Kluwer Mediation Blog

Mediation in the High-context Society of India – an Interview with AJ Jawad

Esther Pfaff (Associate Editor) (Hoffmann Eitle) and ajjawad · Wednesday, May 26th, 2021

Mr. Jawad has been a mediator since 2007 and a passionate promoter of mediation in India from its earliest days. Jawad works as a mediator and trainer with the Mediation and Conciliation Project Committee of the Supreme Court of India and is a global faculty with ADR ODR International UK. He is a SIMI accredited mediator and has recently joined KD Lex Chambers as a partner and Head of ADR Services.

1. Mr. Jawad, you have been actively involved in the working of the Mediation Centre at the Madras High Court since its opening, first as appointed coordinator and then in 2015 as Joint Secretary. The Madras Centre has been the first of its kind in India. Can you tell us a little bit about the motivation behind opening the center and how it all started?

From the court's perspective, the main reason was not so much ideological but rather a serious backlog of cases. The center started with just two rooms and the initial training of mediators was conducted by Geetha Ravindra, who was a mediator of the Virginia Supreme Court at that time. There was some serious resistance from the bar at the time, fearing that the work of lawyers might be devaluated, but they soon realized the need for an alternative approach to be able to deal with the backlog of cases and reconciled with the idea.

2. How has the situation evolved ever since, in the Madras Mediation Centre and across India?

The referrals were few until in 2012, the Supreme Court held in a landmark judgement that referral of cases to ADR methods is mandatory, the only test being the presence of "elements of settlement". The Supreme Court has defined a detailed list of cases fit for mediation and unfit for mediation. If cases "fit" for mediation are not referred, the court must give reasons for not referring. Recent statutory enactments like the new Companies Act 2013, the Consumer Protection Act 2019 and the Commercial Courts Act as amended in 2018 equally prescribe a mandatory referral to mediation.

Today, there are approximately 10,000 trained mediators under court-annexed programs. But as practitioners we feel that for a country like India, these numbers are not enough. It is also not just about the numbers; in many places, the training quality also needs improvement.

3. These efforts all seem to aim at court-annexed mediation, what about mediation on a

private or community level?

Court-annexed mediation is indeed the main playing field. Community mediation and mediation based on a private initiative is still rare. Institutions and organizations have been established which are promoting private mediation. The Bar Council of India has reacted and has made mediation a mandatory part of the law school curriculum to increase the general acceptance of mediation as a path for dispute resolution outside court litigation. The Maharashtra National Law University has now started a first-of-its-kind 2-year Masters' course in mediation.

4. Where do you see the reasons for this lack of interest in community or private mediation?

My experience is that there is a general attitude in Indian society to look for an authority to solve a dispute.

To give you an example, in a landlord-tenant dispute that I was mediating, the landlord asked why he should waste his time with me since I had no power to decide anything. I politely asked him that if the dispute had not been referred to mediation, who would have the power of adjudication? He replied that it would be the judge. I told him that the judge has now relegated that power to him and his tenant as it was their dispute and the judge wanted them to resolve it themselves. This seemed to satisfy him, and the mediation continued. But in other cases, the parties may simply leave as soon as they fully understand the lack of adjudicative authority of the mediator.

The Indian society in general is organized in a very hierarchical manner. It is a high-context society and starting from the home to the workspace, hierarchy dominates, which can render mediation proceedings challenging.

5. Could you elaborate a bit on the implications of a high-context society for mediation?

The psychologist Dr Geert Hofstede coined this term when he published his cultural dimensions model at the end of the 1970s, in which he categorized societies based on four criteria:

1. Power Distance Index (high versus low).
2. Individualism Versus Collectivism.
3. Masculinity Versus Femininity.
4. Uncertainty Avoidance Index (high versus low).

Like most Asian cultures, India ranks high on the power distance index. Decision-making power is vested in the one at the top of the food chain. Until you rise in the pecking order, you are not expected/allowed to take any decisions on your own. This imbalance of subordinance and power exists at all levels, private and public. Therefore, investing an individual with the power of self-determination, as mediation requires, is investing that person with a huge responsibility that he/she may find difficult to shoulder.

Take for example the structure of families. In India, the Undivided Family concept prevails. Families do not only live jointly for several generations, but for example property is often held jointly according to Personal Laws, affecting disputes on alimony, inheritance, etc. The central figure is the patriarch of the family who would not just be controlling the purse strings of the other members but would also be the decision-making authority who decides everything, including who a member would marry.

Family mediations in India can therefore be quite challenging. For example, marriage is not merely between two individuals but between two families. Every elder member of the family has a say in the marital life of a couple and the control continues even after they have children of their own and the children are grown up. It is therefore common to see a disputing couple being accompanied not just by their parents but also an uncle or aunt who holds authority in the extended family.

In a case I recently mediated, the couple was willing to reconcile and live with each other, but the father and brother of the wife gave her an ultimatum that she has to choose between them and her husband. The poor lady was in a quandary and ultimately decided to go with her father and brother at the cost of leaving her two-year old child behind. In another case, the husband, would always be accompanied by his parents. They would say nothing. He would not take a single decision without talking to them privately, thereby disrupting the dynamics of the mediation.

Tax benefits provided to undivided family businesses have perpetuated the concept. Most businesses in India (even the big ones) are family enterprises controlled by one central figure. Unlike the tier system of management followed by western countries, these corporate entities in India (as with many Asian countries) are often driven by family hierarchy as well.

6. You mentioned that the starting point for you at the Madras Mediation Centre was a training by mediators from the US. How do you experience the application of US style mediation to this cultural backdrop?

There is indeed an ongoing debate in mediation circles as to whether the facilitative style of mediation is at all workable in India. At the core of US-style mediation is self-determination and empowerment of the party, the individual. Many mediators share experiences where parties look to them for that last-mile push towards taking a decision and end up asking the mediator "what would you advise us to do?" If no resolution is suggested, they may turn away, or reach out to an elder and the mediation process falls apart.

7. How do you overcome this problem in your practice, how do you empower the parties?

My view is that, with the adoption of appropriate communication skills, mediators can nonetheless work on the facilitative, transformative and narrative styles to assist parties in resolving conflicts. Sometimes the dilemma can then be resolved by placing a set of options before the parties (arrived at through skillful questioning) and asking them to choose from any of the options. Less experienced mediators may end up playing an evaluative role and advising the parties on the course of action that they need to take.

In the scenarios that I have mentioned earlier, an attempt to focus on the individual and separate the parties from their groups sometimes proves fatal as they have to go back to the "group" once they walk out of the mediation room. Therefore, separating them from the group may not serve the purpose.

One of the techniques that I adopt is to lay down the basic rule that no one will interrupt the parties when they speak and through a process of carefully crafted questions, get them to speak out about their real interests. I then break out into private sessions which include sub-sessions with the individual parties and their respective groups separately. This helps to not only enable the parties to share their real concerns and issues but also to understand the motivations of the group. These break-out sessions might also be a good way to sensitize the group to the individual interests of the party at stake and to try to ensure that its position and interests are not overlooked. As after the

break-out sessions the groups reconvene, the focus on the individual may take a back seat again, but at least the interests on an individual level have not been entirely sidestepped in the process.

8. Is there a wider debate on these cultural implications in the Indian mediation scene?

Yes. We have a pan-India association of mediators called "Mediators India". We are planning a conference involving South Asian countries that share common cultural paradigms. The idea is to initially provide a networking platform for mediators that can be used to explore how mediation can be adapted to address the particular cultural needs of our countries. As a long-standing practitioner, I consider it vital to enter into a discussion on handling and potentially adapting the US style and techniques of facilitative mediation to the cultural realities of Asia to see mediation thrive.

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This entry was posted on Wednesday, May 26th, 2021 at 4:00 pm and is filed under ADR, Deal Mediation, Dispute Resolution, Evaluative Mediation, Family Mediation, Future of mediation, India,

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