The future of dispute resolution in the Asia-Pacific region. What has culture got to do with it?

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Abstract

This paper analyses the influence of culture and discourse on the way people view and handle conflict, provides examples of diverse religious and customary dispute resolution practices in Asia and a critique of their limitations, and suggests some implications for dispute resolution practitioners working in the region. Various forms of mediation, conciliation and arbitration have existed for at least two millennia in various countries and cultural groups in Asia. However, globalisation and the colonial legacy have privileged Western ways of knowing and the increasingly dominant, Westernised approaches to dispute resolution have tended to ignore, marginalise or subordinate local indigenous or customary knowledges and practices. The author argues that, for dispute resolution practices to be culturally appropriate, third-parties should understand and value the way Asians and Pacific Islanders, including indigenous communities, have historically conceived and responded to conflict and work towards co-constructing approaches to dispute resolution that privilege local ways of thinking and doing in relation to disputes. Potentially, a blend of Western and Eastern approaches can address the limitations of customary practices imposed by human rights conventions and legal frameworks and include the useful and positive aspects of each approach. However this will require third-parties to be culturally intelligent, culturally fluent, self-reflexive and mindfully aware of the influence of their own culture on their perceptions and practices.

Introduction

This paper focuses on culture, religion and customary dispute resolution practices, their influence on the way people view and handle conflict and disputes in the Asia-Pacific region and implications for dispute resolution practitioners. All societies have dominant mechanisms to manage conflicts, and to bring to account those whose disputes mar social cohesion and the structure of the group or society as a whole. In some generic form, for example, various forms of mediation, conciliation and arbitration have existed for at least two millennia in Eastern nations, for example in China, Japan, Korea and Sri Lanka under the influence of Confucianism (Folberg & Taylor 1984; Irving & Benjamin 2002) and in the teachings of the Holy Qu'ran (Keshavjee 2002), which are influential in other Asian countries such as Malaysia, Indonesia and the Southern Philippines.

Effective dispute resolution processes are not only needed for business and cross-border disputes between trading partners and investors but also for land and family disputes, which can also underlie business disputes. Existing forms of formal Western dispute resolution procedures used in the region are sometimes ill-equipped to deal with some situations and a

lack of knowledge of customary norms and processes can discourage investors and traders, obstruct law reform and disempower traditional dispute resolution practitioners. (Corin Care 2002)

In addition, it has been recognized that indigenous people and their customs and cultures are often viewed as inferior to the cultures of the colonizers or the dominant race in many societies. Under centralist or dominant ideologies indigenous people are defined as 'other', including by the indigenous people themselves. Consequently, indigenous disputing parties are often disadvantaged in the justice system, in particular when indigenous customary law and traditional native dispute resolution practices are overlooked, marginalised or suppressed. (Ahren 2004, p.64)

Article 34 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) asserts that indigenous peoples have the right to develop and maintain distinctive customs, traditions, practices, and juridical systems in accordance with international human rights standards. (Thornberry 2002, p.381) Granting legal protection to indigenous people can be developed as a result of greater appreciation of multicultural diversity. (Short 2014) The concept of legal pluralism recognizes the existence of multiple legal systems in societies where people belong to multiple groups. For example, legal pluralism in Malaysia is reflected by the dual system of civil and Syariah law. (Kuek & Tay 2012)

In this paper I provide some examples of customary or traditional and religious approaches to conflicts and disputes in various cultures and countries in the Asia-Pacific region. However, it is important to recognise that the task of learning about the dispute resolution traditions of groups other than your own is never-ending and if done well would occupy legions of specialist scholars for many years. Even then, the diversity between individuals, families, organisations, groups or communities within each culture or country, and the changes that occur over time with globalisation, will provide exceptions and contradictions to any generalisations that can be made. It is also essential to focus on similarities between cultural groups as well as differences.

As an Australian female 'Westerner' with a keen interest in this topic I write as a humble learner. As a University academic for 36 years I taught and supervised numerous undergraduate, postgraduate and research scholars from the Asia-Pacific region, and as a mediation consultant and trainer I have conducted mediation workshops in eleven different countries[1], including in Malaysia, Indonesia, the Philippines and Fiji, which has made me mindful of the need for Western trainers and mediators working in the region to be culturally intelligent, culturally fluent and self-reflexive. As a past President and Vice-President of the World Mediation Forum, the ongoing President of the Asia-Pacific Mediation Forum, and a keen traveller, I have been fortunate to have had the opportunity to learn about different

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[1] I have conducted mediation training workshops for a range of professionals in all States of Australia, New Zealand, England, Sweden, Ireland, Germany, Denmark, Malaysia, the Philippines, Indonesia and Fiji.

dispute resolution traditions and customs in the region[2]. However, the more I learn about the subtle and complex differences between the diverse dispute resolution practices of groups within this region, the more humble I feel when approaching this topic.

Dominant ways of knowing about and intervening in conflicts

Epistemology is the philosophical study of the nature, foundation, sources and limits of knowledge (Maiese 2005). Epistemology is concerned with who can be a knower, what constitutes truth and how truth is verified. The French philosopher Michel Foucault examined who controls knowledge and what knowledge counts in various institutions. He argued that all knowledge is socially constructed and is situated in a particular cultural and historical context (McHoul & Grace 1993). He also emphasised the close link between knowledge and power and argued that language constructs our understandings of the world and our place in it (Bagshaw 2000, 2003).

Language has political implications and constructs our particular views of conflict and how it should be resolved. In this sense I am talking about the power of language as discourse - dominant ways of talking about and perceiving something (for example, gender, conflict or mediation) in a particular cultural group or context at a particular period in time (Bagshaw 2006b). Chowdhury maintains that gender inequality originating from social discourses may have a dominant impact on mediation and can damage the negotiating capacity of women. She suggests that mediators should be aware of cultural factors which may result in power disparities between disputing parties and challenge gender biased discourses which are dominant in a society by seeking ways to emancipate and enhance women's subordinate voice in mediation sessions. (Chowdhury 2012)

Dominant discourses in an organisation, community and/or society determine what counts as knowledge or 'truth' and what does not. The philosopher, Michele Foucault, highlighted that at any given time in history and in any given context, certain knowledges or 'truths' are privileged and others are ignored, subordinated or marginalised, and those who control or centralise the dominant discourses (colonizers, professionals, experts, politicians, religious leaders and so forth) determine what is viewed as 'true', 'normal' and 'abnormal'.

The colonial legacy in many countries in the region has tended to ignore, marginalise or subordinate Indigenous or customary knowledges and has privileged Western ways of knowing which has led to the process called 'othering' (Pickering 2001). Linnekin points out that in Hawaii, New Zealand and Australia, for example, 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' (Linnekin 1990, p. 149). Many indigenous groups

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[2] See the *Asia-Pacific Mediation Forum website* - www.asiapacificmediationforum - for relevant papers from prior *Asia-Pacific Mediation Forum (APMF)* conferences.

have struggled to assert their own cultural identities where there have been dominant colonial societies in the region.

Culture and conflict

Contemporary writers define culture as:

> 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 the narrative structures organising these – which shapes every aspect of social life.(Frow & Morris 1993, p.x)

LeBaron points out that conflict is always relational and social and argues that culture is integral to understanding conflict. She defines culture as:

> The sets of invisible rules that whisper prompts and frown at us in our mind's eye when we contemplate deviating from norms. They are sets of messages that swirl around us in overlapping circles, often outside our conscious awareness. (LeBaron 2003, p.17)

All cultures are dynamic, or in flux, and each of us has multiple identities (based on age, nationality, geographic setting, gender, sexuality, race, ethnicity, socioeconomic class, profession, job role, ability, language, religion and so forth) and may respond to conflict differently, drawing on one or a blend of these, depending on the context (ibid, p.35). LeBaron also states, however, that while culture is 'multi-leveled and multilayered, there are ways to understand its patterns that can help us decode its symbols'. I agree with her premise that 'practice and experience, together with learning, awareness, and reflection enhance cultural fluency'. (ibid p. 37)

Okun et al identified key elements of culture about which scholars agree:

- 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. (Okun, Fried & Okun 1999, p.9)

Members of a specific culture experience their culture as 'the way things are and the way things should be', a phenomenon called ethnocentrism (Okun, Fried & Okun 1999, p.9), our natural tendency to assume that everybody else views and understands the world in the same way that we do, which often leads to misunderstandings and conflict.

As previously explained, our cultural identity influences our approach to conflict and negotiation and this identity is based on a commonality of experience, perspectives, language, traditions and environments. Language is central to the construction, negotiation and communication of meaning and thought and enables us to categorise, label and make sense of a situation in similar or different ways. Whilst recognising the dangers of categorisation, Table 1 illustrates how in communication Westerners tend to focus more on 'things and objects, rather than on processes and relationships'. (Okun, Fried & Okun 1999, p.8) Westerners tend to use categories as a shorthand way of understanding and communicating about events and experiences. On the other hand, people from non-Western cultures tend to use approaches to communication that may be either more abstract or more particular. For example, people from communitarian or high-context cultures will tend to pay more attention to the context and non-verbal communication and those from individualistic or low-context cultures will focus more on words and their meaning. (Hofstede 1991; Ting-Toomey 1999) These differences should be considered by third parties involved in cross-cultural communications.

Table 1. Factors influencing collaborative dialogue between people from individualistic (Western) and collectivist (Eastern) cultures (adapted from Ting-Toomey, 1999).

Elements of collaborative dialogue	Individualist cultures	Collectivist cultures
Reliance on context	Are less aware of context and non-verbal cues	Are more aware of context and non-verbal cues
Form and style of communication	Place more reliance on direct and verbal forms of communication	Place more reliance on indirect and non-verbal forms of communication
Level of assertiveness	Tend to be more assertive and self-affirming	Tend to be more submissive and self-effacing
Type of reasoning	Rely more on inductive reasoning	Rely more on deductive reasoning
Focus	Focus more on the needs, interests, goals and rights of individuals	Focus more on the needs, interests and goals of the collective and on individuals' responsibilities to the collective.
Content of the communication	Rely more on gathering facts, establishing goals and asking direct, specific questions	Rely more on general narratives, stories, metaphors, proverbs, analogies and understatements to communicate meaning
Turn taking and speed of communication	Engage in overlap talking and faster turn-taking verbal behaviour.	Use longer turn-taking pauses and reflective silences.
Process versus outcome orientation	Focus more on content, action plans and outcomes than process	Focus more on process, identity and relational meanings that underlie content messages and less on outcomes
Leadership	Tend to value horizontal power (low power-distance) and shared, egalitarian styles of leadership	Tend to value vertical power (high power-distance) and hierarchical, authoritarian styles of leadership

However, at this point I want to remind readers that culture is not static; it is fluid and changing and people can be influenced by many different cultures, in particular with the

increased global use of information technology. Also, whilst categorising people according to their cultural background can be useful, putting people and cultures into binary categories (e.g. collectivist/individualistic) can detract from our ability to see shared values and behaviours across cultures and unique, individual aspects within a culture. Individuals belong to a number of categories, as previously explained, and perform in a number of roles (such as manager, colleague, employee, husband, father or friend) and one category or role may be more relevant in some situations than in others.

Bauman has also cautioned against using analyses of culture that are based on binary concepts. She noted, for example, that 'there is a dialectical relationship between individual Aboriginal autonomy and group relatedness, such that whilst Aboriginal individuals may be heard to say, 'I am boss for myself', autonomy can only be expressed through relatedness. (Bauman, T 2007, p. 65) In their research, Tjosvold, Leung and Johnson also found that, while some social scientists are sceptical that Western theory based on individualistic notions can be applied in collectivist cultures (Tjosvold, Leung & Johnson 2000), their findings challenged the universalistic aspirations of Deutsch's theory of co-operation and competition (Deutsch 1973). In cooperative contexts their Chinese participants were able to appreciate constructive controversy, were interested in learning more about opposing views and tended to include them in decisions. To quote: 'Our research challenges Western stereotypes and indicates that leaders in China must develop an open, mutual relationship with employees. Authority cannot be assumed; leaders must earn it by demonstrating commitment to employees and openness to them' (ibid, p.485).

Whilst accepting that there are some universal values, however, in order to be culturally fluent, it is also important to acknowledge that people from different cultural backgrounds have many similarities, but may view conflict situations differently, behave differently, communicate differently and want different things. Diller has outlined various dimensions of culture which can be useful when exploring cultural similarities and differences (Diller 1999, p.50-1). In relation to each dimension, Diller suggested that each culture evolves rituals and prescriptions, patterns, cultural myths and symbols to support them. Some dimensions tend to cluster together and become mutually reinforcing. For example independence, individual rights, egalitarianism, control and dominance are common in Western cultures and interdependence, honour and family protection, authoritarianism and harmony and deference are common in Eastern or Asian cultures. However, a key question is: how do we know the position of a culture based on various dimensions?

There are a number of cross-cultural attitude surveys that have produced data which may be useful to consider, however they also tend to offer binary ways of categorising which ignore the areas of similarity or overlap and individual and group differences. Hofstede, for example, conducted a global survey of IBM employees in 53 countries based on a questionnaire with 60 questions about the employee's basic values and beliefs. In relation to organisational disputes, Hofstede argued that 'decisions have to be made in a way that responds to the values of the environment in which

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they have to be effective' (Hofstede 1980, p.268). In Hofstede's definition, culture is a group phenomenon:

> Culture is the collective programming of the mind which distinguishes the members of one group or category of people from another (Hofstede 1991, p.xx).

After statistical analysis (factor analysis) Hofstede's survey showed that the 53 cultures differed mainly along four dimensions:

- *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' (ibid, p. 28).

- *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' (ibid, p.51).

- *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)' (ibid, p. 82)[3].

- *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' (ibid, p. 113).

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[3] It should be noted that Hofstede's work had been criticised for failing to recognise that sex and gender are not the same thing. Whilst sex is biologically determined, gender is socially constructed. People are enculturated as feminine or masculine, regardless of their sex. He recognised that people have multiple and varied aspects of their identity but claimed that identification on the gender level of his hierarchy is determined "according to whether one was born as a girl or as a boy" Hofstede, G 1991, Cultures and organisations: Software of the mind: 10. He reinforced the notion that individuals and nations have an essential gendered identity based on sex, which ignores other influences on the construction of masculinity and femininity[3].

Hofstede scored each country in his study from roughly 0 to 100 on each of the four dimensions[4]. The results of the measurements for two of these countries (Australia and Malaysia) are shown in Table 2.

Table 2: Cultural profiles of Australia and Malaysia (Hofstede, 1991).

Country	Power Distance	Individ-ualism	Mascu-linity	Uncertainty avoidance
Australia	low 36	high 90	high 61	low 51
Malaysia	high 104	low 26	mid 50	low 36
Median (53 units)	60	38	50	68

The dominant Australian culture was characterised by Hofstede as egalitarian individualism[5]. From Hofstede's study, which gives the global picture, this pattern is quite common in the West, but there were interesting internal differences. The Anglo countries of Great Britain, USA and Australia were revealed as the most individualistic countries in the whole set of 53 countries. The pattern in Asian countries was the opposite of egalitarian individualism. On these dimensions the biggest gap was between Eastern and Western countries.

According to Hofstede's data, Malaysia was the most hierarchical culture in the whole set of countries, even though hierarchy is a characteristic of all Asian countries (and many others as well). However, in order to understand leadership in Malaysia we have to consider another dimension as well. The power of the leader is not perceived as coercive. Because of the collectivistic mentality, relationships between leaders and their followers are coloured by the family metaphor. The leader is perceived as a benevolent father figure or patriarch, not as a harsh despot.

Traditional and religious dispute resolution practices in the Asia-Pacific region

If we assume all knowledge is historically, socially and culturally situated (Foucault 1980; Haraway 1988), then it follows that knowledge about conflict, its causes and approaches to its management, transformation or resolution, are shaped by our cultural understandings and dominant world views. Thus retrieving and reclaiming local epistemologies, customary or 'folk' knowledge with regard to conflict and dispute resolution processes in the region is important if we want to design interventions that are culturally appropriate and relevant. This includes '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'

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[4] The scores represent relative, not absolute positions of the countries. They measure how people in one country differ from people in other countries.

[5] However, it is important to remember that Australia is the second most multi-cultural country in the world.

(Maiese 2005, p.1). We need to value the way that communities have historically conceived conflict and work towards co-constructing models of practice that privilege local ways of thinking and doing in relation to disputes (at the same time considering the limitations posed on these by human rights conventions and legal frameworks) and the useful aspects of recent, formalised Western approaches to dispute resolution, such as mediation.

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. (Ntumy & Angelo 1993) However, customary approaches are not codified and are not well-understood outside of the local communities where they are practiced. The collectivist nature of Asian cultures means that more consensual means of dispute resolution tend to be favoured which are essentially restorative rather than retributive and involve all of the stakeholders affected. However, critics of traditional approaches have concerns about the lack of regulation leading to uncertain outcomes, gender inequality, lack of transparency and accountability, human rights abuses (particularly in relation to gender) and about the qualities of people vested with decision-making capacities in disputes, who are often male village chiefs (Bagshaw & Porter 2009; Mackey 2005; Peace and Democracy Foundation 2004). Various authors have therefore suggested that, for these and other reasons, there are benefits to be gained from blending Western approaches with traditional restorative practices (Bagshaw 2009b; Barnes 2006; Dinnen 2003; Lederach 1995, 1997; Lee & Hwee Hwee 2009).

In Asia some traditional or indigenous practices are similar to what Westerners call mediation, while others are more like conciliation, where a third party (e.g. a mayor, chief or elder) gets more involved in the outcomes of the dispute by enforcing customary norms or other parameters, or arbitration where the third party makes the decision after listening to many different points of view. However, there is no one set of socially transmitted values and beliefs in relation to conflict and the way it should be handled in Asia, due to differences in the social, historical, religious, political and economic situations of groups within and between countries in the region.

In prior APMF conferences indigenous groups from colonised Asian and Pacific countries (including from Indonesia, Hawaii, Malaysia, the Philippines, PNG, Australia and New Zealand) have shared their personal experiences of traditional approaches to conflict practised in their communities and villages. Whilst there have been some differences in their descriptions of the way conflicts are customarily handled, they have tended to share similar traditions and values including:

- 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
- 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.

In mainstream Western cultures individualised, direct, confrontational, linear, solution-oriented, third-party-neutral approaches to conflict are promoted in some, but not all, theoretical models of mediation. However, many Indigenous groups in the Asia-Pacific region are more likely to value indirect communication, harmony, face-saving or face-keeping, holistic approaches and the restoration of relationships. The 'objectivity' and 'impartiality' of the third-party may be prized in some groups, or with some kinds of disputes; respected, well-known elders may be preferred in others.

Malaysia
Similar to other Asian cultures, Malaysians generally see conflict as undesirable:

> Conflicts are seen as the wilful creation of anti-social, immoral and selfish individuals … a sign of personal failure and weakness which brings shame (*malu*) and puts one's reputation at stake. A great deal of effort goes into denying that conflict exists. There is usually strong pressure to conform, not to 'rock the boat' and not to be 'different'. Suppression of true and real feelings seems to be one of the most important goals of socialisation. (Othman, WH 1996, p.41)

The Malaysian majority require people to show courtesy to others in word, deed and action (*adab*) and encourage social harmony (*rukun*) in the family, community and society (Lee & Hwee Hwee 2009, p.5-6). In Malaysia, traditional approaches to mediation are practised by village or *kampong* headmen and village elders, *imams* or mosque leaders, judges and others in the *Shariah* courts and by clan leaders in the Chinese community. (Bagshaw 2009a; Lim 2003) A *kampong* is similar to an extended family; it is strongly community-oriented, acts on the principle of collective responsibility and makes decisions by consensus. *Mesyuarat* (discussion) and *muafakat* (consensus) are Arabic-derived words and reflect very deep values in the Indigenous culture. *Mesyuarat* is a gradual process of mutual adjustment that is made by participants between contrasting points of view, while avoiding expression of open disagreements, until consensus is reached.

 In pre-colonial, traditional Malay societies, family elders, village elders and appointed leaders were often called upon to resolve disputes, using their own personal styles, which included mediation, arbitration and adjudication. In traditional societies, the village elders were held in high esteem, which is not necessarily the case today (Othman, WH 1996, p.34);

as third-parties they tended to pass judgement on who was 'right' or 'wrong' and how parties should or should not behave, according to *adat* (customary) law or divine law.

Indonesia

In Indonesia, traditional deliberation and consensual procedures for decision-making and dispute resolution (*musyawarah*) also aim to achieve a mutually acceptable decision with assistance from an authoritative decision-maker (Barnes 2006; Syukur, Fatahilla Abdul & Bagshaw 2013; Syukur, Fatahilla Abdul & Bagshaw 2018). For example, in Maluku, a multicultural area of Indonesia, *Pela,* an alliance system which involves an enduring and unavoidable tie of brotherhood, has been developed over several centuries. In this system, disputing parties attend a reconciliation ceremony where apologies are given to each other in front of village elders and religious leaders (Barnes 2006).

People's Republic of China

Traditionally, mediation in the People's Republic of China occupied the central place in courts, workplaces, schools and communities (Cohen 1966; Moore 2003). The People's Conciliation Committees, established by the Government, offer mediation at the community level and the mediators are often retired village leaders with high prestige (Moore 2003). In 1995, when I visited China as part of a delegation, my hosts, the Chinese Ministry for Justice, talked of China having roughly 10 million mediators (one for every 10 families) and 800 lawyers (Bagshaw 1995). Things have changed since then but it's important to understand the history of mediation practice. The mediators we met in China described and demonstrated their practices as being far more coercive than those of most Western mediators, in part because their concept of 'neutrality' was based on collectivist rather than individualistic notions and therefore the interests of the State were higher than those of the individual. Many of the mediators we met were older, retired volunteers who were available to the community day and night most days of the week. They often talked about how many lives they had saved by preventing conflicts from escalating, and of the importance of assisting disputants to save or protect face.

The role of the mediator in ancient China was based on the Confucian values. Mediators were not trained or paid in a professional or formal way, as in the West, but were selected on the basis of moral and social standing and wisdom. Hilmer found in her study of mediation in China, that the third party historically had the authority to decide which rules apply and to interpret how they should be applied. Because of the emphasis on maintaining order, the traditional model was similar to Western notions of conciliation, where parties are brought together and encouraged to follow ethical or legal guidelines that rule the situation. (Hilmer 2008)

When developing conflict resolution programs in China, Bretherton et al found that, because China has a long history of patriarchy and an emphasis on hierarchical power relations (which sits uncomfortably with Western assumptions of equality), Western techniques for resolving

conflict are still viewed with suspicion. In China, the importance of power distance is implicit in relationships and the exploration of alternatives to using power and authority is novel and sensitive. Also, a rights discourse can be understood as a veiled Western attack on the government. They stress that in China it is essential to take the time to build relationships and to ensure that the right introductions are made. (Bretherton & H. Zhaoying 2009)

The value and practice of *guanxi* (translated as 'relationship' but with 'deeper and broader connotations') is influential in China and among the Chinese diaspora in other countries in Asia, in particular in business negotiations. *Guanxi* can refer to:
   (a) the social interconnectedness of individuals and groups;
   (b) ties, connections and network of individuals and communities;
   (c) a series of mutual and reciprocal activities;
   (d) social rules and principles of human relations;
   (e) *bao* (reciprocal exchange);
   (f) *renqing* (human and emotional debt); and/or
   (g) *mianzi* (face). (Law 2009)

Guanxi is based on people's familiarity, similarity and friendship and emphasises the virtues of *yi* (uprightness), *ren* (benevolence) and *li* (propriety) as key Confucian principles for moral behaviour. Mediators can, for example, use *guanxi* to establish common ground and remind people of expectations of the people in their '*guanxi* network' (ibid, p. 174).

South Korea

In South Korea mediators also focus on keeping peace and saving face. (Lim, 2003)

The Philippine Islands

Similar to China, the Philippines has organised mediation programs permeating the village or province levels. The movement to restore traditional mediation practices in the Philippines (*Katarungang Pambarangay* or KP) involves compulsory conciliation by the KP conciliation committees in 42,000 barangays. (Lee, 2009) Established in 1978 in the Philippines, the Barangay Justice System offers a nation-wide elaborate system of mediation and arbitration panels to hear community disputes. Disputes are submitted to the *barangay* (village) captain and cannot be filed in the court until that process has been tried.

Japan

Various authors have described the long history of mediation being used at the informal level in Japan where it is embedded in the community, business culture and the court-based system for family and civil cases (Callister & Wall 1997; Graham & Sano 1984; Krapp 1996; Moore 2003). In the business culture, intermediaries are used as introducers (*shoikai-sha*) and as mediators *(chukai-sha)* to smooth business relationships. (Moore 2003) Japanese society expects tolerance and empathy for others and the Japanese have a duty to save and give face,

so open confrontation may be viewed as an admission of personal failure and therefore proceeding to litigation may be seen as undesirable. (Lim, 2003)

India

In India, mediation has been strongly influenced by Gandhian principles in the past and recently Western approaches have been provided by legal aid panels and courts in a number of states. (Chodosh 1999; Chodosh, Bhatt & Firdosh 2004; Moore 2003; The Bombay High Court 2005) As early as 1893, Gandhi, who was then a barrister, was sent to South Africa to settle a major commercial dispute. In settling the dispute out of court, Gandhi and the disputants drew on the *Lok Adalat* system in India and 'also on the teachings of [the disputants'] faith, the Holy Qur'an, which extols the virtues of forgiveness and negotiated settlement'. (Keshavjee 2002, p.4)

The influence of Religion

Traditional dispute resolution practices are often grounded in, or influenced by religious principles

Islam

In Islamic law, for example, arbitration (*tahkim*) and mediation or conciliation (*sulh*) are recognised and pre-existed Islam as the dominant dispute resolution mechanisms used in Arab societies (Othman, A 2007) [6]. 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'. (ibid, p. 5)

In Indonesia, Malaysia, Southern Philippines, Indonesia and Thailand conflicts involving Muslims are prevalent. Abu-Nimer suggests that Western conflict resolution strategies cannot easily be applied to disputes involving Muslims as the following underlying assumptions are contrary to dominant Western assumptions. He states that 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;
- social norms and values are more important than legal values – for example, written agreements are not as important as social and cultural norms;
- codes of honour, shame and dignity are centrally important;

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[6] The 4th Asia-Pacific Mediation Forum conference held at the National Islamic University of Malaysia in Kuala Lumpur in 2008 produced many papers relevant to this theme which are available on the APMF website – www.asiapacificmediationforum.org

- 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 see to be as important;
- 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 (Abu-Nimer 1996, p.30).

Confucianism

Confucianism has been influential in China, Vietnam, South Korea, Taiwan, Singapore and Japan for thousands of years and traditional approaches to dispute resolution are grounded in Confucian ethical principles of harmony, peace and conciliation (Lee & Hwee Hwee 2009; Lim 2003). Wolski describes four interrelated tenets of Confucianism which are as follows:

- 'Social Harmony is the overall goal in human affairs': order and harmony are valued and conflict and competition are unacceptable.

- '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.

- '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.

- '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 1997)

Hinduism

The *panchayat raj* is a customary South Asian dispute resolution system used mainly in India, Pakistan, Fiji and Nepal. '*Panchayat*' literally means assembly (*ayat*) of five (*panch*) wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settled disputes between individuals and villages. Modern Indian government has decentralized several administrative functions to the village level, empowering elected *gram panchayats*. *Gram panchayats* are not to be confused with the unelected *khap panchayats* (or caste panchayats) found in some parts of India. Prasad notes that the widespread acceptance of *panjayats*, both in India and within the Indian Diaspora, can be attributed to its over-arching and well entrenched positioning in Hinduism and its associated religious-cultural values and beliefs. In this context 'panch' (five) is significant. The *Panchayati* panel is

deemed to have the cumulative power of the five principal elements: *Akaash* (Sky), *Vayu* (Air), *Agni* (Fire), *Jal* (Water), *Prithvi* (Earth) that comprise the Indian understanding of the universe. In Indian thought, the human body is made up of five elements - *air, water, earth, fire and ether*. There are five vices - *lust, anger, greed, attachment and pride* and also five virtues- *truth, contentment, compassion, duty and patience.* In the Sikh community, *Panchayat* is perhaps as binding as 'Five Ks', that is, unshorn hair (*kesh*), sword (*kirpan*), comb (*kanga*), iron bangle (*kara*) and short breeches (*kachh*). (Prasad 2007)

Buddhism

The influence of Buddhism can be seen in many countries in Asia, however there is an overwhelming diversity of forms of Buddhism[7]. Buddhism has interacted with several East Asian religious traditions since it spread from India during the 2nd century AD.
The Buddhist concept of 'mindfulness' often referred to in the Western mediation literature. Some of the other tenets of Buddhism are reflected in the following quote:

> If we awaken to the reality of Interbeing and non-self, we awaken to the wisdom of nondiscrimination, it is the wisdom that can break the barrier of individualism, with this wisdom we see that we are the other person and the other person is our self. The happiness of the other person is our own happiness, and our own happiness is the happiness of the other people, of plants, animals, and even minerals. (Tho Accessed online July 2011)

The Buddhist influence can be seen in Cambodia, for example, where the traditional, informal approach to conflict resolution in Cambodian villages is known as *somroh-somruel*, which means to help people to live together happily (*sroh* means to get together for a purpose and *sruel* means easy, comfortable). The courts are perceived as remote and alien while the Buddhist temple (*wat*) is local and familiar. People of high status are held in high regard and traditionally the village headman was 'advisor, conciliator, mediator and judge for a range of problems'. (Coghlan 2009, p. 152)

Buddhism is also influential in Thailand where traditionally mediation has been also used at the village level. Village elders, monks and other leading figures mediated disputes (Barnes 2006; Moore 2003).

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[7] According to analyses found in Wikipedia, Buddhism was the first world religion and is currently the fourth-largest religion in the world behind Christianity, Islam and Hinduism. The monks' order (*Sangha*), which began during the lifetime of the Buddha, is among the oldest organizations on earth. There are many forms of Buddhism which can be found in Cambodia, Laos, Thailand, Sri Lanka, India, China, Japan, Korea, Taiwan, Singapore, Tibet, Bhutan, Mongolia and Nepal.

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) (Moore 2003, p.35).

In Singapore, commercial and family mediation are also relatively well developed and in these contexts efforts have also been made to blend Asian and Western approaches (Lee & Hwee Hwee 2009).

In Australia the use of mediation for the resolution of native title disputes has provided an impetus for the examination of cross-cultural negotiation (Bauman, T 2007). With an increased understanding of cultural differences in the way Indigenous and non-Indigenous communities perceive and approach conflict it was recognised that we needed to change our legal institutions to accommodate them, tailor mediation processes to suit individual communities' needs and to acknowledge the issues of imbalances of power and equality in relationships when doing so. For example, in 2002 in the Family Court of Australia, "family consultants" were appointed to assess the cultural needs of the Indigenous family involved and share information with the mediators before mediation started. (Stephen & Meredith 2002)

In New Zealand, consistent with the Maori culture, a model of family group conferencing has been developed for juvenile justice and family cases to avoid children being removed from their families. This kind of conferencing model has also been adopted by child welfare agencies and courts in the United States and Australia. (Chandler & Giovannucci 2004) Similarly, the "circle process", an indigenous form of conflict resolution developed in North America, which draws on ancient wisdom, supplements existing family mediation services. The perspectives of extended family members are brought into the process, in order to encourage the participants to help others in the circle to obey the circle's decisions. (Daicoff 2015)

In summary, I have only had the time and space to touch on a few traditional or customary approaches to dispute resolution in the Asia-Pacific region and the influence of some, but not all religions. There is an increasing number of books and articles that outline the various conflict management and peace-building processes that have been traditionally, and are currently, used in the Asia-Pacific region. Needless to say there are vast differences between local, religious, customary or traditional conflict management practices and the modern forms

of mediation that are currently being transported from the West to the Asia-Pacific region, often in an imperialistic way and without reference to culture.

Implications for dispute resolution practitioners in Asia

It is important for dispute resolution practitioners to focus on similarities between disputants from different cultural backgrounds, both within a country and between countries. For example disputants may be from a similar generation, gender, age, sexuality, and share similar interests, needs, goals and values. However, given the potential impact of cultural differences on dispute resolution processes in cross-border or cross-cultural negotiations, dispute resolution practitioners should also be culturally intelligent, culturally fluent and competent to assist each disputant to be flexible and to adapt the key elements of negotiation to meet the interests, needs and goals of the other. This will involve assisting disputants to engage in an open 'culture sensitive, respectful inquiry process' in which the disputants 'suspend their own assumptions and invite the other to share their stories, expectations, need and goals' (Ting-Toomey 1999, p.225).

 'Cultural intelligence' is a term used in business, education, government and academic research and can be understood as the capability to relate and work effectively across cultures (Earley 2002). It is related to 'cross-cultural competence' (Johnson, Lenartowicz & Apud 2006) but goes beyond that to actually look at intercultural capabilities as a form of intelligence that can be measured and developed. Cultural intelligence refers to a person's capability to adapt as s/he interacts with others from different cultural regions, and has behavioral, motivational, and metacognitive aspects (Livermore 2011). Originally, the term cultural intelligence (and the abbreviation "CQ") was developed as a researched-based way of measuring and predicting intercultural performance.

Ting-Toomey suggests that when attending to people's cultural identities in cross-cultural mediation it is essential for the mediator, and the participants, to listen 'mindfully' to each other and to notice the verbal, nonverbal and meta-verbal contexts which are being conveyed (Ting-Toomey 1999). This can be difficult for a Western mediator who has been raised in a low-context culture. Ting-Toomey's concept of 'mindful reframing' is important as it involves understanding the others' verbal and non-verbal communication from their cultural standpoint and then translating and reframing our perceptions and understandings accordingly. LeBaron also 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' (LeBaron 2003, p.12).

In other papers I have suggested that mediators working cross-culturally should engage in *self-reflexivity* (Bagshaw 2005b, 2005a, 2006a). Constructivist ideas suggest that it is impossible for a mediator to be neutral, which requires the mediator to take a *reflexive* approach to practice (Gergen & Gergen 1991; Jones 1992; Mauthner & Doucet 1998; Probyn 1993; Steier 1991). The concept of self-reflexivity recognises that our practices are culturally specific (Fraser & Nicholson 1990), not neutral, and involves the mediator 'being explicit

about the operation of power' (Ribbens 1989, p.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 hear alternative views or stories that might be more useful to their situation and to the transformation of the conflict, an approach advocated in models of narrative mediation (Winslade & Monk 2000).

Bretherton et al suggest that deep listening is the ground from which effective negotiation and mediation grows and stress the importance of empathy which involves entering the world of another in a non-judgmental way and putting aside one's own agenda (Bretherton & H. Zhaoying 2009) . Empathic listening provides the recognition and respect that Bush and Folger see as the pivot of conflict transformation (Bush & Folger 1994). However, listening deeply is difficult enough within our own culture and can be even more challenging when in another culture. Marsick and Sauquet point out that adults shape their understanding by looking through a lens of belief that is often unconscious. Much of our cultural learning is implicit and tacit, so listening deeply to someone from another culture challenges cherished viewpoints and closely held assumptions. Learning about another culture hence involves also learning about one's own. (Marsick & Sauquet 2000)

John Paul Lederach stresses that Western mediation trainers should also explore both the content and the approach to conflict resolution training and its relationship to culture (Lederach 1995). He compares and contrasts prescriptive and elicitive approaches to cross-cultural mediation training and concludes that a combination of the two approaches should be used in diverse cultural settings.

An increasing number of dispute resolution educators and trainers from the West are working outside their own countries as so-called 'experts' in dispute resolution, including university academics, private consultants, judges, experts working for government organisations (Honeyman & Chedlin 2002) and organisations such as the Asian Development Bank's Administrative Tribunal. This is partly due to globalisation, which has altered the boundaries of our practices, and partly due to the increasing domination of Western ways of knowing. As Honeyman and Chedlin point out, no matter how well-meaning these 'experts' are they 'may inadvertently cause harm to persons and parties for whose culture, language, or circumstances … has left them inadequately prepared' (ibid, p. 364). Brubaker and Verdonk stress that:

> considerable time and care must be invested in assessing cultural differences, political realities, bureaucratic hurdles, and logistical challenges prior to plunging forward with a training workshop or other activity. In addition, thoughtful and thorough follow-up after training is as important as attentive preparation before the training (Brubaker & Verdonk 1999, p.303).

Conclusions

In this paper I have argued that when resolving disputes in Asia, Western models and approaches to dispute resolution may need to be adapted to embrace aspects of the religious and cultural traditions and norms of the people involved. Westerners have a lot to learn from customary dispute resolution practices, but critics have also highlighted some of the limitations of customary approaches, including their lack of transparency and regulation and the potential for third parties to undermine the human rights of less powerful groups, such as women and children. The strengths of Western and Eastern approaches to dispute resolution have been blended successfully in some parts of Asia. Forms of mediation in Singapore, for example, have been promoted by various authors as being consonant with Asian traditions and much can be learned from their approach. (Lee & Hwee Hwee 2009; Tan 2002)

In summary, I would argue that dispute resolution practitioners working cross-culturally in the Asia-Pacific region should:

- 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;
- first, do no harm;
- focus on, identify and highlight similarities between disputants from different cultural backgrounds;
- be deep, empathic listeners, culturally intelligent, culturally fluent, mindfully aware and self-reflexive;
- 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;
- privilege the participants' knowledge and allow the participants to supply the interpretive context for determining the meanings of events;
- be fluent in the appropriate language(s), or competent to use interpreters when required, and able to use indirect, high context styles of communication;
- incorporate relevant traditional values and practices into the mediation 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, and
- consider including all people in the process who are relevant to the dispute and the disputants.

Finally, 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, however, there is often inadequate time or resources allocated to prepare for third party intervention or training. In addition, where partnerships are involved there are sometimes imperialistic overtones and the partnerships

are often not equal, so when working in a different culture it is important to elicit local ways of doing things from the locals themselves and to take a 'bottom-up' approach. The ultimate goal of all dispute resolution, education and training should be to encourage and empower the host/client to become self-sufficient.

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