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# Navigating Emotions and Cognition: The Psychology of Effective Mediation and Negotiation (ADR)

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## ABSTRACT

*Negotiation and dispute resolution are essential processes in human interactions that impact personal relationships, organisational dynamics, and social harmony. Psychology provides essential insights into the psychological, social, and cognitive mechanisms that influence negotiation and dispute resolution results. The study shows that using different negotiating strategies may lead to effective dispute resolution. It is proposed that global conflicts should use negotiation to resolve disagreements, regardless of whether it is a negotiated conflict or conflict resolution.*

*Emotions are crucial in the process of resolving disputes, yet they are frequently not comprehended or dealt with effectively by the involved parties. Professionals assisting in dispute resolution also often struggle to control and manage these emotions. A good negotiator or mediator must consider the economic, political, and physical components of the process, as well as the psychological and emotional dynamics of themselves and other parties involved.*

*This paper aims to: delineate the primary approaches used in mediation and negotiation processes; define emotions and their significance in resolving legal disputes through negotiation and mediation; and investigate methods for managing and enhancing the psychological conditions in negotiation and mediation procedures.*

**Keywords:** Negotiation, Mediation, Emotions, Psychology, Approaches, Conflict, Resolution, ADR.

## I. INTRODUCTION

According to Stuart Hampshire<sup>4</sup> (1914-2004) “we should look in society not for consensus, but for ineliminable and acceptable conflicts, and for rationally controlled hostilities, as the normal condition for mankind...Harmony and inner consensus come with death.”<sup>5</sup> In a social system,

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<sup>4</sup> Stuart Hampshire, Innocence and Experience, review by Jerome Neu, Ethics, vol. 102, no. 1, pp. 155-158 (1991), available at <http://www.jstor.org/stable/2381729>.

<sup>5</sup> Stuart Hampshire, Innocence and Experience, review by Jerome Neu, Ethics, vol. 102, no. 1, pp. 155-158 (1991),

conflict is unavoidable. Given that humans are capable of logical thought, a variety of concepts, beliefs, values, desires, and objectives may be found in them. These distinctions serve as the foundation for disputes. People from various backgrounds cannot, in the end, collaborate or make choices without encountering conflict. According to John Burton, conflict occurs universally and transcends limits of systems.<sup>6</sup> Interpersonal, communal, ethnic, and international relations all deal with people's ontological demands, necessitating the same analytical approaches to conflict resolution.

The fact that disputes occur at several levels, such as intrapersonal, interpersonal, intergroup, and intragroup conflicts, should be noted.<sup>7</sup> However, because of the world's constant change and the ongoing advancement and sophistication of business ventures and transactions like banking and finance, energy, oil and gas, development projects, construction, trade and commerce, aviation, and so forth, conflicts have proliferated, necessitating the need for a more equitable, quick, and economical method of handling and resolving conflicts.

In past decades, the prevailing thought while engaging in negotiations was to "*separate the people from the problem*."<sup>8</sup> Regrettably, individuals are often a significant contributing factor to the issues raised in discussions and agreements. Put simply, the recognition of the underlying emotional variables at play is just as important to the fundamentals of negotiation and mediation practice as the cognitive analysis of opposing interests and the logical formulation of the most efficient solution.

A wider range of processes, such as arbitration and struggle, are often considered before deciding on negotiation and mediation. Choices among these possibilities were the subject of a few early studies,<sup>9</sup> and there have been some recent indications of a resurrection in this area of research.<sup>10</sup>

## II. MULTIPLICITY IN PRACTICE: CULTURAL AND INDIVIDUAL FACET OF MEDIATION AND NEGOTIATION

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available at <http://www.jstor.org/stable/2381729>.

<sup>6</sup> John W. Burton, Conflict Resolution as a Political Theory <http://cardata.gmu.edu/docs/teaching/TEACHING%20PLATFORM/course%20501/UNIT%203/Burton%20-%20Conflict%20Resolution%20as%20a%20Political%20Philosophy%20copy.pdf>.

<sup>7</sup> Managing Conflict and Negotiation, accessed [http://www.sagepub.com/upmdata/58510\\_Nahavandi\\_Chapter\\_11\\_proof.pdf](http://www.sagepub.com/upmdata/58510_Nahavandi_Chapter_11_proof.pdf).

<sup>8</sup> Roger Fisher, Negotiating Power: Getting and Using Influence, in J.W. Breslin & J.Z. Rubin (eds), Negotiation Theory and Practice, The Program on Negotiation at Harvard Law School, Cambridge, Massachusetts, pp. 127-128.

<sup>9</sup> Thibaut, J.W. and Walker, L. (1975) Procedural Justice: A Psychological Analysis. L. Erlbaum Associates, Hillsdale.

<sup>10</sup> Heuer, L., & Penrod, S. D. (1989). Instructing jurors: A field experiment with written and preliminary instructions. Law and Human Behavior, 13(4), 409-430. <https://doi.org/10.1007/BF01056412>.

### **a) Cultural Differences**

There is evidence that cultural variations exist in the ways that people negotiate<sup>11</sup> and choose conflict resolution techniques.<sup>12</sup> In some cultures, mediation has a long history (Cohen 1966), and its characteristics might vary depending on the setting.<sup>13</sup>

Because of this, cultural disparities in negotiation and mediation will probably grow more significant as nations become more interconnected and multicultural. A viewpoint of cultural disparities stems from the difference between individualism and collectivism<sup>14</sup>. In an integrative bargaining assignment, Chan had participants from Hong Kong and the US deal with a friend or a stranger. The results demonstrated that negotiators in the collectivist culture were more attuned to in-group/out-group distinctions than were negotiators in the US.

### **b) Individual Differences**

There have been conflicting histories in the study of personality and other individual variations in negotiation. Previous attempts to link broad personality traits to negotiating conduct produced a pattern that was unclear and erratic<sup>15</sup>. On the other hand, studies need to start using direct measures of motivational orientation as research on the prisoner's dilemma<sup>16</sup> indicates a connection between the two.<sup>17</sup> There is also contradictory data about gender disparities.

### **c) Technology infused negotiation and mediation**

One fascinating new development is the use of computers in negotiation and mediation. For an overview of research on group decision support systems (GDSS), papers by Pool et al. and Nyhart Samarasan on negotiation support systems (NSS) expand principles from GDSS to negotiation.<sup>18</sup> Arunachalam (1991) found that while negotiators using a computer-based medium demonstrated a significant increase in outcomes across repeated talks, computer-

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<sup>11</sup> Abebe Demewoz Mengesha et al., "Indigenous Conflict Resolution Mechanisms among the Kembata Society," *American Journal of Educational Research*, vol. 3, no. 2, 225-242 (2015), DOI: 10.12691/education-3-2-17.

<sup>12</sup> Leung, K. (1987). Some determinants of reactions to procedural models in conflict resolution: A cross-national study. *Journal of Personality and Social Psychology*, 53, 898–908.

<sup>13</sup> James A. Wall, Jr. & Michael W. Blum, "Negotiations," 17 *J. Legal Stud.* 2 (1991), <https://doi.org/10.1177/01492063910170020>.

<sup>14</sup> Triandis, H. C. (1989). The Self and Social Behaviour in Differing Cultural Contexts. *Psychological Review*, 96,269-289. <https://doi.org/10.1037/0033-295X.96.3.506>.

<sup>15</sup> Rubin, J. Z., & Brown, B. R. (1975). *The Social Psychology of Bargaining and Negotiation*. New York: Academic Press.

<sup>16</sup> Kuhlman, D. M., & Marshello, A. F. (1975). Individual differences in game motivation as moderators of pre-programmed strategy effects in prisoner's dilemma. *Journal of Personality and Social Psychology*, 32(5), 922–931.

<sup>17</sup> Van de Vliert, E., & Prein, H. C. M. (1989). The difference in the meaning of forcing in the conflict management of actors and observers. In M. A. Rahim (Ed.), *Managing conflict: An interdisciplinary approach* (pp. 51-63). Praeger.

<sup>18</sup> Andrea B. Hollingshead et al., "Group Task Performance and Communication Technology: A Longitudinal Study of Computer-Mediated Versus Face-to-Face Work Groups," 24 *Small Group Res.* 3 (1993), <https://doi.org/10.1177/1046496493243003>.

mediated negotiations were more antagonistic, took longer to finish, and produced worse results than face-to-face negotiation.

### III. NEGOTIATION

Negotiation is described as "to bargain, to confer for the purpose of mutual agreement or to arrange for by agreement"<sup>19</sup> in the Chambers English Dictionary. "*Including all cases in which two or more parties are communicating, each with the intention of influencing the other's decision,*"<sup>20</sup> is how Roger Fisher describes it in general. There appears to be more benefit to define the term widely than to restrict the idea of formal negotiation occurring at a table. It is a procedure when two or more parties exchange proposals, counterproposals, and compromises in an effort to come to a consensus.

Without even recognising it, we bargain every day. Commonplace conversations include settling on the conditions of a flat lease or the closing costs for buying a property, buying or selling any kind of commodity, interacting with contractors doing construction work on a structure, etc. The conventional approach to conflict resolution is via the legal system, as is well known, but the nature of the parties' relationship is not taken into consideration.

Even if the disagreement is settled, the parties will still have animosity towards one another, which will prevent them from engaging in any future business that may be advantageous to both of them. Conversely, the Alternative Dispute Resolution (ADR) method of negotiation uses tactics and abilities to keep the parties' status quo in place. "*Let us never negotiate out of fear, but let us never fear to negotiate,*"<sup>21</sup> said former US President John Fitzgerald Kennedy (1914–1963).

Negotiation's yin and yang, or complementary rather than antagonistic elements, may be seen as the emotional and intellectual components. They combine to create a dynamic process that may provide the best outcomes. In addition to the physical, political, and economic factors of the negotiation, a competent negotiator or mediator must consider the emotional state of each party involved as well as their own.

The emotional, cognitive, and behavioural aspects are the three main components of the negotiation conflict factor. For psychologists in particular, the emotional component of every

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<sup>19</sup> Chambers English Dictionary 7th Ed. Edinburgh, W & R Chambers Ltd, 1990, p.961.

<sup>20</sup> Roger Fisher, *Negotiating Power: Getting and Using Influence*, in J.W. Breslin & J.Z. Rubin (eds), *Negotiation Theory and Practice*, The Program on Negotiation at Harvard Law School, Cambridge, Massachusetts, pp. 127–128.

<sup>21</sup> John F. Kennedy, *Inaugural Address*, January 20, 1961, <http://www.bartleby.com/124/pres56.html>.

disagreement is crucial.<sup>22</sup> In contrast to psychologists, however, lawyers-mediators frequently wish to ignore the emotional aspects of the dispute resolution process—or at the very least, not to encourage parties to delve deeply into their feelings—because they think doing so could make matters more complicated or make them incapable of controlling the disputants' behaviour.

#### IV. MEDIATION

When it comes to helping disputants look "*outside the box*," mediation prioritises the interests of the parties and concentrates on constructive conflict management. Long-term disagreements often result in failed negotiations because both sides have narrow perspectives on how to resolve the underlying problems.<sup>23</sup> A mediator helps the parties reach a settlement that satisfies both of them by understanding their needs and interests.

One may refer to mediation as a "*rendezvous discipline*" as it draws on expertise from many other fields.<sup>24</sup> Since mediation transcends the boundaries of the legal system, concerns about emotions, psychology, economics, and even philosophy may be sent to a mediator.

Contrary to popular belief, psychology and mediation have a closer link. The parties cannot reach an appropriate choice if they do not use their mental skills. Experienced mediators make an effort to comprehend the psychological states of the parties both before and during mediation. A mediator is better able to explain to parties that concessions must be made in order to reach a settlement since they know how each party will respond in a particular circumstance.

Another way to characterise conflicts is as an exaggerated disagreement. The apparent disagreement is almost always much bigger than the actual dispute. *Cognitive distortions*<sup>25</sup> such as *overestimation*<sup>26</sup>, *cognitive labelling*<sup>27</sup>, *assumptions based on mind-reading*<sup>28</sup>, *personalisation*<sup>29</sup>, and *self-serving*<sup>30</sup> bias are all responsible for this kind of cognitive exaggeration<sup>31</sup>. A mediator aims to comprehend the psychology of the parties involved in order

<sup>22</sup> Dr. Jim Taylor, How Do We Humans Ever Make Good Decisions?, Dr. Jim <http://www.drjimtaylor.com/4.0/how-do-we-humans-ever-make-good-decisions/>.

<sup>23</sup> Michael Roberts, Why Mediation Works When Negotiations Fail, Mediate.com (Jul. 2002), <https://www.mediate.com/articles/roberts4.cfm>.

<sup>24</sup> Charlie Irvine, Breadth or depth? Why mediation should be proud to be a 'rendezvous discipline', Kluwer Mediation Blog <http://kluwermediationblog.com/2011/09/08/in-praise-of-the-rendezvousdiscipline/>.

<sup>25</sup> Alice Boyes, 50 Common Cognitive Distortions, Psychology Today, <https://www.psychologytoday.com/blog/in-practice/201301/50-common-cognitive-distortions>.

<sup>26</sup> Human beings have the tendency of overvaluing things belonging to them. In a dispute, this bias is extended to undervalue entities that belong to others

<sup>27</sup> Once a party labels the other mentally (usually, negative labels), he/she will be prejudiced and reject any subsequent evidence suggesting the contrary.

<sup>28</sup> People often presume what is going on in someone's mind even though they might not be thinking about it.

<sup>29</sup> Personalization refers to an individual taking an incident or event personally that may not be necessarily personal in the first place.

<sup>30</sup> People often attribute positive events to their character while assigning negative qualities to other individuals.

<sup>31</sup> Parties to a dispute (or humans generally) tend to blow the other side's faults out of proportion, whether

to predict potential outcomes of the conflict by fostering communication between them.

Conflicts may escalate or de-escalate depending on how parties communicate their opinions, which are a reflection of their emotions. If the listener is more comfortable with direct communication, for example, an indirect communicator may come out as evasive, vague, and suspicious<sup>32</sup>; this makes it difficult for the listener to accept the communicator's offer. Those who favour indirect communication, on the other hand, see a direct communicator as impolite, unyielding, and careless. Both situations will probably result in the parties' attempts at negotiation failing and the disagreement turning into a formal dispute.

The parties bring deeply ingrained recollections of what transpired to the mediation table, which are stored in "*documents*" that we refer to as tales. Of course, these tales are selective versions in which the teller conveys the pertinent information while leaving out the rest, thus they do not include every detail of what the teller went through. But meaning is arbitrary; it is formed by personal values, views, beliefs, and allegiances.<sup>33</sup>

An atmosphere of hyper-attention and greater emotional reactivity is often created in high-stakes mediations, such as those involving the possible loss of child custody or the split of a family company, by elevated worry and terror. Consequently, the first exchanges between the mediator and the clients are both potentially dangerous and full of chances to establish a framework for settling long-standing conflicts. In addition to potentially disrupting communication—a single eye roll at a sensitive moment can jeopardise the entire process—this state of elevated awareness and emotional stimulation can also help parties see things differently, especially in response to the mediator's perceptive interventions. The mediator may "*reframe*" a conversation at these highly sensitive times to provide other readings of entrenched viewpoints.<sup>34</sup>

"*What is truer than truth?*" novelist Isabel Allende posed this question in a recent presentation. "*The story*," she claims, is the solution.<sup>35</sup> Because our tales link bits of raw facts in a manner that has specific significance for us, they seem to be so real.<sup>36</sup> We often imbue stories with moral importance as a way of trying to make sense of the world. It is not the case that all sides are to fault. Stories about good and evil energise us all mentally. In response to the question,

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consciously or unconsciously.

<sup>32</sup> Joel Lee, Thoughts on Direct and Indirect Communication, Kluwer Mediation Blog <http://kluwermediationblog.com/2012/05/14/thoughts-on-direct-and-indirect-communication/>.

<sup>33</sup> Kenneth Cloke & Joan Goldsmith, *Resolving Personal and Organizational Conflict 1-10* (2000).

<sup>34</sup> Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (2000).

<sup>35</sup> Isabel Allende, Tales of Passion, TED Talk (Mar.2007), [http://www.ted.com/talks/isabel\\_allende\\_tells\\_tales\\_of\\_passion.html](http://www.ted.com/talks/isabel_allende_tells_tales_of_passion.html).

<sup>36</sup> Peter Guber, *The Inside Story*, 2011 *Psychology Today* 79 (Mar. 15, 2011).

"What is our deepest need?" psychotherapist Michael Elkin says, "Innocence."<sup>37</sup> He is referring to the need to believe that we are good, innocent, and righteous.

## V. ESSENTIAL APPROACHES UNDERTAKEN IN THE PROCESS OF NEGOTIATION AND MEDITATION

### (A) Approaches undertaken during negotiation

An alternative dispute resolution (ADR) procedure called negotiation uses tactics and abilities to keep things as they are between the parties. John Fitzgerald Kennedy, a former US president who served from 1914 to 1963, says, "Let us never negotiate out of fear, but let us never fear to negotiate."<sup>38</sup> Some authors have claimed that when it comes to negotiation, it entails several social techniques such as *cooperation, persuasion, communication, competition, and power dynamics*; it also utilises individual psychological processes such as *motivation, emotion, and cognition*; and because it is always socially situated, it may encompass many different interpersonal contextual factors. Therefore, in order to successfully support the parties in concluding negotiations and arriving at mutually acceptable solutions, the negotiator must be aware of the psychological aspects of the issue.<sup>39</sup>

A negotiator should be familiar with certain tactics and abilities before starting a discussion. Among these tactics are:

- Comprehensive or issue-resolution
- Competitive or Distributive

### (B) Integrative or resolution-based methodology

This strategy is used when the disputing parties have a history of doing business together in the future. It seeks to maximise the interests of disputants, thus removing themselves from the problematic subject and considering a range of choices to achieve their shared goals. This strategy has been referred to as the "win-win" strategy because, upon resolution of the dispute, the disputing parties feel as if they have gained rather than lost anything.

The integrative approach is the most effective negotiation tactic for preserving the current connection between conflicting parties. *Fisher and Ury*<sup>40</sup> suggest that negotiators should take

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<sup>37</sup> Michael Elkin, Presentation at Annual Conference of the Center for Self-Leadership (October 2011).

<sup>38</sup> John F. Kennedy, Inaugural Address, January 20, 1961, available at <http://www.bartleby.com/124/pres56.html>.

<sup>39</sup> M.J. Gelfand, C.A. Fulmer, and L. Severance, "The Psychology of Negotiation and Mediation," in 3 Handbook of Industrial and Organizational Psychology 495, 498 (2010).

<sup>40</sup> Roger Fisher, William Ury, & Patton B. (1991): *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd ed. (New York: Penguin Books).

these steps to implement the integrative approach:

- i. Address the issue independently from the individuals involved. Ignoring personal relationships between competing parties or negotiators and concentrating on the issue's worth.
- ii. Emphasise placed on interests over positions. Clearly define the aims and motivations of competing parties and prioritise their distinct interests rather than their stances.
- iii. Utilise brainstorming to provide a range of possibilities for addressing the competing parties' demands.
- iv. Demand that the discussions adhere to an objective standard by evaluating the results against clearly identifiable criteria based on objective standards.

### **(C) Distributive or competitive approach**

This technique is not well regarded in comparison to an integrated strategy. The distributive technique, commonly referred to as the 'win-lose' strategy, is compared to litigation since it results in one side winning and the other losing. The ensuing impact in the use of this approach is the inability of both sides to win but rather parties set positions and try in the process of bargaining to persuade the opposite party to agree to such views. The bargainer utilising this method tends to be harsh, forceful and skilful in maximizing his/her main self-interest.<sup>41</sup>

This strategy is a zero-sum bargaining in the manner that a single party's gain results in the detriment of another party. In other words, the accomplishment of a party comes at the expense of another party. It is worthwhile to remark that the negatives surpass the positives of distributive method. It is inefficient, inappropriate agreements are the outcomes of such *discussion, aggressive bargaining is promoted, relationships are ruined* etc.

throughout addition, due to the fact that this technique tends to be competitive, it shows adversarial tendencies throughout the course of its procedures. Therefore, as there have been agitations from the population for a more flexible and cost-effective ways of settling conflicts, the employment of distributed approach should be substituted with by negotiation practitioners.

### **(D) APPROACHES UNDERTAKEN DURING MEDIATION**

During mediation, mediators are often allowed to use a wide range of tactics and approaches,

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<sup>41</sup> Henry Brown & Arthur Marriott (2011): ADR: Principles & Practices (London: Sweet and Maxwell).

which frequently differ from one mediator to the next based on factors including *personality, background, and views on the function* of mediation.<sup>42</sup>

As has been well noted, there exists a significant degree of heterogeneity in the use of mediation both globally and domestically. Moreover, mediation functions in a range of social and legal situations and is used for a number of goals. As a result, the mediator often has a variety of training programmes, cultural backgrounds, skill sets, and working methods.<sup>43</sup> All of these elements add to the difficulty of attempting to characterise and define mediation techniques. Several models are used by some mediators during a single mediation.<sup>44</sup>

Different jurisdictions and topic areas use different Mediation methods.<sup>45</sup>

1. **Evaluative Mediation:** where parties are encouraged to reach a settlement in accordance with their entitlements and rights within the expected spectrum of court remedies.
2. **Facilitative Mediation:** where parties are pushed to negotiate according to their requirements and interests rather than their strict legal rights.
3. **Settlement Mediation:** where individuals are urged to compromise in order to settle the differences between them.
4. **Transformational Mediation:** where parties are encouraged to deal with the root causes of their conflicts with the goal of repairing their relationship as a foundation for settlement.

## VI. DYNAMICS OF AN EFFECTIVE MEDIATION PROCESS: NAVIGATING ITS VARIED DIMENSIONS

In order for the parties to reach an appropriate resolution, during the processes or a mediation or a negotiation the following are required to be effectively met:

1<sup>st</sup> it has to have "*an impartial third-party facilitator*" who assists the parties in exploring their options;

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<sup>42</sup> Y. Shamir, "Alternative Dispute Resolution Approaches and Their Application," in Technical Documents in Hydrology, no. 7 (UNESCO, 2003), p. 26.

<sup>43</sup> P.A. De Voe & C.J. Larkin, "Cultural Challenges to Mediation," ACResolution, A Quarterly Magazine, Fall-Winter 2007, pp. 30-31.

<sup>44</sup> M. Drews, "The Four Models of Mediation," DIAC Journal- Arbitration in the Middle East, Vol.3, No. 1(1), 2008, p. 44.

<sup>45</sup> P. Fenn, Introduction to Civil and Commercial Mediation, Part 1 (Chartered Institute of Arbitrators), p. 42, para. 4.12 provides for a contingency approach to mediation, which means that there is no set procedure but the procedure is tailored to suit the parties and the dispute in question. This often means that mediation is conducted without joint meetings, and the mediators play a variety of roles.

2<sup>nd</sup> the mediator must "*protect the integrity of the proceedings*" by establishing ground rules that all parties must abide by and maintaining the confidentiality of the proceedings;

3<sup>rd</sup> there needs to be "*good faith from the participants*";

4<sup>th</sup> those with the full authority to make decisions must attend the proceedings to demonstrate their genuine commitment to the process. If one party is not fully in charge, the other party may quickly lose patience if they have to keep getting consent from higher-ups.

5<sup>th</sup> the mediator has to choose a suitable, neutral setting so that everyone can feel at ease and the process won't seem so daunting.<sup>46</sup>

There has been a contention that the efficacy of the procedures in place to support the right to seek justice is a determining factor in its realisation. The same should be accomplished via a framework built around the following tenets: *cost-effectiveness, party satisfaction, expedition, proportionality, equality of opportunity, fairness of procedure, and efficacy of remedies*.<sup>47</sup>

One may argue that treating any psychological issues that may come up during the mediation process is a necessary step towards obtaining party satisfaction. In addition to being an option to litigation and arbitration, mediation may also be seen from a psychological perspective. The parties' psychology is in play during mediation. The psychology of the mediators is also important. Academics have contended that psychological or emotional principles, often known as psychological barriers, impact and influence all disagreements. All disagreements and fights result in emotional harm.<sup>48</sup>

## **VII. THE EMOTIONAL UNDERCURRENTS: RELEVANCE AND SIGNIFICANCE IN THE FIELD OF NEGOTIATION AND MEDIATION**

In a recent poll, mediators who trained mediators assessed that resolving emotional conflicts was usually of greater significance than resolving substantive conflicts during a mediation session. Ineffective mediation may arise from inadequately addressing the emotional concerns. Two thirds of the most seasoned mediators, of the almost half of respondents, felt that mediation curriculum falls short in preparing mediators to handle parties' emotional outbursts.

"*Beyond Reason: Using Emotions as You Negotiate*" is their study on emotions in the bargaining process. Asserting that emotions are a factor in all negotiations, *Fisher and Shapiro* show how

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<sup>46</sup> Stephen R. Marsh, What is Mediation? (1997), (as quoted in C.R. Smith, Mediation: The Process and the Issues, Industrial Relations Centre, Queen's University Kingston, Ontario, 1998), p.3.

<sup>47</sup> M. Maiese, "Principles of Justice and Fairness," in G. Burgess and H. Burgess (Eds.), Conflict Information Consortium, Beyond Intractability, University of Colorado, Boulder (July 2003).

<sup>48</sup> F. Strasser & P. Randolph, Mediation: A Psychological Insight into Conflict Resolution (Continuum International Publishing Group London, New York, 2004), at pp. 2-30.

negative emotions may hinder integrative discussions as well as how good emotions can improve the process.<sup>49</sup>

Shapiro offers an intriguing categorization of the potential favourable and unfavourable effects that emotions might have on negotiators.<sup>50</sup> The drawbacks are as follows:

- a) Our focus may be drawn away from important issues by our emotions
- b) Expressing our feelings makes us more susceptible to manipulation
- c) Emotions impair our ability to think clearly; 4) they may even control us.

The advantages are as follows:

- a) Emotional awareness aids in knowing a person's needs and interests
- b) We convey other crucial details about who we are, where we stand, and how we want to be addressed via our emotions.

Emotions are thus constant and hard to manage. To be sincere, emotion is a determining factor in both negotiation and mediation. If the emotional components of bargaining are removed, all that remains is a cold, transactional exchange.

The human brain's remarkable ability to integrate information from both internal and external sources creates the subjective and emotional experience that directs perception and interpretation of events. Humans are thought processes, information processors, and decision makers; we are neither robot or computers. However, the emotions that go along with these mental processes are what give life its colour and mould our comprehension.

*"[T]he neurobiological evidence suggests that the aspects of cognition that we recruit most heavily in schools, namely learning, attention, memory, decision making, and social functioning, are both profoundly affected by and subsumed within the processes of emotion; we call these aspects emotional thought,"* as noted neurologist Antonio Damasio and renowned educator Mary Yang aptly note.<sup>51</sup>

According to the study Lehrer cited, decision-making is fuelled by human emotion. In one of the first studies on this topic, medical professionals were attending to a patient whose brain tumour had completely obliterated his ability to feel emotion.<sup>52</sup> The patient's inability to make

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<sup>49</sup> Edward J. Kelly & Natalija Kaminskiene, "Importance of Emotional Intelligence in Negotiation and Mediation," 6 International Journal of Comparative Jurisprudence (2016), <https://doi.org/10.1016/j.icj.2016.07.001>.

<sup>50</sup> Edward J. Kelly & Natalija Kaminskiene, "Importance of Emotional Intelligence in Negotiation and Mediation," 6 International Journal of Comparative Jurisprudence (2016),

<sup>51</sup> Mary Helen Immordino-Yang & Antonio Damasio, "We Feel Therefore We Learn: The Relevance of Affective and Social Neuroscience to Education," 1 Mind, Brain and Education 3 (2007).

<sup>52</sup> Jonah Lehrer, *How We Decide* 15 (2009).

even the most basic judgements, although having full cerebral functioning, was one of the condition's unexpected side effects. "*Emotions are an essential component of the decision-making process,*" the physicians concluded.<sup>53</sup> A mind devoid of feeling is incapable of making decisions. For mediators and negotiators, this means that it is not only unattainable, but also detrimental to repress emotion.

Some people could believe that emotions get in the way of reaching advantageous agreements throughout the mediation or negotiating process. The truth is that emotions may be used to establish a favourable environment that improves results. *Happiness, joy, and tolerance* are examples of these emotions that improve decision-making, inspire original problem-solving, boost teamwork, and lessen the need for divisive strategies.<sup>54</sup> *Anger, fear, and contempt* are examples of negative emotions that may lead to win-lose negotiations, encourage offer rejection, provide less opportunity for shared benefits, and lower the motivation to collaborate.

## VIII. EMOTIONAL OPTIMIZATION IN ADR: TOOLS FOR NEGOTIATIONS AND MEDIATIONS

In order to connect people's beliefs and wants with shared interests, the mediator or negotiator must discover methods to inspire and drive both customers and opponents. Rogers and Shapiro argue that addressing someone else's feelings head-on isn't the greatest approach to move things forward.

Most of the time, we are neither obligated or qualified to "*fix*" emotional issues. They identify five "*core concerns*" in their study that seem to be directly connected to emotional dissonance. The most effective strategy to manage emotions in the negotiating situation is to base decisions on these five key issues, which may also be used as a lever to maximise the advantages of good emotions and as a lens through which to see negative emotions. *Appreciation, affinity, acceptability, status, and role* are these five basic considerations.

### 1. Gratitude

The party's discomfort is often stemmed from the perception that they are not valued, regardless of whether it is motivated by fear, rage, or another emotion. Probably the best approach to express your gratitude to the other person is to pay close attention to what they have to say, demonstrate that you appreciate their time and opinions, and recognise their worries and emotions.

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<sup>53</sup> David Hoffman, "Mediation, Multiple Minds, and the Negotiation Within," 16 Harv. Negot. L. Rev. 297 (2011).

<sup>54</sup> Roger Fisher & Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (2006).

In order to express gratitude, the negotiator should do their hardest to establish points of agreement, refrain from criticising the other party, and concentrate on the ideas. A "thankful recognition" is the definition of appreciation. Effective mediators and negotiators recognise the value in what the other person believes, feels, or does; they also convey that they understand the other person's viewpoint, even when they do not agree with it; and they show that they are open to learning more.

## **2. Affiliation**

According to Merriam and Webster, the word "affiliate" implies to associate as a member or to bring or accept into intimate relation as a member or branch. This calls for the development of a connection. Establishing some kind of attachment is necessary in order to see the other party as a "you" as opposed to a "it".

"Our sense of well-being depends to some extent on others recognising us as a YOU," writes Goleman in "Social Intelligence." "Our yearning for connections is a primal human need; minimally as a cushion of survival."<sup>55</sup> The neuronal echo of that desire today makes us more sensitive to the distinction between IT and YOU and causes us to experience rejection on a par with actual physical pain.

The goal of affiliation is, to put it simply, to transform the other person from an enemy into a comrade. Occasionally, this is determined by identifying institutional relationships, such as affiliations to a certain school, or shared hobbies or interests outside of work. Even little gestures like a handshake, icebreakers, real compliments, or presents may create connections.

## **3. Independence**

A prevalent source of discomfort and exasperation during negotiations is the perception of losing control, intimidation, or control—possibly from the other party or from their own customer. Throughout a negotiation or mediation, input and consultation are required. When parties feel compelled to inform, consult, or negotiate, Rogers and Shapiro advise closely discussing the underlying regulations of the negotiation or mediation with the opposing side.<sup>56</sup> It's critical that pertinent parties to talks or mediations get along and see themselves as participants in the process.

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<sup>55</sup> Daniel Goleman, *Emotional Intelligence* 64-65 (1996); Keith G. Allred et al., "The Influence of Anger and Compassion on Negotiation Performance," *70 Organizational Behav. & Hum. Decision Processes* 175, 181 (1997) (when people are angry, they become even less likely to know what other parties want).

<sup>56</sup> Roger Fisher & Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (2006).

#### 4. Status

A person's status is the rank they now occupy. Ignorance of status may make a tough situation worse, especially if there is a sense of status difference between the parties due to variations in language or culture, historical relationships, or relative negotiating power.

The recognition of status is the crucial element. It is crucial that indicators of status be formally recognised. This is especially crucial in situations where there may be cultural differences between the parties. In most cases, it is preferable for the parties to formally acknowledge one other's status at the start of the negotiation or mediation process before moving on to more casual communication as it advances. In order to improve relationships, it is helpful to show respect and speak with reverence even when someone are not really in a position of authority during negotiations or mediations.

#### 5. Role

Participants in talks and mediations have roles to play. Identifying and accepting the part you perform in a negotiation or mediation, as well as acknowledging and respecting the roles others play, may help reduce negative emotions *like fear, wrath, and anxiety and create a more relaxed and happier environment.*

The following techniques may be used by the negotiator to increase trust and empathy in order to improve the emotional components of a negotiation or mediation, based on the five main issues in each case. Emotional obstacles at the table are recognised and addressed by the negotiator/mediator in an ideal negotiation/mediation process, which takes into account all relevant factors. One crucial non-negotiable component of a successful dispute resolution is the ability to identify and handle the emotional aspects of a negotiation in the earliest instances of the process.

The development of capacity for active listening is necessary for the recognition of emotions. Therefore, the secret to successful negotiation or mediation is listening. In negotiation and mediation, we "*listen*" to the words much too frequently and miss the nonverbal cues, cultural background, hidden meanings, and emphasis levels of the different parties—sometimes even our own clients—that are there. It is no accident that the Chinese character for "*to listen*" also includes the symbols for "*eyes*," "*undivided attention*," "*heart*," and "*you*" in addition to the sign for ears.

### IX. CONCLUSION & SUGGESTIONS

The intricate procedures of mediation and negotiation need emotional, behavioural, and

cognitive skills. Too frequently, and to the grave disadvantage of procedures encompassing *domestic, personal injury, transaction, and international geopolitical and corporate concerns*, the emotional component of the process has been downplayed or ignored for too long. In the twenty-first century, a good negotiator or mediator must be able to handle the emotional dynamic by acknowledging and controlling not just his or her own psychological personality but also the emotional components of other important parties.

Such procedures need to be designed to interrupt the cycle of action and response between parties and to provide everyone engaged with them regular respite. Particularly in highly charged situations, a mediator or negotiator must retain total detachment from negative feelings and impetuous actions.<sup>57</sup>

Recent studies show that prolonged exposure to negativity damages the region of the listener's brain responsible for making decisions. Ironically, while attempting to persuade the parties to resolve their disagreement peacefully, mediators are seemingly to be sacrificing their ability to resolve conflicts and make decisions.<sup>58</sup>

In order to make mediation more party-centric, it is advised that psychology play a larger role in the process. Mediators should be educated to deal with both psychology and human emotions. The use of psychology to mediation may have a significant impact. For instance, a recent psychology research found that illumination may amplify an individual's happy and negative emotions, which in turn affects their capacity to make logical decisions. Bright light has the potential to exacerbate a person's first emotional responses to other persons and things.<sup>59</sup>

In the context of negotiation and mediation, addressing issues of appreciation, affiliation, acceptability, status, and role is the most effective strategy to manage emotions. The negotiator can use the following techniques, based on the five main concerns, to increase trust and empathy and improve the emotional components of a negotiation or mediation: working with emotions in all negotiation dimensions; understanding emotional nuance resulting from power differentials, cultural nuances, or prior experiences; treating procedural issues with the identical vigour as substantive issues; actively listening and encouraging all parties to observe to each other.<sup>60</sup>

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<sup>57</sup>=Joel Lee, "Mindfulness and Mediation," Kluwer Mediation Blog (Oct. 14, 2015), <http://kluwermediationblog.com/2015/10/14/mindfulness-and-mediation/>.

<sup>58</sup> Christopher Bergland, "Chronic Stress Can Damage Brain Structure and Connectivity," *Psychology Today* (Feb. 12, 2014), <https://www.psychologytoday.com/blog/the-athletes-way/201402/chronic-stress-can-damage-brain-structure-and-connectivity>.

<sup>59</sup> NK Park & CA Farr, "The Effects of Lighting on Consumers' Emotions and Behavioral Intentions in a Retail Environment: A Cross-Cultural Comparison," 33 *J. of Int. Des'n* 17, 32 (2007).

<sup>60</sup>John Dewey, "Conflict is the gadfly of thought. It stirs us to," available at

Lastly, instead of going through the drawn-out legal processes, negotiation and mediation are now used to manage and settle our issues. Our world is now liveable despite the disparities in our origins, thoughts, values, and beliefs, thanks to the effective dispute resolution and conflict resolution methods that negotiation and mediation have shown to be in recent years.

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