediation fails.

C. Education: There is a need for training in mediation to all the stakeholders. The following are concrete suggestions:

1. There is a need for a change of mindset and for that purpose curriculum in law schools and colleges needs to be modified by giving greater emphasis to mediation. At present, the emphasis is mainly on litigation.
2. Separate and specialized courses in mediation are the need of the hour. Some Universities like Maharashtra National Law University Mumbai has floated a separate course of M.A. in Mediation and Conflict Resolution.

It is heartening to note that the Bar Council of India has recently notified by its Resolution dated 02.08.2020, that Mediation with Conciliation shall be compulsory subjects to be taught with effect from academic session 2020-2021 in LL.B. degree course. It is intimated that the subject must be a 45 Hour course component mandatory for 3 years and 5 years courses of Law. The Bar Council has further observed that in times of Pandemic and Covid-19, where physical hearings in Court are suspended, mediation as a tool for conflict resolution has come to the fore. This response of Bar Council is to the request and recommendation of the present Chief Justice of India, Hon'ble Mr. Justice Shri S.A. Bobde.

D. General Suggestions:

1. There is great need of spreading awareness amongst litigants and lawyers and judges of benefits of mediation. Effective use of media, social media, films, and print media would go a long way for spreading awareness.

2. Efforts must be made to recognize private organizations and professionals and experts in various fields as mediators.

3. Establishment of mediation centers by different organizations like a confederation of industries, chambers of commerce, professional associations, etc would also bring in the culture of mediation.

E. Government and Public Sector Undertakings:

Government and Public Sector Undertaking are the largest litigants in our country. However, no thought seems to have been given to mediation in litigation relating to Government and Public Sector Undertakings. The reason there seems to be that many times nobody in such an organization wishes to make a decision and take responsibility for the same. The Civil Procedure/ADR and Mediation Rules 2006 of the High Court of Judicature at Bombay Rule 3-(1) and (2) make it mandatory for Government and Public Sector Undertakings to nominate an officer responsible and competent to take decision relating to alternative dispute resolution. Unfortunately, the said rule is not implemented in practice by any of the stakeholders including the Litigants, Government Undertakings, Judges, or even Government pleaders. If this rule is implemented in practice, a responsible Government Officer can take up mediation as an alternative to litigation.

Conclusion:

All in all, we must bring in a culture of mediation amongst our Judges, Lawyers, and Litigants. As has been held by the Hon'ble Supreme Court in "**M.R.H. Krishnamurthy Vs The New India Assurance Company Ltd.**", **Civil Appeal Nos. 2476-2477 of 2019**, that there is a need for enacting the Indian Mediation Act. There is a further need for institutionalization of mediation.

*Adv (Dr.) Santosh Shah stood first class first at LL.B Examination and was a gold medalist. He went to the United States for further studies on Rotary Scholarship. He completed his Masters in Political Science and LL.M. in the United States. He returned to India in 1991. After returning to India he completed his Ph.D. in Law under the guidance of Dr. Satyaranjan P. Sathe. Since 1991 he is active in Law practice, mediation, and academics. He is visiting faculty at many institutions. He is a trainer in the Alternative Dispute Resolution of Bombay High Court. He is invited by several Organizations, Bar Associations, Maharashtra State Legal Services Authority, etc to speak on various topics relating to ADR. He is a member of the Association of Mediation Practitioners, Mumbai.



Euphoria

Chit- chat with our confrère
Ms. Laila T. Ollapally

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Euphoria

chit-chat with our confrère

Ms. Laila T. Ollapally

Laila T. Ollapally



Date of Birth: 23rd February 1955

Zodiac Sign: Pisces

Ma'am as you have been associated with a variety of initiatives, from being the founding coordinator of the Bangalore Mediation Centre to establishing CAMP (Centre for Advanced Mediation Practice) in 2015 and being a panel member for numerous International ADR centres in Singapore, Kyoto, and Italy; how do you manage it all?

I don't think I am doing too many things, that's number one. I have been in this profession for many years so whatever I have done is over a period of time. Having said that Rohit, I need to tell you, that I am very particular

about prioritizing. I choose what I want to do, what I enjoy doing and when I pick something it's because I am deeply involved with that so there is a deeper engagement that I have with whatever I do, be it my practice or my mediation career. I operate in a manner that I am deeply engaged. In my litigation practice, I did a couple of PILs and I managed to get two large parks and a lake for my neighborhood. I worked for the rights of persons with mental illness and when I look back it's because I really got involved with these things. When I did the environmental litigation I was able to access information for the last 100 years, that's the kind of deep engagement I had with my litigation practice and when I advocated for the rights of the persons with mental illness, it was a collaborative effort where I was able to bring in the stakeholders of this issue together on a platform, the persons with mental illness, the caregivers and the mental health authorities. So, it's kind of like the mediation that I subsequently do, I kind of work with dialogue and collaboration, so there's a deeper engagement with what I do. **I think whatever I have been able to do have been because of these things, prioritizing, deeper engagement and trying to create collaborations.**

What would you say ma'am is your strength as a lawyer and as a mediator?

As a lawyer, I think I have already spoken about it, deeper engagement. In fact, **I was briefing Senior Advocate Mr. Parasaran, in one of my litigations regarding minority rights and he asked me if I had done a Ph.D. on minority rights.** So that was the kind of engagement I had with my

What is your favorite movie ma'am?

I think by now you have realized that I don't have any favorites. I like something that's light and I'm not into the bang-bang action type of stuff.

What do you do in your free time ma'am? Which is something I highly doubt exists?

No, I have my free time. I am very possessive of my free time, I love my free time. Free time is my family time, I spend it with my husband, my children, my grandchildren. I like to exercise, go on walks, I like to dance a little bit, I spend time reading, so doing fun things.

What is your favorite dish that you like to make and serve to your family?

Each child has their favorite, so whoever is in town, I make their favorites!

litigation practice. As far as my mediation practice is concerned, I think a deeper engagement with the parties and connect with the human beings and of course **I am very persistent as a mediator.**

Ma'am as you have witnessed various ADR mechanisms across the globe and various legal systems, do you think mediation particularly, has penetrated the Indian legal system deep enough?

I feel mediation has come into the court systems. We have mediation in most of our High Courts and other courts **but I wouldn't say that's enough. I would say mediation has really penetrated when it moves out of the court system into the community, in industries, organizations and when everyone embraces this concept** and it should come in a way that it's the default response and that can happen when it is available across the spectrum, then I would say it has really penetrated.

What would you say ma'am are the universal struggles of being a lawyer and a mediator?

As for myself, a big struggle was how do you get a long-lasting resolution for your clients, in the shortest time, minimal cost and minimal pay. It was a prolonged agony for the clients, very often resulting in frustration and helplessness. That to me was a lawyer's struggle, how do you do this in a manner that you're kinder to your clients.

As a mediator, a big struggle is to convince your parties to move out of the conflict trap. When there is a dispute, I curl my fist at you, you curl your fist at me, and how do I convince such kind of parties to come in for mediation, for collaboration. So, to help them move from the space of a conflict trap into a space of collaboration, to convince them, to demonstrate to them that when you collaborate you create value, you save time, money, you build your business better, there is a better relationship. To convince litigants on this concept, because the intuitive response is to hit and to convince such parties to mediate is a challenge.

Ma'am through CAMP's official website, I got to know that you're really fond of travelling, so what would you say is your favorite travel destination?

I think every country is so beautiful. Each time I go to a new place, I think it's the best.

Ma'am what would be the one thing that you like and dislike about the current mediation culture?

What I like Rohit, is that today we have created a platform in our court system for

disputing parties to once again come and have a dialogue and try to negotiate, sitting with a neutral third party, who has the skills to help them negotiate. I really thank God that we have created that space. It was not there in my early years of practice and today we have it, that's one thing I'm really grateful and happy about. The second part of your question, **I think dislike is a very strong word, what I would want to see in the future maybe is more of a pursuit of excellence.** A mediator's mind is a very important aspect of a mediator's personality and presence, an earnest desire to learn and open your mind, to have the curiosity, and for that one needs to have the humility. **I would like to see among all our mediators, the mediator's mind that is humble, open to learning, the last person in the room, you're the biggest presence in the room, and yet you're the last person, ready for service.**

How do you feel ma'am we can create more acceptance of mediation to an extent that it becomes the first door to seek to resolve conflicts?

As I explained earlier, **the default response in conflict is a competitive assumption.** We really can't improve the acceptance of mediation unless we create a critical mass of people, who have done mediation, who have enjoyed the benefits of mediation. They are the ones who can encourage more and more people to go for mediation. In order to do that, **there are two ways. One** is where the judge pushes for mediation, I would call it **the judge mandated mediation** if every judge made it a point that the parties try to negotiate before

continuing the adversarial process then that critical mass will improve. **Similarly**, if we have a statute as we have in our Commercial Courts Act, if there is **a statute mandating mediation**, then people are able to get over that competitive assumption and go for mediation, experience the benefits of mediation, then the critical mass is formed then it becomes a norm, it becomes the culture and you have more and more people going for mediation.

What do you think ma'am is the one key differentiator between the mediators who make it or break it?

My answer would not be towards the court-annexed mediation, because there you get your cases allotted so it's not that difficult but **in private mediation, you really have to master the skills**. The mediation market all over the world is a winner takes it all market like the musicians; the best musicians are the ones who get to play the maximum number of times. Similarly, it is the mediators who really master the skills that will get to do the cases. So, mastery of skills is really important **and then, of course, you have to market the services**.

What pops up in your mind ma'am when I say, the funniest memory of your career?

That's a good question! This goes back to 2009-10; we were preparing our training manual for the Karnataka High Court, the Bangalore Mediation Centre. Here I was, presenting the manual to the then Chief Justice and the Board of Governors. I was working on my computer which was plugged on to be charged. Everything was very formal, I was also very dignified, dressed formally and then I had to go and

check on the charging and as I went to the plug, I tripped on the wire and I fell flat. I think that was a very funny moment when all the dignity and everything collapsed and there I was flat on the floor.

In 2015, CAMP organized a private mediation conclave which was the first of its kind, how do you think these conclaves help us ma'am and what's their aim?

See Rohit, **mediation has to take off**. I see the future where we will have court-annexed program and private mediation. So we have pre-mediation that's available, mediation for payment that's available. **So we need to tell the community that there are different kinds of mediation and it's not only available under the court system as free legal aid**. Mediation has immense potential to be used in the commercial sector, in different spaces. So, that awareness has to be created and that's why we constantly have seminars, conclaves and now, webinars in order to inform the larger community that mediation is not only in the court space, it's also available in the private space. **We believe this profession is a noble profession and more people should adopt it**. But people don't adopt it unless it is used and it won't be used unless there is awareness, **so we are creating awareness**.

Ma'am what would be your message be to the aspiring litigators and mediators of our country?

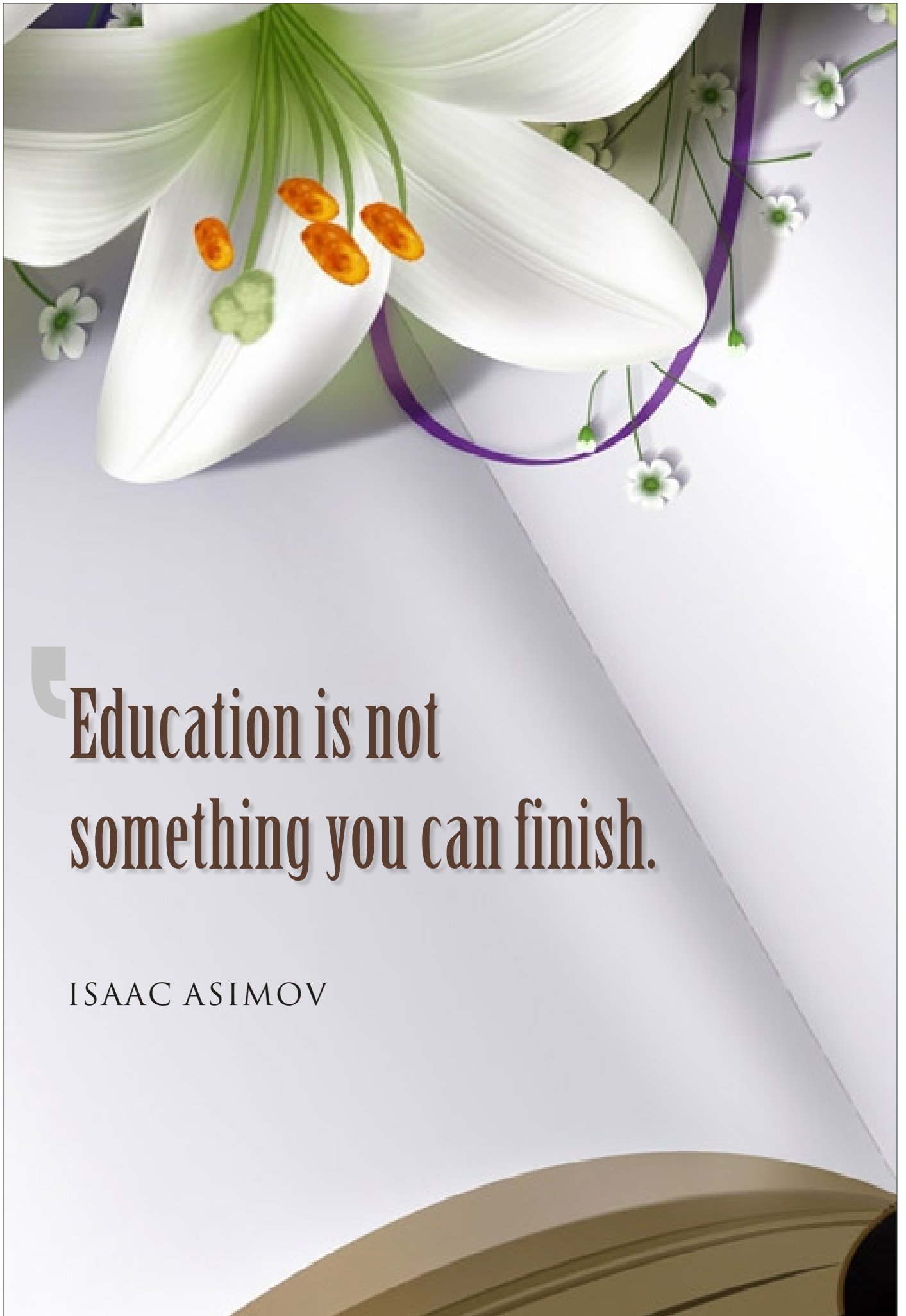
To the aspiring litigators, **my message would be to look at your profession as something which is meant for the larger good, there is a human face to conflict**

and you don't see that human face until you integrate the heart and the soul. So, my advice to the litigators is that we need to look at our profession as problem-solving, not just the determination of right and wrong. I have no doubt that mediation is going to be a part of the dispute resolution mechanism in the future and they need to know how to be an advocate in mediation. Mediation advocacy is different from the advocacy in courts, **they have to deeply connect to the human face of conflict, and they have to overcome the desire to be aggressive,** which we are in courts because that's an adversarial system but that's not what it is in the mediation framework. Here you are persuading your client and the other side to come to a solution. **Aggression doesn't work in mediation.** I truly believe the next generation lawyers, the younger lawyers like you would make great advocates in mediation because you are the next generation stepping into a world full of turmoil and confusion because they will not be blinkered and will have a larger vision for the profession and I believe that's going to happen.

My advice to the mediators is to be in pursuit of excellence. This is an amazing noble profession. It has to grow into a profession. It is not going to be confined to courts, where it is a free legal aid. **It is going to be a profession, where lawyers would be able to earn a livelihood and in order for that to happen there needs to be excellence.**



INTERVIEWED BY
ROHIT KHARE
Young Volunteer
E-Mediation Writings
(EMW)



Education is not
something you can finish.

ISAAC ASIMOV