



UNITED NATIONS  
*Office on Drugs and Crime*



# TRAINING MANUAL ON ALTERNATIVE DISPUTE RESOLUTION AND RESTORATIVE JUSTICE



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United Nations  
Office on Drugs and Crime

**Training Manual  
on Alternative Dispute Resolution  
and Restorative Justice**

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## Foreword

Alternative Dispute Resolution and Restorative Justice have been introduced in many jurisdictions in Nigeria over the past decades with a view to dealing more effectively and efficiently with growing caseloads and to improve citizens' access to the Justice System. While the possibilities for Restorative Justice under our laws and procedures remain limited, many States have introduced systems for Alternative Dispute Resolution with considerable success.

It is in the light of the above that the National Judicial Institute in collaboration with the United Nations Office on Drugs and Crime and with the financial support of the European Commission developed a training course on Alternative Dispute Resolution and Restorative Justice. A large number of Judicial Officers have already benefited from such training and the response has been extremely positive. We, therefore, feel encouraged to further expand this programme, and hope to help build the skills required to improve the services we deliver to our citizens and those who come to our country to invest and participate in our economy.



Hon. Justice Timothy A. Oyeyipo, OFR  
Administrator of the National Judicial Institute



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## **Overview of Workshop**

- Introduction and application of Alternative Dispute Resolution and Restorative Justice concepts
  - Introduction to the concepts
  - Comparative perspectives
  - Application and relevance to Nigerian legal context
  - Design and practice considerations
- Two and a half day workshop, ten sessions, lunch speakers, substantive presentations, facilitated discussions, reading and reference materials

## **Day One Sessions**

- What is ADR? What are its purposes?
- ADR under Nigerian Law
- Approaches to Negotiation
- Introduction to Mediation
- Review, questions, Day two overview

## **Day Two Sessions**

- Mediation skills
- Advanced mediation skills
- Introduction to Restorative Justice
- Restorative Justice under Nigerian law

## **Day Three Sessions**

- Designing ADR and RJ systems in Nigeria
- Evaluating the Judiciary for ADR and RJ (elicitive, facilitated, discussion)

## **Overview and Context for ADR**

**The context:  
Judicial Modernization**

- Builds (or rebuilds) public trust in the institutions of the state
- Helps create better conditions for equitable growth and development
- Contributes to the reduction of social conflict and creates a more peaceful society
- Strengthens rule of law and democracy

See Additional Readings: Wanis-St. John, "Implementing ADR in Transitional States." See also: Messick, "Judicial Reform and Economic Development."

## Four Pillars of Justice

*Justice systems rest upon four principles  
or pillars that guide planning and operation*

- Accessibility
- Transparency
- Efficiency
- Institutionally strong

A functioning, modern judiciary that supports healthy governance and provides justice is:

**Accessible** to all citizens, businesses, civil society groups and government agencies, with variety of different avenues of providing justice services according to the needs of the parties, and dynamics of the dispute, the financial capabilities of the parties and the greater interests of society; consistency with diverse social norms held by civil society, religious groups and other norm-generating parts of society

**Transparent** in operations with equal provision of justice for all citizens and legal entities; procedural information simplified, use of oral procedures; rules and information available to all through a variety of channels for distributing information on cases, laws, regulations, procedures, filings, etc. The outcomes of judicial procedures are devoid of arbitrariness and not determined by the relative ‘power’ of the parties, but rather by the merits of their cases, the public interest, the legal context as well as norms of fairness and equity, as well as other standards

**Efficient** in the provision of services and utilization of resources, including systematic functioning of judicial processes and services, provision of specialized and alternate forms of dispute resolution to increase appropriateness of proceedings and decongest courts, and utilization of diagnostics of performance and capacity for continual improvement. When users of judicial services come to the courts and other justice related agencies, they are able to speedily obtain information, instructions, file proceedings, settle cases and have decisions upheld and enforced without undue delay, expense or other hardship.

**Founded on strong institutional capacity** that includes enhanced human resource skills and knowledge, data-collection and performance evaluation, service-orientation, physical infrastructure, judicial independence, professional advancement and training, modernized technological capacity, processes and creativity.

## Alternative dispute resolution

- ADR refers to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation
- These often include:
  - Arbitration
  - Mediation
  - Conciliation

See Additional Readings: “ADR Guide.”

ADR is modern version of an ancient set of practices. Traditional societies in all parts of the world have featured variations of third-party arbitration and mediation. Western societies saw these practices subsumed by the rise of modern judiciaries. The increased complexity of these processes, however, saw reduced satisfaction with legal outcomes among disputants, leading to a rediscovery of ADR in the 1970s in many parts of the world.

## ADR: Brief definitions

- Arbitration
  - Private individuals or panels outside of the court system that determine the legal and/or technical merits of a dispute and determine an ‘arbitral award’. May be ‘binding’ or non-binding.
- Mediation
  - “voluntary and confidential process in which a neutral person, the mediator, assists disputing parties to clarify issues, develop options and work toward a mutually beneficial resolution” - (Mediation Works Inc.) Mediators usually refrain from suggesting an outcome or solution
- Conciliation
  - Judge-initiated practice of guiding the litigants (usually in a civil suit) to create an equitable, negotiated ‘settlement’ instead of proceeding to trial. Conciliation sometimes incorporates suggestions for resolution

See Additional Readings: Bernard, “A Guide to Dispute Resolution Processes.”

Arbitration functions much like normal judicial processes, and conciliation can be a part of normal judicial proceedings.

Mediation, on the other hand, requires a different set of skills than judicial officers are typically used to employing. First and foremost, a mediator must not judge the disputing parties, and must refrain from giving advice. Parties are instead encouraged to find their own creative solutions to their conflict. If the parties can find their own solutions, they are more likely to be sustainable.

## **Practitioners: Individuals, Institutions within and without the court system**

- Institutions that can practice ADR include:
  - Court-annexed programs
  - Chambers of commerce, bar associations, industry groups, other
  - Private enterprises
  - Grassroots civil society groups
- Individuals that practice ADR include:
  - Judges
  - Specially trained practitioners (arbitrators, mediators)
  - Elders, religious or other traditional leaders recognized by their community
  - Industry-specific specialists or technical experts (environmental disputes, labor disputes, family law)
  - Psychologists, Lawyers, Social Workers

The major choice in terms of creating an ADR program or system is between private and public sector management of the program

Public sector programs are most typically known as “court-annexed” ADR. However other public institutions can manage an ADR program; ministries and agencies that have as their mandate labor, industry, environmental protection, education and others where there is a potential need to resolve disputes among stakeholders, or between the public institution and individuals or groups of citizens.

## Seven Advantages of ADR

1. Strengthens judicial modernization efforts
2. Delay reduction by unclogging courts
3. Increases access to justice for the poorest disputants
4. Reduces costs of justice for all users
5. Preserves, improves or restores relationships among disputants
6. Supports economic development by reducing transaction costs of disputes and increasing certainty of investments
7. Increases satisfaction of the users

ADR can be part of a program strengthening an ongoing judicial modernization and institution-building efforts being conducted by the Nigerian government or in collaboration with international organizations and bilateral assistance

- enabling of users to avoid ineffective and/or overburdened court systems or to have access to alternative means to resolve their disputes and obtain solutions pending reform of such institutions
- increased access to equity and justice for disadvantaged users of legal services
- reduction of delay in resolution of disputes by circumventing overburdened or inefficient court systems
- reduction of the monetary cost of resolving disputes by reducing the necessity of utilizing formal court procedures, the need for counsel, and the length of procedures when resorted to
- improvement and preservation of healthy economic and community relations among disputant parties and avoidance of contentious processes that disrupt social life and commercial transactions through the facilitation of viable resolutions to conflicts
- provision of economic and social stability that facilitates and sustains market economy conditions for domestic and foreign investment
- increased users' satisfaction with the outcomes of their disputes

Well-designed ADR programs—whether private or court-annexed—dramatically increase access to justice for the most vulnerable members of society, reduce the costs of such access, and increase user satisfaction with the justice system. Because of the low transaction costs and relative speed of ADR mechanisms, they increase transparency of justice and provide solutions that are equitable and responsive to the needs of the disputants. ADR mechanisms function with less formality than typical court proceedings, can be offered in the languages and cultural context of the disputants, and can speedily resolve cases precisely because of the streamlined nature of the process. Furthermore, since ADR provides an alternate forum for some cases, it decongests the courts of cases that would have otherwise languished in the courts.

## **Judicial Officers are integral to ADR**

- Planning and execution
- Case referral
- Case filtering and selection
- Review and approval of agreements
- Enforcement of agreements
- Monitoring and evaluation of programs and people
- Professional development, discipline of mediators

As part of a judicial reform or modernization effort, ADR is a supplementary service offered to the public in the form of a court-annexed mediation program.

Mediators are either volunteers or paid professionals, but work directly for the local or national courts or justice-related ministries of the state, and are trained by, supported by and answerable to the public authorities.

Court annexed mediation systems are often under the direct supervision of one or more judges or judicial oversight bodies. Judges and their staff lead the planning and execution of the court-annexed mediation system and collaborate with mediation professionals at the national and international level.

Mediators work hand-in-hand with local authorities such as police, communal courts or religious authorities or justices of the peace for the purpose of referral of cases.

Additionally, agreements reached by the disputant parties in court-annexed programs sometimes have their agreement reviewed and approved (and if necessary, enforced) by the formal justice system.

Court-annexed systems exercise oversight in the planning and execution of mediation programs, and also monitor and evaluate the progress made, the performance indicators and the professional development of the mediators. Discipline and ethics.

## **ADR: international legal context**

- Various UN bodies have endorsed the use of mediation and arbitration for the resolution of commercial disputes
- UNCITRAL has promulgated model laws for domestic adoption and adaptation of UN member states
  - Arbitration
    - Recognition of arbitral awards
  - Mediation
    - Made recommendations regarding standardizing enforceability of settlements, impartiality of mediators, and non-admissibility of evidence
- ICC International Chamber of Commerce, whose current “INCOTERMS 2000,” has been endorsed by UNCITRAL
  - includes model contract language for commercial arbitration in international and domestic markets
- Bilateral trade and investment treaties and free trade agreement often create an international legal context and even new ADR mechanisms
- WTO’s Dispute Settlement Body, based on the Dispute Settlement Understanding (Annex 2 to the WTO Agreement): convenes panels, arbitration, good offices and mediation

UN Commission on International Trade Law, is charged with harmonizing laws of int'l trade

**UNCITRAL Arbitration Rules (Adopted by the UNGA, Dec. 15, 1976)--**

“The General Assembly: Recognising the value of arbitration as a method of settling disputes arising in the context of international commercial relations...Recommends the use of the Arbitration Rules

**UNCITRAL Model law on International Commercial Arbitration**, published 1985

Numerous countries have enacted legislation based on the Model Law, which makes commercial arbitration awards legally binding

**UNCITRAL Conciliation Rules (Adopted by the UNGA Resolution 57/18 (2002). Model Law on International Commercial Conciliation of the United Nations**

**Commission on International Trade Law:**

*“The General Assembly, Recognizing the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably...Recommends that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice. [52nd plenary meeting 19 November 2002]”*

**ICC: INTERNATIONAL CHAMBER OF COMMERCE**, in cooperation with UNCITRAL, has for several decades, promoted “INCOTERMS”, a guide to standardized trade terms that has evolved since 1936. UNCITRAL endorsed INCOTERMS 2000 as of January 1, 2000. It includes model terminology for parties seeking to resolve commercial disputes:

Standard arbitration clause is recommended by ICC: *“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”* **INCOTERMS**

## **ADR Under Nigerian Law**

## ADR under Nigerian Law

1. No law prohibits mediation in Nigeria. Instead some Rules of Court permit judges to encourage the parties to resort to ADR processes.
2. As a general rule, judges in Nigeria are not allowed to mediate from the bench.
3. At the moment mediated agreements are just contracts. However in some states where the facility exists, court-connected mediated agreements are registered and enforced through the courts (*res judicata*).

Mediation, conciliation and arbitration: what is the current state of these ADR practices in Nigeria? Where community and religious authorities resolve communal disputes, what is the rate of compliance, compatibility with existing and formal judicial procedures?

**Statutory provisions,  
rules and judgements that stipulate and encourage the use of  
ADR processes in dispute resolution in Nigeria**

Classification by:

- Constitution
- Acts
- Laws
- Rules of Court
- Rules of Professional Conduct

## **Constitution of the Federal Republic of Nigeria, 1999**

Section 19(d): Foreign policy objectives:

- The foreign policy objectives shall be –
- (d) respect for international law and treaty objectives as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.

## **Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria (Lfn) 2004**

- Part I – Arbitration – Sections 1 to 36
- Part II – Conciliation – Sections 37 to 42
- Part III – International Commercial Arbitration and Conciliation – Sections 43 to 55
- Part IV – Miscellaneous – 56 to 58
- First Schedule – Arbitration Rules
- Second Schedule – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958
- Third Schedule – Conciliation Rules

## **Federal High Court Act, Cap. F12, Lfn 2004**

### Section 17: Reconciliation in civil and criminal cases

- In any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

## **Matrimonial Causes Act, Cap. M7, LFN 2004**

- Section 11: Reconciliation
- Section 30: Petition within two years of marriage

## **FEDERAL HIGH COURT ACT, CAP. F12, LFN 2004**

### **Section 17: Reconciliation in civil and criminal cases**

In any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

## **MATRIMONIAL CAUSES ACT, CAP. M7, LFN 2004**

### **Section 11: Reconciliation**

(1) It shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may –

- (a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;
- (b) with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;
- (c) nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.

### **Section 30: Petition within two years of marriage**

(1) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within two years after the date of the marriage except by leave of the court.

(3) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant the leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.

(4) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interest of any children of the marriage, and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of two years after the date of the marriage.

## **Consumer Protection Council Act, Cap C25, Lfn 2004**

### Section 2: Functions of the Council

- The Council shall –
- (a) provide speedy redress to consumers' complaints through negotiation, mediation and conciliation.

### Section 5: Duty of State Committee

- The State Committee shall, subject to the control of the Council –
- (a) receive complaints and enquiries into the causes and circumstances of injury, loss or damage suffered or caused by a company, firm, trade, association or individual;
- (b) negotiate with the parties concerned and endeavour to bring about a settlement; and
- (c) where appropriate, recommend to the Council the payment of compensation by the offending person to the injured consumer.

## **Environmental Impact Assessment Act, Cap. E12, Lfn 2004**

### Section 29: Referral by Council

- Where at any time the Council [Federal Environmental Protection Council] is of the opinion that – (a) a project is likely to cause significant adverse environmental effects that may not be mitigable; or
- (b) public concerns respecting the environmental effects of the project warrant it,
- the Council may, after consultation with the Agency [Nigerian Environmental Protection Agency], refer the project to mediation or a review panel in accordance with section 35 of this Act.

### Section 33: Mediation

- (2) A mediator shall, in accordance with the provisions of this Act and the terms of reference of the mediation –
  - (a) help the participants to reach a consensus on –
    - (i) the environmental effects that are likely to result from the project;
    - (ii) any measures that would mitigate any significant adverse environmental effects; and
    - (iii) an appropriate follow-up programme

## **ENVIRONMENTAL IMPACT ASSESSMENT ACT, CAP. E12, LFN 2004**

### **Section 29: Referral by Council**

Where at any time the Council [Federal Environmental Protection Council] is of the opinion that –

- (a) a project is likely to cause significant adverse environmental effects that may not be mitigable; or
- (b) public concerns respecting the environmental effects of the project warrant it, the Council may, after consultation with the Agency [Nigerian Environmental Protection Agency], refer the project to mediation or a review panel in accordance with section 35 of this Act.

### **Section 31: Appointment of Mediator**

Where a project is referred to mediation, the Council shall, in consultation with the Agency –

- (a) appoint as mediator any person who, in the opinion of the Council, possesses the required knowledge or experience; and
- (b) fix the terms of reference of the mediation.

### **Section 33: Mediation**

(1) A mediator shall not proceed with a mediation unless the mediator is satisfied that all of the information required for a mediation is available to all of the participants.

(2) A mediator shall, in accordance with the provisions of this Act and the terms of reference of the mediation –

- (a) help the participants to reach a consensus on –
  - (i) the environmental effects that are likely to result from the project;
  - (ii) any measures that would mitigate any significant adverse environmental effects; and
  - (iii) an appropriate follow-up programme;
- (b) prepare a report setting out the conclusions and recommendations of the participants; and
- (c) submit the report to the Council and the Agency.

## **Industrial Inspectorate Act, Cap. I8, Lfn 2004**

### **Section 4: Arbitration**

- (1) Any person disputing a finding of the Directorate relative to the investment valuation of any matter concerning his undertaking may require the matter to be submitted to arbitration and the dispute shall be resolved in the following manner, that is to say –
  - (a) there shall be a sole arbitrator who shall be a person agreed to by the Director and the party disputing the valuation (both of whom are hereafter in this section referred to as “the affected parties”) and who shall be appointed by the Minister [of Industries];
  - (c) the sole arbitrator shall decide on the investment valuation and make his award within one month after entering on the reference or any longer period allowed in writing by the Minister;
- (2) The investment valuation as determined by the sole arbitrator and any award made thereby shall be binding and final as between the affected parties.

## **Trade Disputes Act, Cap. T8, Lfn 2004**

Section 4: Procedure before dispute is reported

Section 6: Reporting of dispute if not amicably settled

Section 8: Appointment of Conciliator, etc.

Section 9: Reference of dispute to arbitration tribunal if conciliation fails

## **TRADE DISPUTES ACT, CAP. T8, LFN 2004**

### Section 4: Procedure before dispute is reported

(1) If there exists agreed means for settlement of the dispute apart from this Act, whether by virtue of the provisions of any agreement between organizations representing the interests of employers and organization of workers or any other agreement, the parties to the dispute shall first attempt to settle it by that means.

(2) If the attempt to settle the dispute as provided in subsection (1) of this section fails, or if no such agreed means of settlement as are mentioned in that subsection exists, the parties shall within seven days of the failure (or, if no such means exists, within seven days of the date on which the dispute arises or is first apprehended) meet together by themselves or their representatives, under the presidency of a mediator mutually agreed upon and appointed by or on behalf of the parties, with a view to the amicable settlement of the dispute.

### Section 6: Reporting of dispute if not amicably settled

(1) If within seven days of the date on which a mediator is appointed in accordance with section 4(2) of this Act the dispute is not settled, the dispute shall be reported to the Minister [of Labour] by or on behalf of either of the parties within three days of the end of the seven days.

(2) A report under this section shall be in writing and shall record the points on which the parties disagree and describe the steps already taken by the parties to reach a settlement.

### Section 8: Appointment of Conciliator, etc.

(1) The Minister may for the purposes of section 7 of this Act appoint a fit person to act as conciliator for the purpose of effecting a settlement of the dispute.

(2) The person appointed as conciliator under this section shall inquire into the causes and circumstances of the dispute and by negotiation with the parties endeavour to bring about a settlement.

(3) If a settlement of this dispute is reached within seven days of his appointment, the person appointed as conciliator shall report the fact to the Minister and shall forward to him a memorandum of the terms of the settlement signed by the representative of the parties, and as from the date on which the memorandum is signed (or such earlier or later date as may be specified therein), the terms recorded therein shall be binding on the employers and workers to whom those terms relate.

(4) If any person does any act in breach of the terms of a settlement contained in the memorandum signed pursuant to subsection (3) of this section, he shall be guilty of an offence and liable on conviction –

(a) in the case of a worker or a trade union, to a fine of N200; and

(b) in the case of an employer or an organization representing employers, to a fine of N2,000.

(5) If a settlement of the dispute is not reached within seven days of his appointment, or if, after attempting negotiation with the parties, he is satisfied that he will not be able to bring about a settlement by means thereof, the person appointed as conciliator shall forthwith report the fact to the Minister.

### Section 9: Reference of dispute to arbitration tribunal if conciliation fails

(1) Within fourteen days of the receipt by him of a report under section 6 of this Act, the Minister shall refer the dispute for settlement to the Industrial Arbitration Panel established under this section.

## **National Health Insurance Scheme Act, Cap. N42, LFN 2004**

### **Section 26: Establishment and functions of the State and Federal Capital Territory Arbitration Board**

- (1) There shall be established for each State of the Federation and the Federal Capital Territory, Abuja, as and when necessary, a State Health Insurance Arbitration Board and a Federal Capital Territory Health Insurance Arbitration Board, respectively (in this Act referred to as “Arbitration Board”).
- (2) The Arbitration Board shall be charged with the responsibility of considering complaints made by any aggrieved party –
  - (a) of violation of any of the provisions of this Act; or
  - (b) against any of the agents of the Scheme; or
  - (c) against an organization or a health care provider.
- (3) A complaint made under subsection (2) of this section shall be made in writing within 60 days from the date of the action giving rise to the complaint, notwithstanding that credible reasons have been rendered for the action.
- (4) The period specified in subsection (3) of this section may be extended if the Arbitration Board is satisfied that the complainant was justifiably unable to make the complaint within that period.

## **Nigerian Co-Operative Societies Act, Cap. N98, LFN 2004**

### **Section 49: Settlement of disputes**

- (1) If a dispute touching the business of a registered society arises –
  - (a) among present or past members and persons claiming through present or past members and deceased members; or
  - (b) between a present, past or deceased member and the society, its committee or any officer, agent or servant of the society; or
  - (c) between the society and any other committee and any officer, agent or servant of the society; or
  - (d) between the society and any other registered society,
- the dispute shall be referred to the Director [Federal or State Director of Co-operatives] for settlement.
- (3) The Director shall on receipt of a reference under subsection (1) of this section –
  - (a) settle the dispute; or
  - (b) subject to the provisions of any regulations made under this Act refer it to an arbitrator appointed in accordance with the regulations made under this Act for disposal.
- (4) A decision made by an arbitrator under paragraph (b) of subsection (3) of this section shall, except as otherwise provided in subsection (6) of this section be final.

## **Petroleum Act, Cap. P10, LFN 2004**

### **Section 11: Settlement of disputes by arbitration**

- (1) Where by any provision of this Act or any regulations made thereunder a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of that law.
- (2) In this section “the appropriate State” means the State agreed by all parties to a question or dispute to be appropriate in the circumstances or, if there is no such agreement, the Federal Capital Territory, Abuja.

## **Public Enterprises (Privatisation And Commercialisation) Act, Cap. P38, LFN 2004**

### **Section 27: Establishment and membership of the Public Enterprises Arbitration Panel**

- (1) There is hereby established under this Act an *ad hoc* body to be known as the Public Enterprises Arbitration Panel (in this Act referred to as “the Panel”) which shall be responsible for effecting prompt settlement of any dispute arising between an enterprise and the Council [National Council on Privatization] or the Bureau [Bureau of Public Enterprises].
- (2) The Panel shall consist of five persons who shall be persons of proven integrity one of whom shall be the chairman.

### **Section 28: Powers of the Panel**

- (1) The Panel shall have power to arbitrate –
  - (a) in any dispute raising questions as to the interpretation of any of the provisions of a Performance Agreement; or
  - (b) in any dispute on the performance or non-performance by any enterprise of its undertakings under a Performance Agreement.
- (2) A dispute on the performance or non-performance by any of the parties to the Performance Agreement shall, in the case of a commercialized enterprise, lie to the Panel provided that such reference may be made after all reasonable efforts to resolve the dispute have been made and have not been proved.

### **Section 30: Other arbitration laws not applicable**

- The provisions of the Arbitration and Conciliation Act or any other enactment or law relating to arbitration shall not be applicable to any matter which is the subject of arbitration under this Act.

## **National War College Act, Cap N82, LFN 2004**

### **Section 5: Centre for Peace Research and Conflict Resolution**

- (1) There is hereby established for the College a Centre for Peace Research and Conflict Resolution (in this Act referred to as “the Centre”) which shall be charged with the responsibility for conducting research into all facets of peace and proffer solutions to conflicts at both national and international levels.
  
- (2) Notwithstanding the provisions of subsection (1) of this section, the Centre shall –
  - (b) organize and facilitate researches on national, regional and global basis in the fields of conflict sources, conflict monitoring, conflict prevention, conflict resolution, peace-making, peace keeping, peace enforcement, peace building, and capacity building;
  - (c) initiate actions and take such other steps which will enhance the resolution of conflicts, both domestically and internationally.

## **National Boundary Commission, Etc. Act, Cap. N10, LFN 2004**

### **Section 3: Functions of the Commission**

- The functions of the Commission shall be –
  - (a) to deal with, determine and intervene in any boundary dispute that may arise between Nigeria and any of her neighbours or between any two states of the Federation, with a view to settling such dispute.

### **Section 6: Functions of the Technical Committee**

- The [Inter-State Boundary] Technical Committee shall have the following functions, that is –
  - (a) dealing with any inter-State boundary disputes, with a view to settling such disputes;
  - (b) finding solutions to any inter-State boundary problems; and
  - (c) making recommendations to the President, through the Commission, as regards borders and boundary adjustments, where necessary, between states.

## **Energy Commission Of Nigeria Act, Cap. E10, LFN 2004**

### **Section 5: Functions of the Commission**

- Subject to this Act, the Commission is hereby charged with the responsibility for the strategic planning and co-ordination of national policies in the field of energy in all its ramifications and, without prejudice to the generality of the foregoing, the Commission shall –
  
- (b) serve as a centre for solving any inter-related technical problems that may arise in the implementation of any policy relating to the field of energy.

**Note:** To this end, Section 3(1) and (2) of the Act establishes a Technical Advisory Committee which consists the Director-General of the Commission and professionals representing the following Ministries and Agencies – petroleum resources; power and steel; science and technology; agriculture and rural development; water resources; finance; defence; industries; communication; environment; National Electric Power Authority [now Power Holding Company of Nigeria]; Nigerian National Petroleum Corporation; Nigerian Mining Corporation, etc. The advice of the Committee can be said to be a process of Expert Appraisal.

**Minerals And Mining Act,  
Cap. M12, LFN 2004**

**Section 76: Agreement of other interested parties**

- (1) An applicant for a water licence shall inform the Minister [for mines and minerals] of persons likely to be adversely affected by the grant of the water licence and furnish the Minister with their names and such other particulars as the Minister may require.
  
- (2) The Minister, upon receiving the information required under subsection (1) of this section, shall enter into consultation with all persons likely to be affected by the grant of the water licence and shall reach such necessary agreement with such provisions [*sic.*] as may be just and proper.

**Section 255: Application of Arbitration and Conciliation Act**

- Unless provided otherwise, the Arbitration and Conciliation Act shall apply to all arbitrations under this Act.

## **National Office For Technology Acquisition And Promotion Act, Cap. N62, LFN 2004**

### **Section 4: Functions of the National Office**

- Subject to section 2(1) of this Act, the National Office shall carry out the following functions –
- (b) the development of the negotiation skills of Nigerians with a view to ensuring the acquirement of the best contractual terms and conditions by Nigerian parties entering into any contract or agreement for the transfer of foreign technology.

## **Nigerian Communications Commission Act, Cap. N97, LFN 2004**

### **Section 4: Functions of the Commission**

- The Commission shall have the following functions, that is –
- (k) the arbitration of disputes between licensees and other participants in the telecommunications industry;
- (l) to receive and investigate complaints from licensees, carriers, consumers and other persons in the telecommunications industry.

**Nigerian Dock Labour Act,  
Cap. N103, LFN 2004**

**Section 2: Functions of the Council**

- (1) The Council [Joint Dock Labour Industrial Council] shall –
  - (i) serve as a medium for resolving disputes and complaints among the interest groups in the port and dock industry.

**Nigeria Export Processing Zones Act,  
Cap. N107, LFN 2004**

**Section 4: Functions of the Authority**

- In addition to any other functions conferred on the Authority [Nigeria Export Processing Zones Authority] by this Act, the functions and responsibilities of the Authority shall include –
  - (e) the resolution of trade disputes between employers and employees in the Zone, in consultation with the Federal Ministry of Employment, Labour and Productivity

**Advisory Council On Religious Affairs Act,  
Cap. A8, LFN 2004**

**Section 3: Functions of the Council**

- The Council shall be charged with the following functions, that is –
- (b) serving as an avenue for articulating cordial relationship amongst the various religious groups and between them and the Federal Government;
- (c) serving as a forum for harnessing religion to serve national goals towards economic recovery, consolidation of national unity and the promotion of political cohesion and stability.

**Nigerian Investment Promotion Commission Act,  
Cap. N117, LFN 2004**

**Section 26: Dispute settlement procedures**

- (1) Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.
- (2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows –
  - (a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act [Cap. A18]; or
  - (b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or
  - (c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.
- (3) Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rule shall apply.

**International Centre for Settlement of Investment Disputes  
(Enforcement of Awards) Act, Cap. I20, LFN 2004**

**Section 1: Award of I.C.S.I. dispute to have effect as award in final judgement of Supreme Court**

- (1) Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for the Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgement of the Supreme Court, and the award shall be enforceable accordingly.

## **Regional Centre For International Commercial Arbitration Act, Cap. R5, LFN 2004**

### **Section 4: Functions and powers of the Centre**

- The functions and powers of the Centre are to –
  - (a) promote international arbitration and conciliation in the region;
  - (b) provide arbitration under fair, inexpensive and expeditious procedure in the region;
  - (c) act as a co-ordinating agency in the Consultative Committee dispute resolution system;
  - (d) co-ordinate the activities of and assist existing institutions concerned with arbitration, particularly among those in the region;
  - (e) render assistance in the conduct of *ad-hoc* arbitration proceedings, particularly those held under the Rules;
  - (f) assist in the enforcement of arbitral awards;
  - (g) maintain registers of –
    - (i) expert witnesses; and
    - (ii) suitably qualified persons to act as arbitrators as and when required; and
  - (h) carry out such other activities and do other such things as are conducive or incidental to its other functions under this Act.

**Administration Of Justice Commission Act,  
Cap. A3, LFN 2004**

**Section 3: Functions of the Commission**

- (2) Without prejudice to the generality of subsection (1) of this Section, the Commission shall ensure that –
  
- (d) congestion of cases in courts is drastically reduced.

## **High Court Act, Cap. 510, LFN (ABUJA) 1990**

### **Section 18: Settlement of disputes**

- Where an action is pending, the court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

## **Lagos, FCT High Court Rules**

### **High Court of Lagos State (Civil Procedure) Rules 2004**

#### **Order 25: Pre-trial Conferences and Scheduling**

- 1. (1) Within 14 days after close of pleadings, the claimant shall apply for the issuance of a pre-trial conference Notice as in Form 17.
  
- (2) Upon application by a claimant under sub-rule 1 above, the Judge shall cause to be issued to the parties and their Legal Practitioners (if any) a pre-trial conference notice as in Form 17 accompanied by a pre-trial information sheet as in Form 18 for the purposes set out hereunder:
  - (b) giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economic disposal
  - (c) promoting amicable settlement of the case or adoption of alternative dispute resolution.

### **High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004**

#### **Order 17: Alternative Dispute Resolution**

- 1. A Court or judge, with the consent of the parties, may encourage settlement of any matter(s) before it, by either –
  - (a) Arbitration;
  - (b) Conciliation
  - (c) Mediation; or
  - (d) any other lawfully recognized method of dispute resolution.

## **Rules of Professional Conduct (Rpc) for Legal Practitioners, 2007**

### **Rule 15: Representing client within the bounds of the law**

- (3) In his representation of his client, a lawyer shall not –
- (d) fail or neglect to inform his client of the option of alternative dispute resolution mechanisms before resorting to or continuing litigation on behalf of his client.

### **Rule 47: Instigating controversy or Litigation**

- (1) A lawyer shall not foment strife or instigate litigation and, except in the case of close relations or of trust, he shall not, without being consulted, proffer advice or bring a law suit.

## **Supreme Court Judgments**

**Owoseni vs. Faloye [2005] 14 NWLR (Pt 946) 719, 740**

**Aribisala vs. Ogunyemi [2005] 6 NWLR (Pt 921) 212**

- Where a statute prescribes a legal line of action for the determination of an action, be it an administrative matter, chieftaincy matter, or a matter for taxation, the aggrieved party must exhaust all the remedies in that law before going to court.

## **ADR in other Countries**

- Colombia
- Peru
- Bolivia
- Costa Rica
- Mexico
- Argentina
- Ukraine
- Guatemala
- United States
- Singapore
- Sri Lanka

Different countries have developed their own ADR practices in response to the general indicators calling for it, as well as the unique circumstances of each country's history, legal system and needs.

Colombia has a robust commercial arbitration and mediation practice that has been a model and leader for other Latin American countries. ADR in Colombia developed most strongly in the private sector, without court management. **Peru** and **Colombia** have thrived in part due to government support for private mediation centers. This support comes from enabling legislation that encourages and codifies ADR, as well as referrals of cases from the courts.

**Bolivia**, and **Costa Rica** have innovative programs run by the courts, private arbitration and mediation centers through chambers of commerce, and private mediation conducted by trained mediators or lawyers. Bolivia has attempted to incorporate indigenous people's norms into its formal legal system as has Guatemala.

**Mexico** and **Argentina** are regional leaders. Mexico's state courts (but not the federal courts) have been incorporating special mediation centers into existing and new court facilities. Argentina has been strongly promoting the skill-building aspects of conflict resolution and has exported its know-how and trainings to numerous other Latin American and other countries.

The **Ukraine** has experienced growth of privately run mediation centers that operate under the umbrella of a grass roots organization with its origins in labor management conflict resolution.

## Aspects of Colombia's ADR

- Colombia is an ethnically diverse country suffering from large scale social violence: military repression, terrorism, guerrilla warfare, drug trafficking and abductions
- ADR in Colombia developed most strongly in the private sector, without court management
- Government support for private mediation of business disputes has been essential to the growth of Colombian ADR
- Private ADR has benefited from both enabling legislation and enormous delays in the courts as well as hundreds of arbitration centers.
- Colombia has a **robust commercial arbitration and mediation** practice that has been a model and leader for other Latin American countries
- Dozens of **community based ADR** centers are now beginning to take hold in Colombia, addressing hundreds of thousands of local level disputes

Colombia exports training and expertise to other Latin American countries; helping design ADR programs, performing external evaluations and consultations, sharing best practices and lessons learned, bringing practitioners and policymakers to conferences, and sending technical assistance.

## Aspects of Peru's ADR

- **Private civil society institutions** (NGOs, chambers of commerce and universities) provide mediation and arbitration for national and international disputes
- **Code of Civil Procedure** encourages out of court conciliation, especially prior to any judgment from a court of second instance
- Specialized governmental agencies have their own alternative dispute resolution mechanisms
- **Access to justice for poor women** often in child custody disputes has been emphasized through new court-annexed mechanisms
- Courts of first instance can **enforce** arbitral awards

Peru passed Law 26872 ("Ley de Conciliación") in 1997 which regulates extrajudicial 'conciliation' and progressively schedules different types of disputes to be covered by the law.

## Aspects of Bolivia's ADR

- **Bolivia** since 1997 has had a comprehensive ADR law, which confers 'res judicata' status on mediated agreements and private arbitral awards.
- **Chambers of commerce, local NGOs, and university law clinics** have been innovators of ADR for their distinct constituencies (investment and trade, family law and civil rights, respectively)
- A comprehensive, well-planned, **court-annexed program** was initiated in parallel to the private ADR channels in late 1990s
- Mandate to respect and potentially even to incorporate **customary norms of indigenous groups** into ADR
- High level cabinet ministers and judicial officials all advocated for the implementation and use of ADR methods

Many countries have large minorities or majorities whose culture, language and norms predate the arrival of colonial peoples. These populations often have their own traditions of justice that have operated in uncomfortable parallel with the modern, formal justice system.

In Latin America, Bolivia is an example of the current attempt to implement the principal of 'judicial pluralism'; the elevation of indigenous law (also known as "community law" or "derecho consuetudinario") to an equal and protected status on a par with 'western' (Common and Roman law) systems. To some extent this requires the formal legal system to decriminalize, recognize, and enforce standards and practices of indigenous people.

It also implies harmonizing the formal legal system so that it adopts some of the beneficial aspects of indigenous law, including:

- Transparency: the community investigates, deliberates, adjudicates together and openly
- Efficiency: oral procedure, no or low cost, no paper, no lawyers
- Speed: justice is accomplished in hours or days rather than months or years
- Fairness: punishment includes not just prison; but also shaming, exclusion, corporal punishment, apology, compensation and other possibilities
- Proximity: judges are ordinary community members, elders or similar combinations

## Aspects of USA's ADR

- ADR operates at all levels of society:
  - Micro and macro commercial transactions (from credit card disputes to alternatives for small claims procedures, family and custody disputes, major labor relations cases, and disputes within nearly all federal agencies and departments)
- **Local, state and federal courts** have experimented with numerous forms of ADR and institutionalized their approaches (the multi-door courthouse concept)
- **Consensus-building methods** are now incorporated not only into dispute resolution, but also federal government rule-making, public policy decisions
  - Environmental policies, wildlife, and other areas often require and invite public input by mediated and facilitated meetings
- Small but growing **private industry** of conflict and dispute resolution consulting, as well as **NGO expertise**
- **Federal government agencies** related to rule of law sometimes provide technical assistance as part of foreign development aid

The multi-door courthouse concept evolved from the writings and practice of Prof. Frank Sander of Harvard Law School, who believed that courts should offer various services that best fit the disputes being adjudicated; and that not all civil or even criminal cases were best served by an adversarial, court-centered procedure. Hence, courts should offer multiple doors through which disputants might come through seeking efficient, low-cost, fair and expeditious resolution of their problems.

## Aspects of Mexico's ADR

- ADR has advanced at several levels, each with different momentum and achievements:
- Numerous **state courts** and state-level government agencies have initiated **court-annexed mediation centers**
- **Chambers of commerce** have spearheaded private mediation, conciliation and arbitration efforts that are paid services
- The **federal court system**, has established a mediation center in in the capital (Mexico City, Distrito Federal) as of 2003 to receive **family** matters. As of 2006, the center receives **commercial** and **civil** disputes with labor matters to follow. It has signed contracts with outside agencies (public and private) to refer cases into the center, and to supply clients with psychosocial support. Mediated agreements emerging from this center are **directly enforceable** with lower federal courts

## Aspects of Guatemala's ADR

- Guatemala's 20 language groups and indigenous majority emerged from revolution and civil war violence with no trust in public institutions
- ADR, as part of a major effort at judicial modernization, created a new way to resolve civil, criminal, land tenure, family and community disputes non violently and without recourse to expensive, outdated, delay-ridden litigation
- Guatemala began offering **court-annexed mediation centers**, in the languages of the local people, respectful of their customary laws and norms, but also connected to the formal justice system
- Massive effort to initiate mediation centers throughout the country at **new Centros** de Administracion de Justicia, especially in remote, under-served parts of the country, and via '**mobile courts**' (refitted buses) with a justice of the peace in one room and a mediator in the other, moving from neighborhood to neighborhood according to a posted schedule

See Additional Readings: World Bank, "Guatemala: The Role of Judicial Modernization in Post-Conflict Transitions."

## Aspects of Singapore's ADR

- Long history of officially supported ADR, **pioneer** in Asian judicial modernization
- Court annexed mediation, private mediation and arbitration are at advanced levels for the region
- **Sector-specific innovations** in ADR include services customized for consumer, **maritime**, construction and internet **domain name disputes**
- Leadership in the creation of government supported **on-line mediation** for e-commerce disputes, use of video conference and web chats for dispute resolution

## Aspects of Sri Lanka's ADR

- Nearly twenty years of officially sanctioned mediation of community local level disputes through broadly dispersed, Ministry of Justice supported “**Mediation Boards**”. These have now begun to be implemented in the northern and eastern conflict affected zones
- **Commercial mediation** is only since 2000. It emerged through federal legislation, but is owned and operated by four national chambers of commerce, with oversight by Ministry of Justice
- **Employment disputes** since 2001 can be handled by a private cooperative run by both workers and employers associations (Employment Mediation Services Centre)
- ADR methods have been used to address conflicts related to the distribution of the 2004 **Tsunami relief assistance** and issues related to the **violent civil war**

**Approaches to Negotiation:  
Links between Negotiation and Mediation**

## **Mediation and Negotiation**

- Mediation is sometimes referred to as “assisted negotiation”
- The mediator negotiates with the parties, and assists them to negotiate better with each other
- The mediator creates a triadic negotiation dynamic, as the parties seek to influence the mediator, and vice versa
- Negotiation concepts and theories are relevant to mediation and helpful for mediators

Mediation can be seen as an effort by a third party to change the way two (or more) disputants are negotiating with one other. Consequently, mediators need to better understand negotiation, with an eye toward transforming competitive (or distributive) negotiations into integrative/cooperative ones. Moreover, mediators are also negotiating with the parties themselves, seeking to convince them of the importance of integrative outcomes.

See attached Additional Reading: Negotiation Preparation Worksheet.

## **Aspects of Negotiation: Distributive vs. Integrative**

- Distributive
- Power determines outcome
- Parties seek to ‘claim’ value for themselves by being demanding and taking positions
- Strategic ‘misrepresentations’ are commonly used
- Parties often feel that the outcome is arbitrary

- Integrative
- Outcome determined by creativity and intelligence
- Parties seek to create value before claiming it
- Valuable options for the parties depend on their disclosure of their needs and interests
- Principles of fairness help the parties reach agreement

Distributive negotiations are also called Competitive negotiations, in which negotiators tend to view the elements or resources to be negotiated as fixed, such that they think there is no room to add additional value. The purpose of the negotiation is thus to decide who gets the larger share. Tactics focus on outflanking the other negotiator, and information is typically not shared.

Integrative (also called Collaborative) negotiations feature perspectives among negotiators in which each views the other as a partner in the process of together solving the “problem” of the negotiation in such a manner that creates the most value for all negotiators involved. In order to do so, they must establish a higher level of trust than in distributive negotiations and share substantial information about each other in order to discuss the fundamental interests at play.

See attached Additional Reading: Stone, “Problem-Solving Method.”

## Components of a Dispute

- **ISSUES:** the problem
- **POSITIONS:** parties' stands (typically, their maximal opening demands)
- **INTERESTS:** needs behind the positions

Integrative negotiations seek to bring out the interests behind negotiators' positions.

Interests are far more negotiable than positions.

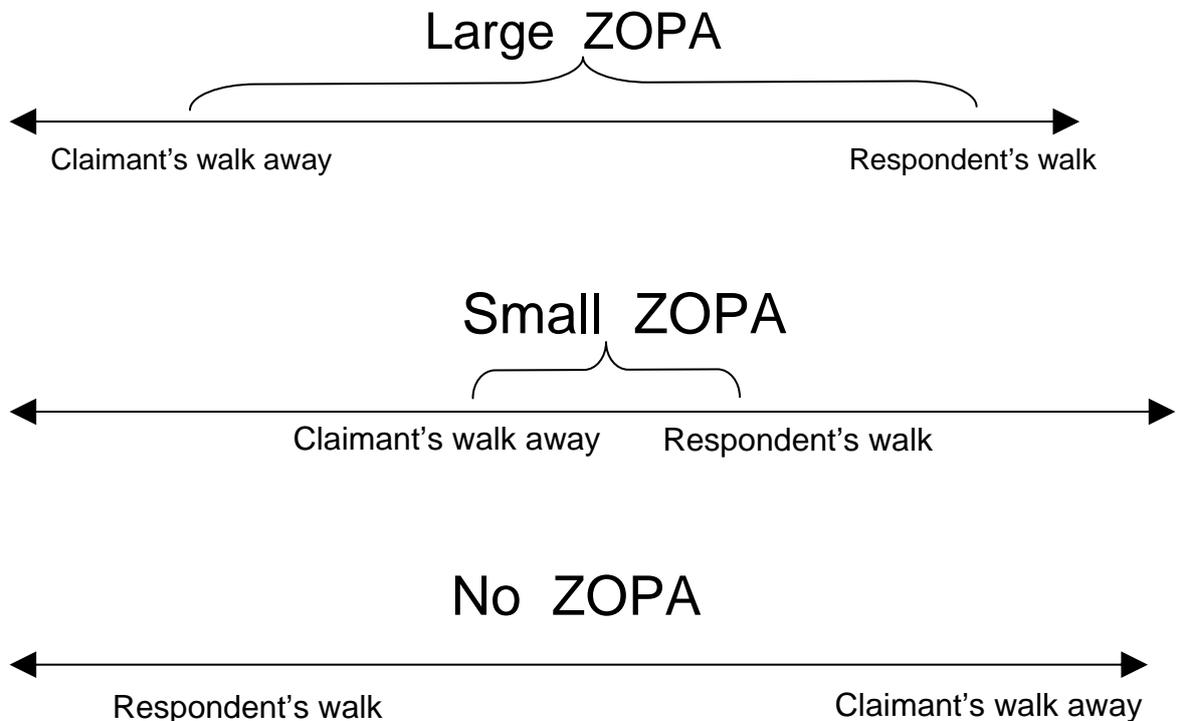
## Alternatives and Perceptions

- BATNA: best alternative to a negotiated agreement
- FRAMING: Role of perceptions and framing of the dispute. Mediators can shift frames.

The BATNA is an important concept for parties and mediators to be aware of because parties often fail to understand what is the real alternative to a negotiated settlement of their dispute. The best alternative to a negotiated agreement is what a party walks away to if they exit negotiations or otherwise break them off. No party should say 'yes' to an offer that is worse than their BATNA. All parties should also understand their adversaries' BATNA as well. It is legitimate to seek to improve one's own BATNA. Occasionally, it is legitimate to weaken an adversary's BATNA.

Framing is a critical aspect of negotiation because parties enter into a dispute with a certain set of perceptions about the conflict and its eventual resolution. One of the key major "frames" around a conflict is the sense of whether or not it is a zero-sum or positive sum situation. Zero-sum perceptions of a dispute incline parties to believe that any gain they make must come at the expense of their adversary, and any loss they suffer is a gain to other side. The relative 'gains' in the interaction add up to zero. Positive-sum perceptions, on the other hand, help the parties understand that gains for one side need not come at the expense of the other. In fact, and even more valuable to dispute resolution concepts, mediators often help get parties focused on solutions that benefit all parties to the dispute, or at least leave no one worse off than they were. Conflicts and disputes are rarely zero-sum, although parties behave as if they were. Mediators help parties move away from self-fulfilling zero-sum perceptions and behaviors.

## Possibilities of Agreement



ZOPA: The Zone of Possible Agreement, refers to the potential overlap between two parties' preferences. Every party has a subjective, sometimes intuitive value, which, if not attained, indicates to them that they should 'walk away' from a negotiation. At that value point, they are indifferent to the possibility of a negotiated outcome. This is known as the reservation value, or walk away point. At the same time, parties often have an aspiration value; this is what they hope to attain in a negotiation. It may be based on an objective valuation, or it may be 'misrepresented' in an effort to claim as much of the ZOPA as possible, as disputants often do in contentious, distributive processes.

Assume a simple two party dispute in which a claimant demands a certain financial compensation for a real or perceived damage suffered, and a respondent seeks to minimize its payout of financial compensation. An overemphasis on the distributive money demands of the parties may preclude them from finding any common ground, Worse still, they may overlook potentially valuable solutions that do not involve financial compensation or that are 'low cost (for the person making the offer), high value (for the receiver)' trades.

## ZOPA analysis

- Three possibilities concerning ZOPAs
  - Significant overlap
  - Minor overlap
  - No overlap
- How we shrink the ZOPA
  - Strategic misrepresentations
  - Tension between claiming and creative resolution
  - Anchoring ourselves according to legal

If there is a wide overlap between a claimant's reservation value or walk away, and the respondent's reservation value, then there exists a large Zone of Possible Agreement.

If, however, a claimant's reservation value is high, and the respondent's reservation value is relatively low (in other words, the respondent is demanding a high value settlement figure and the respondent is not inclined to offer too much value before walking away) then there is a relatively small ZOPA.

If the claimant's reservation value is too high and the respondent's reservation value is too low, there may be no ZOPA at all.

Parties who believe there walk away, no agreement alternatives are quite good are often disposed to assess their reservation value unrealistically, and therefore unnecessarily shrink the ZOPA. Also, parties who make strategic misrepresentations about their walk away point fall into this trap. In attempting to claim too much (or avoid giving enough), a party runs the risk of getting no agreement at all.

Mediators help the parties discover their true ZOPA and also help them to widen it if possible. Sometimes a mediator's role is to gently remind the parties that they have no ZOPA as long as their extreme demands are in place. Occasionally, it may be appropriate for the mediator to close a mediation because the legitimate reservation values of the parties does not permit a ZOPA to emerge.

## Power and Parties

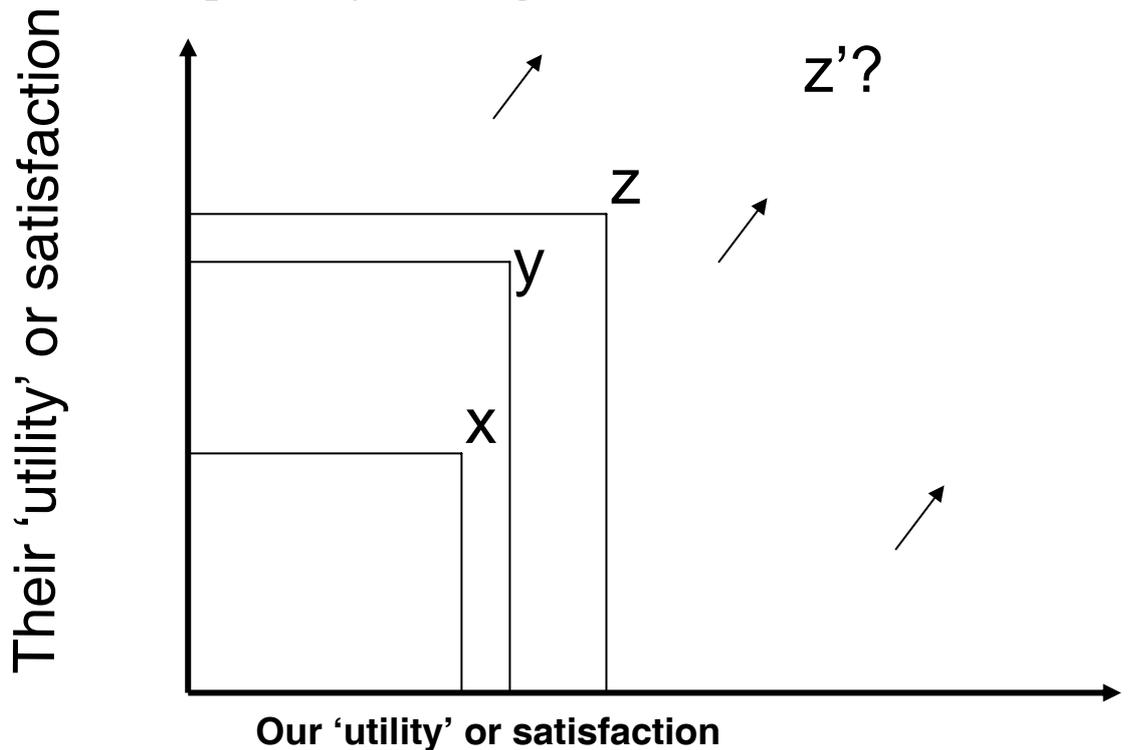
- Classic thinking about negotiation is that ‘strong’ parties get their way since they are more capable of imposing their preferences
- However, this is not a ‘law’ of negotiation.
- ‘Weak’ parties systematically level the playing field by
  - Building alliances
  - Strengthening their BATNA
  - Reframing conflict from zero-sum to positive-sum
  - Appealing to principles of legitimacy and fairness
  - Tenacity and commitment

Mediators and mediation can mitigate some of the power asymmetries inherent in mediation processes. However, they may not be able to completely eliminate them. The legal framework in which mediation takes place helps to determine whether or not ‘strong’ parties can manipulate the process, use it for delaying purposes or claim a larger than fair share of the ZOPA. The legal strength of a mediated agreement often helps build party confidence in the process, and may reduce any tendency to use the process to delay a future litigation or other procedure.

When power asymmetries are very large and an issue of public justice is at stake, mediation may not be the appropriate forum. Issues such as domestic violence, child abuse, and other matters that society wishes to deter outright are not suitable for mediation.

The act of attending a mediation can also, in and of itself, be a demonstration of parties’ recognition that, despite any disparities in their relative strengths and power, they have decided to use an equity-seeking process that is supposed to result in a solution that provides value to all the parties. Thus mediation can itself reduce some of the effects of power asymmetry.

## Optimality and Negotiation



Optimality in negotiation refers to the creation and distribution of value that is often overlooked in bargaining situations as parties settle for unsatisfactory or partially satisfactory solutions, unaware that better solutions that improve outcomes for one or more parties without damaging any party, can be developed with creative thinking.

A proposed settlement between parties at the point of 'x', for example, nets only a modicum of satisfaction to either party.

A solution at 'y' improves the satisfaction of the Other Party, while slightly increasing Our satisfaction. A solution at point 'y' has the added benefit of being 'efficient'; it appears to leave little of no value unrealized (as represented on the curved line which illustrates all the points that distribute all the potential value of the deal. Note that this does not determine the fairness of the outcome. A solution on the curved line that is very close to Our maximum satisfaction may be of little utility for Their party, and vice versa.

A solution at point 'z', on the other hand, appears to go beyond the range of possible solutions, and demonstrates that additional value can be brought to the negotiation table, by creative thinking, a mediator's intervention and resources, and other methods. This dynamic, which we refer to as pushing or extending the optimality frontier, should be considered normative: skilled negotiators try to push the frontier and create joint solutions that leave all parties better off.

The distributional aspect that is implied here (where on a particular curve the parties choose to come to agreement) is often best resolved when the negotiating parties resort to a principle, rule, precedent, norm, or other objective criteria that help them feel that they have attained a fair outcome.

## Objective Criteria

- When parties have negotiated creatively how do they know when to say ‘yes’?
- Parties have a need to feel that they are being treated fairly in any negotiation
- One critically important way for parties to feel that an outcome is fair is to link it to an objective criterion

Is there a benchmark or standard that determines the value of a given settlement between parties? If they are deciding on the sale of a car, is there a guidebook of used car values available to them? Replacement value? If a merchant is selling his share of a business to his business partner, how will they find the fair value of the selling partner’s share? Stream of income? Similar businesses sold? Contribution of the selling partner to the business? Other standards? Religious, social, commercial, cultural, that help us determine fairness of outcome.

Objective criteria are helpful to parties especially when they are beyond the influence of either party.

Examples include legal precedents and judicial decisions, previous accords and agreements reached by the parties, similar transactions, “Blue books”, third party appraisals, and so on.

## **Introduction to Mediation**

## Introduction to Mediation

- Mediation is the most widely favored ADR activity, due to its
  - Potential for developing optimal solutions
  - Low cost to parties and providers
  - Potential for preserving the parties' relationship
  - Efficiency in timely resolution

Mediation is a process of listening, and moving to interests from positions (triangulation).

The mediator: must have the TRUST of the parties = parties feel that mediator's interests do not conflict with own interests.

A mediator never JUDGES the parties.

Start by making the parties comfortable; explain the rules: tell parties to tell your OWN story, do not interrupt. Strict CONFIDENTIALITY: you tell information to the other party only with permission. Meet both parties, show RESPECT. Wait until they answer. Take notes (show you care), and summarize it: let THEM define the problem.

In this way, both parties will listen to each other, and doubts will start to occur in their original positions.

Effective mediators: understand the problem and how the parties FEEL about it; let the parties know that he/she understands how the parties FEEL: the mediator listens to parties like they may never have been listened to before. Mediators create DOUBTS in parties original positions, and helps parties generate new ideas = empowers people to solve own problems.

See attached Additional Reading: David Matz, "Practical Mediation Guide" and Bush and Folger, "Transformative Mediation."

## Procedure for a typical mediation

- Mediator introduction
- Private caucus with party ‘A’
- Private caucus with party ‘B’, etc.
- First joint session; mediator and all parties
- Mediators’ caucus

**1. Mediator introduction:** All mediators and parties are present for the introduction. At this critical first point of contact, the mediator or mediators introduce themselves to the parties, explain the benefits and processes of mediation (autonomy of the parties, voluntariness of participation and party’s proactivity and responsibility for reaching agreement), as well as the rules that govern the mediation (confidentiality, non-admissibility of evidence, etc.). These may change from jurisdiction to jurisdiction, and according to the overarching legal framework. A traditional, customary mediation, such as those conducted by religious or tribal or clan authorities (in contrast to a court-operated mediation) may be altogether different, in terms of who can mediate, and what kinds of outcomes are available. Mediators determine if all the parties to the dispute are present, and if the parties who are present are capable of making a decision and being committed to it should they reach agreement later. Establish the credibility and trustworthiness of the mediator or mediators.

**2. Private caucus with party ‘A’.** Mediators try to understand the narrative of party ‘A’ in a private session, explore the willingness to come to agreement and probe for underlying interests as opposed to stated demands.

**3. Private caucus with party ‘B’, etc.** Follows the same course as above.

**4. First joint session;** mediator and all parties. In this joint session, the mediator has now learned about the points of agreement and resistance among all the parties and assists them to peacefully represent their legitimate needs and potential solutions to each other. If a solution is not solidified in this first joint session, additional time is used for the the mediators and parties to take stock of the situation.

**5. Mediators’ caucus:** If there are two mediators (or more in complex cases), this is the time for them to check in with each other about their co-mediating roles, their shared or different understandings of the dispute and the various potential solutions that might be evolving. They share with each other their perceptions about each other and the parties, and decide on next steps to get the parties to agreement.

## More mediation procedures

- Resumed joint sessions
- Additional private caucuses, as needed
- Agreement writing, judicial approval, implementation
- (Enforcement, as needed)

6. Resumed joint sessions: As above. The purpose is to now get the parties talking to each other about their shared problem and to help them compose a shared solution to it. The mediator refocuses the parties on their underlying interests and needs and gets them to articulate joint solutions that would be amenable to the other parties.

7. Additional private caucuses, as needed: As above. If there is still party resistance to an emerging agreement, the mediator can reality-test the resistant party's BATNA, and help the party reframe (see definitions given earlier).

8. Agreement writing, judicial approval, implementation. Once the parties have reached agreement in principle, it is important to record the agreement in the form required by custom or law. It is desirable to have the agreement in the words of the parties themselves. The agreement should also be clear in terms of each parties' responsibilities, implementable, and not dependent on the actions or omissions of any absent parties. Sometimes parties need a judge to approve a mediated agreement and thus make sure that first, it is in conformity with the law (the parties should not agree to do something illegal or that hurts a third party) and that secondly, the mediated agreement has the force of law (*res judicata*) behind it. Not all countries or situations have this second step embedded in the process, while others automatically confer the status of *res judicata* on the agreement.

9. Enforcement, (as needed)

See attached Additional Reading: Folberg and Tyler, "Stages in the Mediation Process"

## **Mediator Skills**

## **The Skills of the Mediator**

- Active listening
  - Empathy
  - Non-judgmental stance
  - Reflection and feedback
  
- Proactive inquiry

*Active listening is a set of skills that involves the ability to:*

**Be empathetic**

Mediators demonstrate understanding without necessarily expressing agreement. It involves being able to stand in the other's shoes, see the world as that person sees it generally, and appreciate the specific dispute and problem the way that party perceives it, without taking sides. Parties can express their sometimes complex or intense emotions in a safe environment, knowing and sensing that the mediator will give them the space for such expression, offer support (though not agreement).

**Non-judgmental stance**

This refers to the ability to remain neutral with regard to the merits of the case. The mediator suspends and distances himself or herself from making judgments about the relative 'rightness' or 'wrongness' of the parties, recognizing that each party has very likely contributed to a shared problem. Without this quality, it is difficult for the mediator to get the parties to take responsibility and ownership of their problem, and they may try to shift the burden of blame to the other party and the burden of problem-solving to the mediator(s). To some extent the non-judgmental stance applies also to the mediators' attitude toward the parties, but this is more completely addressed by the quality of non-partisanship (see below)

**Reflection and feedback**

Without agreeing with partisan stories and narratives of the parties, the skilled mediator will be able to make sure a party feels heard, appreciated and understood (though, as mentioned above, not necessarily 'agreed with'). This skill involves being able to paraphrase the expressions, needs and desires of the parties. This assures that any mistakes in mediator understanding are corrected quickly. It also communicates the active concern and engagement of the mediator. It thus encourages active participation from the parties. Additionally, reflective communication permits the mediator to reflect back to the party their own words, what they sound like, what they feel like. This in turn has the effect of helping parties realize their own partisanship and denial of contribution to the party. Mediators, simply by actively listening, help parties moderate their excessive demands and claiming tactics.

**Proactive inquiry**

Mediators know how to ask the right questions in order to reframe parties' perceptions of the conflict, help them realize their contribution to the dispute and thus their responsibility to resolve it, help them assess the strength of their BATNA, help them understand their own underlying interests, preferences and willingness to find an equitable solution.

## Skills of the mediator, cont'd

- Redirecting
- Non-partisanship (there are exceptions)
- Ability to gain trust of the parties

### **Redirecting**

This is a communication skill that involves mediators deflecting one party's attempts to focus blame only on the other party or their efforts to hold the mediator responsible for the outcome of the mediation. The mediator redirects the efforts, energy and focus of the party so that they take on increasing ownership of both problem and solution.

### **Non-partisanship**

It is almost always preferable that a mediator be a true neutral, with no ties to the parties nor any interests in the eventual outcome of their dispute. This is particularly true in court-annexed, and private professional mediation. On the other hand, community-based mediation (like its counterpart, international mediation) often benefits from the non-neutrality of the mediator, whose close relationship with one of the disputant parties is relied upon by the other party to deliver concessions from the favored party. In such cases, it is the credibility of the mediator rather than his or her neutrality, that permit mediator entry and mediator success.

### **Ability to gain the trust of the parties**

Disputants come to the mediation table with their trust in each other damaged, sometimes very badly, precisely because the disputants have sometimes had a previously trusting relationship with high expectations that have been shattered. They cannot move forward if they also mistrust the mediator. Whether or not the mediator is a true neutral, they must be certain that the mediator's word is going to be fulfilled, and that any confidences they have made in the mediator will not be broken. A mediator's experience and track record sometimes help the parties to trust in the mediator and the mediation. Reputations--whether justified or not--may precede the mediator. Once party trust is lost, it will be very difficult to regain.

See attached Additional Reading: Honeyman, "Evaluating Mediators"

## **S.O.F.T.E.N.**

- **Smile**
- **Open**
- **Forward Leaning**
- **Touch**
- **Eye contact**
- **Nod**

## Empathetic Listening

1. Small talk: humanize the interaction, sense the client
2. Catharsis: let the emotions come out
3. Information: go back over the story in detail, take notes, ask questions
4. Response: Let the client suggest alternatives, state feedback

### **DO NOT:**

- interrupt
- change the topic
- blame
- lecture
- preach
- moralize
- ignore
- belittle
- deny
- give advice

= Try to be a mirror, paraphrase

## Reframing

Reframing: cleaning the language: restate what someone said in more constructive, neutral language

- “I want to sue him” ◇ “You’re angry and you want something done about this problem.” Or: “She’s driving me crazy, she never shuts up about this.” ◇ “You feel that you are not being listened to...”

= Reformulating the language to BRING OUT THE INTEREST

- “What I hear you saying is...”

A mediator is a skilled listener: he/she takes info from the other party and provides a limited response that keeps the other party SHARING INFORMATION.

Suspend your judgments until necessary in the RESPONSE phase (4).

Parties are stronger if they can make their own decision: thus the mediator cannot decide.

## **Advanced Mediation Skills**

## **Five Advanced Mediator Skills**

- Managing cultural differences in mediation
- Managing power disparities in mediation
- Ethics
- Large group facilitation
- Training mediators, training trainers

## Managing cultural differences

- Sometimes disputant parties come from different cultural background
- Sometimes one or more disputants have a different cultural orientation from the mediator
- Cultural biases and ethnocentrism inhibit good communication
- Cultural knowledge facilitates cross-cultural understanding and prevents the cultural 'distance' from becoming a new source of dispute

Every social structure (a "container") has a culture that "fills" it: business culture, organizational culture, ethnic or religious culture, university culture, and so on.

Individuals belong to many social "containers," thus every individual has many layers of culture, and no two individuals have the same layers, or same amount of one layer. For instance, no two Frenchmen share the exact same amount of "Frenchness," but the two Frenchmen probably share more French culture in common than either one of them do with a German.

## Selected cultural ‘lens’

- Who is important; the group or the individual?
  - Affects decision-making and commitment to an agreement
- Are short term gains or long term relationships more critical?
  - Affects creativity and focus of the solutions
- Are linguistic norms “high” or “low” context?
  - Affects information sharing, revelation of interests, general expressiveness
- What is the social/organizational ‘power distance’?
  - Affects the attitude of one party to the other, ability to accept mediation/mediators, realization of contribution and frequency of distributional tactics
- What is the relevant tolerance of uncertainty of the parties?
  - Affects the mode of crafting an agreement, the specificity of terms and conditions

This suggests several avenues for resolution:

- Do not reduce someone to one layer of culture: forces them into a cultural advocacy role
- Try to appeal to other layers of culture: business, association, educational, etc.
- Try to re-humanize and re-individualize the interaction
- If possible, focus on the *structures* of the containers in question – is there room for positive change?

Culture is experientially learned: thus, disputants must have some sort of experience to reverse any damage done.

## Power and Mediation

- Mediation does not eliminate power disparities, but can reduce them as parties focus on joint solutions rather than hurting each other
- Mediators need to help 'weak' parties realize the power of the mediation process to obtain optimal solutions
- Mediators need to help 'strong' parties realize the joint gains and low costs of mediated outcomes that cannot be obtained by unilateral imposition
- ADR and mediation cannot eliminate overwhelming power disparities, unless the parties voluntarily engage in the process

### Power differentials:

- if the imbalance is too great, may have to suspend the mediation
- need to create a level playing field if possible
- make sure that the parties know the problem, and their RIGHTS

## Ethics

### General Responsibilities:

- honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties'.
- Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias towards individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

### ACR Standards:

#### General Responsibilities

Neutrals have a duty to the parties, to the professions, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties'.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias towards individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

See attached Additional Readings: “Draft National Uniform Mediation Act,” “Massachusetts (MA) Mediator Rules,” and others in the Ethics folder.

## Responsibilities to the Parties

1. **Impartiality**
2. **Informed Consent**
3. **Confidentiality**
4. **Conflict of Interest**
5. **Promptness**

1. **Impartiality.** The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

2. **Informed Consent.** The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

3. **Confidentiality.** Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.

4. **Conflict of Interest.** The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest and any circumstances that may reasonably raise a question as to the neutral's impartiality. The duty to disclose is a continuing obligation throughout the process.

5. **Promptness.** The neutral shall exert every reasonable effort to expedite the process.

## **More responsibilities**

6. Self-Determination of the Parties
7. Unrepresented Interests
8. Use of Multiple Procedures
9. Background and Qualifications
10. Disclosure of Fees; Advertising and Solicitation

**6. Self-determination of the parties**, particularly regarding the Settlement and its Consequences. The dispute resolution process belongs to the parties. The neutral has no vested interest in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate section 3, Confidentiality, of these standards.

**7. Unrepresented Interests**

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of parties dictate, to assure that such interests have been considered by the principal parties.

**8. Use of Multiple Procedures**

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated, the neutral must take care at the outset to advise the parties of the nature of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or share with another decision maker.

**9. Background and Qualifications**

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

**10. Disclosure of Any Fees; Advertising and Solicitation:** A neutral must be aware that some forms of advertising and solicitations are inappropriate and in some conflict resolution disciplines, such as labor arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made. No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients

## Large group facilitation

- Mediation skills are similar to the skills needed to get large groups engaged in a dialogue, and perhaps to reach an agreement
  - Mastery of process: getting the group to agree on a method of discussion and if needed, decisionmaking, according to their agreed norms and principles
  - Mastery of participation techniques: use of small groups, café-style group discussions, reporting, charting, refocusing
  - Mastery of problem definition: getting the group focused on one or more agreed agenda item, rather than permitting the group to fragment, while also being sensitive to “large group tectonics” (the group’s own unpredictable and dynamic movement)
  - Mastery of closure: ability to drive the group to move to the agreed upon end of the process, whether it is simple participation, information sharing, or formal agreement

Much of the effort in large group facilitation focuses on:

- Getting parties to the table: simply convincing them that there is anything useful in talking can take some time
- Deciding who should participate: in group conflicts, you need to make sure that key decisionmakers are present, or aware
- Getting parties to agree to the ground rules: In agreeing to the basic rules of mediation (no interrupting, respectful language, etc.) parties are already on the road to resolution.
- Keeping the parties focused: a group discussion can go off in 100 different, unhelpful directions if the facilitator is not careful. Parties need help staying on track and focusing on what is possible, but also what is most important to them.

See attached Additional Reading: “Group Mediation: The World Café Method.”

## **Training Mediators and Training Trainers**

- A self-sustaining court-annexed program should develop a highly skilled cadre of initial mediators
- They should, in turn, be able to scale up the program beyond a pilot phase and train newly recruited mediators
- With time, they should be able to multiply their impact by training trainers, who then train additional mediators as demand and capacity expand

See attached Additional Reading: David Matz, “Practical Mediation Guide”

**Why Restorative Justice?**  
**Overview of the concepts and models**

## Fundamental RJ Principles

- The primary determinants of justice are the interests of the victim, the community, and even the offender
- *Punitive* actions do not always serve those interests best.
- Crimes are against individuals and, to some extent, communities, not against the state or “the law.”

Restorative justice, much like ADR is rooted in the notion that the interests of the victim, the community, and even the offender are the primary determinants of justice, and that punitive action does not always serve those interests best.

For instance, if someone steals money from you and the person goes to jail, you still may not necessarily get your money back, nor may you gain any security assurances that the person will not commit another crime against you once they are freed. In the case of the US energy giant Enron, many employees lost their life savings, and most will not get that money returned, even though the executive responsible for the scam is going to jail.

Moreover, in the US and other countries, jailed offenders tend to become *repeat* offenders, such that the jails are producing *harder* criminals.

See attached Additional Reading: “Restorative Justice Handbook”

## **Was Justice Served Well?**

- For discussion: The case of the Nigerian Professor who received 2 years jail sentence in the US for pepper-spraying his son
- Would RJ have provided a more appropriate response to the following crime?

### **“Nigerian Professor Who Pepper-Sprayed Son Gets 2 Years In Jail”**

Wire Report, 21 November 2006

The Nigerian professor, Festus Oguhebe, who pepper-sprayed one of his sons as a form of punishment has been sentenced to serve two years in jail by a United States Court for child abuse despite emotional pleas by two of his children and his ex-wife. Hinds County Circuit Judge L. Breland Hilburn on Monday sentenced Festus Oguhebe to five years in prison with three years suspended on his no-contest plea to one count of child abuse.

"I know he went overboard in his punishment, but he loves us. If he is in jail, that would totally mess me up so much," said 16-year-old Anna Oguhebe, who will graduate from high school in the spring. "I want my dad to be there when I graduate, not in jail."

A native of Nigeria, Oguhebe was accused of abusing his 11-year-old son by "placing him in a bathtub, then putting hot pepper juice in his eyes, on his penis and buttocks; and also by tying his hands behind his back and covering his body with ants," according to court records.

Oguhebe also was accused of abusing his son by "whipping and striking the child in such a manner as to cause serious bodily injury," according to records filed by Hinds Assistant District Attorney Jacqueline Purnell.

Oguhebe, who has six children with his ex-wife, wiped tears when his children spoke of their love and respect for him, urging Hilburn to spare their father jail time. "Give him counseling, extensive counseling. That would be better than jail," said Anna Oguhebe.

Anna Oguhebe and her brother, Festus Jr., also a high school senior, said their father may have gone overboard in his punishment, but his discipline and guidance as a father have kept them out of the kind of the trouble they see peers getting into.

Oguhebe's ex-wife, Mary Oguhebe, said what her former husband did was wrong, but he is no danger to society and didn't need to be locked up. Mary Oguhebe had repeatedly reported abuse of the children by their father to the Hinds County Sheriff's Department, a department spokesman told The Clarion-Ledger in March 2005.

While on the witness stand during his sentencing hearing, Oguhebe apologized to his children. "I'm very, very sorry. I say forgive me. It won't happen again. ... I have learned my lesson," he said.

See attached Additional Reading: “Restorative Justice Handbook”

## Philosophical Roots of RJ

- Humans are capable of *reform*.
- Offenders should have the chance to make **amends** for their crimes to victims and take **responsibility** for their offenses.
- If an offender does make amends, then he or she should be **reintegrated** into society.
- Moreover, offenders must also be protected from **retribution** so that society as a whole does not suffer from norms of revenge-taking.

RJ rests on a number of philosophical beliefs:

Human beings – both adults and juveniles – are capable of reforming themselves. Thus, forgiveness and a chance for restitution should be possible.

Offenders should therefore be given a chance to make amends for their crimes – and indeed, they must make direct amends to their victims so that offenders can take personal responsibility for their crimes. Having an offender languishing in jail serves none of these goals.

Moreover, this allows offenders to overcome their guilt and to make amends for their deeds, thus restoring a deeply important sense of self-worth. Low self-esteem and a dehumanized environment may have contributed to the anti-social behavior that produced the crime in the first place. The offender, therefore, needs to learn and to feel that they can indeed do better if they are to rejoin society as healthy members.

If an offender does make amends, then he or she should be reintegrated into society. Moreover, offenders must also be protected from retribution so that society as a whole does not suffer from norms of revenge-taking. Revenge taking can lead to spiraling cycles of crime and violence that escalate out of control and potentially lead to massive social disorder.

## Philosophy of Victims

- Victims need a chance to **confront** offenders directly
- Victims should have some say in the **response** to the crime they have suffered, generating options for the offender to make **amends**, and pointing the path toward **forgiveness**.

RJ also rests on the philosophical notion that victims need to have the opportunity to confront **directly** the individual(s) who perpetrated crimes against them.

Psychologically, this affords victims two important experiences:

1. **Release** of anger, fear, and pain inflicted by the offender;
2. Perhaps an **apology** from the offender to the victim.

Both psychology and medicine are showing increasing evidence of the important mental and physical effects that apology can have *both* for the victim *and* the perpetrator of crimes. In many lesser crimes, in fact, what victims want most is to get an apology from the offender, and to see some genuine expression of remorse from the offender, which is something they will almost **never** get from the offender in the normal judicial process. The terrible psychological stress that victims – and in a different way, offenders – builds without a chance of release.

Victims should also have some say in how **responses** to the crime they have suffered are developed. Victims are critical players in generating **options to make amends**, such that if sufficient amends are made, the victim has an opportunity to **forgive** the offender.

Victims cannot, however, *raise* punishments greater than the law allows, but they should have some ability to say if any punishments should *reduced* if certain amends are made.

## Philosophy of community and government

- Community members should also have a chance to participate in the discussion of crimes.
- Government's primary role is to preserve a **just public order** (the system), while the community's role is to build and maintain a **just peace** (daily behavior)

Restorative Justice also believes that community members should also have a chance to participate in the discussion of crimes committed against members of the community.

Community members are also **potential victims** of crimes by the offender, so they deserve a chance to oversee the process and to voice their concerns or ideas. Although they share the fears of being victims, communities members may collectively be **less biased** than the victim and able to generate more objective solutions for restitution. Thus, community members are **sympathetic** to the victim, but perhaps **distant enough** to view both the crime and the public good more objectively than the parties to the dispute.

Restorative Justice also distinguishes between the roles of government and community members in society, in that it views government's role as maintaining a **just public order**, whereas the community's role is to maintain a **just peace** in the community.

This distinction places primary responsibility for legal **system** with the state, but acknowledges that the community must **live with the results** of any judicial action. The community must face the day-to-day reality of how the victim, offender, and community will live with one another, and thus the community itself must play a role in responding to crimes.

Historically, most societies *started* with a legal orientation toward restitution (not just an "eye for an eye," but repayment for stealing, etc.). In Europe and elsewhere as states grew more complex, however, legal jurisprudence shifted from primarily offering **restitution for crimes** to viewing crimes as **threats to state security** – in essence, viewing the **state as the victim** of individual crimes.

Restorative justice seeks to shift the pendulum back in the direction of restitution, and toward putting victims and communities back in the driver's seat – or at least in the car.

## Stages of RJ

1. **Trial** (optional?): determination of whether or not a crime has been committed through the normal judicial process, but **no sentencing**
2. **Inclusive Encounter among all Stakeholders:** Victims, offenders, community members (self-selected), and judicial system representatives (a judge, and perhaps law enforcement) meet to discuss the crime and its impact, transforming the parties into *stakeholders* (with the goal of integrative negotiation).
3. **Amends:** All assembled individuals, including the offender, determine **jointly** what the offender must do to repair the harm they have done. The state – sometimes through a judge – will **mediate** the process, which produces a **contract**. The judge may or may not have the last word, or the victim may get the last word, but with a judicial “veto” over any decisions that violate the law.

Restorative Justice processes typically begin with a **Trial** under the normal criminal process, with a determination of guilt through the surfacing of evidence through normal law enforcement channels. Once guilt and the extent of the crime have been ascertained, however, the judge does **not sentence** the offender. Instead, the process moves to the next stage of RJ.

Note, however, that many RJ practitioners argue that a trial stage is **not necessary**, and that the assembled community members (including the judge) in the Encounter phase can serve the same functions as a trial. RJ advocates argue that this is particularly true for non-violent crimes, or in some instances, even violent crimes short of murder.

The RJ process then moves to (or begins with) the **Encounter** phase, which seeks to provide an inclusive dialogue among the parties to the conflict and the community. The underlying goal is to transform the parties into **stakeholders**, in which they see themselves as negotiators in social bargain that is trying to maximize the good done for the victim, the community, and ultimately for the offender's rehabilitation.

During this process, the state typically plays the role of **mediator** in producing a binding **contract** between the victim and offender, and between both of them and the community at large. Jointly, the victim, community, state, and offender determine what must be done to repair the harm done by the offender to the victim. The mediator may be a judge or a local government representative, although in some cases government or NGO mediators may be recruited to facilitate the discussion.

State representatives typically have the **last word** on agreements that are reached, but sometimes the victims themselves or communities (through a voting process) may get the ability to make the final decision **if mutual consensus cannot** be reached. If anyone but a judge gets the final decisionmaking word, however, judges still typically must review agreements to ensure that no laws have been violated – an effective **veto**.

## Stages of RJ (2)

4. **Reintegration:** Offenders undertake the agreed steps (the contract) to make amends, and in exchange, they are restored as contributing members of society. **Victims** are also restored as contributing members of society through the empowering experience of the encounter and through additional assistance or therapy, as required.
5. **Oversight:** The state and community monitor implementation to ensure that the reintegration contract is fulfilled.

The fourth stages sees implementation of the agreed contract, in which **both** the offender and victim are brought back into society as integral members. The offender makes amends for his or her wrongs, while the victim seeks to move (psychologically and socially) beyond the event.

Note that judges (and others who may have facilitated the process) also gain a psychological benefit, if the process succeeds. You too are members of the community, and you gain the satisfaction of helping to heal the wounds suffered by all involved.

RJ requires strong **oversight** once reintegration is under way. Offenders must be monitored to ensure that they make their amends, that they and the victims are rehabilitated, and that offenders are protected from revenge or retribution.

## RJ Models

- **State-centered models:** the government judges the crime, hosts the encounter, *orders* a restitution program, and monitors it. Some models include a jobs program in cooperation with local businesses, and therapy and/or education for victims and offenders.
- **Community-centered models:** a community body decides the terms of the restitution contract; the offender expresses guilt and pledges amends in the presence of family, neighbors, and the community. Thus the weight of **social opprobrium** is brought on both victim and offender: **shame**, forgiveness, emotional release, public blessing, and oversight.

Community-centered models can be hosted by local governments, towns, or neighborhoods in a variety of fashions.

The New England “Town Hall” model may be gaining some ground in the US. In this model, the city or town government hosts an open meeting, usually facilitated by a judge for the Evidence phase of RJ, and may provide separate caucuses for victim-offender mediation.

NGOs and other community associations can also host restitution programs. Sometimes these are in cooperation with state agencies, or hybrid community models.

## Specific cases

- **Victim-offender mediation (VOM):** the most common RJ model, it features the victim and offender meeting voluntarily to resolve their dispute, facilitated by a trained mediator (note that the mediator does NOT arbitrate), before *or* after a court conviction.
- **Conferencing programs:** like VOM, but they also involve family members and/or community representatives.
- **Panel models:** groups of unrelated victims and offenders, who share a common kind of crime, are brought together for a conference-like process.
- **Community or local-government –hosted discussions:** similar to conference programs, but community body is clearly the facilitating organ.
- **Assistance programs:** victims, offenders, and communities are provided an array of recovery and rehabilitation assistance, or prevention programming.

See additional reading materials for discussion of:

- Quincy, Massachusetts' Earn-It Program for juveniles
- New Zealand victim-offender mediation
- Circle sentencing
- Traditional community models

## Prospects and Problems for RJ

- Some good evidence: 95% of Vermont VOM meetings resulted in successfully negotiated agreements, with one study showing 68% compliance rate. VOM and other RJ methods consistently show **high satisfaction rates**.
- Some evidence that RJ programs **reduce** prison populations and recidivism at a higher rate than incarceration
- But many local governments **lack a tradition** of RJ, such that judges and law enforcement are oriented toward punitive action. Thus there is a **lack of infrastructure** to undertake RJ, implement the results, or monitor implementation.
- New Zealand, British studies of RJ very **ambivalent** about the results of RJ. Japan has better results (role of culture in shaming?). But RJ is usually viewed as an **add-on** structure to jail, probation, fines, and other punitive measures imposed by the justice system. So has **full RJ** really been tried?
- Challenge: What family and community **environments** will offenders return to?

## **“4 Rs” of Restorative Justice**

- RECONCILIATION
- RESTITUTION
- REINTEGRATION
- RESTORATION

## **Policy Issues for RJ in Nigeria**

- Provide additional legislation for supporting ADR overall
- Open the door for Victim-Offender Mediation, both through the judiciary and law enforcement
- Integrate and develop existing RJ practices under traditional legal frameworks

## **Designing an ADR and RJ system in Nigeria**

## **How ADR can accomplish other development objectives**

- There are complementary dynamics involved in the integration of ADR systems and other development initiatives:
  - Civil society goals: training of community leadership, facilitate constructive public participation in social change, decisionmaking, and political processes
  - Conflict management goals: reduce and manage social/community tensions and conflicts that can impair other development goal

## **Limitations of ADR**

- ADR can be an integral part of the construction and reform of a healthy judicial system, according to the goals for which it is implemented, the background conditions and facilitating factors.
- It cannot, of course, be a substitute for the larger justice system within which it must operate organically.
- ADR cannot:
  - Define, refine, establish and promote a legal framework, although one is needed for it
  - Redress systemic social injustices, discrimination based on ethnicity or gender, nor can it be used to address human rights violations
  - Resolve conflicts between parties of vastly different levels of power
  - Resolve cases that require public sanction for demonstrative and equity purposes
  - Resolve disputes involving defaulting parties

## **Background conditions for ADR design**

- Adequate political support from relevant ministries and subministries, but more importantly, from high ranking judges, constitutive judicial bodies and the political leadership
- Supportive institutional and cultural norms
- Adequate human resources; having a pool of people capable of being service providers
- Adequate financial resources to ensure continuity of program operation and smooth institutional development

## **Program Design Considerations**

- Planning
- Operations
- Monitoring and Evaluation
- Continuous Improvement

## **Design: Planning**

- Assessment of social and commercial dispute resolution needs must be performed:
  - What kind of disputes would benefit from an ADR program?
- A participatory consultative design process should be implemented: include potential client groups/users and service providers
- Evaluate and understand barriers (cultural, economic, information access, linguistic, physical access, etc.)
- Plan for an adequate legal framework specifying
  - legality of ADR procedures
  - qualifications and ethical considerations
  - procedures regarding provision of services
  - enforcement mechanisms
  - overall relationship of ADR with the formal justice

## **Design: Operations**

- Recruitment and training of pilot program mediators, support staff and others
- Financial sustainability of the program
- Case selection/filtering and case management

Provision for the adequate selection, training and management of mediators/arbitrators/conciliators must be made. This requires identification of sources for recruitment, consultants and programs that can provide training, and the setting up of a management system to supervise service providers

Find or create sustainable sources of financial support. One cause of program failure is the dilemma arising from lack of resources to continue a functioning program, or the politicization of financial support (i.e., making it subject to political currents and disputes). Multilateral lending agencies, in conjunction with foreign development agencies and the beneficiary government, are part of the coordination of funding efforts as well.

Establish effective procedures for case selection/filtering and management. Once the type of dispute to be addressed is determined, clear criteria for acceptance in the ADR process must be established. Standards for case management should be set forth, evaluated, adjusted if necessary, and adhered to. Different countries have very different ways of dealing with the 'filtering' of cases. In the pilot phase of a program, the kinds of cases to be admitted (and those not to be admitted) need to be very clearly spelled out. This can be reassessed as a fuller program is rolled out and scaled up.

## **Design: M & E**

- Establish mechanisms for program evaluation and managerial oversight
- evaluate progress and results, and compare them to goals for the program
- Obstacles to achieving results should be analyzed and addressed
- Basic data on case management should be diligently compiled and maintained for such analysis and improvement
  - case applications, acceptances, stage of dispute resolution, outcome, cost, time to resolution, satisfaction with the outcome and the service providers.

## **Design: Continuous Improvement**

- A mediation program, whether court-annexed or private or community based, should ideally be a learning experience
- Periodic reviews of performance variables and data, with participative analysis from mediators and participants to get best practices and program changes
- Outside evaluation for the purposes of validation and healthy critique

## **Evaluating the Judiciary for ADR and RJ**

## **Diagnostics**

- What are the strengths and weaknesses of the Nigerian judicial system?
- What are the specific operational details of the public services provided by the judiciary? How can they be improved?
- What legal frameworks exist (or need to be created in order for Nigeria to benefit from ADR and RJ)?
- What are the cultural affinities for ADR and RJ in Nigeria? Any concerns?

## **Selected Data Items: What else do we need?**

- What data do we have or do we need to get in order to think about modernization projects?
- Number of judges, staff
- Professional development and training
- Average length of civil cases, criminal cases
- Average cost of a civil or criminal procedure
- Where are the bottlenecks in citizens' access to justice?
- How do people currently obtain information about law, courts, traditional justice systems?
- Level of social violence inherent in society
- Infrastructure needs of the judicial branch

## **Planning**

- What kind of judicial planning takes place? Who leads it?
- How participatory is the planning work?

## **Integrating RJ and ADR**

- Do we have any existing RJ and ADR capacity, training and practice
- What kinds of cases do we now have that could benefit from either RJ or ADR?
- What types of anticipated future cases that could benefit from ADR and RJ?