



Mediation and Human Rights

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Columbia Law School



Welcome and Introductions

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Goals of this Workshop

Following this workshop, participants should:

1. Recognize the various **underlying interests of parties** to human rights disputes; and
2. Consider the **role mediation can play** in human rights work; and
3. Understand **process choices** in mediation for different human rights scenarios.





Human Rights

Civil and political rights

- Right to a fair trial
- Freedom of religion
- Freedom of expression
- Freedom of association

Privacy rights
(e.g., border surveillance)

Nationality and statelessness
(e.g., refugees)

Economic, social, and cultural rights

- Education
- Housing
- Adequate standard of living
- Science and culture

Business and human rights
(e.g., role of multinational corporations)

Transitional justice
(e.g. reparations for victims)



Current Human Rights Issues

1. Privacy rights (e.g., the right to be forgotten)
2. Business and human rights (e.g., role of multinational corporations)
3. Nationality and statelessness (e.g., refugees)
4. Transitional justice
5. The right to social security and social protection



A wide-angle photograph of the Columbia University campus in New York City, featuring several large, classical-style buildings with red brick and white columns, set against a clear blue sky. A green lawn and a paved walkway are visible in the foreground.

Question

What is a specific example of a human rights issue you face in your work or country?



Some Relevant SDGs

10 REDUCED INEQUALITIES



Reduce **inequality** within and among countries.

11 SUSTAINABLE CITIES AND COMMUNITIES



Make cities and human settlements **inclusive, safe, resilient, and sustainable.**

16 PEACE, JUSTICE AND STRONG INSTITUTIONS



Promote peaceful societies, provide **access to justice for all** and build effective, accountable, and inclusive institutions at all levels.



What is Mediation?

Mediation is a **process** in which an **impartial** third person **facilitates** a **negotiation** between people in conflict or who are trying to “make a deal”. The mediation process **empowers** them to take control of their lives and find solutions that meet their interests and needs. It is a **private, voluntary, informal** process during which the mediator or mediators **assist** the participants to resolve their dispute in a manner acceptable to all.

- Carol Liebman



Advantages of Mediation

- Can facilitate creative solutions through collaborative problem-solving (e.g., apology as remedy)
- Can address problems before they exacerbate
- Less costly to implement and easier to access
- Can lay the groundwork for later settlement
 - Information-gathering can narrow the issues in dispute



Disadvantages of Mediation

- Power imbalances
- Private settlements
- More time-consuming process
- Too many stakeholders
- Not all stakeholders



Human Rights Mediation Examples

1. Transitional justice (DDR)
1. Business human rights



Transitional Justice: Disarmament, Demobilization and Reintegration

- Traditional DDR program instituted in 2003 sought reintegration through political appointments in Afghanistan
- New model implemented in 2011 featured mediation



Figure 14: Components of Grievance-based DDR Programme

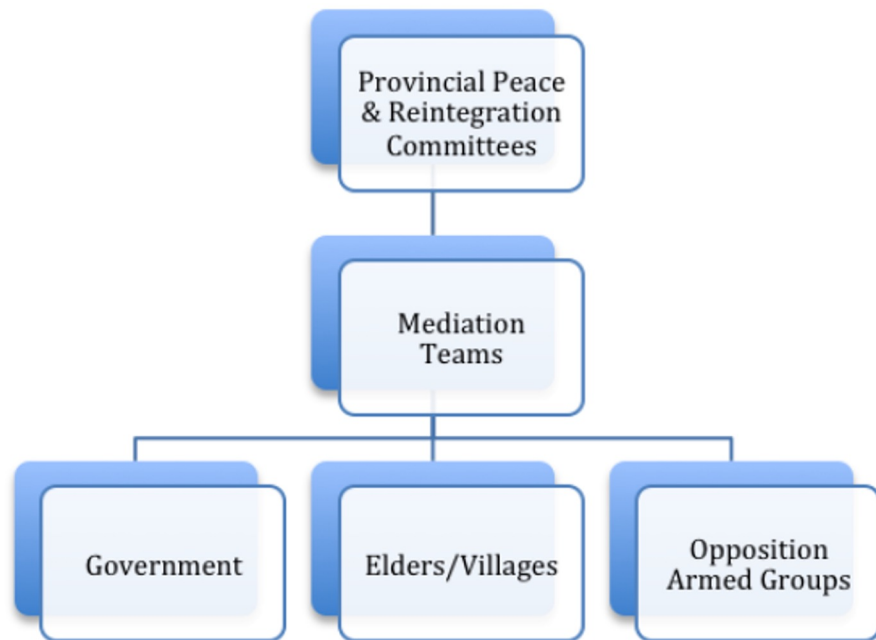


Transitional Justice: Disarmament, Demobilization and Reintegration

- **Rapid Response Team**
 - Sought to identify core grievances and opportunities for reintegration through conversations with stakeholders
 - Internally-generated incentives for DDR including
 - Face-saving mechanisms for reintegrating
 - Local security guarantees
 - Promoting local coexistence for successful reintegration



Transitional Justice: Disarmament, Demobilization and Reintegration



- Mediation process included 3 phases:
- Identified each stakeholder's key issues/grievances
 - Explored options for resolving issues
 - Signed agreement that met all interests

Figure 13: Structure of Mediation Teams



Transitional Justice: Disarmament, Demobilization and Reintegration

By the end of January 2011, the Afghan CSO **had trained 400 people in three provinces** to help the reintegrees and communities cope with reintegration, leveraging both formal and informal justice systems.



Transitional Justice: Disarmament, Demobilization and Reintegration

In 2016, the Colombian government and the largest guerrilla group, the Revolutionary Armed Forces of Colombia (FARC), signed a peace agreement.

Key Provisions

- The demobilization of the FARC and its transformation into a political party
- The establishment of a truth commission to investigate human rights abuses
- The implementation of a number of reforms aimed at promoting justice and human rights



Results

- Significant progress in terms of reducing violence and promoting stability.
- Decline in number of people displaced by the conflict
- Ability to focus on improving its economy and addressing social inequality



Business Human Rights

- **Business human rights violations typically involve—**
 - labor rights standards, discrimination, the right to access safe drinking water, the right to adequate housing, food or the highest attainable standard of health, and freedom of expression or privacy
- **Business human rights issues are uniquely suited for mediation**

**Qualified
Nature**

**Leeway they afford
for contextual
interpretation**

**Room for varied
understandings
of remedy**



Business Human Rights — Qualified Nature

Qualified Nature of business human rights violations

- Most human rights are ‘qualified’, meaning that they are **capable of limitation**
- **Creative solutions** require working with key players to negotiate sophisticated solutions; necessarily based in **collaborative problem-solving**



Business Human Rights — Qualified Nature

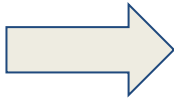
Example: Breach of children's rights to education and of minimum age reqs for work

Court may impose penalty or fine.



Children are likely to go on to similar work or worse forms of abuse such as child prostitution.

Mediation can promote an understanding of the broader rights in play and of the victims' interests.



Ensure families can sustain themselves while providing access to education and seeking industry-wide responses to the systemic problem of abuse.



Business Human Rights — Leeway for contextual interpretation

- There are **‘open spaces’** within the boundaries of minimum human rights standards **where considerable negotiation may take place.**
- **Mediation can empower** individuals and marginalized groups and allow companies to comprehend the ramifications of their activities.



Business Human Rights — Leeway for contextual interpretation

Example: Construction or mining project that requires a community to be relocated

Formal Process

Human rights standards prohibit forcible relocation without due compensation.

Open Spaces

Monetary compensation ignores — accompanying dislocation of communities, the loss of access to religious or cultural sites, the value of uncultivated land, future earnings, and the sustainability of livelihoods.



Creative Solutions

- Retraining for alternative employment
- Agreeing on safe ways to access culturally-significant areas
- Ensuring women are not disadvantaged



Business Human Rights — Case Study: Peru

Conflict

- Local communities opposed a gold mine operated by the Newmont Mining Corporation and Yanacocha in the Cajamarca region of Peru
- concerns about the **environmental impact** of the mine and the **distribution of its profits**



Key Resolution Elements

- creation of a community development fund to support local initiatives
- the implementation of more robust environmental management practices
- increased consultation and engagement with local communities.





COFFEE BREAK



Exploring Multiple Dimensions of Power

Visible Power

Observable decisionmakers

- Community leaders
- CEOs
- Elected officials
- Coalitions
- Press

Hidden Power

Behind the scenes actors

- Political organizations
- Access to the observable decisionmakers

Invisible Power

Societal forces

- Internalized stereotypes
- General helplessness about problems

What other sources of power have you experienced?



A wide-angle photograph of the Columbia University campus in New York City, featuring several large, historic brick buildings with classical architectural details like columns and arches. A green lawn and a paved walkway are in the foreground. The sky is overcast.

Power Imbalances

Because human rights cases are related to people who believe they have been taken advantage of in some way, the role of power imbalances in mediation can be greater.



Approaches to Power Imbalances

- Setting ground rules for human dignity and the right to speak uninterrupted;
- Creating a space for parties to express views and get to the underlying issues behind the dispute;
 - Can use a one-on-one conversation



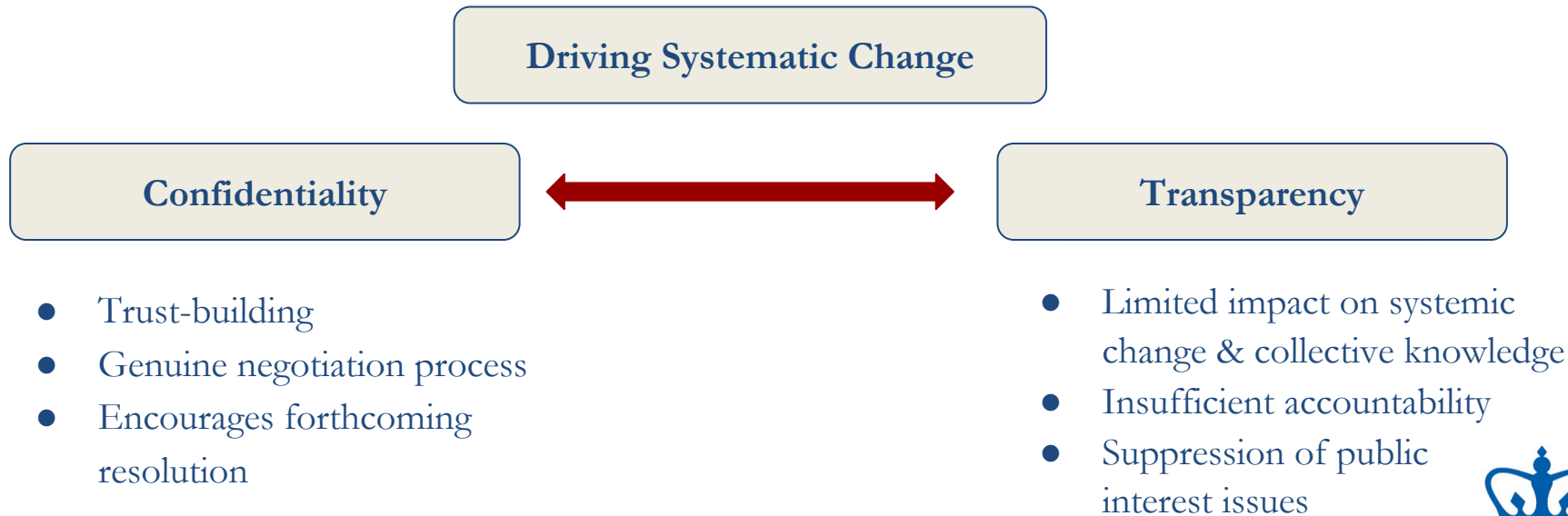
Approaches to Power Imbalances

- Providing advocates where an unrepresented party would suffer particular disadvantages;
- Educating parties about the mediation process prior to the mediation;
- Excluding certain types of cases from mediation



Private Settlements: Tensions

Confidentiality in mediation is important, but can create skepticism about the compatibility of mediation with human rights and the pursuit of systematic change.



Private Settlements— Capacity to Drive Systemic Change

Balancing the two *opposing* forces:

- Confidential settlements may preclude considerations of the wider public interest and inhibit the advancement of systemic change.
- However, with confidentiality in place, parties are more likely to share their true feelings, concerns, and interests— helping mediators better identify underlying issues

Integrating **restorative justice principles**

Developing **tailored** solutions

Building in **accountability** mechanisms

Encouraging **public interest**

Promoting **education and training**

Ensuring **transparency**



Case Studies: Capacity to Drive Systemic Change

Guatemala's National Reparations Program

- Mediation played a role in reaching agreements between victims and the government, ensuring that the rights and needs of victims were respected and addressed.
- Provided regular updates on its progress, including the number of victims registered and the reparations awarded



Kenya National Land Commission (KNLC)

- Launched public inquiry incorporating field investigations to investigate historical land injustices
- Used mediation to facilitate dialogue between community leaders, companies, and agencies to resolve land disputes, ensuring that the rights of affected communities are respected



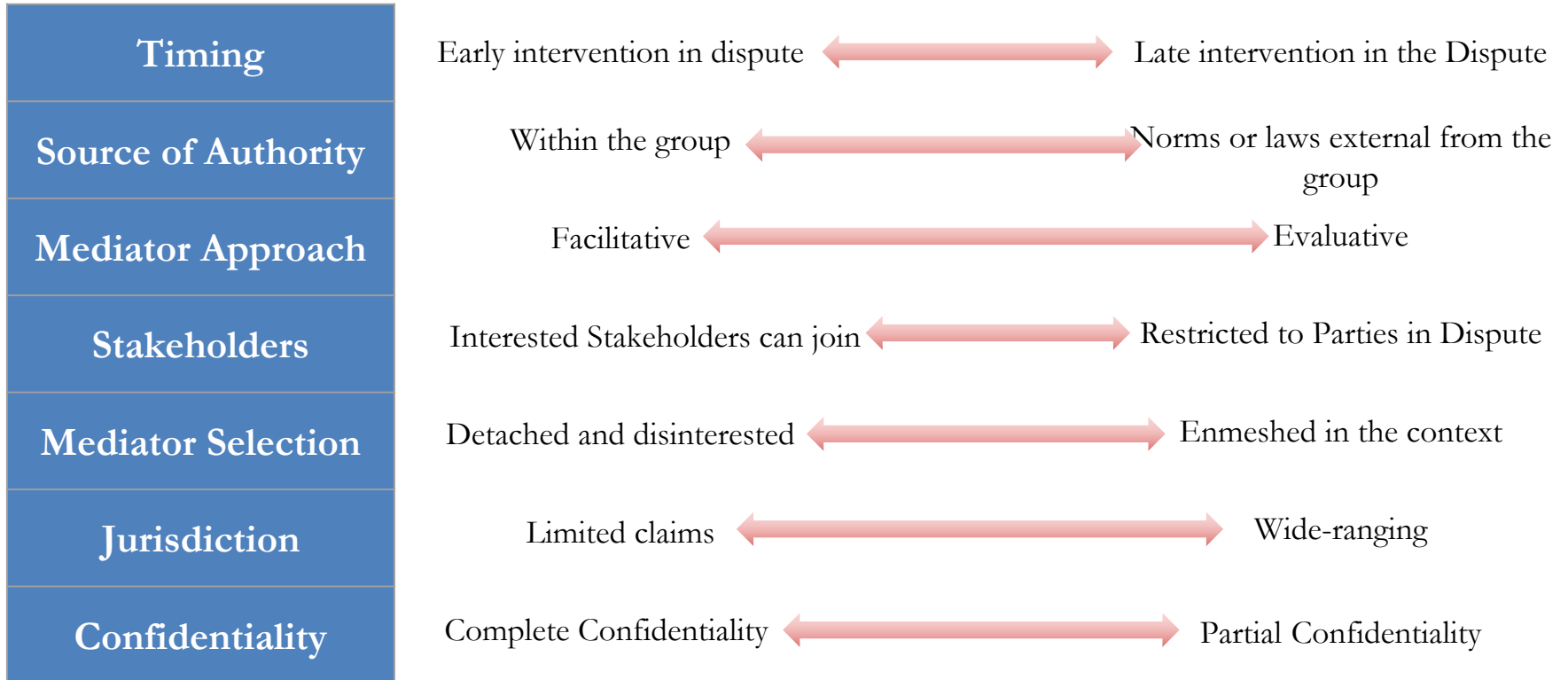
Approaches to Provide Transparency

- **Transparency need not be full disclosure** of outcomes. Alternative approaches that can balance the competing needs of transparency and confidentiality.
 - Anonymized case studies
 - Annual reporting: providing data on complaint trends and outcomes achieved
 - Guiding principles and procedural fairness
 - Stakeholder engagement
 - Public education and awareness

- **Levels of transparency** needed to maintain trust that mediation is supporting human rights in practice may vary according to context and institutional reputation.



Some Process Choices in Mediation System Design



Example of a Mediation Program

British Columbia Human Rights Commission

Available when a citizen complains that their human rights have been violated because they were discriminated against on the basis of a protected characteristic.

- **Voluntary:** Mediation is offered at no cost, but not required for parties to use
- **Early:** Mediation can be held from the time the complaint is made
- **Interest-based mediation:** Mediators help participants identify their interests and design solutions to meet those interests.
- **In-house mediators:** Trained mediators repeatedly work for the Commission
- **Not available to all:** Only available for some human rights claims

What would *your* model mediation program look like?



Activity: Designing Your Mediation Program

Timing
Source of Authority
Mediator Approach
Stakeholders
Mediator Selection
Jurisdiction
Confidentiality

Early intervention in dispute ↔ Late intervention in the Dispute

Within the group ↔ Norms or laws external from the group

Facilitative ↔ Evaluative

Interested Stakeholders can join ↔ Restricted to Parties in Dispute

Detached and disinterested ↔ Enmeshed in the context

Limited claims ↔ Wide-ranging

Complete Confidentiality ↔ Partial Confidentiality



QUESTIONS?

