

Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges



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MEDIATION IN BUSINESS-RELATED HUMAN RIGHTS DISPUTES: OBJECTIONS, OPPORTUNITIES AND CHALLENGES

Introduction

In his 2008 report to the United Nations Human Rights Council, Prof. John Ruggie, the Special Representative of the UN Secretary-General (SRSG) for Business and Human Rights, set out a three-part framework to advance a shared understanding of the complex interactions between companies and human rights. The framework, subsequently endorsed by the Human Rights Council, comprises three elements: the state duty to protect human rights from abuse by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedy.¹

With regard to the third pillar of the framework on access to remedy, Ruggie reflects in both his 2008 and 2009 reports on the respective roles of judicial and non-judicial grievance mechanisms. State-based mechanisms are emphasized as an essential part of the state duty to protect human rights. Company-level mechanisms are seen as crucial to the ability of companies to fulfill their responsibility to respect rights. Non-judicial mechanisms, Ruggie observes, whether administered by the state or other actors, should conform to a minimum set of process principles, summarized as legitimacy, accessibility, predictability, rights-compatibility, equitability and transparency.² With this understanding, Ruggie posits that non-judicial mechanisms – including those based on mediation of disputes – have an important role to play alongside judicial processes in providing remedy for human rights-related abuses by companies.³ Ruggie's conclusion is significant given the contrasting focus of much public discourse on adjudication – and particularly judicial processes – as the preferred, if not essential, means to achieve remedy and justice when human rights are at issue.

In this article I examine the basis for this popular view that mediation and human rights disputes are at best uncomfortable bedfellows, if not inherently incompatible. I highlight competing understandings of what a 'rights-based approach' should mean when defining pathways to remedy. I suggest that, contrary to how the term is used in mainstream dispute resolution discourse, its use in the development field opens up an understanding of how mediation can support and advance the enjoyment of human rights in practice. In this perspective, it becomes in many instances a complement to litigation or other adjudicative avenues for remedy and justice.

The article focuses on arguments over the relative merits of civil litigation and mediation as two options aggrieved parties may pursue directly. It largely sets aside the question of state prosecution for breaches of criminal law given complainants' very limited sway over the initiation of such processes. I do not in any way seek to suggest that mediation

¹ John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, (Geneva: United Nations, 7 April 2008), A/HRC/8/5, 20 Sept 2009 <<http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2008>>

² *Ibid.*, at 24

³ *Ibid.*, at 22

is a better option than litigation nor to downplay the significance of litigation. Rather, I argue that mediation can be a viable and legitimate alternative in a broad range of situations.

At the same time, just as the parties to a human rights-related dispute should be aware of the opportunities mediation might offer them, it is important they also know of its constraints. The second part of the article will therefore review three particular challenges to mediation in the context of human rights-related disputes with companies. These relate to the handling of power imbalances, capacity to drive systemic change and provision of transparency. I will assess the extent to which mediation has demonstrated an ability to meet these challenges in practice and suggest where further innovations are required.

Rights and Mediation: an unnatural alliance?

The view from the field of dispute resolution

The traditional literature on dispute resolution has maintained a careful distinction between ‘rights-based’ and ‘interest-based’ approaches in mediation. Disputes that engage legal or other rights – or are framed primarily in those terms – are seen as lending themselves to adjudicative, often court-based processes, “in which disputants present evidence and arguments to a neutral third party who has the power to hand down a binding decision.”⁴ This contrasts with ‘interest-based’ dispute resolution processes, which encourage the parties to look beyond legal rights to their underlying interests and “[treat] a dispute as a mutual problem to be solved by the parties”.⁵ Interest-based approaches are seen as the more natural domain and strength of mediation: a process involving a neutral third party who facilitates communication, negotiation and problem-solving by the parties to help them address the dispute constructively and move towards agreement on how to manage or, ideally, resolve it.⁶

At the same time, the theory and practice of mediation have sought to evolve to allow for the inevitable co-existence of rights and interests in practice. It has done so by defining different modes or styles of mediation to address each, according to the parties’ preferences or the exigencies of the situation. The key distinction made is between evaluative and facilitative mediation.

Evaluative mediation leans the process towards so-called ‘rights-based approaches’, and is indeed referred to by some as ‘rights-based mediation’.⁷ The evaluative mediator draws on law, industry practice or other authoritative sources to provide direction to the participants on appropriate grounds for settlement. Her experience, training and

⁴ William L. Ury et al., eds. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey-Bass, 1988), 7.

⁵ Ibid. 6

⁶ Carrie Menkel-Meadow et al., eds. *Mediation: Practice, Policy and Ethics* (New York: Aspen, 2006), 91

⁷ Alan Stitt, *Alternative Dispute Resolution for Organizations* (Ontario, Canada: John Wiley & Sons, 1998) 126 and Goldberg et al., eds. *Dispute Resolution: Negotiation, Mediation and Other Processes* (New York: Aspen, 2003), 303

objectivity are seen as validating this role.⁸ As such, this approach arguably moves towards a form of non-binding, persuasion-based adjudication. By contrast, facilitative mediation focuses more on an interest-based process and a less interventionist role for the mediator. The facilitative mediator focuses on enhancing and clarifying communications between the parties to help them decide themselves what to do, presuming that they are better placed to devise effective solutions than is the mediator.⁹

This view of a zero-sum tension between rights and interests when it comes to dispute resolution does not preclude a mediator from moving between evaluative and facilitative modes of interaction with parties to a dispute. But it does presume that the more rights are inserted into the process, the less room there is for interests. And with the growth of mediation in the commercial field, where legal considerations relate primarily to contractual rights, there has been growing traction for the idea that rights considerations get in the way of interest-based approaches and can legitimately and profitably be left outside the door of the mediation room.¹⁰

The view from the human rights advocacy field

This view has been echoed in the discussion of human rights-related disputes that arise between companies and individuals or communities. The international human rights advocacy community has typically insisted that human rights abuses by companies require adjudication-based remedial processes, preferably through the courts.¹¹ There are numerous, well-founded reasons for the call for improved adjudication in this field, including a desire to consolidate the hard-won international law status of human rights, to deter gross abuses of rights through the public – and potentially punitive – nature of the litigated process, and the reality that remedy for some rights abuses may be incompatible with a mediated process.¹²

Yet this support for litigation or other adjudicated processes has been frequently accompanied with a belief that mediation is inherently inimical to human rights, rather than a complementary means to remedy with its own strengths and weaknesses.¹³ This

⁸ Leonard L. Riskin, “Mediator Orientations, Strategies and Techniques” *12 Alternatives* 111, (1994): 111-114, reprinted in Menkel-Meadow et al., eds., *supra* note 6

⁹ *Ibid.*

¹⁰ Mike Perry, “A comment on ADR and Human-Rights Adjudication”, *Dispute Resolution Journal* May 1998, Vol. 53 Issue 2: 53 ; CPR Institute for Dispute Resolution, *supra* note 7, 27

¹¹ Coopération Internationale pour le Développement et la Solidarité, “Submission to the Special Representative of the UN Secretary-General on Business and Human Rights: Recommendations to reduce the risk of human rights violations and improve access to justice”, 24 Sep 2009 <<http://www.business-humanrights.org/SpecialRepPortal/Home/Submissions/2008>>; “Joint open letter from NGOs and individuals to the SRS”, Oct 2007, 24 Sept 2009 <<http://www.business-humanrights.org/SpecialRepPortal/Home/Submissions/2007>> ; “Amnesty International submission to the UN Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises”, July 2008, 24 Sept 2009 <<http://www.amnesty.org/en/library/asset/IOR40/018/2008/en/fa1e737c-6ad9-11dd-8e5e-43ea85d15a69/ior400182008en.html>>

¹² Thomas D. Barton, “Creative Problem Solving and Human Rights” 26 *ABA Human Rights* 17 (1999)

¹³ John Braithwaite, “Building Legitimacy Through Restorative Justice,” in T. Tyler (ed), *Legitimacy and Criminal Justice: International Perspective* (New York: Russell Sage, 2007), 146-162.

antipathy to mediation is premised on various factors: the character of human rights both as legal rights and as rights inherent to the individual that cannot be waived; the actual or perceived power imbalances between victim and perpetrator; the public, norm-setting role of the civil law suit, particularly in common law systems; and the appropriate role of the state in addressing abuses that raise questions of criminal liability. Owen Fiss' seminal 1984 article 'Against Settlement' sets out the arguments forcefully with reference to the US context. Fiss argues that "the dispute-resolution story trivializes the remedial dimensions of lawsuits". He stresses the role of public resources and public officials in the judicial process, in line with the judicial system's duty "not to maximize the end of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them." This duty, he argues, is not discharged when the parties reach settlement outside the courts.¹⁴

So if many in the mediation and legal worlds see either a tension or an incompatibility between the defense of human rights and the process of mediation, and many in the human rights advocacy community conclude the same, is that not the end of the story?

In fact, no. Both the specific nature of human rights and the creative potential of mediation to encompass interests suggest the relationship between the two may in many instances be one of mutual benefit and reinforcement. The following section explores how this might be the case.

'Rights-based approaches': two distinct concepts

At root, human rights are about the dignity of the individual. The preambles to the two founding international human rights conventions, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, state that the rights they articulate "derive from the inherent dignity of the human person". Inherent human dignity requires the enjoyment of the rights articulated in these and subsequent human rights treaties. It has also been recognized increasingly that human dignity requires the empowerment of individuals to manage their lives, welfare and destinies, within the appropriate constraints of others' human rights and of society.¹⁵

This latter, more process-oriented dimension of human rights – an addition and complement to the outcome-oriented treaty provisions – has gained particular traction in recent years. The 2003 'Stamford Principles' set out a common understanding among UN agencies and programmes of what a 'rights-based approach to development' should entail. The UN Office of the High Commissioner for Human Rights (OHCHR) has defined it as a "conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights." It therefore incorporates process principles of

¹⁴ Owen Fiss, "Against Settlement" 93 *Yale Law Journal* 1073 (1984): 1085

¹⁵ "United Nations Declaration on the Right to Development" A/RES/41/128 (4 December 1986), Article 1

accountability, empowerment, participation, transparency, non-discrimination and attention to vulnerable groups.¹⁶

Under this articulation of ‘rights-based approaches’ from the human rights and development context, processes that include, involve and empower are emphasized and valued for their ability to help people shape their own lives and welfare and (re)claim their dignity. Principles of accountability and the rule of law also play an important role, requiring that there should be access to judicial or other adjudicative remedy for breaches of substantive human rights. Yet the OHCHR makes clear that non-adjudicative mechanisms for redress may also be important, and should be developed and strengthened in parallel:

- “Through strengthening access-to-justice components within development policies and programmes, starting with strengthening capacities for data collection and analysis, monitoring, and ensuring accessible avenues (formal *and informal*) for redress when rights are violated...
- By encouraging alternative law groups, paralegals and related civil society organizations to *help mediate conflicts*, assist people in their interactions with the law and facilitate dealings with bureaucratic processes...”¹⁷

In short, informal, mediation-based processes of remedy take their place alongside formal and adjudicative processes in this articulation of how human rights should inform the development of individuals and societies.

This understanding of ‘rights-based’ is notably distinct, then, from how the phrase has been used in the mediation literature. In the dispute resolution context ‘rights-based’ approaches assume a dominant need or desire by the parties to focus on vindicating rights that are defined in positive (national) law. This in turn has led to a presumption that remedy requires processes driven primarily by assessment, evaluation or adjudication. In the development context, ‘rights-based’ has taken on a broader perspective of both outcome and process: achieving, advancing or restoring the enjoyment of rights as an outcome, while empowering rights-holders to participate actively and shape outcomes that also reflect their interests and human dignity.

This latter understanding starts to point the way towards some of the strengths that mediation might hold in the context of disputes involving human rights. First and foremost, mediation enables those who believe their rights have been abused to engage in the process of seeking remedy – to take a role in defining what the realization of their human rights or remediation for harms caused should mean in practice. Mediation alone is unlikely to be an adequate vehicle for justice where there is corporate complicity in crimes such as torture, extrajudicial killings or slave labour. State prosecutions have a

¹⁶ Craig Mokhiber, “Towards a Measure of Dignity: Indicators for Rights-Based Development,” *Statistical Journal of the United Nations Economic Commission for Europe* 18, 2001: 155-162

¹⁷ United Nations Office of the High Commissioner for Human Rights, “Frequently Asked Questions on a Human Rights Based Approach to Development Cooperation” (New York and Geneva: United Nations 2006), 20, emphasis added.

crucial role to play in such cases.¹⁸ But most disputes between individuals or communities and companies that involve human rights do not engage these issues. More typically, they raise labour rights standards, discrimination, the right to access safe drinking water, the right to adequate housing, food or the highest attainable standard of health, freedom of expression or privacy.

What sets these human rights apart from the likes of torture and slavery? Three connected qualities come to the fore: their qualified nature; the leeway they afford for contextual interpretation; and the room for varied understandings of remedy.

Qualified and competing rights

Most human rights are ‘qualified’, meaning that they are capable of limitation either where they knock up against other human rights (of the same or other individuals) or in other limited circumstances provided for in the treaties.¹⁹ They are therefore less likely to raise questions of criminal liability, in contrast with violations of ‘absolute rights’ such as the prohibitions on torture and slavery. Decisions on how to balance competing rights fall primarily to government. Hence we see courts deciding how one person’s right to privacy should be weighed against another’s right to information and legislatures deciding whether to limit freedom of expression where it would amount to hate-speech.

Where disputes that arise between companies and communities or individuals represent a tension between different rights, it is not for the company to decree how different rights should be treated – it has no legitimacy to do so. Yet it would be hasty to conclude that a judicial process is therefore the only appropriate avenue, or necessarily the best one in terms of remedy.

Take a western apparel company that discovers that one of its suppliers in South Asia has sub-contracted work to young children in illegal facilities, in breach of the code of conduct required of it by contract. This represents a clear breach of the children’s rights to education and of minimum age requirements for work under international human rights standards. The company might wish to wash its hands of any association with the abuse by just cutting ties and walking away. A court might order payment of a fine. In either scenario, experience suggests that the children in question will merely go on to similar work for other factories to worse forms of abuse such as child prostitution. Their and their families’ survival depends on the money they bring in: such are the realities of the poverty often linked to such cases. The rights to food, health and housing of the children and their families may be in the balance with the children’s rights to education, to security and not to be economically exploited.

¹⁸ Of course, in jurisdictions where civil action for these kinds of abuses is also possible, mediation can still have an important role to play, as discussed below – see pp. 11-12

¹⁹ The ICESCR allows for further limitations ‘solely for the purpose of promoting the general welfare in a democratic society’; the ICCPR contains provisions for limited derogations from the rights in the event of a public emergency and subject to reporting to the UN.

Where such situations have arisen, the creative solutions have required working with key players, where possible including government and intergovernmental organisations as well as representatives of the victims, to negotiate sophisticated solutions. These might involve measures to ensure the children's families can sustain themselves while providing access to education for the children and seeking industry-wide responses to the systemic problem of abuse.²⁰ Such processes – negotiated or mediated, but necessarily based in collaborative problem-solving – can bring into the discussion an understanding of the broader set of rights in play (beyond those currently being breached), combined with an understanding of the victims' interests, to forge a balance that optimizes remedy.

Leeway for interpretation in practice

The second factor in favour of mediation's potential role in corporate-related human rights disputes is the leeway that most human rights afford for contextual interpretation. This might also be understood in terms of 'open spaces' within the boundaries of minimum human rights standards. Ellen Waldman articulates this concept in describing what she calls 'norm-advocating' forms of mediation. In these processes, the mediator takes the role of educating the parties about the legal and ethical norms relevant to their dispute and to some degree safeguards those norms. At the same time, "considerable negotiation may take place in the open space which normative guidelines leave uncertain".²¹

In the context of business and human rights disputes, this "open space" may be broad. Consider a situation where a construction or mining project requires that a community be relocated. Human rights standards prohibit forcible relocation without due compensation. It may be that the law defines compensation levels for homes and agricultural land and that these are duly accepted by those being relocated. Yet companies have sometimes found that paying legally-prescribed levels of compensation can still leave them open to allegations of rights abuse. This may be due to the way that compensation has been distributed: for instance through a community leader, sidelining others, or through heads of household, disenfranchising women. Or it may be because compensation levels merely reflect the basic cost of a house or one year's loss of crops on cultivated land. This might ignore the accompanying dislocation of communities, the loss of access to religious or cultural sites, the value of fallow land, future earnings, and the sustainability of livelihoods.²²

²⁰ For example, see Gap Inc., "Combating Child Labour in the Garment Industry: July 2009 Update", 24 Sept 2009 <www.gapinc.com/GapIncSubSites/csr/.../Addressing_child_labor_2009.pdf>; "Reebok and the US Fund for UNICEF Partner to Help Put Child Laborers in School", UNICEF 6 May 2004, 25 Sept 2009 <www.reebok.com/Static/global/initiatives/.../Reebok_UNICEF.pdf>

²¹ Ellen Waldman, "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach," 48 *Hastings Law Journal* 703-769 (1996-1997): 755

²² Paul Kapelus, Graeme Rogers, "Newmont Ahafo Community Relations Review" 10 October 2008, 11-12, 26 Sept 2009 >http://newmontghana.com/index.php?option=com_content&task=view&id=224&Itemid=2>; and "Cerrejón Coal and Social Responsibility: An independent review of impacts and intent" Bogota, Feb 2008, 26 Sept 2009 <http://www.cerrejoncoal.com/secciones/CERWEB/ENGHOME/MENUPRINCIPAL/NUESTRACOMUNIDAD/COMITEIND/seccion_HTML.jsp>

Recourse to the courts may offer support, yet the forms of remedy available are constrained. Assuming there is a legal cause of action and a finding in favour of the complainants, a typical remedy will be monetary compensation, although injunctions to halt harmful activity or orders for forms of restitution and certain other options may be available. These remedies can have an important effect, and an injunction may be particularly important in freeing up time and space for additional solutions to be found. Yet it is generally only through negotiation and mediation that there are substantial chances to explore more creative forms of remedy, including options such as retraining for alternative employment, agreeing safe ways to access culturally-significant areas, or working out how to ensure women are not disadvantaged. And, in line with ‘rights-based approaches’ as understood from the development field, this process can empower those impacted and include those groups otherwise at risk of marginalization. With a place at the table, they can articulate their interests as to how they understand their rights in practice. The company in turn is better able to understand the ramifications of its activities and the range of alternatives for reaching an agreed approach.

Such ‘open spaces’ within the recognized bounds of human rights standards are quite typical, particularly when it comes to many economic and social rights. The mediation-based processes established in the context of disputes with communities surrounding BHP Billiton’s operations at its Tintaya mine in Peru (now owned by Xstrata) bore witness to this reality. The so-called Dialogue Table set up four working commissions, with broad representation from the stakeholders involved, to address disputes over loss of land, environmental impacts, human rights violations and sustainable development. With the help of the facilitator, Dialogue Table participants identified key principles and ground rules for the resolution process: participation, consensus-seeking, joint fact-finding and confidentiality of the discussions.²³ The process led ultimately both to agreement on how to address or resolve the immediate issues as well as an agreement in 2004 to keep the Dialogue Table in place to address any future concerns or disputes that might arise.²⁴ It is still operating today.

In the human rights and business context, a further situation arises in which negotiation and mediation may prove important in addressing disputes. Companies can find themselves operating in countries where national law not only doesn’t fully reflect international human rights standards, but actively conflicts with them. For example, prohibitions on workers freely joining unions conflict with the right to freedom of association; national prohibitions on women mixing unaccompanied with men outside their family conflict with women’s right to non-discrimination, including in the work place. Companies have little option but to abide by domestic laws (albeit they may also be able to lobby for their amendment). Therefore, when faced with demands for freedom of association (and preferably before they even arise!) their best approach is often to seek ways to honour the spirit of international standards while also complying with domestic law.²⁵ The creative approaches this requires – for instance helping workers form their

²³ V. Kasturi Rangan, Brooke Barton and Ezequiel Reficco, “BHP Billiton and the Tintaya Copper Mine” Harvard Business School Case No. 506-023 (Boston: Harvard Business School Publishing, 2006)

²⁴ Ibid.

²⁵ John Ruggie, “Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and

own representative structures and supporting training and education on labour rights – may best be identified through collaborative approaches so as to avoid unwittingly leaving workers exposed to further, avoidable repercussions beyond the workplace.

Different perceptions of remedy

The third consideration that allows mediation to play a valuable role in corporate-related human rights disputes is the differing understandings of what constitutes remedy. The concept of remedy has its root in the Latin verb *mederi* meaning ‘to heal’. The dictionary definition includes both a legal process that can provide for the righting of wrongs, and much broader ideas of rectifying, countering, repairing and restoring.

Individuals can differ as to what counts as remedy for their own grievances. As noted, remedies available through courts typically reflect a range of possibilities, including an injunction, orders for restitution in kind, compensation or similar. In some jurisdictions, litigation can also set precedents and impose punitive damages, and it offers public profile to issues. Any or all of these considerations may be important to a complainant when considering how to access remedy.

However, the prospect of a vindication of rights playing out in the courts is in practice a rare phenomenon. Research in the US context found that in 1980 only 0.5% of all grievances, 7% of all claims and 11% of all disputes led to a court filing.²⁶ And the overwhelming majority of cases that do go to court settle before a verdict is reached. Furthermore, protection of some complainants’ rights may first and foremost require that they *not* be put in the public spotlight through a judicial process.²⁷ Add to this the reality that the adversarial cut and thrust of a court process – at least as it typically plays out in common law systems – risks leaving complainants more humiliated and reduced in dignity than they began. The harsh cross-examination, vilification and implicit racial stereotyping of Nigerian plaintiffs suing Chevron for loss of life and injury has been cited as a case in point, with the jury finding ultimately in favour of the company.²⁸

Regardless of these considerations, complainants may simply have broader ideas of what constitutes remedy, such as reinstatement to their job, assurances that an incident will not recur, recognition and an apology, or alternative means to restore their livelihood or well-being other than monetary awards. It may be that it is the opportunity to have their perspective heard by those responsible for an abuse, directly at the mediation table, that drives their sense of remedy. Martyn Day, an internationally-renowned litigator for victims of alleged human rights abuses by governments and companies reflects as follows

Remedy” Framework’ (Geneva: United Nations, 22 April 2009), A/HRC/11/13, 17-18, 15 Sept 2009
<<http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2009>>

²⁶ Richard E. Miller and Austin Sarat, “Grievances, Claims and Disputes: Assessing the Adversary Culture,” *Law & Society Review* 15: 537, 534, cited in Robert A. Kagan, “Can Individuals Get Justice from Large Organizations? – Notes Towards a Research Agenda” (Denver, CO: May 2009), 2

²⁷ Perry, *supra* note 11, at 52

²⁸ “Bowoto v. Chevron: The Oil Men and the Juju Man” Huffington Post 14 November 2008, 29 Sep 2009
<http://www.huffingtonpost.com/scott-gilmore/bowoto-v-chevron-the-oil_b_143741.html>

on a mediation process between Iraqi men tortured by British soldiers in Iraq and a senior representative of the UK military, at the culmination of the civil suit:

“The mediation enabled these men to participate in the negotiations but it also produced the crucial apology. If the case had gone to trial, it is highly unlikely that it would have led to as positive an outcome. Most litigants, even if they are successful, emerge from cross-examination feeling sullied, and a court could not have brought about the apology. All mediations involve an element of compromise, and it is always possible that agreement may not be reached; but with goodwill, and a good mediator, that is unusual. As a process that empowers claimants, and ensures they are fully involved, a mediation beats a court trial hands down.”²⁹

This account reflects what some have classified as ‘interactional justice’ alongside ‘distributive justice’ (reflecting fairness of outcomes and consequences) and ‘procedural justice’ (reflecting fairness of process), whereby the provision of explanations, honesty, politeness, effort and empathy may also play a significant role in the process and experience of remediation.³⁰

In practice, rights and interests interact in complex ways in individuals’ lives. As one observer writes in the context of discrimination disputes, “As people who feel harassed are very different from one another, their notions of justice vary. A realization of justice, therefore, must incorporate an individual’s rights with his or her interests. Most human-rights disputes are value conflicts that include interests. Challenges to the validity of negotiated settlements of human-rights disputes stem from the oversimplified analysis of interests assumed by the rights-based model,” (using the term as in traditional dispute resolution discourse noted above).³¹

Mediating human rights disputes – the opportunities and the challenges.

I have argued that by understanding human rights not just as rule-based outcomes, but also as process principles that reflect ‘rights-based approaches’ from the development discourse, the space opens up to appreciate mediation as a powerful option for resolving many human rights-related disputes between business and society. This understanding of human rights moves away from an absolutist vision of rights that some have suggested is particularly characteristic of US society.³² It therefore moves us beyond a view of mediation as accommodating rights solely at the expense of interests. It suggests that by recognising and creating space in which interests can come to the fore, and by understanding how interests are often intertwined with the practical experience of rights,

²⁹ Martyn Day, Leigh, Day and Co.: taken from a note shared with the author, 2008

³⁰ Stephen S. Tax et al., “Customer Evaluations of Service Complaint Experiences: Implications for Relationship Marketing” *The Journal of Marketing* 62, No.2 (April 1998): 63. See also Luc Zandvliet and Mary B. Anderson, *Getting it Right: Making Corporate-Community Relations Work* (Sheffield, UK: Greenleaf Publishing, 2009), 17.

³¹ Perry, *supra* note 11, at 53

³² Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991)

we may strengthen the sustainability of dispute resolution processes. Thus, outcomes not only reflect basic human rights standards but also tailor the form of their realization to the particular circumstances and support processes that empower and lend dignity.

All this said, this article does not seek to suggest that mediation is *per se* a *better* process for the remediation of human rights abuses than judicial determinations, including litigation. Rather the emphasis is on its legitimacy as an *alternative* and understanding the strengths it may offer. It is therefore important to consider where the real challenges for mediation may lie, if they are not, as argued here, in the very nature of human rights. Three issues in particular require consideration: power balances; systemic change; and transparency. The following section considers these in turn.

Power balances

Of these three issues, perhaps the most has been written about power balances. Fiss highlights this consideration in his objection to dispute resolution, arguing that “the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant”. While acknowledging that imbalances of power can distort judicial decision-making as well, Fiss concludes that a judge is best placed to lessen the impact of such inequalities.³³

Various practitioners and academics have contested this distinction between the judicial and alternative dispute resolution processes.³⁴ First, Fiss is prepared to put faith in a judge as best equipped to redress power differentials between the parties. Yet in many instances of disputes involving companies and communities, the reality suggests otherwise. The law may itself be weighted towards the corporate position, with human rights less present and less clear in the law than protections for investors and commercial contracts. Jurisdictional barriers may enable companies to play out procedural objections for years, making the process too expensive and lengthy for complainants to achieve remedy that is meaningful for their lives. And the capacity of large companies to employ banks of top lawyers – in-house and external counsel – versus the typically small-scale, less well-resourced legal representation of the complainant, considerably constrains a judge’s scope to balance inequalities, even assuming the desire to do so.³⁵

In a mediation setting, the scope to limit advisers on both sides to equal numbers; the predisposition to engage the parties directly, rather than just through lawyers; the ability for human rights to be addressed in the process (whether or not they are articulated in national law); and the ability of the mediator to convey information equally to both parties, can arguably go further to mitigate such disparities than the judge is able. This all

³³ Fiss, *supra* note 15, at 1077

³⁴ See, for example, Barton, *supra* note 13; Tara Parker, Human Rights Dispute Resolution: Protecting the “Public Interest” (1999), 30 Sept 2009 <<http://fcj-fcjc.org/clearinghouse/drpapers/parker.htm>>; Gay R. Clarke and Iyla T. Davies, “Mediation - When is it not an Appropriate Dispute Resolution Process?” *Australian Dispute Resolution Journal* (1992); Jay Folberg and Alison Taylor, cited in Goldberg et al., eds., *Dispute Resolution: Negotiation, Mediation and Other Processes* (New York: Aspen, 2003), 156

³⁵ Clarke and Davies, *supra* note 34, at 72; Ruggie *supra* note 24, at 22-23

depends, of course, on the quality of the mediator. Yet the same proviso applies to judges in the many jurisdictions where business-to-society disputes play out.

Power balances, of course, involve much more than financial power. They include factors such as status, education, literacy, access to information, security and confidence. Mediation has an innate capacity to address these power imbalances, not least due to its nature as an empowering process. Relevant qualities include the voluntary nature of the process; the setting of ground rules that include respect for human dignity and the right to speak uninterrupted; the confidentiality of the process, providing a safer haven to express views and get to the underlying issues behind the dispute; and encouragement to the parties to treat each other as equals.³⁶ Other factors often highlighted include the power of either party to walk away; the mediator's role in providing information to the parties; the allocation of equal time to both sides; the possibility of shuttle diplomacy as an alternative to face-to-face meetings where direct interaction might intimidate one party; and the availability of male-female co-mediation teams.³⁷

David Bryson, writing from the experience of the Equal Opportunity Commission of Victoria, Australia, articulates very particular lengths the Commissioner can go to in empowering both sides, including informing them about the conciliation process, the law, and how past complaints have been resolved; referring the parties to lawyers, unions or other advocates; and educating them on how to engage in the process.³⁸ Echoing the experience of Martyn Day, cited above, he reports having “seen very frightened complainants, who have sometimes been through ghastly sexual harassment experiences, for example, be empowered by the conciliation experience to regain their self-respect and confidence”.

In similar vein, one former General Electric employee found that his drawn-out lawsuit against GE for serious injuries suffered at work led to increasing frustration and a sense of powerlessness to achieve the remedy he strongly believed he was due. It was through mediation that he found the voice to convey how his life had been impacted. The mediator, endorsed by the employee, reports that it was precisely in the mediation forum, where rules of evidence and other courtroom constraints did not apply, that the employee was able to confront GE representatives and make his experience of the events fully understood, “reclaiming centre ground from those who had let [his grievance] become technical” in the context of a purely legal exchange.³⁹ His intervention led directly to a change in position by the company's representatives, marking the start of a move toward resolution.

This brief summary of the debate on power balances in mediation and litigation is again not to propose that mediation is necessarily the better balancer of power than judicial

³⁶ Clarke and Davies, *supra* note 34, at 74

³⁷ Parker, *supra* note 34, also citing Howard Gadlin, “Mediating Sexual Harassment” in Robert Shoop et al. eds., *Sexual Harassment on campus* (Toronto: Simon and Schuster, 1997), 191

³⁸ David Bryson, “Mediator and Advocate: Conciliating Human Rights Complaints” *Australian Dispute Resolution Journal* 1(1990): 136-142

³⁹ Podcast IDN 70: “A Personal Injury Mediation Seen From Three Sides” 1 May 2009, <<http://www.cpradr.org/NewsArticles/Podcasts/tabid/319/Default.aspx>>

processes. Rather it is to reflect that rich experience has shown that in some – perhaps many – instances, mediation will have at least as good a claim on being able to tackle even extreme power imbalances as will the judicial process. As such it remains a legitimate and potentially valuable alternative. This said, the field would be further strengthened if there were better provision for free legal and other expert advice to complainants interested in mediation, comparable to the legal aid available in some states to plaintiffs in lawsuits.

Systemic Change

The second challenge for mediation of human rights-related disputes has been the risk that confidential, piecemeal settlements may preclude considerations of the wider public interest in the realization of human rights, and inhibit the advancement of systemic change.

Human rights are a public good and an individual complaint or dispute may have much wider ramifications for a community or society at large. For example, resolving incidents of racial abuse through individual, confidential dispute resolution processes, however worthy in their immediate terms, may come to substitute for action that would address the wider phenomenon of racism. Fiss articulates the point elegantly: “Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals”.⁴⁰ In other words, it aims at systemic change towards a better, more rights-compliant, rights-respecting society.

A repeated concern of human rights advocacy organisations with regard to companies has been the need to achieve systemic change that dramatically reduces the possibility of corporate abuse of human rights. This, they argue, can only be achieved by projecting instances of abuse onto the public stage through litigation and campaign, and through the setting of legal precedents that warn and deter others. Settlements behind closed doors – at least those that are not preceded by a lawsuit and accompanying publicity – will simply serve to delay the advent of such wholesale shifts in corporate practice.⁴¹

Other observers question the legitimacy of placing a perceived public benefit above the aggrieved individual’s preferred course of action, arguing that “[t]he sensitive advocate must resist making a reluctant client the champion of a human-rights issue through the judicial process”.⁴² To do otherwise would arguably turn any *right* to remedy through the courts into an *obligation* to seek remedy through the courts.

This discussion reflects in part the age-old debate over the nature of justice: whether and how far it should favour solutions – including privately agreed solutions – that may satisfy and have restorative benefit for the parties, over a broader accounting to society for the

⁴⁰ Fiss, *supra* note 15, at 1089

⁴¹ “Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms: Report of 20-21 Nov 2008 consultation,” 2, 22 September 2009 <<http://www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops/Multi-stakeholderconsultations/2008>>

⁴² Perry, *supra* note 11, at 54

upholding of public goods (assuming the two to be in tension). This is not the place to pursue that complex debate. Yet recognizing that it is a legitimate debate is in itself important. So too is moving beyond assumptions that a particular concept of justice is tied necessarily and uniquely to either adjudication or mediation. The discussion demands a more nuanced exploration of the alternative processes and how they may be used to meet particular ends. And for those convinced of the beneficial role that mediation can play in many rights-related disputes, it demands an examination of how individual remedy can be married with the obvious benefits of contributing also to systemic change.

The experience of national human rights institutions is interesting in this regard. These bodies are intended both to protect and remedy individuals' human rights and to serve the wider public interest in advancing the protection of rights. Some such institutions take the view that systemic change is in fact most effectively achieved directly through the mediation process. They suggest that high-profile punishment of those who breach human rights does not necessarily change their behaviour, nor that of others. Rather, processes that enable perpetrators to understand their impacts can be more transformative, both in the instant case and by the example their altered behaviour then conveys to others.⁴³ Braithwaite underlines that human beings tend to make sense of their experience or awareness of injustice through stories, which typically get squeezed out of the courtroom by legal abstractions, but which can play a crucial role in building cultures respectful of rights.⁴⁴

Reflecting this approach, the Australian Employment Discrimination Commissions in the 1980s (later succeeded by the Human Rights and Equal Opportunities Commission), sought to use education and persuasion *within* the mediation experience as a means to transform behaviours with long-term effect. "The choice of conciliation as the appropriate mode of settlement of discrimination complaints was deliberate. Both the ILO and Australia laid stress on the importance of education and persuasion rather than upon legal sanctions and legal procedures as the best way to change attitudes and prejudices in society".⁴⁵

The Kenya National Human Rights Commission is one of a number of human rights institutions that uses tools *outside* the mediation process to fulfil its role in advancing systemic change. While individual disputes may be mediated in confidence, issues that the Commission believes raise systemic concerns may be made the subject of a public inquiry and a resulting report to the government. Such was the case when repeat allegations of human rights abuses by the salt mine industry in Malindi District, arose. The Commission launched a public inquiry that ran over five days. This provided a public platform for voices to be heard and grievances aired; it incorporated field investigations; actively promoted education on human rights, good practices in work places and

⁴³ Braithwaite, *supra* note 14, at 148-149. Also see address by Prof. John McMillan, Commonwealth Ombudsman, to conference on 'Legislatures and the Protection of Human Rights', University of Melbourne, Faculty of Law, 21 July 2006

⁴⁴ *Ibid.*, 152-153

⁴⁵ Eve C. Landau, "Conciliation as a Mode of Settlement of Discrimination Complaints (The Experience of the Employment Discrimination Committees)" *Adelaide Law Review* 11 (1988): 269-270, emphasis added.

communities, and rights-based approaches to development; and produced conclusions and recommendations with the “aim to galvanise policy, legislative and administrative action by institutions to ensure that the community of Magirini [could] begin to effectively exercise its rights and improve its people’s livelihoods”.⁴⁶

Similarly, the Telecommunications Industry Ombudsman (TIO) in Australia, an independent body that can address complaints about companies within the industry, including complaints that raise human rights issues, deliberately looks for systemic issues in its work. They can be identified by consumers or their advocates, or by the TIO on the basis of one or more complaints received. The TIO will seek to address systemic problems directly with the company involved, through investigation and the proposal of a resolution.

These are all third-party institutions that address complaints or disputes involving companies and/or government. When it comes to intra-organisational dispute resolution mechanisms, the drivers and tools for systemic change may be different. Robert Kagan has suggested three factors that might drive the move to link individual claims processes with systemic change: market forces that demonstrate commercial benefit from addressing systemic problems; a desire to avoid government regulation should the organization fail to address such problems; and the impetus from lawsuits that go against the company.⁴⁷

In the case of Chevron’s operations in the Niger Delta, it is reasonable to surmise that both the risk of lawsuits and the potential benefits to the company from reduced interruptions to their operations were in part responsible for their decision in 2008 to use mediated processes to help improve relations with local communities. Their prior efforts to support development in the area had still left residual conflicts and grievances in place, due in part to the company’s unilateral approach to deciding how to spend its funds. In 2008 and 2009, the company took part in new, collaborative processes, facilitated by a local third party with international expert support. These reached agreement on general memoranda of understanding with communities, including how grievances will in future be handled.⁴⁸ The mediation process in this case appears to be both product and cause of systemic changes in the company’s approach to dealing with the communities. It aims at a holistic approach to relationship building, social investment and dispute resolution with communities, empowering communities themselves to become partners.

In addition to Kagan’s three proposed drivers behind institutions linking individual dispute processes with systemic change, a fourth driver might be the professionalisation of

⁴⁶ Kenya National Commission on Human Rights, “The Malindi Inquiry Report: A public inquiry into allegations of human rights violations in Magarini, Malindi” (Kenya: KNCHR, 2006), 184

⁴⁷ Robert A. Kagan, “Can Individuals Get Justice from Large Organizations? – Notes Towards a Research Agenda” (Denver, CO: May 2009), 19

⁴⁸ David Kovick and David Plumb, “Engaging Stakeholders in the Niger Delta – May 2009 Update”, 29 Sept 2009 < <http://cbuilding.org/publication/article/2009/engaging-stakeholders-niger-delta-may-2009-update>>; “Facilitation of Company-Community Partnerships”, 29 Sept 2009 <http://www.nnfng.org/Pages/Social/Compcomm.aspx>; 29 Sep 2009 <<http://www.chevron.com/countries/nigeria/inthecommunity/>>

the dispute resolution function itself: that is, the inherent professional interest of a sufficiently independent mediating body in advancing more effective processes.

The Center for Cooperative Resolution at the National Institutes of Health (NIH), for example, has pushed the boundaries of how mediation can marry the resolution of individual disputes with systemic change within a single organization. The work of the NIH Ombudsman, Howard Gadlin, has sought to reframe the conflict resolution debate, arguing that the current approach “locks in overly narrow assumptions about the relationship between conflict resolution and rule-of-law principles.” The Ombudsman’s work purports to show “that non-adjudicative conflict resolution can...both resolve individual, private disputes and generate systemic solutions and public norms...by explicitly and carefully linking (but not merging) individual and systemic conflict resolution”.⁴⁹

Gadlin is generally not dealing with human rights issues in his work, and yet the dynamic interplay he proposes between the resolution of individual disputes and the recognition and treatment of systemic issues appears viable also where human rights are in play. He illustrates how efforts to identify root causes of disputes through mediation can “lead beyond the confines of a particular dispute” to the identification of “patterns, recurring issues, and problems that cannot be addressed at the level of the individual case.” These point to broader systemic issues that the organization itself needs to address through policies, procedures, training or other means. Yet this recognition of a wider problem can also benefit the parties to the immediate dispute, helping “reframe their understanding of what is causing the problem, and why the problem is one that warrants attention”.⁵⁰ The identification of systemic issues across the organization is therefore not only a product of mediating the immediate dispute, but can integrally support its effective resolution. As discussed below, to the extent that intra-institutional systemic learning can usefully be given a public face, it may also contribute to broader systemic change within a professional field or business sector.

Transparency

Absent transparency, assertions of the capacity of mediation both to support solutions compatible with human rights and to engender systemic change will always be subject to skeptical responses. Identifying the right levels of transparency is the third significant challenge that mediation faces in terms of its credibility as a pathway for addressing human rights-related disputes.

Confidentiality is an essential hallmark of the mediated process. It is this ‘safe haven’ that enables the parties to move beyond ‘position-based’ bargaining that tends to a zero-sum view of all rights. It helps them to explore underlying concerns, root cause issues, and interests that are often intertwined with rights and shape the experience and realization of them in practice. Confidentiality may also be important to protect an individual

⁴⁹ Susan Strum and Howard Gadlin, “Conflict Resolution and Systemic Change” *Journal of Dispute Resolution* 1 (2007): 3

⁵⁰ *Ibid.*, 38

complainant from exposure to further abuse or adverse effects, and may therefore serve to safeguard rights.

Just as confidentiality is a means to the particular and important end of enabling parties to reach agreement, so transparency must be a means and not an end in itself. The ends that transparency can most clearly serve in the context of dispute resolution are two-fold:

- (a) enabling public confidence that the outcomes of such processes respect minimum human rights standards and that complainants are not being pressured to concede these rights;
- (b) enabling others in society to benefit from a growing body of knowledge of how human rights disputes are being resolved, with the objective of disseminating the learning and supporting future dispute prevention.

The question of public confidence in the outcomes of mediations involving human rights issues requires first an acceptance that mediation can be compatible with the realization of human rights in *theory*. This issue was discussed in the first part of this paper with the conclusion in favour of mediation's positive role. The second question, then, is how far an organization should go to provide transparency such that public observers can be assured that this is also the case in *practice*.

Experience suggests that the more public confidence an institution carries, the less demand there is likely to be for transparency to prove that outcomes are not undermining standards. Well-respected labour rights dispute resolution bodies such as the Advisory, Conciliation and Arbitration Service in the UK or the Commission for Conciliation, Mediation and Arbitration in South Africa, may face limited demand for public transparency about the outcomes of dispute resolution processes they mediate (albeit many disputes they mediate will already be in the public domain). Their independence, the quality of staff, and their track records in dispute resolution no doubt all play into this broader public confidence in the process. Their public reporting therefore focuses on indicators such as how frequently their services are used, rates of resolution of disputes, and assessments of their public reputation. CCMA performance measures explicitly include the promotion of social justice while ensuring compliance with legislation.⁵¹ ACAS goes so far as to publish aggregate figures for individual disputes conciliated, broken down according to the category of complaint – such as race discrimination, disability discrimination, equal pay and unfair dismissal – as well as similar figures for collective disputes mediated.⁵²

Other organizations may provide some transparency about the outcomes of processes they mediate in order to build legitimacy and a positive reputation. The Compliance Advisor/Ombudsman (CAO) of the World Bank Group can mediate disputes between corporate clients of the International Finance Corporation (IFC) or the Multilateral Investment Guarantee Agency (MIGA) and communities impacted by projects they support. It publishes summaries of how disputes are resolved and reports at key points in

⁵¹ CCMA Annual Report 2007/08 (South Africa: 2008), 12, 9

⁵² ACAS Annual Report and Accounts 2008/09 (London: The Stationery Office, 2009), 37-4

the process.⁵³ This approach can preserve the confidentiality of a specific mediation process while helping to build public confidence in the function the CAO performs, notwithstanding its institutional location within the IFC. Similarly, the Fair Labor Association publishes the final outcomes of complaints processes involving its corporate members or their suppliers, whether addressed through investigation or mediation or both.⁵⁴ When reporting on security and human rights issues around its BTC Pipeline project in Azerbaijan, BP listed the numbers of complaints received by category of issue (land use and compensation, property damage, etc.) and how many had been resolved.⁵⁵

By contrast, many of the National Contact Points in OECD states, which mediate disputes over the application of the OECD Guidelines for Multinational Enterprises, face constant critiques for their lack of transparency. There is little trust in most of them to uphold human rights and other Guideline standards.⁵⁶ Indeed, where trust in a mediating body is particularly low, it is likely to impact the extent to which the mediation process is used. Complaints and dispute resolution processes within factories, aimed at resolving worker-management disputes, are often a case in point. Here some appropriate transparency about the outcomes reached – at least transparency to the workforce itself – can be essential for the process to be both used and effective and therefore bring benefit to the factory through reduced staff turnover.⁵⁷

This suggests that the levels of transparency needed to maintain trust that mediation is supporting human rights in practice may vary according to context and institutional reputation. However, the second rationale for transparency must also be considered and brings us back to the earlier discussion of systemic change.

Transparency can be a defining factor in the extent to which disputes that have been resolved through mediation can contribute to broader systemic change, and therefore advance the wider public interest in human rights. As noted, some commentators have underlined the direct role of mediation in engendering long-term change in the behaviours of the actors involved and the impact that may have on their home institutions more widely. Yet that still draws a fairly narrow circle in the understanding of ‘systemic change’. Broader change across society requires a more public educating role that is dependent in part on transparency.

Transparency for these purposes need not equate with full disclosure of outcomes. There may be legitimate reasons to keep outcomes confidential, including protection of complainants. However, there are often alternative approaches that can balance the competing needs of transparency and confidentiality. For example, Sturm and Gadlin

⁵³ 3 Oct 2009 <<http://www.cao-ombudsman.org/cases/>>

⁵⁴ 3 Oct 2009 <http://www.fairlabor.org/what_we_do_third_party_complaints_e1.html>

⁵⁵ “BP in Azerbaijan: Sustainability Report 2006” 35-36, 30 Sept 2009

<http://www.bp.com/.../azerbaijan_sustainability_report_2006_english.pdf>

⁵⁶ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises* (France: OECD, 2003), 102; OECD Watch, *Model National Contact Point* (OECD Watch, Sept 2007), 14,1d7

⁵⁷ Ethical Trading Initiative, “ETI: Key Challenges in Ethical Trade”, 27; Fair Labor Association, “SCOPE Report: How a functioning Grievance Procedure may positively impact a factory’s performance” (March 2008), 7-9

note that “there are ways of aggregating data without revealing the identity of individuals. There are general points that can be drawn from the particulars, without referencing the particulars. The intermediary can compose a hypothetical case that is a composite of cases, which captures the essential pieces and dynamic of the conflict. There are ways [of] presenting information that draw on the lessons of the confidential cases without breaching confidentiality.”⁵⁸

Referring to the work of the Human Rights Commission of British Columbia, Tara Parker underlines the need for clear guidelines regarding what will become part of the public record, and a recognition of the limits of confidentiality, particularly with regard to publicizing the outcomes of dispute resolution processes. She also highlights other tools the Commission has to “balance individual confidentiality concerns with approaches that emphasize public policy”. These include research, systemic investigations, publication and public reporting, representative complaints and education.⁵⁹ The Telecommunications Industry Ombudsman in Australia both publishes quarterly statistics on complaints broken down by company and issue and includes anonymised case studies in its quarterly newsletter, as well as including analysis of the leading patterns and trends in complaints in its annual report.⁶⁰

The practice of ACAS noted above is another example of this approach. And Anglo American’s guidance to its operations on complaint handling moves in a similar direction. It encourages operational sites to report locally on the volume and nature of complaints received, in keeping with the principles of openness, transparency and accountability and at the same time to factor these complaints into the annual review of the site’s Community Engagement Plan.⁶¹

The question of transparency regarding the outcomes of mediated disputes remains one of the trickiest areas to navigate, particularly where human rights issues are in play. Outside of obvious points such as the need to protect vulnerable complainants, it becomes difficult to pin down specific principles that will be valid in all situations. And yet research suggests that where individual mediations can be projected also into some form of public narrative, this can both enhance law-making processes and help change attitudes across groups, communities or societies in support of human rights and other social norms.⁶²

Perhaps the overarching principle that might therefore beneficially be added to discussions of this issue is that the current presumption in favour of confidentiality of mediated outcomes should be reversed, with the presumption instead favouring some level of

⁵⁸ Strum and Gadlin, *supra* note 49, at 50

⁵⁹ Parker, *supra* note 34, 7

⁶⁰ 12 October 2009, <www.tio.com.au>

⁶¹ Anglo American, “Tool 4A: Complaints and Grievance Procedure” Socio-Economic Assessment Toolbox, 88, 29 Sept 2009 <http://baseswiki.org/w/images/en/7/72/Upload--4A_Complaints_and_Grievance_Procedures.pdf>.

⁶² Braithwaite, *supra* note 14; John Braithwaite and Christine Parker, “Restorative Justice is Republic Justice” in Lode Walgrave and Gordon Bazemore, eds., *Restoring Juvenile Justice: An Exploration of the Restorative Justice Paradigm for Reforming Juvenile Justice* (Monsey, New York: Criminal Justice Press, 1999).

transparency unless this itself would interfere with human rights. That may mean publishing the key elements of individual outcomes (perhaps anonymised); aggregating data into meta-stories; publishing case studies or similar approaches. But a 'black box' approach to outcomes should require specific justification rather than being the default.

This shift alone could enable far more information to enter the public space about how rights-related disputes involving corporations are being resolved. This could support a greater appreciation of the potential as well as limits for mediation in this field; cumulative understanding of how human rights might best be respected and remedied in different situations; and shared learning about how human rights abuses might be avoided in the first place. This would be a major contribution to enabling systemic change.

Conclusion

I have argued in this paper that mediation has a legitimate and compelling role to play alongside litigation as a means of addressing human rights-related disputes between companies and individuals or communities. Traditional thinking in the dispute resolution and human rights advocacy fields that human rights and mediation are either incompatible or awkward bedfellows is misguided. Through an understanding of human rights not only in terms of outcomes, but also in terms of processes aimed at advancing human dignity, a more felicitous relationship between the two becomes apparent. The interplay of rights and interests in dispute resolution is not a zero-sum equation. Rather they may be mutually supportive, with interests closely informing the experience of human rights in practice and suggesting how balances between competing rights can best be struck. While mediation processes must take care not to produce outcomes that set back human rights, they offer constructive ways to navigate the open spaces that exist within the parameters of basic human rights standards. The capacity of mediation to support inclusion, participation, empowerment and attention to vulnerable individuals and groups represents a further contribution towards the advancement of human rights.

Yet mediation, like litigation, faces challenges as a means to uphold human rights in the context of business-to-society disputes. In particular, it needs to address questions as to how it can redress often extreme power imbalances between the parties; how it can engender systemic change; and how it should balance the need for some confidentiality with legitimate demands for greater transparency. Innovations in regard of all three challenges are being developed and assessed. Evidence appears greatest with regard to mediation's ability to address power imbalances. More work is needed to understand how far the mediation model can go in providing greater transparency and supporting systemic change, thereby bringing individual remedy together with the broader public interest.