

# Negotiation for human beings: what, why and how?

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**Abstract:** The golden words of Kabir Das,<sup>1</sup> “*Kya leke aaya jagat mein, kya leke jaega, do din ki zindagi hai, do din ka mela*”<sup>2</sup> indubitably manifests that the life is too short to indulge in conflicts. However, conflicts do happen. No human being has control over it. A new way forward is to resolve the dispute with the help of negotiation, which is the most common and informal form of dispute resolution. Compared to processes using neutral “third parties”, negotiation has the advantage of allowing the parties themselves to control the process as well as the outcome.<sup>3</sup> The negotiation between Nelson Mandela<sup>4</sup> and the South African Government illustrates the success of world’s best peaceful diplomatic negotiation in putting an end to racial discrimination, where violence seemed inevitable. However, the whole process involved around 60 meetings over a span of 10 years, which reflects the fact that the art of negotiation demands considerable preparation and lots of patience. Taking into consideration the huge variation in negotiation dynamics across contexts, suggesting a single script to the negotiators on how to go about the process cannot be contemplated.<sup>5</sup> However, this article attempts to elaborate the various stages of negotiation in the order in which they are most commonly used.<sup>6</sup> In this article, the author catalogues several approaches, strategies, styles and techniques to have a successful negotiation, and their usage which primarily varies from one case to another, and especially upon the parties’ perceived relative strengths during the bargaining process.<sup>7</sup> Further, the author endeavours to deduce ways to determine the alternatives and achieve the best optimum solution by identifying the best alternative to the negotiated agreement (BATNA).

**Keywords:** Negotiation. Human beings. Bargaining. Strategies. Alternatives. BATNA.

**Summary:** I Introduction – II What is negotiation? – III Why do humans negotiate? – IV Principled negotiation – V How to negotiate? – VI Conclusion – References

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<sup>1</sup> (1440-1518), Kabir Das, was an Indian poet, and spiritual and visionary saint of 15th century, born in a Muslim family, whose writings immensely controlled the Hinduism’s Bhakti Movement and his verses are also present in Sikhism’s scripture, Guru Granth Sahib. He has unforgettable contribution in harmonizing the two religions, Hinduism and Islam, by conveying a universal path to be followed by all.

<sup>2</sup> Translated as “What did you bring into this world, and what can you take away from this world? After all, the life is but a two-day fair”.

<sup>3</sup> Stephen B. Goldberg, Frank E.A. Sander, *et al.*, *Dispute Resolution: Negotiation, Mediation and Other Processes* 3 (Aspen Law and Business, New York, 3<sup>rd</sup> edn., 1999).

<sup>4</sup> (1918-2013), Nelson Rolihlahla Mandela, was anti-apartheid activist and former President of South Africa. He was awarded Noble Prize for Peace in 1993.

<sup>5</sup> Russell Korobkin, *Negotiation Theory and Strategy* 5 (Aspen Law and Business, New York, 2<sup>nd</sup> edn., 2009). *Ibid.*

<sup>7</sup> *Supra* note 3 at 20.

## I Introduction

*“All men are caught in an inescapable network of mutuality”.*<sup>8</sup>

Martin Luther King<sup>9</sup>

Life is full of problems, and one can hardly or rather never, escape from this very reality. As a human being, in order to sustain, one has to communicate with the people around. No one ever can live in isolation. However, when one starts interacting with the other, in many occasions, the anticipated desires of the participants are actually or apparently in the state of opposition, which in turn leads to interpersonal conflict. This is the time where the participants need to manage and resolve the conflict, which has generally arise because of the varied cultural, social, regional, attitudinal, emotional, opinion and perception differences. However, one needs to understand that dispute resolution, dispute being the patent stage of conflict, not always includes legal approaches and is far away from extra-legal approaches like physical violence and war. The best possible way to resolve a dispute is through communication and diagnosis of dispute where the participants look beyond their positions and attempt to resolve the dispute by catering the underlying needs, interests and desires of each other. This diagnosis approach of dispute resolution is called Negotiation.

As a matter of fact, only human beings negotiate. Negotiation may happen between employer and employee, lawyer and client, teacher and student, husband and wife, parents and children, so on and so forth. One basic thing which is common in all, is the involvement of humans. Whatever the role, either professional or personal, a person may have, the negotiation takes place between human beings. Therefore, it is immaterial whether the person is strong or weak, big or small, young or old, rich or poor, literate or illiterate. What only matters is the art of negotiation.

In order to inculcate within, the art of negotiation, one has to understand the nitty-gritties of negotiation which predominantly includes the art of communication, knowledge of overall process, efficient use of appropriate strategy, a little bit of effort and lots of patience. Negotiation provides for maximum gains and maximum satisfaction when both the participants are well versed with the entire process of negotiation and are equally prepared. Preparation for negotiation determines its success. Higher the preparation, higher is the success.

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<sup>8</sup> As quoted in Laurie S. Coltri, *Alternative Dispute Resolution: A Conflict Diagnosis Approach 1* (Prentice Hall, an imprint of Pearson, New York, 2<sup>nd</sup> edn., 2010).

<sup>9</sup> (1929-1968), Martin Luther King, was an American Baptist minister and activist who was awarded the Noble Peace Prize 1964.

Broadly and briefly, the process of obtaining one's objectives from others in our daily lives is negotiation. It is only a dispute resolution process where parties freely engage and come to a peaceful conclusion. The parties urge one another to participate in this non-binding procedure where they voluntarily make themselves liable to the settlement because neither party can impose a settlement on the other. Additionally, the absence of any third parties from the negotiating process gives the parties engaged, complete control over the process and result. Parties increase their chances of achieving a wide range of solutions and mutual benefits by exercising their lateral thinking skills.

After all, the participants have only to talk to each other in a way which is conducive and accommodative to their underlying interests. This is what negotiation means. Every person in this world has a right, rather a birth-right, to have a sleep and whether the sleep is sound depends upon the person's state of mind. Negotiation is nothing, but an instrument which brings in a peaceful state of mind, when everyone is caught in an inescapable network of mutuality and where the chances of indulging in a conflict is inevitable. That is why people negotiate. If the need to negotiate is the first step, the way to do it is the second, and the second step is as important as the first.

## II What is negotiation?

When we hear the word "negotiation," we typically picture a big table in a glass conference room with serious-looking people in suits seated at it. However, negotiation is not just the formal action of talking about a particular dispute across a table. It is the unofficial act we engage in whenever we approach someone to ask for anything. It may be our children, parents, partner, boss, co-worker, or friends.<sup>10</sup>

Before understanding the concept of negotiation, one needs to understand the meaning of the more often used words - conflict, interpersonal conflict, and dispute. When one or more of one participant's aims are really or seemingly at conflict with those of another participant, there is an interpersonal conflict between the two parties.<sup>11</sup> A dispute is an interpersonal disagreement that is not latent and is characterised by the emphasis as well as concentration of the disputants on opposing wants, aims, as well as interests.<sup>12</sup>

Through discussion or other forms of communication, disputing parties attempt to settle an interpersonal issue through negotiation. The conversation may

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<sup>10</sup> Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation: A Wishbone, Funny bone and A Backbone* 105 (LexisNexis, 2015).

<sup>11</sup> Laurie S. Coltri, *Alternative Dispute Resolution: A Conflict Diagnosis Approach* 1 (Prentice Hall, an imprint of Pearson, New York, 2<sup>nd</sup> edn., 2010).

<sup>12</sup> *Id.* at 5.

take place verbally over the phone, in writing, or while utilising one of the numerous cutting-edge communication tools currently in use, such as e-mail, text messaging, video calls, or new online video conferencing platforms like webex, google-meet, zoom, etc.

In a negotiation, the parties to the dispute mutually agree on whether and how the conflict should be settled. In other words, the parties to the dispute have total authority over how the issue will turn out. They alone have the authority to decide whether to settle.<sup>13</sup> The participants more often produce an amicable win-win solution when they share positive working relationships and have a sense of mutual dependence.<sup>14</sup>

Negotiation is not only a kind of ADR<sup>15</sup> method, but also the connecting thread to almost all other ADR mechanisms. It is the most prevalent form of dispute resolution mechanism. This popularity of negotiations stems from the absence of a third-party neutral presiding over the negotiation process thereby giving the parties greater autonomy to control the process and its end results. Although certain third-party dispute resolution mechanisms also provide parties the autonomy to control the final outcome but the involvement of a neutral third party definitely reduces the autonomy, parties have in choosing their desired procedures.

Both aided and unaided negotiation is possible. The disputants are the sole players in unassisted negotiation, often known as simple negotiation. Depending on the facilitator's function, negotiation may also be aided or facilitated, with some variations.<sup>16</sup> In fact, dispute resolution mechanism having a third party presiding over them can be further differentiated amongst themselves on the basis of the role of the neutral in imposing a solution on the parties (e.g., conventional adjudication, arbitration) or merely assisting the parties in reaching a mutually amicable solution (e.g., mediation, conciliation).<sup>17</sup>

Mediation seeks to help participants reach a mutual settlement by first enabling them to understand each other's interest, appreciate their respective positions, and aims to make parties reach a compromise which mutually satisfies such interests. A mediator is a facilitator of the conversation and has no power to impose a binding award on the participants. A mediator only manages the negotiation process and guides them towards a possible settlement. Thus, the final

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<sup>13</sup> *Id.* at 8.

<sup>14</sup> Peter J. Carnevale and Dean G. Pruitt, "Negotiation and Mediation", *Annual Review of Psychology* 570 (1992).

<sup>15</sup> ADR stands for Alternative Dispute Resolution.

<sup>16</sup> *Supra* note 11 at 8.

<sup>17</sup> *Supra* note 3.

outcome of a successful mediation always embodies the participants' interests and is considered to be a generally win-win settlement.<sup>18</sup>

Conciliation, like mediation is another form of consensual ADR process aimed to resolve dispute, including future interest disputes, with the help of a third neutral party called the Conciliator. Conciliation differs from mediation for the reason that the role of a conciliator, unlike mediator, is more facilitative and more evaluative as the conciliator offers parties proposals for settlement and even suggest solutions. However, in both the ADR forums, the common element is negotiation, accompanied by the mutual agreement to reach a settlement.

On the contrary, the possibility of having effective negotiation fades in other ADR forums like arbitration where the arbitrator (the third party) is not bound to pass an award based on the participants' mutual agreement. In other words, participants neither have any control over the process nor over the outcome. This again increases the popularity of negotiation for it provides party-driven approach to reach a party-driven amicable solution.

#### *Every negotiation is a different animal*

Once upon a time a man named 'X' bought a baby goat. With time the baby goat grew and had big horns. 'X', an electric engineer by profession, knew nothing about goats. One fine day he had to put the goat back in the barn. So, he grabbed the goat by the horns and tried to push it back into the barn. The goat resisted his master's attempts and even managed to overthrow 'X'. Later, 'Y', the wife of 'X' came and led the goat back to the barn by gently holding the beard of the goat guiding him to the desired destination. Y knew that beard is the sensitive point of goats which 'X' was totally ignorant about. Hence, it is not about the strongest, smartest or the most experienced ones, but totally depends upon the situation, timing and circumstances.

#### *Phases in Negotiation*

In a standard negotiation process, there are four stages in total namely preparation, opening, bargaining and closing. The first stage pertains to preparation of negotiation where the whole focus is on collection of information which helps each participant in understanding the advantages and disadvantages of a particular case. This is the stage where the participants have to work closely and purposely in order to identify the available options and evaluate the same to explore appropriate alternatives. Once the preparation stage is done, the next step is opening where

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<sup>18</sup> Yaraslau Kryvoi and Dmitry Davydenko, "Consent Awards in International Arbitration: From Settlement to Enforcement" 40(3) *Brooklyn Journal of International Law* 843 (2015).

both the sides present their initial positions to one another. This is done in order to set the tone for negotiation. The opening stage is followed by bargaining where the goal is to reduce the difference between the two original positions and convince the opposing participant to agree to less than they originally anticipated. Finally, once the bargaining is done, comes the last stage called closing. Closing responds to the capitalization of the work done. Ideally, in a negotiation, both the parties should work collaboratively to reach an amicable, workable and acceptable solution. However, it may also be the case where there is no settlement or one of the participants have achieved more out of the negotiation as compared to the other just because the former was well versed with the use of appropriate bargaining and negotiation strategy.

### *Types of Negotiation*

The type of negotiation predominantly refers to the type of bargaining implemented by the negotiator. In general, there are five types of bargaining which are mentioned as follows:

**1 Rights-based bargaining:** The customary and established method of negotiation when the participants' main concern is between right and wrong is known as rights-based bargaining. It is merely a blame-centred analysis. For instance, who was reckless, who violated the contract, etc.

**2 Positional bargaining (Position-based bargaining):** When a party adopts oppositional stances without considering the interests of the opposing side, is known as positional bargaining. Each side adopts and adheres to a position.<sup>19</sup>

**3 Distributive bargaining:** Parties engage in distributive bargaining when they divide the subject matter under discussion. Parties make an effort to share a particular sum of money or other value. There are less possibilities to seek resolutions in such distributive negotiations.<sup>20</sup>

**4 Interest-based bargaining** takes place when both parties abandon their adversarial stances and take into account their own real interests as well as the interests of the opposing party.<sup>21</sup>

**5 Integrative bargaining (Collaborative bargaining)** is the best strategy for putting emphasis on interests and taking a comprehensive approach to the conflict. It focuses on adding value to the dispute-resolution process. Integrative negotiation provides a number of advantages, including improved efficacy, a

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<sup>19</sup> Delhi High Court Mediation and Conciliation Centre "Samadhan", *Reading Material: 45 Hours of Mediation Training Programme* 46 (2021).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Id.* at 47.

reduction in posturing, the retention of relationships, and a better possibility that parties would uphold the agreement.<sup>22</sup>

Though, there is no rule as such pertaining to the use of a specific bargaining, it totally depends upon the negotiator, timing, facts and circumstances of each case. However, in order to achieve a win-win solution, the use of integrative bargaining is highly recommended.

### III Why do humans negotiate?

It is now more evident than ever that in today's world, which is characterised by flatter organisations, rapid innovation, the proliferation of the Internet, and the post-COVID era of digital communication, we frequently have to fall back on dozens, hundreds, or even thousands of people and organisations that we have no direct control over, in order to complete our work and meet our needs. We need to negotiate in order to achieve our objectives.<sup>23</sup>

We are all negotiators, is a truth of life.<sup>24</sup> Every day, everyone engages in negotiations. Children try to convince their parents to allow them to play out for a longer duration. Students ask their teacher to leave the class early. Discussion of spouses where to go for dinner. All these are negotiations.

Sometimes the results of talks affect our life even when we are not directly seated at the negotiating table. When Ukraine and Russia are negotiating the long-awaited cease-fire, millions of people's lives perhaps more may be touched and affected. Thousands of people could lose their livelihoods. New chances could arise. Thousands of people could be uprooted. Families could be split up or reunited. All of this is happening because just two people are negotiating.<sup>25</sup>

The importance of negotiation can be well understood through the following hypothetical situation.

**Consider this:** You are out on a drive and are on a highway entering into an intersection at a green traffic signal to turn left. You wait for the oncoming cars to pass before you make your move. The light turns yellow, then subsequently changes to red, and you initiate your desired turn to leave the intersection. However, one oncoming car jumps the red light and is coming straight at you. You fortunately

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<sup>22</sup> *Ibid.*

<sup>23</sup> Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* ix (Random House Business Books, London, 3<sup>rd</sup> edn., 2012).

<sup>24</sup> *Id.* at xxv.

<sup>25</sup> *Supra* note 10 at 106.

avoid a disastrous collision, thanks to your fast reflexes which kick in just at the nick of time.<sup>26</sup>

Now take a short pause before proceeding to next paragraph. Reflect on your perceptions and feelings towards the other driver. Does the situation create any assumptions in your minds with respect to the other driver?<sup>27</sup>

Now proceed for the following paragraph. It gives a description of what is going on inside the head of the other driver.<sup>28</sup>

“I on my way home from the hospital. My wife and I are devout Christians who abstain from alcohol. However, three days ago, when we were on our way home from a friend’s wedding, our car was badly hit by a drunk driver. The other car rammed into our car on the passenger side because of which, though I was not hurt too seriously, my wife was hit on the side and was thrown against the windshield. In the hospital, the doctors have been trying their best and doing everything in their power, but she has not yet gained consciousness. The doctors have operated to set her broken tibia. My wife has been subjected to a number of scans to determine why she has not yet regained consciousness. The doctors even had to put a tube in her to enable her to breathe. She is being fed through an IV. I have stayed by her side every moment as I have heard that if you talk to the person and tell her how much you love her then there is a strong chance of her waking up.

But this morning the doctors informed me that the latest MRI scans looked very bad. They said that my wife most probably shall never wake up again. I am numb with extreme pain and shock. The doctors have denied me permission to stay by her side. I have been advised to go home and get some rest as there is nothing more which I can really do for her. She was the love of my life. She was my world. She was the purpose of my living. My whole life is over”.<sup>29</sup>

Does this new information change your assumptions about what caused this driver to drive so absentmindedly? Does the new information change your perceptions about this person?<sup>30</sup>

At the end of the day, we all are humans negotiating with humans. Our mind works as we want it to work. In case of any altercation with another human being, if we simply and blindly focus on the facts and circumstances of the case, we will end up having multiple legal proceedings as our mind which is highly influenced by our personal biases, perceptions and interpretations, in such a situation, can only think of legal remedies or violence or even war since we have tuned it to think so. However, if we think intuitively, focusing on emotions and feelings rather

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<sup>26</sup> *Supra* note 11 at 53.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Supra* note 11 at 53.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*



than facts, there will be ample scope to resolve the oncoming conflict amicably with a mutually gained solution that is acceptable, feasible and workable for the humans involved. Therefore, as and when conflict occurs, we should negotiate whenever and wherever possible. Understanding the other human being is the art of negotiation.

In addition, negotiation as an alternative means of dispute resolution comes up with numerous benefits over the traditional legal system. As the negotiation is an informal and flexible process with no involvement of third party, it saves both time and money of the parties involved. It not only preserves the relationship between the participants but also has the potential to mend the broken relationships. The voluntary aspect of negotiation is the another reason for the people to negotiate as not only the participants voluntarily enter into the process of negotiation but are also equally free to leave the process as and when they feel like. Further, negotiation is a confidential process for it helps the participants resolve their dispute without letting the outer world know about it. Lastly, unlike other dispute resolution mechanisms, both process and outcome of a negotiation are under the exclusive control of participants, and the end result is the mutually agreed party-driven solution.

## IV Principled negotiation

A soft negotiator is willing to give, in order to reach a compromise. Despite wanting a peaceful resolution, they frequently end up being taken advantage of and left bitter. On the contrary, a tough negotiator desires to win but frequently comes up with an equally tough response that drains them of their energy and resources and damages their connection with the opposing party.<sup>31</sup>

People typically use either a harsh or soft method of negotiation, avoiding personal conflict or viewing any situation as a clash of wills. Nevertheless, there is a third approach to negotiation known as principled negotiation which is neither firm nor soft but rather combines the best elements of both.<sup>32</sup>

Although every negotiation is distinct, the fundamental components remain constant. An all-purpose approach is principled negotiation. It can be applied whether there is a single issue or many, two parties involved or many, more or less experience, and so on. In contrast to almost all other methods, if the opposing side picks this one up, it actually gets simpler to use.<sup>33</sup>

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<sup>31</sup> *Supra* note 23 at xxvi.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.* at xxvii.

The four fundamental components of principled negotiation, often known as negotiation on the merits, are as follows:

1. Distinguish the individuals from the issue.
2. Pay attention to your interests rather than your status.
3. Create numerous choices in search of win-win outcomes.
4. Demand that the outcome be based on an objective norm.

These four guidelines provide a simple bargaining strategy that may be applied in practically every situation.<sup>34</sup>

That humans are not machines is addressed in the first point. We are highly emotional beings with a propensity for having wildly divergent perspectives and difficulties intelligibly expressing ourselves. Usually, feelings are mixed up with the problem's logical qualities. As people get more associated with their jobs, taking positions only serves to exacerbate this.<sup>35</sup> Positional bargaining are frequently one-dimensional, unimaginative, and poorly suited to the circumstances and requirements of the participants.<sup>36</sup>

Recognizing that every negotiation can be broken down into two main elements i.e., the relationship shared by the individuals participating in the negotiation, and the problem being dealt by the negotiator, helps to distinguish the individual from the issue. The relationship, which is a component of the negotiation's context, has a big impact on how individuals see the issue, how they emote, and how they communicate with one another. The issue is the objective predicament on which the disputants are trying to bargain via negotiation.<sup>37</sup>

Therefore, the "people problem" should be separated from the "substantive problem" and dealt with separately before moving on to that. The participants should learn to see themselves as cooperating and fighting the issue collectively rather than individually.<sup>38</sup> It is not possible to separate the individuals from the issue once and then ignore it. One must continue to work on it. Dealing with people as individuals and the issue as it stands is the fundamental strategy.<sup>39</sup>

In order to avoid the disadvantage of concentrating on people's stated viewpoints when the goal of a negotiation is to meet their underlying interests, the second point is devised.<sup>40</sup> A successful negotiation requires an understanding of the distinction between interests as well as positions. A participant's position is the stance they take because they believe it will advance their interests. However,

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<sup>34</sup> *Supra* note 23 at 11.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Supra* note 11 at 27.

<sup>37</sup> *Supra* note 10 at 135.

<sup>38</sup> *Supra* note 23 at 12.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> *Supra* note 23 at 12.

the demands, concerns, objectives, hopes, as well as fears that drive people to negotiate are their interests. We frequently shield our objectives from the opposing party during negotiations or conflicts in order to safeguard our own interests. As a consequence, rather than cooperating on the interests underlying our perspectives, we find ourselves disputing about positions.<sup>41</sup>

Positional bargaining has disadvantages that can be avoided, and there is a chance to achieve better results if the focus is kept on underlying objectives, values, as well as wants while dissuading any emphasis on articulating views and demands.<sup>42</sup>

In short, an interest is what drives a conflict participant to make a demand or have a specific goal. The terms ‘demand’ and ‘aspiration’ refer to a disputant’s claim to the other disputant of what would be necessary to resolve a conflict and the disputant’s definite, particular, material goals for settling the issue, respectively. In a similar vein, underlying interests would be those ambitions that lie behind a disputant’s ideals or essential human needs. If values were defined, they would refer to the beliefs that underlie a disputant’s attitudes, goals, and underlying interests and would have to do with how important or morally righteous a goal is. The fundamental human needs are the motivating factors behind beliefs, goals, core values, and interests.<sup>43</sup>

The factors that support beliefs, aspirations, fundamental interests, and values are referred to as the basic requirements of people since they are believed to be necessary for a healthy human existence and cannot be compromised. Shallower interests are driven by deeper interests, while all other motives are driven by basic human needs.<sup>44</sup>

If the interests of the opposing side are not taken into consideration, it is unlikely that they will listen to the concerns and discuss the solutions put forth. One must demonstrate their receptivity to the opposing side’s recommendations. Firmness and transparency are necessary for a successful negotiation. Therefore, before trying to reach an agreement, one need to invent options for mutual gain, which is the third important component of principled negotiation.<sup>45</sup>

Brainstorming is the most popular technique for coming up with a variety of options, and it really requires lateral thinking and inventiveness.<sup>46</sup> Any negotiation may result in a variety of possible agreements that are acceptable to both parties. As a result, it is crucial to create several of possibilities before choosing one.

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<sup>41</sup> *Supra* note 10 at 135.

<sup>42</sup> *Supra* note 11 at 28.

<sup>43</sup> *Id.* at 28-29.

<sup>44</sup> *Supra* note 23 at 57.

<sup>45</sup> *Supra* note 23 at 12.

<sup>46</sup> *Supra* note 10 at 138.

Depending on the parties' shared and opposing interests, come up with something first and decide later.<sup>47</sup>

Lastly, an agreement reached through negotiation must adhere to some impartial criteria that is not determined by each party's bare desires. This does not imply that one must insist that the conditions be based on a particular criterion but rather that the outcome be determined by a reasonable standard, such as market value, an expert's view, custom, established practice, or the law. Instead than debating what the parties desire or not desire to accomplish, these criteria allow both sides to defer to an equitable solution without having to give in to one another. As a result, when reaching an agreement, one must concentrate on the fourth fundamental principle, which is insist on applying objective standards.<sup>48</sup>

Three key things to keep in mind when negotiating with the objective standards:

1. Present each issue as a collaborative effort to find objective standards.
2. Use logic to determine which standards are most appropriate and how to apply them.
3. Never give in to pressure, always stick to your principles.

Focus firmly yet flexibly on objective standards, in other words.<sup>49</sup>

Seven negotiation aspects can be used to summarise the entire concept of principled negotiation. First, an efficient two-way communication followed by an appropriate feedback. Second, relationships that needs to be preserved by continuing to create rapport over time. Thirdly, shared interests that must take into account the needs, wants, worries, expectations, and fears of both parties. Fourthly, options where both participants should make an attempt to fully understand all potential outcomes. Fifth, legitimacy, which while weighing the possibilities should unmistakably reflect justice and equal treatment. The identification of BATNA (Best Alternative to a Negotiated Agreement) and alternatives that relate to possibilities that have been fairly considered come in at number six. Lastly, commitments, or the requirements (dos and don'ts) of the parties that must be satisfied before they agree to the final settlement agreement.

One fundamental aspect of negotiation is that the parties involved are dealing with actual people, not just a group of abstract agents. They are unpredictable, have strong emotions, cherished values, varied backgrounds and different points of view. They are prone to illogical leaps, cognitive biases, and partisan perceptions and the same holds true for the negotiator.<sup>50</sup>

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<sup>47</sup> *Supra* note 23 at 81.

<sup>48</sup> *Id.* at 14.

<sup>49</sup> *Id.* at 89.

<sup>50</sup> *Supra* note 23 at 21.

The human element of negotiating can either be advantageous or devastating. The act of reaching an agreement may result in a psychological commitment to a solution that will be satisfying to both parties, which will strengthen and maintain the relationship. People, on the other hand, get irritated, depressed, afraid, disappointed, and offended.<sup>51</sup> Therefore, one must be cautious while dealing with the same identity on the other side.

## V How to negotiate?

Identifying and implementing a dispute resolution mechanism of maximum benefit in terms of interests, goals and needs, is the foremost concern of a participant in negotiation. The secondary yet important concern is to minimise the likelihood of a recurrence of the conflict and of new conflicts popping up. Further, preservation or improvisation of an ongoing relationship is another important consideration for negotiation.

In order to achieve the above-mentioned goals, one has to learn the art of negotiation which includes the art of effective communication, use of appropriate negotiation styles and approaches, and application of apposite negotiation techniques. These elements, forming the part of the art of negotiation, are collectively termed as negotiation strategies.

### *Communication*

There can be no negotiation if there is no communication. The backbone of negotiation is persuasive communication through which parties exact out their desired outcome by persuading each other to settle. In simple words, negotiation is a process in which parties communicate back and forth, so that they can reach a joint decision. It is never an easy task, even when the parties share common values and experiences. For instance, couples who have lived together for years can still have misunderstandings between them.<sup>52</sup>

Negotiation is the most ubiquitous form of interaction amongst human beings and is found in the most consequential and the most mundane aspects of our lives. From signing high stake business deals, to rescuing hostages, to setting a child's tv-watching time, all are possible through negotiations.<sup>53</sup> At the same time, every conversation is not a negotiation. If you eat antibiotics every time you sneeze, your body will stop responding to the medication. Hence, do not overdo negotiation.<sup>54</sup>

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Supra* note 23 at 35.

<sup>53</sup> *Supra* note 3 at 19.

<sup>54</sup> *Supra* note 10 at 106.

People often make mistakes in perception and interpretation, when they are observing other people's behaviour. This same problem arises in communication. The sending and receiving of messages are two equally crucial behavioural actions that are included in any communication. These two acts, nevertheless, are hardly ever executed perfectly.<sup>55</sup>

As they say, no lock comes without a key. On these same lines, there are four important elements which are effective in conflict communication. These are:

1. The capacity to send messages in a way, that is clear, exact and non-escalating.
2. Recognising and adjusting for the perception and interpretation problems that are likely to happen as one receives a communication.
3. Tolerance for imperfections in other people's communication style.
4. The willingness to keep trying after early failures to facilitate good communication.

### *Negotiation Styles and Approaches*

The style of negotiation or negotiating behaviour style relates to one's general philosophy of negotiating. A person may probably use more than one style either equally or alternatively. Every style has its own usefulness given a particular situation. Following are the commonly and substantially used styles and approaches:

**1 Withdraw or Avoidance (I don't care if I win or lose):** Under this approach, disputants neither pursue their interest nor the interest of the other. They are neither assertive nor interested in cooperation.

This negotiation approach is characterised by a sense of powerlessness, surrender, resignation, and accepting whatever the other side is prepared to provide. Negotiators tend to withdraw and distance themselves from the situation.<sup>56</sup> Issues, under this style of negotiation, are generally not addressed and are either ignored or postponed. This approach might take the form of diplomacy and is most often referred to as "passive aggressive".<sup>57</sup>

**2 Defeat or Competitive (I win, you lose):** Under this approach, individuals pursue their own concerns at the other participant's expense. Each party looks to reach their own goals without sharing any kind of information with the other, and both stay firm on their own positions because they believe that is right.<sup>58</sup>

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<sup>55</sup> *Supra* note 11 at 19.

<sup>56</sup> Ved Kumari, Usha Tandon, *et al.*, *Alternative Dispute Resolution Case Material* 50 (Faculty of Law, University of Delhi, 2020).

<sup>57</sup> *Supra* note 10 at 145.

<sup>58</sup> *Supra* note 10 at 142.

It is just a win-lose game marked by pressure, intimidation, and adversarial interactions, the opposite of an accommodating negotiation. The participant's sole aim is to defeat the opposing party at any costs.<sup>59</sup>

**3 Accommodate (I lose, you win):** Contrary to competitive negotiation, this negotiation technique involves participants neglecting their own concerns in order to satisfy the needs and the interests of the other participant.<sup>60</sup>

This strategy concentrates on encouraging harmony to keep any significant differences at rest. By prioritising personal ties over a fair result, accommodating negotiators give up their interests in favour of the other party. The only goal of the negotiator under this approach is to accommodate the other participant's needs.<sup>61</sup>

**4 Compromise (I win some, you win some):** Under this approach, participants seek a quick middle ground position. This approach is defined by compromise, going out of one's way to meet the other side halfway, and settling the issue. The objective of this very style is to find an acceptable agreement. Conflict minimization is more important to compromise profile negotiators than collaboratively solving problems and finding solutions. The goal of this technique is to get at an agreeable solution.<sup>62</sup>

**5 Collaborative (I win, you win):** Under this approach, the participants involved are willing to work with each other to find one solution that can satisfy the needs and interests of both participants.<sup>63</sup>

Collaborative negotiators show great willingness in investing more time and energy in finding innovative solutions, often referred to as "expanding the pie". They feel secure in the fact that once the pie has been expanded, there will be more value to share out between the participants. Collaborative negotiators tend to have the problem-solving behaviour.<sup>64</sup> A collaborative approach seeks to search for common-interest and gain the possible solution for all thereby looking beyond the issues and limitations. It simply leads to a win-win solution.<sup>65</sup>

### *Negotiation Techniques*

One of the crucial elements of negotiation strategy is what is called as negotiation technique which basically corresponds to the way of negotiating. The art of negotiation is nothing but the identification of the best suitable negotiation

<sup>59</sup> *Supra* note 56.

<sup>60</sup> *Supra* note 10 at 144.

<sup>61</sup> *Supra* note 56.

<sup>62</sup> *Supra* note 56 at 51.

<sup>63</sup> *Supra* note 10 at 140.

<sup>64</sup> *Id.* at 141.

<sup>65</sup> *Id.* at 142.

technique given a particular situation. In general, there are eight negotiation techniques. These are as follows:

**1 Salami:**<sup>66</sup> Salami is a technique in which a small part of objective is achieved at a time, rather than going for the whole one big objective.<sup>67</sup>

For instance, you want to purchase 5 acres of land from a man, who for some unknown sentimental reasons is not willing to sell more than 1 acres of land at the moment. Additionally, you do not have any pressure to acquire all the 5 acres. Here, when applying Salami technique, you can offer the man to give you 1 acre of land at the moment, and an option can be installed for the other 4 acres, where you can purchase other 4 acres over the next 4 years.<sup>68</sup>

**2 Fait Accompli:** Fait Accompli is a technique used to accomplish the main objective by not spending the necessary time, effort or expenses to follow or work or related items.<sup>69</sup>

For instance, a person sent you a contract which contained some provision which you were not ready to accept. Here, when we apply the technique of Fait Accompli, you can just remove that provision from the contract and sent it back for correction.

**3 Standard Practice:** Standard Practice is a tactic used to persuade others to do or not do something based on what are considered to be “standard procedures”.<sup>70</sup>

For instance, a builder who was there for the construction of girls’ hostel told the University about the terms of payment which were, 60% when the construction started, 20% when the construction will be half completed and 10% on the completion of the hostel. The University was not ready to accept this offer and showed the builder the standard contract, pertaining to industry standard, which was used to prove his point.

The builder finally agreed to accept 30% payment at the start of the construction, 30% when the construction is half completed and 40% when the construction is complete. This gave the University the assurance that the building would be done before the builder could pocket the profit, while also giving the builder enough money to complete the project.

**4 Deadline:** Time is very important for people and organizations. For the same reason, deadlines can be very important negotiation technique. This is a two-way street. If one party has deadlines, there is a high probability that the other

<sup>66</sup> This technique is said to have been named by Matyas Rakosis, General Secretary of the Hungarian Communist Party.

<sup>67</sup> *Supra* note 56 at 55.

<sup>68</sup> *Supra* note 56 at 55.

<sup>69</sup> *Id.* at 56.

<sup>70</sup> *Ibid.*



party also has some. We can better organize our strategy the more we are aware of the opposing party's deadlines.<sup>71</sup>

E.g., a salesman sometimes try to draw out quotation price negotiations, hoping the amount of time you have invested will increase your commitment to make the deal. Here, to defuse this strategy, apply the Deadline technique and try to begin your negotiation for a new car by informing the salesman that you have only an hour to make a possible deal.

**5 Feinting:** Feinting provides the idea that one thing is sought when in reality, a different goal is the main goal.<sup>72</sup>

For instance, an employee is negotiating with their boss for getting a promotion, when in reality the objective is getting a hike in the salary.<sup>73</sup>

**6 Apparent Withdrawal:** Along with deferring and feinting, apparent withdrawal may also include some deceit. It tries to trick the other negotiator into thinking that you've stopped considering a point when you haven't in reality.

E.g., you want to hire a taxi from airport to your workplace. The taxi driver has offered you a fair which you do not want to pay. Here, apply the apparent withdrawal technique and pretend to move to the other taxi driver. Seeing this, the previous taxi driver may call you offering a lower fair.

**7 Good Guy/ Bad Guy:** This technique is an internationally used strategy. It involves two participants on one side of the negotiation, one of whom adopts a tough stance while the other is approachable and easy to work with. When the bad guy leaves for a little while, the good guy makes an offer that, given the situation, could be too good to ignore.

e.g., A husband and wife go out to buy a fully HD television. The husband acts in an aggressive and dominant way, complaining about the price and the salesperson's condescending manner. However, the wife takes the salesperson aside and apologises for her husband and whispers a price at which she thinks he will buy.

**8 Limited Authority:** By stating that anything other would require higher approval, a position with limited authority is an attempt to induce acceptance of that stance.

For instance, a salesperson cannot offer a cash discount which is more than 5%, as that would require approval from a higher authority.

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<sup>71</sup> *Id.* at 57.

<sup>72</sup> *Supra* note 56 at 58.

<sup>73</sup> *Ibid.*

## Alternatives

Once the participants have identified the potential options available in a negotiation, the next step is to evaluate those options depending upon their acceptability, feasibility and workability in relation to both the participants. These evaluated options, called the alternatives, can further be classified into BATNA, MLATNA, Bottom Line, WATNA and ZOPA.

**1 BATNA (Best Alternative to a Negotiated Agreement):** Creating your BATNA will likely increase the minimum acceptable agreement, in addition to allowing the negotiator to select what is the minimum acceptable agreement.<sup>74</sup>

The best alternative one has, other than the options that are feasible in a particular negotiation, is referred to as BATNA when taking into account one's goals, interests, values, and requirements. To know one's BATNA, then, is to be aware of one's best course of action in the event when negotiations fail to result in an agreement.<sup>75</sup>

Some too optimistic people will reject a fantastic offer that is significantly better than their alternatives because they are unsure of their BATNAs.<sup>76</sup> For effective use of BATNA, every time you receive an offer from the other side, you need to compare it to your BATNA before rejecting or accepting the offer.<sup>77</sup>

**2 MLATNA (Most Likely Alternative to a Negotiated Agreement):** It is sometimes, also called as EATNA i.e., Estimated Alternative to a Negotiated Agreement. Knowing MLATNA enables one to be prepared with an alternative if one fail to achieve what one wanted in the negotiation.<sup>78</sup>

**3 Bottom Line:** By determining in advance the point or the bottom line, beyond which the worst acceptable result, or WATNA, occurs, negotiators frequently attempt to safeguard themselves from a conclusion that has been properly considered rejected.<sup>79</sup>

The ultimate barrier beyond which a discussion will not continue is intended to be the bottom line. It is a technique of defending oneself against the pressure and temptation that are frequently used to compel a negotiator to reach a self-defeating agreement.<sup>80</sup>

Adopting a bottom line comes at a great expense in terms of protection. It restricts one's capacity to gain from what they discover through negotiation. A bottom line is an assertion that should not be modified. To that point, the bottom

<sup>74</sup> *Supra* note 23 at 108.

<sup>75</sup> *Supra* note 11 at 50.

<sup>76</sup> *Supra* note 10 at 154.

<sup>77</sup> *Id.* at 162.

<sup>78</sup> *Supra* note 19 at 45.

<sup>79</sup> *Supra* note 23 at 100.

<sup>80</sup> *Supra* note 10 at 157.

line becomes static and there is no longer any chance of increasing or decreasing it.<sup>81</sup>

A bottom line also limits creativity. It lessens the motivation to come up with an original solution that would reconcile conflicting interests in a way that is better for all parties involved in the negotiation.<sup>82</sup> Adopting a bottom line may prevent one from signing a really terrible deal, but it may also prevent one from coming up with and accepting a solution that is sensible to accept.<sup>83</sup> Therefore, one has to be extra cautious in determining and setting up of bottom line.

**4 WATNA (Worst Alternative to a Negotiated Agreement):** The worst potential result of a certain option, when the result of picking the option is unclear, is referred to as WATNA considering one's aspirations, interests, values, and requirements. In other words, WATNA is the worst result that may result from a failed attempt to negotiate a deal.<sup>84</sup> Knowing WATNA enables one to assess the advantage of the possible agreement.<sup>85</sup>

**5 ZOPA (Zone of Possible Agreement):** ZOPA or bargaining range is the range of possible solutions where both the negotiators would be mutually benefited. It commonly exists when there is some overlap in the expectations of the participants regarding the final settlement. It is that zone which if not fully, to an extent, caters the needs, interests and desires of the participants. If the negotiators fail to attain ZOPA, they are considered to be in a negative bargaining which is only possible when the participants are not actually negotiating. Positive bargaining is a common phenomenon whereas negative bargaining is an exception. In general, ZOPA may range between the BATNAS or WATNAS or even the Bottom Lines set out by the participants in a negotiation. Narrower the ZOPA, higher is the possibility of successful negotiation.

## VI Conclusion

The most important fact about negotiation, which we must never forget, is that negotiation is for and between the human beings. Negotiation is nothing but a fundamental strategy for gaining what one seeks from others. It is back-and-forth discourse intended to reach an understanding when one party and the other have some.<sup>86</sup>

<sup>81</sup> *Supra* note 23 at 100.

<sup>82</sup> *Id.* at 101.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Supra* note 11 at 50.

<sup>85</sup> *Supra* note 19 at 45.

<sup>86</sup> *Supra* note 23 at xxv.

Separating people from the issue, focusing on interests, inventing multiple mutual gain options and objective standard based result, are highly associated with optimised dispute resolution. In addition, seeking cooperation and identifying alternatives wisely are equally important.

The principled negotiating approach, which focuses on fundamental interests, solutions that satisfy both parties, and just standards, often yields a sensible agreement as opposed to positional bargaining. Separating the people from the issue enables one to interact with the other negotiator in a human-to-human manner, independent of any substantive differences, thus making a peaceful resolution feasible.

Expect the unexpected. Every negotiation will be different. Therefore, it is absolute important to identify and choose the appropriate style and technique depending upon the situation, timing and circumstances. The preparation predominantly includes the knowledge of BATNA. Knowing your BATNA before entering into negotiation gives a sense as to what you will do or what will happen if you fail to reach an agreement in the negotiation at hand. The success rate of negotiation rises when participants negotiate as partners and not as opponents, and work for amicable solutions through collaborative style of negotiation as integrative bargaining maximizes the availability of options. It is rightly said – “Always act never react”, for negative reaction causes negative defense position and in such a situation – stop, stay calm and reposition yourself and then continue.

The only idea is, since life is too short, resolve all conflicts before you depart. The trick is, therefore, not having any conflict but to resolve every conflict as soon as you have it. You cannot and should not go to bed having an argument, disappointment, resentment, sorrow and doubt, but rather should try to resolve it for the reason that you are alive, but how long no one knows. So, negotiate today, tomorrow and every day.<sup>87</sup>

*“Let us never negotiate out of fear, but let us never fear to negotiate”.*<sup>88</sup>

John F. Kennedy<sup>89</sup>

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<sup>87</sup> Deepak, Cyberlink Power Director, Youtube, *The Story of Kashi Labh Mukti Bhawan*, 2018, available at <https://www.youtube.com/watch?v=QwVe7WsZxYU> (last visited on October 10, 2022).

<sup>88</sup> As quoted in Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation: A Wishbone, Funny bone and A Backbone* 187 (LexisNexis, 2015).

<sup>89</sup> (1917-1963), John F. Kennedy, was the 35<sup>th</sup> President of the United States.

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Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

VERMA, Akshay. Negotiation for human beings: what, why and how? *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 17-37, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.2.

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