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The Quest for Culturally Appropriate Mediation in Developing  
Constructs – role of mandates in achieving effective dispute resolution

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# Mediation – focus ...



- Define the mediation imperative- the mandate / instruction
- Look into culturally appropriate mediation and how unconscious bias could be a barrier to achieving successful outcomes in effective dispute resolution

# Mediation – role of the mandate ....



- Mandate Legitimacy - every mediation needs to be based on a mandate that shapes the process and outcome sought.
- Research globally confirms mandates are treated very seriously by mediating organisations and mediators, as it ought to.
- Mandates serve several functions. They:
  - Confer legitimacy on a mediation;
  - Endow the mediator with authority and leverage;
  - Provide the mediator with instructions; and
  - Set the parameters of the dispute resolution process and outcome.

## **Example:**

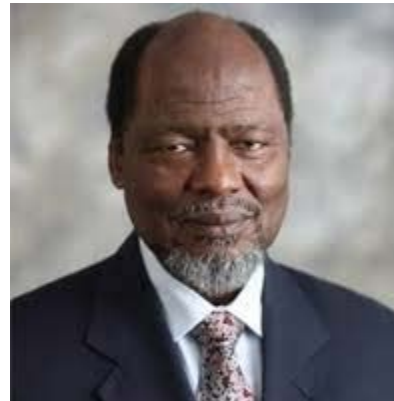
In African contexts for example, mediation mandates are typically contained in resolutions passed by the United Nations Security Council, the African Union's (AU) Peace and Security Council or sub-regional bodies that attempt to resolve specific conflicts.

# Mediation – the mandate ...

- A mandate is **an instruction** to the mediator. Mediators who deviate from their mandate risk being replaced.
- Mandates have **paradoxical effects**. They limit a mediator's flexibility and can greatly complicate the mediation. But they also give the mediator authority and leverage when trying to encourage cooperation between intransigent parties.
- In addition to the mandate issued by the mediating organisation, the mediator must also seek a mandate from the conflict parties. This is essential because mediation is a cooperative effort that cannot take place meaningfully without the consent of the parties.

## Case Study:

In a Madagascar case, SADC sidelined its mediator, former Mozambique President Joaquim Chissano, when he ignored the mandate by accepting that Ravalomanana could not return to Madagascar.



# Mediation – the mandate (c'tnue) ...

- Parties can withhold **consent** in different ways. They can:
  - Reject mediation emphatically
  - Reject the mediating organisation
  - Call for the mediator to be replaced
- Failure to obtain a strong mandate from the parties can weaken the mediator's authority and credibility. It can also cause domestic and international stakeholders to lose confidence in the mediation and give rise to rival peacemaking bids.

## Case Study:

The Movement for Democratic Change called for the Mediator to be changed during Mbeki's mediation for Zimbabwe.



# Mediation – cultural appropriate mediation ...



- Mediation outcomes can vary and differ in complexity due to cultural differences.
- Different cultures have set values and beliefs.
- When these come into play, mediators are challenged to draw on additional skills to assist parties reach a mediated outcome.
- Cross-cultural situations can seem daunting for some and seen to be an advantage by others. This highlights the importance of being culturally sensitive. Legal rights present an added difficulty.

## **Example:**

Significant cultural differences may alter the effectiveness of a mediated outcome.

Intercultural disputes, internationally or domestically, require a mediator to take cultural differences into consideration.

Mediation is primarily focused on effective communication with an eye to ensuring there are no legislative breaches. Communication methods differ globally, depending on the historical development, legal systems, ethnic and cultural backgrounds of each jurisdiction.

# Mediation – cultural appropriate mediation (c'tnue) ...



- When handling cultural aspects during mediation, mediators should be aware of their **bias** which is defined as a prejudice for or against something.
- Implicit bias describes when we have attitudes towards people or associate stereotypes with them without our conscious knowledge.
- Two of the most common problems identified in intercultural disputes are:
  - the **communication barrier**, and
  - **culturally-driven interests.**

## Examples:

A commonplace example of this is seen in studies that show that we frequently associate criminality with indigenous people without even realising that we are doing it. Mediators are not exempt from this trap of implicit bias.

Reference SA and African examples where key mediators were stood aside / replaced due to perceived bias

# Mediation – cultural appropriate mediation (c'tnue) ...



- Language as a social instrument reflects a culture.
- **Examples:**
  - The test of word association clearly shows that the meaning of words is culturally defined; whilst for basic concepts, such as food, associations across cultures are still rather similar, associated words may vary broadly for more complicated concepts.
  - As a matter of fact, some of the words may prompt positive associations in some cultures and negative ones in others. This is of crucial importance from the point of view of mediation since the outcome generally takes the form of a written agreement.
  - In addition, different attitudes to verbal and non-verbal communication are likely to complicate the communication process further: the direct, frank, and confrontational style prevalent in individualist, low-context societies can easily be misunderstood as rudeness and lack of respect by those from collectivist societies. What may be insignificant for some can be deplorable for others.



# Mediation – cultural appropriate mediation (c'tnue) ...



- **Bias:** are mediators able to detach themselves from their own cultural assumptions and values?
- Around the world, people communicate their intentions not only through the words they speak, but through tones, gestures, and body language. These signals are often made and interpreted subconsciously.
- Mediators may resort to interpreting parties' motivations through the lens of their own culture rather than grappling and empathizing with the cultures of the parties. Alternatively, mediators may ignore rather than explore their values and assumptions.

## Examples:

Interestingly for some Aboriginal cultural groups, interruptions are taken as a sign of disrespect and rudeness. A mutual expectation that each party will be able to speak without interruptions might need to be established in the introductory remarks of the mediator. Overt intervention may not always be appropriate.

# Mediation – conclusion ...



- Mediation as a worldwide dispute resolution tool should motivate mediators to broaden their knowledge and improve their skills in cultures where “we both win” is critical.
- It is crucial that a mediator is aware that culture will not be the same between disputants and consciously develop and improve their knowledge and skills to handle the process, under these circumstances.
- If the mediator fails to consider cultural factors, where these are a crucial element of the whole, disputants may have a very poor experience of the mediation process.

## Case Study:

The first Victorian Aboriginal Justice Agreement (AJA1 2000-2006) was developed in response to recommendations from the 1991 Royal Commission into Aboriginal Deaths in Custody and subsequent 1997 National Ministerial Summit on Indigenous Deaths in Custody.

Under the Aboriginal Justice Agreement’s Outcomes Framework, Goal 1.2 calls for Mediation capacity building. Specifically, a call is made to build capacity in mediation skills within ACCHOs and for community members to help resolve local disputes before they escalate.