

CHAPTER 3

CULTURE AND MEDIATING IN ASIA

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1. INTRODUCTION

3.001 The use of mediation as a means to resolve conflicts and disputes has increased tremendously in recent years. The process of globalisation and the development of information technology and the internet have promoted connectivity between people of different countries, especially in the commercial arena, while creating conflict through too much interaction. Mediators nowadays are facing a new challenge. They are increasingly likely to be involved in conflicts between people who represent distinctly different cultures, although only a few will have the opportunity to mediate cross-border business disputes or international political conflict. Cross-cultural conflicts may also happen within the same country when the population is multicultural in nature. This is not uncommon in Asia. The population of Malaysia comprises three major cultural groups: Malays, Chinese and Indians. There are also various non-Malay peoples who are designated as indigenous, most in East Malaysia. Australia is another example where conflicts occur among Aboriginal people. Without adequate preparation, even the most experienced mediators may fail to perform their role as peacemaker.

3.002 Different terminologies have been used to describe this new area of mediation. They include cross-border mediation, cross-cultural mediation, intercultural mediation, transnational mediation and international mediation. While the essence of these terminologies may be different, they share one common focus—mediation between parties from different cultures. It should be noted, however, that when the cultural background of the mediator and parties is involved, mediation might be multicultural in nature. Mediators have to pay attention to not only the cultures of the parties but also their own. Effective management of cross-cultural factors during mediation can help prevent misunderstandings, facilitate discussion and as a result, greatly enhance the chance of success in mediation. This chapter highlighted essential cultural factors that influence the process and outcome of Asian mediation. Implications for mediators, the parties and the parties' representatives are considered. Two cultural issues concerning mediation in Asia are discussed. By acknowledging and resolving these issues, it is hoped that a unique model can be developed for mediation in the Asian countries.

2. NATURE OF CULTURE

3.003 The word "culture" has many meanings, all derived from its Latin source, which refers to the tilling of the soil. In most Western languages, "culture" commonly means "civilization" or "refinement of the mind" and, in particular, the results of such refinement, including education, art and literature. This is "culture" in the narrow sense. "Culture" has also been defined from broader perspectives, which include sociology, anthropology, cultural psychology, communication studies and social identity.¹ Contemporary definitions of culture commonly mention shared values, attitudes, beliefs, behaviours, norms, material objects and symbolic resources.² The many and varied definitions attest to the complexity of the concept of culture.

¹ M Guirdham, *Communicating across Cultures at Work* (London: Palgrave MacMillan, 2011).

² HW Gardiner and C Kosmiitzki, *Lives across Cultures* (Boston: Pearson Education, 2008); FE Jandt, *An Introduction to Intercultural Communication* (Thousand Oaks: Sage, 2009); IE Klyukanov, *Principles of Intercultural Communication* (Boston: Allyn & Bacon, 2005); MW Lustig and J Koester, *Intercultural Competence: Interpersonal Communication across Cultures* (Boston: Allyn & Bacon, 2009); JN Martin and TK Nakayama, *Experiencing Intercultural Communication: An Introduction* (Boston: McGraw Hill, 2010); JW Neuliep, *Intercultural Communication: A Contextual Approach* (Boston: Houghton Mifflin, 2008); JG Oetzel, *Intercultural Communication: A Layered Approach* (Boston: Allyn & Bacon, 2008).

Hofstede and Hofstede defined culture as "the collective programming of the mind that distinguishes the members of one group or category of people from others".³ Culture is conceptualised as a collective phenomenon, consisting of unwritten rules of the social game. It is at least partly shared with people who live or lived within the same social environment, which is where it was learned. Three manifestations of culture are worldview, values and norms.⁴ These three manifestations of culture provide us with resources for making sense of intercultural interaction.

Guirdham summarised the effect of culture on human behaviour from two levels: personal and social.⁵ On the personal level, culture affects our motives, emotions (communication apprehension and emotional intelligence), perception, beliefs (core belief systems, locus of control, religion and work-related beliefs), assumptions (agency, ethnocentrism and stereotypes), expectations, attitudes, intentions, identity, self-esteem, ethics and morality. On the social level, culture affects our social cognition processes and interpersonal relationship. Since both personal and social processes are involved during mediation, culture does affect how parties think, feel and act during mediation.

3. INFLUENCE OF CULTURE ON MEDIATION

"Culture does play a pivotal role in shaping the perceptual and procedural aspects of mediation".⁶ Culture can influence both the process and outcome of mediation. Bagshaw⁷ argued that there is no one way, or "correct" way to mediate nor is there a definition of mediation that will reflect the meanings given to the concept in the various cultural groups in the Asian region. When conducting mediation, it is important for mediators to attend to values, attitudes and behaviours that are culturally specific to the parties, in addition to the mediators' own culture. The following sections discuss the influence of cultural differences on mediation from two aspects. The cross-cultural aspect focuses on the differences in cultural dimensions of the parties and the mediators and how such differences affect mediation. The intercultural aspect focuses on the cultural differences in communication and how they affect interaction during mediation. Both aspects provide valuable insights for mediators to conduct cross-cultural mediation.

4. DIMENSIONS OF CULTURE AND MEDIATION

Any serious look at cross-cultural differences is sure to include reference to the remarkable empirical studies of Dutch cultural anthropologist Geert Hofstede.⁸ Hofstede is most

³ G Hofstede and GJ Hofstede, *Cultures and Organizations: Software of the Mind* (New York: McGraw Hill, 2005) p 4.

⁴ BJ Hall, *Among Cultures: The Challenge of Communication* (Belmont: Wadsworth, 2005).

⁵ Guirdham, *Communicating across Cultures at Work* (n 1 above).

⁶ BC Goh, *Law without Lawyers, Justice without Courts: On Traditional Chinese Mediation* (Aldershot: Ashgate Publishing Ltd, 2002).

⁷ D Bagshaw, "Challenging Western Constructs of Mediation" in D Bagshaw and E Porter (eds), *Mediation in the Asia-Pacific Region* (Oxon: Routledge, 2009) p 13-30.

⁸ G Hofstede, *Culture's Consequences: International Differences in Work-Related Values* (Beverly Hills: Sage, 1980); G Hofstede, *Culture's Consequences: Comparing Values, Behaviours, Institutions and Organization across Nations* (Thousand Oaks: Sage, 2001); Hofstede and Hofstede, *Cultures and Organizations* (n 3 above).

well known for his collection, empirical analysis and books, detailing his work with over 116,000 questionnaires from IBM employees in 53 countries from which he formulated four useful dimensions of culture. He later collaborated with Michael Bond⁹ to add a fifth dimension. Later research by Hofstede and others have added additional information about other countries, and there are now data available from 74 countries and regions around the world. A *dimension* is an aspect of a culture that can be measured relative to other cultures. Hofstede's five dimensions are *Power Distance Index* (PDI), *Individualism* (IDV), *Masculinity* (MAS), *Uncertainty Avoidance Index* (UAI) and *Long-Term Orientation* (LTO) (available for 39 countries). Although not without some criticism, Hofstede's work sits atop all cross-cultural theories about cultural differences and offers a window for looking at cross-cultural differences in negotiation and mediation.¹⁰ The scores of these dimensions of the countries listed in this book are presented in the following table:

Table 1: Hofstede's Dimension Scores of Selected Asian Countries.¹¹

Country	PDI	IDV	MAS	UAI	LTO
Australia	36	90*	61	51	31
China	80	20	66	30	118*
Hong Kong	68	25	57	29	96
India	77	48	56	40	61
Indonesia	78	14 [#]	46	48	-
Japan	54	46	95*	92*	80
Malaysia	104*	26	50	36	-
New Zealand	22 [#]	79	58	49	30
Philippines	94	32	64	44	19 [#]
Singapore	74	20	48	8 [#]	48
South Korea	60	18	39	85	75
Taiwan	58	17	45	69	87
Thailand	64	20	34 [#]	64	56
Vietnam	70	20	40	30	80

Source: Hofstede and Hofstede, *Cultures and Organizations* (n 3 above).

* Country with the highest score on the dimension.

[#] Country with the lowest score on the dimension.

(a) Power Distance Dimension

3.008 *Power Distance Index* (PDI) refers to "the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally".¹² People in societies exhibiting a large degree of power distance (PD) accept a hierarchical order in which everybody has a place and which needs no further justification. In societies with low PD, people strive to equalise the distribution of power and demand

9 G Hofstede and M Bond, "The Confucius Connection: From Cultural Roots to Economic Growth" (1988) 16(4) *Organizational Dynamics* 4-21.

10 J Barkai, "What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem" (2008) 10 *Cardozo Journal of Conflict Resolution* 43-90.

11 Hofstede and Hofstede, *Cultures and Organizations* (n 3 above).

12 *Ibid.*, p 46.

justification for inequalities of power. Among the countries listed in this book, Malaysia had the highest PDI score, while New Zealand had the lowest.

Mediators must take note of the following when mediating parties from countries with different PDI scores. First, there is discrepancy in the significance of status, deference and respect for seniors. High PD cultures such as Malaysia will use senior people as negotiators for mediation. They expect to be mediated by mediators of similar seniority or else trust and rapport will be difficult to establish. They expect to be addressed by their formal titles as a form of respect. Asians, in general, and Japanese, in particular, often start mediation with an exchange of business cards (or *meishi*), partially to allow the other party to read the titles listed on the business cards and to thereby know how to treat the person they are meeting based upon their status. There is also expectation that the opposing parties will be of similar rank or even higher. Being asked to negotiate with a person of inferior position will be taken as a sign of disrespect or even insult. **3.009**

Parties from low PD cultures such as New Zealand will treat everyone equally, from the most senior to the lowest-ranking person at the mediation meeting. They will appear to be informal and may want to use first names for addressing the other parties. They will expect a lot of "give and take" in the mediation. Low PD parties might appear to be disrespectful, improper, rude and perhaps even be considered barbarians to high PD parties. High PD parties might appear bossy and rigid to low PD parties. These negative perceptions will make it more difficult for parties to lower their pride and change their positions during mediation. Mediator can address this problem by empowering the low PD parties during mediation. **3.010**

In high PD cultures such as Malaysia, the decision-making structure is likely to be highly centralised, and the authority of the negotiating team to settle the dispute may be limited. On the contrary, low PD parties may have considerable discretion in decision-making and may not have to consult superiors before making decisions. When mediating parties from Malaysia and New Zealand, mediators should clarify this discrepancy to them. Such clarification would eliminate the sense of inferiority felt by the Malaysian party who has to seek approval from their seniors. It would also eliminate the frustration felt by the New Zealand parties who can make decision independently but have to waste time waiting for the other parties to settle. Mediators must take action to match this difference in the authority to settle so that agreement can be achieved smoothly and satisfactorily. While sufficient time during mediation will allow the high PD parties to seek the necessary approval when needed, settlement agreement may need to be structured as an offer with time limit to facilitate the process further. **3.011**

(b) Individualism versus Collectivism Dimension

Individualism (IDV) "pertains to societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family. *Collectivism* as its opposite pertains to societies in which people from birth onward are integrated into strong, cohesive in-groups, which throughout people's lifetimes continue to protect them in exchange for unquestioning loyalty".¹³ A society's position on this dimension is reflected in whether people's self-image is defined in terms of "I" or "we". Among the countries listed, Australia had the highest IDV score, while Indonesia had the lowest. **3.012**

13 *Ibid.*, p 76.

3.013 Many Asian cultures think and act collectively and emphasise collective interests. Collectivists act predominantly as members of their group or organisation and emphasise obligations to the group. They value harmony more than honesty, and they have a strong need to maintain face. Therefore, they would not want to discuss matters that may bring conflict out in the open or bring embarrassment to them. They place collective interests over the rights of individuals. In collectivist cultures, there is often an expectation of group decision-making. In other words, Australian parties will make individual decisions and Indonesian parties will make collective decisions. This is important for mediators to note when negotiating settlement options.

3.014 The contrasting individualist and collectivist interests will have a great impact at the early stages of mediation. In collectivist cultures, the relationship prevails over task, while in individualistic cultures, the negotiation task prevails over relationships.¹⁴ Individualist parties such as the Australians have a “task focus” and they want to get down to business quickly. Collectivist parties such as the Indonesians prefer to spend their time in rapport-building activities. In addition, collectivist cultures thrive on stable relationships. If there is a need to replace one of the parties, a new relationship has to be built, and it will affect the progress of mediation.

3.015 Individualism versus collectivism will also affect mediator selection. Individualists seek neutral and impartial mediators, while collectivists seek mediators who are already “insiders”. Some Asians might prefer to have a mediator within the trading circle, the Korean *Kabal* or the Japanese *Kiretsu Trading Circle*.¹⁵ A mutual friend who introduced the parties might be the best mediator for some Asian cultures. In Japan, this person is sometimes called the *shokai-sha*.¹⁶

(c) Masculinity versus Femininity Dimension

3.016 *Masculinity* (MAS) focuses on the degree to which a culture reinforces traditional male values and gender. “A society is called *masculine* when emotional gender roles are clearly distinct: men are supposed to be assertive, tough and focused on material success, whereas women are supposed to be more modest, tender, and concerned with the quality of life. A society is called *feminine* when emotional gender roles overlap: both men and women are supposed to be modest, tender and concerned with the quality of life”.¹⁷ The masculinity side of this dimension represents a preference in society for achievement, heroism, assertiveness and material rewards for success. Society at large is more competitive. Its opposite, femininity, stands for a preference for cooperation, modesty, caring for the weak and quality of life. Society at large is more consensus-oriented. Among the countries listed, Japan had the highest MAS score, while Thailand had the lowest score.

3.017 During mediation, parties from cultures high in MAS, for example, the Japanese, will attempt to dominate the meeting through power tactics and may be reluctant to make concessions. They will use competitive negotiation strategies and tactics that might be

¹⁴ Hofstede and Hofstede, *Cultures and Organizations* (n 3 above).

¹⁵ Barkai, “What’s a Cross-Cultural Mediator to Do?” (n 10 above).

¹⁶ J Graham and Y Sano, *Smart Bargaining: Doing Business with the Japanese* (New York: Harper Business, 1989).

¹⁷ Hofstede and Hofstede, *Cultures and Organizations* (n 3 above), p 120.

labelled “hardball”, “hard bargaining” or “win-lose”. Parties from cultures low in MAS, for example, the Thais, are more cooperative and will adopt win-win negotiation strategies and tactics. They will be more willing to discuss interests and offer concessions.

The gender of the mediator and the opposing party are of great importance to parties who come from a masculine culture. Since there is maximum social role differentiation between the genders in masculine cultures, there is inequality between the sexes. Men from masculine cultures may look down on women and refuse to mediate with them. The selection of mediator may also be restricted to male mediators.

(d) Uncertainty Avoidance Dimension

Uncertainty Avoidance Index (UAI) focuses on the level of tolerance for uncertainty and ambiguity within a culture and is defined as “the extent to which the members of a culture feel threatened by unstructured or unknown situations”.¹⁸ Unstructured situations are novel, unknown, surprising and different from usual. *Uncertainty avoiding* cultures try to minimise the possibility of such situations by strict behavioural codes, laws and rules, disapproval of deviant opinions and a belief in absolute truth. There is a need for clarity and structure. The opposite type, *uncertainty accepting* cultures, is more tolerant of opinions different from what they are used to. They have fewer rules, and on the philosophical and religious level they are relativist and allow different currents to flow side by side.¹⁹ Among the countries listed, Japan had the highest UAI score, while Singapore had the lowest score.

Parties from uncertainty avoiding cultures such as Japan need clear structure and rules during mediation. They tend to be more conservative when exploring settlement options and alternatives. Their positions are more difficult to change. Avoidance of failure is the major underlying interest. Parties from uncertainty accepting cultures such as Singapore are more flexible, innovative and creative. They welcome novel ideas and options. They are motivated by the hope of success.

(e) Long-term Orientation Dimension

Long-Term Orientation (LTO) stands for “the fostering of virtues oriented toward future rewards, in particular, perseverance and thrift. Its opposite pole, *short-term orientation*, stands for the fostering of virtues related to the past and present, in particular, respect for tradition, preservation of ‘face’, and fulfilling social obligations”.²⁰ Cultures with high LTO score believe that most important events in life will occur in the future. Saving and investing are important and gratification of needs should be deferred until later. Cultures that score low on this dimension believe that most important events in life occurred in the past or are taking place now. Social spending and consumption are encouraged and immediate gratification of needs is expected. Among the countries listed, China had the highest LTO score, while Philippines had the lowest score.

¹⁸ *Ibid.*, p 167.

¹⁹ G Hofstede, “Dimensionalizing Cultures: The Hofstede Model in Context” in LA Samovar, RE Porter and ER McDaniel (eds), *Intercultural Communication: A Reader* (Boston: Wadsworth, 2012), p 19-33.

²⁰ Hofstede and Hofstede, *Cultures and Organizations* (n 3 above), p 210.

3.022 The interests of parties from long-term oriented cultures, such as China, Hong Kong and Taiwan, are future-oriented in nature. They tend to assess options and alternatives from the long-term perspective. They are willing to wait if the settlement terms fit their needs. They may experience parties from short-term oriented cultures as being irresponsible and lacking future planning. On the other hand, parties from short-term oriented cultures such as Philippines have interests that are short-term in nature. They will only accept settlement terms that will satisfy their needs immediately. They may perceive parties from long-term oriented cultures as being stingy and mean. These differences in perceptions and expectations often lead to deadlocks and impasses.

(f) Implications for Mediators

3.023 It is clear from the above discussion that cultures that best fit the facilitative model of mediation are those cultures that are individualistic, feminine, uncertainty accepting and have long-term orientation and low national distance. Ideally speaking, mediators who grow up in these cultures may possess the most suitable qualities for conducting facilitative mediation. Before the validity of this hypothesis is verified, mediators should take note of their own cultural background, especially when they are mediating parties whose cultures are different from their own. They should be aware of their cultural characteristics and the consequent impact on the parties and the mediation process. For example, mediators from high power distance cultures, such as Malaysia and the Philippines, may expect respect and deference from the parties, thereby creating unnecessary gap with their parties. Rapport will be difficult to build in this case. Mediators from uncertainty avoiding cultures, such as Japan and South Korea, may be rigid and create strict rules for the parties to follow, leading to a loss of flexibility in the mediation process. This also explains why evaluative mediation is more common in Japan. Mediators from individualistic cultures, such as Australia and New Zealand, may overlook the need to consider collective interests when generating and exploring options with the parties. Mediators from masculine cultures such as Japan may be controlling and dominating; while mediators from cultures with short-term orientation, for example, the Philippines, may overlook the future orientation of facilitative mediation. Self-awareness and self-reflection are definitely essential for mediators when they conduct mediation with parties from different cultures.

(g) Guidelines for Mediators

- 3.024** (1) When mediating parties from high power distance cultures, such as Malaysia, Philippines and China, mediators have to show respect for the parties. Mediators should also make known their own professional achievement, especially in the field of mediation, during the first encounter. It may not be easy for mediators who come from a low power distance cultures (such as Australia and New Zealand) to take these actions, as their cultures believe in equality. Yet these actions will facilitate the establishment of trust and confidence with the parties and provide a good start for effective mediation. When mediating parties from cultures with different power distance, mediators should manage the discrepancy in expectations, especially those that concern with the decision-making process.
- (2) When mediating parties from collectivist cultures, such as Indonesia, Taiwan, South Korea, China, Singapore, Thailand and Vietnam, mediators should encourage parties to express opinions that they are reluctant to express due to the fear of open conflict.

When exploring options and alternatives, collective interests and group influence should be considered. Face-work is essential when working with collectivist parties. The discrepancy in orientations between collectivist (relationship-oriented) and individualistic (task-oriented) cultures should also be managed.

- (3) When mediating parties from masculine cultures such as Japan, mediators should be prepared for dealing with aggressive and competitive negotiation tactics. If both parties are from masculine cultures, deadlocks and impasses may happen. Mediators should try their best to change their mindset from "win-lose" to "win-win", thereby changing their adversarial attitudes and behaviour.
- (4) When mediating parties from uncertainty avoiding cultures such as Japan, mediators should provide adequate information to them prior to and during mediation. This will give the parties a sense of structure and certainty and make them feel more relaxed and secured during mediation. This is especially important when the other party is from uncertainty accepting cultures such as Singapore. Parties from this kind of culture are more flexible and creative and are likely to offer innovative options. Settlement options should be discussed in great details so that the uncertainty avoiding parties will feel more certain and therefore more confident when making decisions.
- (5) When mediating parties from cultures with different time orientations, for example, China and Philippines, mediators face a great challenge. First, both parties may have negative impressions of the counterpart due to the cultural difference in their time orientation. Second, short-term oriented parties prefer options that will satisfy their interests and needs immediately, while their long-term oriented counterparts are more willing to wait. These differences in perceptions and preferences must be managed for mediation to proceed constructively.

(h) Guidelines for Parties

- (1) People from different cultures may think, feel and act differently. Parties should not be upset if the other parties show reactions that are different from their own. **3.025**
- (2) People from different cultures have different expectations about mediation, which include manner, involvement of family and social groups and the decision-making arrangement. Parties should be open-minded and respect such expectations even if they are different from their own.
- (3) People from different cultures have different attitudes towards gender roles, gratification of needs, creativity, novelty and the future. Parties should be open-minded and respect such differences even if they are different from their own.
- (4) Parties should understand that they have the right to express ideas and opinions during mediation. They should do so even if they have been told not to do so in their own cultures.
- (5) Parties should be aware that mediators from different cultures might use approaches that are different from their own cultures to conduct mediation.

(i) Guidelines for Parties' Representatives

- (1) People from different cultures might think, feel and act differently. Parties' representatives should remain calm and positive if the other parties and their representatives show reactions that are different from their own. **3.026**

CHAPTER 8

INDIA

Anil Xavier

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1. HISTORY

- 8.001** Mediation is not something new to India. The concept of parties settling their disputes themselves or with the help of third party is very well known to ancient India. Centuries before the British arrived, India had utilised a system called the *Panchayat*, whereby respected village elders assisted in resolving community disputes. Disputes were peacefully decided by the intervention of *Kulas* (family assemblies), *Srenis* (guilds of men of similar occupation), *Parishad* and the like. Also, in pre-British India, alternative dispute resolution (ADR) was popular among businessmen and they resolved disputes using an informal procedure, which combined mediation and arbitration. For example, in Ahmedabad, an industrial centre located in Gujarat State (Western India), leading cloth merchants banded together to form a business association authorised by its constituents to resolve disputes between members, *Maskati Mahajan*, as it was called, which provided for respected businessmen (*Mahajanis*) to be available by turns on a daily basis to hear grievances and resolve disputes. This process was developed to discourage litigation between members. It recognised the overarching importance to cloth merchants of promoting their business interests.
- 8.002** Another form of early dispute resolution, used by one tribe to this day, is the use of *Panchas*, or wise persons to resolve tribal disputes. Here, disputing members of a tribe meet with a *Pancha* to present their grievances and to attempt to work out a settlement. If that is unsuccessful, the dispute is submitted to a public forum attended by all interested members of the tribe. After considering the claims, defences and interests of the tribe in great detail, the *Pancha* again attempts to settle the dispute. If settlement is not possible, the *Pancha* renders a decision that is binding upon the parties. The *Pancha's* decision is made in accordance with the tribal law as well as the long-term interests of the tribe in maintaining harmony and prosperity. All proceedings are oral; no record is made of the proceedings or the outcome. Despite the lack of legal authority or sanctions, such mediation processes were regularly used and commonly accepted by Indian disputants.
- 8.003** Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past.
- 8.004** The present-day mediation bears a striking resemblance, in some respects, to the ancient dispute resolution processes. But the only difference was, under the ancient methods, if mediation failed, the same person was authorised to render a binding decision.
- 8.005** The modern legal system had emerged in India displacing these traditional methods.¹ After the British adversarial system of litigation began to be followed in India, arbitration was accepted as the legalised ADR method. Another dispute resolution process, *lok adalat* (People's Court), has received more favourable attention since its reintroduction in the

¹ Marc Galanter, *Law and Society in Modern India* (Delhi: Oxford India, 1977) 15.

1980s. Originally, *lok adalat* was an ancient method of dispute resolution used by tribal people. The Legal Services Authority Act 1987 promoted the resurgence of *lok adalat* to provide litigants with the means to resolve their disputes early and affordably. The ancient concept of settlement of dispute through mediation, negotiation or through arbitral process known as "Peoples' Court verdict" or decision of *Nyaya-Panch* is conceptualised and institutionalised in the philosophy of *lok adalat*. Parties have the right to decide whether to submit their dispute to *lok adalat*. In essence, *lok adalat* may be compared to settlement conferences as they are traditionally conducted in the United States, except that the neutrals in *lok adalat* are senior members of the Bar.

2. LEGAL SUPPORT

The Arbitration and Conciliation Act 1996 (the Act) was enacted by the Indian Parliament, 8.006 consolidating and amending the law relating to domestic arbitration, international commercial arbitration and conciliation. The Act for the first time gave statutory recognition to "mediation". Although the term used was "conciliation", it could be used interchangeably with mediation, as the concept and spirit were the same.

As per the provisions of the Act, during an arbitration proceeding, the arbitrator was also 8.007 encouraged to use mediation or conciliation during the proceeding to encourage settlement of disputes. Therefore, the primary objective was to promote amicable settlement of disputes outside court.

Even though the Act intended to give impetus to mediation/conciliation, no real effort was 8.008 taken by the courts or by the lawyers to utilise the provisions and to encourage the litigants to choose the method. Even though some mediation training and familiarisation programmes were conducted, it did not create the real effect.

Even though India has not so far adopted the United Nations Commission on International 8.009 Trade Law (UNCITRAL) Model Law on International Commercial Conciliation 2002, India had adopted the UNCITRAL Conciliation Rules 1980 and the UNCITRAL Model Law on International Commercial Arbitration 1985 in its Arbitration and Conciliation Act 1996. As per Section 74 of the said Act, the settlement agreement is given the same status of a court decree. Therefore, the successful culmination of resolution through mediation gets the legal authority and the same status and finality of a court judgment, even though it is not imposed on the parties.

The Indian Parliament in its wisdom thought that ADR could be used as an effective tool to 8.010 cut down the mounting arrears of cases. The Code of Civil Procedure (CPC) was amended and a new Section 89 was introduced and brought into effect in 2002. As per this section, the court has been empowered to refer the disputes for the settlement outside court, through (a) arbitration, (b) conciliation, (c) judicial settlement including settlement through *lok adalat* or (d) mediation.² The court has to see whether any element of settlement exists in the case,

² Amendment Act 46 of 1999, dated 30 December 1999 w.e.f. 1 July 2002 (S.O.No.603(E) dated 6 June 2002).

which is acceptable to parties. The court has to formulate the terms of settlement and give them to the parties for their observation. After receiving the observations of the parties, the court has to formulate the terms of a possible settlement and only then could it refer to one of the above methods of settlement of disputes outside the court. Based on this amendment, the Court Fees Act 1870 was also amended providing for refund of the court fee to the plaintiff in case the matter is settled by any one of the above methods.

- 8.011** Keeping in mind the laws, delays and the limited number of judges available, it was imperative that ADR mechanism should be resorted to with a view to bring an end to litigation between the parties at an early date.³ It was an attempt to blend the judicial and non-judicial dispute resolution mechanisms. It was virtually a mandate by the Parliament to courts that conciliation and mediation should be regular processes in every case. The intention was to make court process as effective and speedy as possible. All that this means is that effort has to be made to bring about an amicable settlement between the parties, before ultimately going to trial.
- 8.012** Even before the existence of Section 89 of the CPC, there were various laws or provisions that gave emphasis for out-of-court settlement of disputes and power to the courts to refer disputes to mediation, which sadly have not really been utilised.
- 8.013** Order 23 Rule 3 of the CPC is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Order 23 Rule 3 gives mandate to the court to record a lawful adjustment or compromise and pass a decree in term of such compromise or adjustment.
- 8.014** Section 80(1) of the CPC lays down that no suit shall be instituted against government or public officer unless a notice has been delivered at the government office stating the cause of action, name and other details. The whole object of serving notice under Section 80 is to give the government sufficient warning of the case to be instituted against it and that the government if it so wishes can settle the claim without litigation or afford restitution without recourse to a court of laws.⁴
- 8.015** Order 27 Rule 5B confers a duty on the court, in a suit against the government or a public officer, to assist in arriving at a settlement. In a suit where government or public officer is a party, it shall be the duty of the court to make an endeavour at first instance, where it is possible, according to the nature of the case, to assist the parties in arriving at a settlement. If it appears to the court at any stage of the proceedings that there is a reasonable possibility of a settlement, the court may adjourn the proceeding to enable attempts to be made to effect settlement.
- 8.016** Similarly, Order 32A of the CPC lays down the provision relating to “suits relating to matter concerning the family”. It was felt that ordinary judicial procedure is not ideally suited for the sensitive area of personal relationships. Litigations involving affairs of the family seem to

³ Supreme Court of India by its decision dated 25 October 2002 in *Salem Advocate Bar Association, Tamil Nadu v Union of India* AIR 2003 SC 189.

⁴ *Ghanshyam Dass v Domination of India* (1984) 3 SCC 46.

require special approach in view of the serious emotional aspects involved. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement. The provisions of this Order applies to all proceedings relating to family, such as guardianship, custody of minor, maintenance, wills, succession and the like. Rule 3 imposes a duty on the court to make an effort of settlement by way of providing assistance where it is possible to do so.

Such provisions were also available in the Industrial Disputes Act, the Hindu Marriage Act and the Family Courts Act. Industrial Disputes Act 1947 provides provisions for conciliation and arbitration for the purpose of settlement of disputes. Section 23(2) of the Hindu Marriage Act 1955 mandates the duty on the court that before granting relief under this Act, the court shall at the first instance make an endeavour to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case. The Family Courts Act 1984 was enacted to provide for the establishment of Family Courts with a view to promote conciliation in disputes relating to marriage and family affairs and for matter connected therewith by adopting an approach radically different from that of ordinary civil proceedings.⁵ Section 9 of the Family Courts Act 1984 lays down the duty of the Family Court to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter.

3. SUPPORT FROM THE JUDICIARY

In 1994–1995, the Indian Supreme Court initiated an Indo–US exchange of information between high-ranking members of the Judiciary. As part of this effort, former Indian Supreme Court Chief Justice AM Ahmadi met with US Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia. In 1996, Justice Ahmadi formed a national study team to examine case management and dispute resolution as part of a joint project with the United States. This Indo–US study group suggested procedural reforms, including legislative changes, that authorised the use of mediation. New procedural provisions eventually were enacted in 2002 (Section 89 CPC), providing for case management and the mandatory reference of cases to ADR, including mediation.

The amendment of the CPC with respect to referring pending court matters to ADR was not welcomed by a group of lawyers. The amendments were challenged as unconstitutional by *Salem Advocate Bar Association v Union of India*.⁶ The Supreme Court of India held that the amendment was not *ultra vires* of the Constitution of India. The court also held that Section 89 has been introduced in order to try and see whether all the cases which are filed in court need not necessarily be decided by the court itself.

The Supreme Court felt that the modalities have to be formulated for the manner in which Section 89 and for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. For this the Apex Court constituted a committee

⁵ *KA Abdul Jalees v TA Sahida* (2003) 4 SCC 166.

⁶ Supreme Court of India by its decision dated 25 October 2002 (n 3 above).

under the chairmanship of Mr Justice M Jagannadha Rao, the chairman of Law Commission of India and former judge, Supreme Court of India. The committee circulated a draft consultation paper with rules on mediation, conciliation and case management and finally submitted a set of rules for the approval.

- 8.021** As per the report, the provisions of the “Civil Procedure — Alternative Dispute Resolution Rules 2003” may be applied to proceedings before the courts, including Family Courts constituted under the Family Courts Act 1984, while dealing with matrimonial, maintenance and child custody disputes, wherever necessary, in addition to the rules framed under the Family Courts Act. Similarly, the “Alternative Dispute Resolution and Mediation Rules 2003”, lays down that the court has to give guidance to parties (when parties are opting for any mode of ADR) by drawing their attention to the relevant factors that parties will have to take into account before they exercise their opinion as to the particular mode of settlement. It also deals primarily with every aspect of mediation, ranging from appointment of the mediator to the procedure to be adopted in the mediation process.
- 8.022** ADR, which was at one point of time considered to be a voluntary act on the part of the parties, obtained statutory recognition by the CPC Amendment Act 1999, Arbitration and Conciliation Act 1996, Legal Services Authorities Act 1997 and Legal Services Authorities (Amendment) Act 2002. The Supreme Court also held that reference to mediation, conciliation and arbitration are mandatory for court matters.
- 8.023** The Supreme Court had also held in *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd*⁷ that the intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section.
- 8.024** Apart from this, the Arrears Committee of the Supreme Court of India also strongly recommended mediation as an alternate method of dispute resolution. It was found by the committee that mediation had a salutary impact on the disposal of cases and, if it is given the necessary thrust and encouragement, it can bring about the necessary reforms needed for quick disposal of cases.⁸
- 8.025** In order to give momentum to mediation, the Supreme Court of India also constituted a committee, known as the “Mediation and Conciliation Project Committee” (MCPC) on 9 May 2005 to oversee the effective implementation of mediation and conciliation in the country. The MCPC laid uniform mediation rules for court-annexed mediations applicable throughout India.
- 8.026** Against this backdrop, Indian courts have utilised a number of ADR processes to provide access to justice. Mediation centres have been established in various High Courts as well as District Courts with full-time staffing.

⁷ Supreme Court of India by its decision dated 26 July 2010 in *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* 2010 (8) SCC 24.

⁸ Annual Report 2008–2009 of the Supreme Court of India.

The Supreme Court of India in a very recent judgment, *Vikram Bakshi v Ms Sonia Khosla*,⁹ highlighted the need for early resolution of disputes in order to “stop the negative factor from growing and widening its fangs which may not be conducive to any of the litigants”. The Court held that the beauty of settlement through mediation is that it may bring about a solution which may not only be to the satisfaction of the parties and, therefore, create a win-win situation, but also develop an outcome which cannot be achieved by means of judicial adjudication. The Court was of the firm opinion that mediation is best form of conflict resolution.

4. GROWTH OF PRIVATE MEDIATION

Ideally, mediation has to be within the comfort zones of parties and should be used before taking legal positions. Mediation can creatively work out the resolutions, which is the main ingredient in a successful mediation practice. Mediation has to be considered as the first option and only if such an amicable resolution is impossible that one should look at adjudicatory options. Disputes should not begin in courts, but should end in courts. **8.028**

But, apart from the few private mediators who were trained from the United States and United Kingdom, India did not have a pool of trained and accredited mediators to whom the parties could approach if they ever needed mediation. The system also had to be authentic, acceptable and under ethical guidelines and review. The mediation service also should not be too late or too remote from the community level to nip the budding emergence of conflicts. It is in this context that the Indian Institute of Arbitration and Mediation¹⁰ (IIAM) thought of the possibility of establishing Community Mediation Clinics. The IIAM Community Mediation Service (IIAM CMS) took the concept of community mediation to an institutional level in India by taking the entire dispute resolution process and maintaining control and responsibility for it in the community at large. The motto is “Resolving conflicts; Promoting harmony”. The mission is to provide neutral and safe dispute resolution opportunities through which individuals were empowered to work collaboratively to develop creative and mutually agreeable solutions to conflicts. **8.029**

The IIAM CMS was launched throughout India by the Chief Justice of India on 17 January 2009 at New Delhi. The IIAM CMS was endorsed by the International Mediation Institute (IMI) at The Hague, Netherlands. Mr Michael McIlwrath, member, Board of Directors of IMI was deputed as Member of the IIAM Advisory Board, chaired by Mr Justice MN Venkatachaliah, former Chief Justice of India. The operations of the Community Mediation Clinics and its ethical norms are supervised and implemented by the CMS Committee, headed by Mr Justice KT Thomas, former judge of the Supreme Court of India. **8.030**

The thrust of IIAM CMS is to promote reliance of mediation at the grass-roots level by way of local capacity building. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute and control of the outcome. Community mediators **8.031**

⁹ Supreme Court of India by its decision dated 8 May 2014 in *Vikram Bakshi v Ms Sonia Khosla* 2014 (2) ILR(Ker) 658.

¹⁰ See www.arbitrationindia.org and www.communitymediation.in.

are selected from a wide variety of backgrounds including retired people, house wives, professionals, youth and the like, who have a good reputation in the local area, with integrity and sense of fairness in public dealing. The people so selected would be given an orientation program by IIAM, and a certificate of recognition and a badge would be issued. IIAM will also implement high standards of ethics as laid down by the IMI, The Hague. The IIAM Community Mediator Orientation Program is a 12- to 15-hour training programme. Evaluation will be made based on the performance in the practical role plays. On successful completion, the participant will be designated as an IIAM Community Mediator. As per IIAM Mediator Accreditation System, a candidate having successfully undergone IIAM Community Mediator Orientation Program is categorised as Grade C Mediator. The community mediator can upgrade to commercial mediator and thereafter to IMI-certified international mediator through the IMI Qualifying Assessment Programmes.¹¹

- 8.032** The Delhi government also started the initiative of starting community mediation centres to ease the burden on courts.
- 8.033** The legal system is simply not equipped to handle the number of cases filed. It is often said that litigation is an unwelcome houseguest that stays for years or decades together. According to a study conducted by the Ministry of Law, Government of India, with a population of 1.22 billion, the number of cases pending in various courts amounts to 38 million, resulting in a civil case lasting for nearly 15 years and giving credence to the adage "justice delayed is justice denied". It is estimated that at the current rate it will take 324 years to dispose of the backlogs of cases in Indian courts. The Supreme Court-supported National Court Management System (NCMS) has given their "most conservative estimate" that by 2040, the pendency will be 150 million.¹²
- 8.034** In these circumstances, setting up of Community Mediation Clinics in all districts of India with a view to mediate all disputes is hoped to bring about a profound change in the Indian Legal System.
- 8.035** In the segment of commercial, business and corporate disputes, IIAM Mediation and Conciliation is based on the IIAM Mediation Rules,¹³ which is intended to help parties and mediators to take maximum advantage of the flexible procedures available in mediation for the resolution of disputes quickly and economically. IIAM Mediation Rules are applicable to the mediation of present or future disputes where the parties seek amicable settlement of such disputes and where, either by stipulation in their contract or by an agreement to mediate, they have agreed that the IIAM Rules shall apply. Under the IIAM Mediation Rules, IIAM will make the necessary arrangements for the mediation, including appointing the mediator; organising a venue and assigning a date for the mediation; organising an exchange of summaries of cases and documents and providing general administrative support. IIAM will also assist in drawing up the mediation agreement, if necessary.

¹¹ See <http://www.arbitrationindia.com/htm/qap.html>.

¹² See http://articles.timesofindia.indiatimes.com/2013-01-17/india/36393546_1_crore-cases-judges-per-million-population-civil-case.

¹³ See http://www.arbitrationindia.com/pdf/rules_mediation.pdf.

The suggested IIAM Mediation Clause is as follows:

8.036

"In the event of any dispute arising out of or in relation to this contract, including any question regarding to its existence, validity or termination, the parties shall seek settlement of that dispute by mediation/conciliation in accordance with the IIAM Mediation Rules".

The suggested IIAM Med-Arb Clause is as follows:

8.037

"Any dispute or difference arising out of or in connection with this contract shall first be referred to mediation at the Indian Institute of Arbitration & Mediation (IIAM) and in accordance with its then current Mediation Rules and as per the Arbitration & Conciliation Act, 1996. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute or difference shall be referred to and determined by arbitration as per the Arbitration & Conciliation Act, 1996 by IIAM in accordance with its Arbitration Rules".

Under the IIAM Mediation Rules, the mediation completes normally within a period of 60 days. The costs and expenses of mediation will be governed by the Fee Schedule¹⁴ of the IIAM Mediation Rules. **8.038**

In private mediation or conciliation, we have an added advantage in India. The Arbitration and Conciliation Act provides for voluntary conciliation, and a settlement agreement entered into by the parties through this process and signed by the mediator has been given the same status of a court decree as per Section 74 of the Act. So after the settlement has been made, it becomes binding on the parties and if a party defaults in complying with the settlement agreement, it could be executed in a court as if it is a decree passed by the court. So this gives an added edge to the process. **8.039**

In the recent years, the volume of transnational trade, investment and business has enormously increased between India and countries in the Asia-Pacific and others. With the rise in the volume of business, dispute resolutions and enforcement have also increased. But numerous problems are being faced on account of cultural and language issues. Moreover, lack of appropriate assistance for business groups to take up dispute settlement efforts in transnational disputes are also felt. With a view to provide international mediation service for business groups from India doing trade, business or investment abroad or multinational business groups doing trade, business or investment in India, by creating a panel of professional mediators representing various countries with respective language and cultural background, IIAM has created an International Mediator Panel¹⁵ from India and abroad. This is apart from the panel of accredited mediators for domestic disputes. **8.040**

¹⁴ See http://www.arbitrationindia.com/htm/mediation_fee.html.

¹⁵ See <http://www.arbitrationindia.org/htm/neutral.html>.

5. ACCREDITATION OF MEDIATORS

- 8.041** The main reason which hinders the growth of mediation and the acceptance of mediation as a true profession is the lack of a credible high-level qualification, training, professional conduct and the like. Continuing professional development has to be more visible, organised and relevant. Code of Ethics and Conduct, process of disciplinary proceedings in case of ethical transgression and the like would add to credibility.
- 8.042** For court-annexed mediators, the Supreme Court of India's MCPC has decided 40-hour mediation training and 10 actual mediations as the essential qualifications required for a mediator to be able to be entrusted the task of mediating disputes.
- 8.043** For private mediations under the IIAM system, based on the IMI guidelines and ethical norms, IIAM has trained and accredited mediators, who are professionally qualified to mediate any dispute by structured mediation on international standards. IIAM is the only institution in India approved by the IMI at The Hague, Netherlands, as a "Qualifying Assessment Programme" (QAP) for IMI Certification for international mediators. This is based on programmes whose mediator training and assessment asserted provides assurance of mediation experience and expertise worthy of IMI Certification.
- 8.044** As per the IIAM Mediator Accreditation System, mediators are categorised as Grade A to Grade C. Mediators are entitled for upgrading based on the IIAM QAP. Accredited mediators of IIAM will be eligible for empanelment with IMI. IMI Certification entitles the mediators to upload their profile onto the IMI web portal and to be recognised and included among the world's most competent mediators and be searchable by a vast number of users worldwide. Accredited IIAM mediators will be bound by the IIAM Mediators' Code of Professional Conduct and IIAM Mediators' Conduct Assessment Process.¹⁶
- 8.045** The IIAM Mediators' Code of Professional Conduct provides users of mediation services with a concise statement of the ethical standards they can expect from mediators who choose to adopt its terms and sets standards that they can be expected to meet. Users who believe that the standards established in this code have not been met may prefer a complaint to IIAM on the Mediators' Conduct Assessment.
- 8.046** IIAM is one of the pioneer institutions in India, providing institutional ADR service. It is a non-profit organisation, which commenced its activities in 2001. The legal and ethical aspects of the institution are guided and advised by an Advisory Board comprising of distinguished and eminent persons from various fields, chaired by Honourable Mr Justice MN Venkatachaliah, former Chief Justice of India. IIAM also assists parties with hybrid processes such as "Med-Arb" or "Arb-Med-Arb" processes to create effective dispute resolution methods which give the party autonomy and consensual method of mediation and on its failure to proceed to binding arbitration process in a time-bound manner. More details about the IIAM ADR processes can be seen at www.arbitrationindia.org or can be obtained by sending a mail to dir@arbitrationindia.com.

¹⁶ See <http://www.arbitrationindia.org/htm/qap.html>.

6. FUTURE DIRECTIONS

With a view to promote mediation, as the first option to resolve commercial and business disputes, IIAM had developed an unique system of establishing in-house "Conflict Management Cell", in corporate business houses, business/trade/professional/technical/management/cultural associations, so that the business house or association can utilise this service for managing conflicts arising between the members or between customers or dealers. IIAM would impart appropriate training for selected members to become "Conflict Managers" or "Mediators" who can act as neutrals for effective conflict management and resolution in the cell. Ethical norms and code of conduct shall be implemented to maintain credibility and international standards. **8.047**

For popularising mediation as an amicable dispute or conflict resolution method and to empower students, IIAM has formulated a concept of developing "Conflict Management Clubs" in schools and colleges, with the cooperation of teachers and students, so that it could cater peer mediations for resolving conflicts among students or with teachers' or staff members and students in an amicable and friendly manner. Through IIAM Young Conflict Managers Initiative, IIAM would assist them to develop a career in ADR and connect them with the Young Mediators Initiative (YMI), which is established under the umbrella of the IMI at The Hague, with the aim of encouraging and assisting young mediators worldwide. **8.048**

The expectations of parties of legal services are changing. The new requirement is "resolution" and not "litigation". Mediation is now being projected as a truly global profession. Even though the Government of India and the Supreme Court of India undertook major reforms in the administration of Justice to popularise non-litigious forms of dispute resolution, the professional growth in this field has not been encouraging. Since it was found that there was a need for a global interaction among ADR practitioners for effective promotion and growth of ADR in India, a global association of mediators, arbitrators, ADR practitioners and ADR users, called the India International ADR Association¹⁷ (IIADRA), was formed. **8.049**

IIADRA is committed to promote the growth of mediation in India as a primary dispute resolution option. It aims to create constant opportunities for communication and interaction among ADR professionals globally and within India and to form a group of "Thought Leaders" who could assist the association in formulating and suggesting schemes for improvement of domestic as well as international ADR operations. **8.050**

IIADRA in association with IIAM has also brought out the concept of "Pledge to Mediate" and plans to encourage companies and organisations to formally pledge their commitment to resolve disputes in a private and forward-looking manner, which would be practical, affordable and reliable and which could transform potential crises into strengthened relationships. As per the concept, the signatory to the pledge makes a public, policy statement indicating its commitment to the promotion of amicable settlement of disputes. **8.051**

¹⁷ See www.adrassociation.org.

CHAPTER 13

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1. INTRODUCTION

- 13.001** Mediation has been practised in different parts of the world, irrespective of their sociocultural orientation and system. However the origin and development of mediation practice can also be attributed to the existing social system and cultural ethos unique to a particular nation. Nepalese society has drawn its values and culture of consensus-based dispute resolution and mediation from such holy books as the *Vedhas*, *Puranas*, *Mahabharata*, *Scriptures* and thoughts of ancient sages and savants.
- 13.002** Nepalese society relates to such Eastern epics as Lord Krishna trying his best in the *Mahabharata* to resolve a dispute relating to the succession to the throne of *Hastinapur* between Kaurav and Pandav to avert a most disastrous war. Since the Kirat dynasty of Nepal, an ancient line with its own written history, the justice system had been interventionist in favour of meditation. As the mediation process was conducive to basic universal principles of religion, it was also tinged with religious ideals and faith.¹
- 13.003** Traditional Nepalese society developed an approach to settle disputes through “community involvement”. As early as the Lichchhavi period (2nd -12th Century AD), *Gosthi* (currently known as *Guthi*) was the lowest tier of society to mediate disputes.² Over the course of time, a system called *Panchayat* in which disputes were settled by five village elders in the presence of the community developed. This practice allowed people to put forward their dispute and arguments; the elders then persuaded them to reach an amicable settlement. In cases of failure, they intervened with a “decision”, generally supposed to be founded on righteousness, necessity and benefit to both parties. The practice continued for a long time, in fact even after the takeover by the Rana Regime,³ the dynasty that ruled Nepal from 1846 to 1949.
- 13.004** Under the Rana period, a system of civil court fees was introduced for each disputant to obtain access to justice. In each step of the litigation procedure, parties had to pay. For instance, litigants could produce witnesses but had to pay “fees to them”.⁴ Even the compromise of the dispute in court was possible only after payment of fees. A penalty fee was payable on withdrawing a case. Litigation thus became one of the most regular sources of revenue for the regime and consequently the formal community mediation system was discouraged.
- 13.005** Informal local community mediation continued to flourish. Nepal is a common land of 125 caste and ethnic groups with 123 indigenous languages. Its physical landscape is also unique, starting from 65 metres above sea level and soaring to reach the altitude of Mt. Everest, at 8,850 metres, the highest peak in world. The country is rooted in different cultures,⁵ styles and local practices, whose values influence mediation history in Nepal. Local practices tend to be passed down to the next generation of the same society. Some popular mediation traditions have been in practice for many centuries.

1 Chiranjibi Bhandari, “Community Mediation in Nepal”, a study submitted to Tribhuvan University, 2011, available at https://www.academia.edu/3769290/Community_Mediation_in_Nepal.

2 *Ibid.*

3 *Ibid.*

4 *Ibid.*

5 National Population and Housing Census in Nepal, GON, 2011.

2. TRADITIONAL DISPUTE RESOLUTION

- *Badghare*:⁶ *Badghare* literally means “the owner of big house-reputed family”. *Tharu* 13.006 are one of the oldest ethnic groups in Nepal, inhabiting the *Tarai* region. Disputes and differences are obvious in every family and community, but here the extended family may comprise four or five generations with 70–80 family members living in the same household. Generally, the patriarchal member of the family takes care of all, with roles and responsibilities delegated by him, and disputes falling under his authority. If they are unable to resolve the dispute, the disputants can go to the *Badghare*. The *Badghare* receives such types of family dispute and small tort claims, and will mediate, seeking an amicable solution, but curiously, reserving a right of veto over the proposed settlement.
- *Khadayanji*:⁷ The word is made up of two components — *Khada* meaning a garland, but made of cloth, and *Yanji* meaning sister, in the *Sherpa* language. The Nepali *Sherpa* community has a rich and unique lifestyle, with strong cultural and social values. *Sherpa* communities are generally female-dominated in Nepal. Dispute resolution within disciplined family and community systems falls to the oldest active matriarchal figure, whose ambit makes her something of a community chairman for wider community disputes.

Any party can go to the *Yanji* and offer her a *Khada* cloth garland and express his grievances. 13.007 She will listen and then will summon the opponent to be present at an appointed time. When the parties come to her, she will counsel them for resolution. If the matter affects the community, it takes on the air of a social gathering. The *Yanji* can ask for apology and forgiveness between the parties or the recovery of any losses.

- *Mukhiya or Kingship*:⁸ Before its unification under King Prithvi Narayan Shah, Nepal 13.008 contained a number of smaller states. After unification, “honorary kingships” were established at a local level. One of the honorary kingships was in practice in Mustang District. Due to a lack of awareness or confidence in the national law, local people would call upon their *Mukhiya* or king in case of any disputes between families or communities.

People from six Village Development Committees (the VDC is the lowest level of local 13.009 government) in upper Mustang frequently go to the *Mukhiya* or the local king. All disputes and differences are resolved by him. The king has the freedom to mediate some cases, arbitrate others and even impose a punishment. Much of his continuing power flows from the ignorance of local people of their rights under national law to go to the local court.

A property partition case *Diki Dolkar Bista v Jigme Parbal Bista* was brought to the Mustang 13.010 District Court in 26 June 1995. During the pendency of the case, the Supreme Court of Nepal ordered the case to be decided in the respective appellate court — the *Baglung* — for its trial verdict. The *Baglung* Appellate Court decided the case⁹ on 30 April 2000. Now the case is pending as to whether the widow will get the property partition as her right in the Supreme Court of Nepal.¹⁰ After the decision of the Appellate Court, local villagers became divided

6 UNDP, *System of Mediation in Nepal, Resource Book for Mediation in Court Referred Cases* (Nepal: UNDP, 2004) 14.

7 *Ibid.*, p 15.

8 *Ibid.*, p 13.

9 *Diki Dolkar Bista v Jigme Parbal Bista* (Case No. Miscellaneous 12/1999).

10 Case No. 0002/2012 NF.

into two groups, one favouring and the other against the jurisdiction of the kingship. Although the power of the local kingship has been weakened, the *Mukhiya* system is still alive.

- 13.011 • *Thakaly*:¹¹ *Thakaly* means an elder and respected member of society in the *Newar* community within the Kathmandu valley. The *Newar* community believes in a local community trust, or *Guthi*, and the head of the trust, or *Thakaly* in the local tongue, will be selected unanimously. Any disputes and differences between the members of the community trust goes to the *Thakaly* for mediation, mostly relating to small tort or property claims. Any aggrieved party is free to go to the court but if he does so, the community will not care for his needs if he should require anything in the future from the community.
- *Santhal Court System*: *Santhal* is an indigenous group of people inhabiting mainly the *Jhapa* and *Morang* districts in eastern Nepal. Only the rarest of cases from their community have come to the formal court system, since it is accustomed to resolve disputes in an amicable manner, first through counselling and mediating, then making a decision on its own. The *Santhal* have a three-stage traditional court-based system which looks similar to the formal state judicial system:¹²

- (1) The court of *Majhi Hadam*: the *Majhi Hadam*, a village headman, decides the disputes of villagers with the help of his own villagers.
- (2) The court of *Desmajhi*: If the *Majhi Hadam* of a village cannot resolve the dispute in the village, he has the right to send it to the upper court of the society. That court is known as *Desha Majhi Parganna*. This court has the right to counsel disputants and can resolve the dispute with the imposition of a punishment.
- (3) *Lobir*: *Lobir* is known as the Supreme Court of the traditional *Santhal* community. The unsatisfied person can appeal in this court where the *Majhi Hamad* and *Desh Majhi* have not decided the case to the satisfaction of the applicant. *The Lobir* is chaired by a highly respected person called the *Dehari*. The community believes that he is a person who has divine power to determine the disputant's fate.

13.012 For amicable and just resolution of the dispute, the *Dehari* can call a *Juri*, a spirit of the jungle to advise him on the dispute. First, counselling and amicable resolution will be encouraged. If there is no successful outcome, a decision will be given by the *Dehari*, which cannot be appealed. The *Santhals* believe that the judges of their traditional court are very fair in counselling and encouraging a decision. Resolution processes of this type are not confined within the boundary of Nepal, but extend to some Indian villages within the same tribal area.

3. LEGAL SUPPORT

13.013 Beside the informal and local indigenous systems of dispute resolution, Nepal incorporated a number of modern laws promoting dispute resolution through mediation and arbitration or Med-Arb mechanisms, before its present Mediation Act, 2011.

¹¹ Above 6, p 16.

¹² A case study "Political and Economic Marginalization of the Santhal Community: A Case Study from Jhapa" District (2012). Also available at http://www.socialinclusion.org.np/new/files/Shiva%20Maya%20Tumbahampe_I365499701dWbb.pdf.

(a) Foreign Investment and Technology Transfer Act 1992

The Foreign Investment and Technology Transfer Act (FITTA) has been a gateway for foreign investment in Nepal. The process of globalisation and economic integration has been growing with large-scale introduction of foreign commodities, capital, technology and labour in the twenty-first century. Commentators reported that "[i]t offers various opportunities of resources, capital, technology and knowledge for economic development. Nepal has opened space to foreign investment since the WTO accession. Foreign investors are interested to invest in a country that has efficient dispute settlement mechanisms".¹³

Nepal introduced FITTA to promote foreign investment and technology. The Act recognised modern dispute settlement processes, including negotiation, mediation and arbitration. Disputes relating to foreign investment, technology transfer and banking could be settled through mutual consultation, failing which the parties might resort to arbitration in accordance with the prevailing arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).¹⁴ Section 7 of FITTA provides a mechanism for dispute resolution in foreign investment claims.

(b) Contract Act 2000

The basic principles of *Lex mercatoria* have flourished under the different mercantile laws of Nepal. The recital to the Contract Act 2000 states that "contract and commerce are interrelated; interwoven. Contract law is the outcome of trade and commerce. It provides party autonomy to settle commercial disputes in a manner agreeable to both the parties". The Contract Act provides party autonomy to determine the method of settling disputes arising under the contract. The parties may, under the dispute settlement clause of their contract, provide for any method of ADR or any of its alternatives or optional variation.¹⁵ Parties to banking contracts are enabled to insert any form of ADR clauses in their contract and resolve their disputes as the method of ADR defined in the contract".¹⁶

(c) Privatisation Act 1993

In an era of private entrepreneurship, a modern dispute settlement mechanism was considered necessary to safeguard party interests. The Privatisation Act 1993 incorporated alternative dispute resolution (ADR) methods for the settlement of privatisation disputes.¹⁷ The Act provides that if any dispute arises in respect of any matter contained in a privatisation agreement, it shall be resolved through mutual consultation among the concerned parties.¹⁸ If the dispute cannot be resolved by this method, then, with the consent of both parties, the dispute may be referred to arbitration. The scheme under the Act extends to disputes relating to the privatisation of public enterprises.

¹³ Shree Kanta Paudel, "Access to Justice through ADR in Banking Disputes" (2012) 1 ADR Commercial Law Journal, CGF Nepal, pp 105-117.

¹⁴ Foreign Investment and Technology Transfer Act 1992, Section 7.

¹⁵ Contract Act 2000, Section 4.

¹⁶ Above 13.

¹⁷ Privatization Act 1994, Section 13.

¹⁸ *Ibid.*, Section 13(2).

(d) Bank and Financial Institutions Act 2006

13.018 This was enacted in line with economic liberalisation and modern principles of banking. It is the umbrella legislation which regulates commercial banks, development banks and provides detailed provisions for the incorporation of banks and financial institutions in Nepal, their governance, lending and recovery, regulation, monitoring and inspection.¹⁹ *Nepal Rastra Bank* (NRB), the Central Bank of the state, has both power and the responsibility to control such institutions. As such, NRB is empowered to settle disputes between banks and financial institutions through counselling and arbitration, and it issues directives to the banking institutions.

(e) Labour Act 1992

13.019 The Labour Act 1992 was designed for the management of labour relations in Nepal, which were traditionally the subject of contentious issues with strong trades unions. This led to management becoming overcautious in labour appointments and the widespread emigration of Nepalese manual labour, particularly to the Gulf countries and Malaysia. In order to stem this tide labour-management disputes needed to be settled in a more efficient and expeditious manner, leading to the increased use of employment mediation, as noted by Shree Patel:

“recently, there has been an increased use of mediation processes to resolve individual complaints about employment issues as well as intra-organizational disputes. Mediation has been used as a means of resolving charges of discrimination in employment and collective bargaining process”.²⁰

13.020 The Labour Act accepted negotiation, mediation and arbitration as a means of resolving issues of personal claims or complaints against employers relating to service levels and of collective disputes.²¹

(f) Arbitration Act 1999 and Arbitration Rules 2002

13.021 The Government of Nepal introduced a new Arbitration Act 1999 based on the UNCITRAL Model Law on International Commercial Arbitration by repealing its previous Arbitration Act 1981. The Arbitration Act 1999 is regarded as a general consolidating statute which include both domestic and international arbitrations, and the recognition and enforcement of foreign arbitral awards.²² It also defines the arbitral process. Banking disputes can be settled by arbitration using the procedure specified in the Act, which provides that civil cases of a commercial nature pending in the court can be referred for arbitration to be

19 (n 13 above).

20 *Ibid.*

21 Labour Act 1992, Sections 73 and 74.

22 Dr Bharat B. Karki, “UNCITRAL Model Law on International Commercial Arbitration (1985) and Nepalese Arbitration Law” (2004) 141 (English Special Issue) *Nyayadoot*, Nepal Bar Association 10–11.

compromised.²³ The Supreme Court of Nepal issued Arbitration (Court Procedure) Rules 2002, which provides detailed arbitration procedures.

(g) Public Procurement Act 2007

The purpose of this legislation is to make legal provision for public procurement procedures in Nepal, with “its processes and decisions, much more open, transparent, objective and reliable. The Act promotes good governance by enhancing the managerial capacity of procurement by public entities, particularly in construction work and materials, consultancy and other services by such entities. Departments of the Government of Nepal or any other governmental entity, corporation, company, bank or board owned or controlled fully or in majority by the Government or which receives grants fully, or in the majority from the Government, are defined as ‘public entities’ and regulated”²⁴ by the Act. **13.022**

The “Act incorporates ADR processes for the settlement of any dispute arising in connection with the implementation of a procurement contract. The contract itself may provide the mechanism for resolution of disputes that cannot be settled amicably. The procurement contract may provide that disputes relating to construction work shall be resolved by an adjudicator for an amount, failing which by a three-member dispute resolution committee; if a party does not accept the adjudication award, it can appeal using arbitration”²⁵ under the prevailing law. **13.023**

Banks which fall within the definition of a “public entity” should follow the standards of the Act for the settlement of procurement-related disputes, which prescribes the methods of mutual consultation required. If such methods fail to bring about settlement, the use of adjudication, a dispute resolution committee and arbitration follow as tiered stages”.²⁶ **13.024**

(h) Court Rules and Regulation

The Supreme Court of Nepal plays a proactive role in applying mediation to cases pending in the courts. “Mediation within the formal justice system was brought into the Supreme Court in 2003 by the fourth amendment to the District Court Rules 1995, and, since 2006, court-referred mediation has been extended to actions in the Appellate Courts and the Supreme Court, and Mediation Operational Guidelines set out the process in all three tiers of the court system. The Supreme Court Rules also introduced a five member Mediation Committee chaired by a Justice of the Supreme Court”,²⁷ which determines policy and oversees the mediation process. **13.025**

23 Arbitration Act 1999, Section 3.

24 Above 13.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

13.026 Under these rules, all types of cases pending can be referred to mediation. There is a roster of mediators in each court to provide mediation services, with subject-specific expertise available for such sectors as banking. Court-appointed mediators provide their services free of cost, but a private sector also operates should the disputants so choose. If the parties reach settlement, a deed of compromise is prepared and endorsed by the court concerned. This is registrable as a court judgment for future enforcement by the court, if needed. If parties fail to reach an agreement, the case is returned to the court for further process. Case referral for mediation and compromise is possible in all courts and at all stages, even at the stage of execution of judgment.

(i) Local Self-Governance Act 1999

13.027 The Local Self-Governance Act 1999 provides a “right to village committees and municipalities to hear and resolves some specific civil disputes through recourse of mediation and arbitration. Cases pending in these bodies are first referred to mediation which, if unsuccessful, can be decided by a process of arbitration”.²⁸ It operates as a hybrid model, dealing with some specialist areas, although the level of jurisdiction makes these few.

(j) Mediation Act 2011

13.028 The Parliament of Nepal passed the Mediation Act on 9 May 2011. This is a piece of comprehensive umbrella mediation legislation, which covers court-referred mediation, commercial mediation and community mediation.²⁹ The Act also deals with contractual provision and the application of the present Mediation Rules. The law permits mediation to be used at all stages of a dispute, even before the case is instituted before a court. Settlement of both pre- and post-issue claims is encouraged under this law, which regulates the mediation process, appointment of the mediator, removal and replacement of the mediator, process for settlement, mediation deed and submission to the Bench of the Justice and termination of the mediation.

13.029 The Mediation Rules contain various mechanisms for mediation implementation. This legal mechanism is really a cornerstone for mediation development in Nepal.

4. TRAINING AND ACCREDITATION

13.030 By 2013, the Mediation Act became fully operational. It created a Mediation Council whose various functions, duties and power are set out under Chapter 5 and Sections 26 and 27. The Council has an express duty to establish and approve curricula for mediation training.³⁰ The quality of both training and the provision of mediation services can be monitored by the Council.³¹ The Board can also require mediators to undergo additional training and academic programmes, and to follow a professional code of conduct for a

²⁸ *Ibid.*

²⁹ Mediation Act of Nepal 2011, Section 3.

³⁰ *Ibid.*, Section 27(e).

³¹ *Ibid.*, Section 27(d).

mediator, which has been instituted³² as an effective regularity authority of all mediation activities in Nepal.

Although practising mediators obtain a basic training of 40 hours, some of the mediators **13.031** undergo both advanced training and Training of Trainers (TOT) training. A group of practising mediators have also obtained periodic refresher training under collaboration with Mediators Beyond Borders International (USA). For the basic requirement and standard of training the Mediation Council is the only governing authority. Mediation practice is slowly moving in the direction of private practice. Any individual or institution is free to mediate on private and commercial cases with the consent of the parties. According to the law, the mediator can receive a fee for his services.

Section 43 of the Act states that, “(1) A mediator may accept fee from parties as prescribed **13.032** with the consent of both parties for providing mediator services. (2) In the absence of consent pursuant to Sub-section (1), a mediator shall be entitled to obtain fee as prescribed by the board”.³³

5. SUPPORT FROM THE JUDICIARY

The strength of such developments in Nepal has been possible because of the initiation, **13.033** cooperation and support of the Judiciary. Before adequate legal enactment, some judges became very vocal for the formalisation of mediation practice within the justice system. The traditional communal practices of mediation before the enactment of current law were protected by Section 82 of the Court Management chapter of the Civil Code (*Muluki Ain*). Owing to the active and dynamic leadership of the late Laxman Prasad Aryal J and others, modern court-based mediation processes have developed quickly. Events, such as a “mediation week”, drew the attention of both judges and practitioners to the synergy of using mediation within the court process, and judges were encouraged to amend the respective rules of their own courts.

These developments have also broken the resistance among those members of the Nepal **13.034** Bar Association who were unsupportive. When the Judiciary became vigorously proactive, the leader of the Bar felt unable to resist progress. Now the Nepal Bar Association itself and its officers are positive and responsive to working in the mediation system. The Secretary General of NBA is an ex-officio member of the Mediation Council.

The framers of mediation law have created a judge-referred, though party consensual, **13.035** proceeding by creating an ambient, safe and enabling room for the disputing parties to discuss their issues and arrive at an amicable resolution. For more than a decade, successive Chief Justices have regarded mediation as an important tool in the provision of access to justice. Former Chief Justice Khil Raj Regmi contributed a foreword to the inaugural issue

³² *Ibid.*, Section 27(g) and 27(h).

³³ *Ibid.*, Section 43(1)(2).

of the *ADR Commercial Law Journal* of Nepal. Former Chief Justice and ruling Chairman of the National Human Right Commission, Justice Anup Raj Sharma graciously provides his Patronage to Nepal International ADR Centre NIAC.

13.036 Two justices of the Supreme Court act as chairman and member, respectively, of the Mediation Committee of Supreme Court, to ensure that the Supreme Court has direct involvement in advancing mediation activity among the wider Judiciary.

13.037 Table 1 provides the data available from the office of the Mediation Council regarding the cases in judicial mediation in the year 2014.

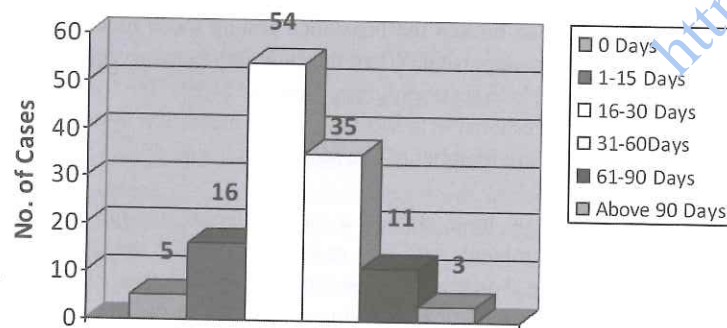
Table 1: Cases in Judicial Mediation in 2014.

SN	Courts	Total No. of Cases in Court	Total Cases Referred	Success	Unsuccessful	In Process	Remarks
1	Supreme Court	16,451	216	23	133	60	
2	Appellate Court	15,246	1,306	154	205	947	
3	District Court	45,664	3,525	838	2,206	481	
	Total	76,361	5,047	1,015	2,444	1,488	

Source: Office of the Mediation Council.

13.038 Figure 1 shows the time taken by successful cases in judicial mediation.

Figure 1: Time taken in success cases.



Source: Office of the Mediation Council.

13.039 The data indicate that mediation development is not without its problems despite judicial willingness. The number of cases referred shows a worrying trend due to a disappointing success rate. At the time of writing, a cycle of discouragement is being caused by too many

ineffectual results. This suggests that the court-appointed Nepalese mediators need further and better skills training to bring confidence to what is a supportive system.

6. SUPPORT FROM THE GOVERNMENT

The government is reluctant to extend and strengthen the mediation system in Nepal, although the legal framework is in place. Despite momentum from the Judiciary, the government has been less enthusiastic. In fact, the Mediation Act was pushed through when the government was temporarily headed by then Chief Justice Khil Raj Regmi during a constitutional crisis. All mediation activities in the Justice Department are run under a budget allocated by the government. **13.040**

Still, Nepal has provided a significant example for the region. No country in South Asia has similar legislation except Sri Lanka, where mediation has broader legal sanction and support through a legal framework enacted by the national legislature. In Nepal's case, the Judiciary voluntarily embraced mediation as part of a court-referred system³⁴ and the development was provided solely by the judges without political pressure. **13.041**

7. RESOURCES

(a) Human Resources

Gradually, mediation practice is becoming broader in scope. The Mediation Council has devolved mediation training to the Nepal Bar Association and other institutions. The roster of mediators is available only in court-annexed mediation centres, of which 92 exist around the country, with each administered by a Registrar. Basic mediation training is conducted through the Mediation Committee of the Nepal Bar Association and the National Judicial Academy. Advanced, refresher trainings and TOT remain sporadic and of mixed quality. Advanced specialist mediation training in commercial, family and divorce matters has not yet been planned. **13.042**

In the private sector, general practice mediators are allowed to receive up to 10,000.00 Nepalese rupees³⁵ per case as their fee in court-referred mediation. There is lack of specialist mediation practice, including mediators' rosters, and scale mediator's fee for community, construction or banking disputes. Most community mediation is carried out by social volunteers without fees and other facilities. **13.043**

Accumulative and authentic data for community mediation has not been made available yet. Where access to justice is weak, citizens are taken to have benefitted from community mediation, simply as a point of access to justice, but a lack of authentic data has prevented any proper analysis. The governing body for community mediation is also the same, that is, the Mediation Council which is headed by a senior justice of the Supreme Court. Other members **13.044**

³⁴ Mukti Ram Rijal, "The Rising Nepal", available at <http://trn.gorkhapatraonline.com/index.php/op-ed/7562-mediation-law-new-shift-in-dispute-resolution-mukti-rijal.html>.

³⁵ Mediation Rule 2013, Regulation 53.

include secretaries of different ministries representing their portfolios, which may provide a vehicle for reporting to government on the requirements of communities in this regard.

13.045 Table 2 provides the data available from the Mediation Council/Supreme Court regarding the number of mediators and mediation centres for judicial mediation.:

Table 2: Data on the Available Number of Mediators and Mediation Centres for Judicial Mediation.

SN	Courts	Mediators Numbers	Number of Mediation Centres	Remarks
1	Supreme Court	409	1	
2	Appellate Courts	638	16	
3	District Courts	1,397	75	
	Total	2,444	92	

Source: Office of the Mediation Council/Supreme Court.

(b) Financial Resources

13.046 An adequate budget allocation is necessary to strengthen mediation in different segments of society, with mediation funding chiefly allotted out of the budget of the Supreme Court. Some donor agencies such as UNDP, ASIA Foundation and JICA support smaller individual mediation programmes. No donor agency is capable of providing for more widespread funding for basic, advanced and specialist training or other academic works and reading materials; moreover, training activity is almost exclusive to Kathmandu. The local government institutions especially the VDC and Municipalities have allocated some few resources to encourage community services centres in their respective areas. Local society organisations have assisted community mediation service centres to operate through the creation of endowment fund to sustain mediation services at a community level through charity.

8. MORE PRACTICE AND ACCEPTANCE OF MEDIATION

13.047 Mediation is now being practised reasonably well and systematically in the judicial sector. Community mediation is also proceeding but faces problems with systemisation. Rosters of mediators, case registration and disposal, recordkeeping, implementation of agreements between the parties and case management mechanism have all been difficult for community-based dispute resolution. Mediation in local authorities has also not been going well because of the lack of any supervisory function of the relevant authority. Private sector mediation has almost no systematisation, although it has the benefit of substantial human resources.

13.048 The largest gap in the field is in labour/management disputes where differences are hard to resolve, operating as they do at a cultural level. Here, the Mediation Council has been failing to provide any comprehensive agenda for development. However, it does record some successes as shown in Box 1.³⁶

³⁶ Bipin Adhikar and Danielle Stein, *Community Mediation Policy Brief*, December 2013.

Box 1:

1. Over 10,980 local disputes registered with mediation committees were resolved, with 81.2 per cent resolution rate.
2. About 26 per cent of the disputes registered were land-related, with over 72 per cent resolution rate.
3. About 93 cases were referred to community mediation from the formal justice sector, all of which were resolved.
4. Over 80 per cent dispute resolution rate were recorded on common interest disputes brought to community mediation, such as irrigation and public land use.

Source: *Community Mediation Policy Brief*, by Bipin Adhikar and Danielle Stein.

The orthodox approach to dispute resolution in Nepal is no different from elsewhere. Criticism of litigation and arbitration are familiar to practitioners worldwide: processes are lengthy, time-consuming and driven by high expense. There is some concern that if mediation submits to formalism, the same problems may accrue, and the distinctive features of mediation may become blurred in the eyes of practitioners and users. Of particular concern is delay. Table 3 below contains data showing old cases pending in the Nepalese courts. The difficulty with stale process is self-evident, and this alone should force both the Judiciary and government to encourage mediation and ADR rather than litigation. **13.049**

Table 3: Old Cases Pending in Nepalese Courts.

SN	Courts	Cases Pending for More than 10 Years	Cases Pending for 10 Years	Case Pending for 5 Years	Case Pending for More than 2 Years	Remarks
1	Supreme Court	77	132	646		
2	Appellate Court	0	0	0	308	
3	District Court	0	0	0	2,133	
4	Total	77	132	646	2,441	

Source: Supreme Court Annual Report 2014.

9. INSTITUTIONAL DEVELOPMENT

In Nepal, it should be recognised that the institutionalisation of mediation is necessary for its development, but at the same time so many international institutions working for mediation were originally established only for arbitration before turning their attention **13.050**

CHAPTER 18

THAILAND

Judge Prachya Yuprasert

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1. HISTORY

18.001 In the era of the absolute monarchy, the king would adjudicate all disputes. Once his royal duty had increased, the Department of Appeal (*Dika*) Scrutiny was formed to lighten his royal burdens. Around 900 years ago, mediation started developing in Thailand during the reign of King Ramkhamhaeng, Maharaj of Sukhothai Kingdom, where the people who had a dispute rang the bell placed in front of the king's palace, who would then enquire and mediate until the parties settle their disputes. In 1891, King Rama V set up the Ministry of Justice and convened all courts under the Ministry. The Ministry of Justice was responsible to the king for the administration of the Court of Justice. The Thai Constitution 1997 (B.E. 2540) stipulated that the administration of the Court of Justice is independent, and the scope and duties of the President of the Supreme Court increased with the addition of case management. In 2000, a new dimension in the Judiciary of Thailand occurred; an independent secretariat was established for the Courts of Justice. The Office of the Judiciary has autonomy in personnel administration, budget and other activities as provided by law. The President of the Supreme Court is also responsible for the formulation of the administrative policy of the Court of Justice, and the supervision of the Administrative Branch of the Judiciary. In rural areas, there are leaders of societies who act as mediators to mediate the disputes between the people within the community. The types of mediation include the disputes between neighbours, borderlines of the land ownership and so forth.

18.002 At present, there are two forms of mediation in Thailand: (1) out-of-court mediation, where parties mediate the disputes before filing the cases in court and (2) court-annexed mediation, where the parties settle their dispute by mediation after the parties file their case in court. The Civil Procedure Code stipulates that the court can mediate the case any time during the proceeding and shall issue a summons ordering the parties to come to court for mediation in the Court of Justice by the assistant of the Office of the Judiciary. Arbitrators also performed mediation to settle disputes in parallel with the arbitration proceedings. Since 23 June 1994 (B.E. 2537), the Civil Courts had set up mediation centres in courts for mediating civil cases. In 1990, when Thailand faced the financial crisis (Tom Yum Goong crisis), the government adjusted the budget of the Office of Judiciary to handle non-performance loan cases. Courts establish the court-annexed mediation centres around Thailand in every Courts of First Instance. Mediation was extended to criminal compoundable cases for victim-offender mediation (VOM). At present, Courts of Justice had set up mediation centres in almost every court around Thailand except in the Bankruptcy Court.

2. DEVELOPMENT

18.003 Out-of-court mediation was established and advanced for a long time; the Alternative Dispute Resolution Office is an organisation of volunteer community mediation, since 1993. There are more than 5,000 trained and registered mediators in 57 provinces. The Ministry of Justice is planning to set up Community Justice Centres around Thailand by recruiting, training and registering the mediators by 2015.

18.004 Court-annexed mediation in Thailand has been developed for more than two decades. The court has set up mediation centres; organised training programmes for judges, mediators and its officers; sent them aboard to train and study; set up the mediation system in the courts and expanded the use of mediation to the people.

3. ACCREDITATION OF MEDIATORS

There are mediators in many organisations in Thailand. They all have their own training programmes. The Thai Mediation Center (TMC), the Office of Alternative Dispute Resolution (ADR) and the Office of the Judiciary have their mediators in the mediators' list.¹ The regulation of the President of the Supreme Court stipulated that the mediators have to pass the training programmes for mediators. **18.005**

(a) Court-Appointed Mediators

The Civil Procedure Code provides that the court shall appoint the mediator to assist the judge in mediating cases.² The mediator shall be at least 35 years of age, graduated with a bachelor's degree, completed the training programme on mediation from the ADR Office, have mediated more than 10 cases after they were appointed by the court. The majority of the mediators come from many sectors such as businessmen, retired teachers and former judges. They have much experience and skill in mediation. There are now more than 2,200 roster mediators, and 3,000 non-roster mediators. The roster mediators' list can be found at TMC, ADR Office.³ The list of non-roster mediators can be found at the courts. The mediators have to pass the 24-hour training programme on negotiation, mediation techniques, mediation workshops, psychology for mediation. From the statistics and research on works of the mediators, it has been shown that the success rate of mediation by mediators does not differ much from the cases mediated by judges.⁴ **18.006**

(b) Volunteer Community Mediators

Volunteer Community Mediators are the leaders of the community, for example, retired officials like retired teachers and businessmen who devoted themselves for their communities. They passed the training programmes for mediators of the organisations they belong to such as the volunteer community mediators (VCM) of the Office of the Judiciary. They have to pass a 24-hour training programme which comprises the principle of negotiation, mediation workshops, mediator's ethic, psychology of mediation and principles of civil and criminal law. After the training programme, the ADR Office organises a mediation mentorship for trained mediators to work with more experienced mediators who have been working for a period of time to increase their knowledge in mediation. **18.007**

(c) Mediators of the Centre for Peace in the Health Care⁵

Many disputes relating to medical malpractice arose. The doctors and medical personals were anxious when they provide services to patients. In some cases, court had rendered imprisonments to the doctors. The Centre for Peace in the Health Care was set up to handle these disputes, wherein the doctors and nursing personnel were trained to be mediators. The mediators have to pass a 40-hour mediation training program. At present, there are more than 300 mediators on its panel. **18.008**

¹ See www.adro.coj.go.th.

² Civil Procedure Code, Section 20.bis.

³ See www.adro.coj.go.th.

⁴ "An Evaluation of the Effectiveness of Court Annex Mediation System", available at <http://www.library.coj.go.th>.

⁵ See <http://www.pro.moph.go.th/>.

(d) Mediators of Other Organisations

- 18.009** The mediators in the Department of Provincial Administration,⁶ Ministry of Interior, mediate civil disputes, involving monetary amount not exceeding 200,000 baht, and compoundable criminal disputes, except criminal cases related to sex abuses such as rape. The mediators need to pass the 24-hour training programme. The mediator will be paid a fee of 1,000 baht for each case that they mediate.
- 18.010** There are more than 30 organisations that provide training programmes for mediators, including the Office of Attorney General,⁷ the Department of Land Ministry of Interior,⁸ the Office of Consumer Protection, the Royal Thai Police,⁹ the Bangkok Metropolitan, the Legal Execution Department of the Ministry of Justice,¹⁰ the Probation Division, the Village Loan Fund and so forth. There are more than 1,000 mediators.
- 18.011** With regard to university and school mediation, mediation is used in universities and schools for resolving the disputes between university and the professors, university and the students, and professors and students and with outside parties and the like. Dhurakit Bandit University, Khonkaen University and Chiang Mai University engage in mediation to resolve disputes.
- 18.012** The legal office of the Office of Permanent Secretary¹¹ and Ministry of Education encourage and support the use of mediation for resolving disputes in schools by appointing working groups of mediation centres, recruiting students and training them to be mediators. It also cooperated with parents of students, Police Stations and Court of Justices for the management of conflicts. A total of 120 students have been trained to be mediators. The mediation process begins when the disputes occur and the parties are willing to use mediation. The mediators mediate with the parties; if they settle the disputes, then they write up a memorandum and submit it to the consulting teacher. If they fail to settle the disputes, the disputes will send to the school for further consideration.
- 18.013** School-based peer mediations are also available in Chalermkwansatree School in the Phitsanulok Province, Phanom Sarakham School in the Chachoengsao Province and so forth.

4. SUPPORT FROM THE JUDICIARY

- 18.014** The Thai Judiciary has been supporting the use of mediation for a long time, although in the past, the ethic of Judges prohibited them from acting as mediators or arbitrators. Judges were concern about their independency and impartiality. However, after 20 years, the Judiciary has started supporting the use of mediation. Now, one can find mediation in the policy of the President of the Supreme Court. The present policy of the President of the Supreme Court promotes mediation and the Secretary General of the Office of the Judiciary follows the policy of the President of the Supreme Court and continues to promote and

6 See <http://www.dopa.go.th/>.

7 See <http://www.ago.go.th/>.

8 See <http://www.dol.go.th/>.

9 See <http://www.royalthaipolice.go.th/>.

10 See <http://branch.led.go.th/>.

11 See <http://www.moe.go.th/>.

support the use of mediation in the trial proceedings of the Court of Justice. Court of First Instance around Thailand supports the use of mediation by setting up the mediation centres, appointing mediators, promoting mediation to the people and organising settlement week activities. The Civil Procedure Code empowers the courts to ensure that the parties comply with the judgment related to the settlement agreement. In the majority of cases where the party breaches the settlement agreement, court will render the judgment in favour to the winning party, except in cases where it is contrary to public policy or public order.

5. SUPPORT FROM THE GOVERNMENT

The mediation in Thailand is supported by the government, for example, in the Court of Justice, the Ministry of Justice, the Office of the Attorney General, the Ministry of Public Health, the Office of Insurance Commission and the like. All the aforesaid organisations set up mediation systems by recruiting mediators to provide mediation services for the disputing parties. Beside private organisations, such as the Lawyers Council of Thailand, support the use of mediation by organising training programmes for lawyers and encouraged them to settle their cases by mediation. Many cases were settled with the assistance of lawyers.

6. LEGAL SUPPORT**(a) Laws Relating to Mediation**

At present, Thailand has not enacted any specific mediation legislation, even though, many organisations endeavour to submit the law to the Parliament. However, there are many laws and regulations relating to mediation as follows.

(i) Civil Code B.E. 2535

It stipulates that a compromise is a contract whereby the parties settle a dispute, whether actual or contemplated, by mutual concessions,¹² and¹³ a contract of compromise is not enforceable by action unless there is some written evidence signed by the party or his agent. The effect of the compromise is to extinguish the claims abandoned by each party and to secure the rights of each party which are declared to belong to them.¹⁴

(ii) Criminal Code B.E. 2499

It stipulates that if the offences such as theft or snatch, as provided in Sections 334–336, first paragraph, and Sections 341–364, are committed by a husband against his wife, or by a wife against her husband, the offender shall not be punished.¹⁵ If the aforesaid offences are committed by an ascendant against his descendant or by a descendant against his ascendant, or by a brother or sister of the same parents against each other, the offences shall, even though not provided by the law as compoundable offences, be deemed as compoundable offences. Moreover, the court may inflict less punishment than that provided by the law for such offences. There are many offences

12 The Civil Code B.E. 2535, Section 850.

13 *Ibid.*, Section 851.

14 *Ibid.*, Section 852.

15 The Criminal Code B.E.2499, Section 71.

such as trespass, criminal misappropriation and fraud which the law stipulates as compoundable offences and which mediators shall mediate. (The first offences shall not be punished by law but the follow are a compoundable offences which it can mediate for the settlement.)

(iii) *Civil Procedure Code B.E.2477*

18.019 The Civil Procedure Code of Thailand empowers the court to order mediation in civil disputes, when the court deems it appropriate or on the request of the parties. Court-annexed mediation is a confidential, informal, non-adversarial procedure designed to bring the parties to an amicable settlement. Court-annexed mediation may also be used at the appellate level and in Juvenile Court and Family Court mediation, in the Central Labour Court and in the Central Intellectual Property and Information Telecommunication Court.

(iv) *Act of Establishment and Procedure of the Juvenile and Family Court B.E. 2534*

18.020 The Juvenile and Family Court has the principle to maintain the relationship in the family between the parent and the child. The law in the Act on Establishment of Juvenile Court B.E. 2494 (1951) and Juvenile Procedure Act B.E. 2494 (1951) and the second amended issue B.E. 2506 (1963) of the Acts, which came into force on 1 January B.E. 2507 (1964), stipulates that the court shall try to settle the dispute by maintaining peace and the livelihood of the family.¹⁶ The trial court shall appoint a mediator for mediating the parties in family disputes to reach a compromise and a report shall be submitted according to the rule of the President of the Supreme Court.¹⁷ Juvenile Court has the duty to register family mediators who must possess the following qualifications:

- (1) He must not be younger than 40 years
- (2) He must have qualification to be the official of the Court of Justice and have knowledge in the regulation issued by the President of the Supreme Court.
- (3) He must have personal and appropriate behaviour for mediating family disputes.
- (4) He must be trained in and must have practiced mediation until he had passed the test of the Juvenile and Family Court family mediation proceeding.¹⁸

18.021 The mediators shall function with the duty of honesty and impartiality and in accordance with the regulation of the President of the Supreme Court.¹⁹ The family mediators shall get a fee according to the regulations imposed by the Judicial Administrative Commission.

18.022 If the parties shall not settle, court shall terminate mediation and bring the case to litigation.²⁰ At present, there are more than 700 family mediators who have settled around 2,500 cases per year.²¹

(v) *Act on the Establishment of and Procedure for the Labour Court B.E. 2522 (1979)*

18.023 Section 38 stipulates that when the plaintiff and the defendant appear in court, the labour court shall mediate with the parties to reach an agreement or a compromise,

¹⁶ The Act of Establishment and Procedure of the Juvenile and Family Court B.E.2534, Section 146

¹⁷ *Ibid.*, Section 148.

¹⁸ *Ibid.*, Section 149.

¹⁹ *Ibid.*, Section 150.

²⁰ *Ibid.*, Section 151.

²¹ See <http://www.jvnc.coj.go.th/>.

since the continuous relationship between the parties is important in labour cases with its specific nature and they should be settled with good understanding between parties.²²

During mediation of the labour court, if any party requests or when the labour court deems it appropriate, the labour court may order that such mediation be held in-camera or in the presence of the parties only. **18.024**

In the case where the labour court had conducted mediation but the parties could not reach an agreement or a compromise, the labour court shall proceed with the trial. **18.025**

(vi) *Government Administrative Act (7th) B.E. 2550*

This Act imposes the districts with the authority to mediate civil disputes relating to land involving monetary amount not exceeding 200,000 baht and cases where either party has his residence within the district, provided the disputes are not about sex abuse offences. This provision also applies to cases where one party has a domicile residence in Bangkok Metropolitan. The measure and way of operation shall be according to the said Act in the ministerial regulation related to mediation and conciliation (B.E. 2553) and in the ministerial regulation related to mediation in criminal offence B.E. 2553. **18.026**

(b) *Regulations Relating to Mediation*

(i) *Regulation of the President of the Supreme Court 2012 and Regulation Relating to the Civil Procedure Code B.E. 2477*

The regulation comes to in force as B.E. 2554 and has 13 parts and 57 sections. The regulation imposes the mediation process in the Court of First Instance, the Appeal courts and the Supreme Court. It comprises the commencement and termination of mediation, the qualification of the mediators and the ethics of the mediators. The court-annexed mediation is run under this regulation in civil cases. **18.027**

(ii) *Regulation of the Office of Attorney General Relating to Mediation and Conciliation B.E. 2555*

The regulation in Bangkok imposes a duty on the special public prosecutor to promote mediation to the parties. Outside Bangkok area, the responsibility falls on the Office of Provincial Attorney. The Office of Attorney General also organises training programmes in mediation for rural arbitration around Thailand. **18.028**

7. RESOURCES

In Thailand, there are the following two types of mediation: **18.029**

(a) *Out-of-Court Mediation*

This type of mediation arises out of court before the parties file a case in the Court of Justice. Many organisations such as Ministry of Justice, Ministry of Public Health, **18.030**

²² Act on the Establishment of and Procedure for Labor Court B.E. 2522 (1979), Section 38.