

Local Mediation in Advance of Armed Conflict

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I. THE INQUIRY

The phrase “mediating armed conflict” implies that mediation directed at representatives of warring communities by *outsiders* (here Americans) *after* armed conflict has already erupted. This presumed conception of the relationship between (Americanized) mediation and armed conflict carries two significant risks.

First, inattention to critical structure and timing issues may cause us to overlook fundamental reasons for frequently disappointing results. American international mediation may be too lofty (by involving military or political leaders but not the communities themselves), too foreign (without foundation in local political and legal culture), or too late (triggered at a point when mediation may be most difficult to apply).

Second, by framing the discussion too narrowly, we may fail to pursue a related, equally important, though structurally different, approach to the topic: the role of Americans, if any, in bolstering local community mediation by *insiders* in *advance* of armed conflict.

In an attempt to mitigate these two risks, Part II of this Article embarks on a modest exploration of the relationship between the unavailability of local mediation and the propensity of conflicts to erupt into violence. Part III then addresses the pitfalls of American assistance in the development of local mediation capacity and pleads for more candid and creative avenues of engagement.

II. LOCAL MEDIATION INCAPACITY AND VIOLENCE

A. *Limited Options*

Societies vulnerable to armed conflict have few available alternatives. Sadly, where people are fighting over historically overlapping claims to land,

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rights of worship on particular sites, reparations for past offenses, and the exploitation of natural resources, including oil and water (a liquid more important to some communities than even their own blood), communities are limited to several undesirable mechanisms for resolving their conflicts.

Political processes are frequently captured by the powerful over the weak and parallel the fault lines of the conflict itself. Civil society may be similarly divided at local levels of social interaction. The court system (as part of the state) normally belongs (or is seen as beholden) to one community or another. Even when the courts evenly represent the communities in conflict, they tend to perform poorly. Courts, the most neglected branch of government, are vulnerable to political interference, chronically slow, and easily corruptible.¹ Furthermore, binary judicial decisions (stay-leave, use-lose, build-destroy, and pray-grieve) are too crude, too partial, or too absolute to provide a durable accommodation of seemingly irreconcilable and mutually exclusive claims.

In addition to the limitations of courts, mediation (even in its most evaluative or position-based and least facilitative or transformative models) appears to be unavailable as an option for resolving conflicts in many societies, including those prone to violent conflict. Conciliation is a word on the books of civil procedure codes, but it represents a perfunctory gesture that adds little real value to people engaged in disputes.

On this rather limited menu of conflict resolution options, the courts are under the political or economic influence of one (not both) of the conflicting parties or take too long to be of service. The political system is captured by one group or blocked by squabbling coalitions. Mediation and even more limited forms of conciliation are not practiced. Thus, violence and conquest by force become increasingly and frighteningly attractive.

The recent conflicts in the state of Gujarat, India, rocked by riots in the spring of 2002,² and still tense from violent rhetoric,³ arose from an

¹ See, e.g., Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL L. REV. 351, 353–58 (2002).

² See Celia W. Dugger, *Hindu Rioters Kill 60 Muslims*, N.Y. TIMES, Mar. 1, 2002, at A6 (reporting that Hindu mobs rampaged through Ahmedabad, Gujarat, India killing more than sixty Muslims in their homes and shops one day after a Muslim mob killed dozens of Hindus, mostly women and children, by setting fire to a train carrying Hindu activists returning from Ayodhya); see also *Death Toll Tops 500 as Religious Violence Continues in India*, N.Y. TIMES, Mar. 4, 2002, at A3 (reporting that the religious riots between Hindus and Muslims claimed more than 500 lives in Gujarat).

³ See Celia W. Dugger, *More than 200 Die in 3 Days of Riots in Western India*, N.Y. TIMES, Mar. 2, 2002, at A1 (quoting a leader of the women's wing of the Gujarat branch of the World Hindu Council, who survived the train attack in Godra: "We cannot sit with

underlying dispute between Muslims and Hindus. The issue presents mutually conflicting rights to tear down, rebuild, and pray in a historically disputed place of worship in Ayodhya in the state of Uttar Pradesh.⁴ The Bharatiya Janata Party (“BJP”) in control of the state government in Gujarat (as well as the national center) and many smaller parties participating in the national government are partial to Hindu interests.⁵ Civil society in Ahmedabad, the capital of Gujarat, is organized along ethnic and religious lines, leaving it much more vulnerable to communal violence.⁶

How have the courts met the challenge? Notoriously slow, the court system first encountered the Ayodhya dispute in 1950.⁷ Court procedures have restricted prayer for now,⁸ and are set on a course to determine the

our hands tied. We have to do something. If the Muslims cannot live in peace with Hindus in India, then why don't they go back to Pakistan?”).

⁴ Hindu fundamentalists want to build a temple in Ayodhya, at a site also revered by Muslims. See Amy Waldman, *India's Big Dig: Will It Settle or Inflamm a Controversy?*, N.Y. TIMES, Apr. 3, 2003, at A10.

⁵ See *id.* (reporting that the dispute over Ayodhya, which has been in India's judicial system for more than half a century, has helped propel the Hindu nationalist BJP party to national power); see also *Hindu Temple Plan in India Stokes Tensions*, N.Y. TIMES, July 20, 2003, §1, at 11 (reporting that the executive panel of the governing party, the BJP, urged the Indian government to pass a law to allow Hindu groups to build the temple in the northern city of Ayodhya); Celia W. Dugger, *Religious Riots Loom Over Indian Politics*, N.Y. TIMES, July 27, 2002, at A1 (reporting “widespread allegations that the [BJP], the Hindu nationalist party that leads India and Gujarat, and the World Hindu Council were complicit in the attacks on Muslims”).

⁶ See Celia W. Dugger, *After Deadly Firestorm, India Officials Ask Why*, N.Y. TIMES, Mar. 6, 2003, at A3 (quoting Mr. Varshney that Godhra, the site where the train carrying Hindu fundamentalists was ignited, “patently lacks the kind of social, civic and workplace integration that blesses more peaceful cities”). See generally Ashutosh Varshney, *Ethnic Conflict and Civil Society: India and Beyond*, 53 WORLD POL. 362 (2001) (arguing that there is an integral link between the structure of civil life in a multiethnic society, on the one hand, and the presence or absence of ethnic violence, on the other).

⁷ *Timeline: Ayodhya Crisis*, BBC NEWS, at http://news.bbc.co.uk/1/hi/world/south_asia/1844930.stm (Feb. 27, 2002) (“Idols of Lord Rama appear[ed] inside the mosque, allegedly placed there by Hindus. Muslims protest[ed] and both parties file[d] civil suits. The [Indian] government proclaim[ed] the premises a disputed area and lock[ed] the gates.”); see also *Ayodhya: Summary of the Legal Findings*, at www.ayodhya.com/ayotemplet.jsp?sno=37&E37=1 (last visited Sept. 22, 2003) (giving a history of the conflict and the legal findings before and after India's independence).

⁸ Saritha Rai, *Court in India Orders Archaeological Study of Disputed Holy Site*, N.Y. TIMES, Mar. 6, 2003, at A13 (reporting that the Supreme Court of India banned religious activities around the disputed site in 2002 to avoid Hindu-Muslim clashes); see also *Faruqui v. Union of India*, A.I.R. 1995 S.C. 605.

veracity of historical claims (instead of building a foundation for *both* communities to satisfy their thirst for spiritual expression).⁹

Until recently, there was no mediation system in the state other than a perfunctory people's court or *lok adalat* process for auto accidents and family disputes. The recent civil procedure reforms of 2002 still await effective implementation.¹⁰ A new mediation center, itself inspired by American exchange, is still in its infancy. In light of these seemingly ineffectual political and legal options, the incentives for violent intervention gain perverse intensity.

B. Diagnosing Submergent Options

1. The Emergence Metaphor

The design of a cure for these social conditions presupposes a diagnosis of the problem. Why do legal mediation systems tend to be so underdeveloped, even in societies that have rich pre-colonial analogues (e.g., *sulha* in Egypt or *dading* in Indonesia), as well as foundational legal authority for conciliation in their modern procedural codes? In Indonesia, for example, there is practically no working alternative dispute resolution (ADR) system other than the use of illicit payment to influence judicial decisions.¹¹ And why in India, the country led to independence by Gandhi, so far ahead of her day in finding transformative value in settlement,¹² is mediation still a relatively unknown practice?

⁹ See Rai, *supra* note 8, at A13; see also *Proof of Temple Found at Ayodhya: ASI Report*, at <http://www.rediff.com/news/2003/aug/25ayo1.htm> (Aug. 25, 2003) (finding evidence that a structure resembling a 10th century Hindu temple exists beneath the Babri Mosque site); see also David Rohde, *Excavation's Finding at Mosque Site in India Could Fuel Dispute*, N.Y. TIMES, Aug. 27, 2003, at A2 (suggesting that these findings will only prolong the violent decades-old holy conflict between Hindu nationalists and Muslim groups).

¹⁰ Salem Advocate Bar Ass'n v. Union of India, (2002) 35 S.C.R. 146–52 (noting that “appropriate rules” need to be “framed” for mediation); see INDIA CODE CIV. PROC. § 89(1)(a)–(c), Order X (as amended in 2002 by Code of Civil Procedure (Amendment) Act 1999).

¹¹ Hiram E. Chodosh, *Indonesia*, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 705, 709 (Herbert M. Kritzer ed., 2002).

¹² See MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 134 (6th ed. 1968):

[B]oth were happy over the result, and both rose in the public estimation. . . . I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private

To answer this complex question, it may be useful to draw on the growing field of scholarship on emergence, developed in diverse fields from biology to computer science.¹³ Emergent systems are self-organizing systems in which relatively simple organisms produce a higher form of community or global behavior of a very sophisticated and intelligent quality. How do ants find food, fish swim in schools, slime mold (a brainless organism) move along the forest floor? How does computer software recognize voice or handwriting? How do social organizations change rapidly? They perform these feats without a pace setter or master planner, but rather through a process of interaction in which individual units (usually a few in the beginning) send off powerful signals (pheromones from ants or cyclic AMP from slime mold) to their peers. Peer interaction then reinforces a communal level of behavior.¹⁴

I do not draw on the emergence metaphor¹⁵ to make a crude point about the equivalence of social and political systems with those of nature; nor do I wish to trivialize the importance of political leadership in social organization. I draw on this metaphor for four specific reasons. First, the metaphor focuses our attention on the self-organizing properties of legal cultures that are often so impermeable to outside-in or top-down intervention. Second, it helps us to concentrate on the conflict (or social dilemma) between individual incentives

compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.

¹³ See SCOTT CAMAZINE ET AL., SELF-ORGANIZATION IN BIOLOGICAL SYSTEMS 8 (Phillip W. Anderson et al. eds., 2001) (“Self-organization is a process in which pattern at the global level of a system emerges solely from numerous interactions among the lower-level components of the system. Moreover, the rules specifying interactions among the system’s components are executed using only local information, without reference to the global pattern.”) (emphasis omitted).

In a school of fish, for instance, each individual bases its behavior on its perception of the position and velocity of its *nearest* neighbors, rather than knowledge of the global behavior of the whole school. Similarly, an army ant within a raiding column bases its activity on *local* concentrations of pheromone laid down by other ants rather than on a global overview of the pattern of the raid.

Id.

¹⁴ See STEVEN JOHNSON, EMERGENCE: THE CONNECTED LIVES OF ANTS, BRAINS, CITIES, AND SOFTWARE 11–23 (2001). A similar process is the subject of a brilliant book by Malcolm Gladwell. Gladwell identifies three common elements in both social and biological contagions: a *few* people become infected with a *sticky* idea and spread it through *peer-to-peer* interaction; MALCOLM GLADWELL, THE TIPPING POINT 15–29 (2000).

¹⁵ For the first application of the emergence metaphor to justice reform, see Hiram E. Chodosh, *Emergence from the Dilemmas of Justice Reform*, 38 TEX. INT’L L.J. 587, 590–95 (2003).

and the collective goals of the reforming community. Third, the lens of emergence concentrates our thinking on the behaviors of the primary participants in the process rather than what the leaders or others espouse in their rhetoric. Finally, although many may take offense to an analogy between legal actors and less intelligent species or technology, I find it inspirational. Can we not learn from unintelligent organisms that are collectively smart when so many really smart people are collectively so self-destructive, particularly in their use of violence as a means to settle social conflict?

For inspiration, as one of many examples, think of the slime mold! If a scientist placed some slime mold at one end of a complex maze and food at the other, who would have guessed that these brainless organisms could solve the puzzle? A few years ago Toshiyuki Nakagaki demonstrated that the slime mold could meet the challenge.¹⁶ Certainly, if the slime mold can achieve such marvels, we surely can figure out ways to emerge from the seemingly endless cycles of violence in so many regions of the world.

To understand why mediation systems are underdeveloped, we should not pose the question from an essentialist notion of legal or political culture. Such notions suggest offensively that there is something uniquely Indian about delay or essentially Indonesian about corruption. Instead, we should see these problems as both symptoms and causes of systemic dysfunction in which individual incentives and the collective behavior they generate create vicious cycles. Individuals respond to the limited options presented by the system (*e.g.*, serving a client's interest by delaying a case or bribing a judge); in turn, institutional dysfunction may be powerfully reinforced by these individual incentives (*e.g.*, the difficulty in imposing time limits or implementing integrity standards against these more powerful behavioral motivations).

2. *The Global and National Context*

The world's judicial systems are under enormous stress. The major trends of democratization, privatization, and globalization have intensified court failure just when these trends seem to call for stronger, more impartial, and more efficient courts. The self-limitation of the state that is so common to these three trends (what Jeffrey Sachs called the rule of law paradox (*i.e.*, the conflicting need of the state to be simultaneously strong and self-

¹⁶ Toshiyuki Nakagaki et al., *Maze-Solving by an Amoeboid Organism*, 407 NATURE 470, 470 (2000) (concluding that "cellular materials can show a primitive intelligence").

limiting))¹⁷ requires strong judicial functions (as the arguably least dangerous of institutions to be entrusted with this critical role).

These new pressures and the concomitantly higher stakes in court decisions, however, have not been accompanied by proportionate investments in the courts, their institutional foundations, procedures, or human and financial resources. Thus, courts remain extremely vulnerable to outside influence, and corruption and delay appear to be on the rise, further undermining the rule of law goals that are so widely shared.¹⁸ Consider two of the four largest democratic systems in the world.

In India, as an extreme example of negative trend, courts are falling further behind. With a crushing backlog estimated at over thirty million cases, urban courts are taking more than fifteen years to go to trial. In September 2000, when I last visited the City Civil Court in Ahmedabad, a city of four million people, the judges assigned to civil matters (beyond small causes) for the entire city were hearing cases filed between 1986 and 1990. Potentially responsive mediation reforms, promulgated in 1999 and implemented into law in July 2002, have produced only a small number of actual mediations throughout the country.¹⁹

In Indonesia, weak terms of judicial employment include: low salaries; politicized appointment, transfer, or promotion systems; insecure terms of office or tenure; and limited forms of economic and personal security. These terms increase the need to seek illegal monetary payments and to avoid political affronts. Vague ethical norms, a poorly regulated and fragmented body of legal professionals, poor monitoring capacity, corrupted review systems, and ineffectual prosecution and enforcement substantially reduce the risk of illicit behavior.²⁰ Opportunities for corruption remain unchecked by an opaque procedural system of limited joint communication, reasoning, or publicity; a slow and fragmented process with multiple steps and appeals; and a state monopoly on the resolution of legal disputes that puts too much discretion in too few hands.²¹

¹⁷ Jeffrey D. Sachs, *Globalization and the Rule of Law*, Remarks at the 1998 Alumni Weekend at Yale Law School (Oct. 16, 1998), in *YALE OCCASIONAL PAPERS*, 2d ser., No. 4, available at <http://www.law.yale.edu/outside/html/Publications/pub-sachs.htm>.

¹⁸ See Chodosh, *supra* note 1, at 353–56.

¹⁹ See INDIA CODE CIV. PROC. § 89(1)(a)–(d), Order X (as amended by Code of Civil Procedure (Amendment) Act 1999) (describing and directing court to utilize dispute resolution mechanisms, including arbitration, conciliation, judicial settlement, judicial settlement through *lok adalat*, or mediation).

²⁰ Chodosh, *supra* note 11, at 709

²¹ *Id.*

C. *The Resulting Ineffectiveness of Mediation*

In either of these and many additional national contexts, mediation systems might be expected to help countries reduce delay (as in India, although this would be an overly narrow objective), bust the state monopoly on the dispute resolution process (as in Indonesia), and thus reduce corruption, or even resolve communal conflicts in advance of their violent eruption (as in the Middle East). Mediation is not likely to flourish, however, precisely because of the underlying problems that frustrate court performance.

Specifically, the incentives of each participant in the system may directly frustrate the growth of mediation systems. If litigants can buy justice in Indonesia or can delay it in India with impunity, why would they care to settle cases consensually? And if their incentives for settlement are so weak, the initial demand for mediation services will be low. The supply of mediation services will thus exceed initial demand, thus stunting development of the potentially valuable communications skills and facilitated bargaining strategies clustered under that rubric. If lawyers are paid by court appearance (*e.g.*, the Indonesian transport fee system) or a large fee upfront, with no limit on subsequent events for which fees may be charged (as is common in India), they are not likely to support mediation for fear it will reduce their income. If judges are evaluated per decision (as in India) and not credited with settled cases, and if Indonesian judges multiply their paltry income with pre- and post-judgment bribes and gifts, they are not likely to support consensual settlements.²² Additionally, parties may be skeptical of particular features (*e.g.*, private caucusing that appears to provide opportunity for manipulation and corruption).

In sum, the local and individual incentive structures do not support the growth of mediation. Unfortunately, top officials and foreign experts often under-appreciate these critical factors. The success or failure of an intervention, from this lofty and removed point of view, is merely a question of the correct institutional design. Top officials often think that they can reform the legal culture by top-down decree, judicial order, or amendments in the codes of procedure. One former Indian Supreme Court Chief Justice expressed this point when he said that implementation of new civil procedure code rules on mandatory ADR will only take place if each Chief Judge of the High Courts announces the implementation of mediation. Such a

²² See Hiram E. Chodosh, *Mediating Mediation in India*, at http://www.lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf (last visited Sept. 26, 2003), reprinted in HIRAM E. CHODOSH, ET AL., *MEDIATION IN INDIA* 101-29 (forthcoming 2003).

pronouncement of support is undeniably useful, but by itself, support from above, though arguably necessary, will not be sufficient to develop a functioning mediation system from below.

Does this mean that the growth of mediation systems to meet the needs of societies in conflict is doomed to failure or that the adaptation of these systems will so alter them that they will cease to provide value? I do not hold this view, but the impediments must and can be addressed by thinking through and adjusting the incentive structures that hinder reform.

This process of reform means improving the conditions in which the justice system operates. Naturally, this includes efforts to limit the opportunities for abuse of that system. More importantly, the growth of effective mediation practices must address the emergent, or submergent, properties of legal processes by tuning the incentive structures to allow individual motivations to produce desirable social outcomes. For example, judges in India need not be evaluated only on the basis of decisions made; cases dismissed because of settlement may also be factored into their reviews. Lawyers can be counseled on how to charge their clients for their role in achieving successful settlements (a factor of the social or economic value their clients derive from the mediation process in contrast, if any, to litigation). Litigants can be convinced that their interests are not well served by delay. Alternatively they can be charged for it (*e.g.*, through realistic pre-judgment interest rates and the requirement of modest bond posting). The frustration of most societies must be channeled effectively to hold politicians accountable for investing in the courts generally and a wide variety of dispute resolution techniques more specifically. Leaders can understand the reliance of effective reform on low-level participants and work with them on creating the conditions in which systems will not only perform well but will provide individuals with the opportunity for both monetary and psychic rewards.

III. PITFALLS OF AMERICAN ASSISTANCE

With these local conditions in mind, is there any role for American assistance in the development of effective mediation systems? As Dean Nancy Rogers noted in her introductory remarks to this Symposium, we risk forgetting that just twenty-five years ago a conference of this sort would have presumed mediation to be a U.S. import. It is indeed ironic that Americans preach the gospel of new ADR techniques to foreign countries whose pre-

colonial experience was rich with extremely diverse and socially relevant models (e.g., the *Panchayat* system in South Asia).²³

We also risk ignoring Professor John Henry Merryman's admonishments that American reformers tend to be unfamiliar with foreign systems, lack a respectable theory, are unaccountable to the consequences of reform failure, and have a tendency to impose their uninformed views and foreign values on legal communities in distress.²⁴ Without attention to these lessons and the exploration of reconstructive responses, we may fall victim to an inescapable intellectual pendulum. The folly of our approach is intermittently exposed and then quickly forgotten.²⁵ Consequently, we swing back and forth between arrogance insulated by ignorance on one extreme to embarrassment, disillusionment, and self-criticism on the other. We can no longer afford, however, the unsatisfactory choice between equally undesirable starting points: either foreign assistance is indispensable²⁶ or it is useless. Reaching a different plane of interaction will require both candor about the limitations of the old system and creativity to find new starting points for our cross-national relationships.

A. *Unfamiliarity*

For American experts engaged in mediation reforms abroad, unfamiliarity with local conditions can be fatal to the benefits of their advice. To take India as one example, insistence on purely facilitative forms of

²³ See Hiram E. Chodosh, *Judicial Mediation and Legal Culture*, 4 ISSUES OF DEMOCRACY 3, 8–9 (Dec. 1999), at <http://usinfo.org/usia/usinfo.state.gov/journals/itdhr/1299/ijdl1299.pdf>.

²⁴ See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 481 (1977). For a more recent critique of U.S. foreign assistance, see generally THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999) (noting a lack of humility, superficial assessment, simplistic modeling, misplaced emphasis on ends instead of process, and weak evaluative tools and commitments).

²⁵ See generally David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974).

²⁶ The arrogance in this view may be quickly exposed. Just ask any U.S. mediation reformer which foreign experts they consulted in advance of their initiative; indeed, ask them which foreign advisers were critical to the process of their own internal decisionmaking. Did they study the Norwegian conciliation process, *tiaojie* in China, *sulha* in the Middle East, or the *panchayats* of South Asia, no less Gandhi's autobiographical account of his own efforts to settle cases as a lawyer in South Africa several decades earlier? They will stare blankly back and plainly answer, "No, none. We didn't think of it."

mediation may underestimate the need for independent evaluations from well-respected sources of authority. Proposing mediation as a fully continuous process (*i.e.*, one sitting) may undervalue the need for individuals to consult people not involved in the dispute (*e.g.*, an older brother or patriarch) for their approval of the settlement. Advising that the judge who conducts mediation should not be the same judge as the one in charge of the trial ignores the fact that many local courts in the country have only one judge in each rural district. Mediation processes derived from or designed for complex commercial disputes in which the participants have full settlement authority may not be as effective in suits against the government, in which officials are extremely reluctant to settle cases for fear of allegations of bribery, concern about making inconsistent policy decisions, or insecure authority in the chain of command.

The practical operation of legal systems is complex, and an understanding of legal process dynamics, including the incentives and behavioral responses to them, is elusive, even with prolonged study. Therefore, any foreign advice carries a very high probability of error. Errors derive from false assumptions about what is happening and why. In addition, faulty reform proposals may rely on simplistic comparisons between different social contexts (*e.g.*, between the United States and the foreign country or between dramatically contrasting rural and urban contexts).

B. *Questionable Theories*

The proper role of mediation in the legal system is hardly a matter of empirical proof or settled theory. For example, the most frequently pronounced justification for mediation is the reduction of backlog and delay, but this asserted purpose is based on a questionable, and particularly instrumental, theory. First, there is still little empirical evidence that mediation alone has a substantial effect on the reduction of backlog and delay. It is hard to determine, for example, whether reforms that set predictable, early trial dates have had a greater impact on settlement than those that supply rigorous mediation services.

Second, attempts to reduce backlog may paradoxically increase them. Throughout most societies, many people have legally cognizable claims they do not bring to court because they have no expectation of getting justice. Often this occurs when the price of justice in time and money is more than they can afford. If that category of potential litigants gets the signal that there is now a chance to extract some value through partial settlements of their claims, a larger number of them may file suits, thus increasing the number of cases to be managed by the courts. For example, think of all of the highway expansions aimed at reducing traffic in densely populated areas that actually

increased traffic. Bringing more people with unattended claims into the courts is not necessarily a bad thing, depending on the available alternatives that aim to prevent the conflicts in advance; however, it does not necessarily translate into a reduction of backlog and delay.

Finally, if too narrowly or exclusively drawn, instrumental theories of this kind can distract attention away from and thus stunt intellectual investments in exploring the intrinsic value of mediation processes. Furthermore, an emphasis on the internalization of neutralizing communication skills or interest-based bargaining may actually achieve more to relieve the underlying causes of an overburdened system by placing a set of conflict-prevention tools in the hands of society, instead of forcing society to seek access to remote and expensive public processes.

C. Unaccountability and Conflicts of Interest

Determining the role of mediation in society is the responsibility of the reforming community. Foreign experts do not suffer the consequences of bad decisionmaking and are thus ultimately unaccountable for their influence. The aggressive posture of foreign experts or foreign or international organizations can also backfire by giving the appearance that the reforms are motivated by values or interests external to, and potentially inconsistent with, those of society. Foreign experts carry the affiliation of their sponsor or source of funding (*e.g.*, a foreign government or international institution). This affiliation reflects, and sometimes even commands, institutional influence, ranging from mild allegiance to contractual obligation. Depending on the reputation of that foreign or international entity, the credibility of the expert may be undermined by this affiliation.

Also, foreign experts often suffer conflicts of interest that are difficult to manage. Nonprofits, for example, are necessarily interested in their own survival. When presented with a conflict between the constraints of available funding sources and what is truly best for the society in which they work, they may struggle to prioritize the latter when their financial livelihood is at stake. Consultants, too, often see a conflict between their own self-interest in the continuation or expansion of their assignments on the one hand and their willingness to critique or publish their work. This is not a purist attack on mixed motives for there is nothing wrong with paying experts for their expertise. Recognition of limits imposed by the business models of foreign experts working either as corporate entities or individuals, however, is an important aspect of developing a more effective role, if any, for outsiders.

Ultimately, only national decisionmakers can resolve the important policy questions raised by mediation reforms.

D. Imposition of Values

Foreign experts are also unaccountable for the implicit valuations they express in promoting the use of mediation in particular forms. As one example of this common tendency, many U.S. proponents of mediation working abroad emphasize settlement. I recall my astonishment several years ago when one of the U.S. federal court's most experienced advisers declared: "A bad settlement is better than a good judgment."

What is troubling about this view? In a word, it is packed with value judgments about the purpose of the judicial process and its more consensual complements.

First, emphasis on settlement alone may be inconsistent with justice and other aims. Knowing only that a case settled is hardly a source of comfort. The fact of disposal indicates nothing about the terms upon which the case settled. Did the parties actually maximize their interests and at what benefit or cost to their legal rights and obligations? Did they preserve and enhance their relationship, internalize the healthy process of direct communication, or get a sense of deep satisfaction from the participatory process? The limited fact of settlement sheds no light on these important considerations. Indeed, political pressure to settle large numbers of cases, which has occurred in the *lok adalat* movement in India, leads to coercive activities, such as judges pressuring lawyers to settle and fraud on the numbers. An example of this type of fraud is the manipulation of cases that would settle on their own into the favored and promoted *lok adalat* system. Alternatively, some courts may count as settlements technical, unilateral dismissals of cases that are then subsequently re-filed. Furthermore, without properly trained mediators and the incorporation of legal advice, settlements may be unjust, without recourse to subsequent challenge or review. Finally, an absolute emphasis on settlement may undermine two important purposes of the justice system: publicity and normativity. Settlements are confidential, and thus, people who violate their obligations can keep such violations out of the public's view through settlement. Settlements also produce no normative pronouncement upon which others in society can order their behavior.

Second, the embedded assumption that mediation is cheaper and quicker, and thus better or more efficient, is not necessarily correct. Mediation in routine cases may surely be speedy and inexpensive, but so would many other techniques. Mediation in the most difficult cases (*e.g.*, complex family or business disputes, high stakes intellectual property claims, or cases against the government) may be both costly and time-consuming, particularly when done properly. The issue of efficiency is not one of speed or cost alone, but whether the time and resources invested in a particular dispute are worth it, measured by the social product generated by the process employed. Thus,

even if one process is quicker and cheaper than another, we need to evaluate the social outcome to arrive at any particular conclusion of efficiency.

Therefore, the role of mediation and the policy issues it raises require a substantial set of value choices by the society in which it is to operate.

E. Conclusion: A Plea for Engagement

In sum, there are two common limitations of foreign experts. First, their substantive views may not be as solid as they might presume. And second, their expertise is, in a word, foreign. They may have expertise in mediation within their own system, but this does not mean that they have expertise in how best to communicate the value of their experience in different environments. They may be very unaware, if not entirely ignorant, of the host system and proud of their own accomplishments. This can produce a form of cross-national solipsism: "Enough about my system! So what do you think of my system?"

Notwithstanding this critique, is there any role for U.S. assistance in foreign mediation reform? If so, what would it be? How would we overcome the problems Professor Merryman identified long before mediation was considered an American export? Candor toward the limits of foreign assistance is surely a solid first step, but where can we find creative approaches to manage, if not surmount, these limitations?

Beyond the dizzying array of American interventions in foreign legal cultures (*e.g.*, conditionality, aid, technical assistance, and exchange),²⁷ a process of engagement may help to transcend these various impediments. By engagement, I do not mean the mere exchange of information, foreign visits, recitation of theory, provision of funds, or the suspension of competing values. Engagement means a process of intense social interaction between foreign and domestic legal communities, experts and non-experts, proponents and opponents, top officials and lower-level actors, leaders and followers. This interaction seeks to gain insight into the nature of the problems, the value of the specific tools, and the applicability of those tools in different combinations to identified problems. Insight necessitates asking before telling, explaining before advising, considering tradeoffs before determining, experimenting before insisting on proof, and challenging before accepting assumptions. Engagement therefore requires an intellectual investment in getting familiar with the legal system and the society in which it functions, thinking deeply about the embedded comparative theories in alternative reform proposals, explicating interests when they may conflict, and

²⁷ See Chodosh, *supra* note 1, at 365–78.

transparently deliberating over value choices that underlie support or rejection of a specific technique or proposal.²⁸

As the group of Americans involved in the development of local mediation reforms grows, we should all recall the story of a British expert in East Africa. He traveled every year to a village that was having trouble with land erosion. For over ten years, he advised the villagers that they had to plant trees. Each year he returned to find that they had not followed his advice. This motivated him only to make his pitch more strenuously. Upon each annual return, however, he suffered the same disappointment. Eventually, his posting took him elsewhere, and twenty years later, he returned for a visit. Happy to see their old friend, the people took him to a special place where there was a single tree and a bench with an engraving of his name. He inquired about the meaning of this special gesture. They explained that they had planted a tree in his honor to thank him for all of his concern for their village and its problems. But why, he asked, had they not followed his advice. Reluctantly, one of the village elders explained that they could not plant trees for they had tried this many times before his first arrival. The trees attracted birds, and the birds ate their crops.²⁹

My hope is that we can learn and retain the lesson of the British expert. He never asked his hosts why there were no trees or which birds ate which crops. Thus, he could never explore the alternatives that might have both protected the crops and prevented erosion. Had he tested his assumptions against the realities of their environment and engaged his values with their sensibilities, I wonder how many more mouths he might have helped feed.

²⁸ These issues will be examined in a forthcoming essay about my recent work on mediation reform in India, *The 18th Camel: Mediating Mediation Reform in India*. Drafts are available upon request from the author.

²⁹ This story was first narrated to me by one of the leading figures of international social work, Dr. Herman Stein, the John Reynolds Harkness Professor Emeritus of Social Administration at the Mandel School of Applied Social Sciences. Dr. Stein was formerly Dean, and two-time Provost, of the Mandel School of Applied Social Sciences and holds the title of professor at Case Western Reserve University.

