

MIDEATE

Madhyastham

A fortnightly newsletter

Is mediation relevant, even if courts function well?

Newsletter 15TH
November '19
Volume 1, Issue 2

Mediation is not an apology for an inefficient court system. There are naysayers to mediation even amongst some of the brightest judges, because to them, we must improve efficiency in the manner we work our courts and deliver quick justice than deflecting the parties to alternative systems of dispute resolution.

There are several factors that result in disputes that arrive in courts. At the grass root level, it may be on account of grievances based on rights, the enforcement of which would require a third party adjudicator to sit between the parties and decide on who is right and who is wrong. Even beyond declaring disputed rights, there could be a bundle of

grievances beyond individual disputes which may involve crimes, environmental issues, etc that are complex requiring adjudication.

The judicial system that we have inherited from the British requires several adaptations through effective court management systems and improving access to justice by strengthening legal aid. The relevance of courts and improved efficiency cannot still satisfy all conflicts only because courts cannot go to unravel why the parties are litigating to administer correctives and prevent their recurrence.

Identifying the underlying interest on what drives the parties to conflict situation is never the court's task.

Restitutive justice and relegating parties to the situation before when the dispute arose will only exacerbate tensions and get the parties to do things in ways different from how the problems came about earlier.

Courts are just not equipped to resolve disputes where emotions play a major part. Where disputes arise by miscommunication or otherwise, an interlocutor who helps conversations better for parties will have done yeomen service for continuation of relationship. Mediation can never be rendered otiose.

Inside this issue:

Getting to say Yes	2
Ways to succeed..	2
Know when to negotiate	2
MBBI Meet at Bali	3
Impactful speeches – David Carden, Christian	
Achleke	3
Speaking frankly on the Ayodhya verdict	4

Could mediation be mandatory?

If mediation is a voluntary process, it would be an oxymoron to mandatorily direct the parties to mediation. But the Civil Procedure Code enjoins through section 89 that the Court may, in a given case, administer any of the ADR formulations, which includes mediation, to be tried by the parties. Same

way, the Commercial Courts Act contains provision that mandates that a party who approaches the court shall have tried for mediation and if only it fails, could approach the court for reliefs. The Act itself provides for an exceptional situation of a party requiring urgent interim relief could

directly file the suit without resorting to mediation. The fact however remains that if a party shows up before the mediator and expresses that she has no interest in participation in the process, the matter shall rest there and the mediator will have no role to play.

Getting to Say Yes

If saying 'no' is a big deal, as we have seen in the previous newsletter, getting the other party say 'yes' to your proposals, without giving in to the demands of the other party at the negotiating table is a big art.

Writing the book *Getting to Yes*, Roger Fisher and William Ury, explain that techniques of negotiation are matters which you perhaps know already and which have worked for you and that is why you consider the suggestion to be correct. Second, just as you do not get fit by reading a book on fitness, the success in negotiation lies in actually working it out. In a negotiation, you want to get what you deserve and with dignity. If the choice were forced to be made between the two, then there is no

good about it. In a healthy negotiation, you must finish with both.

The renowned authors of the book posit 4 essential methods that shall go to make a successful negotiation. It has more to do with your attitudes than the outcome *per se*. 1. Separate the **people** from the problem. Direct the energies at addressing the latter and spare your anger against the former. 2. Focus on **Interests**, not positions. The stand that a person takes could be static. The interest that drives the conflict must be dynamic, capable of giving itself to different formulations. 3. Invent **options** for mutual gain. Drain your ill-will, if any, against the opposite party and look for a result that would save the other party of dignity that you want to preserve for yourself in the

bargain. 4. Insist on using objective **criteria**. They shall be so transparent that the other side is able discern your fairness of approach. It will result in the other side being fair in return and the result will obviously be a benefit just not to you but to the other side as well.

Are you thinking of situations, when the other side has smart tricks? Do you feel that the other side is too powerful and you will not able to get even? Well, those are truly other problems and we will see the answers next fortnight.

"After the final no, there comes a yes and on that yes, the future world depends" - Wallace Stevens

Ways to succeed in negotiation

Collins lists out 5 ways to succeed in negotiations:

- Negotiate to invest in relationships
- Recognise how frequently you negotiate in everyday life.
- Always ensure that there is enough time for negotiations.

- Identify what you can concede to help reach agreement
- Learn as much as you can about your opposite side.

He would similarly warn you of 5 ways to fail!

- Just don't give in. Be firm in your stand.

- Use the same methods which have worked for you before.
- Spontaneity pays; don't waste time planning.
- Never build relationships before negotiations.
- Don't assign team roles. Allot equal time to everyone.

Know when to negotiate

It is fruitful to be well informed when it is worthwhile negotiating and when it is rather the time-tested litigation that would serve the purpose.

- ✚ It shall be when both parties have something to gain and common ground to work from.

- ✚ When retention of relationship is vital, such as when the dispute is between a vendor and a

customer, when both parties want to be engaged in future business transactions that could mutually benefit them

**"Let us never negotiate out of fear. But let us never fear to negotiate."
John F. Kennedy**

- ✚ You need to be able to devote quality time to be engaged in talks. Effective delegation shall also work but the person who is entrusted with the task shall keep the channels of communication uncluttered and be reachable any time

Mediators Beyond Borders International Meet

The 2019 Congress was on the theme, **“Disruptors: Leading Change in a world of Conflict”**. The venue was at the Intercontinental Hotel in Bali, Indonesia between November 6 to 8, 2019. There were 180 delegates from 29 countries with representation from all the continents of the world.



The lay out of the program was interesting. So too were the choice of speakers. Jose Ramos Horta, the former President and Nobel Prize Awardee for his effort to spur a diplomatic solution to the conflict of East Timor based on people's right to self-determination, was at once brilliant and modest; Shadia Marhaban, an activist from Aceh, who had been a championing for Aceh independence from Indonesia as an expression of people's self-determination showed how the sincerity of purpose alone would matter and not her diminutive physical stature. Edita Tahiri was a former Foreign

Minister of Kosovo, spoke of her role in establishing the newly

formed State, having wrested independence after several political rallies and armed conflicts with Serbia. Each one of them has had interesting journey for success. Secessionists at some part of time disrupting their world of conflicts and later metamorphizing as peace builders in the changed world! It is possible to identify each one of them as involved during their youth and making significant contributions.

There is a but a thin line between extremists who fail and therefore still in conflict zones and those who succeed and become peace

Impactful speeches – David Carden

David Carden, Former US Ambassador for ASEAN, while talking on *Equipping the next generation* made an interesting observation of how the trees grow roots at the ground and tend to proximate to the next tree by some symbiotic relationship. The funguses at the roots help trees to communicate with each other. At the top, however, they remain separate and an aerial view will

demonstrate that the tree remains separated by space that allows sunlight to permeate and nurture the trees. He likened the role of

**“Knowing is not enough; we must apply.
Willing is not enough; we must do”
– Bruce Lee**

mediators to those of trees, in that they remain as individuals to obtain light by introspection and work at the grass roots by engaging in conversations with the community disputants to help resolve their differences.



Christian Achleke



The UN Youth Peace Ambassador from Cameroon spoke on Youth Conflict and Peace-building. Revealing how he was himself a juvenile delinquent, he spoke of how he sublimated his boundless energy that got dissipated in anger and violence to disrupting change by constructive activities, particularly in prison work, involving the inmates to productive avocational skills and working amongst the illiterate youth by establishing schools, even if they

should be mere shacks. The prison work not merely helped prisoners reform but also brought the broken families together when the family did not inflict shame on the inmate.

The work for education amongst the youth kept the Boko Haram at bay and saved them from the pernicious activity of the organisation in radicalising them to take to armed conflict.

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End litigation Embrace mediation

We're on the Web!

www.madhyastham.com

Madhyastham is an organisation offering to people an alternative mechanism to resolve conflicts between individuals, companies or societies.

The services offered are essentially the ADR formulations through mediation, arbitration, lok Adalat and judicial settlements, as delineated in CPC. Community mediation is another area where people interested in intercommunity harmony could volunteer to work with Madhyastham. The centre will be a sanctuary for peoples in conflicts to come ashore, air their problems and settle quietly through passive intercessions of the well-meaning wise people of the locality that will assure enduring solutions and amity.

Get trained as a mediator, negotiator and mediation advocacy. The option for early neutral evaluation (ENE) will help you decide through a domain expert the course of action that will be most beneficial to you.

Speaking frankly on the Ayodhya verdict

Does the litigation literally end to all disputes?

At least the disputes will not be brought to streets, it is hoped.

Was the judgment a surprise?

No, not really. The judges must have sniffed the air to realise that it is already toxic, and they could not have infused anything that could have added to kill peace, even if it was only temporary. It would seem that the judgement mirrored the sentiment expressed through the settlement before the mediators to which the Sunni Wakf Board was a signatory.

Is the conclusion legally tenable?

Declaratory action is in the realm of specific relief and Court will necessarily examine the status of the property at the time of the judgment. Alteration of status quo viz, the demolition of the mosque had a significant impact in the ultimate dispensation.

If the mosque had not been demolished, would the court have granted a decree for demolition of the mosque and construction of mandir?

The court held both the demolition of the mosque and the installation of the idol under

the dome of the mosque to be illegal. The court found that the action of the Hindus for declaration regarding title had been barred by limitation. Direction for construction of the temple was just not possible in such circumstances. There is surely no correct legal reasoning to sustain the ultimate dispensation.

