THE FUTURE OF DISPUTE RESOLUTION IN THE ASIA-PACIFIC REGION:
WHAT HAS CULTURE GOT TO DO WITH IT?

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CONFLICT

• Relationships between and within groups and individuals 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.
MY PRESENTATION

• 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 cross-culturally in the Asia-Pacific region.
CENTRAL ARGUMENT

It is essential that third parties design approaches to fit the individual, collective and culturally-based conflict resolution needs of their clients, rather than impose a particular model or approach on their clients.
THIS PRESENTATION WILL

• challenge dominant Western constructs of mediation &
• focus on ways of building culturally fluent approaches to mediation
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
A focus on individual interests or needs does not always 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 values.
IMBALANCES OF POWER BETWEEN PARTIES IN CONFLICT
When mediators are not aware of, or fail to deal with, imbalances or abuses of power that are based on cultural differences then

• imbalances of power and abuses of power are sanctioned and reproduced

• dominant power structures become entrenched

• mediation is therefore not a forum where diverse voices can be heard.
IMBALANCES OF POWER

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

• In Western cultures, *egalitarian individualism* influences how we view power,

• In the East, *collectivism and vertical power relations* are often seen as ‘normal’ and therefore power imbalance is not viewed as a problem in itself, only the abuse of power.
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.

Informal use of intermediaries is common in most indigenous cultures in the region.

Traditional or customary DR practices are often grounded in religious principles e.g. Islamic, Confucian, Christian, Hindu, Buddhist etc.
DOMINANT WAYS OF KNOWING

- **Epistemology** is the study of the nature and foundation of knowledge.

- It is concerned with who can be a ‘knower’, what constitutes ‘truth’ and how truth is verified.

- The French philosopher, Michele Foucault, highlighted how knowledge is socially and culturally constructed through language (or discourse).

- All knowledge or ‘truth’ is situated in time and in a particular cultural context.
WHAT IS DISCOURSE?

- Dominant ways of talking about things in a cultural group (e.g. gender, conflict) which determines what we see and define as ‘true’, ‘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.
DISCOURSE OF EXCLUSION
THE CONCEPT OF ‘OTHERING’

• The colonial legacy is evident in many countries in the region (e.g. Australia, NZ, PNG, Fiji, the Philippines, Indonesia) and 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’
THE CONCEPT OF ‘NEUTRALITY’

- Many Western definitions of mediation still refer to the need for the third party to be ‘neutral’

- This ignores the potential for mediators who are not culturally intelligent, culturally fluent or self-reflexive to perpetuate racism and privilege
Is it possible to be ‘neutral’ or ‘objective’?

- Representations of ‘self’ and ‘other’ are always situated culturally and politically.

- Professional practices can manufacture a colonising discourse of the ‘other’ under the veil or guise of ‘neutrality’
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.

<table>
<thead>
<tr>
<th>Individualist cultures</th>
<th>Collectivist cultures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are less aware of context and non-verbal cues</td>
<td>Are more aware of context and non-verbal cues</td>
</tr>
<tr>
<td>Place more reliance on direct and verbal forms of communication</td>
<td>Place more reliance on indirect and non-verbal forms of communication</td>
</tr>
<tr>
<td>Tend to be more assertive and self-affirming</td>
<td>Tend to be more submissive and self-effacing</td>
</tr>
<tr>
<td>Rely more on inductive reasoning</td>
<td>Rely more on deductive reasoning</td>
</tr>
<tr>
<td>Focus more on the needs, interests, goals and rights of individuals</td>
<td>Focus more on the needs, interests and goals of the collective and on individuals’ responsibilities to the collective</td>
</tr>
<tr>
<td>Rely more on gathering facts, establishing goals and asking direct, specific questions</td>
<td>Rely more on general narratives, stories, metaphors, proverbs, analogies and understatements to communicate meaning</td>
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<tr>
<td>Engage in overlap talking and faster turn-taking verbal behaviour.</td>
<td>Use longer turn-taking pauses and reflective silences.</td>
</tr>
<tr>
<td>Focus more on content, action plans and outcomes than process</td>
<td>Focus more on process, identity and relational meanings that underlie content messages and less on outcomes</td>
</tr>
<tr>
<td>Tend to value horizontal power (low power-distance) and shared, egalitarian styles of leadership</td>
<td>Tend to value vertical power (high power-distance) and hierarchical, authoritarian styles of leadership</td>
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</table>
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 & STEREOTYPING

- Categorising is essential for communication but can lead to stereotyping and prejudice
- People in every culture belong to a number of categories e.g. based on age, gender, ethnicity, race, ability, class, sexuality, profession
- Broad categorisations - e.g. individualistic/collectivist cultures, high-context/low-context cultures - do not apply to every individual in a cultural group
CULTURAL IDENTITY

• is based on commonality of experience, perspectives, language, traditions and environments

• influences our approach to conflict and its resolution
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.
CULTURAL INTELLIGENCE (CQ)

- A person’s capability to adapt, relate and work effectively across cultures – it has behavioural, motivational and metacognitive aspects.

CULTURAL FLUENCY

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

LeBaron, M 2003, Bridging Cultural Conflicts, Jossey-Bass, San Francisco.
MINDFUL REFRAMING

• Understanding the others’ verbal and non-verbal communication from their cultural standpoint and then translating and reframing our perceptions and understandings accordingly.

REFLECTIVE PRACTICE

• Reflect-in-action and reflection-on-action – helps us to maintain our awareness of what we do and why.
• Learning from experience requires a commitment to candid self-assessment.
• A process where you think about the experiences, events and situations of practice and then attempt to make sense of them in light of theory.


SELF-REFLEXIVITY

• Recognises that our practices are culturally specific, not neutral

• Involves the mediator being explicit about the operation of power and mindful of their power position in the mediation process.

• The mediator assumes a non-hierarchical position and works collaboratively with clients in a collegial, partnership role.

• The participant’s knowledge is privileged and the participants supply the interpretive context for determining the meaning of events.

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 - ties between individuals are loose. Everyone is expected to look after himself or herself and his or her immediate family.

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

• Femininity - 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.

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.
COMMON ELEMENTS OF INDIGENOUS APPROACHES TO CONFLICT AND ITS RESOLUTION IN THE REGION

• Respect for elders in decision making
• Focus harmony in relationships and the restoration of relationships
• Use of metaphor and stories to explain events
• Land as a spiritual phenomenon
• Relativity of time
• Indirect, circular or holistic nature of communication
• Central need to assert, protect, keep or save face
• Importance of ceremonies, rituals and acknowledging their ancestors
• Inclusion of the extended family and/or other stakeholders in decision making
• Preference for the third party to be well known and respected by the participants
• A tendency for third parties to listen to others until there is some consensus and then make (or reflect) the decision.
CRITIQUES OF TRADITIONAL/CUSTOMARY APPROACHES

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

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

• Third parties vested with decision-making capacities in disputes are often patriarchal males e.g. village chiefs
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?
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’.
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 – eg. written agreements are not as important as social and cultural norms;

• codes of honour, shame and dignity are centrally important;
IN MUSLIM CULTURES

• 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 - training and other credentials are not seen 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


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FOUR TENETS OF CONFUCIANISM

1. **Order and harmony** are valued and conflict and competition are unacceptable.

2. **Respect and obedience** is required of five key hierarchical relationships (father/son, ruler/subject, husband/wife, elder/younger brother and friend/friend) - based on reciprocal and complementary duties. Overt expressions of anger and hostility are discouraged.

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

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).

• In Australia, the use of mediation for the resolution of native title disputes has provided an impetus for incorporating indigenous practices in dispute resolution processes involving Indigenous people in a range of contexts.

• In New Zealand, consistent with the Maori culture, a model of family group conferencing has been developed, in particular for juvenile justice and family cases – the approach is also used in Australia.

• In North America, the “circle process”, an indigenous form of conflict resolution draws on ancient wisdom and supplements existing family mediation services.
CONCLUSIONS

IMPLICATIONS FOR DISPUTE RESOLUTION PRACTITIONERS WORKING CROSS-CULTURALLY IN THE REGION
WHEN RESOLVING DISPUTES IN THE ASIA-PACIFIC REGION . .

• be deep, empathic listeners - culturally intelligent, culturally fluent, mindfully aware and self-reflexive;

• 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;

• privilege the participants’ knowledge and allow the participants to supply the interpretive context for determining the meanings of events;
WHEN RESOLVING DISPUTES IN THE ASIA-PACIFIC REGION

- be fluent in the appropriate language(s) (or in using trained interpreters) and able to use indirect, high context styles of communication;

- incorporate relevant traditional values and practices into the mediation process e.g. 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, &

- consider including all people in the process who are relevant to the dispute and the disputants.
• Culturally relevant, cross-cultural or trans-national dispute resolution practice, research and/or 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
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.
When working in a different culture- *elicit local ways of doing things from the locals themselves.*

Finally, the ultimate goal of dispute resolution, education and training should be to encourage and empower the host/client to become self-sufficient.
Bagshaw, Dale & Porter, Elisabeth (eds)


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The Asia Pacific Mediation Forum website: www.asiapacificmediationforum.org