

Alternate Dispute Resolution

Introduction

Wherever there are two or more people there is bound to be conflict. It is even possible for conflict to arise inside of you as two opposing feelings or thoughts. And whether inside of you, or in your family, or in the community, conflict is uncomfortable. This is why many people do all they can to avoid it. But far from something that needs to be avoided, the presence of conflict or disagreement PROVES that there are free-thinking and self-respecting individuals in the situation. If you would like a world without conflict imagine one where absolute compliance—the opposite of conflict—was the only way people could respond to disagreement. We would learn very little about ourselves and each other in such a world. Hence, what we need to learn is not full and total compliance, but how to RESOLVE conflict in a healthy way.

As you begin working in difficult and diverse communities you will likely come in contact with a huge backlog of unresolved conflicts. These may range from personal problems one community member has with another one, to power struggles between one family and another, to entire communities at the brink of war with each other. In each case there is a deadlock. No one wants to be in this situation, but no one can back out without considerable loss.

Learning about Alternate Dispute Resolution will open up a world of possibilities to you as you seek to bring change. It will show you how there is always a path and tools to resolving a conflict, no matter how old, or deep seated, if the interested parties are willing to take it. In this module, we will begin with briefly introducing the history of ADR and key terms associated with it. We will then move towards practical application of key approaches to ADR.

What is Alternative Dispute Resolution (ADR)?

Any method of resolving disputes without litigation. (Standard Dictionary Definition)

"Alternative dispute resolution" involves the resolution of legal disputes through methods other than litigation, such as negotiation, mediation, arbitration, summary jury trials, mini-trials, neutral case evaluations, and private trials. (The U.S. Legal System and Alternative Dispute Resolution)

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are alternative to full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of community based ADR. (Law & Justice Commission of Pakistan)

Understanding Social Conflict

The primary step in moving towards alternate dispute resolution is to first understand the concept of conflict. Understanding what conflict entails is an essential pre-requisite before grasping ways in which to deal with it.

Social conflict is the struggle for agency or power in society. Social conflict or group conflict occurs when two or more actors oppose each other in social interaction, reciprocally exerting social power in an effort to attain scarce or incompatible goals and prevent the opponent from attaining them. (Social Conflict, Escalation and Settlement)

A perceived incompatibility of goals or actions. (Jeel Christine)

Keep in mind...

- An understanding of the nature and dynamics of a conflict is integral to effectively handling it.
- Conflicts are natural, normal and even necessary and inevitable.
- The existence of conflict itself is not as big a concern as how we choose to deal with it.
- How we perceive a certain conflict will translate into how we deal with it.

Methods of Dispute Resolution

Methods for dispute resolution fall under two broad categories:

- **Adjudicative methods**, which typically entail the presence of a judge, jury or court appointed arbitrator to determine the outcome.
- **Consensual methods**, where parties try to reach an agreement out of court through mediation and negotiation.

Litigation refers to the process in which disputing parties often categorized as the plaintiff and defendant appear before a court of law for the settlement of their dispute. Lawyers are integral to the proceedings to present arguments in favor of the party that they represent. Based on the evidence and arguments presented by both the parties, a judge or jury awards a legally binding ruling to settle the dispute.

Arbitration is a process in which disputing parties agree to refer their dispute to an objective third party and agree that they would be bound by the decision that the arbitrator(s) takes. The arbitrator(s) listens to the arguments presented by the disputing parties in turns and comes up with a decision based on his/her judgment. Whether or not lawyers will be present during the arbitration process will depend on the disputants.

Mediation is a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the conflicting parties to negotiate a settlement. For a mediation to be successful it is important for the facilitator/mediator to be mindful of the aspirations of the disputing parties. They must at no point try to impose their decision on either or both the parties. The final solution must be sustainable and voluntary. The decisions reached as a result of mediation are legally non-binding.

Negotiation is a dispute resolution process where disputing parties try to resolve their disagreement through mutual discussion without the involvement of any third party. This is often the first step towards any form of dispute resolution. A breakdown of negotiations can then lead the disputants to other methods previously discussed. Conflicting parties might prefer negotiations to other forms of dispute settlement because this allows them to control the discussion and outcome/solution.

While each of these methods are important and needed in different cases, this module will focus on discussing “Mediation” and “Negotiation” in detail as these methods are most typically used when attempts are made to resolve disputes/conflicts at the community level.

Negotiation Skills

As mentioned above, negotiation is often the first step towards dispute resolution. This is when disputing parties attempt to resolve the conflict through mutual discussion rather than involving a third party.

For negotiations to prove effective there are certain skills that each representative of the conflicting parties should be equipped with.

Analytical Skills – A good negotiator will never focus on their own side of the bargain. On the contrary they know that negotiations can only prove successful through a calculated give and take. This means that both parties will have to first agree on showing flexibility on their originally stated positions and find common ground to build upon. For this to happen the negotiator must have an understanding of the problem, its history as well as the aspirations of both the parties.

Preparatory Skills – No negotiator enters into a bargaining discussion blindly. They will always take reasonable time to prepare for the meeting. This will include:

- Proposing a time and place that would serve neutral to the interests of one or both parties.
- Have a Plan B or an alternate offer in case their original demand/offer is out-rightly rejected by the other party. Having a Plan B would ensure that the negotiations do not break down as soon as they start.
- Keep in mind any history that the two parties share and tread their line of argument based on their shared past.
- Any instances of past dispute resolution will prove as important precedents. A good negotiator will always reflect on the outcomes of the past negotiations to ascertain what worked and what did not. This will also help in building a stronger line of argument building on the aspects of the past negotiation that benefitted the negotiator's cause.

Active Listening Skills – A skilled negotiator will always keep a keen tab on the verbal communication and the body language of the other party. This proves very helpful in identifying possible areas of compromise based on any clue that is taken from the arguments of the other party.

Emotional Control – Since negotiations are primarily held between those directly affected by the dispute, it might become challenging to remain in control of one's feelings. This is especially true when negotiations become long and tedious leading to frustration. A skillful negotiator will however always keep a check on his/her emotions knowing that any loss of composure is likely to hurt his/her cause.

Communication Skills – This is among the most important aspects of negotiation. A skilled negotiator must be able to articulate his/her line of argument as well as desired outcome/demand very clearly. This is important to ensure that there is no misunderstanding at a later stage and that all involved stakeholders are clear about the negotiator's stated position on the dispute.

Ability to Identify Collaborative Opportunities – While at first the concept of working collaboratively for the resolution of a dispute might seem far-fetched, good negotiators are always on the look-out for common ground. This common ground can stem from a shared background, history or past or an outcome that will benefit both parties. Finding collaborative opportunities can

quickly change the environment of a negotiation from hostile to amicable and can lead to a swifter solution.

Problem Solving Skills – A good negotiator will never be rigid and will find innovative ways to approach the solution. In doing so they may look into a variety of mutually beneficial scenarios. This essentially means that instead of achieving his/her desired objective, the negotiator's primary focus will be on solving the dispute.

Decisiveness – For negotiations to reach a swift solution it is often important for the negotiator to have the confidence and ability to finalize decisions on the spot rather than procrastinating.

Willingness to Build Confidence – Since negotiations are not legally binding, it is important for the negotiators to create an atmosphere of mutual trust. This can only happen when the negotiating parties demonstrate high level of ethics and reliability to win the confidence of their opponent.

Mediation Skills

Mediation is the process of seeking the help of an impartial third party to resolve the dispute between conflicting parties. The key difference between a negotiation and mediation is that the disputing parties strive to solve the conflict among themselves during negotiations while in mediation they take a mediator's help to reach an agreement. A key aspect of mediation is that the mediator does not attempt to decide on behalf of the disputing parties but rather treads the discussion in a way that supports them to reach an amicable decision themselves.

Although trained negotiators/mediators are also available to facilitate this process there is no binding to seek their help. In fact, any mutually trusted third person/party can be requested to mediate the dispute.

While each mediator will have his/her distinct style to facilitate the bargaining discussion, there are certain attributes/skills that are essential for a mediation to be effective.

Impartiality – For a mediator to be successful it is of utmost importance that they maintain respect in the eyes of both the parties throughout the process. For this to happen it is imperative that the mediator is able to keep his/her biases at bay and be able to direct the course of discussion without taking sides, explicitly or implicitly.

Active Listening – Just as active listening is important for members during a negotiation, it is equally important for a good mediator to facilitate the discussion between conflicting parties. Active listening for a mediator refers to not merely hearing the words being spoken but also paying attention to the way in which they are spoken, the tone that is used and the body language of the speaker.

Emotional Intelligence – A huge part of a mediator's work deals with ensuring that the discussion does not breakdown and some sort of an amicable solution is reached. However, this can prove to be a tall order unless the mediator is emotionally intelligent. Emotional intelligence refers to an individual's ability to recognize and manage their emotions as well as those of others (whether in a group or individually). This skill is vital to ensure that any rise in tempers is managed well before it leads to a deadlock or acceleration of animosity.

Summarizing Skills – This is the ability to articulate the key concerns of both the parties and, where required, support the parties to re-state their issues and demands more logically as opposed to emotionally. The key is to first have all the facts and then find a positive way to state otherwise controversial realities. It is also important to remain as sensitive to both the parties as possible while offering a summary of the discussion.

Empathy – For a mediator to be considered truly impartial it is important that they exercise a high level of empathy for both the parties. Only an empathetic mediator can in turn help both the parties to stand in each other's shoes and swiftly move towards a mutually acceptable solution.

Who is In-charge? - Stakeholder Analysis

All those whose opinion will matter during a bargaining situation are considered stakeholders. Knowing the power dynamics of the various stakeholders in a dispute can prove most helpful for successful and quick negotiation and/or mediation.

There are many commonly used approaches for stakeholder power analysis. The simplest and most relevant of these approaches consists of a 5-step evaluation of each stakeholder's role, stance, process, position and power on a given dispute.

Role – This means understanding whether the given individual will be leading his/her side, will serve as a loyal follower or his/her involvement will be more superficial without any genuine concern for the outcome (i.e. will they be a bystander). The “role” will then decide the level of importance accorded to that individual. For instance, a leader's words will be given greater weightage than that of the bystander.

Stance – This will help determine if a given stakeholder's position on the matter is likely to be proactive or reactive. Someone with a proactive approach is likely to try and control the discussion making the negotiator or the mediator mindful of and prepared to tactfully ward off attempts to hijack the proceedings.

Process – Based on past interaction and overall understanding of that person's worldview, his/her stance as an optimist, pessimist or realist will be decided. Knowing a stakeholder's outlook on life is a helpful way to articulate one's line of argument in a way that is most likely to have an impact. This will also help in determining the level of effort that will be required to win over an important stakeholder.

Position – Here the stated or perceived position of the stakeholder on the dispute will be categorized as “Positive,” “Undecided” or “Negative.” Someone with a positive position on the matter is likely to support a quick and mutually agreeable solution even if it means compromising a little on his/her stated position. On the other hand someone with a negative outlook will prove much harder to bring to a compromise and will require greater patience and caution when dealing with him/her. Finally, someone who might still be “Undecided” on the matter can be easily swayed on either side given the strength of each party's arguments and any potential benefits that they might get from a specific solution.

Power – The power dynamics of the stakeholders will be categorized as “Strong,” “Medium” and “Weak.” Needless to say an individual with “Strong” power will likely try to dominate discussion and might use his/her strength to influence the decision. During mediation understanding the power dynamics will enable the mediator to remain vigilant and be able to protect the interests of the weaker individual or party (without losing sight of impartiality) in case the stronger party tries to influence the outcome.

Cases of Alternate Dispute Resolution

Truth and Reconciliation Commission – South Africa

Following the abolition of apartheid there was need to bridge the huge trust deficit (between the previously discriminated and now in power) people of color and the white people who had previously been the ruling elite. Between 1948 to 1991 their widespread human rights abuses were perpetrated against the native people of color under apartheid. However, in 1991 when Nelson Mandela came to power, becoming the first person of color to secure a democratic victory, there was fear of Mandela launching a campaign of revenge and retribution against the white population.

However, instead of going the Nuremberg Trials' way, Mandela opted to promote reconciliation between the divided citizens of South Africa.

Among the leading measures to secure national unity was the establishment of The **Truth and Reconciliation Commission (TRC)**. The TRC followed the restorative justice approach (i.e. when a crime is personalized by having the victims and the offenders mediate an agreement to the satisfaction of each, as well as involving the community).

Under TRC, witnesses who were identified as victims of gross human rights violations were invited to give statements about their experiences, and some were selected for public hearings. Perpetrators of violence could also give testimony and request amnesty from both civil and criminal prosecution.

This process allowed the victims/survivors to talk about their pain and loss to the face of those who had inflicted them with the misery. On the other hand, it also allowed the perpetrators of violence to speak directly to their victims, begging forgiveness for their actions. This intensely emotional process helped the survivors to receive closure, enabling them to “forgive” those who had caused the pain.

The Hazara Mourners



On 10 January 2013, several bombings took place in the southwestern Pakistani city of Quetta and in the northern Swat Valley targeting the Shia Muslims. A total of 130 people were killed and another 270 injured. Lashkar-e-Jhangvi, a Sunni militant group, claimed responsibility for this attack.

Protests in Quetta by the city's Shia community erupted the day after the bombings, with protesters and local Shia officials refusing to bury those killed until the Pakistani army took control of security in the city. For the first 24 hours, there was a complete media black-out of the sit-in as mainstream media exclusively focused on covering the long march initiated by Maulana tahir-ul-Qadri against the government. However, human rights activists took to social media websites, particularly Twitter and Facebook posting images of the protestors (including women and children) sitting with coffins under the open sky despite rain and ice-cold temperatures. Within 24 hours, these images resulted in nationwide protests in all major city centers of the country with Shia and Sunni communities collaborating to demand justice.

A number of politicians including PTI Chief, Imran Khan and Interior Minister, Rehman Malik visited the site of the sit-in in the hope of persuading the mourners to disburse. However, after a few failed attempts at negotiations, the then Prime Minister Raja Pervez Ashraf flew down to Quetta to lead the negotiation process.

Refusing to budge from their demands, the Prime Minister was forced to dismiss the provincial government of Baluchistan on charges of grave negligence to protect its people.