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ARTICLE

The evolving concept of access to justice in Singapore's mediation movement

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Abstract

This paper examines the key societal developments underpinning the growth of mediation in Singapore with a view to analysing the evolving conceptualisation of justice within mediation. The introduction of mediation corresponded with a shift from adversarial justice to an indigenous form of conciliatory justice, in which a respected mediator played an adviser role for the disputants and was trusted to ensure the fairness of the process. However, this trajectory was tempered by the need to ensure that Singapore mediation practice conformed with international practices concerning the protection of parties' autonomy. The ambivalence concerning the mediator's role has resulted in uncertainty about whether the mediator bears primary responsibility for ensuring procedural and substantive fairness. The paper discusses the implications of this ambiguity and proposes ways to resolve it. The current phase of professionalisation in Singapore's mediation movement offers the opportune moment to resolve these existing tensions and to crystallise the mediator's role in facilitating access to justice.

Keywords: access to justice; procedural justice; substantive justice; indigenous; Singapore mediation

1 Introduction

In 2019, Singapore commemorated 200 years since it was established as a major British trading port within Southeast Asia. Amidst these bicentennial celebrations, some have questioned the meaningfulness of celebrating the colonisation of the country – a time in history that is arguably associated more with subjugation than with autonomy.[1] In the past fifty-four years since gaining independence, Singapore has sought to maintain a fine balance between transplantation of the common-law system and creating an autochthonous legal system that is contextualised to its unique circumstances.[2]

In contrast with two centuries of development, the mediation movement in Singapore has had a considerably shorter history of twenty-five years. Court-connected mediation was introduced in 1994, followed by mediation for commercial disputes in 1997, then community mediation in 1998. The relationship between the mediation movement and access to justice has been impacted by two opposing influences – the desire to create an indigenous model of mediation and the need to be aligned with internationally accepted principles of mediation. As a result, the conceptualisation of access to justice through the use of mediation has been evolving in the past two decades. The introduction of mediation corresponded with a shift from adversarial justice to a traditional form of conciliatory justice, in which a respected mediator played an adviser role to the disputants and was trusted to ensure the fairness of the process. The revival of conciliatory justice strengthened the relationship between mediation and access to justice, as mediation was conceived as being complementary and co-equal to adjudication in the courts. However, this trajectory has been tempered by the need to ensure that Singapore mediation practice conformed with international practices concerning the

[1]See The Straits Times (Singapore) (2019).
[2]See generally Phang (2006).

protection of parties' autonomy. This need has been accentuated by recent efforts to promote the use of mediation in cross-border disputes.

The competing notions of justice within mediation has resulted in ambivalence about the role of the mediator vis-à-vis the disputants. The mediator has been characterised as both neutral facilitator and trusted adviser. Consequently, there is considerable uncertainty concerning whether the mediator bears primary responsibility for ensuring procedural and substantive fairness within the mediation process. The unresolved tension has posed difficulties to the understanding and application of mediation standards in Singapore. This paper argues that the current phase of professionalisation offers the opportune moment to resolve the existing tensions in the understanding of mediation and to shed light on the mediator's role in facilitating access to justice.

This paper engages in a contextual analysis of the concept of access to justice within Singapore's mediation movement. It examines the key societal, political and legal developments that underpin the growth of mediation. Against this backdrop, it draws upon a wide array of sources to infer the evolving conceptualisation of justice within mediation. These sources include court decisions, extra-judicial speeches, official statements made concerning national mediation policies, mediation research and literature, and the content of mediation legislation and regulations. The practical implications on mediation practice are then discussed with reference to mediation standards and case-studies.

The contextual analysis is done in five sections. Section 2 discusses the common understanding of access to justice and its perceived relationship with the mediation process. The next section provides a brief review of the mediation movement in Singapore. Section 4 examines the evolving conceptualisation of justice as reflected in the key developments of the mediation movement. Section 5 considers how the lack of clarity in the role of the mediator has ramifications on mediation practice, notably in reducing the prominence of party self-determination and potentially affecting procedural justice. The final section discusses the pertinent question of who takes primary responsibility for achieving justice within mediation.

2 Mediation and access to justice

Mediation across the globe has developed in tandem with the access-to-justice movement. One prominent motif undergirding both movements is the desire to overcome the barriers to accessing the traditional court system. According to Cappelletti and Garth (1978; Cappelletti, 1993), the first wave of the access-to-justice movement in the Western world focused on dealing with economic obstacles while the second wave was associated with the rise of class actions to deal with organisational obstacles. The third wave from the late 1970s onwards focused on addressing procedural obstacles associated with traditional litigation. This wave led to a search for alternative ways to resolve conflicts beyond the courts, including the mediation process. It is apposite that the growth of mediation coincided with perceived crises in the administration of justice in many countries. The Pound Conference, which is commonly associated with the genesis of court-connected mediation in the US, was convened to address the causes of popular dissatisfaction with the administration of justice in the courts. Similarly, the Woolf Reforms in England (Access to Justice Final Report, 1996) in the 1990s were precipitated by criticism of the lengthy and expensive litigation process (Traum and Farkas, 2017). The mediation process therefore emerged as a counterpoint to the litigation process amidst a growing crisis of public trust in the courts and the consequent attempts to reclaim legitimacy in the formal justice system.

Access-to-justice initiatives have focused in particular on concerns about efficiency and proportionality of costs within the justice system. Lord Justice Jackson's cost reforms in the UK resulted in the Civil Procedure Rules highlighting the need to deal with cases 'justly and at proportionate cost'.[3] In a related vein, the UK Civil Justice Council (2017) noted that mediation had to be utilised more widely to foster a healthy and efficient civil justice system in which the settlement of disputes freed the

[3]Civil Procedure Rules, r. 1.1(1).

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judiciary to try other cases. The Australian Productivity Commission (2014), when recommending more extensive use of alternative/appropriate dispute resolution (ADR) prior to accessing the courts, also articulated the overall goal of building an efficient civil justice system that maximised the return from allocation of public funding. The cost-effectiveness of mediation has thus been gradually incorporated into the justice process.

The search for access to justice has increasingly broadened its scope to move beyond the courts and the formal legal system. Elaborating on this trend, Sandefur (2019) suggested that justice is ultimately about just resolutions, not necessarily legal solutions. She called for the departure from the tacit assumption that the crisis in access to justice arises from unmet legal needs and pointed out the need to recognise that people do not always consider law as the solution to their justice problems. This broader perspective of access to justice has been adopted in Australia, resulting in mediation being situated in a justice system that encompasses not only the courts. Sourdin and Burstyner (2013) wrote about a growing trend to develop a 'multi-option approach' to locate dispute-resolution services within and outside courts, before and after litigation has commenced. They note that this approach arose from a broader view of justice that sees ADR (including mediation) as complementing the adjudicative system. Drawing upon this perspective, it has been argued that mediation and adjudication should be viewed from a 'co-equality' perspective that allows both facilitative and adjudicatory processes to have equal standing in the justice system (Roberge and Quek Anderson, 2018). Hence the broader view of justice and its disentanglement from the confines of the legal system have resulted in a more promising link between mediation and a wider scope of access to justice.

Apart from focusing on barriers to the formal legal system, the access-to-justice movement has also been driven by efforts to embrace a more conciliatory form of dispute resolution that empowers the parties and creates solutions meeting their interests. Describing the early mediation movement, Menkel-Meadow (1991) asserted that dispute-resolution processes that included more control by the parties helped to facilitate greater democratic participation in the legal system than the formal adjudicative system. Consensual settlement, in her view, also allows the parties to consider many other non-legal principles affecting decision-making and is often more just and responsive to the parties' needs than a litigated outcome with win–lose results (Menkel-Meadow, 1995). Similarly, the Canada Law Commission (2003) created the term 'participative justice' to represent the evolution of dispute resolution to include processes that allow active participation of the parties in arriving at outcomes that are customised to their needs. The ascendance of mediation has therefore been intimately connected with the steady reconceptualisation of justice to allow expanded party autonomy. Mediation also offers the opportunity to achieve 'justice from below' based on the parties' interests and values, as opposed to the litigation process that imposes 'justice from above' (Hyman and Love, 2003).

In other jurisdictions – notably non-Western societies – mediation has been associated more with the reaching of consensus than the exercise of autonomy. Observing this emphasis in some African and Asian traditions, Cappelletti (1993) wrote about the focus in these societies on achieving consensus rather than determining fault. He argued that conciliatory processes are able to produce results that are qualitatively better than contentious litigation. In this context, mediation has been perceived as a way to transform justice from rights-based to consensus-driven, and to preserve relationships rather than adopt a contentious approach. Mediation also represents a departure from the Western tradition of adversarial litigation towards the opportunity to revive some societies' traditional ways of resolving disputes. In short, mediation has been associated with the transformation of justice from adversarial, hierarchical and formal in nature to more consensual, participative and informal.

In summary, the link between mediation and access to justice has been shaped by myriad influences. Its growth coincided with increasing criticism of the litigation process and the growing realisation of the limitations in judicial resources. Mediation has also epitomised a change in the understanding of justice – a shift from a rights-based, rigid process to a more conciliatory and participatory way to achieve justice. At the same time, the mediation process has been associated with a broader scope of justice that transcends the formal legal system and provides multiple avenues for individuals to arrive at just resolutions. The multiple aspects of justice are probably best captured

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by the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO)'s method of measuring access to justice, which assesses users' experiences based on the cost of justice, the quality of the procedure and the quality of the outcome (Barendrecht, 2009).

3 The mediation movement in Singapore: a brief history

The twenty-five-year-long mediation movement in Singapore provides a fascinating case-study of the nuanced relationship between mediation and access to justice. Several of the earlier described influences can be discerned in this brief period, but there were additional societal factors that contributed to a unique conceptualisation of mediation's contribution to access to justice.

The development of mediation in Singapore has been largely driven by the state in three key sectors – the courts, commercial disputes and the community. In the courts, former Chief Justice Yong Pung How played a pivotal role in providing vision and support for the nascent field. In various key speeches in the mid-1990s, CJ Yong emphasised that Singapore was developing mediation not as a means to reduce case backlog – a problem the courts had already resolved in the early 1990s – but as a non-confrontational way of resolving disputes to preserve relationships. He suggested that, in an Asian society like Singapore, preserving relationships amid conflicts was an important value. Historically, people relied on community elders to help them resolve conflicts in a conciliatory manner but, with the decline in the importance of clans, people turned to the courts and adversarial processes to deal with disputes (Yong, 1996; 1997b). CJ Yong therefore saw the promotion of mediation as a means to reintroduce conciliatory approaches to litigants.

A few Singapore commentators wrote in 2000 that it was 'clear that the initial impetus to the development of ADR originate[d] from the recognition of a need to improve the productivity and efficiency of the courts' (Tan *et al.*, 2000, p. 134). In a more recent commentary, it was observed that the massive backlog in the 1990s was a catalyst for the mediation movement in Singapore (Chua and Lim, 2017). Hence, although there was no acute crisis in the administration of justice, judicial-efficiency concerns have still been perceived as forming the backdrop for the introduction of mediation.

Under the leadership of CJ Yong, the State Courts piloted a mediation programme in 1994 in which selected judges mediated a range of civil disputes. This was followed by the establishment of the Court Mediation Centre, which is currently known as the State Courts Centre for Dispute Resolution. Court-connected mediation services were subsequently extended to resolve minor criminal complaints, community conflicts, family disputes, harassment and employment matters (Boulle and Teh, 2000; Low and Quek, 2017). The mediations in the State Courts and the Family Justice Courts are conducted by trained judges assisted by court staff and volunteer mediators. Commenting on the courts' promotion of mediation, the current Chief Justice Sundaresh Menon (2014) has stated that consensual outcomes are amongst the best ways to achieve affordable access. More recently, CJ Menon (2017) suggested that the rule of law was intimately connected with access to justice and should not be rooted exclusively in an adjudicative setting. Instead, a user-centric approach and a broader vision of the rule of law would strongly support the use of mediation.

The next milestone in the development of mediation in Singapore arose from the recommendations of a cross-profession committee on ADR that was formed in 1996 to study how mediation in Singapore could be promoted outside the courts. The committee highlighted the importance of creating a framework to resolve disputes in an inexpensive and non-confrontational way outside the court system. It further observed that disputes had to be resolved in a non-threatening environment because of the general reluctance of Singaporeans to litigate. One of the committee's recommendations was the establishment of a network of easily accessible community mediation centres to foster social cohesion, thereby reviving the traditional approach of resolving disputes through informal channels in decentralised systems. In order to achieve this, community leaders and volunteers were trained to be mediators so that communities could be taught how to resolve their own disputes. The Community Mediation Centres Act came into force on 9 January 1998 and led to the opening of several community mediation centres (Boulle and Teh, 2000).

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The final prong in the mediation movement relates to the commercial sphere (Chua and Lim, 2017). The growth of mediation in this sector found its genesis in a call by former Attorney General Chan Sek Keong (1996) to institutionalise mediation through setting up a commercial mediation centre. He highlighted that litigation, being a zero-sum game that invariably resulted in some degree of animosity, affected harmonious relationships. He thus urged the encouragement of citizens to resolve disputes amicably. Following this call, a pilot study to test the feasibility of establishing a commercial mediation centre was conducted by the Supreme Court and the Singapore Academy of Law. This was followed by the launch of the Singapore Mediation Centre under the auspices of the Singapore Academy of Law on 16 August 1997. Unlike court-connected mediation services in the State Courts and Family Justice Courts, this centre provided private mediation services at a fee. Over time, the centre has facilitated the mediation of more than 3,000 disputes and expanded its scope beyond commercial matters to family disputes and specific industries including the medical profession and estate agents. This centre has also played a major role in providing mediation training courses in Singapore. Other organisations that provide industry-specific mediation initiatives have since been established including Eagles Mediation and Counselling Centre, a nonprofit organisation providing family mediation and counselling services; the Consumer Association of Singapore and the Financial Industry Disputes Resolution Centre.

The year 2014 marked a new phase in the development of mediation that shifted the focus to internationalisation and professionalisation. A working group was appointed by the Chief Justice and the Ministry of Law to explore ways to develop Singapore into a centre for international commercial mediation. Unlike the earlier focus on increasing access to justice, the formation of the working group was driven by the desire to make Singapore a focal point of dispute resolution in Asia. The development of international mediation services would complement the well-established arbitration and litigation services, and thus contribute to Singapore's credible offering of the entire suite of dispute-resolution options.[4] The group's recommendations led to the creation of the Singapore International Mediation Centre (SIMC) on 5 November 2014, which has an impressive panel of mediators from more than ten countries. To facilitate the enforcement of cross-border mediated settlement agreements, SIMC created a unique arbitration–mediation–arbitration protocol in collaboration with the Singapore International Arbitration Centre. This protocol allows an arbitration to be commenced then stayed for mediation at SIMC after the appointment of the arbitral tribunal. Any agreed terms at the mediation may be recorded as a consent award before the arbitral tribunal and may be enforced in more than 150 countries under the New York Convention.[5]

The efforts to encourage the use of international mediation were complemented by other measures to professionalise mediation and clarify the legislative framework supporting mediation. The Singapore International Mediation Institute (SIMI) was established in 2014 to create and monitor standards for mediation in Singapore. Collaborating with the International Mediation Institute, SIMI has developed a four-tier credentialing scheme for mediators and an accreditation framework for mediation providers as well as training. The Singapore International Dispute Resolution Academy was subsequently set up in 2016 to complement SIMI's professionalisation efforts through engaging in ADR research. To provide greater certainty on the law relating to mediation, the Mediation Act was enacted in 2017 to codify the principles relating to confidentiality and inadmissibility of mediation communications. One notable provision is an expedited mechanism to record a privately mediated settlement agreement as an order of court.

Most recently, the United Nations Convention on International Settlement Agreements Resulting from Mediation was signed in Singapore on 7 August 2019 and named the Singapore Convention on Mediation.[6] The convention was drafted by UNCITRAL to provide for the cross-border enforceability

[4]Ministry of Law (2013).

[5]See generally http://www.simc.com.sg (accessed 30 March 2019).

[6]Singapore Convention on Mediation (2019) Available at https://www.singaporeconvention.org (visited 3 August 2019); see also Ministry of Law (2019).

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of mediated settlements for commercial disputes. This development marks a major milestone in the internationalisation phase of Singapore's mediation movement.

Within a relatively short span of twenty-five years, the mediation movement in Singapore has swiftly traversed the phases of experimentation, expansion in the domestic sphere, institutionalisation, professionalisation and internationalisation. The underlying reasons for the rapid expansion stemmed from very diverse considerations, including the promotion of Singapore as a dispute-resolution hub, the revival of traditional modes of resolving disputes, the provision of cost-effective ways to deal with conflicts and encouraging greater social cohesion. The next section examines how these considerations cumulatively shaped the overall understanding of achieving justice through mediation.

4 Access to a different type of justice

As evident from Section 2, the concept of access to justice has been analysed from a wide spectrum of viewpoints, ranging from a focus on obstacles to accessing the courts, to finding just solutions beyond the formal justice system and exploring consensual instead of adversarial ways of arriving at justice. In this section, the reconceptualisation of justice within mediation will be examined from two perspectives – a broader scope of justice and a different type of justice.

4.1 A broader scope of access to justice: a co-equality perspective[7]

Notably, the Singapore courts adopted several measures to define mediation according to a co-equality perspective to access to justice and thereby strengthen the positive relationship between mediation and access to justice. The courts' decisions to have judges trained and designated as mediators and to establish dispute-resolution centres administered by the courts evinced a commitment to devote resources to promote mediation as a legitimate way of enhancing access to justice. This model of court-provided mediation indicated that the courts endorsed the value and quality of the programme and were not conveniently diverting cases to external organisations (Brazil, 1999).[8] Furthermore, CJ Menon (2017) has recently affirmed that mediation was not inferior to, but was complementary to, the adjudication process.[9] These statements effectively affirmed the equal standing of both mediation and adjudicative processes as multiple ways to enhance access to justice.

Furthermore, the scope of access to justice has not been confined to the formal court system. Court-connected mediation was introduced at the same time as commercial mediation and community mediation in the 1990s. In the past two decades, mediation schemes have been increasingly embedded in a wide range of sectors, including the construction industry, health care, tenancy, private education and the media industry.[10] The State Courts, in partnership with the Law Society, also created a panel of lawyers who would provide basic legal services that were geared towards using mediation or negotiation before commencing legal proceedings. This project was described as helping to locate justice not only within, but also outside, the courts, 'in order to build a complete justice ecosystem capable of meeting the varied needs of our society' (See, 2014, p. 5). Elaborating further on the project, CJ Menon endorsed Sourdin and Burstyner's (2013) view that justice is not primarily to be found in official justice-dispensing institutions (Menon, 2014). Collectively, these developments reflect the belief in a broader scope of justice to be found beyond the judiciary.

[7]Roberge and Quek Anderson (2018).

[8]See Brazil (1999), observing how a court using its own full-time employees to serve as ADR neutrals is likely to inspire the greatest public confidence that ADR services represent real added value, instead of being a poor substitute to adjudication.

[9]CJ Menon further elaborated that mediation contributed to a user-centric approach to access to justice because of the benefits the individual litigant could reap. These included affordability, better accessibility in terms of navigating the process, flexibility in terms of determining a mutually acceptable solution without formal constraints and effectiveness due to the high mediation settlement rates.

[10]See generally http://www.mediation.com.sg/business-services/industry-schemes/ (accessed 30 March 2019).

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4.2 A different type of justice

Apart from redefining the scope of access to justice, the Singapore mediation movement was characterised by a particularly strong emphasis on transforming the experience of justice. This push to reconceptualise justice is reflected in the calls to revive traditional modes of resolving conflicts and efforts to develop mediation according to Asian culture.

4.2.1 An autochthonous or international approach to mediation?

Culture has played a particularly prominent role in the overall development of mediation in Singapore. When the courts first introduced mediation in the 1990s, CJ Yong noted that this was 'an opportunity to introduce into our culture a process to which it was no stranger' (1997a, p. 112). The mediation process represented a shift from an adversarial and rights-based approach to a more non-confrontational way of resolving disputes. In the same vein, A.-G. Chan (1996) highlighted that mediation was part of Asian tradition and therefore offered a better form of dispute resolution than adversarial justice. A similar narrative was also evident outside the courts. The committee suggesting the establishment of community mediation centres in 1997 stated that it wanted to rekindle the traditional approach of resolving problems through informal channels in decentralised neighbourhoods. As such, community leaders were chosen and trained to perform the role of mediators in the new community mediation centres (Boulle and Teh, 2000). In short, mediation was being used in Singapore to reconceptualise justice – within and beyond the courts – as more consensual and aligned with the country's traditional Asian roots.

The initial sentiments of reviving indigenous forms of justice led to more concrete efforts to develop a mediation model that was more attuned to Asian culture. In 2002, CJ Yong commented that it was ironic that 'we had to relearn mediation from the West'. He stated that the facilitative model of mediation that was transplanted into Singapore might benefit from an infusion of Asian perspectives, including considerations of 'face' and the expectation that the mediator provided input and guidance on substantive matters (Yong, 2002, p. 19). Following these comments, the Singapore Mediation Centre convened a working group to study how an Asian model of mediation could be developed. Their efforts culminated in the publication of an influential book, *An Asian Perspective on Mediation*, which offered a methodology of contextualising the interest-based and facilitative mediation model to suit more Asian-oriented assumptions.[11] The authors Lee and Teh (2009) suggested that many Asian societies tend to place great importance on hierarchical relationships and more weight on the collective rather than the individual interests, as evidenced by the high power–distance index and the low individualism–collectivism score in Geert Hofstede's Cultural Dimensions.[12] Many of the cultural assumptions underlying the facilitative mediation model are therefore incompatible with Asian preferences. For instance, expectations about individual autonomy stand in stark contrast to the primacy of social hierarchy. Because of these tensions, a more Asian-oriented approach requires the mediator, and not the parties, to be at the heart of the mediation. The mediator is thus expected to lead and guide the parties as well as express opinions and give input.

Separately, the courts also drew upon cultural considerations in designing its model of court-connected mediation. CJ Yong described the court-mediation model as 'court-directed' with judge-mediators 'playing a proactive role' (1997b, p. 112). Subsequently, CJ Chan Sek Keong, in a reported decision, elaborated on the link between culture and the use of judge-mediators. He stated that feedback from litigants showed an overwhelming preference for judges to act as mediators because of the public confidence and respect they commanded. Distinguishing the court-mediation model from other facilitative models, CJ Chan remarked that this approach was suited to a jurisdiction in which litigants respected the impartiality of judges in giving objective views on the merits of the case.[13] This allusion to the judge playing an authoritative mediator is consonant with the above

[11]See Lee and Teh (2009).

[12]The Hofstede Centre. Available at http://geert-hofstede.com/singapore.html (accessed 26 April 2020).

[13]*Jonathan Lock v. Jessline Goh* [2008] 2 SLR(R) 455, at [28]–[29].

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suggestions that the mediator should take leadership of the process because the parties would usually expect them to do so.

Amidst the drive to create an indigenous form of justice, there was concurrently a push to professionalise the mediation field and develop standards consistent with international practice. These are arguably opposing trajectories, as an indigenous model of mediation may deviate from international standards in defining fairness within mediation. Nevertheless, the push to internationalise mediation has accelerated since 2014, resulting in the creation of standards that are aligned with international practice. For instance, a code of professional conduct that bears close resemblance to the code used by the International Mediation Institute has been introduced by SIMI for its accredited mediators. Such mediators, regardless of their training, background or organisation, would have to comply with this code.[14] While the 2017 Mediation Act did not focus on regulating the conduct of mediation, its provisions concerning when the court may decline to convert a mediated settlement agreement to a court order implicitly set standards on when a mediated outcome is not considered just and when it was not reached through a fair process.[15] The recent drive to put Singapore's mediation services and infrastructure on the international stage has led to a reduced focus on formulating an indigenous form of mediation and a corresponding push to institutionalise standards that meet diverse international preferences. Nevertheless, the earlier efforts to create a distinctive model of mediation for domestic matters continue to exert an influence,[16] albeit with less prominence than before. The co-existence of both trajectories has resulted in unresolved issues about mediation practice and principles that impinge upon the practice of mediation.

5 The implementation of conciliatory justice within mediation

5.1 The diminution of the principle of self-determination

One such unresolved issue relates to the importance of party self-determination in achieving justice within the mediation process. When mediation was first introduced in the Singapore Mediation Centre, the focus was a on a facilitative model that envisages the mediator as facilitating the negotiations of the disputants and refraining from expressing his or her opinion on the dispute.[17] This facilitative approach is premised on a vision of expanded personal autonomy and self-determination. As such, the disputants have a larger role than the mediator in decision-making for the mediation process and the final settlement.[18] The prominence of the principle of self-determination in mediation has permeated many mediation ethical codes, leading to common prohibitions against exercising undue pressure on the parties or imposing solutions on them.[19]

The search for an autochthonous approach to mediation in Singapore has resulted in the reduced prominence of the principle of self-determination and a corresponding elevation of the mediator's role. As explained above, Lee and Teh (2009) pointed out that many of the cultural assumptions underlying the facilitative mediation model are incompatible with Asian preferences. The authors were careful to stress that the suggested cultural preferences did not apply to all Asian societies, given the diversity of the region. Instead, they premised their analysis on societies that were influenced by Confucianism, had collectivist inclinations and valued face concerns.

[14]See Singapore International Mediation Institute, *Code of Professional Conduct*. Available at http://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct? (accessed 30 March 2019).

[15]Mediation Act 2017 (No 1 of 2017). See also Quek Anderson (2017).

[16]See generally Lee (2016).

[17]See Yong (2002), stating that Singapore Mediation Centre, when first established, based its practice on Western practices as the first mediators were trained by academics from the US, Australia and Canada.

[18]See Lee and Teh (2009, pp. 67–68).

[19]See e.g. Australia National Mediation Accreditation Approval Standards. Available at https://www.ama.asn.au/wp-content/uploads/2012/04/AMA-Revised-NMAS-1-July-2015.pdf (accessed 14 April 2020); American Bar Association Model Standards of Conduct for Mediators. Available at https://www.americanbar.org/groups/dispute_resolution/policy_standards/ (accessed 14 April 2020).

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These insights have been beneficial in clarifying the legitimacy of both facilitative and more evaluative mediation styles. Significantly, certain mediation codes of conduct in Singapore currently accommodate evaluative practices. The SMC Code of Conduct does not prohibit the mediator from making an evaluation of the merits of the case, provided that the parties have requested it and he or she is confident in the ability to make such an evaluation.[20] The SIMI Code of Professional Conduct appears to accommodate evaluative practices, as it allows mediators to 'draw on their expertise and experience to assist the parties in developing sustainable settlements' with the parties' consent.[21] However, the overriding principle of party autonomy seems to take precedence. The mediators are warned against 'prescribing solutions or offering any statement, suggestion, or value judgment which may create an undue influence on any one party towards accepting a specific outcome'.[22] The mediator is also obliged to ensure that the parties arrive at a settlement voluntarily and to prevent any conduct that may create or aggravate a hostile environment at the mediation.[23] The SIMI Code therefore appears to accommodate an Asian approach to mediation that includes suggesting solutions or giving value judgments, while subordinating such an approach to the overriding principle of respecting the parties' autonomy.

Notwithstanding the commendable balancing of the dual approaches in the SIMI Code, there are practical difficulties in ensuring that the 'Asian' approach will not inadvertently breach ethical principles. It is evident that the code has given deference to the principle of self-determination, given its stress on the need to avoid undue influence. This stance complies with most international standards on mediation. Nevertheless, the Asian approach, which puts the mediator at the heart of the mediation, is premised on the assumption that the parties do not value self-determination as highly as their Western counterparts. Can the mediator who utilises a more evaluative approach assume that the parties consent to this approach or does he or she have to specifically ask the parties and obtain their consent? Even if the parties expressly gave their consent, is there still the possibility that the mediator's directive and evaluative approach undermines their voluntariness in arriving at a settlement? As discussed below, there is a very faint distinction between taking leadership in the mediation and exerting undue pressure on the parties. The lack of clarity as to when the threshold is crossed has significant ramifications on whether a procedurally fair result (that has been voluntarily reached) has been achieved through mediation.

5.2 Implications on procedural justice within mediation

The danger of the ambivalence in the mediator's role is further substantiated by existing research on procedural justice. Socio-psychological studies have consistently shown that 'voice' – the extent to which one can provide input in the decision-making – is positively related to high perceptions of fairness. This correlation has also been established in the negotiation and mediation contexts.[24] After all, the quintessential principle underlying mediation is the exercise of autonomy, which includes expressing one's views and being able to decide on a solution. A high degree of voice will therefore lead to high levels of procedural justice in terms of the parties' perception of fairness within mediation. Conversely, an approach that reduces the disputants' voice potentially risks diminishing procedural justice. However, there has also been a growing body of research showing that cultural norms can exert a moderating influence on people's reactions to voice. Brockner *et al.* (2001) showed that individuals were more dissatisfied with situations of 'low voice' in a low power–distance culture than in a high power–distance culture. In other words, individuals who place great primacy on hierarchy may

[20]Singapore Mediation Centre, *Code of Conduct (Annex B)*, para. 8.1. Available at http://mediation.com.sg/assets/business-services/CMS/CMS-Mediation-Procedure-Rules-with-Annexes-6Nov15.pdf (accessed 30 March 2019).

[21]Singapore International Mediation Institute, *Code of Professional Conduct*, para. 5.10. Available at http://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct? (accessed 30 March 2019).

[22]*Ibid.*

[23]*Ibid.*, at paras 5.7–5.8.

[24]See ABA (2017, pp. 41–42); and Hollander-Blumoff (2017).

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not necessarily find a situation to be unjust when they have not been given the opportunity to exercise autonomy. Although this research indicates that perceptions of fairness may not be compromised in high power–distance cultures despite the lack of opportunity to exercise autonomy, it is questionable whether it justifies a directive approach in mediation. Given that mediation is distinguishable from adjudicative processes by the high degree of parties' control, endorsing a directive mediation style may undermine the very essence of the mediation process.

Furthermore, there are grave dangers in readily adopting a highly directive mediation approach in an Asian setting for a few reasons. First, the mediator is usually not in a position to accurately discern the underlying cultural preferences of the disputants. Unlike the information one gets in psychological studies, the mediator does not have precise measurements of each party's power–distance index or individualism–collectivism preferences. His or her understanding can, at most, be gleaned from brief observations in pre-mediation meetings. However, these initial hypotheses may be incorrect and need to be further refined from further observations during the mediation.[25] The mediator using the Asian model may thus make wrong assumptions about the parties' cultural preferences. Second, studies have shown that substantial variations in the power–distance-related effects on procedural justice have been found across different persons within a country and not only across cultures.[26] As such, while a disputant may come from a distinct Asian culture, he or she may hold rather different power–distance preferences from the predominant preference in the culture. The Asian model may be suited for one disputant, but not necessarily for another. Hence, given the potential for huge variations in cultural preferences, it is no easy task for a mediator to have a precise understanding of the disputants' cultural preferences.

Furthermore, even if a disputant were to naturally place great emphasis on high power–distance and collectivism, his or her preferences may change drastically in a mediation setting. The impact that power–distance differences have on reactions to voice may be moderated by priming the person with countercultural values. Van De Bos *et al.* (2013), when studying the reactions of respondents from India and the Netherlands, found that the impact of being denied voice was strong amongst the Indian respondents when they were primed with situational cues reminding them about the desirability of low power–distance. The impact was similar to the dissatisfaction the Dutch respondents indicated when denied voice. This was despite the higher power–distance that the Indian respondents had than the Dutch respondents. This is a potentially significant finding for the mediation context. When parties participate in mediation, they are usually given the prior impression that mediation, unlike litigation, allows them to exercise their autonomy. This idea is further reiterated in the usual mediator's opening statement. The participants are thus effectively primed with cues that emphasise the advantages of exercising self-determination within mediation. Van De Bos's finding suggests that the parties, regardless of their inherent power–distance preferences, will have low perceptions of fairness when the mediator denies them the opportunity to exercise self-determination. Utilising the Asian approach to mediation will then result in low levels of procedural justice because of the parties' strong association of mediation with lower power–distance.

In summary, the delivery of justice in mediation has been inextricably connected with cultural considerations in Singapore as well as a strong push to professionalise mediation. These two trajectories have brought about competing notions about how much voice and self-determination parties are given within mediation. The current mediation ethical principles seem to endorse the importance of voluntariness, while also accommodating the use of more directive methods. However, the practical difficulties in accurately discerning the disputants' cultural preferences readily result in a misalignment

[25]See Quek Anderson and Knight (2017), observing that mediators often make educated guesses on the individuals' cultural preferences, which could be based on misinformed generalisations and biases.

[26]See Brockner (2003, p. 353), noting from studies that individuals from China with more independent forms of self-construal behaved similarly to those from the US who tended to have independent self-construal and studies within China found variations in power–distance beliefs with findings analogous to those found in between-country studies; Brockner *et al.* (2001), finding in study 4 that variations in power–distance within Hong Kong moderated their reactions to perceptions of voice; and Francesco and Chen (2000) studying variations in power–distance in China.

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between the directive style and the parties' actual preferences. In addition, all parties, regardless of their cultural orientations, may be primed to expect to exercise self-determination in the mediation context. Consequently, the potential for undermining the disputants' voluntariness is very high, which will then greatly compromise procedural justice within mediation. The ambivalence concerning the prominence of self-determination within the mediation process potentially causes great uncertainty about how justice is achieved through mediation. The following section turns to discuss some implications of this lack of clarity.

6 Who is responsible for access to justice in mediation?

The ambiguous role of the mediator vis-à-vis the parties has significant ramifications on the practice of mediation in Singapore. One key question concerns who bears primary responsibility for justice within mediation. Accountability issues are significant since justice obtained in a private and confidential process is heavily dependent on how the mediation is conducted. A lack of oversight, coupled with the confidential nature of mediation, will easily result in undetected abuses and the undermining of mediation's role in advancing justice. The increasing association of mediation with the advancement of access to justice makes accountability an even more acute issue.

6.1 Who is responsible for procedural justice in mediation?

The push to professionalise mediation in Singapore in the past five years has led to the creation of more robust systems to ensure accountability. A major change is the establishing of national standards for mediators by SIMI and the introduction of a structured review process to deal with complaints made against SIMI-accredited mediators.[27] A nationwide complaints process was absent prior to this point. SIMI's introduction of standards has been complemented by other helpful measures, such as requiring an external review of the mediator based on user feedback in the mediator's application for accreditation and introducing a mentorship programme for its mediators. A more indirect form of oversight has been provided by the Mediation Act. In its provisions allowing parties to request the court to record a privately mediated settlement agreement as a court order, the court may decline the application if the 'agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract'.[28] These grounds will encompass situations of unethical conduct by the mediator.

Despite these positive developments to increase accountability, there are limitations to their overall impact. Court oversight under the Mediation Act is only triggered if the parties decide that they require their agreement to be encapsulated as a court order. Furthermore, the SIMI accreditation process is voluntary for mediators. Not all disputants using mediation will have recourse to the review process provided by SIMI. More significantly, it is rare for mediation organisations in Singapore to incorporate internal review mechanisms to deal with complaints against their mediators.[29] Granted that mediation discussions are confidential, this is a major omission and obstacle to effective professionalisation of the mediation field. If mediation is to truly be regarded as having a co-equal standing

[27]Singapore International Mediation Institute, *Assessment of Professional Conduct for SIMI Mediators*. Available at http://www.simi.org.sg/Portals/0/Code%20of%20Conduct/SIMI%20Assessment%20Of%20Professional%20Conduct%20%5BJAN%202017%5D.pdf (accessed 30 March 2019).

[28]Mediation Act 2017 (No 1 of 2017), s. 12(4)(a).

[29]Although mediation organisations may apply to be SIMI-registered service providers, this application is only meant to empower the organisations to accredit its mediators and not to subject the organisation to SIMI's review procedures. To apply for this status, the organisation is only required to provide details on their selection processes for mediators, the keeping of records of mediation sessions and measures to authenticate details of mediators and parties. There is no requirement to have a process to monitor the quality of the mediation or deal with complaints. Available at http://www.simi.org.sg/What-We-Offer/Mediation-Organisations/SIMI-Registered-Service-Provider (accessed 14 April 2020).

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with the litigation process and be trusted as a way to obtain justice, it is crucial that it is subject to accountability measures.

The need to ensure accountability is arguably more pressing for mediation organisations that are connected to the state and the courts. Disputants readily associate such providers – notably the courts – with the delivery of procedural and substantive justice. This author has thus suggested elsewhere that many ADR ethical principles, including impartiality and equal treatment, assume greater importance in the formal court system because of the users' high expectations of fairness (Quek Anderson, 2018, pp. 25–28). Welsh has also very persuasively argued that procedural justice can and should characterise *all* dispute-resolution processes offered by the courts, including court-connected mediation programmes. The procedural justice offered by the courts has the potential to extend beyond the public sphere, encouraging greater procedural justice in private consensual processes (Welsh, 2012, p. 885). She thus urged courts to establish mechanisms to monitor mediation and provide parties with opportunities to provide post-mediation feedback (Welsh, 2016, p. 990; 2017, p. 731).

Going beyond structural measures, it is vital to gain greater clarity about how the ethical rules are to be interpreted in a variety of situations. Mediation organisations that lack understanding of how the rules are applied are hardly in a position to enforce them and encourage compliance by their mediators. The preceding section discussed the ambivalence of self-determination in ethical mediation practice. Questions abound as to when a mediation style that is ostensibly suited to an Asian context has undermined the parties' voluntariness, how a mediator can accurately discern the parties' cultural preferences and how to seek the parties' consent before the mediator adopts a more evaluative or directive approach. These are difficult but necessary questions to consider in order to ensure that the responsibility to ensure access to justice in mediation is properly discharged.

More importantly, mediation organisations have to proactively place priority on the ethical practice of mediation. In this regard, local commentator Low (2011, pp. 24–30) highlighted the crucial importance of clarifying the endgoal of mediation, strengthening the understanding of mediation ethics and strengthening the implementation and enforcement of the relevant codes of ethics. This will mean going beyond giving perfunctory approval of ethical codes and will instead entail taking active measures to ensure consistent alignment with these principles. Measures of mediation success should therefore include not only settlement rates, but also the monitoring of users' feedback. Mediators should be continually assessed and trained according to these ethical standards (Low, 2011, p. 30). Complaints received should be properly reviewed and accounted for. Hence, the link between mediation and access to justice places great onus on mediators, mediation providers and public institutions to be accountable for fair processes.

6.2 Who bears responsibility for substantive fairness in mediation?

It is conventionally thought that the substantive outcome in mediation is determined by the parties. Justice in mediation has thus been described as coming from below, and not above, from the mediator (Hyman and Love, 2003). The conceptualisation of mediation as a largely consensual process effectively implies that the disputants themselves should take responsibility for the final outcome and not the mediator, who is merely facilitating their negotiations. It is probably for this reason that mediation standards commonly caution the mediator from giving advice, suggestions or evaluations. Such input by the mediator invariably influences the content of the mediated outcome. Private mediators are also careful not to incur any potential legal liability based on giving inaccurate input.

6.2.1 Should the mediator share responsibility with the parties for the outcome?

The competing influences within Singapore between the mediator's directive role and a more facilitative role have a significant impact on the above conventional thinking in the practice of mediation. The comments of former CJ Chan reflect the tension between these emphases. He described the judge-mediator in court-connected mediation as helping to facilitate settlement by helping the parties to appreciate how their interests will be advanced through a settlement. On the other hand, he also stated

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that 'the parties obtain the best legal advice that litigants in an adversarial system of dispute resolution can get, viz., that of a judge who has experience in assessing evidence and determining liability'.[30] There are considerable difficulties in envisaging a mediator who is both facilitator and adviser. A mediator who chooses to give input on solutions or give advice is at risk of sharing responsibility for the substantive fairness of the mediated outcome. If he or she did not adequately check that the parties agreed with the input and did not prefer a different solution than what was suggested, the mediator may be effectively imposing his or her view of a fair outcome on the parties. The diminished ownership of the parties over the substantive outcome may then affect the durability and legitimacy of the settlement.

This danger is best illustrated in a public misunderstanding of a community mediation in 2011. It began with a report giving examples of cases that were successfully mediated by the Community Mediation Centre. One case was described as involving a Chinese family that could not tolerate the smell of curry that their Indian neighbours would often cook. The report described it this way:

> 'They said: "Can you please do something? Can you don't cook curry? Can you don't eat curry?," said Madam Marcellina Giam, a Community Mediation Centre mediator. But the Indian family stood firm. In the end, Mdm Giam got the Indian family to agree to cook curry only when the Chinese family was not home. In return, they wanted their Chinese neighbours to at least give their dish a try.' (Quek, 2011, p. 18)

This report precipitated a widespread debate as to the fairness of the mediated outcome. Many questioned whether the result was fair to the Indian family. Others attributed the outcome to the mediator's decision and questioned the wisdom of the mediator. This led to the clarification by the Ministry of Law that the solution was proposed by one party and accepted by the other, and that the mediator did not propose it or impose it on them. Subsequent reports reiterated that mediators would steer clear of imposing a particular solution on the parties and passing any form of judgment.[31] Although this misunderstanding stemmed from the wrong understanding of mediation that perceived the mediator as making a decision, it illustrates the grave danger of the practice of the mediator giving input. Any doubts about the fairness of the outcome will be easily attributed to the mediator's intervention, instead of the parties' views about what was fair. In the event that the parties do not fully concur with the outcome, they may readily ascribe blame to the mediator. Accordingly, a lack of clarity about the mediator's proper role may result in the mediator inappropriately sharing the responsibility with the parties for the substantive outcome, resulting in the parties' lack of ownership of the mediated outcome and a potentially less durable settlement.

6.2.2 Should the mediator exercise oversight over the content of the mediated settlement?

On the other hand, this incident also raises the issue about whether the mediator should intervene if the parties arrived at a questionable solution that infringes public norms. This incident raised a public uproar because some criticised the solution as being culturally intolerant and unduly restrictive of the Indian neighbours' freedom to practise their culture within a multiracial society. The public debate culminated in a campaign to have a 'cook and share a pot of curry' day, to encourage Singaporeans to 'celebrate curries as part of our way of life and share the celebration to those who are new to our shores' (Lim, 2011, p. 4). The emotive response from the Singapore society to the curry incident probably reflects the widespread misgivings about the fairness of the mediated outcome. If both families had indeed voluntarily arrived at this solution, should the mediator have intervened and questioned the wisdom of their views?

The issue of ensuring the fairness of the mediated outcome has been subject to long-standing debates within the global mediation community. It is therefore not surprising that this issue has also not been fully resolved within the Singapore mediation field. The early mediation movement,

[30] *Jonathan Lock v. Jessline Goh* [2008] 2 SLR(R) 455, at [28]–[29].

[31] See Lim (2011); The Straits Times (2011).

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being strongly premised on the concept of self-determination, emphasised that party acceptability of outcomes was the defining feature of justice and independent standards to assess the fairness of an outcome were not needed (Stulberg, 2005). Because the disputants are free to use whatever standards they wish, justice in mediation is defined by the parties (Hyman and Love, 2003). It has thus been argued earlier that an advisory and evaluative approach readily leads to the mediator unduly influencing the mediated outcome and imposing his or her standards on the parties.

Nevertheless, there is growing consensus within mediation codes and legislation that the mediated outcome cannot breach overarching societal norms. The SIMI Code obliges the mediator to withdraw from the mediation if the mediation has assumed 'an unconscionable or illegal character' or is likely to result in a settlement 'against public policy or of an illegal nature' (para. 5.9). Singapore's Mediation Act allows a mediated settlement agreement to be recorded as a court order, except when the agreement contravenes public policy in Singapore; is not capable of being enforced as an order of court; or is not in the best interest of a child.[32] These are clear endorsements of mediation taking place within the constraints of public norms. The Australian Standards allude to similar limits by imposing the duty to terminate when a participant is misusing the mediation, not engaging in the mediation in good faith or the participant's safety is at risk.[33] There are also specific mediation schemes that oblige the mediator to ensure compliance with certain standards. In this respect, Astor (2007) referred to mediators practising in statutory mediation programmes (such as discrimination mediation), who have to explain to the parties what the law is and ensure that the settlement complies with the relevant legislation. She rightly concluded that '[t]he control of the parties over what happens in mediation is not, and never has been, absolute' (Astor, 2007, p. 234).

Waldman and Akin Ojelabi (2016) have thus suggested that the mediator exercises oversight over the substantive fairness of the outcome by being a consciousness-raiser and a safety net. This approach is not tantamount to adopting an evaluative style that readily imposes the mediator's views on the parties. It merely acknowledges the reality that a consensual outcome in many institutionalised mediation programmes has to be subject to overarching public norms. A mediator who disavows responsibility for such oversight will be effectively relinquishing the duty under many an ethical code to monitor whether the agreement breaches well-established public policies. The close association of mediation with a vision of self-determination has, unfortunately, resulted in little discussion of the degree of responsibility held by the mediator in ensuring a fair outcome. It is undisputed that the parties bear the bulk of the responsibility for their agreed outcome. However, it is also inaccurate to assert that the mediator bears completely no responsibility. The discussion should instead focus on how the mediator can appropriately exercise oversight for a fair outcome, while respecting the autonomy of the parties.

This author suggests that public norms are particularly prominent in mediation programmes that are closely connected to state institutions and involve legal principles. These include mediation that is done to handle harassment claims, mediation of employment disputes lodged with the Singapore Ministry of Manpower, community mediations handled by the community mediation centres set up by the Ministry of Law and family conflicts. The state-related organisations that have set up these mediation schemes are obliged to ensure that the mediated outcomes do not infringe legal and other communal norms upheld by the organisations. The parties will therefore expect that the mediators or the relevant organisation exercise oversight of the substantive outcome. Without doubt, the mediators in such programmes should have a clear understanding of the applicable norms limiting the parties' exercise of self-determination and should terminate the mediations when such norms are in danger of being violated.

Beyond using the drastic option of terminating the mediation, it is also arguable that the mediator should educate the parties on these norms where they are unaware of them. After all, such practices are

[32]Mediation Act 2017 (No 1 of 2017), s. 12.

[33]Australia National Mediation Accreditation Approval Standards, para. 5.1. Available at https://www.ama.asn.au/wp-content/uploads/2012/04/AMA-Revised-NMAS-1-July-2015.pdf (accessed 30 March 2019).

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in reality taking place in mediation practice. Waldman wrote about the norm-educating model used commonly in divorce mediations, wrongful termination and other court-referred cases mediated 'in the thick shadow of the law'. She contends that the consideration of social norms in this model helps 'enhance autonomy by enabling parties to make the most informed decisions possible' (Waldman, 1997, p. 731–733). Barlow *et al.* (2017), in a study in the UK, found that family mediators not only referred the parties to external legal advice, but also offered information to the parties. Many of them distinguished between advice and information, reasoning that it was within ethical limits to flag out to the parties the legal parameters limiting their negotiations. The acknowledgement of the role of the mediator as norm educator in relation to critical norms encapsulated in codes and legislation will be invaluable in advancing substantive fairness in mediation (Quek Anderson, 2017). This has yet to be done for many statutory mediation programmes in Singapore. There is thus great potential to articulate within the relevant standards the role of the mediator in norm education, and to train mediators to understand how norm education can be done sensitively.

6.2.3 Should the mediator manage power imbalances?

Apart from educating the parties on applicable norms, the mediator also exercises substantial influence on the outcome by managing imbalances of power. Mediation's promise of arriving at a mutually acceptable outcome is premised on the fundamental assumption that all the disputants are able to exercise self-determination. However, there are often power asymmetries that severely undermine the quality of self-determination and consequently prejudice the fairness of the final outcome. Much of the trenchant criticism of mediation has been directed at the abuses that take place because of the lack of genuine autonomy. For instance, Delgado *et al.* (2007) cautioned that informal dispute resolution tends to increase prejudice towards vulnerable disputants such as minorities because there are few rules to constrain conduct and there is a lack of emphasis on public values. They thus contend that mediation should only be used for parties of comparable power and status to confront each other. These realities have led to widespread acknowledgement that the mediation process is not appropriate for all disputes.[34] It is also increasingly acknowledged amongst mediation practitioners that they are obliged to deal with power differentials and cannot feign mediator neutrality (Astor, 2007, p. 236). Again, more can be done in Singapore mediation programmes to acknowledge the responsibility of mediators to manage power asymmetries, discern when severe power imbalances make mediation unsuitable and to train mediators in various strategies to manage these disparities.

6.2.4 Exercising the mediator's responsibility to ensure substantive fairness: how it works in practice

How will the principles of norm education and balancing of power imbalances apply to the community dispute described above?[35] The details of what transpired in the mediation are unavailable; we only know that the solution was proposed by one party and accepted by the other. Suppose that the mediator had doubts about whether this proposal potentially violated certain policies that were upheld by the Community Mediation Centre such as cultural tolerance. Recognising that the parties need to take ownership of the mediated outcome, the mediator could have separate conversations with each family about whether they were genuinely willing to accept the solution or had misgivings about it. There could well have been an imbalance of bargaining power, such that the family proposing the concession of cooking curry when the neighbour was out was feeling unduly pressurised by the other family. A private session with this family would be useful in encouraging them to share with the mediator whether they were comfortable with this proposal or preferred to explore other solutions. It is also entirely possible that the family may have no misgivings with the proposal or feelings of being pressured. In either outcome, the mediator would have done his or her part to ascertain that the solution was truly consensual and did not arise from any power disparities. To ensure that the other family

[34]See e.g. NADRAC (2009), noting at r. 2.3 that some matters may not be suitable for ADR or pre-action requirements.

[35]This suggested approach is similar to that proposed by Waldman and Ojelabi (2016), except that there is greater reference to the use of private sessions to ascertain whether there is an imbalance of power as well as evening the playing field.

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considered the possible cultural implications of the solution, the mediator may also convene a private meeting with the Chinese family to discuss whether they found such a solution sustainable and whether it would cause outsiders to perceive them as being intolerant. The mediator will be effectively engaging in norm education by alluding to the values upheld by the Community Mediation Centre in a tactful way. The proposed solution could eventually be adopted, but only after all parties were made aware of the applicable norms and were arriving at a voluntary settlement.

However, suppose that the Indian family informed the mediator in a private session that they made the suggestion reluctantly and had reservations about the fairness of such an outcome. The mediator would then need to manage the imbalance of power by assuring the family that the proposal need not be made if there are serious misgivings. The parties can discuss other alternative ways to resolve the matter. In the private session with the other family, the mediator may then help them understand why their neighbours are uncomfortable with the solution and want to explore other possibilities. This strategy of amplifying the weaker party's voice will help to deal with the possible imbalance of power. It could be further complemented with a conversation about how the proposal may infringe certain well-accepted norms about cultural tolerance.

7 Conclusion

The mediation movement in Singapore in the last twenty-five years has swiftly transitioned from experimentation and expansion to professionalisation and institutionalisation. The movement has been characterised by a wide array of competing influences – a rights-based approach to administering justice as contrasted to a consensual approach; and internationalisation as opposed to indigenisation. These influences have left an indelible mark on how justice is defined through mediation. Mediation has equal standing with litigation within the formal justice system, thereby facilitating greater access to justice in the society. Furthermore, conciliatory justice is seen as a prominent aspect of mediation, due in no small part to the efforts to revive indigenous modes of dispute resolution and to develop an Asian model of mediation. The mediator under this traditional characterisation of mediation is depicted as a respected person of authority, who takes leadership of the mediation and guides the disputants. He or she may prescribe solutions or evaluate the merits of the dispute. At the same time, the push to professionalise mediation in Singapore has led to efforts to create mediation standards that are consistent with international preferences that frequently perceive the parties as exercising greater control over the mediation process.

The unresolved notions of justice within mediation have led to uncertainty in understanding the role of the mediator, particularly the mediator's responsibility for procedural and substantive fairness. This ambivalence potentially prejudices the effective professionalisation of the mediation profession because of the difficulty in interpreting and applying national mediation standards. Justice within mediation is ultimately advanced through gaining clarity of the underlying principles of mediation and how they work in practice. Any lapses in monitoring the quality of mediation will readily put the mediation movement into disrepute, thus marring the positive connection between mediation and access to justice, undoing the past decades' efforts to portray mediation as a legitimate way of attaining justice. It is therefore an opportune time in this period of professionalisation not only to spread the reach of mediation, but to deepen the understanding of how justice is and can be properly achieved through mediation.

Conflicts of Interest. None

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