25 YEARS
PROJECT MUSE®

Alternative Dispute Resolution in Tanzania

J. Mashamba



Published by African Books Collective

Mashamba, J.
Alternative Dispute Resolution in Tanzania: Law and Practice.
African Books Collective, 2014.
Project MUSE. muse.jhu.edu/book/45606.

For additional information about this book
https://muse.jhu.edu/book/45606

[This content has been declared free to read by the pubisher during the COVID-19 pandemic.]

Part 1

The Genesis of Alternative Dispute Resolution (ADR)

Chapter One

The Concept of Dispute and Conflict Management

1.0 INTRODUCTION

Any meaningful study of dispute resolution must necessarily entail an understanding of what disputes or conflicts are. In this study we prefix an analysis of conflicts and the need to manage them. This is done here because conflicts are endemic to, and form an integral part of, human life; thus, society should always look at ways to manage or contain them. From time immemorial, societies around the world have grappled with conflicts or disputes and have come up with different approaches to managing them. From such endeavours normative laws evolved.

1.1 UNDERSTANDING DISPUTES AND CONFLICTS

> *As long as human beings have conscience and intellect to think about the future, definitely there will be conflicts. Conflicts are made by human beings and methods to solve them must be created through human intelligence. It is wise to solve the conflict through dialogue, not through weapons. – H.H. the Dalai Lama, Dharamsala 29.11.2001*[1]

1.1.1 Introduction

There are numerous definitions of, and approaches to understanding and addressing, conflicts or disputes worldwide. An interesting definition of conflicts or disputes is one offered by the Danish Centre for Conflict Resolution, which simply states that: 'Conflicts are disagreements that lead to tensions within and between people.'[2] Inspired by Buddhist philosophy, the Dalai Lama elaborates that,

> *… from the perspective of dharma, we say that the root causes of conflict are hatred and attachment, and a strong separation of "we" and "others". Building this strong notion of "self" and "others" is based on ignorance, or not knowing reality. All these problems are caused by ignorance of the concrete grasping of the self, which is diametrically opposed to the comprehension of selflessness. This is a very profound discussion of the Buddhist philosophy.*[3]

---

1 Quoted in Hammerich, E., *Meeting Conflicts Mindfully*. Tibetan Centre for Conflict Resolution (TCCR) and Danish Centre for Conflict Resolution (DCCR).

2 Ibid, p. 5.

3 Ibid, p. 6.

1.1.2 The Dimension and Nature of Conflict

Viewed in the above sense, conflict results from a 'relationship between two or more parties (individuals or groups) who have, or think they have, incompatible goals.'[4] According to Fisher et al. conflicts are 'a fact of life, inevitable and often creative. Conflicts happen when people pursue goals which clash. Disagreements and conflicts are usually resolved without violence, and often lead to an improved situation for most or all of those involved.'[5] In human relations, imbalances may give rise to conflicts. These imbalances may be reflected in unequal social status, unequal wealth and access to resources, and unequal power, which lead to 'problems such discrimination, unemployment, poverty, oppression, crime.'[6]

Conflict is a necessary part of society, which affects life and our relationships with each other. The challenge facing human society is not to eliminate them but to seek effective ways to positively address them. The management of conflicts can be done both positively and negatively. Negative conflict management can be done through avoidance or use or threat to use force. Conflicts can be managed through negotiation, joint problem-solving and consensus-building.[7] Positive conflict management helps to build and sustain constructive relationships with others.

1.1.3 Functions of Conflict

If not positively managed, conflicts may degenerate into devastating human calamities such as violations of human rights. To the contrary, if positively managed conflicts may help to build and sustain relationships, may foster communication and create coalitions in society. It may also strengthen institutions, foster ideas and enhance rule of law and observations of human rights in society emerging from well managed conflict.[8]

Coser (1956)[9] lists the following positive functions of conflict:

---

4 Fisher, S. et al. *Working with Conflict: Skills and Strategies for Action*. New York: Zed Books/Responding to Conflict, 2000, p. 4. *See* also Mitchell, C., *The Structure of International Conflict*. London: Macmillan, 1981. Chapter 1.

5 Fisher, et al. Ibid.

6 Ibid. P. 4.

7 Centre for Conflict Resolution, *The Human Rights and Conflict Management Training Programme: Induction Workshop*. Cape Town, Centre for Conflict Resolution, 2000, pp. 9–10.

8 Ibid, p. 11.

9 Coser, L., *The Function of Social Conflict*. Free Press, New York, 1956.

(i) Conflicts help to establish our identity and independence;

(ii) Intensity of conflicts demonstrate the closeness and importance of relationships;

(iii) Conflicts can build new relationships;

(iv) Conflicts can create coalitions;

(v) Conflicts serve as a safety-valve mechanism, which helps to sustain relationships;

(vi) Conflicts help parties to assess each other's power and can work to redistribute power in a system conflict;

(vii) Conflicts establish and maintain group identities;

(viii) Conflicts enhance group cohesion through issue and belief clarification; and

(ix) Conflicts create or modify rules, norms, laws and institutions.

In fact, conflicts or disputes are with us willy nilly. In this context, conflicts or disputes function to make people aware of problems, promote necessary change, improve solutions to addressing them, raise morale, foster personal development, increase self-awareness, and enhance psychological maturity.[10] Fisher et al. offer a very interesting assumption about conflicts and disputes. They point out that,

> *Without [conflicts], you might imagine, individuals would be stunted for lack of stimulation, groups and organisations would stagnate and die, and societies would collapse under their own weight, unable to adapt to changing circumstances and altering power relations. It is commonly said, for example, that the Roman Empire collapsed because it was not able to adapt and change.*[11]

10 Fisher, et al. P. 4. *See* also Tjosvold, D., *The Conflict-Positive Organisation: Stimulate Diversity and Create Unity*. Addison Wesley, 1992.

11 Fisher, et al. Ibid.

1.1.4 Causes of Disputes and Conflicts

(a) Theories of Causes of Conflicts or Disputes

Fisher et al. offer a list of six major theories on the causes of conflicts,[12] each of which points to different methods and goals. The six theories are summarized below.

(i) Community Relations Theory

This theory presupposes that conflict is caused by ongoing polarization, mistrust and hostility between different groups within a community. According to Fisher et al. the goals of this theory are: first, 'to improve communication and understanding between conflicting groups'; and, second, 'to promote greater tolerance and acceptance of diversity in the community.'[13]

(ii) Principled Negotiation Theory

This theory presumes that 'conflict is caused by incompatible positions and a "zero-sum" view of conflict being adopted by the conflicting parties.'[14] This theory has the following goals: first, 'to assist conflicting parties to separate personalities from problems and issues, and to be able to negotiate on the basis of their interests rather than fixed positions'; and, second, 'to facilitate agreements that offer mutual gain for both/all parties.'[15]

(iii) Human Needs Theory

This theory presupposes that 'deep-rooted conflict is caused by unmet or frustrated basic human needs – physical, psychological and social. Security, identity, recognition, participation and autonomy are often cited.'[16] The goals of this theory are: first, 'to assist conflicting parties to identify and share their unmet needs, and generate options for meeting those needs'; and, second, to assist the parties to reach agreements that meet the basic human needs for all the sides.[17]

---

12 This list of theories of causes is adapted from Working with Conflict course notes on "Conflict Theories" by Hugo van der Merwe, Johannesburg, South Africa, 1997, and from a paper by Ross, M., "Creating the Conditions for Peacemaking: Theories of Practice in Ethnic Conflict Resolution." *Ethnic and Racial Studies*, 2000.

13 Fisher, et al. Op. Cit, p. 8.

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

(iv) Identity Theory

The identity theory assumes that 'conflict is caused by feelings of threatened identity, often rooted in unresolved past loss and suffering.'[18] Its goals are: first, to identify threats and fears embedded in the conflicting parties through facilitated workshops and dialogue. This helps each party to feel and build empathy and reconciliation between themselves. Second, to jointly reach agreements 'that recognize the core identity needs of all parties.'[19]

(v) Intercultural Miscommunication Theory

This theory presupposes that conflict 'is caused by incompatibilities between different cultural communication styles.'[20] This theory aims at: first, increasing the conflicting parties' knowledge of each other; second, to weaken negative stereotypes the parties have of each other; and, third, to ultimately enhance effective intercultural communication.[21]

(vi) Conflict Transformation Theory

This theory assumes that conflict is caused by real problems of inequality and injustice expressed by competing social, cultural and economic frameworks. The goals of this theory are: first, to change structures and frameworks that cause inequality and injustice, including economic redistribution; second, to improve longer-term relationships and attitudes among the conflicting parties; and, third, to develop processes and systems that promote empowerment, justice, peace, forgiveness, reconciliation, and recognition.[22]

18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid, pp. 8–9.

(b) Analytical Causes of Conflicts or Disputes

In order for one to come out with strategic methods for resolving disputes, a better understanding of the causes or sources of conflict is paramount. Moore (1996)[23] identifies five sources of conflict as follows:

(i) Data or Information Conflict

This involves lack of information and misinformation, as well as differing views on what data are relevant, the interpretation of that data and how one performs the assessment. As the Centre for Conflict Resolution opines, dealing with this type of conflict 'may entail the help of human rights actors, since they would be in a position to provide the information necessary for conflict resolution practitioners to efficiently carry out their functions.'[24]

(ii) Relationship Conflict

This type of conflict results from strong emotions, stereotypes, miscommunication and repetitive negative behaviour. It is this type of conflict 'which often provides fuel for disputes and can promote destructive conflict even when the conditions to resolve the other sources of conflict can be met.'[25]

(iii) Value Conflict

This arises over ideological differences or differing standards of evaluation of ideas or behaviour. The actual or perceived differences in values do not necessarily lead to conflict. It is only when values are imposed on groups or groups are prevented from upholding their value systems that conflict arises.

(iv) Structural Conflict

This is caused 'by unequal or unfair distributions of power and resources. Time constraints, destructive patterns of interaction and geographical or environmental factors contribute to structural conflict.'[26]

---

23 Moore, C.W., *The Mediation Process: Practical Strategies for Resolving Conflict*. 2nd edn. San Francisco: California: Jossey-Bass, 1996.

24 Centre for Conflict Resolution. Op. Cit, p. 12.

25 Ibid.

26 Ibid.

(v) Interest Conflict

This involves actual or perceived competition over interests, such as resources, the way a dispute is to be resolved, or perceptions of trust and fairness.[27]

From this kind of analysis of causes of conflicts or disputes, the Centre for Conflict Resolution observes that: 'An analysis of the different types of conflict the parties are dealing with helps the intervenor to determine strategies for effective handling of the disputes.'[28]

1.1.5 Conflict Analysis

In order to be able to manage conflicts or resolve disputes, a better understanding of the dynamics, relationships and issues involved in a conflict situation is very important as it helps conflict managers to plan and carry out better actions and strategies.[29] Fisher et al. argue that this understanding can be gained in two ways: first, by carrying out a detailed analysis of the conflict or dispute from a variety of perspectives; and, second, by exploring the specific issues and problems that relate to the conflict or dispute.[30] According to them, conflict analysis is 'a practical process of examining and understanding the reality of the conflict from a variety of perspectives. This understanding then forms the basis on which strategies can be developed and actions planned.'[31]

In practical terms, conflict analysis can be done with the help of a number of simple, practical and adaptable tools and techniques, such as the Circle of Conflict, which is 'a useful analytical tool for examining disputes and uncovering the root cause of conflict behaviour.'[32] The Centre for Conflict Resolution observes, in this context, that,

> *By examining a conflict and evaluating it according to the five categories – relationship, data, interest, structure, and value – we can begin to determine what causes the dispute, identify what sector is primary, and assess whether the cause is a genuine incompatibility of interests or perceptual problems of involved parties. These insights can assist us in designing a resolution strategy that will have a higher probability of success than an approach which is exclusively trial-and-error.*[33]

27 Ibid.
28 Ibid.
29 Fisher, et al. Op. Cit, p. 17.
30 Ibid.
31 Ibid.
32 Centre for Conflict Resolution.Op. cit, p. 13.
33 Ibid.

The Circle of Conflict is well illustrated by the Figure 1.

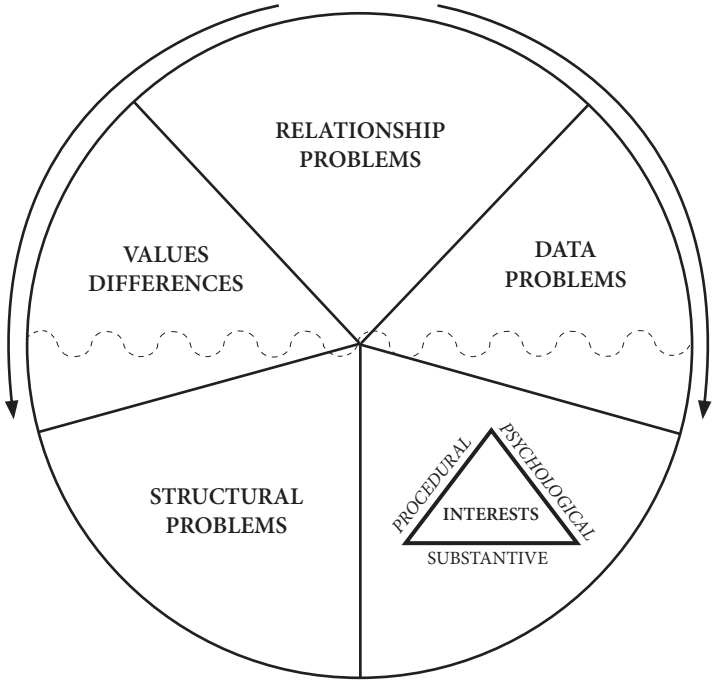


Figure 1: Circle of Conflict (Copyright © 1997 CDR Associates, Boulder, Co.)

There are five reasons why there is a need to analyse conflicts or disputes. These are: first, to understand the background and history of the situation as well as current events. Second, to identify all the relevant groups involved, not just the main or obvious ones. Third, to understand the perspectives of all these groups and to know more about how they relate to each other. Fourth, to identify factors and trends which underpin conflicts and, fifth, to learn from failures as well as successes.[34]

1.1.6 Tools for Conflict Analysis

There are several tools that have been developed to assist in analyzing conflict. Some of the core tools are discussed below.

(a) Stages of Conflict

Analyzing the stages through which a conflict or dispute passes helps to understand the dynamics and events that form the material part of the conflict or dispute. This is so principally because conflicts change over time, passing through different stages of activity, intensity and, in some

34 Fisher, et al. Op. cit, p. 17.

cases, violence.[35] Normally, there five different stages used to analyze the metamorphosis through which a conflict passes as discussed below.

(i) Pre-Conflict

This is a period characterized by an incompatibility of goals between two or more parties, which may lead to open conflict. At this stage, the conflict 'is hidden from general view, although one or more of the parties is likely to be aware of the potential for confrontation. There may be tension in relationships between the parties and/or a desire to avoid contact with each other at this stage.'[36]

(ii) Confrontation

This is a stage where the conflict has become more visible; and if one of the conflicting parties feels there is a problem, 'its supporters may begin to engage in demonstrations or other confrontational behaviour.'[37] It is at this stage of a conflict where there occurs occasional fighting or other low levels of violence committed by either side of the conflicting parties. The conflicting parties may also start to mobilize resources and garnering support from allies 'with the expectation of increasing confrontation and violence.'[38] One of the main symptoms of a conflict visible at this stage is strained relationship between the conflicting parties, which result in polarization between the supporters of each side.

(iii) Crisis

In many ways, this is the crest of the conflict or dispute. It is at this stage where tension and/or violence is most intense. In a large-scale conflict, this period may be marked by break out of war, 'when people on all sides are being killed. Normal communication between the sides has probably ceased. Public statements tend to be in the form of accusations made against the other side(s).'[39]

35 Ibid, p. 19.
36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.

(iv) Outcome

In most conflict situations, a conflict leads to an outcome, which may be in the form of a defeat or success or a cease-fire (if it is a war). An outcome, at this stage, may be expressed in the surrender or giving in to the demands of the other party by one of the parties; or the parties may agree to negotiate with or without a mediator. As Fisher et al. point out: 'at this stage the levels of tension, confrontation and violence decrease somewhat with the possibility of a settlement.'[40]

(v) Post-Conflict

In the end, a conflict situation may be resolved in a way that leads to the ending of any violent confrontation, to a decrease in tension and to more normal relationships between the conflicting parties. Nonetheless, if the issues and problems arising from the conflicting parties' incompatible goals 'have not been adequately addressed, this stage could eventually lead back into another pre-conflict situation.'[41]

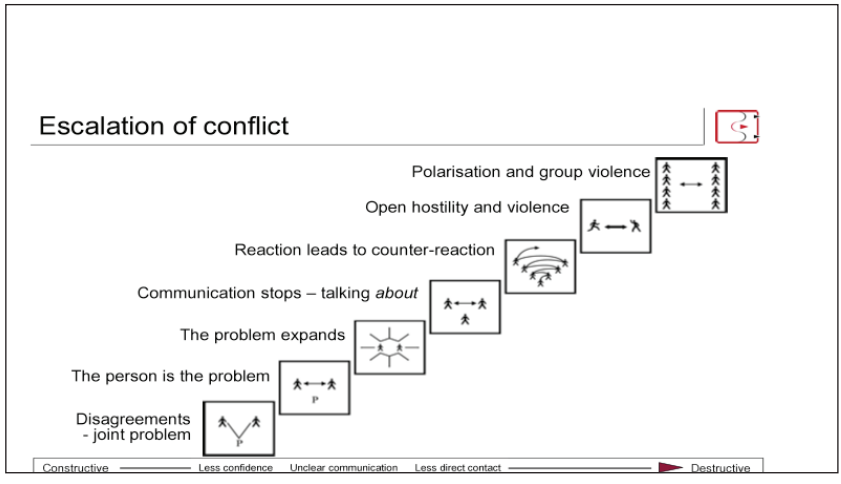


Figure 2: Escalation of Conflict

(b) Timelines

Fisher et al. observe that timeline is 'a very simple tool. It is a graphic that shows events plotted against time. It lists dates (years, months or days, depending on the scale) and depicts events in chronological

40 Ibid.
41 Ibid.

order.'[42] This tool is principally used to show the history of a conflict. Through the timeline tool conflicting parties 'may note or emphasise different events, describe them differently, and attach contrasting emotions to them.'[43]

The aim of using timelines 'is not to try to arrive at a "correct" or "objective" history but to understand the perceptions of the people involved. For this reason, the different events described by opposing groups are an important element in understanding the conflict.'[44] The tool also is 'a way for people to learn about each other's history and perceptions of the situation.'[45] Through discussing their different perceptions of the conflict, conflicting parties 'develop a richer understanding of their shared situation.'[46]

(c) Conflict Mapping

Mapping is a tool or technique used in conflict analysis to represent a conflict graphically. In this regard, the technique places the conflicting parties in relation to both the problem and to each other. Fisher et al. opine that: 'When people with different viewpoints map their situation together, they learn about each other's experiences and perceptions.'[47] This technique helps to show the relationships between the conflicting parties.

Conflict mapping aims at achieving a number of goals, including assisting in understanding the conflict situation better. It also helps to see more clearly the relationships between the parties, clarifying where the power lies. It further helps to check the balance of one's own activity or contacts; and to see where allies or potential allies are. It, moreover, assists in identifying openings for intervention or action and to evaluate what has been done already.

Given its strategic importance, the conflict mapping tool should be applied as early as possible in the conflict or dispute resolution process. This should be applied along other analytical tools. It could be applied thereafter in the conflict or dispute resolution process to

42 Ibid, p. 20.
43 Ibid, p. 21.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid, p. 22.

help identify possible entry points for action or to help the process of strategy-building.[48]

(d) The ABC (Attitude, Behaviour, Context) Triangle

Conflicts have three interdependent major components: the context or situation, the behaviour of those involved and their attitudes. Popularly abbreviated as the ABC tool, these three factors influence each other. According to Fisher et al. the ABC Triangle is an analytical tool of factors related the attitude, behaviour and context for each of the major conflicting parties.[49] The tool aims at analyzing how these factors influence each other and relate them to the needs and fears of the conflicting parties. This helps to identify a starting point for devising intervention in the conflict situation. Viewed in this sense,

> *… a context that ignores the demands of one group is likely to lead to an attitude of frustration, which in turn may result in protests. This behaviour might then lead to a context of further denial of rights, contributing to greater frustration, perhaps even anger, which could erupt into violence. Work that is done to change the context (by making sure that demands are acknowledged), to reduce the level of frustration (by helping people to focus on the long-term nature of their struggle) or to provide outlets for behaviours that are not violent will all contribute to reducing the levels of tension.*[50]

This tool should be applied at the early stage in the process of resolving a dispute or conflict in order to gain a greater insight into what motivates the conflicting parties; and later into the process in order to identify what factors might be addressed by an intervention to be devised. Fisher et al.[51] draw four essential stages for applying the ABC Triangle tool in conflict management or dispute resolution:

(i) Draw up a separate ABC Triangle for each of the major parties in the conflict situation.

(ii) On each triangle, list issues related to attitude, behaviour and context from the viewpoint of that party. (If the parties are participating in this analysis, then they can each make a triangle from their own perspective.)

48 Ibid, p. 23.
49 Ibid, p. 25.
50 Ibid.
51 Ibid, p. 27.

(iii) Indicate for each party what you think are their most important needs and/or fears in the middle of their own triangle. This will be YOUR perception.

(iv) Compare the triangles, noting similarities and differences between the perceptions of the parties.

In using the ABC Triangle 'it is important to be sure about whose perception the analysis is based upon. You could do the analysis entirely on your own perception of the realities in the conflict if you are closely involved in it. Otherwise, it will be important to put yourself in the shoes of each of the main parties and look at the issues in the conflict as they see it in terms of "context", "behaviour" and "attitude".'[52]

(e) The Onion (or the Doughnut)

The onion tool is a way of analyzing what different parties to a conflict are saying. This is reflected in positions the parties take; the interests they pursue; and needs they want to be satisfied in a conflict situation. In this analysis, positions are contained in an outer layer of the onion – that is, the position is shown publicly for all to see; the interests are put in the middle layer and needs form a core of the onion. According to Fisher et al. the Onion Analytical Tool aims at moving beyond the public position of each party and understanding each party's interests and needs. It also aims at finding the common ground between groups that can become the basis for further discussions.[53]

The Onion technique can be used at various stages of conflict management or dispute resolution: as part of an analysis to understanding the dynamics of a conflict situation; in preparation for facilitating dialogue between groups in a conflict or dispute; and as part of a mediation or negotiation process.[54]

(f) The Conflict Tree

This tool has been borrowed from the "Problem Tree" used in development and community work. Preferably used within groups, the Conflict Tree is a graphic tool using the image of a tree to sort key conflict issues. Fisher et al. point out that,

52 Ibid.
53 Ibid.
54 Ibid.

> *The Conflict Tree offers a method for a team, organization, group or community to identify the issues that each of them sees as important and then sort these into three categories: (1) core problem(s), (2) causes and (3) effects.*[55]

The Conflict Tree tool aims at stimulating discussion about causes and effects in a conflict as well as helps a group to agree on the core problem. It also assists a group or team to make decisions about priorities for addressing conflicts and to relate causes and effects to each other and to the focus of the organisation. This tool is usually used when a group is having difficulty in agreeing about the core problem in their conflict situation and when a team needs to decide about which conflict issues they should try to address.[56]

(g) Force-field Analysis

This is tool for analyzing both positive and negative forces in a conflict. It is normally used to identify forces influencing a conflict. It 'offers a way of identifying these positive and negative forces and trying to assess their strengths and weaknesses.'[57] It can also help the dispute settlement actor to 'see more clearly what is maintaining the status quo.'[58] It strives to identify forces which either support or hinder a plan of action or a desired change; to assess the strengths of these forces and our own abilities to influence them; and to determine ways of increasing positive forces or decreasing negative forces. It can be used when planning an action or strategy, 'to clarify the forces that might support or hinder what you intend to do.'[59] It can also be used 'while implementing a strategy of change to assess the strengths of other forces and your ability to influence them.'[60]

(h) Pillars

This is also a graphic illustration tool of conflict, which illustrates the elements or forces that impinge on an unstable situation. It aims at: understanding how the structures are sustained; identifying factors that are maintain an unstable situation; and considers ways to weaken or remove these negative factors, 'or perhaps to change them to more positive forces.'[61]

---

55 Ibid, p. 29.
56 Ibid.
57 Ibid, p. 30.
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid, p. 31.

(i) The Pyramid

This tool is used to analyze conflicts with more than one level. Using this tool, the dispute settlement manager identifies the key parties or actors at each level and relates them to the present situation, with a view to locating 'critical resource people who are strategically placed and embedded in networks that connect them vertically within the setting and horizontally in the conflict.'[62] As Fisher et al. contend,

> *These are people who have the ability to work with counterparts across the lines of division, therefore they can be key allies for working within the various levels as well as working simultaneously at all levels.*[63]

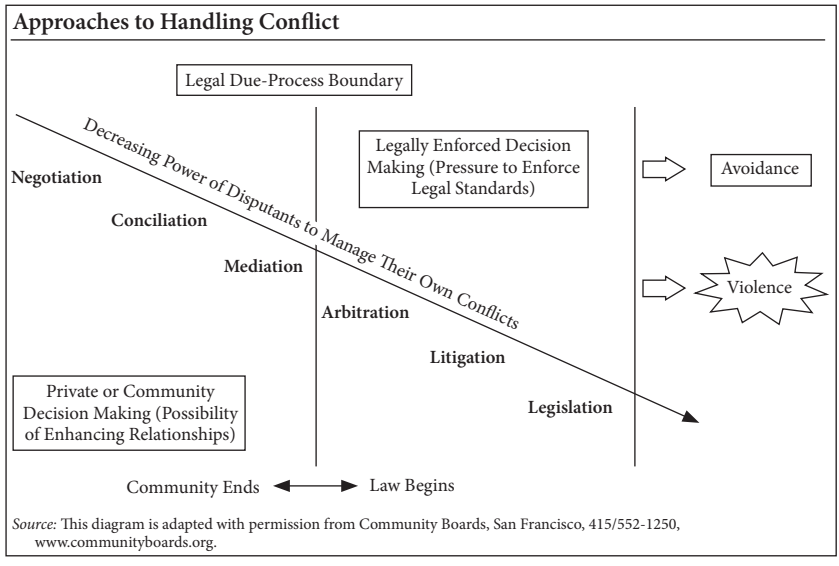


Figure 3: Approaches to Managing Conflicts or Disputes (Diagrammatic Summary)

This strategy aims at identifying key actors, including leaders, at each level and to decide what other actors should be included. It also aims at assessing what types of approaches or actions are appropriate for work at each level and how links should be built between levels and identify potential allies at each level. In this regard, it can be used when analyzing a situation that seems to include actors at various levels; when planning actions to address a multi-level conflict; and when deciding where to focus one's energy.[64]

62 Ibid, p. 33.
63 Ibid.
64 Ibid.