Mediation and Human Rights

April 3, 2023
Columbia Law School
Welcome and Introductions

Professor Rebecca Price
Lecturer, Columbia Law School Mediation Clinic

Brenton Browne, Kevin Cryan,
Joy Chow, Sasha Yusuf, Sonia Helen Pascale
Columbia Law School Mediation Clinic
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

Economic, social, and cultural rights
- Education
- Housing
- Adequate standard of living
- Science and culture

Privacy rights
(e.g., border surveillance)

Nationality and statelessness
(e.g., refugees)

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

- Trust-building
- Genuine negotiation process
- Encourages forthcoming resolution

Driving Systematic Change

- Limited impact on systemic change & collective knowledge
- Insufficient accountability
- Suppression of public interest issues
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.
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

<table>
<thead>
<tr>
<th>Timing</th>
<th>Early intervention in dispute</th>
<th>Late intervention in the Dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Source of Authority</td>
<td>Within the group</td>
<td>Norms or laws external from the group</td>
</tr>
<tr>
<td>Mediator Approach</td>
<td>Facilitative</td>
<td>Evaluative</td>
</tr>
<tr>
<td>Stakeholders</td>
<td>Interested Stakeholders can join</td>
<td>Restricted to Parties in Dispute</td>
</tr>
<tr>
<td>Mediator Selection</td>
<td>Detached and disinterested</td>
<td>Enmeshed in the context</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Limited claims</td>
<td>Wide-ranging</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>Complete Confidentiality</td>
<td>Partial Confidentiality</td>
</tr>
</tbody>
</table>
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

<table>
<thead>
<tr>
<th>Timing</th>
<th>Early intervention in dispute</th>
<th>Late intervention in the Dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Source of Authority</td>
<td>Within the group</td>
<td>Norms or laws external from the group</td>
</tr>
<tr>
<td>Mediator Approach</td>
<td>Facilitative</td>
<td>Evaluative</td>
</tr>
<tr>
<td>Stakeholders</td>
<td>Interested Stakeholders can join</td>
<td>Restricted to Parties in Dispute</td>
</tr>
<tr>
<td>Mediator Selection</td>
<td>Detached and disinterested</td>
<td>Enmeshed in the context</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Limited claims</td>
<td>Wide-ranging</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>Complete Confidentiality</td>
<td>Partial Confidentiality</td>
</tr>
</tbody>
</table>
QUESTIONS?