

TOWARDS A NEW DEFINITION OF MEDIATION

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Abstract

*In a dispute, disputants are normally and quite rightly focussed on 'what' they need to resolve. Mediators are however focussed on 'how' to most appropriately assist disputants to talk about 'what' they need to negotiate. This paper seeks to explore the needs disputants bring to the **procedural** negotiating table and to what extent those needs are shaped by the cultural contexts of the disputants. By drawing on the models developed by Edward T. Hall this paper will seek to identify whose cultural context is dominating the design of dispute resolution processes and interventions and what the consequences might be for achieving legitimate sustainable substantive outcomes.*

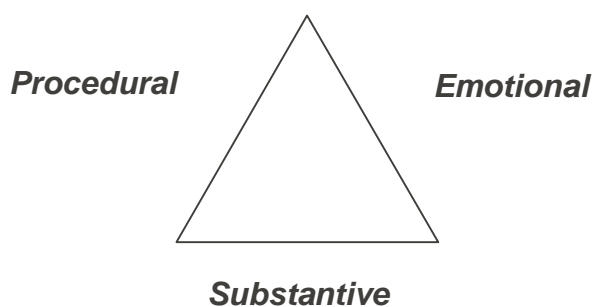
Using examples drawn from the author's experiences of working in cross-cultural dispute resolution process particularly with Indigenous and non-Indigenous Australians, this paper will argue that it is the dominant group which normally designs the process, that this process meets their cultural context needs and that this often further marginalises the other disputants.

This paper will then explore that if mediation is not a culturally neutral process and is shaped by the cultural contexts it emerges from what are the critical implications when mediation is used in cross cultural contexts. The paper will then propose a definition of mediation as a relationship focussed rather than an outcome focussed process. The paper will conclude by arguing that if endorsed this definition will prompt a critical re-think of many mediation processes and approaches in order to ensure more just, equitable and appropriate processes are applied.

In a dispute, disputants are normally, and quite rightly, focussed on what they need to resolve. There are often particular outcomes that they wish to secure. Those outcomes tend to make sense to the disputant because of the ways in which they understand the dispute, their and others' role in it, and the needs they wish to satisfy. Disputants very rarely understand the perspective of other disputants, even though, in many instances, they may believe they do. Indeed, it is often the misunderstandings that escalate the dispute because they feed the disputants' negative perceptions of one another.

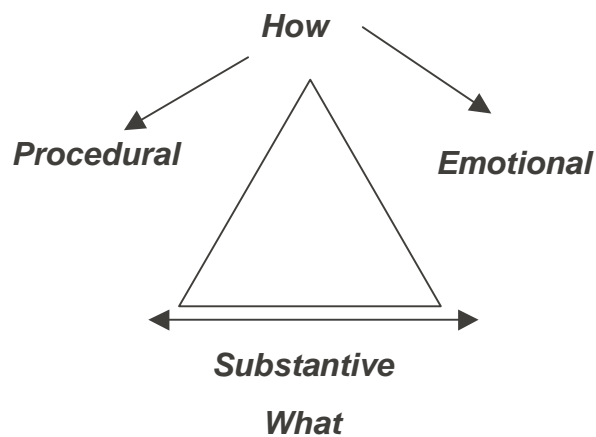
The outcomes sought by a particular disputant, fit the understanding that disputant has of the dispute. Yet the "dispute" is a shared property. It belongs to all the disputants involved and each of their "stories" of the dispute builds to a more complete picture. The challenge for the mediator is to assist disputants to move beyond their individual and partial viewpoint to a shared understanding that enables the development of mutually acceptable agreements. In essence, mediators are assisting disputants to transform their understanding of the dispute in order to resolve it. How then do mediators effect this transformation and what are the range of factors that impact on the design of the mediation process such that such a transformation is best enabled?

According to Chris Moore in his book *The Mediation Process*, people in dispute, or in any communication exchange, have three interdependent needs as represented by the following diagram – termed the Satisfaction Triangle:



Procedurally, people need to believe that a process is fair, that it gives them an opportunity to have their say, and that it is not biased or prejudiced in any way. Emotionally, people need to feel OK about themselves and their participation in discussion or dispute resolution processes. They need to feel listened to, acknowledged, respected and validated as part of their participation. Substantive needs relate to the issues or things that are the subject of the negotiation. These can be material and tangible, for example, land, rights, money or intangibles such as, for example, respect, recognition or consideration. Disputes are not resolved by dealing with only one or two of these needs or sides of the triangle. People may often appear to get their tangible, substantive needs met in a dispute resolution process and yet not feel happy about the outcomes because their emotional or procedural needs have not been met. For example, a dispute between a separating couple may reach a "fair" substantive outcome in the division of property, and yet one person may continue to feel aggrieved because their emotional need to understand why the relationship ended has not been addressed.

It is also useful to overlay "how" and "what" over the satisfaction triangle. The procedural and emotional arms of the triangle parallel the "how" of how people resolve their issues and the substantive arm parallels "what" needs to be resolved. Thus in the separating couple example above, whilst a 'what' or an outcome has been achieved the 'how' of how people feel has been left dissatisfied, which in turn, may ultimately lead to dissatisfaction with the 'what'.



It is important to recognise that culture is one of the key forces shaping how disputants constitute their procedural, emotional and substantive needs. In his book *Understanding Ways – Communicating Between Cultures*, Kerry O’Sullivan provides the following example of a negotiation between Chinese and Australian counterparts on an aid project in China.

“Prior to the meeting, the Chinese side had been very concerned about the (culturally inappropriate) behaviour of one of the Australians. The Chinese head-of-project began by praising the work of all people involved in the project. He spoke at length about the difficulties overcome and the enormous contributions made and sacrifices endured by the Australian participants. He enumerated the successes achieved. Only right at the end of the speech did he comment on the importance of respecting others’ customs and working for the common good.

At no stage was the name of the offending party mentioned, but he expected that from the outset the message was quite clear” (O’Sullivan, 1994)

To the Chinese it was obvious that they were communicating grave concerns about the behaviour of one of the Australians – their substantive concerns were clear to them and **how** they communicated those concerns was also clear. However, as Sullivan goes on to point out, the speech probably suggested to the Australians that “... all was well.” (Ibid) How the substantive concerns of the Chinese delegates were communicated did not translate to the Australians in the same way.

The writer Edward T. Hall argues that cultural contexts are critical to understanding effective inter-cultural communication. Hall argues that all cultures exist along a continuum from high to low context. For Hall, high and low context refers to the amount of information that a person can comfortably manage. This can vary from a high context culture where background information is implicit to low context culture where much of the background information must be made explicit in an interaction. People from a high context culture often send more information implicitly, have a wider “network”, and thus tend to stay well informed on many subjects. People from low context cultures usually verbalise much more background information, and tend not to be well informed on subjects outside of their own interests. Hall argues that all cultures exist along a continuum from low to high context and that the following values can be ascribed to each context.

LOW CONTEXT (INDIVIDUALISTIC)	HIGH CONTEXT (COLLECTIVE)
Mastery over nature	Harmony with Nature
Personal Control over the environment	Fate
Doing	Being
Future Orientation	Past or Present Orientation
Change	Tradition
Time Dominates	Focus on Relationships
Human Equality	Hierarchy/Rank/Status
Youth	Elders
Self-Help	Birthright Inheritance
Individualism/Privacy	Group Welfare
Competition	Co-operation
Informality	Formality
Directness/Openness/Honesty	Indirectness/Ritual/"Face"
Practicality/Efficiency	Idealism/Theory
Materialism	Spiritualism/Detachment

Put simply in low context cultures the majority of information is explicitly communicated in the verbal message whereas in high context cultures the information is embedded in the context of the relationship. Hall identifies that England (including Australians and New Zealanders of English origin) Germany, the US and Scandinavian countries fit on the low context end of the continuum and Asian and Indigenous cultures are on the high context end. (Hall 1981)

The cultural context of the mediator and their ability to recognise it is of critical importance in the design of mediation processes. In many instances when the need is identified for mediation, high profile mediators from outside the immediate area or country are brought in and they will often be drawn from low context cultures. A low context culture mediator is often far more comfortable working within the limited amounts of time available for mediation as this fits easily with the value of "time" being a core priority in low context cultures. Time urgent processes are often justified on the grounds that certain, if not all parties are busy; it is expensive to bring people together and it is important to move quickly to reach agreement so as to not hold up economic development, government or industry schedules, etc. Whose need is this mediation process meeting? Certainly not the need of establishing and focusing on relationships as a completely interwoven element of any agreement process for those from high context cultures.

There are many consequences of limiting the time of the mediation process. It often forces participants to focus prematurely on what will be done to resolve matters thus defaulting to the low context value of focusing on the future. Whilst it may be argued that mediation is about reaching agreements about what *will* be done, it must also be acknowledged that for high context cultures the need is to explain and seek acknowledgement for what has happened or what has gone before. Unless there is an opportunity to do this there may be vital elements missing from any agreement or settlement from the perspective of high context participants.

Another consequence of time limited processes is that when issues are raised that seem to relate to historical relationships between the disputes, they are understood by the low context mediator, in a linear sense as being in the past and separate from future agreements. However, for those from a high context cultural perspective they are inseparable because they define or contextualise the relationship and

therefore must be resolved. Furthermore in most disputes there is often one or more groups who feel most strongly about the historical relationship (particularly in disputes when the history is often one of colonisation and dispossession). Mediators who frame discussion processes that allow for the exclusion of historical contexts and instead emphasise future agreements are prioritising the interests of one or some parties over others and in so doing are being biased.

Some Australian writers on mediation have sought to create schema that justify the exclusion of particular interests from the mediation process. In relation to how Indigenous Australians constitute their interests in relation to land management issues such as Native Title, it has been argued that: *“There are other interactions between the parties and within the parties that may have an influence on the conflict but are in a sense excluded from the conflict resolution domain. An example, may be how the group interacts with its elders or... conflict between members of the group that is only amenable to resolution by traditional law means. ...An understanding of these interactions allows the mediator to make decisions about what issues should be in the negotiation and which should not.”* (Jones 2000)

It is clear that some writers see a role for mediators in “policing” what interests can be brought into the mediation. Yet the role of the mediator is not to “police” what is in the mediation. The role of the mediator is to facilitate the parties’ decision-making about how they will manage the full range of issues that constitute and impact on their disputes. Artificial exclusions or third party determinations of what constitutes appropriate issues for mediation is a positional approach requiring parties to ignore the full range of their substantive, procedural, emotional interests in order to achieve an “outcome” or “agreement”.

Further to this if a time limited mediation process is instituted that does not allow participants the time to explore what is relevant to them but instead pushes for agreements, then when those agreements breakdown, as they invariably do, participants blame each other for this breakdown. Further to this the low context mediator may not appreciate the consequences for those involved of the loss of face associated with the breakdown of agreements. This loss of face then further contextualises the relationship between the parties in dispute and becomes itself part of the story or history that needs to be resolved. Mediators drawn from low context cultures may miss the significance in high context cultures of both the practice and symbolism of co-operating. Whilst in low context cultures a breakdown in an agreement is often also a loss of face, it is normally seen as something to be overcome. However, in high context cultures a breakdown may be seen to be indicative of the very nature of the relationship between those involved and in some instances may mean it is impossible for the relationship to continue. In essence, mediation processes that do not allow time for the necessary level of discussion in order to build genuine understanding and cooperation can only serve, as observed by Laurie Nathan, from the Centre for Conflict Resolution at the University of Cape Town, South Africa, to “... heighten the suspicion, fear and anger of beleaguered disputants”.

Mediators often lack an awareness of how their own cultural context is shaping their determination of procedural acceptability. Models of mediation can easily be seen to be culturally determined when they are future focused and time dominates with an emphasis placed on pushing hard for settlement or agreement. Approaches to mediation that emphasise the need to discuss and understand what has gone before in order to understand how to move to any future agreement and that focus on relationships, allow for participants from both high and low context cultures to participate meaningfully in the process. Inevitably this will mean that any mediation process may seem to be proceeding much more slowly from the perspective of the low context culture mediator. Yet it should lead to a more meaningful and lasting engagement between the stakeholders.

The emphasis on the importance of taking time to build relationships as the pre-requisite to securing sustainable outcomes which are owned by stakeholders is being recognised by those outside the mediation community. In 1997 there were growing forecasts of a very severe El Nino drought for Pacific nations in the 1997/1998 summer. A number of countries including the Federated States of Micronesia, the Republic of Palau and the Republic of the Marshalls set up El Nino task forces and insisted that their ministries all worked together to prepare for the coming drought. Whilst the El Nino resulting drop in the rainfall was one of the most significant, its impacts were far less.

In preparing the El Nino, a key thing was learnt. There was a critical need to build relationships in order to establish trust between the scientists who forecast El Nino and the people who are going to use the forecasting information. In one instance forecasters were describing the coming drought whilst standing under a tin roof in pouring rain. The only reason people responded was that they trusted the forecasters and the only reason they trusted them was because relationships had been built up. As one researcher involved explained it's "... eyeball to eyeball contact: you can't write it in a paper and expect people to believe you; it's got to be a human, individual, personal trust relationship". (Williams 2003)

It is also critical to recognise that technical experts need to recognise that communities are experts in themselves – that is they are expert in what it will take to make things work in that community. Technical experts are concerned with getting an outcome, or 'the right answer' whereas in many instances creating relationships with communities requires time and a degree of comfort, at least initially with ambiguity. However, relationships are necessary to sustaining the process of getting the community to engage with the experts about both the problems and the answers. This can also be true for mediators. As Nathan points out "the pressure on the mediator ... may be intense particularly where a large number of people are dying in ongoing hostilities. Father Romano recalls that the Sant'Egidio team in Mozambique was "put under strong pressure to end the talks quickly.... Our awareness that every day more of war meant more killings was an extremely hard burden to bear." The mediators nevertheless resisted the pressure because the "pathology of memory could not easily be cancelled", and because "there is no use in forcing people to agree on anything. The only way the process could have been successful and the reason that made it successful was that all the actors involved gained ownership of the process...". (Nathan 1998)

Mediators need to work hard to uncover the cultural biases within their processes and their perceptions of what makes for "good" mediation. Low context mediators tend to focus on "what" people need to negotiate, they see that at the heart of their process are the substantive issues. From my perspective as a practitioner it is vital that mediators remember that "how" people talk is as important as "what" they need to talk about. Mediators must start by negotiating with parties in dispute the "how" of how they will talk about "what" they need to negotiate. As this paper has sought to explain any limits on the process have consequences for both the disputants and the outcomes of the process. Mediators must see that procedural negotiations must precede substantive negotiations and that this is vital if parties are to have a sense of ownership over both the process and its outcomes. Mediators need to be prepared to start by negotiating and not imposing their process.

In Australia there has been a proliferation of mediation services. Have a dispute with your neighbour, your boss, your ex-partner – business or personal, your church, your council or just about anyone else and you'll probably be offered mediation. It is fair to say however that whilst you might be offered mediation services in every Australian state and territory, with some jurisdictions even having mandated mediation processes, there is no one approach to mediation that is universally agreed. It does appear however that most mediation processes tend to emphasise the importance of achieving outcomes or settlement, particularly where they have been funded as a means of expediting matters that might otherwise be dealt with by the courts.

Both the Moore and Folberg and Taylor definitions of mediation, which are broadly accepted by mediation practitioners in Australia, place a strong emphasis on 'settlement' as a core component of the mediation process. Moore has defined mediation as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party to assist disputing parties in voluntarily reaching their own mutually acceptance settlement of issues in dispute" (Moore 2003). Folberg and Taylor describe mediation as "... a process by which the participants, together with the assistance of a neutral person or persons, systematically isolate dispute issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process which emphasises the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process"(Folberg and Taylor 1984).

Both these definitions seem to place the dispute at the heart of the mediation process. If, as I proposed relationships between parties are at the heart of many, if not all, disputes, mediation is not merely process of enabling parties to 'settle' dispute issues but is one that can assist them to fundamentally renegotiate their relationships with one another, and in so doing transform their understanding and the nature of 'their dispute'.

I would like to propose a definition of mediation that draws on elements of both the Moore and Folberg and Taylor definitions whilst emphasising the centrality of relationships rather than outcomes or “settlement”. I propose that: *Mediation is a process whereby people choose to come together with the assistance of a non-partisan and mutually acceptable third party, who assists them to analyse and discuss the causes of the differences between them in order to better understand and negotiate ways of fairly dealing with each other. It is a process which recognises that disputes are shaped by the relationships between the disputants and that assisting disputants to build and manage their relationships with one another is central to any meaningful, sustainable and mutually agreed and acceptable resolution of dispute issues.*

I believe, if accepted, this definition will require mediators to evaluate if their process is emphasising outcomes at the expense of relationships. And if it is, is it doing so because it reflects the cultural context of the mediator rather than the parties?

Approaching dispute system design with this definitional approach has had considerable impact on my own mediation practice. Since 2000, I have been engaged as a Process Advisor to the Aboriginal Legal Rights Movement supporting their Statewide Approach to negotiating Native Title. A key responsibility of mine has been to design relationship building processes between the stakeholders such as farmers, miners, government or Aboriginal people. Each of the stakeholders has a range of connections and shared histories and these are often points of misunderstanding between them. Relationship building exercises are seen as a key support to the negotiation process. What has happened in South Australia is that the groups have been brought together in processes that focus not on the substantive issues in relation to Native Title, but rather on the procedural and emotional issues of each stakeholder group. These processes have brought people together with the express purpose of building shared relationships including cross-cultural understanding in recognition that any lack of understanding holds the potential to derail the substantive negotiations.

The emphasis has been on humanising the exchange. The pilot meeting for the relationship building meeting was set up between the Boards of the Aboriginal Legal Rights Movement and the South Australian Farmers Federation. Traditionally farmers and Aboriginal people have had a fraught relationship in South Australia particularly since it was determined that Native Title could co-exist with pastoral leases. The meeting between the two Boards was seen as a very important meeting as it was vital that when farmers and Aboriginal people came to talk about, '*what does Native Title mean in practice?*' or '*what does co-existence mean in practice?*' – it was important that they had a shared understanding of their various relationships to land. During the preparation for the meeting a number of the farmers had identified quite confrontational questions that they wanted to put to Aboriginal participants in the meeting. My colleague and I thought that we needed to introduce the element of 'saving face' into the process, so we asked the participants to undertake a role reversal exercise. We asked the farmers to imagine they were Aboriginal people and thinking as Aboriginal people what were the questions they would want to put to farmers. We did the same with the Aboriginal people by asking them to imagine that they were farmers and as farmers what were the questions that they would want to put to Aboriginal people.

Each of the Boards identified all of the questions that the other Board had wanted to put to them, but as Aboriginal people were role-playing farmers and drafting the questions, there was no heat in the questions, because they hadn't come from the actual farmers themselves. One of the other powerful impacts of the process was that each Board gained an understanding that the other Board did have an insight into how they saw things. The process didn't go on to discuss substantive issues in any way. What it allowed each of the participants the opportunity to do, was to explain in greater detail their personal stories. Both the Aboriginal participants and the pastoralists chose to share quite personal and emotional stories. What was powerful about this was that at the end of that meeting both of the groups decided that they wanted to produce a joint statement indicating their commitment to and support for working together. They recognised the need to work together because their connections to land and country meant, that despite the very difficult issues for negotiation their areas of commonality significantly outweighed their differences. Furthermore, they recognised that prior to coming together they had seen their differences as largely overwhelming any commonalities. The opportunity to come

together and get to know each other, without the pressure to negotiate an outcome was seen as invaluable by all attending.

Through the realisation that their relationships and shared connections, were bigger than their current conflict, that relationship was able to sustain them through the difficult negotiating points that lay ahead. As a practitioner, it reinforced for me that the key to transforming conflict is to assist the parties with the conflict to understand that the conflict is a part of their relationship not the whole of their relationship.

As a mediator it is easy to measure the success of the process by whether an outcome has been achieved. However outcomes breakdown and if insufficient attention has been paid to the relationship between the parties, there will be very little in place to sustain a process of re-negotiation. The key to transforming conflict is to start, not with the solution or the outcomes, but to look at the relationships between all of the stakeholders to that conflict, and to build in processes that assist them to transform their relationships. This approach of assisting stakeholders to manage and transform their relationships is one that has transformed my own practice as a mediator. It has enabled me to uncover some of the cultural biases within my processes and to recognise that the very act of preferencing outcomes or settlements can actively work against achieving them. After all, it is relationships not conflicts that are the building blocks of societies.

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