Mediation in a globalising world: Culture, context and human rights.

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Mediation in a Globalizing World: Challenges to Multi-Culturalism, Peace-Building, and Religious Tolerance

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Conflict

- Relationships between individuals and within groups form the basic building blocks of all functioning societies.
- Conflicts and disputes are a normal part of relationships and decision-making processes.
- Conflict is necessary for good decisions, for development, change, learning and intimacy.
- It is the way that we handle conflict which causes difficulties that may require third party intervention.
- Culture influences the way the third party and the disputants perceive and handle conflict.
In this presentation I will briefly

• discuss the influence of culture, and dominant discourses within a culture, on the way people view and handle conflict,

• provide examples of diverse religious and customary dispute resolution practices in Asia and a critique of their limitations, and

• suggest some implications for dispute resolution practitioners and peace-builders working in the region

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This presentation will challenge dominant Western constructs of mediation and focus on ways of building culturally fluent models of mediation within a human rights framework.
My central argument

It is essential that third parties design models or approaches to fit the individual, collective and culturally-based conflict resolution needs of their clients, rather than force their clients to follow a particular model that they impose.
There are many Western models of mediation, however Western practices are dominated by problem solving and interest based approaches. From this perspective conflict and disputes are assumed to occur because people do not always share similar:

- interests
- needs
- goals
- resources
However, a focus on individual interests or needs does not take into account the needs and interests of the collective, or the cultural and structural inequities in the broader social context.

It may not be possible for parties to share world views or find common interests where there are conflicts involving differing cultural or religious values.
The issue of imbalances of power between the parties in mediation is important to consider.
and the power of the mediator
Critics have worried about mediators ignoring structural inequities and allowing effective negotiators to violate the rights of weaker parties.

When mediators are not aware of, or fail to deal with, imbalances or abuses of power that are based on cultural differences then these imbalances and abuses are sanctioned and reproduced – mediation then becomes the method of entrenching dominant power structures, not a forum where diverse voices can be heard.
Imbalances of power

In mediation, the power imbalance between parties may be subtle, hidden, fluid, difficult to define and culturally based.

e.g. 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.
Mediation in the Asia Pacific

• In the Asia Pacific region there is a longstanding history of informal conflict resolution practices involving intermediaries or third parties.

• Some traditional practices are similar to what Westerners define as mediation where the parties make their own decisions, others are more like arbitration, where the third party (e.g. a chief, religious leader or an elder) makes the decision.
Mediation in the Asia-Pacific

- Traditional or customary mediation practices are often grounded in religious principles e.g. Islamic, Confucian, Christian, Hindu, Buddhist etc.
- Informal use of intermediaries is common in most indigenous cultures in the region e.g. the *kong chin* among Chinese, *kampong kutu* or *penghulu* among Malays.
Dominant ways of knowing

• All knowledge or ‘truths’ are situated in time and in a particular cultural context

• Epistemology is the study of the nature and foundation of knowledge. It is concerned with who can be a knower, what constitutes truth (or knowledge) and how truth is verified.

• The French philosopher, Michele Foucault, examined who controls what and whose knowledge counts in particular contexts at particular points in history and highlighted how knowledge is socially and culturally constructed through language (or discourse)

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What is discourse?

- Dominant ways of talking about things in a cultural group, e.g. conflict, which determines what we see and define as ‘normal’ or ‘abnormal’.
- Without language we have no thought.
- Dominant discourses determine our realities and ‘truths’ - what counts as knowledge or truth in a particular culture and what doesn’t.
Dominant discourses

• Some voices or views of the world are privileged, some are subordinated, others are marginalised or ignored.

• Those whose voices are dominant define what is ‘normal’ or abnormal’ in any society at any point in history

• For example, post-colonial legacies in many countries in the Asia Pacific have elevated Western ways of knowing.
Discourse of exclusion
The concept of ‘Othering’

• The colonial legacy is evident in many countries in the region (Australia, NZ, PNG, Fiji, Indonesia, India, the Philippines etc).

• It has tended to ignore, marginalise or subordinate indigenous knowledges and privilege Western ways of knowing.

• This has led to a process which is sometimes called ‘othering’ which can impact on our dispute resolution training and practices when working cross-culturally.
The concept of neutrality

Many Western definitions of mediation still refer to the need for the third party to be ‘neutral’, ignoring the potential for mediators who are not culturally fluent to perpetuate racism and privilege.
Is it possible to be ‘neutral’ or ‘objective’?

Professional practices can manufacture a colonising discourse of the ‘other’ under the guise of ‘neutrality’ or ‘objectivity’, without acknowledging that representations of ‘self’ and ‘other’ are always situated culturally and politically.
A definition of culture

• .... a set of rules, written and unwritten, which instruct individuals on how to operate effectively with one another and with their environment. It not only defines ways to act, but also ways to react, and thus is a valuable tool .... It’s the way we do things around here.

(Barbara Filner)
Another definition of culture

• ...the ‘whole way of life’ of a social group as it is structured by representation and by power ... a network of representations – texts, images, talk, codes of behaviour, and narrative structures organising these – which shapes every aspect of social life (Frow and Morris, 1993, p. x).
Key elements of culture

• Culture includes all aspects of human life by which groups impose order and meaning on their life experiences.
• It involves communication between all the senses in patterns that are recognisable by members of a given culture.
• The way that language is used in a culture shapes meaning and experience, which in turn shapes the language.
• The most effective method for understanding one’s own culture is to compare it to other cultures.
Examples of factors influencing collaborative dialogue between people from individualistic (Western) and collectivist (Eastern) cultures.

• (Adapted from Ting-Toomey, 1999)

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<thead>
<tr>
<th>Individualist cultures</th>
<th>Collectivist cultures</th>
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<td>Rely more on gathering facts, establishing goals and</td>
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<td>asking direct, specific questions</td>
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<td>Engage in overlap talking and faster turn-taking verbal</td>
<td>Use longer turn-taking pauses and reflective silences.</td>
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<td>behaviour.</td>
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<td>Focus more on content, action plans and outcomes than</td>
<td>Focus more on process, identity and relational meanings</td>
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<td>process</td>
<td>that underlie content messages and less on outcomes</td>
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<td>Tend to value horizontal power (low power-distance) and</td>
<td>Tend to value vertical power (high power-distance) and</td>
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<td>shared, egalitarian styles of leadership</td>
<td>hierarchical, authoritarian styles of leadership</td>
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The complex nature of culture

Michelle LeBaron

- All conflicts are culturally based
- Cultures are fluid and changing continually
- Cultures are constructed from deeply shared meanings
- Each person is a part of many cultures
- There is wide variation within cultures
Categorising and stereotyping

• Categorising is essential for communication but can lead to stereotyping and prejudice

• People belong to a number of categories e.g. based on age, gender, ethnicity, race, ability, class, sexuality, profession

• Broad categorisations do not apply to every individual in a cultural group – e.g. individualistic/collectivist cultures, high-context/low context cultures
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 ADR processes is seen in its true complexity.
Cultural identity

• is based on commonality of experience, perspectives, language, traditions and environments
• influences our approach to conflict and its resolution
Cultural fluency (LeBaron)

• ... developing mindful awareness by reflecting on our own cultural ways of knowing and being.

• Self-reflexivity
Hofstede’s (1991) cross-cultural attitude survey IBM employees in 53 countries, 60 questions x 4 dimensions

1. Power distance

‘the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally’ (p.28).
2. Individualism-collectivism

- 'Individualism' pertains to societies in which the ties between individuals are loose. Everyone is expected to look after himself or herself and his or her immediate family. Collectivism as its opposite pertains to societies in which people from birth onwards are integrated into strong, cohesive in-groups, which throughout people’s lifetime continue to protect them in exchange for unquestioning loyalty’ (p.51).
3. Masculinity-femininity:

- **Masculinity** pertains to societies in which social gender roles are clearly distinct (i.e. men are supposed to be assertive, tough, and focused on material success, whereas women are supposed to be more modest, tender, and concerned with the quality of life);

- **Femininity** pertains to societies in which social gender roles overlap (i.e. both men and women are supposed to be modest, tender, and concerned with the quality of life’ (p. 82).
4. Uncertainty avoidance

• ‘the extent to which the members of a culture feel threatened by uncertain or unknown situations. This feeling is, among other things, expressed through nervous stress and in a need for predictability, a need for written and unwritten rules’ (p. 113).
Hofstede’s findings

• The Anglo countries of Great Britain, US and Australia were the most individualistic countries.

• The pattern in Asian countries was the opposite of egalitarian individualism. On these dimensions the biggest gap was between Eastern and Western countries.

• Hierarchy is a characteristic of all Asian countries - Malaysia was the most hierarchical culture in the whole set studied.
Traditional and religious dispute resolution practices in the Asia-Pacific region

- In the Asia-Pacific region arbitration, litigation and traditional customary procedures are the three most commonly used forms of dispute resolution for cross-border, domestic and local village disputes respectively.
Critiques of traditional/ customary approaches

• They are not codified and are not well-understood outside of the local communities where they are practiced.

• Lack of regulation can lead to uncertain outcomes, such as gender inequality, lack of transparency and accountability, human rights abuses.

• The people vested with decision-making capacities in disputes are often patriarchal males e.g. village chiefs.
Common elements of Indigenous approaches to conflict and its resolution in the region

- a respect for elders in decision making
- the central importance of harmony in relationships and the restoration of relationships
- the relevance of metaphor and stories to explain events
- a regard for the land as a spiritual phenomenon
- the relativity of time
- the indirect, circular or holistic nature of communication
Common elements of Indigenous approaches to conflict and its resolution in the region

- a central need to assert, protect, keep or save face
- the importance of ceremonies and rituals and acknowledging their ancestors
- the inclusion of the extended family and/or other stakeholders in decision making
- a preference for the third party to be well known and respected by the participants
- a tendency for the third party to listen to others until there was some consensus and then make (or reflect) the decision.
Cultural values & mediation

• In mainstream Western cultures, individualised, direct, linear, confrontational, solution-oriented approaches to conflict tend to be promoted in some (not all) theoretical models of mediation.

• Australian Indigenous communities and many other cultural groups and individuals in the Asia Pacific may be more likely to value indirect communication, holistic approaches, harmony and the preservation or restoration of relationships.
Choice of mediator

• An ‘objective’ and ‘impartial’ mediator may be prized in some cultural groups, or with some kinds of disputes

• Respected, well-known elders may be preferred in others
The influence of religion on traditional or customary practices?
The influence of Islam

- Arbitration (tahkim) and mediation or conciliation (sulh) are recognised in Islamic law and pre-existed Islam as the dominant dispute resolution mechanisms used in Arab societies.

- The Holy Qur’an specifically mentions conciliation (sulh) and refers in several places to the principle of resolving disputes amicably, calling on protagonists to ‘forgive: for to forgive is ennobling’.

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The influence of Islam

• The Qur’an also outlines ‘the principles of fairness and of right and wrong which clearly state what is *halal* (permissible) and what is *haram* (forbidden)’ which are enforced by third parties, such as *imams*, when intervening in disputes.

• Othman notes that some jurists are critical of *sulh*, as it can involve competing ethical and religious values.
In Muslim cultures

• conflict is viewed as negative and dangerous and should be avoided;

• group affiliation (family, clan, religion, sect etc.) is the most central and important identity and should be protected and sustained;

• spontaneous and emotional acts in the interaction between the parties are integral to Arabic society and therefore embedded in Arabic mediation and negotiation;
In Muslim cultures

- Social norms and values are more important than legal values – eg. written agreements are not as important as social and cultural norms;
- Codes of honour, shame and dignity are centrally important;
- Unity is often the ultimate goal for groups;
- Hierarchical, authoritarian procedures and structures are preferred, thus ‘leaders’ tend to be older males and high-power officials and training and other credentials are not seen to be as important;
In Muslim cultures

• conflict resolution processes are more relationship-oriented than task-oriented and parties are very concerned about their image and perceptions of their relationships;

• arbitration and mediation are more commonly used than adversarial processes
Four tenets of Confucianism

1. ‘Social Harmony is the overall goal in human affairs’: order and harmony are valued and conflict and competition are unacceptable.

2. ‘Society is composed of hierarchical relationships’: respect and obedience is required of five key hierarchical relationships (father and son, ruler and subject, husband and wife, elder and younger brother and friend and friend) which are based on reciprocal and complementary duties. Overt expressions of anger and hostility are discouraged.
Four tenets of Confucianism

3. ‘Relationships are the source of an individual’s humanity’: self-esteem is drawn from observing proper conduct, conforming to family and groups norms and suppressing one’s individuality.

4. ‘Compromise, yielding and non-litigiousness are virtues’: conflict disrupts harmony so self-sacrifice is required for the good of the collective; litigation or a failure to compromise involves a loss of face [Wolski, 2009 p.102-3].
Blended approaches

• In Singapore efforts has been made to build on the dispute resolution traditions of its Chinese, Malay and Indian populations and to build a blended mediation approach:

• by incorporating Western models of mediation with traditional Indigenous philosophies and procedures that engender a ‘kampong spirit’ (a sense of community and being together), informal use of intermediaries (the kong chin among Chinese, kampong kutu or penghulu among Malays), village meetings such as the panchayat (Indian, gift giving and tea).
Conclusions
Planning, preparation & partnering

- Culturally relevant, cross-cultural or trans-national dispute resolution practice, research and training involves planning, preparation and partnering and can be extremely time consuming.
- There is no substitute for relationships, especially in non-Western cultures, and relationship-building takes time.
When resolving cross-cultural disputes

• ensure that the third party is acceptable to and respected by the disputants and, if possible, can operate as part of a multicultural team so an appropriate mediator can be selected for each dispute, or co-mediation can be used when required;

• take time to prepare prior to intervening and become familiar with relevant cultural norms and traditional approaches to conflict and its management, transformation or resolution;
When mediating cross-cultural disputes

• privilege the participants’ knowledge and allow the participants to supply the interpretive context for determining the meanings of events;

• be good empathic listeners, fluent in the appropriate languages, flexible and able to use indirect, high context styles of communication;

• be culturally fluent, mindfully aware and self-reflexive;
When mediating cross-cultural disputes

• incorporate relevant traditional values and practices into the dispute resolution process, for example by using a consensus-building approach

• focus on preserving and building relationships and on assisting the participants to assert, restore, preserve and/or keep face as required

• include all people in the process who are relevant to the dispute and the disputants.
First do no harm

- There is often inadequate time or resources allocated to prepare for third party intervention or training

- Where partnerships are involved there are sometimes imperialistic overtones

- The partnerships are often not equal.
Build on local traditions

When working in a different culture—elicit local ways of doing things from the locals themselves.

The ultimate goal of education and training should be to encourage and empower the host/client to become self-sufficient.
Our book

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