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The Mediator as a Humanising Agent: Some Critical Questions for ADR Today

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Abstract

With mediation being at the crossroads, the author of this paper makes the argument that the time may be opportune to reassess the role of the mediator in the whole dispute resolution process. While the mediator has to respect the canons of mediation, ensuring that there is always strict neutrality and impartiality and that the parties, themselves, remain in control of the dispute, this paper makes the point that a mediator is not an automaton. He is a human agent, helping people to reorient their relationships following a dispute and the commitment to making this happen, therefore, cannot be just a technical exercise. The mediator has to have an involvement in the process, but this involvement has to be delicately balanced with his role as a mediator. Thus, on a spectrum, his role comes closer to being a facilitator rather than a director but always a facilitator with a deep and abiding empathy with human issues. Divorce is a "psycho-social transition" which like all other psycho-social transitions in life, calls for a reorientation, and the necessary coping mechanisms. This paper calls for the mediator to have a "Controlled Emotional Involvement"– the capacity to be very humanly close to the clients, yet sufficiently "one removed" to be able to see "the wood for the trees". In this whole process, listening with empathy, being intellectually curious and having the humility to learn about other cultures, are important cornerstones in moving the mediator from a novice with the necessary technical skills to an artist with the appropriate intuitive insights and intelligence.

Introduction

Mediation is at an important crossroads and like human beings, who, when they reach a certain age, ask themselves certain existential questions, mediation, as well, needs to ask itself certain questions. Most importantly, one such question could be: "where to next"? Mediation, as a profession, is young – in its early 30s. Cross cultural mediation is even younger – perhaps only a decade old. Mediators – those people most responsible for the process – are, in many cases, still relatively young. So, the need to ask certain basic questions, becomes even more acute today than at any other time before.

In this short paper, my purpose is to ask the critical questions: what constitutes a mediator? And how can he/she play a more humanising role in a matter when conflict often renders the disputants into disembodied spirits, who become so irrational, that they are scarcely able to navigate the ship of their lives back to normalcy. In this process, hopefully, we will also be able to get some idea of "where to next".

For us to reappraise this whole role, we need to go back and ask ourselves the fundamental question: what is mediation all about? If it is only a binary to litigation – a brutalising

alternative – then its efficacy will be judged primarily by whether it can deliver what litigation is supposed to deliver, but at a lesser (often, monetary) cost. On the other hand, if mediation is viewed for what it is able to do for a human being, in making him become more human, then mediation and all its human components, need to be reappraised and the roles reconsidered. The mediator's Terms of Reference, therefore, are a constantly evolving phenomenon: it is a work in constant progress.

Mediation and Mediators

According to Lon Fuller (1971: 325), "*the central quality of mediation*", lies in "*its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes towards one another"*. For this to happen, "*the primary quality of the mediator… is not to propose rules to the parties and to secure their acceptance of them, but to induce the mutual trust and understanding that will enable the parties to work out their own rules"* (ibid: 326).

If the above mission statement of mediation still holds true today, then a mediator cannot be just a dispenser of rules. His role has to be somewhat more central to the whole process. And this, he has to learn to do with a great deal of intuition, tact and wisdom. For while he ponders his expanded role, a mediator needs to keep in mind the canons of his profession, which, it could be argued, though not cast in stone, need to be very carefully adhered to. This is not an easy task. It is almost like the situation of the "reasonable man" in the early English negligence cases in the law of torts, who was supposed to have so many attributes, that an English judge once cynically remarked, that the "reasonable man" is someone who has the "agility of an acrobat and the foresight of a Hebrew Prophet".

The mediator of today, like the "reasonable man" of earlier tort cases, cannot humanly be invested with such superhuman attributes. However, given the rich potential of mediation, he or she could help bring to bear on the practice of mediation some very interesting dimensions, based on personal beliefs and values – betraying a deep inter-personal sensitivity, coupled with an abiding empathy for the parties, without necessarily losing objectivity. In short, mediators need to be *with* the problem, but at the same time, to be *above* the problem.

To help them play this delicate role, we need to critically re-examine the notion of a pristine mediator, slavishly adhering to mediation's pre-defined "cast in stone" rules and ask ourselves: have we learnt enough about the profession to date, to set its goalposts firmly in concrete? Or do we have the liberty, and if I may call it, the humility, to review not only the location of the goalposts, but even their very shape? I would argue for the latter. Certain canons of mediation, as well as mediation's various techniques, may not only not work in different cross-cultural settings, but at times, they do not even work in their original settings. For example, narrative mediation (Winslade and Monk, 2001), which is now on the horizon, posits a new understanding of the history of a dispute. Often, people's stories of the past are saturated in conflict and yet, present mediation practices largely in the Anglo-American common law jurisdictions, do not allow for venting (other than for a very limited period in the first few minutes). If one had to follow the principle of John Haynes, and not allow disputants to vent about the past, but concentrate only on a future focus, how would the process of deconstructing the narratives that people actually carry with them take place? Haynes' practice direction that emotion is "unuseful dialogue" would be at serious odds with the very principle of narrative mediation which guides professionals and their clients through various

techniques to make sense of the complex social contexts that shape human conflicts, and ultimately helps to create new possibilities for change.

Domestic abuse is another such area where a mediator is supposed to do some basic screening in order to decide whether mediation is the appropriate process in a particular matter and whether it should continue or not. Domestic abuse, as we are beginning to learn, is a very complex issue and often, women in certain cultures do not even speak about it. In some cultures, particularly the South Asian culture, any reference to it tentamounts to a violation of the family honour (*Izzat*) and here, the "family" often constitutes not only the immediate members, but encompasses a whole Greek chorus – an extended group of people – sometimes numbering over a hundred members. Would the techniques of domestic screening or the time allocated to it, be the same in the mediation of a Western couple as it would be for an Eastern couple? Can a mediator, in such a case, follow a "do it yourself" manual and ask a few perfunctory questions and peremptorily come up with a decision? Would such an approach yield the necessary insights? One could legitimately ask: Would a mediator, in such a case, not have to be far more culturally sensitive and try to pick up certain nuances that are peculiar to a cross-cultural setting? Here again, is an example of where a mediator may need to be a little more proactive in order to gain greater insights. While he has to be impartial and to be seen to be so, he does not necessarily have to be neutral about injustice.

A third area which is critical is the notion of the mediator being there – not to *decide* for anybody but to help *facilitate* the process. One asks: in reality, does this really always happen? The present debate between the upholders of a pure mediation process and the constant encroachers on the process, often in the form of lawyers and other specific-discipline *gurus*, in my opinion, obfuscates the real issue which goes back to the fundamental question and that is: what is the role that a mediator can realistically play, given the expectations of disputants? Often, the mediator is confronted by the disputants with the questions; "what would *you* suggest? What would *you* say we should do or what do *you* feel is right? Or perhaps less of an imposition: What might you, yourself, *do* in a similar situation?

The mediator, then, very loyally and dexterously uses all the armaments in his/her linguistic arsenal and gently suggests things to the clients so that, in no way, is he/she seen to be violating the sacred canons of the profession, and while doing so, merrily and perhaps unwittingly moves across the mediation spectrum from a predominantly facilitative function to one being actually directive. In fact, many mediators would find it very difficult, at any point in time to clearly demarcate where exactly he or she stands on this ever-shifting spectrum.

Gulliver (1979: 214-217), one of the early pioneers on cross cultural mediation recognised this problem in the very early days of the evolution of the profession, when he said *"what a mediator can do, what he chooses to do, and what he is permitted to do by the disputing parties are all much affected by who he is in the particular context and why he is there at all. The context, the culture and the relationship of a mediator to his community, or his or her standing in it, will often determine the role he will be playing in a dispute"*.

According to Palmer and Roberts (1998:107), there is quite a strong Western stereotype of the mediator as impartial, even "neutral"; an intervener carefully distanced from the interests of either party (Gulliver, 1979: 212). Despite the USA requirement of a mediator "to conduct mediation in an impartial manner" (Standards of Conduct (1994) approved by the American

Arbitration Association and the Society of Professionals in Dispute Resolution) and the UK, Law Society's Code of Conduct for Mediators which defines the role as one of a "neutral facilitator of negotiations", such a person rarely exists without qualifications being made by the mediators themselves. Gulliver sets any claim to neutrality in its proper perspective when he says that *"the truly disinterested, impartial mediator is rather rare"* (Gulliver, 1979: 214).

Though total impartiality would be the ideal, mediation may range from minimal intervention that aspires to do no more than set in place or improve the quality of communications between the parties – passing messages between the parties; facilitating information exchange – to an active, direct intervention, encompassing the provision of specialist advice (Palmer and Roberts, 2005:155).

Gulliver surveys the range of possibilities. According to him:

"The continuum runs something like this: from virtual passivity to 'chairman', to 'enunciator', to 'prompter', to 'leader', to virtual 'arbitrator'" which terms, he says, are not "principally typological but rather useful indices along that continuum". For him, the actual roles and associated strategies can be displayed as more or less resembling, more or less near to, one or other of these indices.

Describing each of these roles and the presence of the mediator in the equation, Gulliver's description gives rise to a range of questions that surround the scope and ambition of mediatory intervention (Palmer and Roberts, 2005:219).

- Should the mediator's role be confined to improving the communication arrangements between the parties, or should a more extensive role be attempted?
- Beyond providing a structural framework for the process of negotiation, how far should the mediator seek to inform, or further to control, the outcome?
- Has the mediator responsibility for the nature and quality of the outcome? Is the outcome simply a matter for the parties; or can we see the mediator as accountable?
- If the mediator is seen as responsible for the outcome, does this extend to:

    - Handling imbalances of power in support of the weaker party?
    - Seeking to ensure the protection of third parties who may be affected by the outcome?

These questions and many more are at the very heart of the ongoing debate between the proponents of a minimalist approach to mediation, characterised in the present literature and practice of ADR as providing a "facilitative" form of mediatory intervention and a more dominant approach, leading to a more "directive" one.

A Mediator's 'Terms of Reference'

Given the evolving nature of the ADR movement, I posit in this paper a draft Terms of Reference for the mediator to help align his job description to the new realities that are emerging. These principles, like all Terms of Reference for any assignment, are basically a general framework for operation and the incumbent, himself, has to give a sharper and more definitive focus to them as the work progresses. These Terms of Reference can operate, at best, as guiding parameters to help the mediator ask himself/herself some basic questions as

he/she begins to do his/her work to both shape the process, but at the same time, also be shaped *by* the process. These terms aim towards the ideal situation but always keeping in mind that that is a horizon that can never be reached in an otherwise imperfect world. Notwithstanding this limitation, it is still something that mediators should always aspire for, if the promise of mediation is going to bring about some change in a person's life through conflict, which Marian Roberts so aptly describes as "the spark that drives the wheels for constructive change" (unpublished seminar). Elsewhere, she states that *"Conflict can signal constructive ways of bringing about change and reordering lives. At least, the potential for positive change is greater where there is anger than where there is the helplessness and hopelessness of depression"*. (Marion Roberts, 1977).

I would characterise the role of the mediator primarily as a helper who brings to the dispute an unique insight based on his/her personal beliefs and values, while at the same time remaining objective, yet interpersonally sensitive and demonstrably empathic. These, I would argue, are important attributes in cases of family disputes. According to Tony Whatling[3], "divorce can be described as a major psycho-social transition, for example, of a similar magnitude to that of starting or leaving school, starting work, getting married, or retiring, and like any psycho-social transition in life, it needs reorienting and the necessary coping mechanisms". At a time like this, the mediator cannot really take a "hands-off" approach. He has to be demonstrably empathic. Often, disputants at such times, become tremendously "mad" at what has happened in their lives but they have not become brain-dead, sufficient to justify their loss of control over things they did so well while they were still happily married. It is here where the mediator can help them take back control of their lives, of their parenting responsibilities and their need and ability to rehabilitate themselves into their communities and societies.

According to Whatling, "for years, these people have been deciding on their own as to what time is the best to put their children to bed, which schools to send them to and what nutritious food to give to them. Why should they now have to relinquish that right to someone else? Should we not help them through this trauma"? At such a stage, conflict between the disputants is at its highest and trust between the parties is at its lowest – a situation, hardly conducive to mediation taking place. Often, the unwritten (and even unspoken) fidelity bonds (e.g. – spousal, parental, financial, community, trustworthiness) exchanged within the context of a marriage have been violated by one of the parties and the other party, pinning all his/her anger and frustrations on that one violation, fails to see any good whatsoever, in the other spouse (the "left" partner may feel not so much that the marriage has "died" but that it has been "murdered"). It is here that a wise mediator, through experience and intuition, helps to bridge the gulf between high conflict and low trust to the point where there is sufficient critical mass and understanding to conduct meaningful negotiations. Mere utilisation of mediatory techniques in a ritualistic manner, alone, may not work. In fact, it could become counter-productive and in some cases, could even breed cynicism. It is here, where summarising, as a technique, can be wisely utilised to engender greater communication between the parties by ensuring that the aggrieved party is being listened to through an empathic third party neutral, summarising and reflecting what he/she is hearing, but doing it wisely, by utilising the technique of positive reframing without distorting the message.

To be an effective mediator, one must genuinely believe that all clients are capable of being (a) reasonable and (b) responsible, even though the trauma of a "psycho-social transition" has rendered them temporarily "mad" – betraying characteristics of unreasonableness and irresponsibility.

Disputants' narratives, by the time they come to mediation, as stated earlier in this paper, are often conflict-saturated. They are rooted in, and in no small part created by, their past, their present and their hopes and fears of the future. The mediator has to deconstruct some of these. He/she should be able to discern what "baggage" each side is carrying and how heavy it is. Here, again, active listening and summarising can be both therapeutic, but at the same time can also help to narrow down the issues. It is from this worldview that solutions can emerge and often, do emerge. The chances of the solutions working well will depend very much on whether the clients, themselves, can feel a sense of ownership of them.

Mediators should not pretend that they do not have emotions, values and opinions. It is better to acknowledge that emotions do exist, but to put them into one place in one's head, while, at the same time, demonstrating impartiality. This could be done by the mediator taking a break and recognising that he/she is responding to his/her internal values rather than what the clients are bringing to the table. The Code of Practice of the UK College of Mediators, reserves the right of any mediator to pull out of mediation whenever his or her own personal values are in conflict with what the couples want to do.

Across all interpersonal helping professions runs a common fundamental theme – the need for clients to experience being "listened to and understood". This emerges, more often than not, as the most crucial thing the helper can do. A leading psychologist, Stewart Sutherland (Sutherland, 1976) describes his own ten-year personal journey through severe manic depressive illness and a full range of all known treatment options that were available to him, including drugs, psychotherapy and ECT. His conclusion about what was most constantly beneficial from all this experience and professional knowledge was the same – i.e. talking and listening and being heard and understood. This was what helped him – not being judged. But this, the mediator has to do without carrying home each day each client's problem, otherwise he/she will very soon be so burdened down with other people's problems, that he/she will not be able to rise from his/her bed, let alone walk to the office. It is clear that if the mediator becomes totally immersed in the conflict-ridden world and perspectives of the client, he/she will be no better able "to see the wood for the trees". He/she will be as disabled as the client who, after all, has come to him/her for help with a temporary disability. Empathy thus means the capacity to walk in the shoes of the other, not to *"be*" the other.

In the 1950s, a Jesuit priest, Father Felix Biestek (1957) described "Controlled Emotional Involvement" as …*"the caseworker's sensitivity to the clients' feelings, an understanding of their meaning and a purposeful, appropriate response to the clients' feelings"*, in other words, the capacity to be very humanly close to clients, yet sufficiently "one removed" to be able to "see the wood for the trees". This "Controlled Emotional Involvement" calls for an enlightened input but at the same time, also calls for ensuring that one does not bring one's stereotypical values from one's previous jobs or other callings where one is required to make decisions for others, into the mediatory process, e.g. child protection workers, domestic abuse workers and family court welfare officers. In mediation, a third party mediator is *not* required to make decisions. Mediators should respect the canons of mediation and not make decisions. In the same way, lawyers, when asked to mediate, should mediate and not give advice, unless specifically called upon qua lawyers to give advice on a matter of law in which case, they will be acting as lawyers and not mediators. This is something, social sciences workers are generally better able to do, mainly by being Socratic and asking the right questions, such as: how do you think that the arrangements you are planning to make will affect the children? Or, how will you know if the children are unhappy once you start trying to implement these arrangements?

Mediators should thus conduct themselves in the true spirit of what is known as "private ordering", i.e. empowering the couple to make whatever arrangements they feel is best for themselves. Mediators have to get some insights of the past, not in the way of being therapists but to help the couple reorient themselves to the present and the future. As Kierkegaard so aptly put it, *"Life can only be understood backwards – it has to be lived forwards"*. Mediators must be, and be seen to be, demonstrably "impartial as to the issues and outcomes" – since there will always be at least two parties in the process and any proposed solutions the mediator proffers are likely to be viewed as partial to one party over the other, or at least be favoured more by one than the other. This is the situation within most Western Individualist cultures today.

With regard to the mediator playing a more empathic role without getting embroiled in the whole dispute, he/she can play an important role in both transformative and narrative mediation. In the former, as a principle, one can either look at a divorce as a crisis or as an opportunity for development and change. Here, the mediator can help the disputants to view conflict more constructively through recognition and empowerment (Bush and Folger, 1994), the twin vectors for this process to take place. Also, transformative mediation reminds us that we have to move back to the original principles of facilitative mediation. Bush and Folger's seminal work on this subject can help mediators, who have moved closer to the directive end of the spectrum, to get back to the facilitative end. Crisis can thus be seen as an opportunity for change – for people to rewrite the scripts of their life – an opportunity to *transform* their lives, their careers, their relationships and, in fact, their entire destiny – with a view to reformatting their lives. The present trends point towards transformative mediation, narrative mediation and therapeutic mediation as possible models for the future. Given the polyvalent nature of human conflict, mediators, of necessity, would have to draw from a wide range of disciplines and insights from across the globe to help human societies become more human – particularly at a time of increased global conflict. It is only then that mediation will fulfil its long warranted promise of unleashing its limitless remedial imagination in the service of mankind. Through greater research and more international sharing of different learnings, mediation would benefit immensely in this aspect.

As this paper has tried to show, a mediator has to understand what a couple goes through in this "psycho-social transition". Bohannan (1971), describes what he terms, 'the six stations of divorce' – emotional, legal, economic, co-parental, community and psychic. A mediator is able to make parties go through a legal divorce at the same stage, he can make them go through a financial divorce at the same time. He can also make them go through the co-parental divorce at the same time. But the emotional, the psychic and the community stages of divorce are more difficult to achieve at the same time, because this is where people will enter and progress through the trajectory at different times. All of these stages have to be gone through by the divorcing parties, themselves, individually at their own pace of time.

The one who has been planning the divorce for the last 3-4 years has already done a lot of psychic work on it – and has undergone the process of anticipatory grief. The one who has known of it for only a month, has a lot of catching up to do, in the cycle of loss and grief, i.e. to progress from "denial" through "emotional reaction" to "planning the future" and finally to "getting on with life outside the marriage" (Tony Whatling). This is where mediators can come in. Judges cannot really handle such situations. Courts cannot really handle them. Solicitors also cannot really handle them. Mediators can!

Mediators have to remember that clients invite them to open a "very small window" into their personal lives and the world. This, they need to do as human beings, by being in close proximity to them as fellow human beings and listening to them, and being empathic to them, trying to imagine what it would be like to be in their world. But at the same time, they must ensure not to become totally overwhelmed by that other person's condition, since by doing so, they, themselves, could become incapacitated like the clients they are trying to help. This invitation, to open a "very small window", is a very modest moment in the lives of the disputants. It does not give the mediator a license to make that entry into a "patio door".
A final point on cross-cultural insights which the writer has gained through a series of 15 international training programmes mounted in Asia, Africa, Europe and North America, is that certain cultures, by their very nature, espouse a more arbitration-like approach to the resolution of their conflicts. Disputes, in many societies, are not completely a private affair. Everyone is involved in ensuring that harmony is restored and the old adage is borne out eloquently in such situations. "You are either a part of the solution or part of the problem" (Eldridge Cleaver, 1968). Bringing in all the stakeholders thus goes a long way in actually resolving the dispute.

Mediation Today

Mediation, as I have tried to show in this paper, has a long way to go. Today, there are major financial cutbacks in many countries that have led to less than satisfactory practice and training programmes. Research is also suffering greatly. In a recent survey in the UK on whether mediation was really working for people, some, dissatisfied respondents complained that they did not feel listened to, that they were not heard or understood by the mediator and that the mediator was telling them what to do rather than helping them reach their own solutions.

Mediation, thus, stands at an important juncture today. For those of us who believe in it, the time may be propitious to stand up for its future and be counted. There are massive financial cutbacks that we are witnessing in the present time. There is a predilection for a more directive approach, because such an approach is quicker and therefore, cheaper. But cheaper justice is not necessarily better justice. Notwithstanding these constraints, for those of us who genuinely believe in its value, we need to follow mediation with a passionate zeal and to bring our collective wisdom and knowledge to bear on the movement and its evolution. But this, we need to do with a strong commitment, with wisdom, and a sincere assiduity of purpose.
To quote Oliver Cromwell: "Know what you stand for and love what you know".

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