PARADOX OF 'NEUTRALITY' IN MEDIATION: AN ANALYSIS UNDER HIGH POWER-DISTANCE VERSUS LOW POWER-DISTANCE CULTURAL DICHOTOMY

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ABSTRACT

The issue of defining the interventionist role of mediators in the mediation process is a highly contentious issue in the literature. Since the debate has taken place around the interventionist role of a mediator— that is often argued a breach to the concept of 'neutrality', the mediation literature reflects a semantic quandary on mediators' neutrality. However, taking a departure from the state of perplexed dichotomous position, this paper adapts a postmodernist approach of 'multiple truths' to consider the fluidity of this concept under different cultural contexts. Further, the Power Difference Index (PDI) developed by Hofstede is employed to demonstrate how cultural expectations on mediators' neutrality may vary across cultures. Under this analytical framework, it argues that the concept of 'strict neutrality under facilitative orientation' is culturally located in low power distance (Western) societies and thus may not suite in high power distance (Eastern) cultural context, as exists in Bangladesh. Hence, this paper analyses the notion of mediators' neutrality under a different philosophical frame that cuts across the limits of the dominant-traditional view of mediator's strict neutrality. To substantiate this argument, it rather adopts the emerging concept of 'expanded' neutrality to legitimize the practice of evaluative mediation that is both culturally coherent and functionally appropriate for resolving disputes in Eastern context including Bangladesh. The result of this is to unveil a space for the evaluative mediators to legitimately intervene in the process that is loath in Western mediation practices, yet culturally ingrained in Eastern context.

I.   INTRODUCTION

The debate in the mediation literature on mediators' neutrality over the facilitative-evaluative dichotomy was most certainly extensive.[1] In much of the

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1   Marks, J.B., "Evaluative Mediation – Oxymoron or Essential Tool?", (1996) *The American Law,* 1996, at p. 48A; James A., "Evaluative Versus Facilitative Mediation: A Discussion", 24 (1997), *Florida State University Law Review,* pp. 919-935, at p. 919; Bickerman, J., "Evaluating Mediator Responds", 14 (1996) *Alternatives to High Cost Litigation,* at p. 70; Golann, D., "So You Want an Evaluation", 15(2) (1997) *Alternatives to High Cost Litigation* at p.5.

literature, evaluative mediation[2] was argued to be anathema, even oxymoronic, and labelled either 'bad' mediation, or decried as simply not being mediation at all.[3] As observed by Riskin, evaluative mediators "by providing assessments, predictions, or directions, removes some of the decision-making burden from the parties and their lawyers,"[4] and in some instances are making it easier for parties to reach agreement. As evaluative mediators may advice parties to settle according to law, social norm or other standards, it may be referred to as advisory or normative mediation[5]. However, evaluative mediators never dictate to parties what outcome they should demand[6], rather always promote parties to decide on their own outcomes of a dispute. Facilitative mediation, on the other hand, was posited as the 'pure'[7] mediation or true version of the mediation process[8], with self-determination supported by mediator neutrality, upheld at its core. Mediator's engagement and interaction with the parties in facilitative mediation is aimed at upholding the parties' control over the dispute resolution process and self-determination over its outcome.

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[2] Evaluative mediation is a rights-based approach. In addition to facilitation to parties, an evaluative mediator may provide his or her advice or suggestion to parties and may help them understand their legal and social position in a dispute. See more on, Bush, R. and Folger, J., *The promise of mediation: Responding too conflict through empowerment and recognition*, San Francisco, 1994, at pp. 16-18.

[3] See in particular, Kovach, K.K. and Love, L.P., "'Evaluative' Mediation is an Oxymoron", 14 (1996) *Alternatives to High Cost Litigation,*, at p. 31. See also, Love, L.P., "The Top Ten Reasons Why Mediators Should Not Evaluate", 24 (1997) *Florida State University Law Review,* pp.937-948, at p. 937.

[4] Riskin, L.L., "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", 7(1) (1996) *Harvard Negotiation Law Review,*, at p. 44. See also, Riskin, "Mediation Quandaries" 24 (1997) *Florida State University Law Review,* at p. 1007.

[5] Boulle, L., *Mediation: principles, process, practice*, 3rd ed, Sydney, 2011, at pp. 45–6.

[6] Chowdhury, J.A., *Gender Power and Mediation: Evaluative Mediation to Challenge the power of social discourses,* Newcastle upon Tyne*, 2012, at p. 58.

[7] Kovach K.K. & Love, L.P., "Mapping Mediation: The Risks of Riskin's Grid", 3 (1998) *Harvard Negotiation Law Review,* pp.71-89, at p. 76. See also, Menkel-Meadow, C., "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices", 11 (3)(1995) *Negotiation Journal,* pp. 217-223, at p. 217. Joseph, S., "Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock", 24 (1996-1997) *Florida State University Law Review,* at p. 986.

[8] Christopher Moore defined mediation as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third-party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute". See more on Moore, C.W. *The Mediation Process: Practical Strategies for Resolving Conflict*, San Francisco, 1986, at p. 14.

Since facilitative mediation is supported by the dominant Western philosophy that the mediator is 'neutral', Stulberg, in line with many other Western scholars, concurs that the term 'mediation' "should be reserved to the facilitative orientation"[9]. On the other hand, critics of facilitative mediation opine that "there are many myths about the [facilitative] mediation process and these needs to be dispelled if parties are to access justice through mediation as an increasingly used dispute resolution process".[10] Further, facilitative mediation is argued as giving rise to a range of serious ethical dilemmas, and practise discrepancies, for mediators; mostly arising from concerns about the unrealistic expectation of mediator's neutrality. As Professor Boulle acknowledges, '[s]ome writers refer to neutrality as the most pervasive and misleading myth about mediation, arguing that it is neither a possible attainment nor a desirable one'[11]. Boulle also recognises that the concept of mediator's neutrality is multi-dimensional and has 'several shades of meaning'[12].

Likewise, Wellik, who is in line with postmodernism,[13] argued that "there is no accepted universal definition for mediation. Mediation means different things to different people."[14] And for another it is inevitable that "the needs of a heterogeneous, multicultural society will give rise to more diversity in the shape of mediation."[15] Thus, "neutrality is not an absolute in the sense of something achieved or failed, present or absent. It is complex, contextual and contingent. It has different practical meanings depending on the circumstances of the mediation"[16]. By taking the notion of postmodernism that accepts the

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[9] Joseph, S. B., "Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock", 24 (1997) *Florida State University Law Review,* at p. 985.

[10] Field, R., "Neutrality and Power: Myths and Reality", 3(1) (2000) *ADR Bulletin,* at p. 16. See also, Tillet, G., *The Myths of Mediation,* Sydney, 1991, at p.17.

[11] Boulle, L., *Mediation: Principles, Process, Practice,* Sydney, 1996, at p. 17.

[12] Boulle, L., *Mediation: Principles, Process, Practice*, 2nd ed., Sydney, 2005, at p. 30.

[13] It is a philosophy that accepts the existence of multiple truths at the same time under different culture and contexts.

[14] Wellik, S., "Ethical Standards for Mediation: Embracing Philosophical Method", 10 (1999) *Australasian Dispute Resolution Journal,* at p. 258.

[15] Lichtenstein, M., "Mediation and Feminism: Common Values and Challenges", 18(1) (2000) *Mediation Quarterly,* at p. 29; See also, Stempel, J.W., "Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role", 24 (1997) *Florida State University Law Review,* at p. 949; See more, Weckstein, D.T., "In Praise of Party Empowerment – and of Mediator Activism", 33 (1997) *Willamette Law Review,* at p. 501.

[16] Astor, H. and Chinkin, C., *Dispute Resolution in Australia***,** Sydney, 2002, at p. 153. See also, Astor, H., "Rethinking Neutrality: A Theory to Inform Practice – Part 1", 11(1) (2000) *Australasian Dispute Resolution Journal,* pp. 79-80. at p.73.