

Adequacy and generic nature in Alternative Dispute Resolution in dealing with an escalating conflict in constructive manner

Conflict Resolution (CR) was initially discussed and studied at the beginning as theory and practice as an effort to end interstate power oriented conflicts. Therefore most of the theories and practices propounded by various scholars in this field at the nascent stages based those theories and practices on political realism. These approaches were mainly confined to non-zero-sum or mixed-motive games in which parties have both competitive and cooperative options available. Mixed motive negotiations involve situations in which parties seek realization of a common interest where conflicting interests are present. This approach was dominant in the 1960s and 1970s.

Nevertheless, Anatol Rappoport in late 70s laid a foundation for a new school of thought based on basic assumption of the traditional bargaining framework, stressed that states do not always have incompatible goals, but they often find themselves in situations where real or perceived conflict of interests arise. Some times this may be due to real difference of goals or different perceptions or understanding of the issues which parties are grappling with. Based on this assumption Rappoport introduced a new approach to the negotiations called integrative bargaining or problem solving instead of distributive bargaining of the traditional school. By contrast; integrative bargaining refers to a situation in which the parties may jointly enlarge benefits (voluntarily) available to both, so that both may gain from creating large amount of values to be shared among themselves. This approach finally helped to evolve the Alternative Dispute Resolution (ADR) school of thought.

Most of the Conflict Resolution (CR) interventions such as peace making, peace building and peace keeping as well as CR methods such as facilitation and mediation belong to the Alternative Dispute Resolution (ADR) school of thought and practice. In this approach it is called alternative to dispute resolution because they are based on sphere of non military (power orientated) and non judicial interventions. In a way ADR techniques also can be identified as techniques that are based on political idealism and non Marxist radicalism. As a theory and practice ADR has become the foremost approach and method in the Conflict Resolution field now days.

Therefore in an attempt to analyze and understand the western conflict theory and practice, it is pertinent to start its journey through understanding and analyzing ADR as a theory and practice.

In the western hemisphere ADR is considered as a huge success story. According to Gunther Baechler¹, the vertical spread of alternative methods at all societal levels, from the grass roots to the top level of international diplomacy; secondly, horizontal or geographical and intercultural distribution of these methods throughout the world; and thirdly, and probably the most visibly, the myriad of recent publications in this growing field of scholarship are the standing testimony for this success

Nevertheless, Luara Nadar and Elisabetta Grande in their polemic article written to *Law & Social Inquiry*, Vol 27, No.03 (Summer, 2002) pp 573-594 reported in <http://www.jstor.org> under the heading of " From the Trenches and Towers"

¹ Gunther Baechler (Ed), *Promoting Peace, The Role of Civilian Conflict Resolution*, Pp 01, Civilian Conflict Resolution in the context of International Peace promotion in the 1990s, Staempfli Publishers Ltd,Berne,2002

"Current illusions and delusions about conflict management In Africa and else where" states that 'ADR approaches imported from United States deals with dispute resolution simply in terms of mechanisms and techniques , ignoring substantive issues central to African and other communities. The entire discourse surrounding ADR pays insufficient attention to problems with terms such as modern or traditional , and encourages and ingenious denial of the effects of the inequality in power and money on conflict resolution. This ideological baggage renders unreflective imposition of ADR incompatible with the best interests with the African communities'.

The gap between the above quoted two assertions by the Gunther Baechler as well as Luara Nadar and Elisabetta Grande provides good passage to formulate a hypothetical question to analyze western conflict theory and practice. Against such a background, this paper asserts to find out whether ADR techniques applied in conflict resolution field are adequate and generic in its foundation in dealing with an escalating conflict in constructive manner?

To generate an answer to this question we have to analyze ADR techniques taking several points of departure and borrowing from several ideological points of views such as.

1. Political Realism²
2. Political Idealism³
3. Marxist Approach⁴
4. Non Marxist Radicalism⁵

² theories thus become instruments not answers to enigma

³

⁴ Dialectical approach to knowledge and society that defines the nature of reality as dynamic and conflictual: social disequilibria and consequent change are due to the class struggle and working out of contradictions inherent in social and political phenomena.

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ADR as a Technique:

When the ADR techniques are involved with a conflict, it is a well accepted fact that the success rate is of ADR depends on;

1. Contextual factors,
2. On the conflict stage,
3. Its complexity,
4. Types and nature of the actors involved,

This shows that ADR techniques are more or less based on speculative approach rather than solid techniques based on an approach that has the ability of changing a conflict dynamics identified through universal definition of a conflict. It is true that dynamics of a conflict is going to be different from inter personal conflict to personal conflict to group or institutional conflict. Nevertheless if one goes into the bottom of these conflict dynamics, it can be argued that all of these conflicts, one should be able to identify common dynamic/s within a conflict with an aid of a philosophy or ideology. It is the view of the bargaining school that persistence of a Conflict always depends on how the power, that of a party to a conflict wields over the other. Power Dependency Theory (Emerson, 1972)⁶: Speaks about how much others depend on you. The dependence would decide on the power that other wield on you. Deutsch (1973) described power as a relational concept functioning between the person and his/her environment. Power therefore, is determined not only by the characteristics of the person or persons involved in any given situation, nor solely by the characteristics of the situation, but by the interaction of these two sets of factors⁷. If the ADR is

⁶ Power and Negotiations in Organizations, Edt Arthur Hochner et el, page 73,Kendall/Hunt Publishing Company,2001

⁷ Hand Book of Conflict Resolution:Theory and practice,Edt Morton Deutsch,Peter T. Coleman,Page111,Jossey-Bass Publications,2000

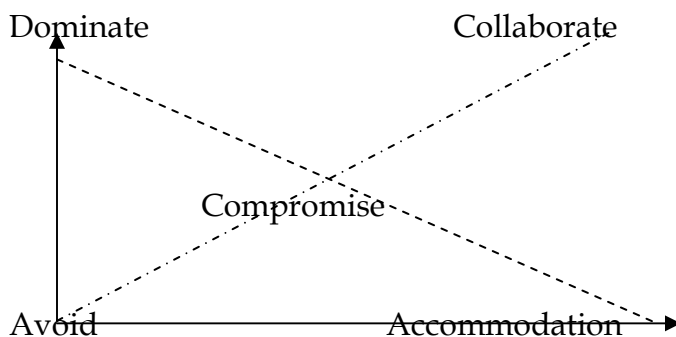
founded upon a non power oriented premise, it should be able to explain how the dynamics of a conflict as well as resolution of a conflict works in a non power centered manner.

Main lacuna of the ADR is that it fails to provide this philosophical or ideological support to develop a coherent intervention strategy. Instead, ADR is more inclined to deal with changing the actor perception or external factors (factors that lead to a conflict) to the conflict in technical manner. As a result ADR has not been able to maintain a coherence in its applications. To understand this complexity in approach it is necessary to look at the various approaches applied under the ADR as definitions as well as interventions.

1. Understanding ADR approaches:

Conflicts are an unavoidable phenomenon in human behavioral culture and it may happen where ever human stands. Also it is vital for human development as far as it is properly managed, resolved or transformed. If conflicts considered as unavoidable phenomena, it is vital to generate conflict resolution methods in parallel with the existence of conflicts. By nature humans tend to react for a conflict according to his or her perception of power in hand. Following diagram shows how such perception is executed in an atmosphere, when he/she is entangled with power.

Perceived conflict opportunistic potential based on power:



when one party has overwhelming power, future relationships are not of great concern for him or her, if he or she is extremely assertive and if the other is passive or not as aggressive as the “winner”, satisfaction of the interests of the competitors is not dependent on their mutual cooperation, if one or more parties are uncooperative and are unwilling to engage in cooperative problem-solving negotiations in which interests can be mutually satisfied, often it is not possible to avoid a conflict, or accommodate with the parties in a conflict or collaborate with the parties. Parties always in such a situation would try to dominate the other. If not possible they will reach a compromise. Compromise is called win-loose outcome of a conflict. This is the instinct way of humankind in dealing with conflicts. Nevertheless, ADR brings about a new concept in dealing with conflict under the name of win-win outcomes. This approach is based on the assumption that if the parties are not engaged in a power struggle; future positive relationship is important; stakes are high for producing mutually satisfactory solutions; both parties are assertive problem solvers; interests of all parties are mutually interdependent; in such a situation parties would be free to cooperate and engage in joint problem solving and reach a win-win outcome.

Nevertheless in practical terms these two approaches represent pure forms at opposite ends of a continuum, whereas most, reality falls some where between these two pure versions. It is the parties to the conflict who decide what approach is best but not the theory or practice. It depends on the nature of the parties, the issues being negotiated and a wide range of contextual factors. Therefore adoption of a particular approach is contingent upon the ideology or perception of the parties primarily and context secondarily. This shows that ADR based negotiations and mediations do not provide generic strategy to avoid win-loose outcome and how to achieve win-win outcome. This weakness is mainly due to the assumption made at the deriving point of integrative bargaining concept (Rapoport).When it was propounded by Rapoport he developed it on

the basic assumption of the traditional bargaining framework and he did not want to deviate from it philosophically.

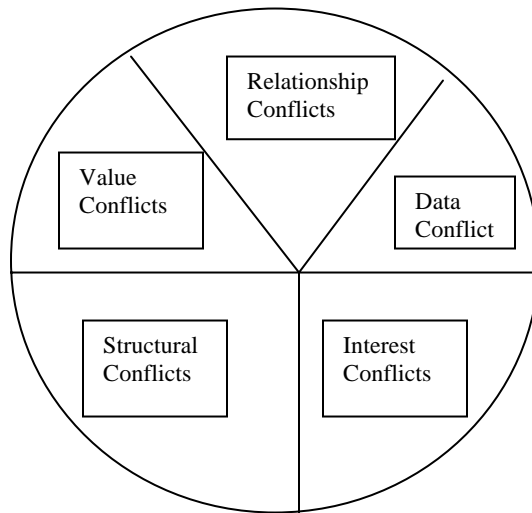
On the other hand ADR approach assumes that necessary factors and actors to reach a win-win outcome will be either built in or could be developed within the parties through outside intervention (through workshops: William Zartman). But its prescription in interventions lacks generic explanation on how to do it. To understand this assertion it is vital to understand definition to the conflict and the way conflicts are occurring according to ADR school of thought.

Conflicts, compared to disputes, are often understood as a Violent collision, a struggle or contest, which are deeply -rooted in human needs, and which frequently require major environmental and policy restructuring for their resolution⁸. In such a context one can identify a conflict as a phenomenon that is always entangled with the behavior of a living entity and this behavior can be a part of person, groups, organization, nation or regime.

Nevertheless, it is observed that linier definitions to a conflict, in most of the occasions defeat the chances of generating proper intervention strategy in resolution. Therefore, the concept of different facets of a conflict, which is called conflict cycle,⁹ was introduced in order to design proper interventions.

⁸ Conflict Resolution and Provention, John Burton, St. Martin's Press, 1990

⁹ The Mediation Process, Practical Strategies for resolving Conflict by Christopher W. Moore, Jossey-Bass Publication, 3rd edition, 2003



Although conflict cycle is a product of ADR techniques, when applied through negotiations and mediations often these ADR interventions tend to omit or give a lesser degree of attention to certain facets of this conflict cycle. For example, in most peace making strategies, structural¹⁰ and interest based conflicts¹¹ get more attention in generating multiple options compared to value¹² and data conflicts¹³ of the same conflict. The argument posed by ADR strategists for this discern is that if there is value conflict possibility of resolving it could be remote. Therefore the strategy prescribed is to avoid it or generate super ordinate value that all parties can accept. Diagram below depicts how this happens at the negotiating table.

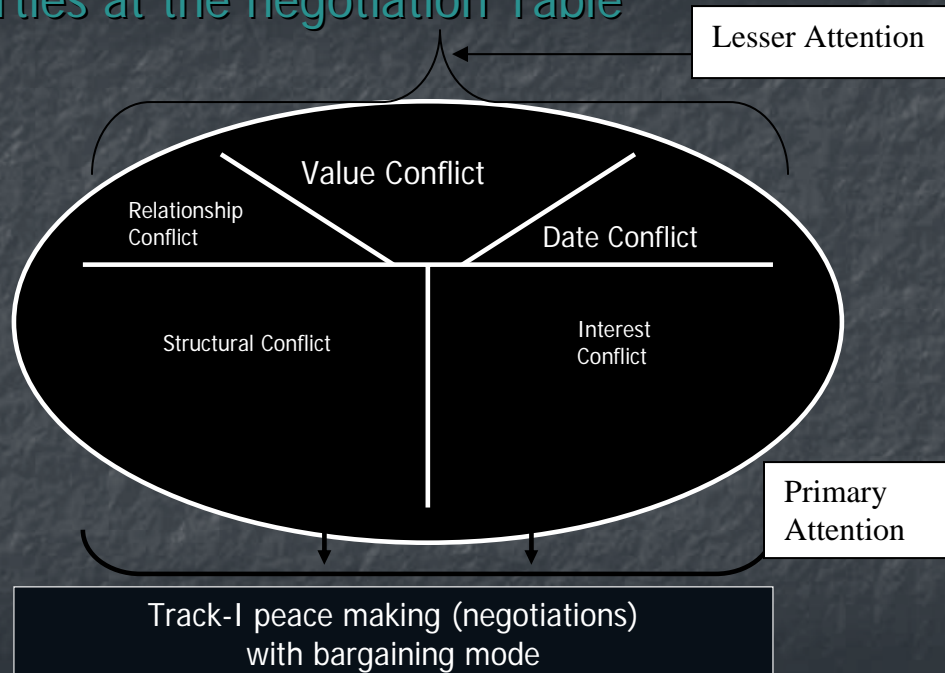
¹⁰ **Structural Conflicts** are caused by: 1). Destructive patterns of behavior or interactions, 2). Unequal control, ownership, or distribution of resources, 3). Unequal power or authority, 4). Geographical, physical or environmental factors that hinder cooperation, 5). Time constrains,

¹¹ **Interest conflicts** are caused by: 1. Perceived or actual competition over substantive (content) interests, 2. 3) Procedural interests. Psychological interests.

¹² **Value conflicts** are caused by: 1). Different criteria for evaluating ideas or behavior, 2) Exclusive intrinsically valuable goals, 3). Different ways of life, 4). Ideology or religion.

¹³ **Data Conflicts** are caused by: 1). Lack of information, 2). Misinformation, 3). Different views on what is relevant, 4). Different interpretation on data, 5). Different assessment procedures,

Prevailing Negotiation Strategy by the parties at the negotiation Table



To understand the weakness of this approach it is important to understand how conflicts occur between individuals, organizations, states and international regimes. Conflict matrix below help understand the pattern of conflict occurrence among the different entities.

Conflict Matrix:

The way behaviors of these entities getting into conflict can be depicted in following matrix. "X" represents the general pattern of conflicting behavior of these human entities and "#" represents the way modern day conflicting behaviors that are being spread into other inter entity conflicts.

	Individual	Organization	State/Nation	International Regimes
Individual	X	#	#	#
Organization		X	#	#
State/Nation			X	#
International Regimes				X

It is obvious that most of the modern day conflicts that happen between individuals and organizations (Industrial disputes, etc) , individual and states (Human Rights oriented, etc), organization and states (policy oriented, etc), organizations and international regimes (WTO, Environmental, etc), states and international regimes (WTO, North-South) are based on value driven conflicts and data driven conflicts. Data conflicts often derive from value conflicts and it is always a process based conflict rather than substance related conflict. Relationship conflicts also some times derive from value conflicts. In such a context most vital conflict facet to be resolved is a value conflict.

If the ADR techniques prescribe to avoid values or provide lesser attention in dealing in its resolution approach it will be difficult to see a success in many of the conflicts depicted in above matrix.

This inability synchronizes with the outcomes of the conflict resolution efforts. Compared to power based or judicial based dispute resolution approaches, most of the ADR techniques practiced in the last two decades have not shown any impressive results in dealing with modern day conflicts that are happening between states and international regimes, i.e. world environmentalists Vs. Nation states,(Greenpeace Vs French Government over Nuclear tests),organizations Vs. states and international regimes,(Human Rights organizations Vs. States) or

(INGOs Vs. WTO regime), International regimes vs states(US vs Alkaeda) as well as the conflicts that occurs in general pattern. As a result, parties who wish to resolve a conflict in hand, often tends to follow non ADR techniques such as arbitration, judicial as well as extralegal coerced decision making or resort to distributive bargaining strategies. Reason behind this tendency is the non embodiment of ADR techniques within the power dealing world, whether it is a state, organization or regime as a viable alternative to power or judicial dispute resolution or distributive bargaining. Reason for this is in addition to what is mentioned above is that these entities have not yet been equipped with proper institutional infrastructure to absorb ADR techniques such as ADR friendly institutional atmosphere or trained ADR technicians compared to their power dealing machineries i.e. Armed forces, judicial systems, pragmatism orientated decision making bodies, etc. On the other hand ADR is still in its nascent stages and is therefore unable to prescribe such a detailed strategy in establishing macro level ADR orientated infrastructures and human resource deployment policies to the power based organizations as an alternative and a viable option. Inability to develop proper ADR implementation policy and strategy within the UN system yet is a living testimony for this assertion.

Conflict Transformation as ADR technique:

In many studies of conflict transformation suggests that social conflict causes changes in four dimensions of behavior of a person, group, nation/state or regime: the personal, the relational, the structural and the cultural. According to these studies the dimensions identified here are always impacted upon by conflict causes . Diagram bellow explains how this happens in a conflict. Based on these understandings Conflict transformation techniques prescribes deconstructing prevailing individual-environment axis and transforming (reconstruct) it into a new (peaceful) individual-environment axis. Most important in this approach is proper analysis of the conflict and generating transformation road map based on peace keeping, peace making and peace building strategies. Basic problem in this approach is that this approach has over looked the sequence of deconstruction, reconstruction and transformation axis in change. In reality, transformation happens only when reconstruction through deconstruction of a phenomenon is finished. Reconstruction and transformation are two different notions by substance and process. Nevertheless, this difference is not clear within the transformation discussed under the ADR.

<p style="text-align: center;"><u>Personal</u></p> <p>Conflict changes individual personally, emotionally and spiritually.</p>	<p style="text-align: center;"><u>Relational</u></p> <p>Refers to people who have direct face to face contact. When conflict escalates communication pattern change, stereotypes are created, polarization increases, trust decreases.</p>
<p style="text-align: center;"><u>Structural</u></p> <p>Conflicts impacts systems and structure-how relationships are organized and who has access to the power- from families and organizations, to communities to whole societies.</p>	<p style="text-align: center;"><u>Culture</u></p> <p>Violent conflict causes deep seated cultural changes, for example, the norms that guide pattern of behaviors between elders and youth or men and women.</p>

The above chart shows to us what is ultimately relevant is not the conflict causes but an individual and dynamics that are created by individuals. This is because in reality conflict causes as well as change of context is finally as well as constantly influenced by individuals. Therefore one has to first identify the elements (deconstruction) of a conflict. Above chart provides good explanation to deconstruct the complex relationship of an individual and the context. Then these elements (i.e. individual and context) have to reconstruct in order to transform. Transformation desired is taking place only after this stage of reconstruction. It is questionable whether modern day conflict transformation theories have understood this aspect correctly. They merely talk about transforming parties to the conflict as well as the context that the parties are situated. But tend to ignore to be specific on the strategies of reconstruction as well as transformation in changing process. As a result the strategies that talk about transformation become mere prescriptions. To cover this inability they

insulate the strategies that prescribed through number of assumptions. The Berghof hand book states “Finally, these different types of transformation further relate to the **phase of the conflicts** and the **timing of intervention**. Context and structural changes **tend to take place over longer time-scale**, and affect the setting of the conflict; the other types of transformations occur more rapidly and subsequently, as part of dynamics of the conflict. The sequencing of the changes **varies with each peace process depending on the logic of the situation**". Therefore it is not bad to say that most of the strategies that are suggested to transform context have become abstract to the reality and hypothetical by nature. This is because prescribed strategies to transform conflict parties as well as conflict environment are not premised on proper philosophical base. It is not clear those strategies are meant for reconstruction or transformation. When the strategies are not following such philosophical premise, the prescribed techniques that are suggested get obsolete.

Chart bellow¹⁴ prescribes various actors and factors transformation strategies. The strategies prescribed here shows the obsolescence mentioned above.

Type	Exmple
1. context Transformation	Change the international and regional environment.
2. structure Transformation	Change from asymmetric to symmetric relations, Change the power structures, Change the markets of violence
3. Actor Transformation	Changes the leadership, Changes of goals, Intra-party change, Change in party constituencies, Changing actors,

¹⁴ Transforming Ethno political conflict, The Berghof hand Book, Pa 78 Alex Austin.Martina Fischer,Norbert Roupers (Edt) 2003,Berghof Publication

4. Issue Transformation	transcendence of contested issues, Constructive Compromise, Changing issues, de-linking or re-linking issues
5. Personal-Elite transformation	Changes of perspective, Changes of heart, Changes of will, Gestures of conciliation,

Also these involvements sometimes overlook the fact that these actors and factors are also social construction of an individual at the deconstruction stage and prescribe mechanical transformation methods without considering complicated social milieus that are connected with individual and the environment. Examples given in the above mention chart as transformation strategies prove this assertion.

This kind of approach in ADR has created multiple defects in conflict transformation such as late reactions to the conflict, generating conflicting interests of intervening parties, inadequate responses to the crisis, and mission creep. Therefore to overcome this inherent lacuna in approach above mentioned chart has to be reconstructed in following manner.

Types of actors	Deconstruction strategy	Reconstruction strategy	Transformation strategy
Actors/Factors			

Conflict Management as an ADR technique:

In some instances, ADR methods do not go in hand in hand with ADR principles. Good example for this is peace keeping as a conflict management tool. Although conflict management comes under ADR approach, it is observed that in most instances peace keeping as an intervention strategy uses the force in subtle manner to manage a conflict. As a result peace keeping as conflict management method faces conceptual and substantive crisis. In most instances peace keeping (separation of forces by force) is unable to make clear distinction between "observing peace" and enforcement. Therefore in many international experiences, peace keeping has exposed its hollowness. Some times it has become a reason for resumption of conflict in different magnitudes.

Preventive Diplomacy is also another conflict Management method that has shown similar defects in concept as well as in substance. For instance, humanitarian interventions practiced under preventive diplomacy has failed to adhere to non military/non judicial dispute resolution principles. Often it has become a tool of power. As a result preventive diplomacy has always become a tool of judicious decision of powerful group of nations and its forces.

Interventions to a conflict through ADR approaches:

It is reported that nearly one hundred national and minority peoples took part in serious, violent conflicts at some time between 1945 and 1990. Of these, sixty were protracted ethno national conflicts. At the beginning of 1999 there were fifty nine armed ethnically based rebellions are underway. In addition to these ethno-political conflicts, numerous interpersonal and inter institutional conflicts surfaced on a by day basis.

Against this background its pertinent raise the question as to how many conflicts mentioned above have been resolved and out of that how many of these resolved ones adopted ADR techniques in resolving those conflicts. Nevertheless every body knows that there is no magic formula to resolve a conflict .Conflicts may get resolve due to multiple reasons. Some times conflicts get resolved when the conflict reaches its own natural end of conflict escalation cycle. It is a well accepted fact that ADR is the only approach other than military and judicial approaches that become closer to resolving a conflict. Yet it has to go a long way in generating a foolproof approach. The problem right now faced by the ADR is it's lack of uniformity in approach and long term efforts, at multilateral levels with proper strategies that can dent the conflict surface.

If one assumes that Conflict surface is created by the will of a deformed rational being the most important aspect in conflict resolution is reforming such a deformed rational being in to a rational one. This should be the strategy of the ADR techniques. In order to do this ADR needs universal approach. To generate universal approach, the most important challenge is to understand universal dynamics of a rational being or deformed rational being that generate a conflict based on grievances and greed or generate coexistence founded up on peace and reconciliation based on empathy and compassion. What is described as negotiation in ADR is a private decision making effort by parties, in which they are striving to become rational being and establishing conditions for coexistence within the society devoid of conflict/violence. Nevertheless, negotiations as an ADR approach have not been able to generate the best strategy to achieve this objective.

Why people negotiate:

The traditional approach for the negotiation process is that every negotiation is unique and therefore meaningful generalization about the process can not be achieved. This traditional school mostly represented and employed in diplomacy had a common foundation, that is non zero-sum or mixed motive approaches. In such a situation parties have both competitive and cooperative options to achieve each others objectives. At these negotiations each party is confronted to achieve either to accept the agreement or continue with the negotiations in the hope of obtaining better terms or to break off from the negotiations. In simple terms the interests of the parties to the conflict are fundamental and each party tries to win for it self the largest possible share of what ever value is being divided. This is what called distributive bargaining in negotiations.

Against this traditional bargaining approach, new perspective in negotiations, surfaced to the field which have been identified as problem solving approach as a result of the basic studies of bargaining models by Anatol Rapoport.¹⁵In this negotiation process parties may jointly enlarge the benefits available to both, so that both may gain from creating larger amount of values to be shared among them selves. This kind of approach is also called integrative bargaining or win-win negotiations.

Nevertheless in practical terms these two approaches represent pure forms at opposite ends of a continuum, while optimal reality falls some where between these two pure versions. It is the parties to the conflict as well as the mediators who decide what approach is best. It depends on the nature of the parties, the issues being negotiated and wide range of contextual factors. Therefore adoption

¹⁵ P. Terrance Hopmann, *Bargaining and Problem solving; two perspectives on international negotiation, Turbulant Peace; the challenges of managing international conflict*, USIP press 2001

of particular approach is contingent upon the concrete situation of each particular negotiation.

In such a context it is important to understand on what circumstances parties' select particular approach.¹⁶ Christopher W. Moore provides useful criteria to identify appropriate approaches in negotiations. According to Moore this criteria may be different for interpersonal, commercial, organizational and public disputes. Some of the criteria or variables for selecting approach are cost, time, the relationships between the disputants, the internal dynamics of the conflict, and power.

Therefore it is now important to understand normally on what circumstances negotiated compromise or interest based negotiations are taking place. Mooore¹⁷ once again provides us a useful comparison on those two approaches. At the same time it is important to examine particular reasons for such a behavioral pattern.

Negotiated compromise (Moore's)	Reasons for such a Behavioral Pattern (My Emphasis)	Interest Based Negotiations (Moore's)	Reasons for such a Behavioral Pattern: (My Emphasis)
The parties do not perceive that the possibility of a win-win situation will meet their needs. They have decided to divide and share what they see as a limited resource.	Greed	Parties have at least a minimal level of trust in each other	Community feeling based on trust

¹⁶ The Mediation process, Practical strategies for resolving conflict, second edition Pp109

¹⁷ Ibid Pp107

Interests are not seen as interdependent or compatible.	ignorant	Parties have some mutually interdependent interests.	understanding
The parties do not trust each other enough to ensure joint problem solving for mutual gains.	Competitive	Equal, but not necessarily similar, means of influence exist, or the party with the superior power is willing to curtail the exercise of power and work toward cooperative solutions.	Empathetic
Parties are sufficiently equal in power so that neither can force the issue in its favor.	Power oriented	Parties have a high investment in a mutually satisfactory outcome because of mutual fear of potential costs that might result from impasse.	Practical
		Parties desire a positive future relationship	Visionary

Nevertheless, it is obvious fact that unlike in the negotiated compromise approach, interest based negotiations cannot take place in a void (anarchy). In the former, parties embark on to a bargaining relationship that have perceived or actual conflict of interest. They voluntarily join into a temporary Relationship until they find a compromise out come from the negotiations based on human instincts (Freud). But the interest-based negotiations can produce positive out come only when parties are assisted by out side or the parties, holding certain level trust, understanding, empathy, practical and visionary other than their strategic interests. This is the basic problem area of problem solving approach. Negotiations as a technique of ADR is unable to explain how much of level of these qualities has to be acquired in reaching problem solving mentality in negotiations.

Mediation:

Under the ADR, if the negotiations reach an impasse (due to non-acquirement of the required human qualities in negotiations), the parties may need to get some assistance from outside. Such occasions are called mediations. According to Moore¹⁸ Mediation is an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited or no authoritative decision making power. Mediation is usually initiated when the parties no longer believe that they can handle the conflict on their own and when the only means of resolution appears to involve impartial third assistance.

Nevertheless, if mediation is to become interest based problem solving negotiations then it has to adhere to certain parameters. In the conflict resolution parlance this is called principled negotiations.

Principled negotiations:

The seminal articulation of principled negotiation is propounded in the work of Roger Fisher and William Ury¹⁹. According to these principled negotiations, Fisher and Ury developed four, what they term, and principles to guide negotiators:

- Separate the people from the problem
- Focus on interests, not positions
- Invent options for mutual gain
- Insist on using objective criteria

¹⁸ Ibid, Pp08

¹⁹ Getting to Yes: Negotiating without giving in, Penguin Book 2nd ed. 1991

If one put these parameters of the principled negotiations into a particular context we can expand those principles (practically) in the following manner:

- The conflict issues as well as the relationship between the parties have to be addressed
- The negotiations should try to identify the enlightened and common interests of the parties and overcome bargaining from adversarial positions
- Negotiations should be framed and organized in a such a manner that mutual gain is achieved and agreements should be based on jointly accepted principles

Nevertheless, often we see in the mediated negotiations, these principled negotiations are not adhered to. Among the two approaches always there are four possible combinations in a two party conflict (Moore 1991) .

- Both parties use positional bargaining
- Both parties use interest bargaining
- One party use predominantly positional bargaining and other users predominantly interest based bargaining
- Both parties use a mixed procedure depending on the issue and their interests

Other than the behavioral and perceptual factors mentioned above, epistemological factors also influence the process of mediation to deviate from interest based negotiations. Amongst the several epistemological factors that decide the process of mediation are the capabilities of the parties to frame the basic issues of the conflict and mediators ability to comprehend the context. This particular aspect is connected with the parties' as well as mediator's ability to

develop comprehensive and common strategic framework for process of negotiations in order to develop multiple options by enhancing relationship between the parties and ownership to the process. Nevertheless main problem of ADR in this respect is that there is no coherent strategy other than expecting the parties to enlighten on the desired behavior.

Problem areas of ADR approach in mediation:

There are the two areas where interest based principled negotiations recipe is unable to deliver its anticipated results and need some improvement. There are several reasons, which contribute to this failure. First reason is its inability to develop a common analytical framework to assess the data related to the conflict. This includes inability to reach an agreement on what data are important, what strategy is appropriate to collect data and what kind of common criteria is suitable to assess the data. Because of this inability parties as well as mediators often fail in developing mutually acceptable strategic framework for the process of negotiations. Finally this defect in the process affects generating mutually acceptable options for settlement. ADR so far have not been able to generate solutions to over come this challenge.

Why parties like to become pragmatic instead of ideal?

Against this context it is important to understand why parties tend to sail with pragmatic approaches. It is not a complete truth if some one says that parties tend to adopt pragmatic approaches in a process solely because of their natural instinct towards power. The real reason for such a tendency is lack of guidance generated through the principled negotiations through strategic framework of

negotiations. Therefore it is pertinent to understand the lacking part of the interest based negotiation process, which is a main approach of ADR.

Lacking part of the interest based negotiation process:

The two basic strategies that are available to negotiator:(a) problem solving approach, which involves an effort to find an alternative that is acceptable to both parties;(b)pragmatic approach that encompasses the bargaining, which involves an effort to force one's will on the other party.

Problem solving approach involves pursuit of a formula for reconciling the two parties' aspirations. (Pp27 Negotiations theory & Practice)Problem solving can be individual activity or joint enterprise. In joint problem solving, the parties exchange accurate information about their underlying interests, collectively identified new issues in light of this information, brainstorm to locate alternative ways of dealing with these issues and work to together to evaluate these alternatives. But often this joint problem solving is not happening as it is prescribed and expected.

Even disputing parties join a mediator in an open honest, collegial, joint problem-solving quest for reasonable compromised solution, but the parties are often confronted with an analytical problem of some complexity and find difficulty in developing alternatives through joint or one sided brain storming.

Under normal circumstances this happens due to various reasons.

1. Joint gains (through integrative bargaining) could be realized if only the contesting parties are willing to allow mediator to act with comparative freedom to analyze their joint problem and devise creative alternative.

2. Often one party is not ready for it or the parties do not trust each other to enter into a joint enterprise.
3. Partial information and partial control over the outcome would hamper joint problem solving effort.
4. Lack of joint effort to share delicate information, value trade offs, and reservation values.
5. Imbalance accumulation of information by the mediator.
6. Different levels of capacities of the parties in analytical problem solving skills.
7. Lack of uniform formula and process for joint participation in problem analysis.
8. Possible abstract analysis and decomposition that highlight differences in judgments about uncertainties and in opinions about value trade offs.

In traditional approach what mediators do in such situations is exploiting these differences to fashion compromise agreements.

The principle argument here is that these problem analysis and option developments by the mediator is based on mere speculation and subjective knowledge on the context. Therefore there is always luck involved with the success of mediation. To understand this statement it is important to analyze critically these two stages of the process of the problem solving approach.

Joint problem analysis:

In order to develop multiple options through joint problem analysis, the foremost requirement is the parties ability to come into a consensus on the basic nature of conflict and mediator's ability to understand of the nature of context. In this quest, local variations as well as cultural practices by the negotiating parties and mediator plays pivotal role. It is a well known fact that the local variations

are determined by the various cultural practices and differences among the people. Local variations and cultural practices in this sense are very important because articulation of the problem by each party relies on their value systems, culture and their language. If the mediator is unable to comprehend these values, cultures, practices and variations correctly the hypothesis that is developed by the mediator on the conflict may be far from reality. Therefore developing a common framework to analyze the problem in hand is an essential prerequisite in mediation. Like any other social activity, mediations can also surface universal patterns of human relations if one digs deep in to the conflicting relationships notwithstanding their cultural differences. Nevertheless, this general statement does not indicate how deep is deep enough to find the universal pattern in conflicting human relationships and finally frame the problem between the parties. The challenge of ADR technique is to find a methodology for digging in to deep. As discussed above Harvard school project envisioned this by introducing the importance of moving into interests of the parties from the positions. Nevertheless it does not provide comprehensive methodology in finding the interests from the positions in this deep sense. But the Harvard school correctly lays the foundation for problem analysis. Therefore it is important to find a common methodology in finding hidden interests of the parties.

Objective of the conflict Analysis:

It is presumed that a negotiated out come is dependent on a comprehensive analysis. This kind of analysis should be able to understand universal behavioral characteristics as well as cultural and local variations. In order to do that the mediator has to identify first targets of analysis. The targets of such an analysis would be,

- I. Behavior of the actors

- II. The structure and process that conflict started, developed and existed(the factors)
- III. Goal values of the actors

These are the three determinants of a negotiated outcome. Actors could be studied individually, by looking at their perspectives and traits. The structure refers to a distribution of elements, usually elements of power (or means) but also elements of values (ends). Most of the conflicts: data, human relationship, interests or structural conflicts are based on foundation of values. Therefore identifying the nature of conflict and its dynamics will help to understand the values.

In this context it is important to get an understanding of what a problem means in negotiation process.

In policymaking, how one defines a problem begins to determine what he or she will do about it. The definition of the problem begins to determine policy. In negotiation theory, the recognition of a common problem that the two sides share an interest in solving is almost a prerequisite in negotiation. In fact, negotiation is sometimes defined as a shared effort to solve a problem. (Pp63 neg. theory)Therefore what is important is not identifying the problem of individual party but the overlapping parts of identified problems of all parties.

Therefore the most important aspect in problem analysis is defining the common element (universal element of the conflict irrespective of cultural or local variations) of a conflict. Nevertheless, analytical approaches that exist so far have not been able to attain these objectives. To understand the defects of the existing tools the basic approaches of those have to be analyzed.

Standard Analysis:

In negotiation theory there are five basic modes of analysis to surface so as to identify the common problem in hand

1. Structural analysis²⁰
2. Strategic analysis²¹:
3. Process analysis²²:
4. Behavioral analysis²³:
5. Integrative analysis²⁴:

Nevertheless, like the proverbial blind men who confronted the elephant and brought back conflicting accounts of its salient characteristics, above-mentioned different modes of these analysis provides different aspects of a single

²⁰ This analysis is the most common place approach in conflict analysis. This is based on a distribution of elements defined either as parties' relative positions (resource possessions) or as the relative ability to make their options prevail (or to counter the other's efforts to make its options prevail)²⁰

²¹ Strategic analysis is also based on an array of elements, but its structure is one of ends, not means. It begins with an assumption that outcomes are determined by the relative array of their values to the parties, under conditions of rational (i.e. preferred) choice²¹.

²² Process analysis has the common feature of explaining outcomes through a series of concessions determined by some element inherent in each party's position. The particular element varies slightly according to the particular version of the theory: most process analysis is based on security point theory in some form, although few other versions are also used²².

²³ Behavioral analysis provides an obviously different explanation of negotiated outcomes by using the negotiators themselves as the focus of analysis (Jonson 1978) the terms of analysis used are the personalities of the negotiators, either directly or in interaction. Personality social psychology is used to refer to personal predispositions that exist at a number of different levels²³.

²⁴ Integrative analysis, like behavioral analysis, would seem to constitute an exception to the general understanding of a negotiation process. Although it too conceives of negotiation as process, its process runs through stages, in which the outcome is explained by the performance of behaviors identified as specifically appropriate to each successive stage. Rather than see a process that works from fixed points of discord to a common point of convergence, integrative analysis emphasizes the imprecision of parties' interests in their own mind²⁴.

phenomenon. Therefore what is needed in conflict analysis is a unified formula to bring in all these modes of analysis together. Otherwise employing one mode will not bring the comprehensive picture into the surface although it represents the correct picture of one aspect of the conflict in hand. This weakness ultimately severely hampers the invent of options for mutual gain.

Invent options for mutual gains:

To understand the above heading it is important to understand what Harvard project entails about joint problem solving.

The Harvard project:

According to this project any outcome of negotiation would be fairly judged by three criteria: It should produce a wise agreement if agreement is possible. It should be efficient. And it should improve or at least not damage the relationship between the parties²⁵. The method that the Harvard project prescribes to achieve the above criteria is the five folded approach. That is

1. understanding the problem
2. Separate the people from the problem
3. Focus on interests, not positions
4. Invent options for mutual gain
5. Insist on using objective criteria

The weakness in option making for mutual gains are several folded. In most negotiations there are four major obstacles that inhibit the inventing of an abundance of options; (1) premature judgment;(2)searching for the single answer;(3)the assumption of a fixed pie; and(4)thinking that solving the problem is the problem²⁶.

²⁵ pp4 Getting to yes,Negotiating Agreement with out giving in Roger Fisher and William Ury second edition the Harvard Negotiation project

²⁶ Ibid Pp57

In order to invent creative options by avoiding these weaknesses the Harvard project proposes (1) to separate the act of inventing options from the act of inventing options from the act of judging them;(2) to broaden options on the table rather than look for a single answer;(3) to search for mutual gains; and (4) to invent ways of making their decisions easy.

The most important step in this conceptualization process is the separate inventing from deciding aspect. Without this all other steps would become redundant. Therefore careful analysis is needed to understand this approach and thereby measure the impact on this approach for other steps. The methodology that proposes to achieve the quality that speaks under the approach is brainstorming. According to the Harvard project it says" A brainstorming session is designed to produce as many ideas as possible to solve the problem at hand. The key ground rule is to postpone all criticism and evaluation ideas. The group simply invents ideas without pausing to consider whether they are good or bad, realistic or unrealistic²⁷.According to Harvard Project towards option making there are four kind of thinking.

1. About the particular problem; the factual situation you dislike
2. Descriptive analysis: you diagnose an existing situation in general terms
You sort problems into categories and tentatively suggest causes.
3. What ought perhaps to be done. Given the diagnosis you have made, you look for prescription that the theory may suggest.
4. Some specific and feasible suggestions for action.

The scheme that the Harvard project, through the Circle Chart, proposes is an easy way of using one good idea to generate others. According to the project this will provide answers to most of the problems that are discussed above in relation to the problem analysis. Nevertheless still it does not provide proper answers to

²⁷ ibid Pp60

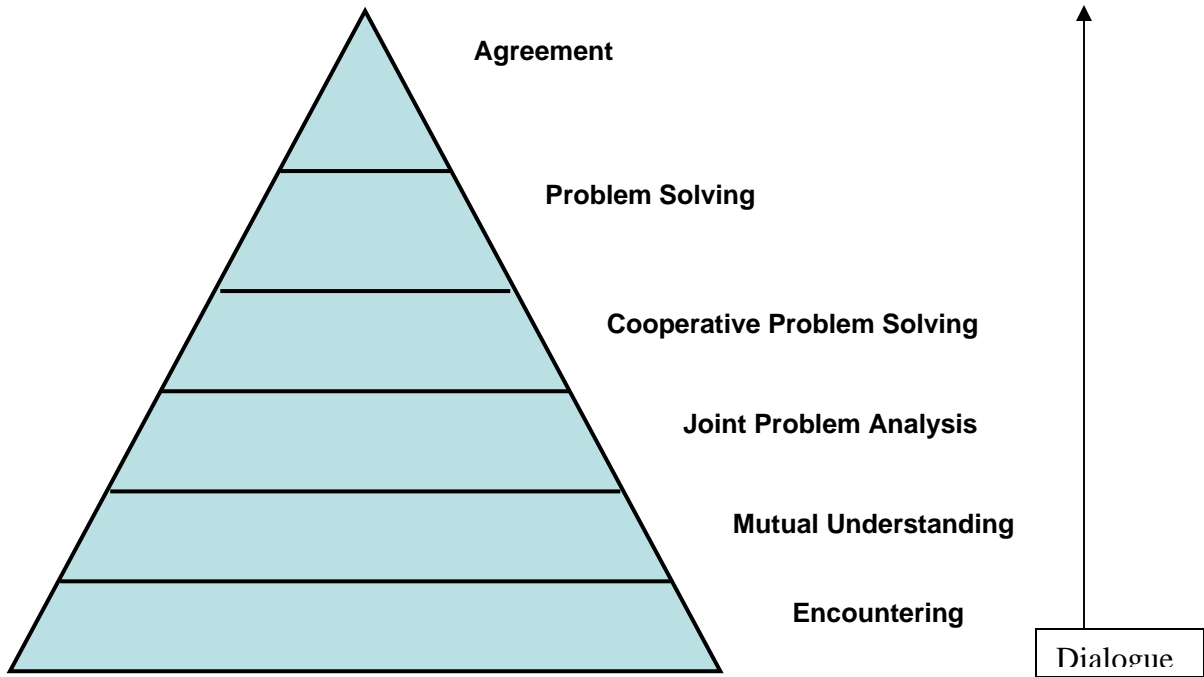
the conflict analysis in the conflict resolution field suffering from. Following are the salient issues that can be identified in this regard.

1. This scheme is still not providing an answer to how the conflicting parties can work together and make options for their mutual benefit.
2. This scheme allows to in most occasions for speculations and no proper tools are identified to generate ideas for the benefit of the purpose.

Although brainstorming is prescribed as a joint problem solving tool, often they are conducted in mediations as one sided event due to its inherent weaknesses of joint problem solving approach i.e. parties do not like to come together as the parties' reluctance to disclose their confidential information inadvertently in brainstorming sessions. Also parties do not like this method because wrong gestures at the brainstorming such as compel other side to make a mistake believing that option proposed by one party may seen as an offer.

Problem solving so far has not been able to find answers to these natural human apprehensions that prevent joint brainstorming as a problem solving tool.

Therefore reaching some what closer to the reality has become a tall order unless the brainstorming techniques under the problem solving is not guided by set of practical and innovative tools and that allow to break the ice of the parties based on mutual apprehensions. Only this kind of tools allows the participants to jointly speculate at brainstorming. Until then the dialogue pyramids as depicted below become mere pictures that decorate the problem solving concept.



In order to overcome this tendency in negotiations joint problem solving should be equipped with more practical tools. These tools should be able to bridge the gap between joint problem analysis and joint option making.