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ADR in facilitated decision making

Facilitating meaningful outcomes

Jonathan Nuss

For inexperienced facilitators there exists a genuine risk that their desire to achieve a particular pre-determined result will fundamentally affect group processes in a manner that will limit broad ownership of the outcome.

This article looks at the experience of regulatory reform in the Youth Atlantic Treaty Association ('YATA'), an international non-governmental organisation ('NGO'). The article further assesses prospects for inclusive decision making as viewed through the conceptual lens of deep democracy and regulatory negotiation theory.

Theoretical frameworks

This article looks at facilitation through the framework of two separate, yet closely related, theoretical frameworks: deep democracy and regulatory negotiation.

Deep democracy

Deep democracy refers to a facilitative theory based on inclusiveness and openness. Developed by American academic Arnold Mindell in 1988, deep democracy is a framework which is designed to hear 'all voices and roles, including our collective experiences of altered states, and subtle feelings and tendencies. It is a principle that makes space for the speakable, the barely speakable and the unspeakable'.¹

In other words:

Deep Democracy suggests that all voices, states of awareness, and frameworks of reality are important. [...] Just as conventional democracy strives to include all individuals involved in the political process, Deep Democracy goes a step further in the effort towards fostering a deeper level of dialogue and inclusiveness that makes space for all people [...].²

Deep democracy processes attempt to uncover the core of individual experience in order to foster an environment in which a number of stakeholder views are expressed for the benefit of the broader community.

Indeed, 'Deep democracy is not what elected representatives do, nor experts, nor large public institutions, nor voters. At its essence, deep democracy is the inner experience of interconnectedness'.³ As such, agreements reached through deep democracy allow for broader stakeholder participation, and are thus more sustainable in the long run.⁴

Despite the central functions of the group as a kind of collective decision maker in deep democratic processes, the facilitator plays a key role in fostering consensus. Patricia Wilson affirms that 'Process leaders create the container for building trust and shared understanding amid diversity and difference'.⁵ As such, the facilitator fulfills 'a crucial role behind the scenes in nurturing the capacity of individuals and the group to find their voices and connect with others'.⁶

Regulatory negotiation

Regulatory negotiation ('reg-neg'), also known as negotiated rulemaking, is a process for regulatory reform that brings together a broad group of affected stakeholders in an effort to produce regulations by consensus that balance the interests of those stakeholders.⁷ One source defines the process as follows:

Negotiated rulemaking brings together affected stakeholder groups — businesses, organizations, and citizens — with the relevant government agency and a neutral mediator or facilitator to build a consensus on the features of a new regulation *before* it is proposed officially by the agency. Regulatory provisions are developed as a bottom-up participatory process of negotiation.

Negotiated rulemaking is a fully collaborative process, in which all interested groups are convened in an Advisory Committee. Key issues and concerns are identified, the interests of all sides are compared and contrasted, negotiations take place, and hopefully, agreements based on consensus are developed.⁸

As such, reg-neg is distinguishable from the established top-down approach to regulatory reform, which is described below:

Government initiates, formulates and proposes the rules. In centralized or closed systems, regulations are imposed; in more open systems, businesses, groups or individuals may comment on the proposals in public hearings, but with little possibility of making major structural and functional modifications to the regulations. This process, while well-intentioned, often leaves stakeholders feeling far removed from the process and disempowered. They may feel that they have minimal voice in designing the regulations, standards and provisions that must be obeyed, and, as a result, compliance may be low and enforcement costs high — a double-edged sword.⁹

The US Environmental Protection Agency affirms that as opposed to the top-down approach usually employed — which leaves little room for public engagement — negotiated rulemaking brings together and fosters dialogue with interested stakeholders:¹⁰

The regulatory negotiation process allows the interested, affected parties a more direct input into the drafting of the regulation, thus ensuring that the rule is more sensitive to the needs and limitations of both the parties and the agency.¹¹

A common result of this bottom-up approach is a more satisfactory result for all stakeholders and involved parties.¹² Indeed, the participatory nature of the process fosters ownership of the outcome.

Case study

When the Executive Board of YATA met in Ottawa for its General Assembly in 2007, it was agreed that the YATA Rules and Regulations ought to be updated to reflect the changing nature of the organisation. It was understood that this project necessitated broad reflection about the organisation and called for consultation with the YATA leadership.



This case study sets out the process employed for the development and adoption of the amended YATA Rules and Regulations as adopted at the YATA General Assembly in Berlin during 2008.

YATA's organisational structure

The Youth Atlantic Treaty Association is an umbrella organisation for nearly 40 autonomous national associations. Article 5 of the YATA Rules and Regulations states:

National YATA Chapters are *autonomous entities* from YATA.

However, insofar as they wish to be members of YATA and be affiliated with its international network, they must abide by the YATA Rules and Regulations.¹³

As such, the YATA Executive Board helps to steer the entire group, but ultimately has little leverage to affect the policy and actions of each individual association.

The desired outcome and the process

One of the principal challenges the Executive Board faced was the difficulty of developing effective leadership strategies in view of YATA's decentralised structure. Indeed, the Board had very little institutional power to drive forward policy and activities for the group of nearly 40 national associations under its leadership. A particularly important issue was that of national associations meeting certain minimum standards with respect to their basic responsibilities (that is, programming and communication).

As such, the Board developed a set of articles in the new Rules and Regulations that centralised power and entrenched national association responsibilities alongside meaningful enforcement mechanisms.

To come into force, the new Rules and Regulations had to be adopted by a vote of the General Assembly, which is composed of the various national associations. The Board discussed different options for consultation among the national associations, including online debate and open discussions during the General Assembly.

Ultimately the Board felt that extensive debate might risk derailing the

process of adoption. In particular it was concerned that lengthy debate might bring about an outright rejection of the new demanding articles that set out the minimum standards for national association performance.

Article 8 of the new YATA Rules and Regulations set out the national association responsibilities:

National YATA Chapters shall:

- participate in YATA activities;
- organize at least one event per calendar year which furthers the aims outlined in Article 4 of the YATA Rules and Regulations;
- nominate national representatives to participate in YATA conferences;
- publish a National YATA Chapter annual report and have it made available to the Secretary General at least one month prior to the start of the General Assembly;
- publish a National YATA Chapter annual strategy proposal and have it made available to the Secretary General no later than one month after the termination of the General Assembly;
- remain in regular contact with the Secretary General and provide, on an annual basis, a list of the principles and all relevant contact and member information for their association; and
- abide by the YATA Rules and Regulations and refrain from any activity which may counter the aims of YATA.¹⁴

Article 9 set out the process for investigation into non-performance:

Where there is reason to believe that a National YATA Chapter has conducted itself contrary to the responsibilities established in Article 8 of the YATA Rules and Regulations, the President, with the advice and consent of the Executive Board, may investigate into the status and efficacy of the said YATA National Chapter.¹⁵

Article 10 set out the sanctions for non-performance:

1. Where it is alleged that a National YATA Chapter has failed to comply with the responsibilities established in Article 8 of the YATA Rules and Regulations, the following rules shall apply:
 - (A) the National YATA Chapter shall receive a notice in writing from the President which shall inform

it, in a clear and sufficiently detailed manner, of the allegation made against it,

- (B) the National YATA Chapter shall be allowed a period of no less than ten (10) days from receipt of this notice to prepare a written response, in which the National YATA Chapter shall present its defense to the Executive Board.

2. Where an allegation of negligence or misconduct has been upheld by the Executive Board, it may impose one or more of the following sanctions:
 - (A) a reprimand,
 - (B) suspension from YATA initiatives and activities, either permanently or for a period deemed appropriate by the Executive Board, and/or
 - (C) expulsion from YATA.
3. In the event that the Executive Board imposes the sanction of expulsion, it may, subject to the approval of the ATA Secretary General, seek and/or approve a new National YATA Chapter membership in the country of the expelled National YATA Chapter.¹⁶

To ensure that the new Rules and Regulations would be approved by the General Assembly, the Executive Board opted for a top-down approach. The drafting of the articles was done behind closed doors and they were then submitted to a vote in Berlin.

The result

The General Assembly approved the new Rules and Regulations by unanimous consent without the slightest objection. In fact, there was hardly any discussion of the matter. Success, right? Well, perhaps in conventional terms.

The Executive Board had achieved its desired outcome — the seamless adoption of the new Rules and Regulations and, by extension, the acceptance of more centralised control over the performance of the national associations. However, the lack of discussion of the important matters underlying the regulatory changes created an uneasy feeling. The process of adoption was certainly democratic, yet voices remained unheard.

Nearly two years since the Berlin



General Assembly, it remains questionable whether the national associations have fully understood what their new responsibilities entail. Furthermore, does the new Board (most probably made up of members on the floor during the adoption of the new Rules and Regulations) feel the need to enforce the standards that, in some ways, were imposed upon them by a previous Board?

Driven by the desire to reach a particular outcome, the top-down approach employed by the Board excluded national associations from the drafting process. Although the new Rules and Regulations were adopted unanimously, in hindsight it appears that the national associations do not have ownership over them.

Analysis

It appears that the Executive Board allowed the outcome to control the process. Had the Board fostered a degree of discussion on the matters to be adopted, the outcomes might have been more meaningful and effective for all stakeholders involved. Indeed, according to principles of deep democracy, governance is for the most part driven by inclusive processes — even in the challenging context of NGOs:

Group dynamics are ironically harder to manage in NGO settings where the level of passion and idealism tends to be high. Deep Democracy is especially effective in helping NGOs, their staff, trustees and volunteers to make genuinely collaborative decisions reflecting their shared interests and commitment.¹⁷

By failing to engage in constructive discussion, the Board missed an important opportunity to appreciate the different interests at play among the national associations.

The Board ought to have unpacked contentious issues in order to foster discussion about what was truly at the core of the organisational challenges faced by YATA. The top-down process that was employed ultimately removed these issues from the broader debate. A *smart* facilitation strategy would have engaged the group to discuss and debate the matters at hand in an effort to reach a *sincere* group consensus on the best solutions for the YATA community. Indeed:

Performing involves the facilitator providing safety and structure for the group to perform. To do this the facilitator needs to assist with a structure that is *firm enough to give the group a sense of where it is going and where it has come from and flexible enough for the group to explore its path* in its own way¹⁸ (emphasis added).

Accordingly, facilitators must strike the appropriate balance between control and flexibility.

The Resolve Advisors *Facilitation Overview* sets out key stages in the facilitation process. They are (in shortened form):

- preparation;
- introduction;
- definition of issues;
- exploration (unpack and expand);
- decision;
- recording of agreement; and
- review.¹⁹

Without knowing it at the time, the Executive Board covered many of these steps in Berlin. However, the step unquestionably left out — exploration — was the one that would have led to an informed discussion on the new Rules and Regulations. Indeed, in all likelihood it was the step that would have fostered broader ownership of the final product.

For fear of losing control over the desired outcome, the Board did not unpack and expand the issues that were at the core of YATA's regulatory reform. By simply engaging in a top-down imposition of a newly-minted governance scheme for the organisation, the Board failed to explore the issues at the core of YATA's challenges with respect to the performance of national associations. Ultimately, the result was an accord adopted by all the national chapters more out of apathy than genuine consensus.

Regulatory reform is a unique process. How does a facilitator best work within a facilitation framework such as the one proposed by Resolve Advisors while addressing the intricacies of regulatory reform? Regulatory negotiation appears to provide a practical and effective solution. Indeed, it allows for broad participation among stakeholders in a manner that permits them to shape the regulations of their organisation.

Conclusion

The new YATA Rules and Regulations as adopted in Berlin are of great benefit to YATA. However, for the reasons set out above, they are unlikely to meet their full potential.

Based on the analysis and research carried out for this paper, it would have been advisable for the YATA Executive Board to incorporate the principles of deep democracy and regulatory negotiation vis-à-vis the development and adoption of the amended YATA Rules and Regulations. Such a process would likely have created a broader sense of *ownership* ●

Endnotes

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4. Deep Democracy, *Deep Democracy in the Not-for-Profit* <<http://deep-democracy.net/about-dd/ngos>>.
5. Wilson, above note 3.
6. Ibid.
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13. YATA Rules and Regulations, art 5.
14. Ibid, art 8.
15. Ibid, art 9.
16. Ibid, art 10.
17. Deep Democracy, above note 4.
18. Resolve Advisors, *Mastering Facilitation UNSW Course Pack* 27.
19. Resolve Advisors, *Facilitation Overview*.