AFRICA ASIA MEDIATION CONFERENCE 2019

AFRICA ASIA MEDIATION ASSOCIATION

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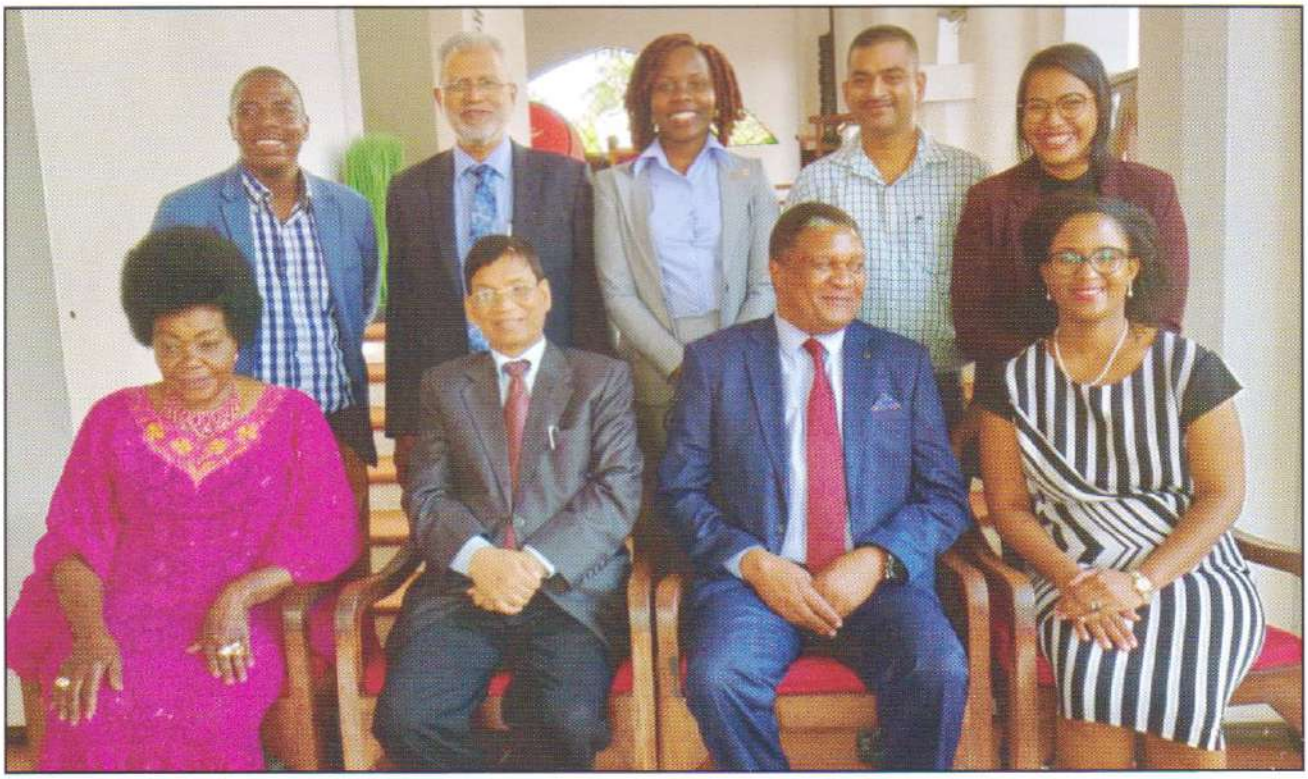
2019

1ST AFRICA - ASIA MEDIATION CONFERENCE
5-6 SEPTEMBER 2019
DAR ES SALAM, TANZANIA

REACH OUT TO US AT: africaasiamediationconference

Pictorial

A Historical Moment: World Mediation Analyst (From left) Mr. Kevin Brown (Europe), Ms. Madeline C. Kimei (Africa), Mr. S.N. Goswami (Asia) & Mr. Dr. Richard L. Benkin (America)



Executive Committee Member's of AAMA

Africa-Asia Mediation Conference - 2019

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1st Africa-Asian Mediation Conference
5-6 September 2019
Dar Es Salaam, Tanzania

OPENING REMARKS

By Madeline C. Kimei, Founder – iResolve Tanzania

Honorable Mr. Mahbubey Alam Attorney General for Government of the People's Republic of Bangladesh to Dar es Salaam -Tanzania; Hon. Lady Justice Joyce Aluoch (retired) Former – Vice President of the International Criminal Court at the Hague, The Netherlands; Honorable (Rtd) Judge Robert Makaramba, Judge Of The High Court Of Tanzania; Honorable Zubeda Mkombozi, Director of Mediation at the Commission for Mediation and Arbitration Tanzania; Adv. Mr. Samarendra Nath Goswami, founder and chairman of Bangladesh international mediation society (BIMS); Adv, Mr Sam Nderitu, Chairman of the Chartered Institute of Arbitrators Kenya Branch; Mr Richard Benkin, International Ambassador of the Bangladesh International Mediation Society; Mr Kevin Brown, President of Mediation International and The International Mediators Association; Mr Sarma, CEO and Director of Life Skills (India) Training Private Limited, All Members of the faculty of the Bangladesh International Mediation Society. Distinguished, participants, ladies and gentlemen. All protocols observed.

It is my great pleasure and honor to welcome you all to Dar es Salaam for this inauguration of the Africa - Asia Mediation Conference 2019.

Ladies and gentlemen, the decision to have this conference was made early this year in January when realizing that mediation is now becoming a dispute mechanism of choice in both African and Asian countries. This brought about iResolve partnering with Bangladesh International Mediation Society to initiate this conference which will move and alternate between the continents.

In my view there is no better place to hold this than Dar es Salaam with its gentle welcoming coastal beauty - which I hope is rejuvenating to us all during this conference. **Mediation law** refers to a form of alternative dispute resolution (ADR) in which the parties to a lawsuit meet with a neutral third-party in an effort to settle the case. The third-party is called a **mediator**. ... The **mediator's** role is not to reach a decision - it is to help the parties reach their own decision.

Mediation is by now a proven highly effective tool for achieving harmonious resolution of conflicts arising in different sectors. Domestically we wish to promote the use and

understanding of mediation to the general public so as to assist them in resolving conflicts amicably and harmoniously. At an international level, we wish to bring together experts in this area so that both Asia and Africa continues to provide a unique platform for exchange of views in this area as part of its aim and vision to be a leading dispute resolution centre in the Africa- Asia region.

The AAMC event creates the forum for on-going conversation and dialog about mediation trends, practices, and futures and provides the opportunity for practitioners to develop and maintain professional relationships.

The theme of this year is "**Mediation and the Law**". There have always been very different views on the topic. Some believe that mediation being a voluntary process, no legislation is needed. Some believe that mediation should be compulsory before the introduction of any claim. Others wish the judge to invite the parties to consider mediation and possibly impose a penalty on a party which unreasonably refused to consider mediation.

We would like to recognize our partners, BIMs and thank them for their support towards this worthy conference. BIMS provides Mediation Service to help resolve civil and commercial disputes of both a domestic and international nature. BIMS Affiliated Mediators' comprise experts in law and other fields and are bound by BIMS's Code of Conduct foe Mediators' and confidentiality obligations. Also, this conference is supported by various key players in the field of mediation as you can see.

We extend our gratitude to the Indian Institute of Arbitration & Mediation (IIAM) which is one of the pioneer institutions in India, providing institutional Alternative Dispute Resolution (ADR) services, which includes international and domestic commercial arbitration, mediation and negotiation. IIAM is the first institution in India approved by the International Mediation Institute (IMI) at the Hague for qualifying mediators for IMI certification. To cater the requirements of people interested in ADR, IIAM conducts various courses to suit their convenience and need.

Our media partners Chartered Institute of Arbitrators -Kenya is a leading professional membership organization representing the interests of alternative dispute practitioners worldwide. With over 14,000 members located in more than 133 countries.

The Tanzania Institute of Arbitrators the local institution providing for arbitration services both will have opportunity to address you all. Open dialogues as is going to happen today will no doubt provide a lot of food for thought for all of us, and for us in both continents as a matter of making our future policy for dispute resolution to see how that can be taken forward even further.

On this note, I wish this event every success. For those coming from overseas, I wish you an enjoyable stay in Dar es Salaam.

DAR ES SALAAM, 5 SEPTEMBER 2019

WELCOME ADDRESS

By Mr. Samarendra Nath Goswami, Advocate
Editor- Bangladesh Law Times
Chairman- Bangladesh International Mediation Society (BIMS)

The Distinguished Key Note Speaker – Honourable Attorney General of Bangladesh – Mr. Mahbubey Alam, the Honourable Lady Justice Joyce Aluoch , the host – Ms. Madeline Keimi, Mr. Kevin Brown the President of International Mediators Association, the other learned speakers, delegates from different countries, ladies and gentlemen:

I am very happy and delighted that this event about which we have been dreaming and planning is happening today.

The day is not far off when Mediation will not be an Alternative Dispute Resolution mechanism but will be The Dispute Resolution process. And litigation will become the Alternative and the last resort. Yes, litigation has to be the last resort. Negotiation is what happens first between two parties. If it fails, they should seek the intervention of a Mediator. If that too fails, they may go for Arbitration. If Arbitration also fails, the parties may go to the court of law.

The Singapore Convention that took place last month has made Mediation the only way to resolve cross border disputes. It has empowered Mediation. It has empowered us – the mediators. The Singapore Convention has opened a floodgate of opportunity for us the mediators to play an important role in promoting international trade commerce, besides promoting peace and harmony in the world. I congratulate and thank all those who brought about the Singapore Convention on behalf of all of you present here.

I congratulate Ms. Madeline for choosing 'Mediation and Law' as the theme of this Conference. After the Singapore Convention, Mediation has become the law! As the speakers will be deliberating on this, I do not want to go into its detail.

This Conference is international in its nature. Eminent speakers from different parts of the world are going to address us today and tomorrow. The delegates too are from different countries. This event is a collaborative effort of 'i Resolve' of Africa and Bangladesh International Mediation Society (BIMS) of Asia. I am grateful to the Indian

Institute of Arbitration Mediation (IIAM), CIArb and World Mediation Summit for the support that we received from them for this Conference.

I am grateful to the Honourable Mr. Mahbubey Alam for having accepted our invitation to be here travelling a long distance in the midst of his very busy schedule to deliver the key note address of this conference. I take great pleasure in welcoming him.

I am very happy to welcome the eminent speakers Mr. Kevin Brown – the President of IMI and Mediation International, the Honourable Lady Justice Joyce Aluoch, Ms. Iram Majid – Director of the Indian Institute of Arbitration and Mediation, Ms. Mercy Okiro – Advocate of the High Court of Kenya and Mr. K S Sarma – the Advisor of Bangladesh International Mediation Society and all the delegates from Tanzania and other countries.

I am pleased to announce on this happy occasion that we propose to confer Mediation Award posthumously to Bangabandhu Sheikh Mujibur Rahman – the Founding Father of Bangladesh and an Apostle of Peace, during the next, that is, during the Second Africa Asia Mediation Conference.

I wish all of you a great time of learning and fun today and tomorrow.

Thank you.

KEY NOTE

By Honorable Mr. Mahbubey Alam, the Attorney General of the People's Republic of Bangladesh

Friends:

It gives me immense joy to be in your midst in this lively city of Dar Es Salaam of your great country of Tanzania and to participate in the first Africa Asia Conference on Mediation. I congratulate the organizers of this programme and in particular Mr. Samarendra Nath Goswami – the founder Chairman of Bangladesh International Mediation Society and Ms. Madeline Kimei – the Founder CEO of Resolution Experts of Tanzania for organizing this event.

You have chosen an apt title for your Conference, because though Mediation is accepted today as an Alternative Dispute Resolution process and lawyers have started to become mediators, there is a lingering doubt in the minds of many advocates on whether mediation is legally valid. Hence it is good to deliberate on the relationship between Mediation and Law.

We need to understand the meanings and purposes of 'Law' and 'Mediation' to know where they intersect each other. By 'Law' we mean a system of rules that a government develops to deal with crime, business agreements and social relationships. Out of the 3 areas that I stated, two come under 'Mediation' as well.

In other words, both 'Law' and 'Mediation' are systems to deal with business agreements and social relationships. And both are different systems to deal with business agreements and social or family relationships.

What then is the basic difference in the two systems?

Law is a system of rules developed by a government and all the citizens are expected to comply with the same. So, when there is a dispute, it is settled by applying the rules to the case by a court of law. It involves parties and/or their advocates differently interpreting the laws leading to arguments and counter arguments. What is debated is who is right and who is wrong or who has the right and who does not have the right. It becomes personal and parties take positions. They are called 'opposite parties'.

In Mediation, they are not opposite parties, they are collaborators engaged in finding

an innovative solution to the problem that both of them face and in adding value to the settlement, benefiting both the parties. The mediator tries to prevent parties from taking positions and thus prevents wastage of time and energy in accusing each other. The mediator enables both the parties to understand their real respective interests and needs and to focus on the same.

We need to admit that all of us make mistakes. To err is human. When we make mistakes while dealing with another person in commerce or family or society, disputes arise. Once we realize that we are also prone to commit mistakes, it will become easy to forgive the mistakes committed by others. When we forgive others for their mistakes, we will prevent disputes. Voltaire said, "We are all formed of frailty and error; let us pardon reciprocally each other's folly - that is the first law of nature."

If we shift the focus from finding fault in others to taking charge of the current situation, see what it offers with an open mind, we will see the seed of a greater opportunity in the problem, which can benefit both the parties.

Many governments the world over are today legislating laws that will result in more and more people opting for Mediation. Once people understand the advantages of Mediation, it will become a popular and natural way of dispute resolution. Conferences such as this help to promote mediation within and between countries.

With the increase in trade and commerce between Africa and Asia, mechanisms for speedy redressal of disputes has become a necessity. Cross border mediation will promote international business. Hence Mediation is a process to promote peace and prosperity.

A lingering doubt in the minds of a few people, particularly those belonging to the legal fraternity is about the legal validity of a mediated settlement agreement. The question has been how to enforce such settlements. This was addressed by the United Nations Convention on International Settlement of Agreements Resulting from Mediation, which is also referred to as the 'Singapore Convention'. It allows direct enforcement of mediated settlement agreements. Therefore, once it comes into force, mediated settlement agreements will be as good as judgements and awards of the courts of law, as far as cross-border commercial disputes are concerned, thus enhancing the credibility of Mediation.

We need to look at problems from different perspectives. Enforcement of a mediated agreement is an advocate's point of view. The question of enforcement of agreement does not arise at all from another point of view. To appreciate and accept this point of view, we need to remind ourselves of the process and purpose of Mediation.

A mediator enables the parties not only to resolve the dispute, but to add value to the settlement by an innovative approach. A good mediator will enable the parties to explore different options to solve the problem in a collaborative manner. When two parties are fighting against each other for their rights, the focus is on their respective positions. But, when they collaborate to resolve the issue, the focus will shift to finding solutions to the problems. The solution is not imposed on them. They have volunteered to accept it. They have become collaborators and created additional value, by which both of them will benefit. Hence, they will act as per the agreement, as it benefits them.

The quality of a mediated settlement agreement will determine whether the parties will implement it or not. Professionally trained mediators, who can think out-of-the-box can bring about such agreements. Therefore, solution lies in developing professionally trained mediators, who are problem solvers and who can think innovatively and who possess excellent human relations skills.

Africa and Asia have immense potential for international trade and commerce, which will result in creation of wealth by the African and Asian countries leading enhanced quality of living in the countries of Asia and Arica.

Conflict Prevention and Resolution is a multidisciplinary profession. It is a science, because it works on certain basic axioms. It is an art, because like any other art, its scope is unlimited. It calls for imagination, flexibility and spontaneity.

A mediator enables disputants to negotiate between them effectively and brings about not only settlement but also a value addition to both.

All of us have our own prejudices and preconceived notions, because of our past experiences. We are all products of our own respective environments. But the irony is that everyone thinks that he or she is not prejudiced whereas the other person is! Our minds are so conditioned by our past experiences that we cannot see our own prejudices.

Therefore, one has to succeed as a mediator, he or she has to do a lot self-introspection and cleanse his or her mind of the prejudices and develop a fresh outlook – an open mind and a discerning perspective.

Man is essentially and basically a good being. The environment in which he is brought up shapes his personality. A mediator has to believe in this essential goodness of man. It is a basic requirement of a mediator. This belief will build hope in the mediator to bring about an amicable settlement.

Then the question arises, 'How to develop a belief in the goodness of man?'. It is possible to develop that belief in ourselves by developing in us the habit of always

looking for the good in others and focussing on the same and by forgiving their shortcomings by reminding ourselves of our own shortcomings. When we cultivate this habit, we will be happy with people for what they are. Our genuine appreciation of their good qualities will naturally get expression in our communications with them. As a result, they will develop trust in us.

Once a mediator is able to win the trust of the parties, he has won half the battle.

Mediation is a supported or facilitated negotiation Therefore, a mediator has to be a good negotiator, if he or she has to succeed as a mediator. Parties go for mediation after they had failed to reach a negotiated agreement. The mediator is again making them to negotiate, but this time in a structured manner called 'Principled Negotiation'.

Unlearning is more difficult than learning! The mediator will have to make the participants to unlearn the ways that they adopted earlier and train them afresh in 'Principled Negotiation'. Therefore, a mediator's job is a challenging one. And to face this challenge successfully, a mediator has to be also a Trainer in Negotiation, because he has to train the parties to negotiate effectively.

A mediator has to ensure that the parties do not lose hope in the process, so that they continue to negotiate until they reach a settlement, which means that a mediator should be a leader who can inspire others. That is why, I said earlier that Mediation is a multi-disciplinary function.

Though Mediation has been developed into a structured discipline during the recent years as an ADR mechanism, mediation as a function is as old as human civilization. If we go through the pages of history, we will see that great leaders of mankind the world over had done mediation and or negotiation to achieve noble purposes.

When one excels in Mediation, he becomes a leader.

I wish all the mediators and all the aspiring mediators present here all the best and very best luck to scale great heights in your career and also bring about peace and harmony in Africa, Asia and in the entire world.

I wish this Conference all success. May this Conference pave the way for making Mediation the most popular mechanism of dispute redressal.

I thank Mr. Samarendra Nath Goswami and Ms Madeline Keimi for giving me this wonderful opportunity of being with you today and to participate in this Conference.

Thank you.

Mediation in an International and Geopolitical Context

By Dr. Richard L. Benkin- International Ambassador
Bangladesh International Mediation Society

Jambo! Thank you for asking me to address this important conference. My name is Dr. Richard Benkin, International Ambassador of the Bangladesh International Mediation Society, or BIMS for short. Through its mediation services, BIMS has successfully helped parties resolve civil and commercial disputes both domestically and internationally. We're also an educative body that teaches people the skills, perspectives, and moral bases that they need for a successful mediation. And I want to emphasize that last skill. BIMS endeavors not simply to resolve cases regardless of the ethical implications. Mediators should remain ever mindful of their obligation to maintain an ethical standard that helps dispute parties and others recognize social and humanitarian elements. Ultimately, that's conflict *prevention* as well as conflict resolution. Besides, I don't think any of us want to be part of a settlement that supports ongoing persecution or inequality of opportunity. BIMS also teaches pertinent legal skills for mediators like settlement drafting; but you can read more about that at our web site, http:/www.bdims.net/.

All of us think and act within cultural and legal parameters created by the place and time in which we live and develop. I am an American and as such, I understand the world and work within the parameters of *my* culture. BIMS founder S N Goswami and BIMS mediator Iram Majid identified an important aspect of that in their book, *Definition of Mediation.* They noted that we North Americans see conflict as occurring "between two or more individuals *acting* as individuals, i.e., as free agents pursuing their own interests." Equally important, we see that pursuit of self-interest as, in and of itself, neither "right" nor "wrong." If you're familiar with the father of capitalism, Adam Smith, and his concept of an invisible hand arranging everyone's self-interest to produce the best social and economic results, you'll recognize the perspective. Ironically, Smith introduced that concept in his book, *The Wealth of Nations,* in 1776, the same year that the United States—the greatest expression of his economic philosophy—declared its independence from Great Britain. A quarter of a millennium later, of course, we temper that with our shared ethical understandings in that pursuit. For example, when I helped

parties resolve large workers compensation cases, we began with the understanding that workers who are legitimately hurt while on the job must be compensated fairly. In other words, we can't accept a settlement that uses corporate power to take advantage of individual workers.

This is an important understanding for assessing opportunities in the United States (US) and a good tool for mediators everywhere. US law recognizes the *individual* as the epicenter of rights and responsibilities; not the tribe, not the faith, not the social class, and not the party. If requirements for any of those identities conflict with the law of the land, the law of the land prevails; and we have many examples of that. There was a Muslim woman who refused to remove her *niqab* for the required photo ID on a driver's license. Without it, the State of Florida would not issue her a license. She said it would violate her religious beliefs; the State cited the importance of driver's licenses for identification.

In the end, the courts upheld Florida's refusal to issue her a driver's license without that *identifying* picture. Similarly, an Oregon baker and Washington florist refused to serve a same-sex wedding, saying it violated their Christian beliefs. The courts rejected their parochial arguments as well.

Even before we were a nation, our *Declaration of Independence* stressed that *individuals* "are endowed by their Creator with certain unalienable rights." Endowed not by government but by God, which marked an essential departure from the British Common Law and previous understandings of an individual's rights. That difference still exists today. In 2017, British investment manager Gina Miller led a suit that challenged the British government over its tortuous Brexit deliberations. To recap quickly, in a national referendum on 23 June 2016, the *people* of the United Kingdom voted whether to remain in the European Union or leave it. They voted to leave, and that was supposed to represent the will of the British people. Anti-Brexit media and opposition interests tried to say otherwise, despite the fact that the number voting to leave was greater than those voting to stay in a 1975 referendum that ended the other way. So, agree with it or not, the result clearly reflected the will of the people.

Yet, in ruling on Miller's suit, the court reaffirmed *the government's* right to implement or subvert that decision. In a subsequent statement unchallenged by either friend or foe, Miller said that, "Only *parliament* can grant rights to the British people, and only

parliament can take them away." That would never fly in my country. Can you see why it wouldn't and how it differs from the way Americans understand legal rights? We even treat corporations as people with the rights and responsibilities enjoyed by physical human beings. It's called corporate personhood. The concept of individualism remains the bedrock of the American legal system that cannot be subverted. And it remains the bedrock assumption of mediation in the US.

So, what does that tell us about practicing in the United States? It means that we see dispute parties within their distinctive contexts that include a jumble of strengths, weaknesses, self-interests, limitations, and more possessed by every individual. Successful case resolution requires that we identify each party's interests. To complicate matters, when working with major US corporations, I had to do this for the corporation and also each involved person. If corporations, like persons, have their own interests; we must allow that the individuals representing them do not necessarily have the same set of interests. This can be a major stumbling block to a successful resolution unless we recognize it, make sure we get the corporate decision makers to recognize it too, and consider it in our efforts. For mediation is a voluntary process, and our great ideas mean nothing unless we *convince* the parties that the resolution works for them.

Let me give you an example of how those interests diverge. It is in a corporation's interest to eliminate long term liabilities, which large open cases represent. Long term liabilities can place drags on corporate planning and development and depress a company's stock price, which can determine if CEOs or other top executives are retained or fired. Yet, I frequently encountered individual managers who were more concerned about their performance on the next monthly or quarterly profit and loss statement. Why? Because that was the metric used by *the company* to assess their performance and determine their compensation. Of course that would be their focus! How we overcame this differed with each situation. Regardless, however, the conflict between interests of the "big person" (i.e., the corporation) and those of individual managers was real; and mediators cannot make the mistake of assuming it is not. The *long term benefits* were a high priority for the corporation, but for the individuals who represented it, it was the next month or next quarter. Mediators must consider both and if necessary have the corporation make clear what interests will prevail in any settlement. Otherwise, even resolutions that "make sense" to us likely will fail. Conflict resolution requires that we recognize the different interest sets and align them.

So, a big part of successful mediation is perceiving what those strengths, weaknesses, interests, and limitations are. Or to put it bluntly: *a good mediator must be able to read the room and do so quickly.* What is in whose interests? What benefit do the individuals and not just the company see in our efforts? What sort of "corporate culture" sets what kind of parameters? Are there hot buttons or sacred cows we need to avoid or take action on before addressing?

For years, I helped parties settle large workers compensation cases through negotiation and with little or no litigation. It was not mediation per se, but is indeed germane to potential mediation opportunities in the United States and how we become valuable participants. My basic presumption was no different from that which mediators bring: that it is in everyone's interest to resolve disputes with zero litigation or as close to that as possible. Doing otherwise costs money that could go toward a settlement. Doing otherwise adds time, which leaves plaintiffs without financial relief and defendants with unresolved liabilities. We have become extremely litigious; filing more than 100 million civil suits in state courts annually and over 400,000 annually in federal courts. With only 30,000 state judges and 1,700 federal judges to handle them, this makes for serious backlogs and unsatisfied litigants. Mediation can bring an individual resolution without standing in the back of that long line, while bringing social value by avoiding litigation and the extensive delay it causes. Our best bet for developing new business is to identify an area where we can have an impact on the reduction of that backlog.

There is no one workers compensation system in the US. Each of the 50 states has its own system; so does Washington, DC; and certain cases fall under a federal system. Each of the 52 systems has its own rules regarding everything from costs and restrictions on opioid use, to what can be settled and what can't. It was also important to figure out if the state, or even judges and courts within a state, were more "worker friendly" or "employer friendly." Getting each side to recognize its impact on their strengths and weaknesses—and to recognize that their adversaries knew what they did—helped everyone develop more realistic expectations of what they might get out of a settlement.

Some elements were pretty constant from state to state; others differed vastly. If a claims professional in Missouri was also handling a company's claims from Illinois (the state right next door), applying the same resolution method to both would hinder, not help, resolution. Work comp rules also make states like Illinois and California extremely costly, whereas rules in states like Indiana and Arkansas make them relatively

inexpensive; and knowing which is which helped me guide the participants' expectations. Obviously, if parties have unrealistic expectations, they have to be fixed before we can achieve resolution. Moreover, few attorneys—even the best in the field—have that sort of multi-jurisdictional knowledge; and national corporations might have cases in all of them. By providing it, mediators eliminate the cost of legal education or expertise that otherwise would be needed for the best resolution.

Even with that, parties often were mired in emotion:

Defendant: "That worker is faking and trying to game the system. He doesn't deserve a penny and so I'm not budging from my offer."

Plaintiff: "That nasty corporation is just trying to screw me, so I'll screw him worse."

Defendant: "What? This costs too much."

Plaintiff: "What? I deserve much more than that."

Emotion is the enemy of resolution, so you have to bring an element of objective reality to the process or no one will be convinced to settle. One of our most important skills is removing that element from settlement attempts without dismissing the parties' feelings about the case. So, when I had a party mired in emotion, I never addressed it head on—because there was no doubt that if I did, it would come off as dismissive and seriously impair my ability to get results. My most frequent and effective method was to focus on numbers, mostly dollars, often time. I wouldn't tell a company to stop pushing back on reasonable settlements because of ego, personal pique, or some other factor that does not predict the cost of a resolution. I would talk about what the claim would look like in terms of dollars if we did not settle; that is, what seems like a lot of money—and very well might be—is actually the best the corporation can hope for given all the critical factors.

Rather than try to fight about emotion, I substituted a more compelling factor that could help turn the parties to an objective assessment of their options. Sometimes, that was all it took to flip things from stalemate to resolution. Other times, it seemed that nothing could overcome someone's emotional reaction. Plaintiff attorneys sometimes admitted that their client was being "unreasonable" in rejecting a settlement, but that they were obliged to support that position. In those instances, I often advised to shut down the mediation unless or until there was a change. In other cases, I would recommend that we give the

worker her or his day in court so that once we did, the emotional motive will have subsided and we could proceed toward a resolution. Again, you have to read the room; seize opportunities when they're presented, and pivot to a different tact when necessary.
I also encountered defense attorneys who would fight almost any claim, be quick to litigate. Quite often, it was clear that all these actions did, was to increase the corporation's cost and keep the liability open. Meeting only with the defense (counsel and the corporation), I would break down counsel's intended litigation and ask something like, "OK, given the fact that we are doing this in California before a judge that would award benefits to anyone still breathing, what would you estimate to be a *realistic* chance of prevailing?" (I did this knowing that the answer was "slim to none.") That usually did it, but if I had to go further, I would ask attorneys to give us a dollar figure that they expected to get from their action, the estimated cost of litigation, and the time it would take to get that ruling. We might go back and forth on a few points, but in the end, we would get past this knee-jerk impulse to litigate by looking at what really could be gained and at what cost.

Even if I suspected an attorney focus on billable hours rather than on the result; I never engaged attorneys on that point or questioned their competence or integrity. I found another way. Again, and the tried and true answer was *numbers*: dollars, months, percentages; things that were the same for anyone. That way, a client's decision to change course was not a rejection of the attorney's value. And we were able to move on to a productive settlement in one of the most contentious areas of the law in the United States. There also were imbedded political beliefs; for instance, by some who believe the system should provide workers with a sort of social insurance, regardless of the employer's culpability. I got it from the other side, too. US employers and their insurers pay more money in workers compensation each year than all the money spent on unemployment insurance, disability, or welfare. Based on that, there are some who believe the system operates as an indirect tax on consumers who have to bear the cost to employers in higher prices. Does that make workers compensation an attack on capitalism or on the American consumer? Clearly, neither set of political biases should have any bearing on resolutions. It was my task to make sure they didn't.

Once we got past all of that, parties solicited demands and counter demands; we went back and forth a few times, and occasionally that was enough. But if a gap between the parties remained, it was time to put on another hat. Parties tend to think about dollars in fixed terms: the plaintiff's demand is X, and the defendant is willing to pay Y. The only way to

close the gap is for one of them to give into the other. The reality, however, is that those dollars are not fixed. I was able to bring several financial instruments to the table that enabled most defendants to get what they wanted *and* most employers to pay no more than they determined they should. Structuring the money to be paid over time is a good one, especially during periods of high interest rates. The higher the rates, the more easily we could structure resolutions for lower dollars or with less time remaining in plaintiffs' life expectancy. I also brought medical administrators into the mix, who would secure defendants' lifetime medical care for a fixed amount. That way, defendants would not risk losing their medical benefits (a big fear in these cases), and companies would have fixed, known liabilities. Have the proper tools at the ready and know when you can use them.

I also am a human rights activist, and I am convinced that private mediation offers us the best chance of resolving human rights disputes. Over the years, it has been my experience that only a minority of human rights violations are committed by people who *are committed* to doing them. A minority but still monsters; like the Rwandan genocide; Pakistan's slaughter of 3 million Bengalis and Europe's slaughter of 6 million Jews; Myanmar's persecution of Rohingyas and China's persecution of Uighurs.

The majority of parties want to find a way out, but the greatest obstacle to negotiating resolutions is "face": that if a government resolves a human rights dispute, political and other costs will be too much to bear; or by compromising, the injured party will be seen as selling out. For instance—and I am maintaining the confidentiality of specific matters and parties—the resolution might be seen by some as "giving in" and making the government look weak; which will be a consideration by most governments. It will entail in fact, if not as part of the settlement, a tacit admission of guilt. That admission could have a disastrous impact on the nation's brand, or the international image on which its relationships with other countries is premised. Elected governments might fear negative political consequences by making concessions or admitting guilt. This means that conflicts in all likelihood will remain unresolved as long as attempted resolutions are public; that is, these other factors are allowed to get in the way of a rational and reasonable resolution.

Let's take an example an international dispute resolution that was resolved only because of secret agreements; not a human rights issue but the 1962 Cuban Missile Crisis. After a US attempt to overthrow the communist regime of Fidel Castro's Cuba, the Soviet Union installed offensive nuclear warheads there, which American intelligence detected. The

United States found that unacceptable and said so; and the two superpowers came close to nuclear war—which means that those of you born after 1962 might never have been born, and those of us born before then might consider you the lucky ones. There was a lot of public discussion, and US President John F. Kennedy imposed a naval blockade on Cuba. Soviet Premier Nikita Khrushchev saw Kennedy as weak, and he expected him to back down. But Kennedy did not, and it was Khrushchev who blinked and ordered his ships to turn back from Cuba—a great victory for the United States. Kennedy went from being considered naïve in foreign policy matters to being seen as a great statesman and tactician. And he deserved that. What we Americans did not know until years later, however, was we had to make a concession, too. Both countries were preparing for war—and they really were. The dreaded nuclear Armageddon was getting very close. Then, US Attorney General Robert Kennedy met secretly with Anatoly Dobrynin, the Soviet Ambassador to the US. He told Dobrynin that to resolve the crisis, the US would agree to a Soviet demand that it remove its Jupiter missiles from Turkey; *but that it could not be part of any public resolution.* The next day, Khrushchev announced that the USSR would dismantle the missiles in Cuba; and the world breathed a sigh of relief.

Let us hope that the fate of life on earth does not hang in the balance of our case resolutions! Nevertheless, we can lead the way to a *better* life on earth for all and help parties resolve their human rights conundrums by mediating quiet negotiations that remove all those extraneous factors. How we do that should be the focus of our discussion.

Many of us have contacts with people in government. Many of us know both the challenges preventing human rights resolutions; and the assets that exist for them. And I am sure we all know of world leaders who are caught up in situations they would like resolved; however, they need a knowledgeable and rational voice to help them do so without risk. Collectively, as individual professionals and knowledgeable organizations, we can make a difference and help countries make a difference, as well. *A positive difference.*

As our Torah says, "*Tzedek, tzedek tirdof*" in Hebrew. "Justice, justice shall you pursue." That quest for justice was paramount then, and it remains paramount today. Whether you are mediating a financial dispute, compensation to an injured party, or an international human rights solution; *Justice, justice we MUST pursue.*

Asante.

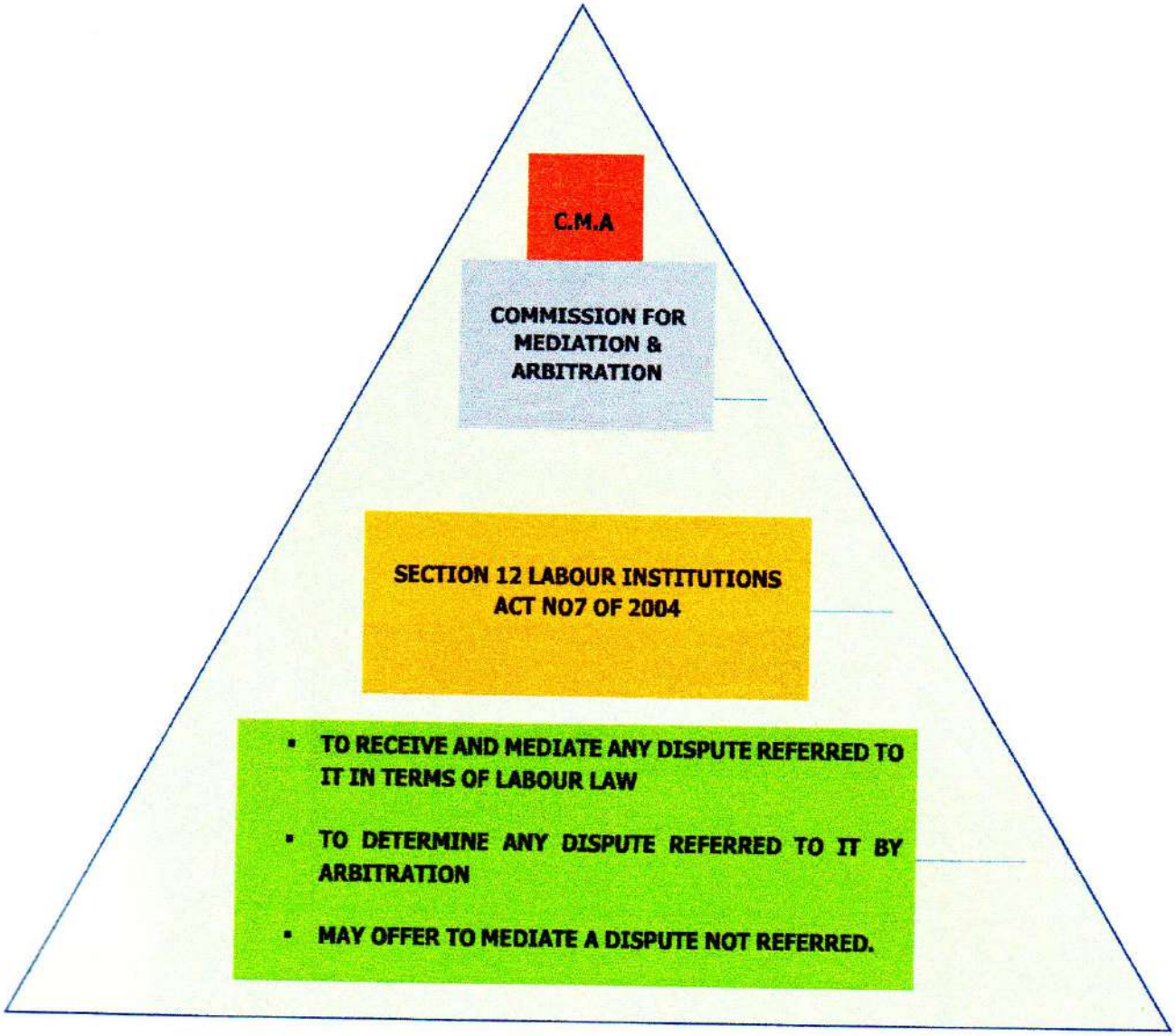
Mediation and Law: A Case Study of The Commission For Mediation And Arbitration (CMA)Tanzania)

By Commission for Mediation and Arbitration (CMA))

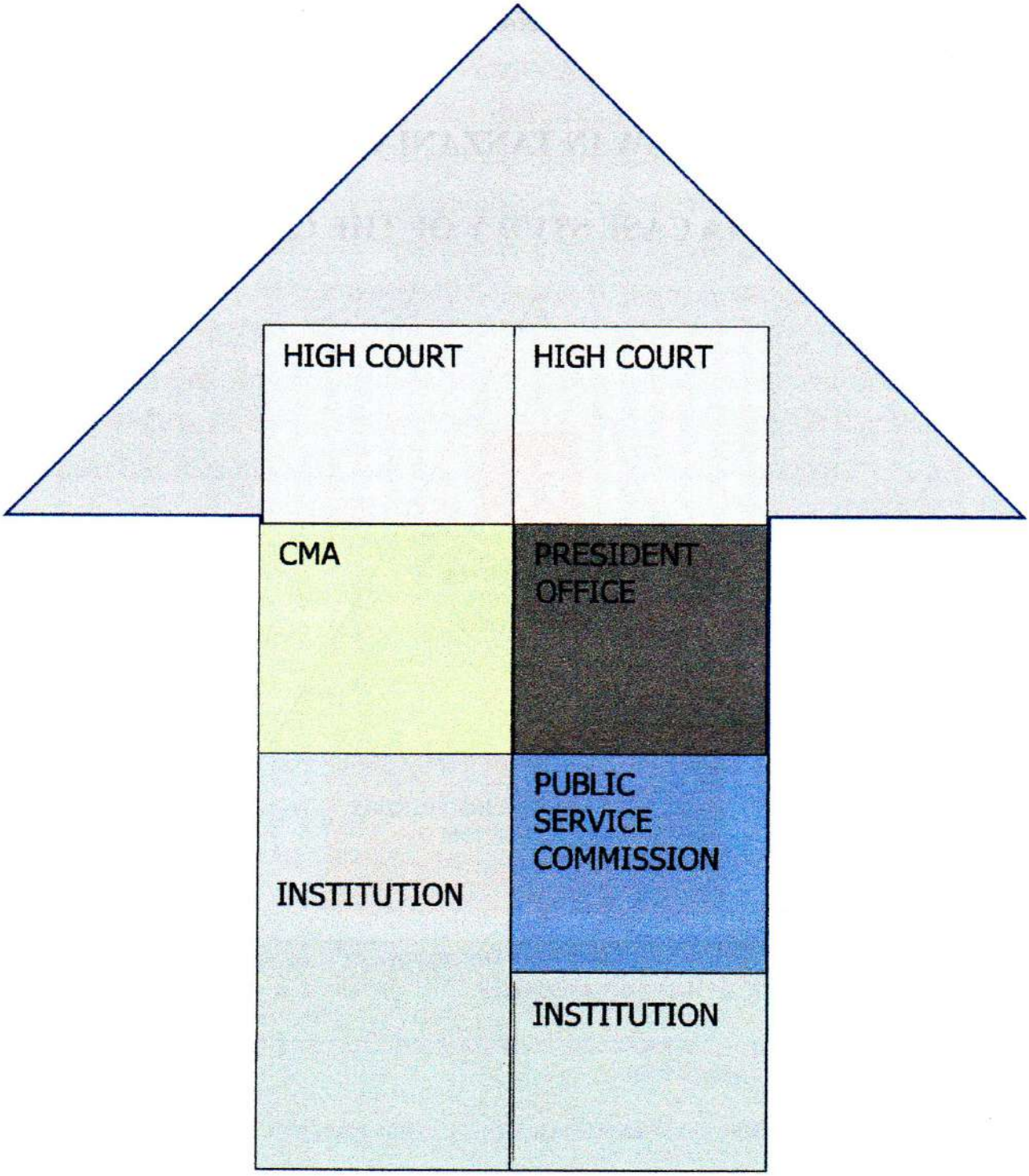
Hon. Zubeda Mkombozi & Senior Mediator, Mwangata Makawa

1. MEDIATION AND LAW IN TANZANIA

(A CASE STUD Y OF THE C.M.A)



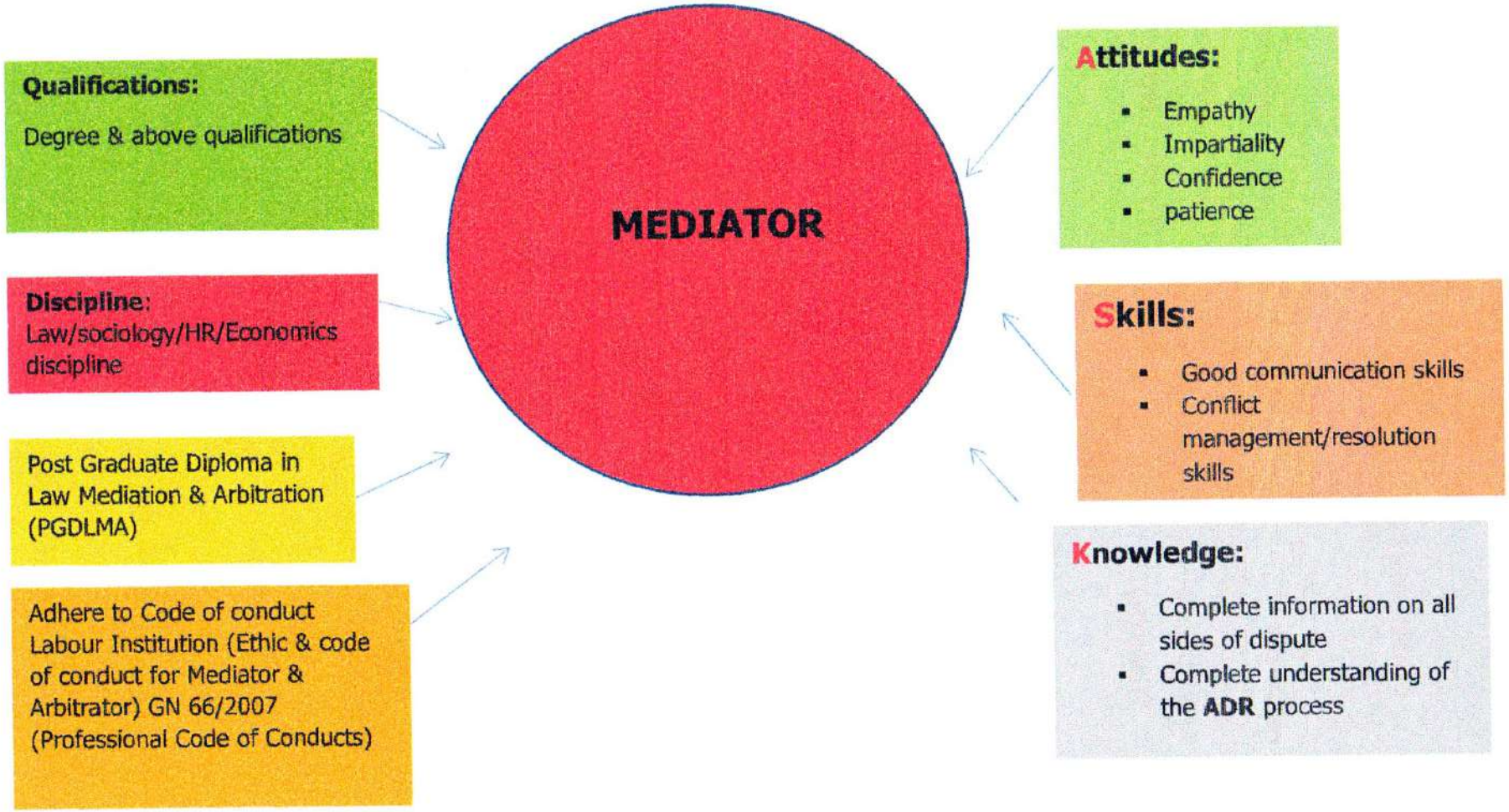
2. LABOUR DISPUTES HANDLING IN TANZANIA MAINLAND COURT OF APPEAL OF TANZANIA



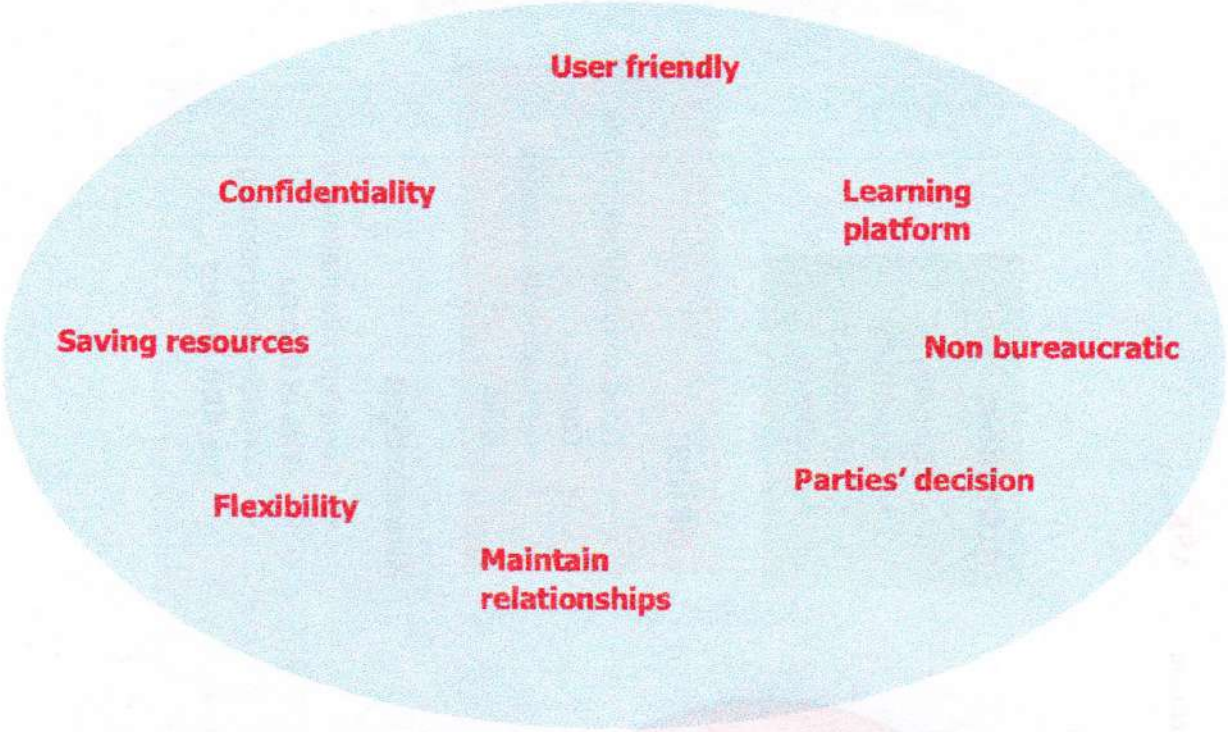
3. WHO IS THE MEDIATOR ?- CMA CONTEXT

For employment purpose

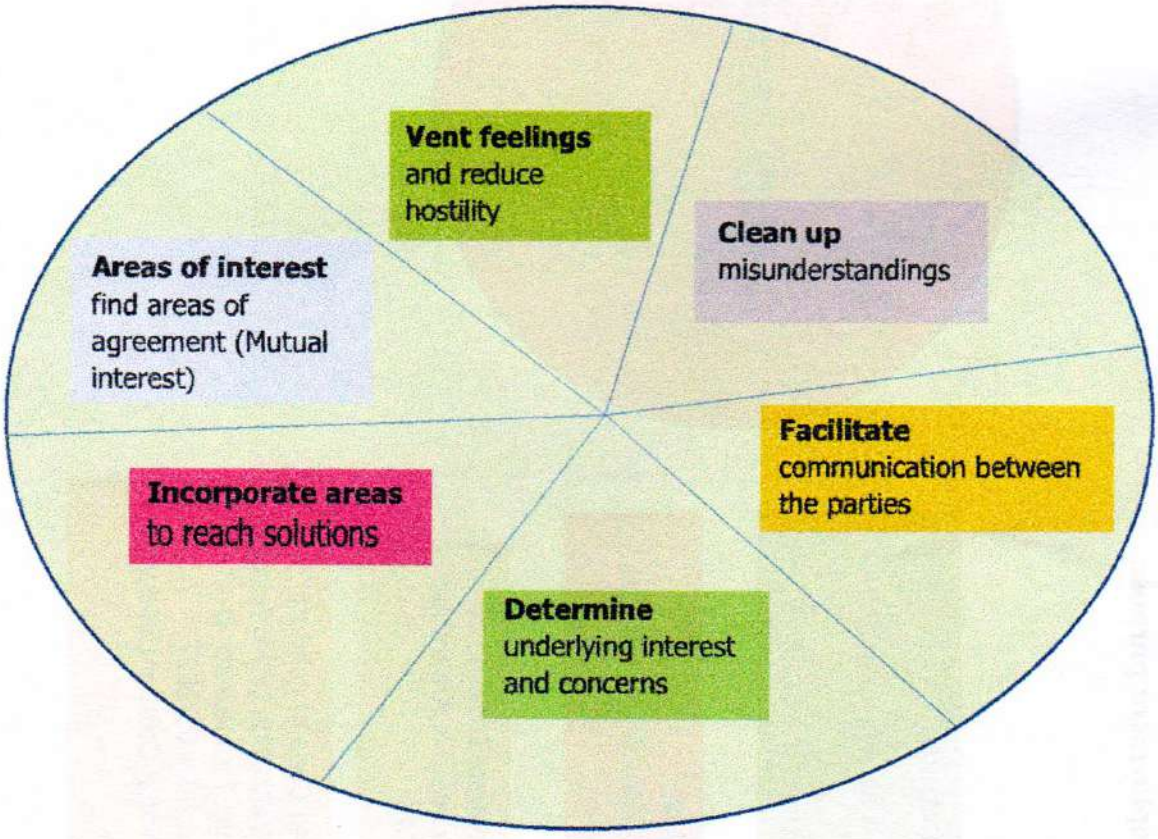
By traits: ASK



4. ADVANTAGES OF MEDIATION



5: OBJECTIVES OF MEDIATION



6. THE LAW AND MEDIATION

S/N	LAW	MEDIATION
1.	The process is compulsory	The process is voluntary
2.	Arbitration is designed by the law.	Mediation is parties' consensus
3.	The Arbitrators have the role of remaining impartial and neutral all the time	Mediator must remain impartial though he can support parties in the process.
4.	The Arbitrator decides	Parties make their own decision
5.	The procedure is determined by laws, rules and regulations	The process is only guided by mediator but with mutual consent of the parties
6.	The outcome is Win – Lose	Outcome is settlement, partial or non-settlement.
7.	Involves Cumbersome procedures	Parties control the process

6. MEDIATION PROCESS IN CMA

S/N	STAGE	PROCESS	ACTIVITIES INVOLVED
1.	I	Preliminary issues	❖ Ascertain jurisdictional issues ❖ Dispute filed on time 30 or 60 days. ❖ Dealing with late referral i.e. Affidavit & condonation forms ❖ Entertain application (s) & decide if any
2.	II	Mediation Process	❖ Introduction & settling ground rules. ❖ Gathering of information from parties ❖ Exploring option and developing consensus ❖ Conclusion: Settlement, Non Settlement or partial settlement ❖ Entertain any application arisen
3.	III	Post Mediation Stage	❖ Arbitration Stage ❖ High Court (Labor Division) ❖ Strike ❖ Lock outs

8: APPROACHES TOWARDS SUCCESSFUL MEDIATION SETTLEMENT (DURING SIDE MEETING)

APPROACHES	BEFORE CONFLICT (PAST)	CURRENT POSITION (PRESENT) CONFLICT	WAY FORWARD (FUTURE)
Legal position/approaches	• Breach of law, process, procedure • Noncompliance of a certain rule or standard	• Remind of the law, process and procedure	• Resolve the present dispute while strategy to have a compliance of the process in future or • Possibility of losing case in other stages taken into the next step)
Social approaches	• Hatred • negativity, • miscommunication, • grievances	• insist on team work bond • humility, • no one is perfect • To error is humane • etc.	• Improve communication • Increase social interaction • Increase openness • Institution reputation • Improve ethical standard
Religions/Spiritual approaches	• Cruelty • Discrimination • Negativity • Disliking	Remind of God's will; • Love • Forgiveness • Tolerance e.t.c.	• Act in consideration of God's will
Resources based approaches	• Resources used internally i.e. time, cost	• Understanding of future prospects e.g. time, cost to be incurred, existence of tension and uncertainly	• Cost cutting approach (Developing settlement strategy)
Alternative to the problem	• Only one side of problem concentrated on	• Conflicts manifestation	• Alternative approach adop

9: ROLE OF LAW IN THE MEDIATION

HEADING	CREATION OF INSTITUTION	CREATION OF PROCEDURE		DEALING WITH APPLICATIONS	CONDUCT OF MEDIATION	OUTCOME/DRAFT OF SETTLEMENT
Process	CMA	Appointment of Mediators/ Arbitrators Having representation of parties	Parties compelled to attend	Dealing with all necessary pre mediation stage	Four steps of mediation	Settlement; Non-settlement; Partial Settlement; Dismissal order; Exparte Decision; Strike; Lock outs
Provisions	Section 12/ Labour Inst. Act	Section 19 (1) LIA Act 7/2004. R. 7 (1) GN 67/2007	R. 6 GN NO. 64/2007	R. 29 GN 64/2007	R. 9 (5) GN 67/2007	R. 13 GN. 67/2007 Section 87(3) Act no. 6 /2004

10: ROLE OF LAW DURING MEDIATION STAGES

MEDIATION STAGES	INTRODUCTION	GATHERING INFORMATION	EXPLORING OPTIONS	CONCLUSION
Related stages & Provisions	• Issues relating to conflict of interest R. 10 (3) GN 67/2007 • R. 6 (5) GN 66/2007 • Compliance to the ground rules R. 10 (6) GN 67/2007 • Determining jurisdictional issues	• Deal with any application e.g. joinder of party (s) substitution R. 29 () GN 64/2007. •Issuance of summons R. 6 GN 64/2007 or ask for necessary document. • Deciding on issues of objections etc. (Ruling + Order writing & pronouncing}. • Determine jurisdictional issues		• Properly drafted outcome R. 13 GN • Re – drafting/mediating previously of High Court section 14 (1) (b) (7/2004 • Ex-parte decision • dismiss/struck out section 87 (3) 6/2004. • Strike • Lock out
Responsible role	• Mediator	• All parties to the dispute & Mediator		• Mediator

11: MEDIATION AND PRECEDENTS (HIGH COURT DECISIONS)
JURISDICTIONAL ISSUES BEFORE AND /OR DURING MEDIATION

S/N	CASE	ISSUES ADDRESSED	COURT DECISION
1.	HETOR SEQUEIRA VS SERENGETI BREWERIES LTD. LAB REV NO. 20/2009	JURISDICTION (Importance of Mediation)	Labour complaint that was filed directly at the Court without first pursuing Mediation is incompetent.
2.	CHRISTIAN MICHAEL VS UJENZI SEC SCHOOL. LAB REV NO.178/2013	TERRITORIAL JURISDICTION	Labour disputes must be referred to the area where the dispute arose. The proceeding without consideration of geographical jurisdiction will be declared nullity by the
3.	CHARLES M. MATELEGO VS EPSON LTD LAB REV.NO.3/2007(UNREPORTED)	CONDONATION (LATE REFERRAL)	The commission for Mediation and Arbitration has no power to process time barred condoning it
4. 5.	AMBONI PLANTATION LTD VS ATHUMAN IMBARAK & 148 OTHERS. LAB REV. NO.1/2016 UNLIVER (T) LTD VS SAID SUDI & 45 OTHERS. LAB REV. NO.13/2007	EXISTANCE OF DISPUTES	If there is no dispute to resolve, there is no jurisdiction to conduct mediation.
6.	PETER MREMA VS MICHAEL KUSAGA LAB REV. NO.138/2008	TIME FOR REFERRAL OF DISPUTES	Disputes referred late cannot be processed unless CMA condoned delay. To my issue of limitation of time is not a subject of parties can agree on mediation and nothing on records to suggest that the issue was amicably settled.
7.	ISSA A. MASUKUZI & 169 OTHERS VS TAKOPA CONSTR. CO. LTD, SUMA JKT, SHIMO & CHUNGMOO CO. LTD LAB. REV. NO. 193/2013	PARTIES TO THE DISPUTES	The party who refers the dispute to the Commission must copy the referral to all dispute who might be an employer, employee, trade union or employers' association. no properly dispute so called where there is no dispute and the commission jurisdiction
8.	MPUTO SAWASAWA t/a LIGANGA STORE VS SHANI SAID MWETA & 30 OTHERS	REPRESENTATION	A good mediator must be prepared and check the status on the parties and representation process of mediation. Failure of mediator to prepare and consider the status justifies nullification of the mediation process. The mediator must conduct mediation standard and professionally as the attributes of a mediator

6. MEDIATION PROCESS IN CMA

ASPECT	DESCRIPTION	THE INTEREST IT SERVES
LAW	• Establishes institutions (CMA inclusive) • Guides on the appointment of the mediators • Provides for ethics and code of conduct for mediators • Creates procedures • Determines the jurisdictional issues	**Procedural justice**
MEDIATION	• Guides party's interests • Resolve the disputes ➢ Clear up misunderstandings ➢ Determines interests of the parties ➢ Learning platform • Facilitates communication • Maintains relationships	**Substantive Justice**
JUSTICE	• Procedural justice & • Substantive justice	**Justice done**

12. CONCLUSION

CMA staff will benefit from experiences of other jurisdictions.

References

1. *ELRA- The Employment and Labour Relations Act, Act no 6/2004*
2. LIA- The Labour Institutions Act , Act no 7/2004
3. GN 42 – The Employment and Labour Relations (Code of Good Practice) Rules, 2007
4. GN64/2007 –The Labour Institutions (Mediation and Arbitration) Rules,2007
5. GN 66/2007 –The Labour Institutions and Code of Conduct for Mediators and Arbitrators Rules
6. GN 67/2007 – The Labour Institutions (Mediation and Arbitration Guideline) Rules 2007

Transformational Mediation through Leadership

By K. S. Sarma --Advisor of the BIMS

A leader inspires. Inspiration and Leadership are in a sense are synonyms. A leader inspires his people to work together as a team. What prevents team work is the misunderstandings and rivalry between the team members.

A leader is able to motivate everyone in his or her team to work to work together to achieve the specified goal. Motivation is the very purpose of leadership. A leader is required mainly to motivate his team and to hold it together. That is why, a former president of Ford Motor Company and doyen of the corporate world – Mr. Lee Iocacca said 'management is nothing more or less than motivation'. The importance in motivation cannot be overemphasized.

A good leader is a coach, a mentor and an educator. While mediating between the members of his team, he also subtly trains them in negotiation and in mediation. Thus, they learn to prevent and to resolve disputes.

Conflict Prevention and Resolution is a multidisciplinary profession. It is a science, because it works on certain basic axioms. It is an art, because like any other art, its scope is unlimited. It calls for imagination, flexibility and spontaneity.

A mediator enables disputants to negotiate between them effectively and brings about not only settlement but also a value addition to both. A coach also achieves it, but dealing with only one of the parties, who is the coachee. For example, a coach may guide an executive to deal effectively with her difficult colleague.

The world's leading executive coach Marshall Goldsmith defines his purpose as helping his clients to 'achieve lasting positive change in their behaviour'.

As a trainer in human relation skills and as a mentor, I had helped my protégés to resolve their disputes with their colleagues/customers, though I had not even met the other 'disputant'.

The participant of a workshop that I conducted for a large government sector enterprise in India told me that there was a problem with his son, who was doing his undergraduate programme in engineering and requested me to talk to his son. I told him that instead of meeting his son, I would like to discuss with him. I tried to understand how he was dealing with his son right from the latter's childhood. After a few 'fact accumulating' discussions, I felt that the problem was not with his son, but with himself! When I told him that there was no need for me to meet his son and that instead, I could guide him to resolve it.

Though he was a very senior manager, he was open minded, and as a result, I could bring about positive changes in his behaviour towards his son. I had a few sittings with him, when he used to report to me what he did and the outcomes. Within a few months, his relationship with his son became good, which resulted in the son doing well in his studies as well.

Though I had resolved the conflict, what I did is not mediation, but coaching or mentoring. I brought about a positive shift in the behaviour of the father. I did the same thing for another senior manager of the same organization, where the 'dispute' was between the father and the daughter. The father realized his mistake and changed his approach towards his daughter. As a result, he won the love and respect of his daughter.

In another large MNC, a senior manager complained to me about his junior colleagues and made them to attend a training programme along with him, as he believed that I might bring about a positive shift in the attitude of his junior colleagues. After a month he reported to me that his junior colleagues' attitude and behaviour had improved. The reason he gave was interesting. He said that it had improved mainly because he changed his attitude/behaviour towards them, which he said was noticed by his wife and children as well. which resulted in his improved relationship with the members of his family!

What I did was coaching. However, I had enabled my clients to resolve disputes with their son in one case, daughter in another case and with the junior colleagues in the third case.

All the three participants learned how to conduct themselves with son/daughter/junior colleagues. The process brought about transformation in their outlook. However, these

may not technically qualify to be mediation, because I had dealt with only one party. If what I did is not mediation, then coaching or mentoring deserves to be called another ADR!

When I was working with an engineering company, the managing partner of a dealer of my company became my protégé! He used to complain to me about his younger brother, who too was a partner of the firm. I tried to make the elder brother to realize the flaw in his behaviour towards the younger brother. Later, the younger brother too approached me for guidance, which I gave. Their relationship became normal thereafter. I did not do mediation here, though I dealt with the younger brother also subsequently.

What I did in this case also was mentoring and coaching, which is the leader's function. I tried to drive home the point that how the other person behaves with us is not important and that what is important is how we respond to it. What happens to us is not that important. How we respond to it will determine our fate.

I tried to make my participants to understand that every situation is a resource, irrespective of whether it looks good or bad. If we have the right attitude, we will be able to engineer the situations to the benefit of all concerned.

If there is a possibility of resolving a dispute by dealing with only one party by mentoring/coaching her, it is a better option than simultaneously dealing with both the 'disputants' for the following reasons.

I. While dealing with two parties, establishing impartiality is sometimes a challenge. Familiarity with a disputant becomes a disqualification. As a result, a mediator is not able to resolve the disputes of known persons, unless of course the impartiality is established.

II. Coaching is a more transformational process than Mediation, because the protégé takes the onus entirely upon herself to negotiate and convince the other party and as a result, brings about a metanoia in the other person. As a result, the protégé will be able to prevent and resolve disputes herself without the help of a mediator in the future.

III. In the case of Coaching, the coach can focus entirely on his coachee on developing her negotiation and human relations skills. Whereas in the case of Mediation, the focus of attention is on resolving the dispute in hand.

IV. In the case of coaching/mentoring, the coach considers the dispute as a tool and as an opportunity to mentor his protégé. So, the focus is on the client's development and not on just resolving a specific dispute.

Coaching only one of the parties to resolve the dispute may not be practically possible in all the cases. It is possible only if the coach finds her trainable. Even Marshall Goldsmith decided to get a coaching contract cancelled after having spent half-a-day with the coachee, who was the CEO of a company. Besides, when the dispute is highly commercial or on sharing wealth, mediation or arbitration only may be feasible.

Mediation and Coaching have their own spaces in preventing and resolving conflicts. Both are nonviolent processes and both lead to peace! A leader does both.

Note:
There is difference between coaching and mentoring and between the terms 'coachee' and 'protégé'. Similarly, there is a difference between 'inspiration' and 'motivation'. I have used both the terms in all the above three cases interchangeably. I did so because out of the four clients cited, three of them were participants of my workshop, who approached me for one-in-mentoring. In the fourth case, the client was my dealer, to whom I became a coach. But he conducted himself like my protégé. Perhaps, I didn't know sometimes, whether I was training, coaching or mentoring, though I was sure I was not mediating!

William Shakespeare comes to my rescue! He said, "what is in the name? that which we call a rose by any other name, would smell as sweet."

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To Mediate Or Litigate: What Factors Would Influence A Party's Choice?

By Lady Justice Joyce Aluoch, Ebs, Cbs
(Rtd) Judge, Mediator, Arbitrator.

The Hon. the Attorney General for the Government of the People's Republic of Bangladesh, Distinguished delegates, ladies and gentlemen.

It is my greatest pleasure and privilege to make a presentation at this important mediation conference whose theme is "Mediation and the Law." My topic for discussion poses a very interesting question whose answer becomes crucial when a dispute arises. I will this morning try to examine what factors a party would consider in making a decision whether to go to court, or opt for mediation?

Whereas many people know what court litigation is, not many know much about mediation, or other forms of alternative dispute resolution mechanisms. If anything, mediation is quite often confused with arbitration, which is also an ADR mechanism. Because of this apparent confusion I will very briefly explain the two ADR mechanisms before I get into my topic.

Mediation and Arbitration are "tools" for resolving disputes, but very different in application. Mediation is a confidential, voluntary, non- binding process, conducted by a mediator, who is a trained, neutral third party, who does not make findings or issue any rulings of law, because mediation is a formalized negotiation process, and not an adjudicatory process. If mediation succeeds, the party executes a settlement agreement, and signs it, thus making it formal. However, if the process fails, the parties may revert to arbitration(Med/Arb procedure),or at the very extreme, proceed to court to be heard by a judge as if mediation never happened and no one is permitted to divulge anything which occurred during mediation because of the confidentiality of the process. This is different from the court process where information can be accessed by anybody with interest. At times the proceedings find their way into both the print and electronic media and therefore become public. Arbitration on the other hand is a "private litigation process", which the parties agree will substitute court litigation. An arbitration clause is usually provided for in a contract. The

arbitrator is a decision maker who makes rulings and awards, after hearing evidence, like a judge. The rulings are enforceable by the courts, and can only be set- aside on grounds provided for in law.

Having clarified what appears to be a confusion between mediation and arbitration as ADR mechanisms for dispute resolution, I will now turn to my specific topic, and examine what factors would influence a party's choice whether to mediate or litigate?

But first, what can be mediated?

It is important to note that not all matters or disputes can be mediated. This begs the question as to what can be mediated. Here are some examples:

- Mediation is available in most non-criminal matters, however, some non-violent criminal cases like those involving verbal harassment, often result in successful resolution during mediation. Claims which do not involve a legal issue are also good for mediation. A good example is a dispute with a neighbor over an encroaching fence or the brightness of their
- out-door lights. This is hardly the type of claim that merits a law suit. Parties will most likely resort to mediation.
- Disputes involving business partners, companies, landlords and tenants, labor – unions and management, child support, maintenance and custody, probate and administration of deceased persons estates, family disputes, neighbor disputes etc. only to mention a few.

The Mediation Procedure, Characteristics and Advantages

Mediation is an informal process where the parties come by choice and voluntarily. There is no legal format to the proceedings - the mediator does not make the decisions, adjudicate or judge. He merely encourages and facilitates negotiations. The process is non-adversarial where each party is encouraged to look at the broader aspects rather than focus on the narrow aspects of their rights and obligations. The process is not limited by legal doctrines or procedural rules. For example, the parties do not need to proof their case using applicable legal and evidentiary principles or by calling witnesses. The mediator is often more skill oriented than legal knowledge oriented. He has to have excellent negotiation, listening and problem solving skills.

Being an informal process, the sitting arrangements, addressing the parties and the language used are all chosen to ensure cordial relations between the participants: round

table sitting, first name terms and avoiding contentious wording as far as possible.

Mediation commences with a joint session attended by the Mediator and the parties and their representatives. Introductions are made, and the ground rules set (e.g. confidentiality, no name calling, maintaining civility and respecting others' feelings etc.) Once the issues have been agreed and listed, solutions and options are invited from parties. After the initial joint sessions, the proceedings often move to individual sessions between the Mediator and each of the parties in turn. These private sessions also known as caucuses are helpful in that parties may be more forthcoming with ideas and suggestions and solution seeking than in the presence of the other party. The Mediator may go to and fro between the parties several times until some agreement (or deadlock) is declared. If an agreement is reached as already stated in this presentation, it is usually recorded in a written form and signed by the parties it would then be enforceable as any other contract. This process is easy and manageable, very different from the court process.

As the mediation process is not constrained by procedures and legality, parties can tailor a flexible format to suit their own specific requirements. This can be as informal, within limits and speedy as they choose it to be. Typically, simple to medium complexity disputes can be sorted out in one or two days. Compare this to long, protracted action in litigation or Arbitration which may span weeks, months or even years. An expedited process implies lower costs (costs of parties' representatives, documentation, etc. are all reduced dramatically.)

Mediation takes less time, is more cost effective and causes less stress than litigation. This is in sharp contrast with court litigation, where parties are subjected to payment of both court and legal fees.

The reason mediation takes less time is because it does not run by a clogged court schedule. It is flexible as the sessions can be easily scheduled anytime at the mutual convenience of the parties, and can take place in a location convenient to the parties and the mediator.

Another major advantage of mediation is that the process resolves disputes whilst preserving relationships. This is a spin- off from the non-adversarial approach. Since mutual interests are explored and addressed, the parties are not polarized or locked up into, "us-them,'' positions. The focus is usually not on what is,' 'legally correct, but more on, "our joint interests."

In mediation, underlying issues are identified as parties share information. This leads to a better understanding of issues affecting relationships. The process allows the parties to revise and adjust the scope of their conflicts. This is different from a trial where initial pleadings and rules of procedure limit the issues which a party can raise. However, as mediation is flexible, as circumstance change, so can the topics for discussion. This increased flexibility makes it easier for negotiators to act as problem solvers, instead of adversaries.

In mediation, the parties have a greater commitment to the solution reached since they participated fully in generating it; and the agreement reached is likely to be more enduring.

Inappropriateness of Mediation to certain Disputes.

As I conclude, I must point out one or two issues which some critics have labelled against mediation as opposed to litigation as a way of resolving disputes.

First is what is termed, "lack of finality." It is argued that because mediation does not have court ordered solution, parties may feel that the solution to the dispute lacks finality. However, this is countered by the fact that the parties are more likely to implement what they have discussed and agreed upon, reduced in writing and signed.

Secondly, is the legal procedure of "discovery." Here again some critics argue that parties in a mediation do not have the option of receiving as much information from the other party as they would receive through court litigation, however, the flip side of this is the "good faith," of the parties to a mediation as they have agreed to mediate voluntarily. There is also "reality testing or risk assessment," which is a technique of inviting a party to adjust his perceptions of the claim. A party may over-estimate the likelihood of success on merits, or the other party's ability or unwillingness to pay. He may have an unrealistic assessment of his alternatives to settlement. The transaction costs of continuing the dispute in court may not have been accurately addressed. The purpose of reality testing is to help eliminate those obstacles.

Thirdly, Mediation will not work without the good will of the parties since the process is by consent. Again, it will not work well where the parties need public resolution (e.g. if you want to set legal or industry precedent), or in solutions requiring urgent rights protection. It will not work where a party is bent on causing delay insisting on litigation. The issues I have discussed in this presentation are in my view, sufficient to enable a party to make an informed choice, whether to litigate or mediate a dispute?

Thank you for your attention.

Diplomacy Mediation or Political Mediation

By Ms. IRAM MAJID

Lawyer, Arbitrator, IMI Certified Mediator & Director of IIAM

I. Introduction

A very good afternoon to all present over here. My name is Iram Majid and I am from India. I am a practicing lawyer at the Supreme Court and accredited Mediator from various institutions across the globe. I currently regional head BIMS in India and director of the IIAM, the Indian Institute of Arbitration and Mediation. India has been the centre of international new off-late due to a couple of very important incidents. First, the ICJ verdict on the Jadhav case and second the Kashmir issue. While I may not espouse a certain political outcome, I do believe that transnational political mediation is the ideal way to address such sensitive issues. In this speech therefore, I shall focus on the topic of Political and Diplomatic mediation, its benefits and the best practices to carry out the same.

II. Body

The use of mediation for conflict resolution is not a new process. The first recorded mediation efforts occurred in 209 B.C., when Greek city-states helped the Aetolian League and Macedonia produce a truce in the first Macedonian war. Since then, mediation has been increasingly employed as a tool for peacefully resolving conflict. The International Conflict Management Dataset reports 1334 mediation attempts by states in 333 interstate and civil conflicts since World War II, with more than half of the mediation efforts occurring since the end of the Cold War. States represent the most common type of political actor willing to serve as a mediator in international dispute resolution—a category often referred to as "state-led" mediation. Not all states, however, volunteer to serve as mediators and not all disputes receive mediator assistance. This speech examines the drivers of such choices and suggests factors that policymakers should consider when assessing whether to engage in state-led mediation. An understanding of these factors will help policymakers generate expectations about which states are likely to have an interest in mediating conflicts (and can be successfully encouraged to do so), and which disputants are likely to accept state-led mediation offers (thereby avoiding the loss of face associated with rejection). The objective of this exercise is to assist the policymaker in

identifying the circumstances where state-led mediation will have a positive and permanent influence on long-term peace.

Managing international conflicts has become a priority on the global agenda. The devastating consequences of conflict in an increasingly globalizing world order cannot be ignored. There are several peaceful ways to manage conflicts. These include negotiation, mediation, arbitration, and adjudication. Of these mediation offers many advantages. It has been studied by scholars and students of political science, psychology, business management, and law as well as practitioners. All have proposed various definitions of the process with very little consensus on any of these.

What are the characteristics of mediation? First, mediation is a voluntary process. It takes place when disputants seek the assistance of third parties. The right to accept or reject an offer of mediation or a mediation outcome rests entirely with the disputants. The fact that mediation is a voluntary process is directly related to its success or failure. Without a high level of disputants' willingness to concede, and motivation to engage in conflict management, a successful mediation outcome is unlikely to be achieved.

Secondly, the outcome of mediation is non-binding. Mediation's non-binding nature distinguishes it from other forms of external intervention such as arbitration and adjudication. In mediation, third parties have no authority over disputants' compliance with a mediated outcome. Indeed, most disputants would not accept mediation in the first place if mediation bound them to an outcome.

Mediation is defined here as a pacific approach to conflict resolution in which impartial third parties help disputants resolve conflicts through a process of information and social influence, without using violence or invoking the authority of a legal system. The objective of disputants in inviting or accepting mediation is to reach compromise in a conflict, or at least to indicate willingness to do so. The third party in mediation may be an individual, organization, or country that is not a direct party to the conflict. For a mediation to be successful and for a compromise to be reached, an effective strategy must be employed by a mediator. But how can we determine which strategy is likely to be the most effective?

Strategies for international disputes mediation.

Mediation strategy denotes an overall plan of mediators to resolve and manage conflicts Therefore it can be seen as "an overall plan, approach or method a mediator has for

resolving a dispute and it is the way the mediator intends to manage the case, the parties, and the issue." Differences in the implementation of various mediation strategies may be attributed to how a mediator chooses to handle the mediation process, and the specific context of the conflict. _In essence, the practice and process of mediation revolve, to a large extent, around mediators' choice of strategic behaviours.

Scholars have identified three discrete categories of behaviour of mediators based on the level of third party involvement that describe the full range of mediation techniques. The three categories are the following: communication, formulation, and manipulation. This categorisation allows us to analyse and understand what mediators actually do when they get involved in a conflict, and how successful they may be by analysing how different patterns of behaviour lead to different outcomes. Scholars in later years have developed on this categorisation and formed more niche and refined categories by factoring in the present three categories of strategic behaviour along with the level of intervention by the mediator. These are communication-facilitation; procedural; and directive strategies. Let us describe each of these strategies in turn.

1. Communication-facilitation strategies: These strategies describe mediator behavior at the low end of the intervention spectrum. Here a mediator typically adopts a fairly passive role, channelling information to the parties and facilitating co-operation but exhibiting little control over the more formal process or substance of mediation. When mediators adopt communication-facilitation strategies they play a role of "go-between," such as passing messages from one disputant to the other, and providing disputants with unbiased information. Such strategies work when the resultant conflict is due to a misunderstanding.

2. Procedural formulative strategy: These strategies enable a mediator to exert more formal control over the mediation process with respect to aspects of the environment of conflict management. Here a mediator may control where mediation takes place, how often the parties meet, how the agenda is structured and information about progress is distributed. Other aspects of this strategy include controlling constituency influences and media publicity, enhancing situational powers of weaker parties', and chairing the communication process. Procedural strategies are designed to create a favorable environment for conflict management and therefore allow mediators to exert a higher level of control.

3. Directive strategies

These strategies are the most powerful form of intervention. Here a mediator affects the content and substance of the bargaining process by providing incentives for the parties or issuing ultimatums. Directive strategies deal with, and aim to change, the motivation and behavior of the parties in dispute. The tactics associated with this strategy include changing the parties' expectations, taking responsibility for concessions, making substantive suggestions and proposals, making the parties aware of the costs of non-agreement, supplying and filtering information, suggesting concessions parties can make, helping the negotiators to undo a commitment, rewarding party concession, helping devise a framework for acceptable outcomes, changing perceptions, pressing the parties to show flexibility, promising resources or threatening withdrawal, and offering to verify compliance with agreement. Directive strategies represent the highest level of mediator involvement.

This conceptualisation specifies a clear distinction between various types of mediator behaviors and provides an extensive descriptive account of what exactly these behaviors entail. It provides the basis for a logical and systematic explanation of mediation behaviour that can be applied to the empirical analysis of mediation in international conflicts. One is able to test whether a given profile fits a specific mediator role and how to enact it. It also provides basis through which we can look at what influences and determines these behaviors.

So which approach must be adapted for mediating international political disputes?

The choice of strategy is rarely random, they all have their advantages and disadvantages. Directive strategies, for instance, allow mediators to control the process and the substance of a conflict, but this is achieved at the expense of the disputants' freedom to control their own affairs. When this strategy is used, disputants may be motivated to resolve a dispute as soon as possible before they cede further control to mediators. It is also possible that disputants may reject a mediator's proposal or even mediation itself when mediators put too much pressure on them.

Political conflicts are simultaneously public and private, intellectual and emotional, procedural and structural, preventive and reactive, relational and systemic. As a result of this complex, multi-layered character, resolution efforts are required that focus on encouraging local, collaborative initiatives and *combining* these elements, rather than importing or externally imposing generic solutions.

To successfully develop conflict resolution capacity across cultures, I have found it best to adopt the collaborative, "elicitive," democratic approach created by John Paul Lederach, which focuses on supplementing rather than replacing indigenous resolution strategies, while learning from and building on local conditions.

In order to recover from severe political conflicts such as war and genocide, people in divided communities, including former combatants, need to develop the *emotional* skills to work through their rage and guilt and assuage their grief and loss; the *communication* skills to reduce bias and prejudice and engage in constructive dialogue; the *heart* skills to rebuild empathy and compassion and reach forgiveness and reconciliation; the organizing skills to develop interest-based, collaborative leadership and become productive, functional communities again; and the *conflict resolution* skills to design systems that successfully prevent and resolve future disputes.

The literature on mediator behavior suggests that in general directive strategies are more effective, especially in international militarized conflicts and the historical instances that bear examples to the same are: Lets take the example of 2016 Colombia peace agreement.

The **Colombian peace process** refers to the peace process between the Colombian government of President Juan Manuel Santos and the Revolutionary Armed Forces of Colombia (FARC–EP) to bring an end to the Colombian conflict. Negotiations began in September 2012, and mainly took place in Havana, Cuba. Negotiators announced a final agreement to end the conflict and build a lasting peace on August 24, 2016. However, a referendum to ratify the deal on October 2, 2016 was unsuccessful after 50.2% of voters voted against the agreement with 49.8% voting in favor. Afterward, the Colombian government and the FARC signed a revised peace deal on November 24 and sent it to Congress for ratification instead of conducting a second referendum.[1] Both houses of Congress ratified the revised peace agreement on November 29–30, 2016, thus marking an end to the conflict.[2]

Why it was failed initially because of relevant constituencies and stake holders ,it failed to gain public support .

International and political negotiation is the two level game, constitution, laws, organisational structure determine what is ratification ,who is the relevant constituencies what is necessary majority and ratification is always not formal voting process (public support is often sufficient to make or break the deal.

Lets take the example of *Ottawan landmine convention*

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, typically referred to as the "Ottawa Convention" or "Mine Ban Treaty," seeks to end the use of anti-personnel landmines (APLs) worldwide. It was opened for signature on December 3, 1997, and it entered into force on March 1, 1999.

The Ottawa Convention: Signatories and States-Parties."

Because of the treaty, international norms have now formed that discourage any country, signatory or not, from using mines. Many non-signatories are in de facto compliance with the Ottawa Convention by refusing to use landmines and committing to voluntary destruction of stockpiles. Non-state armed groups continue to use mines, in particular improvised landmines (improvised explosive devices [IEDs] that meet the definition of banned APLs) in about 10 countries per year.

:States-parties commit to not using, developing, producing, acquiring, retaining, stockpiling, or transferring anti-personnel landmines, which are defined by the treaty as mines "designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons." APLs that are remotely triggered, such as claymores, are not proscribed, nor are anti-vehicle mines, including those equipped with anti-handling devices, which are designed to protect anti-vehicles mines from being tampered with or moved. The treaty also forbids signatories from assisting or encouraging any other state or party from engaging in the activities outlawed by the treaty.

Another example

The March 26, 1979 Egypt–Israel Peace Treaty sealed accords which had been settled the previous year at a groundbreaking summit at Camp David, near Washington, between Egypt's President Anwar Sadat and Israeli Prime Minister Menachem Begin.there was state of war from many years then In November 1977 the Egyptian leader travelled to Jerusalem for peace talks, becoming the first Arab head of state to visit the Jewish nation. It culminated a year later in the US-brokered Camp David Accords, signed in September 1978 by Sadat and Begin, that envisaged a proper peace treaty between the two nations within three months.

When no formal peace accord had been signed three months later, Begin decided to end Israel's freeze on settlements in the West Bank as evoked in the Camp David Accords.

To save the peace process, Carter headed to both countries.

His efforts paid off and on March 26, 1979 Sadat and Begin signed the treaty at a 10-minute White House ceremony attended by some 2,000 dignitaries.

"We have won at last the first step of peace, a first step on a long and difficult road," said Carter, who signed on as a witness, adding though: "We must not minimize the obstacles which still lie ahead."

Sadat praised Carter as "the man who performed the miracle."

Another very important protocol. The Rio Protocol of friendship between Peru and Equator.

The **Ecuadorian–Peruvian War**, known locally as the **War of '41** (Spanish: *Guerra del 41*), was a South American border war fought between 5–31 July 1941. It was the first of three military conflicts between Ecuador and Peru during the 20th century. During the war, Peru occupied the western Ecuadorian province of El Oro and parts of the Andean province of Loja. Although the Ecuadorian–Peruvian War occurred during World War II, it was not part of the conflict; Ecuador and Peru were neither affiliated with nor supported by the Allies or the Axis.

A ceasefire agreement between the two countries came into effect on 31 July 1941. Both countries signed the Rio Protocol on 29 January 1942, and Peruvian forces subsequently withdrew. The enmity over the territorial dispute continued after 1942 and concluded following the Cenepa War of 1995 and the signing of the Brasilia Presidential Act agreement in October 1998.[1]

- In Guatemala, El Salvador and Nepal, for example, UN human rights monitors were deployed to build confidence during the peacemaking process. As one UN mediator notes, the establishment of human rights monitors in Guatemala created a sense that "the peace process was bringing something tangible for the parties
- Swedish opposition leader Olof Palme who was immediately recognized as a mediator in the war between Iran and Iraq

Before concluding lets discuss about united nation convention.

The United Nations Convention on International Settlement Agreements Resulting from Mediation was signed by 46 States on 7th August 2019 at an official signing ceremony in Singapore. To be known as the "Singapore Mediation Convention", the Convention is intended to facilitate the enforcement of settlement agreements that have been entered into with the assistance of mediation.

Key benefit of the Singapore Mediation Convention

The Singapore Mediation Convention provides a process for the direct enforcement of cross-border settlement agreement between parties resulting from mediation. The Convention provides that a settlement agreement may be enforced directly by the courts of a State. This allows the party seeking enforcement to apply directly to the courts of the State where the assets are located such that execution may also be sought if the enforcement process is successful. This prevents potential multiple proceedings.

The Convention will only apply where the settlement agreement:

- is in writing;
- results from a mediation;
- is an agreement between two or more parties who have their place of business in different States; and
- the place of business of each of the parties to the agreement is in a State that has acceded to or ratified the Convention.

The Convention does not apply to settlement agreements:

- relating to consumer transactions nor to family, inheritance or employment law;
- that have been approved by a court or concluded in the course of proceedings before a court and that are enforceable as a judgment in the State of that court; or
- that have been recorded and are enforceable as an arbitral award.

Simplified enforcement procedure

The enforcement procedure involves the party seeking enforcement to provide to the relevant authority in the State where enforcement is sought:

- a copy of the signed settlement agreement; and
- evidence that the settlement agreement resulted from mediation (e.g. the mediator's signature on the settlement agreement or a document signed by the mediator confirming that there was a mediation).

The relevant authority is to "act expeditiously" in considering an enforcement application.

The relevant authority may refuse to enforce the settlement agreement in limited circumstances, these including:

- where a party to the settlement agreement was under some incapacity;
- the settlement agreement is null and void, inoperative or incapable of being performed;
- the settlement agreement is not binding or is not final, according to its terms;
- the settlement agreement has been subsequently modified;
- the obligations under the settlement agreement have not been performed or are not clear and comprehensible;
- granting relief would be contrary to the terms of the settlement agreement;
- there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement;
- there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement;
- granting relief would be contrary to the public policy of that State;
- the subject matter of the dispute is not capable of settlement by mediation under the law of that State.

It is anticipated that, as with the exceptions to enforcement of an arbitral award under the New York Convention, it may be difficult to demonstrate enforcement of a settlement agreement should be refused.

What it means for you?

During the official signing ceremony, 46 States signed the Singapore Mediation Convention, including the US, Singapore, China, India, Malaysia, the Philippines and South Korea. Notably, the UK, the European Union and Australia have not yet signed the Convention. The Convention will enter into force 6 months after 3 States have acceded or ratified the Convention.

The success of the Convention (when entered into force) will in large part depend on the extent to which it is accepted and ratified by States. Nonetheless, the Convention is likely to encourage parties involved in cross-border projects and transactions to consider mediation as a time and cost efficient process as part of their dispute resolution toolkit.

III. Conclusion

This analysis shows that directive strategies are the most effective in settling international conflicts. In a later study, he found that communication strategies were most likely to be employed but less likely to lead to a successful outcome. The choice of a strategy by a mediator is often a complex process where many dimensions have an impact. The choice of a strategy, in any area of human behavior, is the product of perceptions, expectations and some contextual conditions. We looked in particular at three factors that might impact on the choice and effectiveness of a strategy: nature of the issues in conflict, memberships of same regime or bloc, and the degree of trust in a mediator. Therefore, in conclusion I would like to state that In general we find that directive strategies are much more effective than non-directive strategies, this is especially so in the context of tangible issues, parties from different blocs, and trust in a mediator, are far more effective than non-directive strategies. Much more work needs to be done, both theoretically and empirically, to understand what influences mediators' choice of strategies, and how to delineate the crucial factors that have an impact on the process and outcome of mediation. Hopefully, we can build on this work and develop a better understanding of how types of mediation strategies are matched with different kinds of conflicts.

Mediators Without Borders

More importantly, if we cannot learn to resolve our conflicts without war, coercion, grief, and injustice, we will find ourselves unable to survive, either as a species or as a planet. By responding to international conflicts in preventative, heartfelt, and systemic ways, we prepare the groundwork for the next great leap in human history – the leap into international cooperation and coexistence without war. Through these efforts, we may hope someday to achieve the transformation promised in a pamphlet published by the South African Truth and Reconciliation Commission:

Story of map
Instead of revenge, there will be reconciliation.
Instead of forgetfulness, there will be knowledge and acknowledgement.
Instead of rejection, there will be acceptance by a compassionate state.
Instead of violations of human rights, there will be restoration of the moral order and respect for the rule of law.

CUSTOMARY PRACTICES OF MEDIATION

BY PRIYANKA CHAKRABORTY
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INTRODUCTION

Mediation is not a newly developed or founded concept across the world as there are established practices of mediation happening over ages across the world. However, the present understanding of mediation as a part of Alternative Dispute Resolution (referred to as 'ADR' hereafter) practice shadows such roots. The concept of structured mediation is a new concept but not mediation per se. When one is trying to learn, and establish mediation practice, one must be well-aware of the origins making it easier to appreciate and propagate the process. Terming it as one of the ADR process is not enough to weigh its significance, impact and value.

When one refers to the term of "Alternative Dispute Resolution," the immediate question which hits the conscious is what is 'Alternative?' The usual understanding states that few processes are termed as alternative because they are the ones other than the usual form of dispute resolution. Then what is the usual form of dispute resolution becomes the second thought which leads to the point that Litigation stands to be the usual form of dispute resolution and therefore the others are called Alternative Dispute Resolution.

Such claims of Litigation being the original form of resolution, and others forms of dispute resolution which one terms in today's world as arbitration, mediation and conciliation, needs to be reconsidered.

As history suggests, there is no reasonable justification for such categorization as the practices which are termed as alternative are the aboriginal forms of dispute resolution and the court system was the one which was introduced in the British Colonies as a part of the British Rule. The concept of court originated from France.

Therefore, it can be clearly concluded that these ADR systems are our original form of Dispute Resolution and Litigation is ideally the alternative path. To understand that better, one needs to track the history of dispute resolution.

In this Article, I will be discussing few of such established age-old practices of mediation from across the globe. The cultural side of mediation will not only help understand the roots and history but also help develop effective and meaningful process of mediation in today's world.

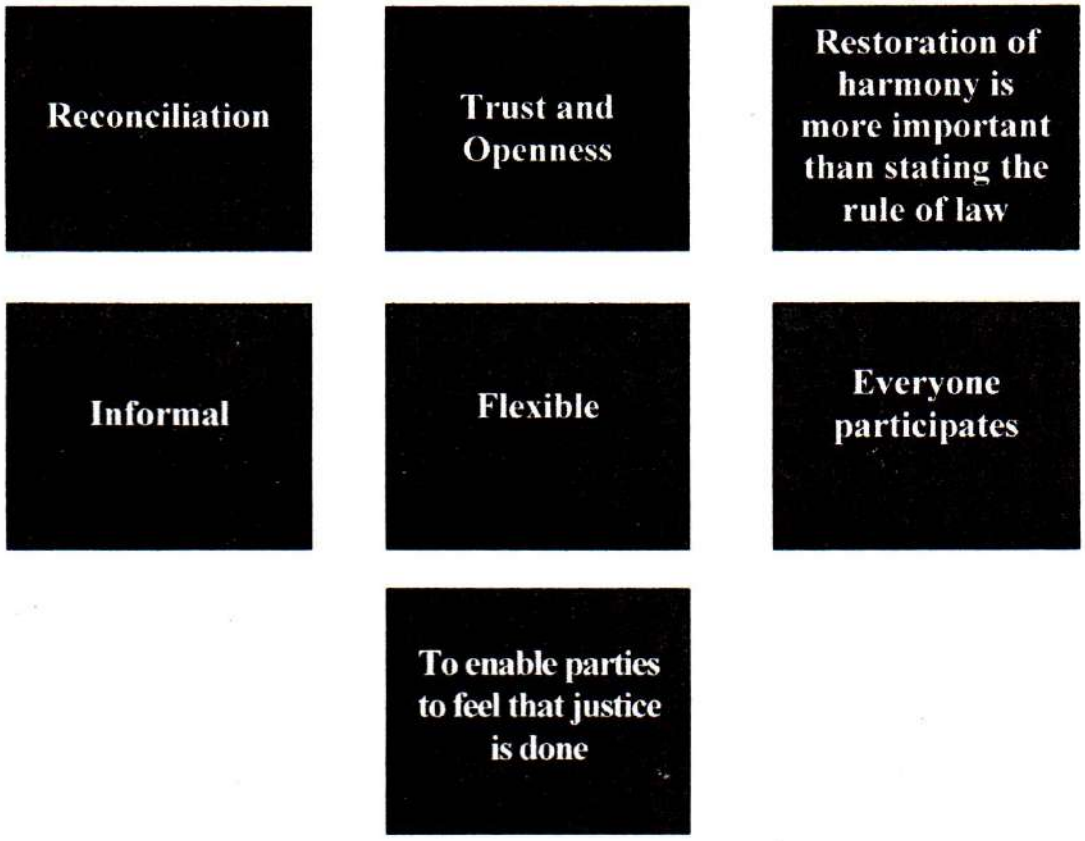
As Bercovitch states, "A successful mediation is predicated on the awareness of cultural differences and the creation of shared norms."

THE UBUNTU SYSTEM, AFRICA

Mediation is compulsory in African culture, including when a family problem occurs. The family or neighborhood mediation is facilitated by elders and takes place in "an attitude of togetherness" and "in the spirit of Ubuntu". Harmony is important and rituals are performed to maintain it. Facts need to be brought into the open so that the truth can be known and the parties can heal. Peace is a communal matter.

In African regions, a person who possesses Ubuntu attitude is the one who is noted to be hospitable, friendly, generous, compassionate and caring for his fellow human being.

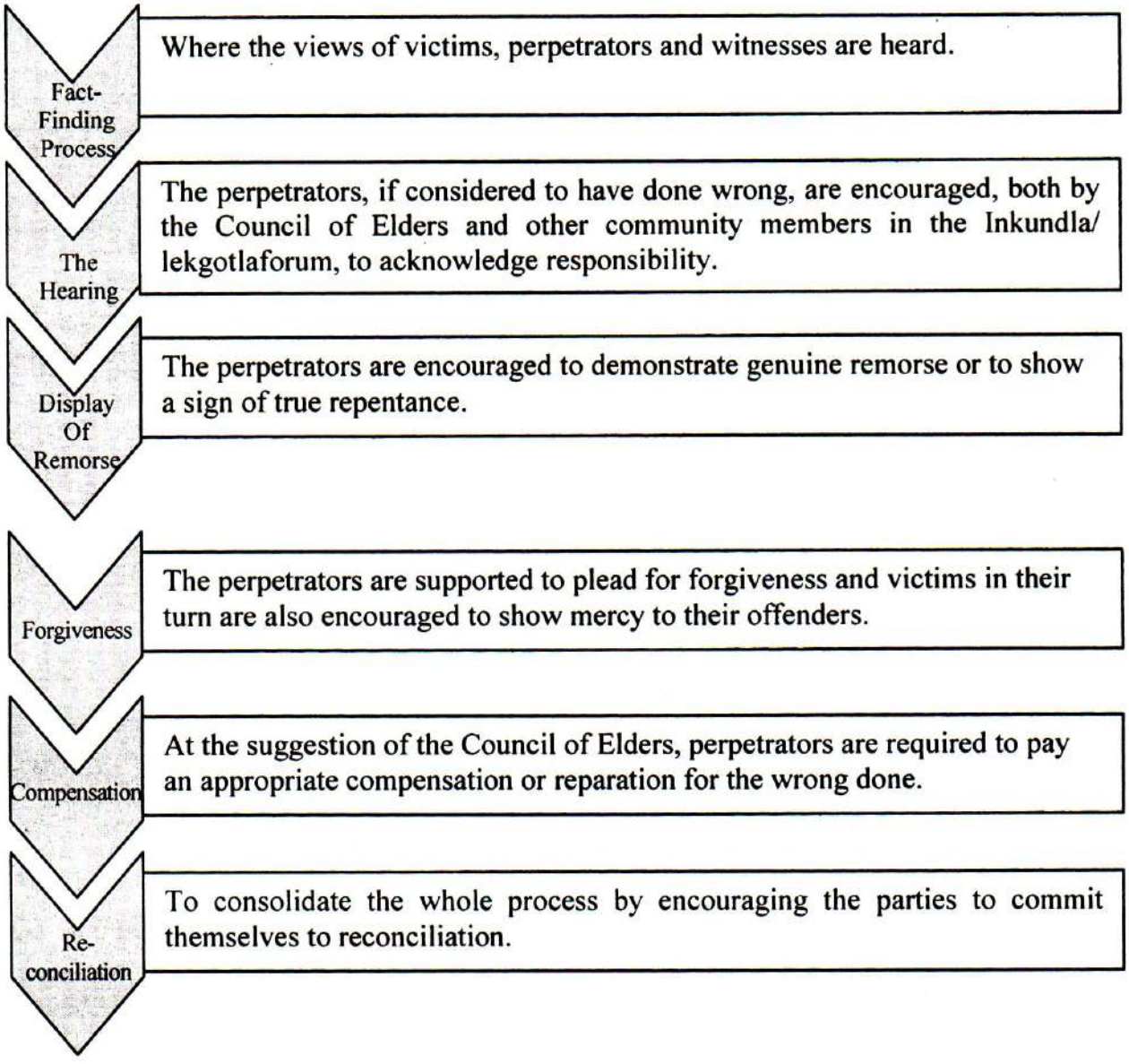
THE VARIOUS ESSENCE OF THE SYSTEM IS :



The Ubuntu principle is an African philosophy of humanity and community. The principle of Ubuntu implies that we can create healthy relationships based on the recognition that within the web of humanity, everyone is linked to everyone else. Ubuntu places emphasis oncooperation with one another for the common good as opposed to competition that could lead to grave instability within any community. It is intended to

work toward a situation that promotes a mutually beneficial condition. The secret behind Ubuntu is that, a person is considered rational human being if he or she participates and shares with his or her neighbor despite all ancient or past hatred. The act of reconciliation symbolizes the willingness of the parties to move beyond the psychological bitterness that had prevailed in the minds of the parties during the conflict situation. This practice makes the Ubuntu system more of restorative justice than a retributive system of justice. Ubuntu is the traditional process of ascertaining wrong doing and finding a suitable resolution between the victims and perpetrators. The Ubuntu principle allows members of the public to share their views and generally make their opinions known during the process of reconciliation.

THE PROCESS FOLLOWED IS :



For compensation, the payment is not in-kind, but some symbolic signs, with the primary function of reinforcing the remorse of the perpetrators.

The process of reconciliation involves the victims' and perpetrators' family members and friends, all together in a participatory manner. After the adjudication process, both groups can embrace coexistence and to work towards healing the broken relationship between them and thus contribute towards restoring harmony within the community, which was vital in ensuring the integrity and viability of the society. Ubuntu principle suggests that a society with sharp divisions and fractured relationships could commit itself to reconciliation towards a harmonious and all-encompassing community.

THE ESSENTIAL ELEMENTS OF THE PROCESS ARE:

1. The Story

Story telling was a key activity in South African's Ubuntu traditional conflict resolution and peace building process. A person could not be judged based on a perceived or alleged guilt which could be an affront to justice. An opportunity was created for story-telling so that both the alleged perpetrators and the victims could be publicly heard.
Victims could give a detailed account of their experience; the agonies and pains, which they suffered. Through the victims' story-telling, the offenders appreciated the gravity of the atrocities or crime they committed during the apartheid regime.

2. Full Participation of the Parties

Ubuntu traditional conflict resolution demands that the parties be involved in the peace process so as to promote the spirit of fairness, openness, equitableness and justice. The parties through their involvement, help to appreciate the root causes of the conflict and various ways to addressing the harm or crime committed against each other. It helps prevent an imposition and premature resolution. Parties when perceive themselves as owners of the resolution process are likely to approve the product and agreement becomes much easier. Sustainable conflict resolution and peace building demands full participation of all parties involved.

3. Joint Problem Solving Approach - Voluntary

Ubuntu focuses on restitution rather than retribution; on restoration of friendship rather than fault finding, truth rather than fact, on dialogue rather than blame, an apology and forgiveness rather than zero sum game; on accommodating rather than avoiding; and on cooperativeness rather than assertiveness. The Ubuntu principle process was not forced on the parties; it was a voluntary process, which enabled the parties to discuss their issues

and areas of conflict freely. Under the Ubuntu principle, the parties were encouraged to be in full charge of their decisions and agreements without any coercive interference by the other parties or the peace facilitator(s).

4. Mutual Respect

Ubuntu principle emphasizes on mutual respect and dignity of persons.

Parties in disputes are not enemies in the battlefield, but rather co-partners in a problem-solving process.

It is important that parties in a conflict accord each other legitimacy in the relationship.

When one party refuses to acknowledge the other as a player or a representative in a resolution process, then it dooms the exchange to one of confrontation. No fruitful outcome would be achieved.

Thus, in the African setting there is no "private dispute" of any seriousness, since a dispute affects everyone in one way or another.

THE NAVAJO SYSTEM, NORTH AMERICAN INDIGENOUS GROUPS

It is a "horizontal" model of justice which is in clear contrast to the "vertical" system of justice. The horizontal justice model uses a horizontal line to portray equality: no person is above another. It permits anyone to say anything during a dispute. There is no authority figure who must determine what is "true." The end goal is of restorative justice which uses equality and the full participation of disputants in a final decision.

A better description of the horizontal model, and one often used by Indians to portray their thought, is a Circle. In a circle, there is no right or left nor is there a beginning or an end every point (or person) on the line of a circle looks to the same center as the focus. The circle is the symbol of Navajo justice because it is perfect, unbroken, and a simile of unity and oneness. It conveys the image of people gathering together for discussion.

THE CONCEPT OF HEALING:

The Navajo system believes that where there is hurt, there must be healing. When a Navajo becomes ill, he or she will consult a medicine man. Patients consult Navajo healers to summon outside healing forces and to marshal what they have inside them for healing. A Navajo healer examines the patient to determine the illness, its cause and what

ceremony matches the illness to cure it.' The cure must be related to the exact cause of the illness because Navajo healing works through two processes: first, it drives away or removes the cause of illness; and second, it restores the person to good relations in solidarity with his or her surroundings and self.

THE CONCEPT OF SOLIDARITY:

Language is a key to law and words are signs which convey feelings. The Navajo understanding of "solidarity" is difficult to translate into English, but it carries connotations which help the individual to reconcile self with family, community, nature, and the cosmos-all reality. The sense of oneness with one's surroundings, and the reconciliation of the individual with everyone and everything, makes an alternative to vertical justice work. Navajo justice rejects simply convicting a person and putting them in prison; instead it favors methods which use solidarity to restore good relations among people. Most importantly, it restores good relations with self.

THE CONCEPT OF GUILTY:

Under the vertical justice system, when a Navajo is charged with a crime, the judge asks (in English): "Are you guilty or not guilty?" Navajo cannot respond because there is no precise term for "guilty" in the Navajo language. The word "guilt" implies a moral fault which commands retribution. It is a nonsense word in Navajo law due to the focus on healing, integration with the group, and the end goal of nourishing ongoing relationships with the immediate and extended family, relatives, neighbors and community.

THE CLAN:

Clanship-dooneeike'- is a part of the Navajo system. The traditional justice institution was the clan or the kinship structure. The clan institution establishes relationships among individual Navajos by tracing them to a common mother. The clan is a method of establishing relationships, expressed by the individual calling other clan members "my relative."

Within a clan, every person is equal because rank, status, and power have no place among relatives. The denial of k'e is expressed in the maxim, "He acts as if he had no relatives." A person who acts that way betrays solidarity and kinship; he or she is not behaving as a Navajo and may behave in a "crazy" way.

K'e, or a relationship of obligations to the group based on respect, solidarity, love and loyalty to the group, which also refers to 'reciprocity.' When Navajos meet, they introduce themselves to each other by clan: "I am of the (name) clan, born for the (name)

clan, and my grandparents' clans are (name)."' The Navajo encounter ritual is in fact a legal ceremony, where those who meet can establish their relationships and obligations to each other.

One must treat his or her relatives well, and we say: "Always treat people as if they were your relative." Navajo justice uses k'e to achieve restorative justice. When there is a dispute, the procedure, which we call "talking things out," works like this: Every person concerned with or affected by the dispute or problem receives notice of a gathering to talk things out.

At the gathering everyone has the opportunity to be heard. As a Navajo, if ones relative is hurt, that concerns him/her; if ones relative hurts another, he/she is responsible to the injured person. In addition, if something happens in my community, every individual is affected.

ESSENTIAL ELEMENTS OF THE PROCESS:

Relatives Participate- The parties and their relatives come together in a relaxed atmosphere to resolve the dispute. Anyone present at the gathering may speak freely about his or her feelings or offer solutions to the problem. Because of the relationship and obligation that clan members have with each other, relatives of the parties are involved in the process. They can speak for, or speak in support of, relatives who are more directly involved in the dispute. Benefits of Relative participation are that the involvement of relatives assures that the weak will not be abused and that silent or passive participants will be protected. An abused victim may be afraid to speak; his or her relatives will assert and protect that person's interests. Deals with the phenomenon of denial where people

refuse to face their own behavior. For instance, a perpetrator may feel shame for an act done, and therefore hesitant to speak. Relatives may speak to show mitigation for the act and to try to make the situation right.

No Formal Rule or Setting - There are no fixed rules of procedure or evidence to limit or control the process. Formal rules are unnecessary. Free communication without rules encourages people to talk with each other to reach a consensus.

Focus on Problem - Truth is largely irrelevant because the focus of the gathering is to discuss a problem.

No Punishment- The absence of coercion or punishment is an important Navajo justice concept because there are differences in the way people are treated when force is a consideration else focus remains on problem solving. No Punishment benefits are that if in the vertical system, a decision will lead to coercion or punishment, there are procedural controls to prevent unfair decisions and state power. These safeguards include burdens of proof on the state, a high degree of certainty (e.g. "proof beyond a reasonable doubt"), the right of the accused to remain silent, and many other procedural limitations. If, however, the focus of a decision is problem- solving and not punishment, then parties are free to discuss problems. If we choose to deal with a dispute as a problem to be solved through discussion, rather than an act which deserves punishment, the parties are more likely to openly address their dispute.

Ceremony - Navajo values convey the positive forces which aims toward a perfect state. The focus is on doing things in a "good way," and to avoid "the bad or evil way of speaking." A ceremony is a means of invoking supernatural assistance in the larger community of reality. People gather in a circle to resolve problems but include supernatural forces within the circle's membership. Ceremonies use knowledge which is fundamental and which none of us can deny. It reaches out to their basic feelings.

NALYEEH - RESTORATIVE JUSTICE:

In the law of nalyeeh, one who is hurt is not concerned with intent, causation, fault, or negligence. "If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt to stop, and I want others to acknowledge that I am in pain." Nalyeeh, is a demand by a victim to be made whole for an injury.

The maxim for nalyeeh is that there must be compensation so there will be no hard feelings. Returning people to good relations with each other in a community is an important focus.

Before good relations can be restored, the community must arrive at a consensus about the problem. The nature of the dispute becomes secondary (as does "truth") when the process leads to a plan framed by consensus. Consensus helps people heal and abandon hurt in favor of plans of action to restore relationships. If, for any reason, consensus is not reached (due to the human weaknesses of trickery, withholding information or coercion), it will prevent a final decision from being reached or void one which stronger speakers may force on others.

CONCEPT OF DISTRIBUTIVE JUSTICE:

Navajo case outcomes are often a kind of absolute liability where helping a victim is more important than determining fault. Distributive justice is concerned with the well-being of everyone in a community. This value which translates itself into law under the Navajo system of justice is that everyone is part of a community, and the resources of the community must be shared with all. Distributive justice abandons fault and adequate compensation (a fetish of personal injury lawyers) in favor of assuring well-being for everyone. This affects the legal norms surrounding wrongdoing and elevates restoration over punishment. Motive was not an issue but the significance of the loss suffered by the aggrieved party or his/her family, and the general reputation and character of the disputants.

Another aspect of distributive justice is that in determining compensation, the victim's feelings and the perpetrator's ability to pay are more important than damages determined using a precise measure of actual losses. In addition, relatives of the party causing the injury are responsible for compensating the injured party, and relatives of the injured party are entitled to the benefit of the compensation. There were no general rules governing the offense; each dispute was dealt with on a case by case basis, and the resolution was dependent on the people involved.

The vertical system also attempts to treat everyone as an equal before the law, but judges in that system must single out someone for punishment. The act of judgment denies equality, and in that sense, "equality" means something different than the Navajo concept. The Navajo justice system does not impose a judgment, thereby allowing everyone the chance to participate in the final judgement, which everyone agrees to and which benefits all.

Navajo justice was and is more concerned with the "wholeness of the person, a peaceful community and adjusting relationships than it is with punishing people." Severe punishments, such as capital punishment was possible if the person continued to cause trouble. There was no formal authority to enforce whatever resolutions were reached. Social control was progressive. The ideal solution was for all parties to leave a meeting

feeling a solution had been reached, including the offender who now understood himself or herself better. If the wrong-doer left the meeting feeling ashamed, then a second 'monster' had been added to the first monster. If a person did not comply with the agreed-upon solution, then they might be shamed or 'nagged' into fulfilling their obligation. The goal is reconciling or restoring solidarity with victims and offenders and preventing recurrence.

HOZHO:

Peacemaking applications are simple, because hozho measures the root cause of one's conduct and prompts the participants to seek solutions to regain that hozho. It means that reality and the universe are unified, and there is a unity in existence itself. Reality is not segmented or compartmentalized in the Navajo worldview. There is no separation of religious and secular life. Everything has its place and in a relationship to the whole which is something like the clan relationship. All animate and inanimate beings, and all supernatural beings (or forces), have their proper places and relations with each other. Thus, hozho is a state of affairs or being where everything is in its proper place, functioning in a harmonious relationship with everything else.

For example, if there is a land dispute, the Peacemaker may tell this story to guide the parties: Before humans assumed their present form, the Holy People had their own problems to address. During that time, Lightning and Horned Toad had a dispute. Horned Toad was walking on some land, when suddenly Lightning confronted Horned Toad and asserted that he, Lightning, owned the land and Horned Toad must leave immediately. Horned Toad replied, "My brother, I don't understand why you should have possession of this land, and I certainly don't lay claim to it." He continued along. Again, Lightning asserted his claim, and he threw a bolt of lightning as a warning. Homed Toad said, "I am very humble, and can't hurt you as you can hurt others with your bolt of lightning. Could we talk about this tomorrow? I'll be waiting to talk with you on top of the refuse left there by Brother Water." Lightning agreed.

The following day, Horned Toad arrived, wearing his armor. Lightning announced his arrival and asserted his power by throwing more lightning bolts at Horned Toad.

Horned Toad sat atop a pile of driftwood, which was left behind after a storm. From atop that pile, he discussed the matter with Lightning. Horned Toad said, "You are very powerful; you can certainly strike me down with a bolt of lightning." "I certainly can," said Lightning. "That's not what we are here about, "said Horned Toad. "We are here to discuss the land ownership issue, and we must talk." "There is nothing to discuss; the land is mine!" Lightning got angry and threw another bolt of lightning, which hit Horned

Toad. "Brother, you did not hurt me," he said. The bolt bounced off Horned Toad's armor. "Brother, "he said, "this armor was given to me by the same source as your bolts of lightning. Why is it we are arguing over the land, which was also loaned to us?"

This story takes land complainants back to the true "owner," and it is a forceful traditional precedent to take the parties to common ground.

HOZHOOJI NAAT'AANII:

Hozhooji Naat'aanii, the Navajo term denotes the process of peacemaking. It is itself a ceremony. Navajo prayers are based on the concept that the processes of prayer and ceremony create hozho. Many Navajo prayers end with a repetition of the phrase hozho nahasdlii four times. This repetition expresses a feeling of the restoration of hozho, meaning something like "the world is hozho again." After the prayer, which ends a ceremony, individuals are again in their proper place, functioning harmoniously and in beauty with everything else.

Hozho is the end goal of hozhooji naat'aanii.

1872 KITSEGUKLA INCIDENT:

An example of Indigenous negotiation is the 1872 Kitsegukla Incident. For several months, Gitxsan chiefs blockaded significant portions of the Skeena River in the British Columbia interior in Canada as a reaction to the accidental burning of the Gitxsan village of Kitsegukla by white miners. This impasse ended only after a negotiation aboard a British navy gunboat between the chief's colony. The negotiations took three days to finish.

For the British, this meant three painstaking days of meeting with the Indians, listening to their long recitation of grievances that led to the blockade, listening to songs and stories from the Indian representatives, and providing them with a small sum as remuneration for the loss. On the part of the Indigenous Indians, the three-day negotiations symbolized a "feast" that included their traditional recitation of the British offense of village burning as the cause of the blockade, storytelling, which is inevitable in like situations, sharing of oral history, acceptance of gifts, which represent the British acknowledgment of wrongdoing and recognition of the chiefs' jurisdiction, signing of a paper representing mutual agreement, and a celebration for being able to conclude the agreement. The Gitxsan chiefs did not demand that the offending white miners be brought to justice. Their blockade, its ramifications and the three-day feast were enough to make their point and for healing to occur.

This may have been seen differently by the British negotiators, who may have been under the impression that they were simply paying off Indian troublemakers or indirectly threatening them not to repeat such action by firing their canons, after the three days, as a symbolic show of force. They may have failed to appreciate that the three-day feast was a way for the Native Indians to make peace with them, to share their horizons and oral histories, and provide an opportunity for the British to better understand native culture. The British may even have viewed the three-day feast as too long, boring, frustrating or a waste of time. The truth is that such "Indian time" does not connote being late in arrival, delaying procedure or wasting time. Those three days were well spent in relationship building. "Indian time" essentially means just simply sitting together to know one another better.

CONCLUSION

One can understand that the process of mediation is not a newly made concept. It has various understandings and usages based on the system and culture of the place and group but it has the same essence and spirit everywhere. Todays structured mediation is based on similar principles and therefore understanding the roots makes it easier to implement along with carrying the cultural aspect of the process which helps in better implementation and eventually a more successful process.

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Closing Remarks at
The Africa -Asia Mediation Conference 2019

By Madeline Kimei, Founder – iResolve Tanzania

I would like to conclude the inaugural Africa Asia Mediation Conference with a few thoughts on what we have learned during these 2 days and how that fits into the overall event.

First, the message by Attorney General was loud and clear for us: that the meaning and purpose of law of Mediation works with the system to deal with business or social relationships. Also, that more governments are now legislating and regulating by introducing ADR, in particular mediation for resolution of disputes as it prevents parties from taking positions. The honorable attorney general also encouraged us to develop fresh outlook and open minds in this field.

Of course, I must also thank the very distinguished speakers at today's conference, both overseas and local, who have given us much food for thoughts and insights regarding the future development of mediation in the 2 continents.

Dr Lukumay presented to us that mediation is as old as mankind. It is found in all of man's activities. In everyday life we witness the intervention of so-called neutral third party facilitators to resolve disputes between neighbours, parents mediating between their young children and in closely-knit societies and tribal communities, where the mediation culture is particularly strong, persons held in high regard by the societies as tribal elders, chiefs or people's representatives mediating in all sorts of civil cases.

Dr Priyanka Chakraborty demonstrates to us various customary practices of mediation across the world - and spoke about the talking stick and the peace circles. Another example is that of my own tribe known as the "Chaggah" - It is through village or clan councils of elders. There were elders who were trusted to listen to both sides and their decisions were final. They were rewarded a bucket of Mbege by the loser of the dispute or costs shared if there no losers. If it was between husband and wife the husband paid for resolution even if he worn!

Our lady justice Aluoch gave us the factors that would influence a party's choice as to either mediate or litigate and she emphasized on the need for fairness in the process. We then were shifted to the west, the United States and heard from Richard about Mediation in an international and geopolitical context.

Ferda, gave us insight on legal and regulatory framework currently in turkey with respect to Mediation. And it seems from her presentation that The Turkish government shows strong commitment to integrate mediation into the legal system and hence the Turkish mediation practice is developing quickly through the implementation of mandatory mediation.

The second day has also been fun packed with a presentation from Kevin on mandatory vs voluntary mediation considering that the choice / right of parties is to decide whether they are willing to participate in a mediation. This got us to critically question whether to regulate or not to regulate.

Mercy drove us through the Kenyan court annexed mediation - I noted that they have a provision 59D which empowers the court to enforce private mediation agreements which in my view rids the fear of lack of finality and enforcement usually seen in parties.

The Honorable senior mediator Makawa gave us insights from the labor related mediators at CMA which is a creature of statute. Ms. Iram, mediation means you have to take control of your dispute and she very interesting touched on the Singapore Convention - this convention aims at ensuring the international "direct" enforcement of Mediated Settlement Agreements ("MSAs") worldwide. A few countries in Asia and Africa have signed this convention which gives effect to the MSA similarly the same treatment as an arbitral award under the New York Convention for Enforcement of arbitral Awards (1958).

Mr. Sarma, despite driving our morning simulations he also gave us a uniquely interesting presentation on transformational mediation process through Leadership. He reminded us that a mediator is a leader and should be able to recognized good qualities of the people who are in the room. This in my opinion helps in building rapport one of the key pillars of **mediation** is the **trust** that the **mediator** is able **to build** with and between the parties, often in a short space of time.

Ladies and gentlemen, What I take away from the many presentations is that multi-layered approach to regulation in mediation – a combination of market-based legislative and self-regulation with strong responsive and reflexive review mechanisms in place. In a

dynamic and developing professional field, participative regulatory processes with the ability to review and adapt the mediation mix to changing circumstances are vital.

Though we have built a foothold for mediation in this community, there is no room for complacency. As a neutral practitioner, I can still see that there is potential for the greater and better use of mediation to resolve disputes in our society. There are still far too many cases where the parties would have been much better served by making attempts in good faith to mediate their differences than spending disproportionate and (sometimes unaffordable) legal costs on litigation.

Let this conference be another reminder that all stakeholders should continue our efforts in our respective field to handle dispute with a healthy mindset and to resolve differences in a collaborative manner.

In concluding; The Africa Asia Mediation Association Committee has discussed outcomes from this conference and has passed the following resolutions;

IT RESOLVED THAT, an Mediation award be extend at the AAMC 2020 to Sheikh Mujibur Rahman, known with the honorary title Bangabandhu, is the **founding father of Bangladesh** in recognition of his role to using peace-building and Mediation techniques in many occasions to secure the freedom of Bangladeshis.

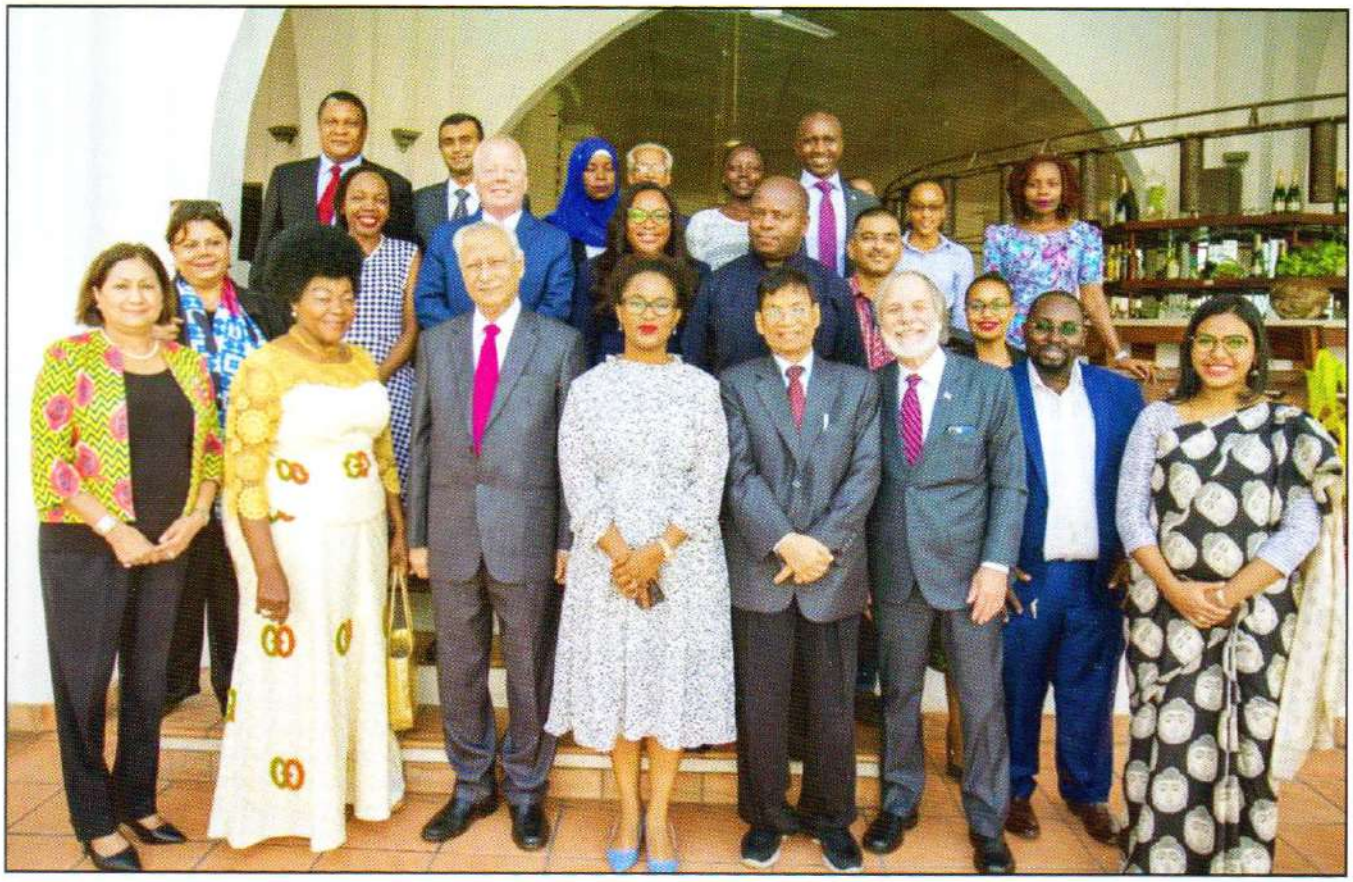
Bangabandhu Sheikh Mujibur Rahman was not a mere individual; he was an institution, a movement, a revolution and upsurge. He is the architect of the nation. He is the essence of epic poetry and he is history.

Sheikh Mujibur Rahman was an advocate for unity, solidarity and secularism, and he banned the use of religion in politics. "His immense contribution towards Bangladesh had his exemplary negotiation and mediation skills at work."

IT RESOLVED THAT, the AAMC 2020 will be in Dhaka, Bangladesh- dates will be communicated in due course. I call on all of us to be ambassadors for the great success of the 2020 event.

Thank you all for coming to Dar es Salaam this September and hope to see you all in Dhaka next year for this same gathering.

Pictorial



A group of Mediator's with Mr. Mahbubey Alam Hno'ble Attorney general for Banladesh at Hotel Slipway, Dar-Es-Salaam, Tanzania.

Speach delivered moments at 1st Africa-Asian Mediation Conference Dar Es Salaam, Tanzania (From left) Mr. Mahbubey Alam, Ms. Madeline C. Kimei & Mr. S.N. Goswami

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