ALTERNATIVE DISPUTE RESOLUTION

Law & Practice

Edited by

Adnan Yaakob
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CHAPTER 7

MEDIATION: DEFINITION, ORIGINS AND PROCESSES*

Abstract

This chapter will discuss the definition, origin and the processes of mediation. The traditional and modern concept of mediation and its development will be traced. It is no doubt that traditional societies recognised and practised negotiation and mediation to resolve disputes, however the practice has not been structured and institutionalised. The modern concept of mediation started in the United States, developed further and expanded globally. This chapter will also emphasise on the application of negotiation and mediation by Malaysian traditional communities and the aptness of its application in the presence of today's community. The discussion will further explore the processes of modern mediation, its stages and flexible procedures.

Introduction

The late twentieth century saw the development of mediation in many societies affecting law and other disciplines. The delay in the court litigation process and the demand for quicker, cheaper and appropriate resolutions have prompted reform. The rise of mediation reflects

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* This chapter is contributed by Nurah Sabahiah Mohamed. Some parts of this chapter have been extracted from the author's Ph.D. thesis entitled 'Mediation in the New Dispute Resolution Landscape: A case for the enhancement of its application in Malaysia' (2013) (UM).

the need of society for reliable conflict resolution. In mediation, the disputant parties may negotiate and discuss their objectives, needs and further propose the best settlement terms. They may propose the best options for a compromise to meet the objectives of both parties. In sequence, this may lead to an amicable settlement and a win-win situation to the satisfaction of the parties involved. For a bigger picture, it would seem that mediation in the community has made a swing from being litigious and confrontational to harmonious and considerate, so that the social cohesion may then be preserved.

Definition Of Mediation

The *Oxford Dictionary* defines 'mediation' as 'intervention' between two persons or groups for the purpose of reconciling them.[1] The *Oxford Dictionary of Law* (2006)[2] further defines mediation as a form of alternative dispute resolution in which an independent third party (mediator) assists the party involved in a dispute or negotiation to achieve a mutually acceptable resolution of the parties of conflict. The mediator, who may be a lawyer or a specially trained non-lawyer, has no decision-making powers and cannot force the parties to accept a settlement.

Mediation is further clarified as a decision-making process in which the disputants are assisted by a third party, the mediator, who attempts to improve the process of decision-making and to assist the parties to reach an outcome which each of them can assent.[3] He/she helps the disputants to find a sensible and reasonable solution to their conflict rather than continuing their dispute. He/she helps them to search for common ground and finds creative and realistic ways to resolve their issues.[4]

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1 *The Oxford Dictionary of Current English* p. 456.

2 *Oxford Dictionary of Law* (6th Edn) p. 338.

3 L Boulle, Teh Hwee *Mediation — Principles, Process and Practice* (2000).

4 Alan Stitt *Mediation A Practical Guide* (2004).

In mediation, an independent third party, the mediator, facilitates effective communication and negotiation among the disputants so that the parties themselves are able to reach an agreement. He/she should assist the parties to identify their interests and needs and further encourage them to look at possible and creative ways to resolve the issues. He/she does not issue a decision and has no power to advise and direct the parties on how to settle their dispute. He/she should not act like a judge imposing any judgment or decision on the parties involved.

It can be said that mediation is a structured negotiation process assisted by a third party to help the disputant parties resolve their disputes in an amicable manner.

Traditional Mediation

Mediation is said to have existed since the dawn of human civilisation. When the first humans started to argue for their basic needs and wants, they resorted to employ a third party to assist them in resolving the disputes in order to keep the sense of belonging and community together.[5] It is observed by researchers that mediation existed in many traditional societies, however, the traditional form of mediation conducted was not clear. There was evidence that supports the existence of mediation in such societies and although society did not have a formal state system and legal institution, they had a well organised system for managing conflict within the families and communities.[6]

Apparently, traditional mediation was unstructured, informal and non-institutionalised.[7] Normally, the disputant parties would approach the respected leaders or elders in the community who would be the

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5 D Spencer, M Brogan *Mediation Law and Practice* (2006) pp. 23-24.

6 *Ibid.*

7 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) pp. 223-224. Most writers seem to agree that traditional mediation was not formalised and not institutionalised. The form it was conducted was also not clear.

intermediary or the mediators. They would have had to be someone who had gained the trust and authority amongst the community through his or her capabilities, knowledge, experience and sense of fairness.

In resolving the dispute, the mediator would emphasise on morals and the importance of maintaining harmonious relationships. It was observed that a mediator in traditional mediation played an active role wherein he or she intervened in the negotiation to maintain the relationship of the parties. In this regard, he or she might be described as an educator of good social conduct and even reprimand the parties for their roles in the dispute. This method strengthened the understanding amongst members of the community.[8]

Most researchers opine that mediation has its roots in Confucianism. This is due to the reason that the main core of Confucianism which are the concepts of inquiry, understanding, empathy and forging harmonious relationships are the essence of mediation.[9] According to Confucius, the peaceful organisation of society starts from proper inquiry and understanding, leading to compassion and empathy. Further, the principle of harmony steers towards a conflict free, group-based system of social interaction. It is also observed that in traditional Chinese culture, the emphasis is more on achieving collective good and the merits of each disputant is secondary. In distributing justice, Confucianism requires that the needs of each party are taken into account as the primary objective is to maintain and strengthen the social order and the integrity of the community as a whole.[10] Furthermore, a person defines his or her identity, rights and obligations according to the perceived relationship between the parties. Right or wrong is not determined by the merit of each case regardless of the relative position or relationship between the parties. It can be seen that

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8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

the basis of Confucianism reflects the main core of mediation which emphasises on the preservation of harmonious relationships and de-emphasises the positive or negative elements of the matter in dispute.[11]

Mediation is also recognised under Islamic Law as *Syariah* promotes conciliation. The *Qur'an* highlights its importance as seen in the following verses:

Surah Al Hujurat (49), ayah 10

The Believers are but a single Brotherhood: so make peace and reconciliation (*sulh*) between two (contending) brothers; and fear *Allah*, that ye may receive Mercy.

Surah Al Hujurat (49) ayah 9

If two parties among the Believers fall into a quarrel, make ye peace (*sulh*) between them ...

Surah An-nisa' (4) ayah 114

In most of their secret talks there is no good; but if one exhorts to a deed of charity or justice or conciliation (*sulh*) between men, (secrecy is permissible) to him who does this, seeking the good pleasure of *Allah*, we shall soon give a reward of the highest (value).

Sulh literally means 'to end dispute' or 'to cut off dispute' either directly or with the aid of a neutral third party. The word *sulh* as used in the *Qur'an* is also defined as mediation, conciliation, as well as compromise in action.[12] According to Ibnu Qudamah, *sulh* is an agreement between two disputing parties which would lead to peace.[13]

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11 Dale Bagshaw 'Family Mediation Chinese Style' Australian Dispute Journ Vol. 6 1995 p. 12. See also Lim Lan Yuan *Theory and Practice of Mediati* (1997) p. 364; L Boulle, M Nesic *Mediation, Principles, Process, Practice* (200 pp. 223-224.

12 Syed Khalid Rashid *Alternative Dispute Resolution in Malaysia* (2000) p. 29.

13 Ibn Qudamah alMughni cited in Ramizah Wan Muhammad 'Sulh (Mediatic in the Malaysian Syariah Court' in *Mediation in Malaysia: The Law and Prac* (Eds. Mohammad Naqib Ishan Jan, Ashgar Ali bin Ali Mohamed) (2010) p. 4

In another verse, on the issue of *qisas*, *Allah (s.w.t.)* prescribes that the punishment for a murderer is *qisas* or retaliation. However, when the family of a victim pardons the murderer, then there should be compensation given to the former. This verse did not use the word, *salaha* or *sulh*, but the whole context of this verse is to be understood that the right to pardon the accused is given to the family of the victim and finally make peace between them. Ibnu Abbas also reported that the above verse is to show that *sulh* is one way to achieve justice and peace between the two parties.[14]

Research has shown that most of the communities, races and religions in the world whether Polynesians, Romans, Greeks, Hindus, Jews, Christians and Muslims, follow the teachings of their religions and rituals which require peace and harmony in resolving disputes. Peace and harmony form the main core for mediation.[15] Evidence shows that mediation, as a method of dispute settlement, is not a new phenomenon. It can be seen in most oriental cultures such as Japan and China. Mediation has long been used as a means of resolving conflicts because of its emphasis on moral persuasion and maintaining harmony in human relationships.

The application of mediation was adopted by traditional communities in Asian countries. In the instance, the Chinese who believe in Confucianism, hold that maintaining peace is the best option over lawsuits. In the Ching Code, inherited from the Ming Dynasty (1368-1644), provides that the village leader and the elderly have the power to carry out mediation in minor conflicts relating to domestic and community relationships. They prefer a peaceful resolution (*youhao xieshang*).[16]

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14 *Ibid* p. 417.

15 Raihanah Azahari *Sulh Dalam Kes Kekeluargaan Islam* (2008) pp. 2-3.

16 *Ibid.*

The Japanese, whose majority embraced Confucianism and practised the laws of Shogun Tokugawa from 1603-1868, provided that any civil dispute should be referred to village headmen for mediation. This was the pre-condition for the case to be brought to court for trial. In Sri Lanka, mediation was in practice for 425 years before the Christian era. It was executed by the tribal headman who acted as a mediator. While in Pakistan and Nepal, disputes were normally resolved by the village elders known as *panchayat*.[17]

Mediation has also been practised by African society. The process however is more transparent and open. Music, dance, storytelling and poetry are used as vehicles for conveying messages of peace, injected with spiritual values and goals.

In Indonesia generally, dispute resolution can be classified into two categories according to their community social structure. First, for those who follow the *hukum adat*, they have a formal structure where the leader of the community is appointed to resolve disputes. For those who are not bound by *hukum adat*, they have their own way of resolving disputes, like the ethnic group of *Batak*, *Jawa*, *Bukat* and *Kereho*. Terms used like *runggun* and *rapat* in these societies, shows the importance of conciliation in resolving disputes.[18]

With the evidence above, it is no doubt that mediation has been practised and has become popular in traditional communities even if it has not been particularly structured or formalised. Evidence also suggests that each society would have its own form of practising mediation.

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17 *Ibid.*

18 *Ibid.*

Modern Mediation

The traditional practice of mediation has been around since time immemorial. In contrast, the modern Western concept of mediation is new and of recent origin. Research shows that modern mediation began in the United States.[19]

Boulle[20] has suggested that modern mediation has its roots in America when in 1913, a small claims mediation scheme was introduced in the Municipal Court in Cleveland, Ohio. In the 1930s, the United States judiciary took the initiative on encouraging lawyers to consider conciliatory methods of dispute resolution.[21] It was from the middle of the 1960s that saw mediation beginning a period of expansion.[22] It first became popular over issues involving labour management, domestic relations and neighbourhood disputes. These cases brought mediation to the attention of the bench and administrators as they offered relief for a court system that was unable to provide enough trials.

By the late 1960s, mediation was considered a means of increasing access to justice in the United States.[23] The growth of mediation was due to the increase of civil cases filed in court. New procedural rights were also introduced that took much of the court's time. As a consequence

19 D Spencer, M Brogan *Mediation Law and Practice* (2006) pp. 23-24.

20 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001).

21 *Ibid* p. 225.

22 D Spencer, M Brogan *Mediation Law and Practice* (2006) pp. 25-26.

23 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) p. 225.

the trial date and the judgment were not particularly expedient.[24] As a result, the situation led to a backlog of cases. In order to solve this problem, mediation was used as one of the mechanisms.

Hence, the courts and legislatures embarked on mediation programmes for domestic relations and small claims cases.[25] The programmes were conducted in the courthouse and staffed by state employees. In some courts, participation was mandatory; but the initiation of domestic relations mediation programmes was later changed from purely voluntary process to a mandatory procedure in appropriate cases. This development was further enhanced in the 1970s. Mediation was seen as a potential means of reducing caseloads that led to 'quantitative-efficiency' arguments in its favour. Mediation then became part of a larger reform movement directed towards resolving the internal courts' problems.[26] The 1970s and 1980s witnessed judges and academics endeavour for a new kind of judicial system, with mediation as a central feature of the resolution. Professor Frank Sander at the 1976 Pound Conference, called for a new kind of courthouse to screen cases into processes other than litigation.[27] Mediation was included prominently in this model of 'multi-door courthouse' as a feature of a better justice system. This model was tried in several sites and was deemed successful.

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24 Research shows that during the 1960s, civil trials had become more popular and expedient. In the early period of litigation, the litigant was usually able to get an early trial date after filing a case. The judgment and resolution were also expedient. In this period (1960-1970), many new causes of action for example, in the areas of environmental rights and civil rights were created due to an increasing number of aggrieved citizens These new causes of action proved to be fairly complex and time consuming for the courts. See, D Spencer, M Brogan *Mediation Law and Practice* (2006) pp. 25-26

25 Small claim cases here refer to neighbourhood level cases.

26 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) p. 225.

27 D Spencer, M Brogan *Mediation Law and Practice* (2006) p. 28.

The development of the Alternative Dispute Resolution (ADR) specifically mediation in the United States, was also contributed by the Ford Foundation which played a pioneering role in the development of ADR processes. The Foundation launched a search around 1978 for the so-called new approaches to conflict resolution, dealing particularly with complex 'public policy disputes', 'regulatory bodies', disputes arising out of social welfare programmes with the intention, to find alternative ways to handle disputes outside the formal justice system. This search yielded certain alternative forms of resolution which were conciliatory and non-contentious.[28]

The period of the 1970s continuing through the 1980s, witnessed mediation expanding from a small practice in discrete disciplinary areas to other industries and areas of law.[29] Encouraged by the domestic relations experience, supporters of mediation spread this new practice to other civil and to some extent, criminal matters. Mediation advocates were able to persuade legislators and court administrators that mediation was faster, cheaper and more satisfying than the court process. They financed several state and federal mediation programmes.

The expansion of mediation created the need for more trained mediators. To meet this demand, law schools started offering the course and training on mediation. By the mid-1980s, many law schools began offering such training. In addition, several independent training organisations offered short courses for anyone who wanted to be a mediator. The training produced a larger than ever number of mediators.[30]

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28 Syed Khalid Rashid *Alternative Dispute Resolution in Malaysia* (2000) pp. 9-10.

29 D Spencer, M Brogan *Mediation Law and Practice* (2006) p. 28

30 *Ibid* p. 27

By the 1990s, mediation in the United States was considered part of a trend towards private dispute resolution. At this stage, mediation was offered by a large and disparate group of courts, agencies, individuals and groups both large and small. There was a growth in the number of mediation service providers like JAMS, Endispute, Bates-Edwards, Conflict Management Inc. and others. This period also witnessed the expansion of mediation into most areas of legal practice.[31]

The corporate world learned that in-house use of mediation was able to lessen or avoid costs of litigation or contested cases. Public policy disputes came to be seen as suited to mediation, as litigation in complex matters such as environmental affairs and land use, seemed to drag on while the case or issues in question worsened. Mediation practices extended further to be used in the health care industry, for cases pending appeal, and by public school systems in the form of peer mediation programmes.

Two significant federal laws were passed in 1990, and they ensured that mediation was a national enterprise, and not a method for only local disputes. Congress passed the Civil Justice Reform Act (CJRA) and the first Administrative Dispute Resolution Act (ADRA). The CJRA required all 94 of the federal districts to create a mechanism that would reduce expense and delay. The objective was to achieve a just, speedy and inexpensive resolution in civil cases. The programme started with ten pilot courts; ten courts that would be a control group, and five more courts that would each try a different experimental effort.[32] The CJRA included recommendations relating to discovery reform and case management as well as alternative dispute resolution. The final report of the CJRA committee in 1997 indicated the ADR component was a success and that the rules committee supported the continued use of appropriate forms of ADR.

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31 *Ibid* pp. 27-28.

32 *Ibid* p. 29.

While the CJRA treated all ADR processes equally, mediation became the dominant form. As of 1996, more than half of all federal courts had some form of mediation programme. The Dispute Resolution Act of 1998 went one step further, requiring every federal court to consider mediation specifically.[33] The introduction of the Acts gave more strength to mediation. As the CJRA authorised mediation for the judicial branch, the ADRA did the same for the executive branch. The ADRA mandated that every agency in the United States government adopt a policy to promote alternative dispute resolution; that each agency should have a designated senior official in charge of ADR; and that it reviews its standard operating procedure, including contracts, to encourage the use of alternative means of dispute resolution.[34]

The law also promoted the executive branch to apply mediation. There were precedents abound. The United States Air Force which was used to grievance and arbitration procedures, turned to mediation in many of its internal disputes. Mediation has been further used to resolve issues in federal natural resource agencies, including energy and water disputes. Federal employment issues were mediated by the Equal Employment Opportunity Commission. Mediation is even used to resolve tax disputes at the Internal Revenue Service.[35] Hence, the United States experience shows that in a short period of time, the nature of legal practice and mediation has changed significantly.

With the efforts of the judges, mediators, advocates, the government and the private sectors, mediation then spread to other areas. The introduction of the two Acts, i.e., the CJRA and the ADRA have given an encouraging impact in the expansion, enforcement and

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33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

regulation of mediation. It is noteworthy that mediation has been used as a mechanism to reduce the backlog of cases in the US courts, the success of which has influenced other countries to adopt the method. Mediation has been the main agenda in civil justice reform in the United Kingdom,[36] Commonwealth, as well as other countries. Hence, mediation has been recognised globally as one of the effective mechanisms to dispose backlogs and speedy disposal of cases in courts.

Together with the introduction of mediation into the court system, non-court mediation or private mediation was also introduced and developed. Initiated in the United States, private mediation has been accepted globally. Community mediation centres, family mediation centres, and various dispute settlement centres have been established in the UK, Australia, Hong Kong, New Zealand, Singapore and many other countries to accommodate the needs for the settlement of disputes out-of-court.

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36 The Civil Procedure Rules 1998 which came into effect on 26 April 1999 represents the most extensive overhaul of the Civil Justice System since the Judicature Act 1873-75. The rules reinforce the views of Lord Woolf MR and Lord Bingham LCJ — the fact that litigation is not the only means of achieving appropriate and effective dispute resolution, was the reason cited by Lord Woolf for including mediation and other forms of alternative dispute resolution on his inquiry on improving access to justice in English Courts. Lord Woolf's interim report included: that courts should encourage the use of ADR; that parties should acknowledge at case management conferences and pre-trial reviews whether or not the parties had discussed the issue of ADR that judges should take into account a litigant's unreasonable refusal to attempt ADR when considering the future conduct of a case. See L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) p. 228. See also Karl Mackie, David Miles, William Marsh, Tony Allen *The ADR Practice Guide, Commercial Dispute Resolution* (2000) p. 64.

Historical Background Of Mediation In Malaysia

In the Malaysian context, RH Hickling,[37] points out that conciliation and mediation have always been the traditional dispute resolution mechanism of the different races.[38] It was observed, that the local villages conducted most of neighbourhood disputes relating to land ownership and boundaries, stray cattle, the use of water, family disputes or petty quarrels. The disputes were disposed by the village headmen, often with the advice of the elders of the community.[39]

As for the Chinese, they brought with them, the Confucian concept of yielding and compromise, and the Confucian views based on the family and morality. For Chinese litigants they usually sought the restoration of reputation and the family's standing in the eyes of the community. As such, traditional symbolic gifts, for instance, red candles, red cloth and gold flowers were considered more valuable than any monetary damages. Most of them relied on the principle of *kan-ching* (good relations) and preferred the disputes to be settled through mediation.[40] As for the Tamils, the mediation process can be seen in the text of its scriptures as well as in the concept of the *panchayat.* It is a form of mediation practice in the village, usually held at a gathering and conducted by the village head alongside a few other senior members.[41]

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37 RH Hickling *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (2001) pp. 147-148.

38 The same was also pointed out by N Pathmavathy 'Alternative Dispute Resolution Procedure' at the Seminar on Rights and Remedies in Contract Law, 19 May 2004, Kuala Lumpur.

39 This was observed by RH Hickling *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (2001) pp. 147-148, quoting an elder by the name of En Zakaria in Terengganu: 'in conducting dispute settlement, he is governed by the *Syariah* anchor, while *adat* is the rope that is linked to it.'

40 RH Hickling *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (2001) pp. 147-148.

41 Cecil Abraham *Alternative Dispute Resolution* (retrieved 6 May 2008) at http://www.aseanlawassociation.org.

Thus, it can be concluded that Malaysia, with its multi-racial and multi-religious population, provides a favourable place for the practice of mediation. The teaching of Islam, Hinduism, Buddhism, Christianity, Confucianism and other beliefs, encourage conciliation and settlement. The study shows that mediation has been the mode of settling disputes amongst Malaysians as it promotes conciliation, however, English common law principles has since reduced its importance with the concept of confrontational or the adversarial system.

When the court system was introduced, it was reported amongst the Malays that the legal system would remain an alien legal system by the nature of its rules of procedure, court atmosphere and expensive process. Furthermore, the concept of the adversarial system during trials was creating disharmony in the community. The use of the formal court system was resorted to for only economic or political reasons. Disputing parties would usually opt for court proceedings when they did not know each other, or when they were not on good terms.[42]

It was also hardly accepted by the Chinese as the English judicial process requires a judicial verdict rather than a compromise solution. It was said amongst the Chinese that the manner the court resolved problems was destructive and not constructive and on that basis, they would not resort to the courts. It is observed that to have one's case adjudged in court amounts to a public display of family shame in the Chinese sense.[43] A particular Confucius proverb renders a strong distaste to the adversarial process by the saying, 'in death avoid hell, in life avoid law courts.'

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42 As observed by RH Hickling *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (2001) p. 148.

43 According to Lee Seok Yew of the Paloh Chinese School, 'law is one of the many ways of solving problems. However, the manner in which it solves problems is destructive, not constructive. Villagers here observe *li* (ceremony, correct behaviour) and thus there is no need for them to resort to the law courts to settle their problem': RH Hickling *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (2001) pp. 139-140.

Negotiation and conciliation were also observed by the indigenous people in Peninsular Malaysia as well as Sabah and Sarawak. The customary laws as practised by the indigenous people form a system of adat laws which the communities have embraced and administered for generations without the assistance of any external agency. It was observed that when the British administration introduced the English legal system to them, it was considered alien to the indigenous administration of justice. For the natives, all disputes should be settled by the headman and a council of elders. A similar situation was observed in Sabah, as customary laws were the basic law of the land. Therefore, the British sought to formalise the native customary court system so as to bring it within the general legal system in order to have a comprehensive system of law.

The practice of mediation can also be seen in the *Semai* community in Peninsular Malaysia's rainforest. In order to settle a dispute, a 'community board'[66] is usually arranged where the natives would be seated in a circle to discuss what had happened, how to resolve the issue and mend the injured relationship.

From these observations, we can conclude that Malaysian communities whether Malay, Chinese, Indian or native tribes have used conciliation as a method of resolving disputes and it appears to have been part of the culture of the community to invite a third party, to mediate between the parties. The utmost concern of the people at that particular time was the preservation of a harmonious relationship. From these observations, it can be inferred that modern mediation could be accepted and absorbed as a culture for the Malaysian community if it is seriously reintroduced.

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66 As observed by William Ury. See W Ury *Getting to Peace: Transforming Conflict at Home, at Work and in the World* (1999).

ıerstone Of Mediation

fundamental principles of mediation include the following.

ıntariness

ɔre entering any mediation process, consent must first be obtained ɲ the disputing parties. Mediation is aimed at achieving an amicable lement, consensus, and fair solution for the parties. An agreement ifficult to achieve if the parties are hostile and any reluctance to ɟotiate and co-operate, could end as a deadlock.

ɹcus Stone[45] commented that the voluntary nature of mediation is ıdamental and a party cannot be compelled to enter into mediation law or any other form of mediation. However, the voluntary concept mediation has been challenged due to the evolution of mediation d the impact of legal, social and economic development. Spencer d Altobelli[46] state that in contemporary Australia, mandatory ɹrticipation in mediation is very common. This is clear from various ɔts that have been amended to make the application mandatory. ɔulle and Nesic[47] further view that even if the parties are coerced to ıediate, it is still up to them to participate in the process and to work ut the terms of any settlement in the mediation. The better approach is ɔ focus on developing adequate safeguards to ensure mediation works t its optimal level. This would involve screening of cases to ensure that ɯholly inappropriate matters do not go to mediation; quality controls

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45 M Stone *Representing Clients in Mediation* (1998) p. 19

46 D Spencer, T Altobelli *Dispute Resolution in Australia, Cases, Commentary, Material* (2005) p. 152

47 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) pp. 14–16, 372, 373.

in relation to qualification and expertise of mediators; and monitoring and surveys of the systems over time. Besides that, the funding of mandatory mediation programmes should also be taken into account.[48]

Impartiality

The mediator should be an independent and neutral person who has no connection with the parties in dispute or the subject matter of the dispute. In the opening statement, the mediator should highlight to the parties that he/she has no self-interest over the subject matter and will not be biased towards any of the parties. The element of impartiality is essential in determining the success of the mediation process as the parties will be at ease to negotiate in a comfortable manner. This element is usually common in any mediators'code of conduct for example, Rule 5.4 of the Mediators' Rules & Code of Ethics of the Malaysian Mediation Centre, provides that the mediator should not act for any parties at any time in connection with the subject matter of the mediation. Rule 6.1 further provides disqualification of the mediator in the event, he/she has any financial and personal interest in the result of the mediation.

Confidentiality

Confidentiality refers to subsequent access of what transpired in mediation. It has two dimensions, i.e. first, it relates to what transpired during the separate meetings between mediators and the individual parties. The element of confidentiality at this session encourages

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48 *Ibid.* In clarifying the gradations of voluntariness, the author stated that in certain situations, mediation is neither completely voluntary nor completely mandatory, but falls somewhere on the spectrum between the two.

parties to speak out with candour and honesty. It provides a safe environment for each party to reveal to their mediators their concern and interests. The second aspect is related to the mediation process as a whole. The element of confidentiality is essential to help prevent publicity of mediation meetings and also to avoid any adverse legal consequences from any disclosures during the sessions.[49] The element of confidentiality is inherent in any mediation rules and mediators' codes of conduct.

Generally, the rule on confidentiality provides that all matters, information and communication relating to mediation proceedings shall be kept confidential. The exceptions are given only in the following circumstances:

- the disclosure is required by law;
- the disclosure is with the consent of all the parties;
- the disclosure is necessary to implement or enforce any settlement agreement.[50]

Flexibility

The process, procedure and the outcome of mediation are highly flexible and negotiable between the parties. This is to ensure that all parties are comfortable throughout the proceedings and the best solutions can be achieved.

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49 William KH Lau, 'The Role of KLRCA as a Regional Centre for Arbitration and Mediation' at the Asia Pacific Conference on Mediation (17-18 July 2006, Kuala Lumpur).

50 Mediators' Rule & Code of Ethics of the Malaysian Mediation Centre r. 4.

Process Of Mediation

In general, mediation involves the following steps:

- pre-mediation process where parties sign a mediation agreemer indicating their submission to mediation;
- preliminaries which is an introduction to mediation;
- mediator's opening remark where the mediator will brief tl ground rules for the session. Mediators are provided with a bri statement of facts;
- joint sessions where the parties are invited to state their respecti cases in each other's presence;
- caucuses where it is optional and usually exercised to enal parties vent emotions and speak freely. The session may allow t mediator to pick out common issues and hidden messages;
- when an amicable solution has been reached, the parties will si a settlement agreement witnessed by the mediator.[51]

Pre-Mediation Process

This stage is also known as the 'preparatory stage'. The gatheri exchange and analysis of information are important parts of this st This is to enable the discovery and disclosure of relevant informat and documents by the respective parties. Full disclosure may required in the 'Agreement to Mediate', to enable the mediato

51 Sharifah Suhanah, Roy Rajasingham 'The Malaysian Legal System, Practice & Legal Education' Judicial System and Reform in Asian Cou (Malaysia), IDE Asian Law Series No. 4 (March 2001).

mediation service to firstly, assist in identifying data which needs to be obtained and disclosed; and secondly, to encourage and supervise the exchange.[52]

Preliminary Stage

This stage is also known as the 'introductory phase' when mediation begins. The mediator begins by greeting the parties, indicating their seating area and then ensuring that they are introduced. This may involve some light conversation and pleasantries. In all circumstances, mediators will ascertain what name or title needs to be used at the meeting. These might reassure the parties and establish a rapport with them.

The mediator then makes an opening statement, clarifying the role of the mediator and the parties; explaining the process, nature and steps of mediation; emphasising the element of impartiality of the mediator; confidentiality of the proceedings; authority of the parties; and setting up the ground rules of the proceedings.

Joint Session

After the mediator's opening statement, the parties are then invited to give an opening presentation of their case. Each party will be given time to speak uninterrupted. The mediator may ask questions for clarity and assist the parties to identify the key points of issue. After each party's presentation, the mediator summarises the key points. Good listening skills are needed from the mediator. Being heard and understood are the key elements for the parties to move on, define their issues and understand the other side's story. The mediator should be able to play his role by encouraging a party to acknowledge the opposing party's point of view even if he or she does not agree with it.

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52 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) pp. 118-119.

After the presentation and after the mediator has considered the interests and needs of the parties, he/she would then set the common ground and suggest an agenda.

The mediator further identifies areas of agreement between the parties, and lists the remaining issues which are in dispute that needs resolving.

After the exchange of views, the mediator, whilst exercising an acceptable standard of impartiality and reasonableness, encourages parties to develop and explore possible options for the settlement of the dispute and evaluates the options in terms of their mutual needs and interests.[53]

Caucus (Separate Meeting) And Further Joint Meeting

This caucus or separate meeting is optional. The mediator normally proceeds with the caucus to give each party private space to express their concern of the issues in dispute or when negotiation in the prior joint session reaches a deadlock. The mediator may gather more information and discuss issues which are confidential and sensitive. The mediator further develops options and focuses on the party's needs and interests.[54]

In most mediations, the parties are brought together again after the separate meeting. The purpose is to conduct further discussions, to engage in the final bargaining and to settle the finer details of the agreement.[55]

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53 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) p. 135.

54 D Newton Mediation Core Training Kuala Lumpur, 2014.

55 L Boulle, M Nesic *Mediation, Principles, Process, Practice* (2001) p. 139.

Agreement Stage

The mediator clearly summarises the offers and assists the parties to draft an agreement. Mediators should ensure that the parties are satisfied with the accuracy of the agreement. In case the parties have not reached agreement, the mediator may invite them to make a decision based on an alternative to deal with the dispute.[56]

Types Of Mediation

There are a few options in choosing a suitable style or type of mediation to resolve a dispute.

Facilitative Mediation

The role of the mediator is to facilitate the negotiation process and enhance communication between the disputing parties so that they are able to identify their underlying interests, needs and objectives. The mediator usually does not make any recommendations but may assist the parties to propose and analyse solutions that are fair and reasonable so that a mutual agreement can be achieved.

Evaluative Mediation

The mediator studies the strengths and weaknesses of the disputants' positions; helps the parties evaluate their legal position and costs for court litigation as compared to mediation; and through a structured negotiation, makes suggestions so that the parties resolve their disputes according to their legal rights.[57] However, the suggestions recommended by the mediator are not binding on the parties.

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56 *Ibid.*

57 See Zena D Zumeta 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' cited in Naqib Ishan Jan 'Alternative Dispute Resolution Process: Concept and Selected Process' in *Mediation in Malaysia: The Law and Practice* (2010) p. 8. See also Leonard L Riskin 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed' 1 Harvard Negotiation L Review 1996 p. 24.

In assuming that disputants may not be well versed on the current laws, industry practice or technology, mediators here act as guides as they are usually suitably qualified or have the required proficiency or expertise in the area of the dispute.[58]

Transformative Mediation

The main focus in transformative mediation is to repair the relationship between the parties as the basis for resolution of disputes. The mediator applies some therapeutic skills of 'recognition' and 'empowerment' to deal with the issues. The parties are encouraged to define their problems and propose solutions. Being recognised and empowered, the disputant parties may understand the underlying cause of the problem, listen to the other party's point of view and further recognise the other side's needs and interests.

Western Culture v. Asian Culture

The important aspects that should be studied in depth is the different approaches of negotiation between Western and Asian cultures. Modern mediation introduced by the West should be modified in their approach to suit the Asian culture and values. Such modification would attract more Asian communities to adopt and practice mediation. The analysis by Lee and Teh[59] with regard to Asian culture towards mediation should be given due consideration:

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58 Leonard L Riskin 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed' 1 Harvard Negotiation L Review 1996 p. 26.

59 Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (2009) pp. 71-108.

Prevalence Of Face-Saving

In the Asian context, face-saving involves the preservation of respect, avoiding shame within one's reference group; maintaining harmony;[60] and more outwardly, directed towards social relations.[61] In Asian cultures, this tendency to 'save-face' is to safeguard one's reputation and that of the family not to bring shame — to maintain dignity and avoid embarrassment.[62] In the West face-saving is defined in a different context, for example, Fisher and Ury,[63] define face-saving as a person's need to reconcile the stand he takes in a negotiation or an agreement with his principles, and with his past undertakings and deeds. Another perspective is offered by the proposition that in Australia, 'face value is derived from achievements and getting a good deal'.[64]

There may also be some reluctance on the part of Asian parties to initiate mediation as this can be construed as a sign of weakness and consequently lose face. Therefore, mediation centres or providers should be sensitive to this, especially when approaching or persuading potential parties on the mediation process. By assuming the role of case-persuaders, they will be addressing the parties' 'face-saving' concerns right from the beginning.[65]

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60 S Ting Toomey 'Cross-cultural Face Negotiations: An Overview' cited in Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (2009).

61 B Wolski 'Culture, Society and Mediation in China and the West' Commercia Dispute Resolution Journal 3(2) 1997 cited in Joel Lee, Teh Hwee Hwee *A Asian Perspective on Mediation* (2009).

62 See Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (2009). I is observed that, for Confucius, it may lead to the avoidance of face threat offering of apologies, taking blame, other oriented conversations and an indirec and high-context communication style. See further analysis by R Callaha 'Facework in Mediation: The Need for "Face" Time' bepress Legal Series Pape 837 (2005). For the Malays, maintaining harmonious relationship should b given priority, direct conflicts and open criticism should be avoided and any lo of face, *maruah* or *air muka*, should be prevented.

63 R Fisher, W Ury *Getting to Yes: Negotiating Agreement without Giving In* (198 p. 28. See also Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (200

64 See Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (2009).

65 *Ibid.*

Mediators Should Be Authoritative Figures

In the Asian context, traditional mediators are persons of high standing. The analysis of Lee and Teh,[66] see that present-day Asian disputants have the same expectations that mediators should be authoritative figures.

Lee and Teh further report that authority may stem from a person's age, gender, social position, professional standing, qualifications and training, expertise, experience, personal connections or membership in the 'right' reference group. It is necessary to consider the circumstances of each case to identify a mediator with the right 'authority' attributes. For example, an elderly grassroots leader who is widely recognised for his work in promoting community welfare, may be regarded as an authority figure by quarrelling neighbours at a community mediation centre. He may, however, not be regarded the same way at a mediation of a high-end commercial dispute by corporate executives and their lawyers. In that context, a retired judge with extensive commercial law experience may be more appropriate.[67] In order to attract parties to mediate, the criteria for mediators should be one of the main concerns to be diligently looked into by mediation centres.

Mediators Should Assume Leadership Role

Unlike a mediator in the Western context who is viewed as a neutral outsider, the mediator in the Asian context is at 'the heart of the equation'. The parties look to him for guidance, and are likely to rely on his views on the most sensible way forward. In explaining the role of a mediator, the mediator should not suggest that he/she is a mere facilitator of communication and negotiation. He/she can still lead, for example, by acting as a sounding board of sort, and bring his/her experience and expertise to bear without dictating the issues, judging or deciding on

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66 *Ibid.*

67 *Ibid.*

the outcome. The parties expect him/her to play a direct and active role in seeing them through their problems, and in shaping the process and the outcome decision, lies with the parties. It is therefore important for the mediator to emphasise that while the final decision lies with the parties, he/she would be there to help them every step of the way. In addition, although the outcome of the mediation may not have any impact on him/her, he/she should be keen to see to it that the parties arrive at a satisfactory resolution to the matter.[68]

Communication Should Be At An Appropriate Level Of Formality

The familiar Western style of formality, such as the use of first names and other casual forms of interaction based on a low power distance and the norm of equality, may be inappropriate in many cases. Although mediation is informal, an egalitarian approach will be out of place where status and behavioural norms are clearly ordered by social hierarchy. A mediator should communicate at a level of formality at this initial stage to set a tone for the rest of the mediation that is congruent with a context that has respect for hierarchy and authority. Further, the mediator should avoid asking for approval or permission in the course of the opening statement although he/she is perfectly at liberty to consult with the parties for their views and preferences on how the mediation should be conducted.[69]

Base Of Trust In The Asian Context

The first requirement in Asian cultures seems to be the need to feel a sense of connection prior to giving trust. Asian cultures in general, are considerably more collectivistic than Anglo-Saxons.[70] Studies spanning

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68 *Ibid*, as analysed by Joel Lee and Teh Hwee Hwee.

69 *Ibid.*

70 G Hoftstede *Cultures and Organisations* (1997) p. 9, cited in Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (2009).

groups from Chinese Malaysians to Cambodian Americans and Australian aboriginals, have shown that in Asian societies, the cultural background of the mediator plays a significant role in the trust of the disputants and their willingness to engage in the process.[71] From this belief, Lee and Teh suggest that it will be useful to 'provide complete information on a proposed mediator to establish him as an equidistant insider to the disputants.' The goal is to broaden a possible sense of identification and thus, create a connection with the disputants.[72]

Therefore, the modern western concept of mediation needs to be modified accordingly[73] to meet the values of the Asian culture. With this modification, Asians would easily be attracted to adopt mediation.

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71 C Honeyman, BC Goh, L Kelly 'Skill is not enough: Seeking Connectedness and Authority in Mediation' 20(4) Negotiation Journal 2004 p. 489, cited in Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (2009).

72 The analysis by Joel Lee and Teh Hwee *An Asian Perspective on Mediation* (2009). Lewicki has defined three types of trust: calculus-based trust (based on a sense of understanding the other party); knowledge-based trust (based on a sense of control over the other party); and identification-based trust (a true sense of connectedness). Providing adequate information about a mediator, beyond mere qualifications, can contribute both to knowledge-based and identification-based trust. As Asians tend to be concerned with general experience and qualifications, including education, positions held, honours received, age, family status other affiliations, there will be a bonus by doing this: explanation by Joel Lee and Teh Hwee Hwee *An Asian Perspective on Mediation* (2009). See also RJ Lewicki, B Bunker 'Trust in Relationships: A Model of Development and Decline' in BB Bunker *Conflict, Cooperation and Justice* (1995) pp. 133–173.

73 See further analysis in Joel Lee, Teh Hwee Hwee *An Asian Perspective on Mediation* (2009).

Conclusion

The historical development of mediation shows that mediation has been practised by most of the traditional communities in the world. Even if the practice has been applied in various societies, much of it may not have been formalised, nor institutionalised. To reiterate, we have seen the development of modern mediation from the Municipal Court in Cleveland, Ohio in 1913; then in 1930, the call for conciliatory methods of dispute resolution; through to the period of 1960-1970, when mediation became one of the mechanisms to minimise the problem of the backlog of cases. Looking at its potential in reducing the bottleneck, the judiciary took the initiative to have mediation programmes in court mandated. The courts have also moved further with the introduction of the multidoor courthouse which was reported to be a successful and efficient system of justice. The success of the application has influenced other countries to adopt the method as the main agenda in the civil court reform.

In Malaysia, specifically, traditional mediation has been practised by Malaysian communities, involving the main races or other indigenous people. The basis for this is their religious teachings and their beliefs that encourage conciliation and settlement, nonetheless, the method of the practice was not standardised although it was observed that the preservation of relationship has usually been the utmost concern of Malaysian traditional communities. On this basis, it can be inferred that mediation is suitable to be promoted as a culture for resolving disputes in Malaysian society.

It was also observed in the past that the adversarial court system seemed alien when it was first introduced for Malaysian communities. The use of the formal court system only became relevant for economic or political reasons or when disputing parties were not familiar or were not on good terms. However, it seems that the adversarial system has over time, gradually been accepted and much more popular nowadays.

The view that the adversarial court with its complex procedures, once considered alien by our traditional communities but now absorbed and accepted; is sufficient proof that the concept of mediation, i.e. negotiation and conciliation has been welcomed by the Malaysian community as a whole. This is so because the elements of negotiation and conciliation in mediation has always been an inherent value for these communities. Furthermore, the process of mediation does not involve complex procedures and when the aim of mediation is to preserve the relationship, this is in line with the teachings of each community's religion and beliefs.

In conclusion, mediation can be adopted as a culture to resolve disputes in Asia, in particular Malaysia. The application could be more effective if proper techniques and approaches are adopted. Proper implementations, improvements and regulations may give mediation an upsurge of interest in Malaysian communities.

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