

Culture-sensitive Process Design: Overcoming Ethical and Methodological Dilemmas

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Abstract

The belief systems of conflict actors not only have various potential impacts on the substantial issues of a conflict. They also heavily influence the actors' deeply ingrained normative mindsets of social interaction, including their perception of how conflicts should be handled: their behaviors, customs, convictions, expectations, and needs in procedural regards are thoroughly shaped by their respective religious or non-religious beliefs. Third parties are faced with considerable difficulties if these procedural cultures on the part of the involved conflict actors (including those of the third parties as well) are incompatible in essential points: How can they design mutually acceptable negotiation and mediation procedures that allow for effective talks and sustainable agreements without imposing their own procedural standards on the parties? This article provides an analysis of the main ethical and methodological dilemmas that these kinds of procedural differences entail for third parties. Building on this, it proposes a generic model for mediating these differences in a systematic manner. It basically consists of a three-step iterative process: 1) presupposing hypotheses, 2) eliciting and integrating information and feedback, 3) continuous correction and retrospective legitimization. The model can be used as a basic framework for culture-sensitive process design in all stages, such as in process

planning and talks about talks, in fine-tuning during negotiations as well as in process evaluation.

I. Introduction

To third parties, normative conflicts usually pose considerable methodological challenges. But when these conflicts relate to the question of how to handle the conflict *procedurally*, they become especially difficult to manage.² Further complications arise when the actors draw on different cultural³ backgrounds to justify their procedural claims and when the facilitator realizes that her⁴ own procedural concepts have a strong cultural imprint, too. But when there is no inter-cultural consensus on how to handle a conflict, how can the facilitator lead the process in a way that is legitimate and acceptable for all actors involved? How can she mediate without imposing her own values and norms on the parties, but also without requiring unacceptable normative compromises from herself? In short, how can we manage culture-based procedural conflicts in an ethically appropriate and methodically effective manner?

This article explores the crucial ethical dilemmas and methodological problems that mediators encounter in procedural conflicts arising in negotiations. Seeking to overcome these ethical dilemmas and methodological problems, it proposes a basic methodology that allows procedural

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2 For the distinction between the substantive, procedural, and emotional levels of conflicts, see the triangle of satisfaction in Moore et al. 2010, 91.

3 The term "culture" is understood as "the shared, often unspoken, understanding in a group (...) (which) shapes our ideas of what is important, influences our attitudes and values, and animates our behaviors." See LeBaron et al. 2006, 14; also Geertz 1973, 89. Cultural groups are constituted by socio-economic, religious, political, ethnic, gender, generational, class, educational, professional, organizational, and other shared similarities. For methodological questions on dealing with culture-based traits, see Cohen 2007.

4 For simplicity and beauty of language, as well as to reflect the gender of the respective author, the author's gender will be used throughout the text, but it includes the other gender, in this case the male.

differences to be mediated without imposing one's own normative mind-set on the parties and without negating own values and norms at the same time. *On the one hand, this approach tailors negotiation processes that are in agreement with the cultures of the actors involved:* As far as possible, the actors' subjective conceptions of procedural justice and effectiveness are incorporated in the design of the process. To prevent this pluralistic approach from being abused or becoming ineffective when confronted with destructive behavior, on the other hand, *every actor, including the facilitator herself, is entitled to a veto when they regard their own fundamental values and norms as being violated.* This explicit respect for their indispensable values and norms might encourage the parties to jointly work on a reconciliation of their functional interests⁵ concerning the process. In sum, the key argument is that culture-based procedural conflicts are manageable if we respect the legitimate normative limits of all actors involved and mediate between their procedural interests on a functional level.

While we will focus in the following on process design⁶ for negotiations⁷ with third-party assistance (as in mediation),⁸ the method theoretically provides impulses for dealing with and transforming conflicts that involve any means and forms of interaction, including violent or legal ones.

II. Culture-based procedural differences

When actors to a conflict come from different cultural backgrounds, it can be assumed that they rely on different culture-based values, norms, and patterns of behavior of handling conflict.⁹ Because of that, in a considerable number of cases, actors may not accept the procedures suggested and/or adopted by other actors or third parties. In such a case, besides substantive disagreements (*what*),

tensions will appear in relation to procedural issues (*how*).¹⁰ But as negotiation processes are highly interdependent by nature, a mutually acceptable result of negotiation depends on how the actors cooperate in the process. Because of this, unmediated procedural tensions may be one reason why inter-cultural¹¹ negotiations often reach impasses and agreements are difficult to implement.¹²

What is the nature of procedural conflicts in practice? For instance, regarding the distribution of power in the process, actor A may find it obligatory to make all parties participate in decisionmaking, while for B, it is indispensable to leave decisionmaking to an authority. Here, the procedural conflict is about different (joint authoritative) types of decisionmaking. Or, concerning the in-/directness of communication, actor A may be convinced that conflicts have to be settled as discreetly as possible through confidential consultations with insider facilitators in order to save face and protect relationships, while B claims that conflicts have to be discussed directly and explicitly with the assistance of external third parties so as to identify root causes and ensure accountability.¹³ Another example would be the tension between task- and relationship-oriented approaches: For instance, A deals with a conflict very functionally and focuses on the immediate issue at hand, while B is only ready to discuss the issue if A is more mindful of how the history of their relationship shapes the present understanding of the issue.¹⁴ From a broader perspective, we see that most of the categories for mapping cultural differences

5 For the concept of functional interests, see Rothman 1997, 57, 178.

6 For two different concepts of process/dispute systems design, see Moore 1996, Chapter 4 and 6; Sander 2006 and 1994.

7 Negotiation understood as a method of joint decision- and action-taking.

8 Mediation understood as negotiation facilitated by a third party structuring the process without having decisionmaking power.

9 See Moore et al. 2010, part 1; Williams 2003; Moore 1996, 211p, 228, 266, 317; from a socio-historical perspective, conceptions of justice have always varied between different cultures, see Ross et al. 2002, 4-10, and, with regard to procedural justice, Epp 1998, 85. Concerning the question of justice in conflict, see Deutsch 2006.

10 The term "procedural" applies very broadly for every *form* of handling and managing conflict, whereas "substantive" refers to the *issue* at the heart of the conflict; see Moore 2010, 91.

11 When using the term "inter-cultural", an interaction or collaboration between parties from different cultures is implied. "Cross-" or "trans-cultural" refers to actors from different cultures from a comparative or overall perspective, considering each of them separately or as a group rather than focusing on the interaction between them.

12 See W. Pearce et al. 1997, 158; Rothman 1997, 5; Bush et al. 2005, 2; Albin 2001, 7; Salem 1993.

13 On this observed difference between Asian and Western actors, see Ropers 2011; Leung et al. 2010; Antaki 2006; Faure 1999; Lee 1997; Kirkbride et al. 1991. For specific conceptions of honor, see Pely 2011.

14 This example refers to the case of a discussion between a US state agency and an American Indian tribal representative (source confidential).

(such as high context/low context communication and individualism/communitarianism)¹⁵ entail considerable procedural implications.

What can we learn from this? To the same extent that culture shapes the way in which actors deal with conflict, culture-based procedural differences can turn into potential breaking points in inter-cultural negotiations.¹⁶ This means that *in order to mediate inter-cultural conflicts in a fair but also effective and sustainable way, we need to establish common procedural principles and rules that can reconcile the particular normative standpoints of the actors involved.*¹⁷

Conflicts where different belief systems play a key role¹⁸ can be especially susceptible to procedural tensions for two reasons. First, there is an immense diversity in belief-based conceptions of justice, honor, guilt, and interpersonal relationship and, in consequence, also a big variety of belief-based values, norms, and social practices of dealing with conflict; consider, for instance, the diverging attitudes towards Dealing with the Past, such as forgiveness and oblivion vs. investigation and punishment.¹⁹ Second, belief-based standpoints are necessarily normative and, in addition, tend to be perceived as non-negotiable: To the extent that they are part of internalized convictions and social rules, actors may consider them as indispensable for

their moral and cultural identity and individual well-being as well as for the groups' social order.²⁰

III. General problems of dealing with culture and normativity in conflict

When contemplating how to mediate between these differences over procedural questions in negotiations, we have to bear in mind some general problems regarding culture, conflict, and normative claims, and their potential implications regarding procedural questions:

First, even if a tradition of handling conflict is well-founded in history and society from a cultural or religious point of view (such as customs of physical punishments), it is not necessarily justifiable from an ethical or legal point of view (based on human rights postulating a right to physical integrity). At the same time, ethical and legal standpoints are also shaped by the cultural context of the actors who stipulate them; the validity and legitimacy of these ethical and legal values and norms also depend on historical and social acceptance.²¹ This constructivist understanding of the irreducible interdependency of values, norms, and culture means that from a philosophical point of view, *there are no and never will be universal and ultimate standards about what is "fair" "negotiation" that we could resort to when dealing with procedural differences.*

Second, how can we distinguish an authentic culture-based claim from a culturalized one? A culturalized claim unconsciously mixes or deliberately conceals basic human needs or economic, political, or strategic interests with real or pretended cultural fixations.²² For instance, is a defendant who rejects a truth-finding commission and insists on a reconciliation ritual seeking spiritual peace or impunity? If an actor rejects the procedural principle "nothing is agreed until all is agreed," as suggested by the mediator, is this rejection based on cultural reasons or on a lack of trust in the other actor or the process in general?²³ As each "culture" largely depends on the

15 Hall's and Hofstede's "dimensions of culture" (High context/Low Context Communication, Individualism/Communitarianism, Universalism/Particularism, Specificity/Diffuseness, Sequential Time/Synchronous Time, Low Power Distance/High Power Distance) can be helpful as starting points for understanding culture, as long as they are not misunderstood and misused as dichotomized, fixed-point descriptions of particular social traits to legitimize culturalistic claims. See LeBaron et al. 2006, 32-55; see also Williams 2003; Hui 1986.

16 See Law 2009.

17 See the classics of procedural ethics: Luhmann 1983, 169; Lind et al. 1988. More recently, see Ropers 2011, 25; Törnblom et al. 2007; Williams 2003, 6; Albin 2001, 28, 35; Epp 1998.

18 Concerning the role of religion in conflicts, conflict transformation, and peacemaking, see for instance The Center on Conflict, Development and Peacebuilding 2009; Berg et al. 2005.

19 See Ropers' report of the case where Buddhist monks found that 'Vergeben und Vergessen' ("forgive and forget") was more appropriate for Buddhist culture in dealing with Sri Lanka's war experience than 'Aussprechen und Bearbeiten' ("express and work on it"), which was perceived as a typical Christian idea. See Kühner 2007, 58f. For more examples, see, e.g., Irani et al. 2000. At the same time, besides these differences, there are of course various *commonalities* between religious ideas of peace, which are used in interreligious dialog; see, e.g., Merdjanova et al. 2009.

20 See Enns 2007.

21 See Vossenkuhl 2006, 43, 53.

22 See Mason et al. 2010, 3. Similarly, conflict entrepreneurs utilize grievances for waging war by tying these grievances to cultural identities, see Eide 1997.

23 See Mason 2008, 76.

interpretations of its representatives, *it is very difficult to determine from outside whether certain procedural practices are really motivated and justified by a cultural context or not.* For handling procedural conflicts, this means that the argument of culture can easily be used as a pretext to conceal other kinds of interests or to excuse violations of other actors' integrity.

Third, there is no point in trying to negotiate directly on and transform belief-based values and norms as long as they are perceived as subjectively indispensable.²⁴ In order to avoid ending up in a moral stalemate or violating legitimate moral claims, *it might be more advantageous to focus on mediating practical procedural interests instead of values and norms:* the functional means that serve to fulfill values and norms are usually much more negotiable than these values and norms themselves.²⁵ Nevertheless, if we can ensure that the actors' legitimate moral and cultural boundaries are respected, we may still look for ways to make fixed procedural values and norms more negotiable.

Bearing in mind these fundamental challenges, there seems to be one basic precondition for successfully mediating between conflicting procedural claims in an explicit²⁶ manner: *the parties to the conflict must have an interest in overcoming the procedural deadlock that prevents them from settling their substantive issues. Only when we can build on this common interest will parties be willing to negotiate on procedural questions and temporarily postpone the discussion on content questions.*

IV. Dilemmas in dealing with culture-based procedural differences

Let us now look a bit more closely into the specific ethical and methodological challenges of procedural conflicts.

Considering the global pluralism of values and norms from a cultural as well as an ethical point of view, there is neither an abstract universal idea of procedural justice nor a body of procedural rules for settling conflicts that can be considered cross- or trans-culturally valid in a consensual sense.²⁷ Of course, there are some overlapping fundamental values that can be found in several cultures. For instance, the ideas of "human dignity" given by God in Islam and the secular Western "human rights" are surprisingly similar in practice, even if they have different roots. However, these overlapping ideas do not yet establish a resilient universal consensus on procedures. Additionally, apart from the fact that any "universal" or supra-national normative order thus lacks the legitimating basis of a trans-cultural consensus, the provisions of international human rights and international law are far too abstract for the kind of conflict we have in mind here: Even if these norms and rules were acceptable for all actors involved, they do not apply for regulating the subtle practical interactions between individuals from different cultures.

The pluralism and relativity of procedural values and norms produces two difficult ethical dilemmas when it comes to designing processes for inter-cultural settings. Both of them have significant methodological consequences.

First, in the absence of an overarching procedural standard, we cannot justify subordinating one set of values and norms to another. Thus, we have to respect and treat them equally when designing inter-cultural procedures. That also means that we cannot expect our own culture-based methods to fit into other cultural contexts if we only "adjust" them to the respective context.²⁸ Instead, we need to tailor procedures in accordance with the specific culture-based procedural needs, interests, and constraints of the actors and have to ensure their acceptability before applying them. In summary,

24 See Mason et al. 2010, 3; Atran 2008; Enns 2007.

25 Jay Rothman's concept of functional interests provides an effective tool to address this level of more negotiable ideas amid other non-negotiable claims. See Rothman 1997, 57, 178. Ropers 2011, 25, Noesner 2010, 113, 123 and Montada 2009, 504, also highlight the conduciveness of a practical/functional level of negotiations and rules when it comes to facilitating normative or identity-based conflicts.

26 See Section VI for a discussion on whether to mediate explicitly or implicitly in procedural conflicts.

27 See Ernst et al. 2010; Bhatia et al. 2008, 127-143; Hastrup 2001; Brems 2001; Habermas 1999; Tergel 1998; Walzer 1994; Nunner-Winkler 1994; Kausikan 1993, 26; Maxwell 1990; Bernstein 1983.

28 Furthermore, international procedural rules for ADR in civil and commercial matters (e.g., those of ICC, WIPO, UNCITRAL and, for the Chinese-American or -British context, CIETAC/CCPIT with CPR and CEDR) do not rely on a trans- or inter-cultural consensus, but only seem to reproduce the culture-based norms of the most powerful players among the rule-makers.

culture-sensitive process design needs to be inductive and consensual.²⁹

However, most procedural models entail normative preconditions that are not inductively and consensually verified. Habermas even argues that some of these preconditions are generally irreducible: every actor who enters into a conversation, Habermas says, intuitively accepts the implicit rules of argumentation.³⁰ Thus, he asserts that participating in a negotiation automatically implies acknowledgement of the rules of the actor who is explicitly or implicitly “leading” the talks – which, in the end, is a question of power. But even if this were true in a descriptive sense, it is not a voluntary consensus and thus lacks both justification and sustainability.³¹ Therefore, *instead of relying on implicit procedural assumptions and “irreducible” preconditions, a culture-sensitive procedural model needs to uncover them and allow them to be contested.*

But if we want to do this, we are confronted with the following dilemma: *How can we design and start a consensual process that respects and integrates both parties’ procedural claims equally, when there is no consensus between them which we could build on to avoid discriminating one of the parties?* The methodological consequence is that we either have to work with procedures that lack acceptance, effectiveness, and sustainability; or that we have to refrain entirely from becoming involved as a third party because one of the most basic requirements for a successful process – clarity on procedural questions – is missing.

This brings us to a second dilemma: (Western) third-party ethics claim impartiality in terms of not taking sides; many also claim neutrality with regard to the own interests, objectives, and values of the mediator concerning the conflict.³² However, while staying impartial and neutral concerning the content (*what*), third

parties are required to structure the process of negotiations (*how*) in order to support the parties in handling the conflict.³³ In procedural conflicts, this distribution of roles (impartiality and neutrality regarding the content, combined with leadership in the process) results in a serious problem for mediators: when the process becomes the substance of the conflict (*how=what*), a third party cannot be impartial and neutral anymore. Whatever principles, methods, and instruments the mediator uses, they are infused with cultural values and norms that express not only the mediator’s professional principles, but also her ethical, political, and belief-based values and convictions.³⁴ Procedural conflicts thus reveal the fact that mediators themselves, whether they like it or not, are positioned and interested parties when it comes to the question of procedures.

The best example for this is our own third-party approach: If one actor were persistently violating a basic ethical and methodological principle of our own, e.g., “one side may not oppress the other”, would we still continue with our efforts? If not, why not? How can we substantiate and legitimize such a principle in the context of culture-based procedural conflicts despite the fact that there is no trans-cultural consensus in procedural matters? This second dilemma challenges our self-conception as third parties not only in an ethical, but also in a methodological sense. To illustrate this with a real-life example, imagine this case of a training workshop that took place within a broader conflict transformation process:

The team of international facilitators invited the participants from a European neighboring state to help structure the workshop in terms of agenda-setting and content. The participants were bemused by this way of proceeding, as they had expected the facilitators to take on the role of “experts” and actually tell them precisely how to handle their conflict. For the facilitators, who shared a liberal democratic worldview, part of their

29 See Ropers 2011, 27.

30 See Habermas 1983, 103.

31 Ironically, this lack of voluntariness also contradicts Habermas’ own key principle of universality for consensual decisionmaking (“Universalisierungsgrundsatz”), which claims that only if an action is right (or wrong) for others can it be right (or wrong) for us; see Habermas 1983.

32 See Bolger et al 2010; Moore 1996, 197, 354; for an example, see the European Code of Conduct for Mediators 2004.

33 For the separation of process from content in classical models of mediation, see for example Moore 1996, 18. Nevertheless, Cobb highlights how process and content are interdependent and how the mediator has an impact on content and outcome by shaping the process, see Cobb 1993.

34 For a discussion on the contextual or culture-based relativity of mediation procedures, see Montada 2009, 509; Antaki 2006; Reif 2005; Bercovitch et al. 1992, 4.

expertise consisted of procedures designed to empower the participants to take a leading role in setting the agenda. Thus, there was a fairly clear and even paradoxical conflict between strongly participatory facilitators and less participatory participants over the procedural question of who should take the leading role in shaping agenda and content.³⁵

Taking a look behind the scenes, the participants may have felt bound to the cultural rules of the broader normative context, where the relevant stakeholders would only accept and follow decisions made by recognized authorities. If in this situation, the facilitators had insisted on their own participative approach, the participants might have perceived this as an expression of ignorance of their culture, living conditions, and constraints of their real life beyond the workshop and, in consequence, may not have collaborated either in the process or in the implementation of results.³⁶

Should we try to be procedurally impartial and neutral in such a case and submit the process completely to the contextual circumstances, whatever costs or missed opportunities this may entail from our point of view? Should we do so even if we believed that the participants would benefit from our own approach or that this approach could contribute to a constructive transformation of the bigger social context? Thus, how can we reconcile our professional commitment to impartiality and neutrality with our own ethical and methodological convictions?³⁷

First of all, we have to acknowledge that the idea of a normatively *neutral* third party hardly fits with reality. Neutrality in substantive normative issues may be possible in some cases, but when it comes to process questions, it is clearly an illusion: Third

parties acting in the role of process facilitators inevitably have to perform in a norm- or rule-based manner with regard to procedure in order to be capable of acting effectively. A facilitator will always need to control the process in certain respects (e.g., stop insulting, minimize violence) in order to accomplish something with it. In addition, if a mediator is professionally or personally committed to certain values and norms, she will have a legitimate desire to make sure that her work is not abused for intentions and actions she does not support, such as violations of human rights.³⁸

Let's say that this state of affairs is acceptable to us – what about *impartiality*? Even if and, paradoxically, precisely because we want to stick to our own values and principles, we still may want to adhere to impartiality and respect the pluralism of norms when mediating conflicting procedural claims: We know that we have to treat everyone fairly in equal measure because if we do not, the parties will not build trust and we cannot negotiate effectively.

Translating both consequences into the mediator's role, an "all-partisan" or "multi-partial" approach that actively ensures that all parties can equally voice their legitimate concerns and at the same time reflects the own mediator's normative standpoint captures the idea of "being impartial while not being neutral" quite well.³⁹ This approach may be even quasi trans-culturally acceptable, as long as its scope is limited to the minimal common interest of all parties to overcome the dead lock situation resulting from the conflicting interdependent process claims (see section III).

But there are still open questions here: How do we deal with other, more demanding procedural norms and rules that we perceive as indispensable? Do they overrule the impetus to be impartial or all-partisan towards the parties and, if yes, how can we legitimize such a claim? Or is the principle of all-partisan impartiality

35 One of the participants remarked in the closing session that they had engaged in the process because it was consistent with their culture to follow the instructions of the facilitators. Case description of Mariska Kappmeier, Alexander Redlich, and Jay Rothman, 2011.

36 In the case described above, the facilitators did not actually abandon the participatory approach. They became explicit and transparent about it and addressed the fact that it may be confusing; they also explained that the nature of this procedure was a deliberate part of the way they worked. Case description of Mariska Kappmeier, Alexander Redlich, and Jay Rothman 2011.

37 On this dilemma, see also Ropers 2011, 27.

38 International Alert differentiate this in their Code of Conduct as follows: "Although *impartial* in as far as we conduct our work among different conflict parties, we are *not neutral* in terms of the principles and values we adhere to which we must in appropriate ways work to advance at all times." See International Alert 1998, 4 (emphasis added).

39 On the concept of impartiality as all-partisanship ("Allparteilichkeit"), see Kirchhoff 2008, 247; Carnevale et al. 1996.

so obligatory and absolute that we had better refrain from claiming any other norms and rules by ourselves?

V. Overcoming the dilemmas through hypothetical presupposition and continuous self-correction

Looking for knowledge and tools we can draw on for tackling these issues, we find wide-ranging studies on culture-based differences in conflict styles⁴⁰ and many concepts of inter-cultural negotiation and mediation, inter-cultural fluency, and hybrid conflict management mechanisms.⁴¹ However, there seems to be no method yet that allows both a) systematic mediation between diverging normative procedural claims in an impartial manner that nevertheless does not amount to a denial of own principles, as described above, and, on basis of this, b) the development of inter-cultural procedural principles and rules that are acceptable to both parties. That means that we do not yet systematically apply the basic idea of mediation to inter-cultural process design. The matter seems to be not so much a matter of methodological incoherence as a typical blind spot problem: In designing and performing procedures that we consider fair and effective, we may intuitively assume that the way we act when doing so must also be fair and effective.

In the following, a basic model will be proposed that should help to make this blind spot accessible. The model has been developed in direct response to the ethical dilemmas and methodological challenges pictured above in order to handle them in an ethically acceptable and still practicable manner. It has not yet been applied and tested in practice, which means that the examples given in the following only illustrate a hypothetical real-life application. The model consists of an iterative trial-and-error process that allows us to presuppose a provisional procedure, which we gradually legitimate by continuous correction and confirmation by means of the results and feedback we get from its application.

Having learned that mediating procedural conflicts in a fair and sustainably effective manner requires

a process that is inductively and consensually legitimized, we know that, theoretically, we have no legitimate grounds for prescribing any absolute rules for the process. But at the same time, we want to make sure that in these open and unregulated negotiations nobody's fundamental values and norms are violated. Thus, what we need is a very basic ground rule⁴² that is capable of preventing an exacerbation of the conflict and at the same time minimalistic enough to be acceptable to all actors.

As already mentioned above, we suggest the following minimal rule: All actors, including the third party, are explicitly entitled to veto process elements that they cannot endorse. A veto is accepted when the actor can provide evidence that the element in question would violate values and norms considered indispensable (for the question of how to distinguish between false and authentic claims concerning indispensability, see section III). As much as this fundamental principle of mutual respect for each other's values and norms can serve to avoid further escalation, we can base its legitimacy on the parties' common interest in overcoming the deadlock in process questions, which is a prerequisite for the process in any case (see section III). It follows that we can keep the right to veto separate from the continuous correction as described in the following. This means that parties have to consent to the equal veto right of all actors before they actually start the process.

This iterative process has the following three steps:

Step 1) Presupposing Hypotheses: After having studied the cultural (culture understood as a generic term that also includes religion) background of the parties and having tried to identify their culture-based procedural standpoints, the third party postulates common procedural principles on a hypothetical basis. These principles also include the facilitator's own fundamental procedural values and norms, e.g., the principles of "not oppressing the other" or "participative ownership of all the parties in decisionmaking (including intra-party decisions)".⁴³ Building on the principles of all actors involved,

40 See, e.g., Busch et al. 2010; Bagshaw et al. 2009; LeBaron 2006; Williams 2003; Avruch 2003; Said et al. 2001; Kopelman et al. 1999; Avruch 1998; Pearce et al. 1997; Rothman 1997.

41 See, e.g., Moore 2010; LeBaron 2006; Reif 2004; Ropers 2011, 26.

42 See Moore 1996, 156.

43 Some scholars see the equilibrating empowerment of weaker actors as a key factor for the success of negotiations processes; see, e.g., Larson 2003.

the facilitator develops a provisional procedure for mediating conflicts in the specific inter-cultural setting.

Step 2) Eliciting and Integrating Information and Feedback: The provisional procedure is carried out by focusing on mediating between process-relevant functional interests, leaving aside conflicting values and norms (see comments on separating values and norms from functional interests in section III). While doing so, it must be made unmistakably clear that the facilitators will ensure that all parties have the same opportunity to contribute their concerns and interests concerning process questions in order to jointly shape and optimize the common procedure (all-partisan or multi-partial approach).

In mediating between the functional interests, the facilitator may rely on the techniques and instruments she normally uses for mediating conflicting interests. However, she will have to allow these techniques and instruments also to become subject to the procedural discussion. In doing so, the facilitator receives not only information on the actors' general procedural values, norms, and functional interests, but also spontaneous feedback on the ongoing procedure; this information must not be explicit, it can also be provided implicitly by the parties while interacting with each other. For example, party A claims that decisionmaking has to be assigned to the religious or political authorities from both sides, whereas B stipulates that all actors should participate in decisionmaking. Both parties argue that their preferred way is fairer to the parties as well as more effective in anchoring results and agreements in people's minds. The facilitator will then elicit the functional interests of both sides in more detail and then encourage the elaboration of a common decisionmaking process (e.g., a voting procedure) that fully or partially assigns the required roles to both the religious authority and the other actors.

If parties reject a principle of the provisional procedure because it is unfamiliar or seems unfavorable to them, the facilitator can give a non-binding taste of its benefits so that parties can "test" it. For instance, at the start, the parties may still attempt to insult, oppress, and hurt each other;

but over time, they may realize that negotiations where this behavior is not accepted (because they follow the principle "not to oppress each other") serve to reach their objectives: While the mediator is creating a safe space and preventing one party from trying to dominate the other, they will find that such a condition enhances the effectiveness and fairness of interaction. In this way, one can work towards establishing common principles that are beneficial to all parties even if the parties perceived them as unacceptable in the beginning.

If an indispensable claim for modification from actor A and a veto from actor B exclude each other, the facilitator needs to explore whether this conflict is about fundamental values or about mere normative positions. In the first case, the process has uncovered a discrepancy of values that has to be respected and may bring the process to a (provisional) end. In the second case, the facilitator would continue to elicit the negotiable functional interests behind the positions and mediate between them.

Step 3) Continuous Correction and Retroactive Legitimization: The outcomes of these negotiations inductively correct or confirm the provisional procedure that has been applied up to that point. To prove this revised version and in order to further optimize and finally legitimate it, the procedure is repeated starting with step 2). In the course of its iterations, the procedure acquires more and more acceptance among the parties. The point when the parties do not ask for more corrections marks the achievement of a minimal consensus on procedural principles and rules.

The question whether and how a third party should make this self-reflexive approach explicit to the parties or carry it out implicitly while discussing substantive matters is in itself an inherent part of process design.⁴⁴ Depending on the case and the cultural background of the parties, it can be very encouraging or highly irritating for them to make the approach transparent: On being assured that there will be a continuous self-correction of hypothetical principles and instruments, parties from a democratic cultural context with participatory traditions may gain confidence in the process and its results. If there are indications that parties from

44 See Moore 1996, 212 and 228.

a cultural context with authoritarian traditions would have serious problems to place their trust in such a self-challenging and open structure, it may be more agreeable for them if it is adopted implicitly - which, however, does not necessarily mean keeping it secret. In general, talking about procedures instead of substance requires a certain readiness for meta-communication.

Let us explore the potential real-world application of this methodology:

In Nepal, in the talks that led to the 2006 agreement, the Maoists and the democratic parties had a procedural culture that was different from that of envoys and mediators from the West.

Step 1) Both Nepali parties realized that it would be beneficial to structure their talks more than was common in their culture, even if they were not ready to give a formal mandate to an outside mediator (not least because this could have been problematic in the eyes of India, not in a cultural, but in a political sense). For the facilitator from the Swiss FDFA, Günther Baechler, the *presupposing hypothesis* was therefore: "No formal mandate as mediator will be possible in this case, but an informal, implicit mandate as facilitator to structure the process may work."

Step 2) By *eliciting and integrating more information and implicit feedback from the parties* during the negotiations, it soon became clear that although he was trusted, even an informal mandate as a facilitator did not imply that he could sit in the meeting rooms. In Nepali culture, the role of facilitator is traditionally given to insider persons with some decisionmaking power on content rather than to an outside, impartial mediator, who would only focus on process.

Step 3) Therefore, *partly correcting the initial hypothesis*, a procedural compromise was found through an iterative process, where the parties welcomed the structuring and "go-between" services of the Western facilitator outside the meeting room, e.g., by drafting a sequence paper, even if he never sat in the meeting rooms when the talks took place. Looking back after the agreement, both the parties and the Swiss facilitator were satisfied with the process. It combined strong process ownership from the Nepali parties with

some useful elements of process structure stemming from the indirect facilitation inputs from the Swiss side.⁴⁵

The procedural solution found between the parties and the facilitator in this case was definitely not a classical example of mediation, as the facilitator did not have a formal mandate and was not sitting at the table between the two parties. When considering the case with the methodology developed above as an analysis framework, however, one would argue that it was an appropriate culture-sensitive process, as it took into account the procedural culture of the parties, but also provided space for improving the procedure methodologically through structuring the talks by informal third party services. As a result, it seems that this three-step model can help to analyze and clarify processes that do not fit the "standard" approach.

A second example illustrates how the model may help to proceed in negotiations where the procedural cultures of the parties differ. In the case of the Waco siege in 1993, the FBI as one party framed the negotiation process as a "complex hostage taking case". If negotiations led by the negotiation coordinator Gary Noesner failed to work, combat forces would enter the compound and liberate the "hostages". David Koresh, the leader of the Branch Davidian community, on the other hand, saw the conflict as a fight between the "forces of evil" (the US government and the FBI) and the "righteous" (the Davidian community), which had to hole up in their compound to defend themselves. In Koresh's interpretation, this was the battle of the "end times" (Armageddon) as prophesied in the Book of Revelation he believed in.⁴⁶

Step 1) The advice of scholars of apocalyptic belief as well as film footage on the Davidian community was used in this case. Based on this, the *presupposing hypothesis* of the negotiation coordinator was that one could negotiate with Koresh, also because advisors to Noesner told him that Koresh's arguments - e.g., the conviction that he was

45 Insights provided by Günther Baechler, Swiss Federal Department of Foreign Affairs. On insider mediation in Asia, including in the Nepal case, see Ropers 2011, 23.

46 See Noesner 2010, 96-98.

a prophet, stockpiling weapons, and practicing defensive actions to prepare for Armageddon – were coherent with the Bible, even if they reflected an unorthodox interpretation of it. Therefore, the negotiation coordinator treated him as a counterpart with whom it was possible to negotiate a “way out” of the conflict that was also compatible with the Bible.⁴⁷

Step 2) In discussions with Koresh over the phone during the siege, *the idea for a process was jointly shaped* by which Koresh would deliver a nationwide broadcast explaining his apocalyptic interpretation of the Book of Revelation and then write down his message to the world. Once he had been heard by the world, he would peacefully surrender together with his followers and submit to the US justice system – and would not, as the negotiators feared, lead them into mass suicide.⁴⁸ In contrast to these practical negotiations on process questions, discussions about religious questions with Koresh turned out to be a dead end.⁴⁹

Step 3), the *continuous correction and retroactive legitimization of the process*, never happened, because the iterative process of how to handle the situation peacefully (step 2) was aborted by the FBI when David Koresh did not fulfill a part of his promise on time. The FBI decided not to continue negotiations, but to enter the compound with heavy weapons, and the entire compound burnt down. Seventy-five Davidians were killed.⁵⁰

The Waco case shows the danger of labeling the “other” as a “psychopath” or the “forces of evil” rather than acknowledging the differences in belief concepts and reasoning as conflicting understandings of how to handle the process that do not preclude cooperation on a practical level.⁵¹ The negotiation coordinator started to develop a process that could have made sense in both worlds, if he had been given enough trust and time from both sides to allow it to develop. Unfortunately, the two sides were unable to trust each other, as they perceived the actions of the opposite side as mere manipulations and insults

to their authority that had to be punished and defeated uncompromisingly. The FBI combat teams’ impatience and will to use force also minimized the space for a negotiated outcome.

In this case, the beauty of the model is that it highlights the possibility of a more balanced way of shaping a negotiation process, where the process is “negotiated in the making” rather than imposed by either party. It also reveals that with a consistently respectful pluralistic attitude towards differences (even if they are perceived as strange or pathological), combined with a creative functional approach in process questions, can generate new space for negotiation and joint decisionmaking.

VI. All questions answered?

After having illustrated the model with two cases, let us finally see how the model answers to our problems in detail. The first question was how to start a process without having a procedural consensus among all actors to rely on. The answer is the iterative process itself: *the negotiation or mediation procedure does not need to be fully accepted from its very beginning if we ensure its systematic correction and acceptance in the course of the process itself*. Our answer follows the idea of reflexive learning: just as when trying to communicate with strangers without having a common language, but an object to refer to as a common reference point, we knowingly presuppose mere assumptions (Presupposing Hypotheses) in order to correct and legitimate them afterwards (Continuous Correction and Retroactive Legitimization) according to the responses we get (Eliciting and Integrating Information and Feedback). This offers the possibility of postponing the legitimization of a proposed procedure until we are able to deliver it. In other words: In return for a continuous and inductive self-correction, we are allowed to act on prejudice.⁵²

In the end, that means that it is not a procedure recognized as “just” that legitimizes the outcome, but the outcome legitimizes the procedure. As the procedure actually produces the outcome, it retroactively legitimizes itself. Thus, by

47 See Noesner 2010, 98, 105.

48 See Noesner 2010, 110.

49 See Noesner 2010, 114, 127.

50 See Noesner 2010, 127.

51 See Noesner 2010, 113, 123.

52 Davidson offers this idea when describing the triangulation principle that people use when interacting without having a common language. See Davidson 2001, 83, 86.

making the procedure as self-reflective and adaptive as possible, we can embark upon it despite having no commonly accepted normative basis to build on. In this way, the iterative process allows us to overcome the dilemma of starting a negotiation or mediation procedure without an inductively legitimated procedural basis.

But how do we deal with the circle of double relativity that starts when procedure and outcome are treated as mutually dependent? We have to make a virtual break here: We take *either* the procedure *or* the outcome (the elicited procedural principles and rules of the parties) as a given reference point for adjustment.⁵³ However from an ethical point of view, there has to be a certain primacy of the procedure over the outcome: Only a bigger procedural structure can take care of the common good of the parties, who primarily have to make sure that their own interests are fulfilled. Thus, only when the functional interests and/or vetoes of both parties can be mediated and there is a consensus on how the existing procedure has to be improved, the procedure will be modified.

Altogether, the procedure remains self-constituting and permanently temporary as long as its outcomes give new reason for adjustment. As each result (in the form of common procedural principles and rules) depends to a large degree on context and actors, it has to be understood as a minimal, situative, and temporary consensus that cannot be transferred to another context without systematic inductive self-correction.

How does the model answer the second question, which was how the facilitator can deal with own indispensable values and norms and remain all-partial at the same time? As long as the facilitator sees none of her own indispensable values and norms as being in jeopardy, she will mediate and integrate the parties' procedural interests in an all-partial manner. *However, at the moment she feels obliged to veto unacceptable modifications of the procedure and the other actors do not accept this, the facilitator may resign from her role and mandate in that process.*

⁵³ Vossenkuhl suggests this method, called 'Maximenmethode', for handling the mutual interdependency between abstract moral norms and real-life problems, which both are changing over time. See Vossenkuhl 2006, 87, 252.

One procedural norm that a facilitator may regard as non-negotiable could be the principle of "not oppressing the other". Beyond that, there are most probably other indispensable values and norms to which the individual facilitator is legally bound or ethically committed. Regarding the legal dimension, the cogent norms of international law (such as the prohibition of amnesties for war crimes, crimes against humanity, and genocide) constitute the minimal framework that any mediator is theoretically bound to, especially when she is acting officially for an organization such as the UN or the Swiss FDFA. With regard to the ethical dimension, the third party should carefully explore her own bottom line in terms of her minimal values and norms as well as their concrete application in the given context before starting the process.

We may summarize this second answer as follows: When applying the iterative process described above, it is a prerequisite on the mediator's side to make herself aware of what exactly is negotiable and what is non-negotiable in procedural regards for her, whether it comes from the legal and ethical code of her organization or her personal ethical values.

VII. Conclusion

Without doubt, inter-cultural conflicts about the how of handling conflicts confront mediators with intricate ethical dilemmas and methodological challenges. But having analyzed and understood these problems, we learn that they are manageable, too, if we respect and integrate the legitimate procedural perspectives of all actors involved within the minimal parameter that all sides can veto procedural elements that they perceive as violations of their values and norms. Correspondingly, culture-sensitive procedures have to be built on the balance of two kinds of efforts on the side of the facilitator: to become aware and confident of own indispensable procedural values and norms and at the same time to integrate the parties' procedural conceptions wherever possible. As a result, the main added value of this approach is that appropriateness can be achieved in all relevant regards: On the one hand, the procedure offers a way to tailor context-specific processes that do justice to the particular values and norms of the parties. On the other hand, it does not force normative compromises that would not be

acceptable for a third party or from a broader methodological, ethical or legal standpoint. In this way, the framework provides a basis for dealing with procedural conflicts that can finally be accepted as a consensual and legitimate procedure.

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