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Conflict management processes in the cultural soup

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ADR and culture: an introduction

Conflict management processes in the cultural soup

Peter Condliffe

I am particularly pleased to introduce this special edition of the *ADR Bulletin* dealing generally with the issue of the role of culture as an element in conflict and its management.

You will find here a number of writers who represent a wide range of cultural views. Recently I had the chance to visit China where I met and talked to a number of administrators, academics, students and mediators and this has inspired the idea for this edition. So I will start with a contribution from my host on that trip, Professor He Yunfeng of Shanghai Teaching University.

The First Step in Chinese Mediation: a comment

Different people, surrounded by various cultures, have different patterns of dealing with conflicts. China has quite a different culture from other nations. When dealing with Chinese conflicts, the mediator must make the first step to make good relationships with all the parties concerned. This is the most important thing in mediating Chinese conflicts. It usually determines if the mediation will be successful or not.

What does 'relationship' mean in mediation? It means that the mediator should try to make 'friendships' with the parties concerned; to be more precise, to make the parties think that the mediator seems to be as reliable as their own friends. If the mediator can successfully

make good relationships with the parties, the parties will think of the mediator as their 'friend'. If this happens, they will be feeling confident about the result of the conflict.

However, the relationship-making must go on 'secretly'. This means the mediator should not let one party know that he or she is making or has made good relationships with the other party. Otherwise, the party will not voluntarily co-operate with the mediator. If the relationships with both parties have been set up successfully but the one party does not know the relationship between the mediator and the other party, both of the parties of the conflict will believe that the mediator will make the mediation in favour of them, and that the result of mediation will come out as well as they expect!

In this way Chinese conflict management skills are much different from the way of dealing with Western conflicts. The latter requires an image of fairness from the mediator — for Western dispute settlements, the most important thing is to make both parties believe that the mediator will settle the dispute impartially. But in the Chinese culture, mediators must make both parties believe the mediator will settle the dispute in their favour. This is like the 'prisoner's dilemma' game. Though the parties know the mediator actually cannot do as they expect, both parties still have such a ➤



Editorial Panel

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➤ wish. This expectation from the parties of Chinese conflicts can be called 'self-partial expectation', while the parties of Western conflicts have a 'non-partial expectation'.

Since the parties involved in the dispute have this self-partial expectation, they may actively try to initiate a positive relationship with the mediator. In this case, the mediator will very easily take the important first step of mediation.

How do mediators make relationships with the parties? First of all, the mediator should meet the parties separately in advance of the mediation. They may try to find some topics that can make the relationship between them closer; for example, finding the same native language (in China there are many different native languages). Secondly, the mediator must try to show his or her honest intention to do their best for the party. Thirdly, they must explain what the most fair result of the conflict would be, so that the party can clearly see how much favour the mediator is showing them (even though the mediator intends mediating the conflict fairly, they still must try to explain their approach this way). Lastly, if the party bribes or gives small gifts as a return for a self-partial expectation, the mediator should step very carefully. On one hand they should not break the law by taking the bribe, but on the other hand they must also manage to make the party believe in them.

During mediation, if the mediator takes the successful first step, they can give their suggestions to each party about the following steps. If the suggestions are reasonable usually both of the parties will take the suggestions. Advice giving is usual in Chinese mediation but it depends on taking 'the first step'.

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One of my enduring problems with many of the advocates of alternative dispute resolution is that they tend to define the object of inquiry (that is, the dispute) separately from issues related to the society

in which it occurs. Theory and practice is thus derived from the nature of the dispute itself rather than from the interactive social processes which transform it.¹ These advocates follow what I term the 'dispute focused approach'.

In my view this leads to a problematical assumption that there is a compatibility between disputes in different societies.² However, there is strong empirical evidence to suggest that third party interventions, such as mediation, significantly differ from one social group to another, and from one problem to another.³ Advocates of ADR processes often seek to present a simplified view of the alternatives in dispute management so as to rationalise their application and use.⁴ Fortunately, the advocates of these simplified views have not been without their critics.⁵

There is also a species of ADR disciples who advocate what can be called the 'new formalism'. They assume that there is a definite range of processes that exist in any society for settling disputes and that there is a fit between disputes and those processes which most effectively deal with them.⁶ This approach, as exemplified in the writings of Fuller, Danzig and Goldberg, Green and Sander,⁷ also does not adequately put dispute processing in its socio-cultural and political contexts.

I would rather see disputes as 'social constructs' whose meanings change with the audience, which is constantly and actively redefining it.⁸

Fortunately, there are a number of other models of disputing which may be more useful; for example, models that treat disputes not as discrete isolated events but as representative of a continuous and cyclical movement. Rummell's model of latent and actual conflict is probably the best example.⁹ In this model an existing potential for conflict (conflict structure) is followed by a demonstration by one or more of the parties of their power (conflict situation), and finally the manifestation or display of that power (manifest conflict). This is represented in *box 1* over the page.

This conceptualisation is similar to Deutsch's division of conflict into underlying and overt (or manifest) conflict.¹⁰ The former is hidden, denied or implicit, ➤



Box 1: Rummell’s model of conflict

CONFLICT STRUCTURE

Interests that have a tendency to oppose each other.

CONFLICT SITUATION

Opposing interests are activated.

MANIFEST CONFLICT

Specific behaviour or action.

➤ while the latter is express and open. The advantage of conceptualising conflict in this way is that it can be seen as being shaped by the social context in which it occurs. Rummell further maintains that once an important social issue goes through the stages of his cyclical model, the socio-cultural context will be affected and may itself set off another round of latent or manifest conflict.

While this conceptualisation has its limitations, it is a useful way to perceive conflict as the constant playing out of structurally opposed forces. It may also be implied from this model that in some situations conflict may be desired by the participants.¹¹ This is most clearly seen in industrial and environmental disputes. These ‘cycles’ or ‘rituals’ of disputing may also be interpreted as important socio-psychological aspects of the process of conflict.¹² This view of conflict draws heavily upon Lewis Coser’s seminal concept of conflict as an instrument of social integration. To Coser, conflict is a group binding and preserving institution which maintains and establishes legitimate distributions of power.¹³

Perhaps of more use here is Richard Abel’s attempt to point out and explain the presence of a constantly evolving and dynamic relationship between social institutions and culture on the one hand, and dispute processes and institutions on the other.¹⁴ This work anticipates and parallels the research and writings of the anthropological and socio-legal ‘schools’ of contemporary legal scholarship.¹⁵

Abel provides a basis for comparison of different dispute processes in different societies.¹⁶ In particular, he attempts to isolate those elements which may explain why certain dispute processes are used in different societies. He concludes that certain structural properties of the dispute are highly

significant.¹⁷ The most important of these is the role of the intervener in the dispute.¹⁸ This role revolves around three important aspects:

- (1) specialisation — the degree to which the intervener’s role requires special knowledge and skills;
- (2) differentiation — how the intervener is kept apart from or assumes ‘separateness’ from disputants; and
- (3) bureaucratisation — the tendency to rationalise the role of the intervener to the needs of the organisation.

Further, any given dispute institution represents only one possible way of handling a given dispute. This is understood if it is recognised that in any particular society there will be a range of disputing institutions to deal with any particular dispute. These can range from highly specialised, differentiated and bureaucratised institutions, to those which are minimally so. Disputant choice will affect both the shape and existence of such institutions. This is related to the type of social relations within that society which will generate certain types of disputes and lead to certain preferred solutions. Therefore, to explain why certain dispute institutions occur in any society requires an understanding of broader social forces. In summary, we have to look at both social structures and disputant choice.

‘I would rather see disputes as “social constructs” whose meanings change with the audience, which is constantly and actively redefining it.’

My first mediation

The dispute was between two neighbours over the lighting of a fire in a stove on a hot day. One of the neighbours had a serious illness. After the mediation, which took a whole day (8 am to 5 pm) the relationship was restored.

The Department of Justice, for whom I work, has the responsibility of ➤



'Further, any given dispute institution represents only one possible way of handling a given dispute. This is understood if it is recognised that in any particular society there will be a range of disputing institutions to deal with any particular dispute.'

➤ intervening in these matters according to law. I think this is the Civil Procedure Law. I was a student on placement there.

I prepared myself by talking to the two parties separately to gather information about the case.

I wanted to know why the dispute had happened, whether mediation would work and if there was a possibility to work it out.

The actual meeting together was one and a half hours. In the morning I talked to them separately, then after lunch met with them together. There were many complications about this dispute. There were many issues underneath.

In the meeting I gave them alternatives from what they had told me. I gave them three ways and they chose two. They were as follows:

- (1) the person who fired the stove must put the fire out;
- (2) the 'older one' pays damages to the other one because he had initially agreed that the other could have a stove and it has been purchased on this basis; and
- (3) both parties say sorry to each other. In China reputation is very important so this aspect is important.

The first and third options were agreed to but the second option was not insisted on because the older person was retired with little income.

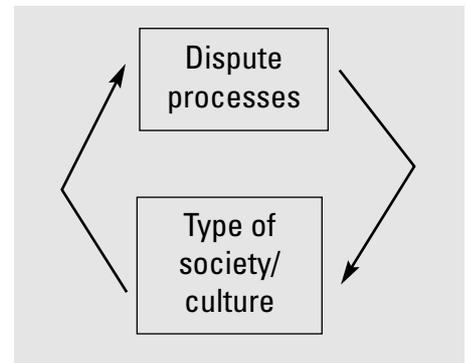
These agreements were written down. Copies were given to the parties and signed by them. It is not valid at law. It is a matter of honour.

Wu Dong is a postgraduate student at Shanghai Normal University. He has degrees in Politics and Law. This was his own account of his first mediation.

In other words, there is a constantly evolving and dynamic relationship between social institutions and culture on the one hand and dispute processes and institutions on the other. To explain the complexity of disputing behaviour we need to incorporate a composite of norms and social factors.

Also, by treating dispute processes as part of their social context and culture we can

see them as both cause and effect. Rather than simply thinking of disputing processes as resulting from a particular type of society as normally suggested, it may be worth considering to what type of society or culture such processes will lead:



The following articles will hopefully challenge and stimulate you to think about some of the underlying assumptions that are brought into the management of conflict. ●

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Endnotes

1. Some of these arguments were included in an article titled 'Law Dispute Processing and Thinking About the Foreign: Some Preliminary Observations', 8 (1997) *Australian Dispute Resolution Journal* 70; Felstiner W L, Abel R and Sarat A, 'The Emergence of Transformation of Disputes: Naming, Blaming and Claiming ...' (1980) 15 *Law and Society Review* 631 at 633-637.

2. Cain M and Kulcsar K, 'Thinking Disputes: An Essay on the Origins of the Dispute Industry' (1981) 16 *Law and Society Review* 375 at 377-383.

3. Roberts S, *Order and Dispute: An Introduction to Legal Anthropology* Penguin, Hammondsworth, 1979.

4. For a good example of this see Danzig R, 'Towards the Creation of a Decentralised System of Criminal Justice' (1974) 26 *Stanford Law Review* 1.

continued on page 24 ➤

➤ continued from page 16

5. See in particular, Sarat A, 'The New Formalism in Disputing and Dispute Processing' (1988) 21 *Law and Society Review* 695; Esser J, 'Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know' (1989) 66 *Denver University Law Review* 499; Merry S, 'Disputing Without Culture' (1987) 100 *Harvard Law Review* 2057; Ingleby R, *In the Ball Park: Alternative Dispute Resolution and the Courts* Australian Institute of Judicial Administration Inc, Carlton, 1991; Abel R, 'A Comparative Theory of Dispute Resolution Institutions in Society' (1973) 8 *Law and Society Review* 217; Tomasic R and Feeley M M, *Neighbourhood Justice: Assessment of an Emerging Idea* longman, New York, 1982 pp 377-383.

6. Sarat A, as above note 5; Esser J, as above note 5.

7. Fuller L, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; Danzig R, 'Towards the Creation of a Complimentary Decentralised System of Criminal Justice' (1974) 26 *Stanford Law Review* 1; Goldberg A, Green E, and Sander F,

Dispute Resolution Little, Brown & Co, Boston, 1985.

8. See Mather L and Yunguesson B, 'Language, Audience and the Transformation of Disputes' (1980) 15 *Law and Society Review* 775.

9. Rummell R J, *Understanding Conflict and War* Wiley, New York, 1976.

10. Deutsch M, *The Resolution of Conflict: Constructive and Destructive Processes* Yale University Press, New Haven, 1973.

11. Mernitz S, *Mediation of Environmental Disputes* Praeger, New York, 1980, p 52.

12. Above note 11.

13. Coser L, *The Functions of Social Conflict* Routledge, London, 1956.

14. Abel R, above note 5.

15. See, for example, Moore S F, *Law as Process: An Anthropological Approach* Routledge and Kegan Paul, London, 1978; Sarat A above note 5; Nader L and Todd H F, *The Disputing Process Law in Ten Countries* Columbia University Press, New York, 1975.

16. Abel R, above note 5, p 244.

17. As above, p 244.

18. As above, p 242-53.

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