Keynote Address

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Mediation, culture and transformative peacemaking. Constraints and challenges

First of all, I would like to thank the conference organisers from the Harun M. Hashim Law Centre, International Islamic University for providing me with this opportunity to address so many distinguished guests and ADR professionals from different countries and cultural groups in the Asia Pacific region.

My paper will address a concern that I have been exploring for some time, that is the tendency for Western discourses on mediation to marginalize or subordinate the knowledges of cultural groups that have informed conflict resolution practises for centuries, such as those of Indigenous communities in Australia and traditional cultures in the Asia-Pacific region.

Globalization and the introduction of information technology have altered the boundaries of our conflicts and our practices, and have fostered the domination of Western ways of knowing. North American cultural assumptions about conflict and how to resolve it are embedded in mediation models emanating from the United States and Western mediation trainers engage in a 'residue of imperialism when they attempt to transfer these models to other cultures as the right way to resolve conflict' [1: 3]. Mediators and mediation trainers in the Asia Pacific, of all cultural and religious persuasions, should therefore examine both the content and the approach of their conflict resolution education and training and its relationship to culture.
I would like to start with the premise that it is essential that mediators design models of mediation to fit the cultural, individual and collective conflict resolution needs of their clients, rather than force their clients to follow a particular, model imposed by the mediator, regardless of the context, the background of the participants or the nature of the dispute. Mediators also need to be concerned with issues of justice and human rights or mediation will be discredited as a dispute resolution approach.

In this paper I will challenge dominant Western constructs of mediation and focus on ways of building culturally fluent models of mediation which will acknowledge traditional ways of resolving conflict and also redress power imbalances and challenge structural inequalities to ensure just outcomes for all involved. I will also examine the links between mediation and peacemaking.

I will start by briefly look at approaches to mediation in the Asia Pacific region and the trend toward adopting Western models of mediation; outline some of the Western approaches to mediation and their constraints; explore the issues of power, justice and human rights as they relate to mediation; briefly touch on the importance of culture and cultural fluency which enables the mediator to effectively bridge cultural differences; and look at the potential for mediators to engage in transformative peacemaking.

Mediation in the Asia Pacific region

Mediation has a long history, the practice of which falls along a spectrum that defies strict definition. Though formal forms of mediation are now widely accepted in the West, informal forms of mediation have permeated all cultures to varying degrees for centuries [2], possibly since there were more than two people on earth [3].

In some generic form, mediation has been practised for at least two millennia in Eastern nations, such as China, Japan, Korea and Sri Lanka, under the influence of Confucianism. It also had roots in Judaism, was evidenced in early Quakerism, and the African 'moot' court [3, 4] and also in the teachings of the Holy Qu'ran, 'which extols the virtues of forgiveness and negotiated settlement' [5: 4].
Various authors have described the long history of mediation in Japan where it is embedded in the community, business culture and the court-based system for family and civil cases [2, 6-8]. In Thailand, mediation primarily is used at the village level, as in Indonesia as well as for labour and environmental disputes [2] Japanese models of mediation are now also being applied in courts in Indonesia.

Over the past two decades we have witnessed the establishment of many centres and associations for conflict resolution and mediation in Western liberal democratic countries. In the last few years, there has also been a burgeoning interest in Western approaches to mediation in the Asia-Pacific which has led to a marked increase in the number of postgraduate students from various countries in the region enrolling in our Master of Mediation and Conflict Resolution programs at the University of South Australia (many of whom are from Malaysia).

There are a number of factors contributing to the increased interest in mediation in various Asian and Pacific countries today, including the inability of the civil justice systems to deal with the increasing load of cases, leading to long delays, scarce resources (such as legal aid), the rising costs of litigation and the uncertainty of outcomes where the dispute is not based on a clear legal principle. It is also now generally recognized that adversarial approaches to dispute resolution tend to alienate and damage relationships. Where continuing relationships are important, some individuals and cultural groups prefer approaches that promote cooperation and harmony. With increasing consumer awareness, more people are choosing to stay in control of their dispute and its resolution rather than handing it over to a third party to make the decision. In other situations, parties may wish to keep a matter private to avoid public humiliation or to save face.

Democratic and market-based trends are also generating too many legal disputes for courts to handle and many judicial systems in the region have not kept pace with the problem. Many suffer from insufficient institutional resources and outdated

procedures, and litigants and lawyers complain of excessively adversarial, lengthy and costly trials, unenforceable judgments and court backlogs. Western approaches to court-annexed mediation have recently been viewed by some Courts and Governments in the Asia-Pacific region as one possible solution to the problem, for example in Papua New Guinea, Singapore, Malaysia, the Philippines, India, Fiji, Cambodia and Indonesia [9]. Western trainers, such as myself, have been invited to train relevant people to be mediators in those countries.

It is my considered view that we need to work together to develop more inclusive models of mediation in Asian and Pacific countries than those imported from the West – models that build on the strengths of local, traditional practices - and locate them within a broader social justice and human rights framework. To that end, I am currently co-editing a book which focuses on different dispute resolution practices in various countries in the region[10].

In the past two decades, theorists have raised awareness of the impact of culture on the mediation process and the culturally complex systems of meaning that third parties and parties in conflict bring to mediation [1, 11-13]. However, that 'has not necessarily led to changes in language or practice' [14: 2]. For example, many definitions of mediation still refer to the need for the third party to be 'neutral', ignoring the potential for mediation to 'perpetuate racism and privilege' if practitioners do not have 'a complex appreciation of culture' and the skills and flexibility to respond to difference [14: 2].

Western approaches to mediation

There is not one Western model of mediation – there are many.
Problem solving or *interest-based* approaches dominate the Western mediation literature [2, 15]. These stem from early theorists such as Morton Deutsch who defined a conflict as existing 'whenever incompatible activities occur' [16: 10]. From this perspective, conflict and disputes are assumed to occur because people do not always share similar interests, values, power, understandings and resources. It also assumes that constructive confrontation between parties in dispute, using a problem solving approach, can lead to productive, creative solutions/outcomes that lead to more positive system functioning. This approach is reflected in the following definition of mediation developed by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC):

> Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement.
> [17: 9]

A problem-solving approach to mediation, however, rarely occurs in a linear, staged fashion. A mediator often has to take a more circular approach to assist people to deal with their conflicts and their related emotions.

In contrast to the mainstream Western problem-solving approaches to mediation, that tend to be individually-oriented, confrontational and outcome-focused, Australian indigenous communities and many other indigenous groups in the Asia-Pacific, are

more likely to value the involvement of the broader extended family or community, indirect or circular communication, harmony, holistic approaches, face-saving and the restoration of relationships. The 'objectivity' and 'impartiality' of the mediator may be prized in some cultural groups, or with some kinds of disputes; however respected, well-known elders may be preferred in others [18, 19].

Many critics have questioned the primacy of the interest-based problem-solving approach in the West, including feminists, critical theorists, rights-based practitioners and those who give priority to the transformation of relationships [20, 21], or the importance of deconstructing dominant narratives [22], over the reconciling of individual interests. A focus on individual interests or needs does not take into account the needs and interests of the collective, or the structural inequities in the broader social context, which may be necessary for lasting change and peace [23]. In addition, it may not be possible for parties to share world views or find common interests where there are conflicts involving differing values – for example those related to human rights, philosophical or political views or religion – however the parties may have to continue in a relationship and therefore need to find ways to tolerate or respect each other's views or 'agree to disagree'. The interest-based approach to mediation may not be suitable where there are imbalances of power (unless explicit conditions are put in place, which I will address in my paper on domestic violence) as it requires parties to be competent to negotiate for themselves and to cooperate.

Bush and Folger's model of *transformative mediation*, focuses on the 'empowerment' of the parties and their 'recognition' of each other and on the opportunities for personal growth that unfold at every moment of the mediation process [20, 21]. This approach is more relationship and process-oriented and fits more closely with ideas, which I will explore later, about mediation being a transformative, peacemaking activity, although the approach does not explicitly address the issue of power, or the broader context.

Language plays a powerful role in how concepts of 'normality' are fashioned and subjectivities or identities are positioned [32]. Mediators can fall into the trap of categorising or labeling their clients and their problems (for example, as 'normal' or 'dysfunctional') in ways that reify and reinforce the power and knowledge of the mediator and the dominant cultural view. Winslade and Monk in their book, *Narrative Mediation* [22: 35] critically analyse the premises underlying the problem solving approach to conflict, which generate and apply 'universal cultural truths'. They view problem-solving as only one conceptualisation of mediation practice - a 'plausible story' of how conflict occurs and can be resolved, which has a particular historical and cultural slant. A narrative mediator focuses on the deconstruction and reconstruction of the dominant societal and cultural discourses reflected in conflict narratives or stories about conflict that the parties bring to the mediator. From the narrative perspective there is no universal truth - there are many 'truths'; stories mediate, shape, and create our 'truths' or realities. Stories or narratives are viewed as cultural creations constituted in a particular historical time and place. In mediation all parties and others involved (such as lawyers), will have their own stories or versions of the 'truth'; no one story is true and out of the complexity of stories can emerge a range of possible future stories. The mediator works with the parties to create an alternative but plausible story in a way that makes sense to the participants. It is not

surprising that this approach is popular with Australian Indigenous communities, given the importance they place on story-telling as a way of giving meaning to a situation.

The so-called 'neutrality' or 'objectivity' of our professional practices are being questioned [24: 579]. It is now recognised that professional practices can manufacture a colonising discourse of the 'other' under the veil or guise of 'neutrality' or 'objectivity', without acknowledging that representations of 'self' and 'other' are always situated politically [25: 72]. Lang and Taylor's [26] *reflective, artistic* approach to mediation and a *reflexive* approach to mediation that I have promoted in various papers [27-31], stress the importance of mediators engaging in *self-reflexivity* and using an *elicitive* approach to practice and to training so they can make visible the personal biases and the cultural, political and social influences which impact on their neutrality.

Steier [33] variously describes *self-reflexivity* as: 'turning-back of one's experience upon oneself' [33: 2] and 'being conscious of ourselves as we see ourselves' [33: 5]. Self-reflexivity recognises that our practices are culturally specific [34], not neutral, and requires the mediator to be 'explicit about the operation of power' [35: 162] and mindful of their power position in the mediation process. The reflexive mediator assumes a non-hierarchical position ('bottom up' rather than 'top down') and works collaboratively with clients in a more collegial, partnership role, sometimes described as engaging in *conversation* rather than as intervention. It is the *participants'* knowledge that is privileged, and the *participants* who supply the interpretive context for determining the meanings of events. The mediator is primarily interested in their different world views, as expressed through their stories about the conflict, and assists them to open up to alternative views or stories that might be more useful to their situation and to the resolution of the conflict.

The importance of culture and cultural fluency

Lederach suggests that the concept of culture is extremely complex and hotly debated, in particular as it relates to conflict and its resolution. Michelle LeBaron [47] argues that all conflicts are culturally based and points out that '[c]ultures are fluid, changing continually with context and experience …. [and] are constructed from deeply shared meanings'. Each person is a part of many cultures and there is also a wide variation within cultures [14: 3]. She sees culture as being integral to conflict and advocates the need for mediators to engage in 'cultural fluency' through a process of 'mindful awareness' by reflecting 'on our own cultural ways of knowing and being' [48: 12]. She also stresses that when conflict is interrelated with culture it is important to challenge processes that institutionalise, bureaucratise and homogenise mediation processes.

> Recognizing that cultures are constructed from deeply shared meanings, that each individual is a part of multiple cultures, and there is wide variation within cultures, the aspiration to design culturally appropriate processes is seen in its true complexity. [14: 2]

I believe that increased knowledge of customary dispute resolution practices can contribute to the development of more culturally fluent mediation practices in various

institutions in the region. Priority needs to be given to retrieving and reclaiming local epistemologies, customary or 'folk' knowledge, with regard to conflict and its resolution, that is, 'knowledge that ordinary people have about causes and ways to deal with conflict in their particular cultural setting … not just empirical observation, theoretical research, and systematic testing of methodologies, but also personal experience, intuition, and imagination' [46: 1]. We need to value the way that Pacific Island and Asian peoples conceive and approach conflict, and construct approaches to mediation which build on the strengths of local ways of thinking and doing in relation to conflict and disputes and also draw from useful aspects of Western models. However, in this process, we also need to pay close attention to issues of power, justice and human rights.

The issues of power, justice and human rights

Taking a culturally relativistic approach to mediation has its limitations - it should not mean that 'anything goes'. Mediators must pay attention to broader structural issues of power, justice and human rights when assisting people to resolve their disputes. If these issues are ignored, mediators are in danger of mediating agreements which are individually or socially unjust and which may never come under pubic scrutiny or be challenged, thereby maintaining the status quo. (I am addressing this issue in more depth in my paper on family violence and mediation later in the conference [36]).

Some mediators have become far too concerned with definitions, process and outcome and have neglected the issue of justice, in particular where there are imbalances of power and concerns of injustice or human rights. The issue of power should always be a major consideration in mediation. Dominant Western models of mediation presuppose a roughly equal balance of power between the parties and rarely take into account the power inherent in the dominant discourses in a culture (which narrative mediation addresses), nor the structural (e.g. economic, gendered) inequities in the broader social context, which sociologists and feminists draw our attention to [27, 28].

One facet of power, which narrative mediation addresses, is overlooked in other Western approaches. Michelle Foucault, the French philosopher, highlighted how dominant discourses in a culture have the power to determine what counts as knowledge or 'truth' and what does not, whose voices are dominant and whose voices are marginalised, subordinated or silenced [37]. For example, the colonial legacy in many countries in the Asia-Pacific region has tended to ignore, marginalise or subordinate indigenous knowledges and has privileged Western ways of knowing. This has led to a process of 'othering' of minority groups, in particular in colonised countries [38]. Where there have been dominant colonial societies, indigenous groups have struggled to assert their own cultural identities. Linnekin has pointed out that in Hawaii, New Zealand and Australia indigenous people have been 'transformed into subordinated minorities of the Fourth World. In each of these cases the colonial society's categorization and treatment has been founded on Western biological criteria and openly racist assumptions' [39: 149].

Because mediation focuses on building cooperation, critics have worried, justifiably, about the possibility that effective negotiators may ignore structural inequities and violate the rights of weaker parties, or that a supposedly 'neutral' mediator may press

the weaker party to settle. For the outcomes of mediation to be fair and just, the issue of the use and abuse of power must therefore be addressed, in particular as mediation is a private process. When mediators are not aware of, or fail to deal with, imbalances or abuses of power these imbalances and abuses are sanctioned and reproduced: '… dominant narratives will colonise alternative narratives and mediation becomes a method of entrenching dominant power structures, not a forum in which diverse voices can be heard'. [40: 226].

At another level, the question of whether a conflict is asymmetrical or symmetrical is often difficult to answer and has cultural connotations. In mediation, the power imbalance between parties may be subtle, hidden, fluid or difficult to define. In addition, power is not a completely objective property that can be attributed to a relationship independently of how the actors define the situation and how it is defined in a particular culture. In Western cultures, egalitarian individualism influences how we view power, whereas in the East, collectivism and vertical power relations are often seen as 'natural' and therefore power imbalance is not viewed as a problem in itself, only the abuse of power [41].

Regardless of culture, constructs of mediation must enable the mediator to recognise and explicitly address abuses of power and human rights abuses or mediation could easily become another process which marginalizes and subordinates women and other disadvantaged groups, in particular those who are subjected to violence and abuse in patriarchal, hierarchical cultures. It is also essential for constructs of mediation to address issues of human rights and social justice for long-term peacebuilding to occur.

Feminist scholars have pointed out that the effect of ignoring the social and cultural context of mediation where there is domestic violence, for example, is to ignore those responsible for violence and to leave violence unchallenged [42-45]. The tendency of Western mediators to focus on individual interests and needs, rather than on the social context, and to try to be 'neutral' and 'impartial' in their role as facilitators, may lead to compromises that imply that the victims of violence are blameworthy and need to change in some way. We also need to be mindful that some traditional conflict resolution practices may produce agreements that are unjust for one party; in patriarchal cultures, for example, the victims are often women.

Mediation as transformative peacemaking

The language we use to describe what we do as mediators is important. For example the popular conceptions of the term 'conflict resolution' promote the idea that conflict may be undesirable and should be stopped at the expense of justice, whereas in ongoing relationships, conflict remains. The term 'conflict management' is too 'narrow' and 'technical', suggesting that we can control conflict [1: 16]. Conflict 'transformation', however, is more closely linked to peacemaking [49, 50] than conflict 'resolution' or 'management'. The term 'transformation' addresses the ongoing, longer term conflicts and the potential need for structural changes. To quote John Paul Lederach:

> Social conflict is a … phemomenon that transforms events, the relationships in which conflict occurs, and indeed its very creators. It is a necessary element in

transformative human construction and reconstruction of social organization and realities … in other words conflict is seen as a transforming agent for systemic change. [1: 17-18]

I am attracted to Lederach's concept of conflict transformation as a framework for building healthy relationships and communities, both locally and globally, and which requires fundamental changes in our thinking. He highlights that conflict impacts on people personally, relationally, structurally and culturally and conflict transformation focuses the mediator's attention on the context of conflict and the cultural meanings attached to the complex web and system of relational patterns. In addition, he suggests that mediation must be 'understood and integrated into an overall peace-building framework, oriented toward social empowerment and change' [1: 119].

The fields of mediation and peacemaking have followed separate paths and the links between the two are often not considered. In 1971, Adam Curle described mediation as a peacemaking function, along with education and advocacy. He noted that these approaches shared a vision of justice which enabled less powerful groups to attain a voice. Successful mediations can facilitate the articulation of the legitimate needs and interests of each of the parties and enable relationships to be restructured so that substantive and procedural issues contributing to conflicts can be dealt with in a mutually acceptable way, thereby contributing to building peace [50, 51].

Lederach argues that in order to build lasting peace, mediation should not just address the resolution of interpersonal and relationship issues, it should also be concerned with transforming conflicts, which may involve the need for structural change [1]. He suggests that: 'transformative peacemaking is based on understanding fair, respectful, and inclusive process as a way of life and envisions outcome as a commitment to increasing justice, seeking truth, and healing relationships' [1: 22]. He describes mediation and peacebuilding as 'two broad camps, that of non-violent social change, the "revolutionary" camp, and that of mediation, the "resolutionary" camp' [1: 11].

Lederach [1] and Adam Curle [51] both argue that mediators can be peacemakers if they work to empower people to be active participants in transforming conflict and making decisions that affect their lives. Lederach states that '[t]ransformative peace making … empowers individuals and nurtures mutuality and community' [1: 21]. Catherine Morris suggests that peacebuilding also includes an emphasis on human rights. She notes that: '[p]eacebuilding includes building legal and human rights institutions as well as fair and effective governance and dispute resolution processes and systems' [52:1]. Instilling notions of peacebuilding into our dispute resolution systems requires us to move beyond the dominant, narrow models of mediation that are currently in favour.

Conclusions

In order to transform conflicts and build a just peace, mediators need to ask the right questions to uncover the nature of social relations, in particular from the perspective of those who are 'othered', marginalized or relatively disempowered in a culture. Culturally fluent mediators are interested in the lived experience of people and place emphasis on allowing people to construct their own identity, process and outcomes within the mediation process. However, if mediators blindly promote cultural relativism and do not accept that there are some universal principles, such as human rights, then the process and outcomes of mediation may not be just [27] and they cannot claim to be peacemakers.

Mediators need communication competence in the knowledge that their clients supply the interpretive framework that is necessary for determining appropriate interventions. They must be client-centred, use enabling and empowering ways of working and strive to be inclusive, especially ensuring the inclusion of previously excluded or 'othered' voices, such as those of indigenous people. They need to accept that tensions and conflicts will be associated with recognition of diverse values and difference and avoid defining themselves and their role as 'neutral'. Most importantly, it is essential for mediators to engage in self-reflexivity (which demands awareness and control of one's own professional, personal and cultural biases in order to understand the standpoint of the other) and allow for a relativity of client needs, but this must occur within an explicit framework which addresses issues of social justice and human rights.

It is impossible for mediators to be value-free and the human rights of oppressed individuals and groups in a society can easily be ignored by mediators in the guise of 'neutrality'. As more and more groups define identity as being a human right so we become aware of the ways in which social policies are embedded within relations of cultural oppression [32] The language of 'rights' should include the right to define one's situation and experience across a broad range of social situations and institutions [54].

Finally, I would like to reiterate that there is no one way, or 'correct' way to mediate, nor is there a definition of mediation which will reflect the meanings given to the concept in the various cultural groups in the Asia-Pacific region. I have argued that constructs of mediation can constrain us and the challenge for us is to find ways to design mediation approaches that fit the needs of our clients and that acknowledge and address the issues of culture, power discrepancies and transgressions of human rights. If we as mediators are also to be transformative peacemakers, we need to broaden our constructs of mediation to address the structural changes needed to transform conflicts and build lasting peace.

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