International Journal of Law, Policy and the Family **14**, *(2000)*, 302–325

CROSS-CULTURAL MEDIATION: A CRITICAL VIEW OF THE DYNAMICS OF CULTURE IN FAMILY DISPUTES

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ABSTRACT

As a means of facilitating the smooth management of disputes arising from family breakdown, the benefits of mediation are often extolled. Yet, the question of how the individuals' particular cultural identity comprises a prism through which disputes and their resolution are viewed, is one that has been neglected. In particular, it is often precisely within the parameters of the marital relationship that individuals are motivated to practise their normative ethics. This article seeks to analyse these dynamics and the manner they influence the process of mediation by closely examining the model expounded by Gulliver, and argues that an appraisal of cultural dynamics is a fundamental prerequisite to understand the process of family mediation. The objective is to evaluate Gulliver's model with a view to laying the foundations for a synthetic model of the processual dynamics of negotiation in the light of an analysis of cultural factors.

1. INTRODUCTION

In the United Kingdom cross-cultural mediation is a relatively new term finding itself attached to the panoply of terms now readily associated with the fashionable panacea for all ills, mediation. The fact that cross-cultural mediation evokes the idea of cross-fertilization is no accident; there is indeed a close correspondence between the two ideas. The soil from which mediation processes emerge in one culture can be enriched by influences, procedures, and creative ideas from other cultures. Given that mediation has continuously existed as a primary means of dispute resolution in non-western cultures, it would now behove those involved in the theoretical articulation and creative application of mediation in the West to be even more sensitive to those insights that mediation can derive from other cultures that have now taken root in the West. A few years ago, the suggestion that mediation,

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along with any dispute management process, is susceptible to the spectre of cultural hegemony was innovative. Now, however, the idea that the process of mediation must be sensitive to the cultural identities of the disputants is obvious; as if anything else was short-sighted. Nonetheless, it has not been stated in clear terms that the process of negotiation, and *a fortiori*, mediation, does not and cannot be situated in a cultural or normative vacuum; the disputants' view of the world, their cultural identities, their universe of meaning invariably and indelibly shapes the dispute management process.

This paper offers a critique of cross-cultural mediation by exploring it from the vantage point afforded by the model of negotiations expounded by Gulliver in his watershed study *Disputes and Negotiations; A Cross Cultural Perspective*.[1] He states that in order to understand mediation it is necessary to view the process as 'an integrated part of negotiation'[2] into which the mediator enters and transforms the bilateral negotiations by becoming a party to them.[3] My objective here is to evaluate Gulliver's model with a view to laying the foundations for a synthetic model of the processual dynamics of negotiation in the light of an analysis of cultural factors. The discussion will revolve around marital disputes as they provide a forum for debate about the forces that cultural factors inject into the negotiation process. In his conclusion, Gulliver acknowledges that he has not given enough emphasis to how 'the nature of the relationship between the disputing parties within the structure of their society affects the negotiations between them'.[4] He then goes on to say that he has also not given enough emphasis to inter-personal disputes of all kinds and that he has presumed that his paradigm of negotiations applies to them.[5] It is difficult to deny that the model developed by Gulliver does apply to inter-personal disputes, albeit sometimes only in a very general way. Gulliver's acknowledgement of the shortcomings in his analysis paves the way for this paper. In the first instance, it is clear that in the domain of marital disputes, the social structure, or 'social unit'[6] within which parties find themselves has a profound impact on the negotiations between the parties to an extent not fully expounded by Gulliver; and moreover, the very assumption about the joint decision-making to take place between the negotiating parties, upon which Gulliver's model is predicated, has to be critically evaluated in the light of an understanding of the cultural factors that impose themselves upon relationships.

Arguably more than in any other domain, it is in the sphere of marital disputes that the social structure impinges upon the negotiations, because the marital relationship, and its attendant values, is the cornerstone of any particular social structure. If, as Gulliver stresses: 'the very definition of a relationship – the pattern of behavioural interaction, interests, rights, obligations, and affective content,

and the extent of tolerable leeways in all these – depends on such accepted standards, more or less clearly understood by the members of the social unit',[7] this is even more the case with the marital relationship. It is within the parameters of this intimate relationship that the individual is motivated to define his/her identity in socio-cultural terms and to practise his/her normative ethics. This is the case no matter what the cultural background of the individual; the existential reality referred to by the term 'social identity' appears to be one from which there is no escape. However, in the case of minority communities, the standards which the 'social unit' apply to define the marital relationship are often circumscribed by the very dynamic of maintaining (or rejecting) a minority identity within the larger social matrix. The fluidity of social reality[8] however cannot be explored in sufficient depth here; suffice it to say that with the development of social structures, the complexities governing relationships multiply. To be more precise: negotiations within the domain of marital disputes assume a very particular complexity as the dynamics of both gender and identity-defining normative ethics shape the setting in which the negotiations take place, to an extent that Gulliver has not sufficiently explored. The assumption made by Gulliver in the preface to his book, about negotiations being 'a set of social processes leading to interdependent, joint decision-making by the negotiators through their dynamic interaction with one another'[9] upon which his whole model is predicated, has to be analysed within the context of the dynamics of cultural identity. This notion of joint decision-making cannot simply be stated and left unexamined. The question of who the relevant parties in the dispute are needs to be addressed, and the particular framework of the decision-making process needs to be articulated. On the universal plane, the reality of how much choice the individual has, in terms of taking decisions regarding the dispute management process, is subject to tremendous fluctuation. There can be no doubt that the degree to which one perceives any choice in pursuing a particular course of action varies significantly. In the realm of differing cultural practices there is also no doubt that the choices which are available in any given situation vary significantly according to some of the most salient factors that make up cultural identity: ethnicity, gender, socio-economic status, religion. This understanding of variation in practices and social mores has to be applied in depth to Gulliver's model to attain a truly cross-cultural perspective.

Mindful of Gulliver's protestations that his model should not be criticized simply for not applying to specific empirical cases,[10] in the sphere of marital disputes, where the socio-cultural context in which the dispute takes place cannot be ignored, the model does require re-evaluation.

2. GULLIVER'S PROCESSUAL MODEL

The model developed by Gulliver can almost interchangeably be applied both to the processes of negotiations and the mediation of them, if we consider that mediation is the process by which negotiations are facilitated. There are two interconnected processes taking place during the course of a negotiation; the repetitive cyclical exchange of information, and the development of the process itself:

> [a] simple analogy is a moving automobile. There is the cyclical turning of the wheels . . . that enable the vehicle to move, and there is the actual movement of the vehicle from one place to another. The latter depends on the former but the raison d'être of the automobile is its spatial movement.[11]

In this paper the focus is on the developmental stages of the negotiation, but, needless to say, for the sake of clarity reference will also inevitably be made to the cyclical process of 'information exchange'[12] which takes place continuously throughout the course of the negotiations. The mediator's role is primarily to encourage this process of information exchange, whilst keeping a tight rein on the development of the negotiation and ensuring the passage from one phase of the process to the next. In order to forestall any objection to the use of the term 'tight rein', it is important to take note of two factors: first of all, were the parties able to negotiate effectively with one another there would be no need for any mediatory intervention; and second, the mediator invariably transforms the process of bilateral negotiations, but with the parties' consent, and so, one may conclude, with the express, and mutually agreed purpose of facilitating negotiations.[13] As such, facilitating communication is the single most important function of the mediator, and, it follows, one that is heavily reliant upon an understanding of the dynamics of the cultural identities of the disputants. The mediation process is predicated on achieving an initial consensus, which will ultimately succeed because of the mutual respect between not just the parties themselves, but also between each party and the mediator. This respect entails, at its most fundamental level, the acknowledgement of the universal human capacity to act with dignity in the pursuit of fairness, at the same time as being understandably oriented towards what is in their [and their dependants'] best interests. This respect can only be authentic when the cultural and ethical norms upon which it is based can be shared by both the mediator and the parties.

3. GULLIVER'S PROCESSUAL MODEL AS INFORMED BY AN ANALYSIS OF CULTURAL IDENTITY

Gulliver set out eight stages of the negotiation process:

Stage I: The search for an arena

Stage II: Agenda formulation
Stage III: Exploring the field
Stage IV: Narrowing differences
Stage V: Preliminaries to final bargaining
Stage VI: Final bargaining
Stage VII: Ritual affirmation
Stage VIII: Execution of agreement.

Gulliver is keen to stress the fluidity of the phases and the fact that the phases arise out of the nature of the dynamic interaction between the parties. As the aims of the parties change, so successive/new phases are entered into. Alongside this interaction there is the movement of the cyclical exchange of information from antagonistic paucity of exchange between the parties, to co-ordination between them with mutual increase in learning. Needless to say, this model is not arbitrary, nor restricted in its application; it serves as a trajectory to chart the progress of negotiations.

A. Stage I: The Search for an Arena

Often, this search becomes an issue in marital disputes once the dispute has reached such a crisis point that parties are aware that simple bilateral negotiations are no longer possible to resolve the situation. As such, this search for another arena in which to conduct negotiations signifies taking the dispute into the public domain, and thereby altering the dimensions of the dispute. Gulliver labels this phase as one of movement from antagonism to co-ordination, as the parties have to co-operate at least to agree a venue, and to involve a third person/third party. In terms of mediatory intervention this may be the first time another party, who is asked to mediate, is made aware of the dispute. In the Western context of formal mediation sessions, with the increasing institutionalization of mediation services there is often not much scope for the parties to choose the venue for the mediation sessions. However in other cultures this is a lengthy first stage of the process,[14] and in all situations where the mediatory intervention is very much less formal, the decision of where negotiations are to take place is a crucial first step in the dispute resolution process.

Each venue indicates a particular set of ground rules for the disputants,[15] and within the context of minority ethnic communities the difference between social mores at home, at venues amongst the member community, and in the wider social domain is exaggerated. The dynamics of migration, the concomitant insecurities and need for self-preservation and simply the fact of being in a minority has implications for the way in which any family dispute is tolerated and the importance the dispute acquires in the life of the family. The choice of venue for any particular phase of the negotiation process

may continue to change as the negotiations progress; for example from the family home of one of the disputants to the local place of worship. This signifies important developments in the dimensions of the dispute, and the varying degrees of antagonism or co-ordination between the parties. For instance, taking the example just cited, a movement of the negotiation venue from a family home to a place of worship obviously indicates that antagonism has become so high that parties are keen to involve authoritative religious outsiders to break the deadlock. This can, in turn, signify the desire to shift the ground rules by encouraging the acknowledgement of, and need to adhere to, a particular set of norms. There appear to be clear differences between the various minority ethnic communities as to whether such family disputes can be resolved with the intervention of outsiders (that is, those who are outside the immediate family), and the status of the outsider is also viewed in differing ways by the various communities. The receptivity to outsiders can depend on many factors. It can depend upon differences in attitude amongst diverse generations in a community; so that in a study concerning the Hindu-Gujerati community in the United Kingdom, predominantly older respondents indicated that they would prefer intervention to take place in the home or in community centres, as opposed to younger generations who in general preferred the intervention to be located outside the community.[16] In the same vein, it is also interesting to consider that whilst there are parallels between the Jewish community and the Muslim community in this regard, there are also marked differences. One factor that led to limited referrals to a specifically Jewish family mediation service that was established in the London area in the early 1990s, was the reluctance of the appropriate religious authorities to recommend mediation to disputants, despite the particular mediation service's prior consultation with religious community leaders.[17] However, it is also widely known that an additional factor was the difference in opinion between those members of the community who considered themselves to be orthodox, and those who did not. Those disputants from the orthodox community were reluctant to reveal the dimensions of their marital disputes to outsiders. In contrast, research that the author is conducting in the Muslim community appears to reveal the opposite trend; members of the community who consider themselves to be practising Muslims (and the degrees of adherence vary considerably) are keen to involve the intervention of outsiders with religious authority in their marital disputes in an attempt to ensure that the dispute be resolved within a common normative framework. As such, an important parallel with the Jewish community is the necessity for the outside intervention to be 'authorized' by respected religious community leaders. However once that authorization takes

place, Muslims, unlike Jews, will seek the active involvement of outsiders.[18]

In mediatory intervention, it is clear how significant this phase is for the disputants, as it requires a high degree of co-operation between the parties, because of the shared readiness to seek a tolerable solution to the dispute. However, if the mediation session is to move in the right direction, not only must attention be paid to the social and geographical location in which the mediation session will take place, but also to the more important question of who the parties to the dispute are. As stated earlier, the whole premise regarding the decision-making capacity of the disputants needs to be re-evaluated in the light of cultural factors.

Joint decision-making

The opening sentence of Gulliver's *Disputes and Negotiations* reads:

> Negotiation is one kind of problem-solving process – one in which people attempt to reach a joint decision on matters of common concern in situations where they are in disagreement and conflict.

He continues, 'the way in which two parties negotiate with each other',[19] – herein lies the rub (or at least one of them). This assumption of an interchange between two equals is prevalent throughout Gulliver's exposition of this model of negotiations: 'Negotiations may operate within fairly distinct subsystems (such as small clusters of neighbours, kin groups, voluntary associations) where the members are roughly equals.'[20] And again, 'two kinsmen or neighbours fail to agree; two businessmen are unable to fix the matter . . . one or both parties can no longer tolerate the situation as it stands'.[21] Gulliver goes on to say, in his concluding remarks, that he envisaged, throughout his book, negotiation between two opposing sides, possibly comprising teams.[22] What he then omits to mention is that often, particularly within the context of marital disputes, negotiations do not take place between two equals, but between one disputant and one representative. In many cultures, disputes are negotiated and resolved not between husband and wife, but between the husband and the wife's representative. In some cultures, this is the case even in disputes between unmarried women; the dispute is resolved between the male family members of the female disputants. To take one example, in Witty's[23] study of conflict management in a Lebanese village, she outlines a dispute that takes place between two women.[24] Here two women cross paths on the road from the village to the fields. As one of them hurls sexual insults at the other, the other responds by hitting her with a metal pan. Physical violence then ensues, until a group of other women passing by separate the two, by this time, bloodied and bruised disputants. All the women return to the village, and the disputants relate their version of the

dispute to their families. The fathers and brothers of the two disputing women 'met initially to discuss who had initiated the argument, who was the most seriously injured, and which actions were provoked or motivated by events in family history. These men had one heated, exploratory session, and a second session in which the mayor and three non-related male elders were present. All tentatively agreed at this second meeting that the injuries and insults were about the same for each woman and family, and that the women should apologize to one another.[25]

In the meantime, the female relatives of the disputants continued to work and live together (whilst continuing to support the two disputing women), as they had an interest in not severing relations, having previously entered into an informal political alliance against an opposing female group. They were unwilling to damage their good relations simply because of a dispute between two younger women in their families. Six weeks after the second meeting between the male relatives, the two disputing women came together at a meeting. The male family members and the mayor were present, and the two female disputants were accompanied by their mothers and maternal grandmothers. Brief apologies were exchanged and coffee was served. As this case demonstrates, it is unnecessary to generalize and stereotype women who are not themselves negotiating the outcomes of their disputes. Here it is self-evident that the women are neither passive and gentle, nor are they vengeful and vindictive to the point of disrupting valuable political alliances. As Witty observes, this case illustrates that women do actually influence the course of proceedings, despite their inexplicit involvement, and that 'the movement from one stage to another is certainly not the sole activity of male mediators and male elders'.[26] Nonetheless, it is clear that the interchange involving the exchange of information as envisaged by Gulliver takes place not between the parties themselves but between their male representatives.

Although it is often the case that the process of negotiations, as analysed in Gulliver's processual model, takes place between men, it is difficult to underestimate the power and influence of women in the resolution of disputes within any particular social unit. Thus, when taking a closer look at Gulliver's operational scheme of negotiating power, and the transformation of potential power into persuasive strength,[27] it is clear that, whilst women may possess these resources of power and strength in a dispute, they may not be the agents who directly apply these resources to the opposing side in a dispute, and that the power-brokering is a more complex enterprise. It follows, then, that another facet of joint decision-making demanding closer examination is what consequences there are for the negotiation when there are two or more parties. Throughout Gulliver assumes 'that negotiation occurs between two opposed parties . . . [which] must surely comprise

the majority of negotiations'.[28] From a truly cross-cultural perspective what must be acknowledged is that in many marital disputes where the social unit in which the couple are situated is tightly-knit, the wider family network has an important bearing on the dispute, akin to the presence of an interested third party in the negotiation process. The effect can often be to circumscribe the possible outcomes of the negotiation process, because marriage is seen as one vital component in the extended family network: for example, in the Hindu-Gujerati community:

> [i]t is important to remember that one function of marriage is to perpetuate community and caste ties. When couples deviate from established patterns of partner selection, they risk losing the support of their families and their community. The acceptance of a marriage is very important in relation to how the couple interacts with other family members and whether that network is supportive.[29]

From this quotation it is possible to grasp some idea of the all-pervasive way in which the wider family network, with its own normative value system, can impinge upon the disputants' choices in the negotiation process, so that the extent to which decisions are taken on the sole basis of the parties to the dispute is very questionable. For Gulliver, the fact that an 'interdependent joint decision'[30] has been taken is what distinguishes the process of negotiation from adjudication 'because there is no third party to determine what the outcome should be'.[31] Gulliver does go on to mention the pressure felt by disputants from 'outsiders'[32] but he adds that this does not fundamentally alter the nature of the joint decision-making process. This may not be the case, however, when, for example, male family members intervene where female disputants are involved, because these male family members become, effectively, parties to the dispute. The negotiations that take place can be between the male family members, the female[s] involved and the 'opposing' party (male or female).[33] The involvement of other parties in the process necessitates a realignment of the dynamics of the negotiation/mediation model, and in particular analyses of the power shifts, but does not totally prohibit, the applicability of the model, as the mediation process may still undergo the stages outlined by Gulliver.

B. Stage II: Agenda Formulation

Once the arena or venue for the negotiations has been agreed upon, the next crucial preliminary step in information exchange for the parties is to define the agenda. This phase involves finding out what is in dispute between them. This depends upon the parties' perception of the dispute, how they perceive and understand conflict and marital breakdown and the causes of the dispute.

This phase in the process is one in which the disputants are defining

the dispute for themselves and taking stands on issues, and as such, this is a period of high conflict[34] between them. This conflict eases as the wheels of the cyclical exchange of information turn, and the disputants learn about how the other perceives the problem. This perception depends fundamentally upon the 'universe of meaning' that the disputants inhabit, in terms of their understanding of the cause and facts of the dispute.

Perceptions of the dispute

Gulliver states the importance of understanding the normative framework within which the dispute is situated:

> the dispute itself is defined in part by a normative framework that both parties more or less accept in a situation . . . The point here, however, is that the framework and the definition are and must be in normative terms, and that means that the parties are in part constrained by the agreed and accepted norms. Moreover, their expectations are significantly affected by these norms.[35]

This normative framework is determined by the cultural identity of the disputants. This identity can depend, at the very least, upon the gender, religion, national and regional background, socio-economic status, education, 'generation'/age of the individual. The 'world view' held by the parties and their adherence to religious norms and particular community values are instrumental in comprehending the dimensions of the impact of cultural identity.[36] Recent research serves only to confirm the varied importance of religion in the lives of people from minority ethnic communities.[37]

In modern multi-cultural communities it cannot be assumed that there is a store of common knowledge about the interaction of these factors. Merry warns against assuming that the values shared by one cultural community can be transposed onto another community, and this is *a fortiori* the case when there are different cultural minority communities, existing amongst the majority. In her critique of community mediation, Merry contrasts the pastoral community, whose ideals of community mediation are espoused by Western community mediation programmes, with modern American society:

> these horticultural and pastoral societies consist of small, stable, close-knit bounded settlements . . . [a member] becomes accustomed to submitting to the social control of his peers . . . [who] share similar values according to which disputes can be settled . . . Community mediation has been transplanted from this social context into a very different setting; the heterogeneous, transient, anonymous, and morally diverse American city whose citizens believe they possess legal rights that should be protected by the courts.[38]

The divergence in attitudes concerning marital conflict is likewise just as pronounced amongst different minority communities who, for

example, perceive divorce in a variety of ways with varying degrees of stigma, and hold diverse views about the infringement of norms. So the view that Muslims hold about divorce is influenced by the fact that divorce has been a right available to both men and women since the inception of the religion, contrary to the view held by Hindus that marriage is an unbreakable lifelong union, which until recently, could only end upon the funeral pyre. However, both these examples need to be attenuated, depending on the national identity or the generation of the Hindu or Muslim in question. A Muslim from the Indian sub-continent is likely to have very different views from those of a modern Arab Muslim, or a modern Hindu brought up in the West. Furthermore, behavioural norms are very important in shaping people's perceptions about the causes of disputes[39] including attitudes towards conflict generally; whether community members are encouraged to air grievances, or whether there is an attitude of silent resignation. In some cultures, marital breakdown is, in principle, a matter for the whole community, and therefore dispute settlement in this realm involves contextual discussions with many members of the community. This is in stark comparison to other cultures where, precisely because of the stigma attached to any kind of familial conflict, parties are discouraged from airing their grievances in public. In such cases, marital difficulties are 'discovered', rather than brought to attention. Such variance in attitude has profound implications for the ease of the ensuing negotiation process.

At this stage in the mediation process other very important decisions about the process also need to be made. The institutionalization of mediation services requires that particular attention be paid to matters that might be taken for granted if the mediations were taking place in traditional homogenous contexts. For example, a decision about whether to conduct initial caucus sessions could be sensitive because of the inappropriateness of single mediators being alone with the opposite sex in the same room, as this is also the stage where the 'ground rules' regarding communication are laid down. Other factors to consider are the participation and presence of other family members; and it could even be important to consider the layout of the room.[40] As decisions are finalized about the process and the shape that it will assume, the mediation proper begins with an attempt to define the issues in dispute.

C. Stage III: Exploring the Field

At this stage there is an emphasis on the differences between the parties, as the antagonism between them increases. To pass through this phase requires managing these differences, and weathering the storm created by the high conflict and tension as the differences are aired.

In this stage of the process the disputants are emphasizing their

individuated approaches. It is a phase 'garnished with ideology, righteousness, and accusations'.[41] There is an attempt to 'establish maximal limits and demands . . . [and this] logically puts the two parties in the extremes of opposition'.[42] Gulliver goes on to note that during this phase a kind of 'ritualistic' anger is displayed and he gives examples of groups where the norm of 'reticence and taciturnity' is replaced by rhetorical performances.[43] Evidently, this departure from more common behaviour would only be apparent to the mediator , if s/he were familiar with the behaviour traits of the particular social group in question. At the very least it would be necessary to appreciate whether conflict was generally tolerated, and whether confrontation was encouraged. Furthermore, there can be marked cultural or linguistic differences between parties regarding the cultural attitude towards verbal and non-verbal communication, even where communication is in the same language. To take an example from the Indian sub-continent, something as seemingly minor as the raising of voices during the course of an argument is perceived quite differently by members of the Punjabi community, where this is considered common, in contrast to members of the Urdu-speaking community, for whom such behaviour could be considered as exceptional. Examples such as this can be found across the range of minority groupings. The significance of non-verbal communication cannot be assumed to be capable of universal interpretation, or at least to Western modes of interpretation. One very simple example is the fact that in many cultures avoiding eye contact is a mark of respect, contrary to the notion of openness and integrity that such eye contact can signify in the West. The attitude towards self disclosure and display of emotions also varies considerably; in some cultures, silence can indicate positive acceptance, whereas in others it is a sure sign of disapproval. Clearly current Anglo-American trends towards openness in displaying emotions and communicating freely about oneself are not necessarily shared by members of minority ethnic communities resident in the West. Nor would it automatically enhance the quality of the mediation if these attitudes were encouraged in an attempt to dispel tension and promote an airing of all the issues.

This seemingly inexplicable departure from common behaviour in this phase of the negotiations appears as nothing less than 'madness'[44] and it is only understood when it is realized that this is a necessary precursor to the order that should eventually prevail. So it is here that the skill of mediatory intervention can be of real advantage in enabling the parties to move onto the next, more productive, phase. The mediator has to facilitate the exchange of information by enabling the disputants to see how the other perceives the dispute, as, in the final analysis, the resolution of the dispute is achieved by this accumulation

of information. The disputants seek to ensure their initial demands are not pitched too low, but this positioning takes place within the context of what is ultimately possible. Not all boundaries can be transgressed as the 'field of dispute'[45] is surveyed. If the mediator is unaware of the defining parameters of 'reasonableness' of the options that are being suggested, his/her capacity to facilitate communication is severely hampered. During this phase of the process a great deal is dependent upon the mediator earning respect in order to inspire the parties to recognize commonalities and come to an agreement:

> 'In order to function well in any interpersonal situation it is necessary to be able to reinforce others' . . . and to interpret other's reinforcement (or lack of it) appropriately.[46]

D. Stage IV: Narrowing Differences

This phase of the process involves the disputants moving forward by narrowing differences, and strategies are employed to sift through the issues with the eventual aim being to reveal the more 'obdurate'[47] ones. Here, the mediator should enable the parties to explore possible common interests, as 'co-ordination is essential. It has to begin somewhere somehow'.[48] This phase is one characterized by the movement from ideal preferences to possible outcomes which are intended to be taken seriously. It is a matter of 're-orientation leading to final bargaining'.[49] The ability to perceive possible outcomes as opposed to preferred options depends very much on the capacity to perceive the 'normal' limits for a party. Necessarily, options are examined by all concerned in the light of what can be expected of the parties.

The intense sphere of marital disputes magnifies the claim that norms have been violated or rights abrogated. The criteria enabling the resolution of any dispute have to be firmly situated within the common normative framework of the parties, and often it is precisely because one party has transgressed boundaries that the dispute has arisen. This perception of what has been the underlying cause of the dispute often manifests itself as a stalemate in the dispute resolution process. Mediatory intervention can act as a catalyst inducing parties to unleash the impetus to find options. The many roles that the mediator can adopt during the mediation process of passive listener, leader, enunciator of norms, and prompter[50] all come into play during this phase. The facility with which the mediator moves the parties toward some form of co-operation, or at least shared agenda, depends on both the skill and confidence of the mediator. These two attributes are necessarily shaped by the depth of knowledge the mediator feels s/he has of the dispute, the disputants, and the ethical and normative framework within which they operate. The mediator needs to be aware of how far the disputants have strayed apart:

some norms are so intrinsic to the culture that they are scarcely articulated. They are taken for granted in tacit agreement yet they considerably affect both the process and the content of joint decision-making.[51]

If the mediator is unable to categorize the behaviour of the disputants for fear of making stereotypical generalizations, this fear will then cause the mediator to traverse the shaky terrain of multicultural tolerance. Having been removed from their particular 'universe of meaning' the mediator will inevitably make hasty judgements and clumsy assumptions, and so be forced to look through an unfamiliar prism. If the mediator is placed at that kind of disadvantage (and attendant diminution of self-confidence), their professional appraisal will necessarily be inhibited, resulting in a less than satisfactory resolution of the mediation process. The question then arises as to whether the mediator will truly be able to fulfil the role of 'facilitator of the exchange of information', and whether it will be possible for the mediator to enhance 'the concomitant learning and the consequent readjustment of perception, preferences and action decisions . . . [and] therefore assist the flow of information both in quantity and effectiveness'.[52] If successful, the mediator has facilitated the flow of information exchange by clarifying the demands that have been made and the solutions open to the parties:

> Once the mediator goes on to provide a normative framework for discussion, however sparse, the universe within which bilateral negotiation would have taken place is profoundly changed . . . [m]any mediators will see it as necessary to a settlement that the disputant's view of their predicament be transformed; and so deliberately set out to do this, offering evaluations of past conduct or future options, and identifying what they consider to the appropriate outcome.[53]

E. Stage V: Preliminaries to Final Bargaining

At this stage, parties are conscious of the narrow range of issues still in dispute and need to develop a 'bargaining formula'.[54] This is done by establishing a 'viable bargaining range',[55] to determine the final limits that can be placed upon the negotiations. This point in the process can often mark a tentative breakthrough as parties become aware that some of the issues between them may be resolved The mediator's key function is thus to ensure that this light that appears on the horizon does not fade, and this is achieved in the main by ensuring that the channels of information exchange flow freely.

As the scene is set for the final bargaining, this phase and the next may be very short, if the flow of information exchange has thus far been copious. Often, what Gulliver calls the most 'obdurate' issues have been identified, or are well into the process of being so identified, and these are issues that lock parties into mutual antagonism; where there

is a determination not to lose. Frequently obdurate issues concern the social identity of the disputants, what Gulliver outlines as their 'reputation, morality and status',[56] and so the dimensions of the social life of the community comprise an important aspect of these issues. During this phase then, disputants often re-articulate matters, so that a viable trajectory for final bargaining can be established with a distant view to agreement. Parties will usually agree to abandon certain issues as non-negotiable and establish some kind of bargaining formula – what can be conceded and what cannot – which is almost the resolution of the bargaining itself.

The mediator has to facilitate the parties' perceptions of how the dispute can be resolved within their ethical and normative framework. The fact that marital disputes envisage continued contact because of persisting ties such as children, can mean that as much as parties are aware of the necessity of arriving at some breakthrough, curiously they are concomitantly more able to jettison every ounce of goodwill knowing that whatever happens they will be forced to communicate again, even if that means they will be locked into a state of permanent attrition. Attempts to arrive at bargaining formulae only have meaning when it is clear what can be compromised for the sake of smooth relations, and what cannot, and it is self-evident that the subtleties of pervasive viewpoints can be elusive. For example, in England the current emphasis on child-centred solutions[57] could result in overlooking the starkly differentiated cultural imperatives of child rearing. Harrington and Merry's notion of the mediator as an 'agent of reality'[58] who acts as a kind of barometer, by which the parties can gauge the reasonableness of their assertions, is particularly illuminating in the context of marital disputes where disputants are all too willing to operate on the bases of extremely emotionally laden criteria. Within this context, the knowledge of normative family structures such as the dynamics of the extended family, or the prevailing attitude towards elders is axiomatic in achieving dispute resolution. The complexity and importance of these wider family relationships can have a greater impact on the dispute than any problems in the marriage of the couple. So that, for example in the Hindu-Gujerati community:

> Now he [my husband] is the head of the house, he not only has to look after my needs and care for me but also for the whole family and make sure that their needs are catered for. Similarly for me being the eldest son's wife and having his younger brother married, I'm suddenly considered an elder person! And because my younger sister-in-law is looking up to me, the way I act reflects on the way she behaves and acts.[59]

Given that not all disputants could be so articulate about the impact of such complex family relations upon the marital dispute, it is clear

that much depends upon the mediator's familiarity with the prevailing cultural norms in order to act as the 'agent of reality' in such a way as to facilitate a resolution of the dispute.

F. Stage VI: Final Bargaining

As the end is in sight, the disputants often relish one final opportunity to put forward partisan views or achieve personal gains; taking the risk of jeopardizing the final resolution to the dispute, even at this late stage in the mediation process. It may be that all that remains in this phase is the ironing out of small details; if not, it is the case that no truly viable range of options has been established and the negotiations are poised to fail. Gulliver echoes the widely held view that bargaining itself 'constitutes convergence by incremental concessions'.[60] As such this phase can be very short indeed if disputants come to the conclusion that the agreement *per se* is more important than the points to be agreed. This stage then, if successful, is characterized by the making of concessions, and then as Gulliver himself notes 'bargainers frequently plump for an outcome with a suddenness that defies explanation'.[61] They are so keen to come to an agreement, that they gravitate to a position that has an 'intrinsic magnetism'.[62] But as Gulliver points out, this position may be one that has been suggested by a mediator.[63] Ideally the principle of party control over the dispute resolution process would dictate the degree of mediatory intervention, so that disputants are ensured of arriving at workable solutions, and the mediator is given clear signals as the degree to which the outcome of the mediation process should be evaluated. Nonetheless, the peril of ignorance on the part of the mediator is that outcomes that would not in any way be tolerated within the normative frameworks of the disputants are reached because ignorance has resulted in one party's voice being misunderstood.

G. Stage VII: Ritual Affirmation

This penultimate phase, in fact, quite often the final phase, is to mark the outcome of the negotiations. As Gulliver notes there may not necessarily be any agreement except to return to the *status quo ante*, but nonetheless that is a conclusion to the negotiations, worthy of some acknowledgement. Gulliver writes very briefly about this and the next concluding phase, and clearly states that there are cultural prescriptions that govern these proceedings. The importance of these customs is profound in ensuring the successful execution of the outcome. The rituals acknowledge satisfaction with the process and forestall the possibility of default by some kind of proclamation about the agreement to the wider community. The rituals range from the shaking of hands, to a mandatory celebratory meal with the mediator. In some cultures the signing of a document heralds mistrust and any written agreement

could achieve exactly the opposite effect to that intended. Likewise the use of libations could be entirely inappropriate and the invocation of prayer entirely appropriate. Needless to say the absence of any ritual seal to the agreement would clearly jeopardize its lasting efficacy for the disputants.

H. Stage VIII: Execution of the Agreement

Gulliver added this very last stage so as to incorporate the possibility of carrying out any agreement then and there, at the conclusion of the session, as often took place in the African negotiations detailed in his ethnographies. However, in the context of marital disputes the occasions upon which it would be possible to execute any agreement immediately would be rare and limited. Some possibilities are: the immediate pronouncement of Jewish or Muslim divorce; or handing over of a child; or the immediate vacation of the family home. The value of putting the agreement into immediate effect goes without saying, but is obviously more possible when the process has been more informal.

4. CROSS-CULTURAL MEDIATION IN MULTI-CULTURAL SOCIETY

The perceptions that parties have of the dispute, and the choices open for the way forward, are to a high degree delineated by the ethical and normative framework within which the parties operate. There is both universality and specificity to consider: on the one hand, there is an undoubted need for general guiding principles that are universally applicable, given the fact that human beings share a certain irreducible minimum; for after all, without such a minimum the very notion of a cross-cultural perspective on mediation would be meaningless. On the other hand, there is a no less imperative need for an understanding of specific cultural and religious norms that significantly enter into the formation of perceptions of and responses to given social situations. Without an appreciation of this cultural specificity, supposedly 'universal' principles run the risk of being hollow abstractions that are far removed from the concrete modalities of disputes in the real world. Furthermore, even on the basis of appreciating cultural values there remains another question to be addressed. To what extent can such appreciation render credible the role of a mediator who does not share the culture of the disputants? Too often, where outsiders,[64] those who do not share the same cultural identity as the disputants, are involved, despite themselves they lose their position of neutrality, and fall prey to the attempts made by interested parties to generate sympathy for their own cause. This is contrary to the ideals that Western mediators hold dear, but is not necessarily anathema to adversarial lawyers. However this is not to ignore the possibility that lawyers themselves abide

by different ethical frameworks,[65] and that for the lawyer, the difficulty in ascertaining the correct ethical duties surrounding the conflict whilst conducting negotiations are compounded by the release of the cultural dynamic into the equation. However in a process so fraught with value judgements as is mediation during the breakdown of a marriage, there is no question that the mediator's influence is instrumental in achieving the success of the negotiations, as in the minds of the disputants themselves the mediator can no longer be considered simply as a detached observer, but is a party to the process of mediation. A mediator ostensibly from the minority community who did not assert values that are commonly held, could also be seriously undermined and mistrusted, because the non-assertion of commonly identifiable values would indicate such a poor assimilation of the cultural norms by which the community abides:

> norms refer to, and represent in shorthand form, sets of interests and distributions of power and status in society. To invoke such norms, and to claim to conform to them, is not only an acknowledgement of their importance *per se* but an attempt to make use of them by showing that a party's past behavior and present demands concur with, and are supported by, those interests and power.[66]

In Western mediation programmes the notion of mediator neutrality is paramount and it is considered imperative that value judgements about the disputants' actions are not vocalized, even if the dispute arises because of a clear violation of normative behaviour in the eyes of one of the disputants, as they are almost always likely to. But in the context of marital disputes where both disputants share the same minority cultural background, (or even more complicatedly where there are differing minority and majority cultural identities amongst the parties), the mediator's lack of assertiveness about commonly held values can result in a corresponding lack of respect for the mediatory intervention, and thus impair the quality of the outcome of the dispute.[67] The reason why this is more acutely the case concerning marital disputes in minority community contexts, is that the coherence of these social groups depends acutely on the assimilation of a common normative framework. The migration process has the effect of increasing the 'the perceived value and significance of religious belonging. In a way, in the new environment, the religious affiliation moves from the latent to the manifest'.[68] Thus the insistence upon 'neutrality' as a notion in mediation parlance, even when that is contrary to the common ethical framework shared by the parties, results in the imposition of outsiders as mediators to the exclusion of community members, at the expense of achieving the ideal of genuine community mediation.[69]

It is possible to perceive the benefits of exploring the different models of mediation where, for example, community members approve

the third party as authorized to perform the tasks of mediation.[70] However, if minority community members are deemed not to have the requisite neutrality required and neutral professionals are chosen instead, the principle of autonomy that community or cross-cultural mediation is predicated upon is then compromised. The initiative to mediate comes then from a source that does not really 'belong'. Contrary to the more commonly held view that it is the mediator who needs to identify with their client, advice and involvement can only be efficacious and acceptable when there is that 'identification' with the mediator by the client. Where a community is a minority, an outsider remains just that, no matter how sympathetic, so much so that even a member of the community who has rejected some of its normative ethics is considered an outsider. All of this follows as a consequence of the heightened salience accorded to the normative framework in any minority community, whose abiding identity as such is founded in large part on this framework. Whilst conducting research into the Hispanic community in America, Taylor and Sanchez[71] argue persuasively for training to be accessible to the 'natural helpers' within the community:

> those who already command respect because of their personal attributes or their position within the community, such as the priest, the formal godparent (compadre), the social workers who are already in agencies specific to the community, and even the mother, who often informally mediates as part of her role to keep the family together. It is unrealistic to think that members of this community will seek out mediation services in little white boxes when there is no anticipation that those providing it will understand the needs and language, let alone the cultural themes and dynamics or the nuances.

The ideal, then, is for mediators to be of the same cultural background as the parties, since no form of training can, *a priori*, impart a fully comprehensive understanding of the 'universe of meaning' that shapes our responses to the whole gamut of situations that arise in the course of life. However, this does not absolve all mediators from the need to acquire training into the dynamics of culture, because to be effective mediators it is necessary to recognize problems involved in bridging the gaps – often unconscious – between the psychological responses differentiated, precisely, by divergent cultural attitudes. Only in light of this awareness can there be any question of appreciating the impact that cultural values have upon the dynamics of a dispute and its resolution.

The focus of this paper has been to examine the developmental model put forward by Gulliver in light of an understanding of the importance of the ethical and normative framework ingrained within the attitudes and expectations of the parties involved. The reality of different cultural concerns operating within the process of negotiation points to the necessity of a fuller appreciation of the different dimen-

sions assumed by outwardly similar problems in differently constituted cultural communities.

It is also within the context of marital disputes that mediation is set to play a prominent role in the UK under the Family Law Act 1996. This and other reforms in the current wave engulfing the civil litigation system in Britain have ensured that the process of mediation has come to mean all things to all men. The view that mediation is a process that facilitates longer-lasting and more amicable resolutions to the disputes pertaining to a divorce settlement is a central tenet of the new Act and a view that appeals to the current trend for the devolution of power. Mediation is viewed as one means of reducing the sense of bitterness, resentment and grievance resulting from divorce that mar the way forward for couples and any children to resume their lives in a different family situation. This approach has been the fruit of various studies.[72] However, none of these studies has addressed minority community concerns. Thus far, the studies concerning family mediation and alternative dispute mechanisms compiled in the UK have focused on the majority population groupings, or have made no distinction in respect of the identity/origins of the participants. Studies compiled elsewhere have, as a general rule, neglected the perspectives of minority groupings existing in industrialized Western nations and have focused on the dispute processes of non-industrialized communities.

Mediation is deemed capable of restoring the locus of power back to the disputants, encouraging self-determination in the judicial sphere. The benefits of this are manifold, not least for those involved in the costly administration of dispute management.[73] Nevertheless, from the perspective of those eager to roll back the boundaries of legal positivism, the process of mediation acknowledges the complex and nuanced nature of disputes, and by so doing, through a kind of deconstruction, the simplistic determinism of positivism is broken down. The concomitant imperative is to ensure that the potential sphere of mediation is not restrictively delineated as a result of failing to consider the needs of all who could benefit from its fluidity. Amongst many minority communities mediation is a primary means of dispute management, but despite this, they may fail to reap the fruits of the present enthusiasm for its application, unless efforts are made to incorporate their perspectives.

Unquestionably, Gulliver's model has provided valuable insight into the processes of negotiation, and arguably, provided the foundational terms for the discourse through which this debate can continue. In the concluding pages of *Disputes and Negotiations* Gulliver outlined areas that he considered required 'further research and analysis', in particular; '[that] the nature of the relationship between the disputing parties within the structure of their society affects the negotiations between

them'.[74] This paper is an attempt to adumbrate a theoretical framework within which this analysis can be conducted. The discourse surrounding any paradigm reflects the currents of social interaction through which these processes weave. In the present debates surrounding dispute management, the social dimensions within which disputes occur cannot be ignored. In the interests of fairness, and in pursuit of the avowed aims of a process such as mediation to restore the locus of control to the disputants, there is a need to ensure that particular extraneous value systems do not dominate in the dispute management process of minority communities who have their own intrinsic values as this clearly militates against the satisfactory resolution of disputes. It is clear that the presence of many differently constituted minority-ethnic communities with widely varying value systems challenges the unquestioned assumptions that have hitherto prevailed regarding party control of and intervention in the dispute management process.

NOTES

[1] Gulliver (1979) *Disputes and Negotiations: A Cross-Cultural Perspective*, New York, London: Academic Press.
[2] Ibid at 213.
[3] For a full and illuminating exposition of this transformation in the light of family mediation see S. Roberts (1983).
[4] Gulliver (1979) at 271.
[6] Ibid at 74.
[7] Ibid at 74.
[8] See S. F. Moore (1975) at 237.
[9] Gulliver (1979) at xvii.
[10] Ibid at 172: 'To be frank, I wish to avoid the charge that this developmental model is "incorrect" or not useful because it does not fit closely the processual sequences of a specific empirical case.'
[11] Ibid at 82.
[12] Ibid at xvii. The phrase is introduced in the preface to the book and then utilized throughout the text: 'the exchange of information (and its manipulation), which permits and compels learning by each party about his opponent, about himself, and about their common situation: that is, about their expectations, requirements, strengths and strategies'.
[13] See above n 3, referring to S. Roberts (1983).
[14] See the earlier work by Gulliver (1973) particularly 668–73.
[15] Gulliver (1979) at 125.
[16] See, Goodwin, Adatia *et al* (1997) at 32.
[17] See Berg (1994).
[18] Again it is of interest to note that the majority of members of the Hindu-Gujerati community were not keen to involve religious leaders as such, but were in favour of intervention from individuals who shared the same cultural background, Goodwin, Adatia *et al* (1997) at 32.
[19] Ibid at xiii.
[20] 'Introduction to case studies of law in non-western societies' in Nader (ed), (1969) *Law in Culture and Society*, Chicago: Aldine at 21.
[21] 'Negotiations as a mode of dispute settlement: toward a general model', *Law and Society Review* 7, 667–91 at 671.
[22] Gulliver (1979) at 266.
[23] See Witty (1980).
[24] Ibid. 'Case 6. A Case of Insult and Violence Between Women' at 70.

[25] Ibid at 73.
[26] Ibid at 73.
[27] Gulliver (1979) at 201 and 267.
[28] Ibid at 268.
[29] See above n 19, Goodwin, Adatia *et al* (1997).
[30] Gulliver (1979) at 79.
[31] Ibid at 6.
[32] Ibid at 6.
[33] Gulliver himself notes at 266 in *Disputes and Negotiations: A Cross-Cultural Perspective* ('I have not considered the dynamics of discussion and interaction . . . inside a negotiating team'), that he has not considered negotiations within 'teams' although the presence of the 'third' male representative in the context discussed hitherto may not mean that there is a team effort as such.
[34] Ibid at 182.
[35] Ibid at 193.
[36] The notion of 'world view' adapted from Goldstein (1986).
[37] See, Berthoud, Modood *et al* (1997) *Ethnic Minorities in Britain: Diversity and Disadvantage*. London: Policy Studies Institute.
[38] S. E. Merry (1982) 7–45 at 20.
[39] See further, Goldstein (1986).
[40] For a detailed exposition of the need to take into account many such factors in the context of conflicting cultural communities, see further Barnes' study about contrasting Hawaiian communities, in B. Barnes, 'Conflict resolution across cultures: A Hawaii perspective and a Pacific mediation model', 12 *Mediation Quarterly* 2, Winter 1994.
[41] Gulliver (1979) at 136.
[42] Ibid at 139.
[43] Ibid at 140.
[44] Ibid at 114.
[45] Gulliver (1979) at xviii.
[46] See Goldstein (1986).
[47] Gulliver (1979) at 152 and see further below at 34.
[48] Gulliver (1979) at 146.
[49] Ibid at 142.
[50] See Gulliver (1982).
[51] Gulliver (1979) at 10.
[52] See n 49 above; Gulliver (1982) at 25.
[53] Roberts (1993) at 549.
[54] Gulliver (1979) at 153.
[55] Ibid at 153.
[56] Ibid at 153.
[57] Amongst others, see for example, the recent report by Murch *et al* (June 1999) *Safeguarding Children's Welfare in Uncontentious Divorce*, published by the Lord Chancellor's Department.
[58] Harrington and Merry (1988) at 728.
[59] Respondent in a Study on the Hindu-Gujerati community in Leicester; Goodwin, Adatia *et al* (1997) at 18.
[60] Gulliver (1979) at 162.
[61] Ibid at 167.
[62] Schnelling (1960) *The Strategy of Conflict*, Cambridge: Harvard University Press, cited by Gulliver in *Disputes and Negotiations: A Cross-Cultural Perspective* at 167.
[63] Ibid at 167.
[64] For a parallel discussion of this term, see Todd (1978).
[65] See White (1980) at 921.
[66] Gulliver (1979) at 191.
[67] Auerbach (1983) at 131–5.
[68] Baumann (1998) 'Asian religions entering European shores, the importance of religion in migrant settlement', paper delivered at the 25th EUROFOR conference: 'The role of religion, especially Islam, in the process of marginalization of ethnic minorities', London, 8–11 October 1998.
[69] See, Harrington and Merry (1988), n 58 above at 730.
[70] See further: Gulliver (1979); Merry (1982); Palmer (1991), all of whom have detailed the processes of mediation where the third party is authorized and chosen by the community.

[71] See Taylor and Sanchez (1991) at 119–20.
[72] For example: see Davis and Roberts (1988).
[73] See G. Davis (1999) 'Monitoring publicly funded mediation', *Family Law*, September, 625–35.
[74] Gulliver (1979) at 271.

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