Mediation: The Great Equalizer? A Critical Theory Analysis

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Introduction

In the past two decades, mediation has become an increasingly common form of dispute resolution. (1) In part, this is due to the growing use of mandatory mediation programs. As with other forms of dispute resolution, mediation has been extolled for the numerous advantages that it offers over the formal litigation process. These advantages include increased privacy, greater flexibility, reduced costs, improved access and the emphasis on compromise. One of the most celebrated advantages of mediation is its creation of an extremely accessible forum for minority and other disenfranchised groups to pursue their complaints. Specifically, the reduced cost and the decreased formality of mediation are seen as factors that are likely to encourage minority groups and others who may have been hesitant to take their complaints to court, to now bring their grievances forward. It is hoped that mediation would become a means through which to rectify some of the injustices that minority groups experience in the judicial system.

However, critics are now suggesting that contrary to this belief, mediation may actually undermine the ability of minority and disadvantaged groups to obtain a fair and just hearing. (2) As mediation is often aimed at serving groups whose members are particularly vulnerable to prejudice, these critics suggest that society proceed extremely cautiously when channeling disputes towards mediation. (3) This paper will evaluate the validity of these criticisms and explore the merits of the measures suggested to address them. To begin, the two primary theories criticizing the impact of the mediation process on minority groups will be discussed. The first, is the psychological theory of prejudice. It suggests that mediation creates an environment that is highly conducive to the exploitation of racial prejudices and power imbalances. The second is the pro rights theory which believes, that mediation weakens the ability of minority groups to instigate social change. The validity of these criticisms will then be reviewed. Next, a series of recommendations that are designed to address the alleged flaws in mediation will be explored. Finally, a model whose purpose it is to maintain the ideal of mediation as a just forum for minority and other disenfranchised groups will be proposed.

Criticizing Mediation: The Psychological Perspective

The psychological criticism of mediation is based primarily on the works of Richard Delgado. (4) The origins of Delgados' theory are found in the psychological literature regarding the origins of prejudice. Delgado emphasizes that in the short term, the selection of a particular model of dispute resolution can do little to counter the deep-rooted prejudices that stem from either historical currents or an authoritarian personality. (5) However, Delgado argues that forms of prejudice that result from social psychological factors are relatively controllable. (6) This position is the result of research which indicates, that to large degree both racism and prejudice are the result of a persons' environment. Specifically, people are more likely to either express or act on racist beliefs if they are in a setting that either encourages or tolerates it. Therefore, certain environments or settings are more conducive to the expression of racial intolerance.

According to the social psychologists Delgado cites, once a person realizes that their attitude or behavior deviates from what it expected from the environment that they are in, they will either change or suppress their beliefs. (7) The foundation of Delgado's critique of mediation is based on this research. Specifically, it is that the informal atmosphere of mediation is an ideal setting for prejudice and other intolerant views to flourish. Delgado asserts that if one of the parties involved in the mediation is from a historically disadvantaged group, then the environment of a mediation enables the other party to either act on their inherent prejudices or exploit the balance of power in their favor. This type of abuse is allegedly due to the lack of formal rules and direct personal contact that occurs in mediation.. Delgado suggests that given the human tendency to conform or adjust to a particular environment, the judicial system is therefore better suited to the restraint of prejudice. He believes that this is due to the societal norms of fairness and institutional expectations that have been incorporated into courtroom procedure. Delgado maintains that these norms create, "…a higher public conscience and a standard for expected behavior that check overt signs of prejudice." (8) The reinforcement of these norms is done in a variety of ways. For instance, the formalities of the court, the flag, the black robes and formal mannerisms all serve to remind those present that the occasion calls for higher "public values" rather than the lesser values embraced during moments of intimacy and informality. As well, the formal adjudication process avoids the unstructured, intimate interactions that social scientists have found to foster prejudice. (9) In addition, the justice system contains both external and internal constraints designed to prevent judges from exhibiting either prejudice or bias. For example, the repetitive nature of the caseload inclines judges to ignore the actual parties involved and instead perceive a case solely in terms of the legal and factual issues. As well, this doctrine of *stare decisis* is intended to produce results consistent with prior cases. Recourse for anomalous results is available through appellate review. Delgado's primary criticism of mediation is that it is rarely able to provide the atmosphere necessary to prevent inherent prejudices from emerging. In addition, he argues that mediation contains no formal rules, procedural safeguards or avenues for recourse and therefore it renders minorities and other groups entirely vulnerable to exploitation. For these reasons, Delgado suggests that it is far better for members of minority groups to seek recourse through the judicial system.

Criticizing Mediation: The Pro-Rights Approach

Advocates of the "pro-rights theory" also believe that for those conflicts involving members of a disadvantaged group, the formality, procedure and adversarial nature of courtroom litigation creates a forum that is preferable to that of mediation. As well, many "pro-rights" critics are suspicious of mediation and other forms of dispute resolution due to the timing of its rise in popularity. They allege that mediation became popular with government and court authorities just when an increasing number of minorities and other disadvantaged groups began extensively using the court system to pursue their claims. Pro-rights critics posit that mediation is an effective way to control or undermine this "rights explosion" and thereby maintain the present status quo. (10)

The essence of the pro-rights criticism is that for those who have less power in the larger society, the notion of "legal rights" is of particular importance. The informal aspect of mediation in conjunction with its emphasis on compromise only serves to undermine this need. (11) In addition, pro-rights theorists feel that mediation effectively avoids a discussion of the principles, values and power imbalances that inherently underlie a conflict. Advocates of the pro-rights approach emphasize that the informality and compromise of mediations mistakenly encourages parties to believe that consensus on social and political values exists thereby undermining the will of these groups to seek broad social change. (12) As well, pro-rights theorists argue that in the mediation process, it is the values that are most strongly reflected in society at large that will be superimposed on the parties and their conflict. Invariably, these values are those of the more politically and economically powerful party. In addition, pro-rights activists feel that historically disadvantaged groups need to be encouraged to view the attainment of their own self-interests as a legitimate endeavor. (13) The pro-rights theory considers that the courtroom provides

the better arena for minority and other disenfranchised groups to address these types of power and socio-economic imbalances.

In addition, there is a broader social aspect to the pro-rights critique. This is the belief that as disadvantaged groups lose power within the process of informal adjudication they also lose power and control in the larger society. (14) As well, the pro-rights theory views mediation as extending the direct influence of the state into a greater area of society. All institutionalized mechanisms, whether formal or informal, involve state regulation. Informal mechanisms like mediation handle both those cases that are diverted by the formal system and those that otherwise would have been resolved outside of any institutional forum. Thus, the addition of informal mechanisms such as mediation works to expand the regulatory capacity of the state, an institution viewed by pro-rights theorists as inherently racist. In addition, pro-rights theorists claim that mediation encourages disenfranchised groups to view their conflict from an individual and not group perspective. Pro-rights commentators feel that state supported mediation is simply a way to pre-empt the social change that would result if members of minority groups addressed their collective needs through the public forum of the litigation process. (15) In essence, the pro-rights theorists believe that it is only through the adversarial process that minorities and other historically disadvantaged groups will achieve social change.

Analysis: Examining the Validity of These Criticisms

In Delgado's opinion, formal litigation creates a forum that is more suitable than mediation for minority and other disenfranchised groups to resolve disputes. This is due to the alleged ability of the procedural rules of formal litigation to create an "equalizing" atmosphere in the courtroom that increases the ability of minority groups to receive a fair trial. (16) This theory contains several flaws. First, given the depth and the intractability of racial prejudice, it seems highly unlikely that any legal procedure could eradicate the impact of racial bias. This is especially true in the case of indirect or unconscious racism. All that courtroom procedures may be able to do, is to either control or mask the appearance of blatant forms of racism. Secondly, Delgado seems to have entirely ignored the thoughts of minority groups towards litigation or mediation. It is well established that the majority of minorities and other members of disenfranchised groups distrust the judicial system and with good reason. (17) It is viewed as a systemically racist institution where visible minorities have little chance of receiving a fair trial. To those belonging to a politically or socially dominant group this may seem like an extreme emotion. Given the anecdotal and empirical evidence however, it seems this is a justifiable sentiment. (18) However, minority groups that have been involved in the mediation process report an extremely high level of satisfaction. (19) In addition, Delgado's theory ignores other realities that directly discount the ability of formal litigation to provide minority groups with a forum for equality. For example, both the Canadian and American judiciary continue to greatly under represent both females and visible minorities. (20) Similarly, the number of ethnic lawyers remains far below their respective numbers in the general population. (21) As well, Delgado's assumption that the courtroom is an "equalizing" forum ignores economic realities. Specifically, that in the litigation process, those with greater financial resources will often have the advantage. Finally, formal litigation requires that the parties primarily communicate through their attorneys. This renders the courtroom yet another place in society where the authentic voices and perspectives of disenfranchised groups become silenced.

The pro-rights theory has an equal number of shortcomings. The core of the pro-rights theory is that formal litigation provides the best avenue through which minority and disenfranchised groups can pursue an agenda of social change. As well, pro-rights theorists claim that during a mediation the values and principles of the dominant culture are imposed on the parties involved. In constructing this theory, pro-rights activists seem to have disregarded that by definition a mediator is a neutral third party. A competent mediator would never impose any type of values framework on the parties. Instead, the focus should be on reaching a consensus within the parameters of each parties principles. In addition, pro-

rights theorists feel that by overemphasizing compromise, mediation prevents minority groups from being able to adequately address the social injustices or power imbalances that may be underlying the conflict. This claim ignores one of the essential duties of a mediator. This is to facilitate the parties discovery of the underlying issues that are either motivating or exacerbating the conflict and then constructively address them. Finally, pro-rights theorists are fearful that mediation will undermine the collective desire of minority groups to alter their present status in society. This concern dismisses both the will and the ability of disenfranchised groups to seek change. In addition, it discounts the work currently that being done by non-governmental organizations and other grass roots lobby movements.

Remedies

Contrary to both Delgado's and the pro-rights theory, mediation is not directly detrimental to either the status or interests of minority groups. However, a review of the suggested remedies is still important. Studies clearly indicate that minority groups continue to face high levels of discrimination in the Canadian justice system. Therefore, it is imperative that measures be taken to insure that the mediation process does not become tainted by either allegations or incidents of discrimination and racial bias. This is particularly true for those provinces currently experimenting with mandatory mediation programs.

Intervention in the Mediation Process

If during mediation racial stereotypes or some other negative cultural myths begin to emerge, intervention may be appropriate. Currently, mediators use caucus sessions as a time in which to privately address a party about some aspect of their behavior or attitude. This remedy proposes that intervention be taken one step further. Specifically, if either the mediator or one of the parties feels that racial tension or cultural misunderstandings are hindering or affecting the flow of the mediation then a mandatory "time out" would be called. When this happens, the main issue being mediated would be temporarily set aside. Instead, through the use of individual and joint sessions, the mediator would direct a discussion that centered on understanding the root of the tension between the parties. This would involve evaluating the basis, the cause, the extent and the impact of these negative racial beliefs. Thus, this type of "time out" intervention would be designed to provide a method for confronting the participants with the conflict between the ideal values of equality and prejudicial attitudes. Ideally, the time spent on this intervention would resolve the negative cultural myths while providing both parties with a greater understanding of both each other.

However, the implementation of this remedy raises several concerns. For instance, the ability of a mediator to alter the racial beliefs of a person is likely to be severely limited. As well, this type of "quasi counseling" may undermine the neutrality of the mediator. In addition, a long "time out" to address these types of issue may have a significant impact on both the cost of the mediation and the likelihood of reaching an agreement.

Same Race Mediators or Mediation Teams

In order to prevent racial or cultural issues from arising during mediation, the most common suggestion is to assign a mediator that is the same race as the parties involved. (22) The use of same race mediators may eliminate some problems. However, it is an overly simplistic solution with negative long-term consequences. It is incorrect to assume that members of the same identity group always or even often have the same perspective. Matching parties and mediators based on the criteria of gender, race, or sexual orientation provides a false sense of security that the mediation will be free of negative cultural myths or power imbalances. In addition, it is incorrect to suggest that an effective mediator must be of the same race, culture or sex as the parties involved in the mediation. To do so, ignores the abilities of

many exceptional mediators while simultaneously undermining the goal of facilitating cross-cultural understanding. However, minority and other disenfranchised groups have consistently affirmed that it inspires greater confidence in the mediation process to have a mediator that is like them. (23) A possible compromise between these two positions would be the creation of diverse mediation teams. These would be composed of approximately two mediators, representative of each party. Ideally, a diverse mediation team would be one where the sex, race, sexuality and religion of each mediator correspond to one of the parties involved in the mediation. Diverse mediation teams signify to both parties that cross-cultural understanding and equality are issues that will be taken very seriously. There are two problems with diverse mediation teams. First, a diverse mediation team could double the expense of the mediation. Second, finding mediators that match the requirement of each party may be difficult.

Mediator Training

A frequently proposed solution is to incorporate into the mediator-training program, techniques to minimize racial prejudice and increase cross-cultural understanding. This appears to be an effective suggestion. However, if the training was improperly done, it may actually promote racial stereotypes and damage race relations in the long term. The problem is that most mediation programs define "culture" as synonymous with one facet of a person's identity such as race, ethnicity or gender. This narrow perspective diverts attention away from the search for a more accurate and constructive approach to exploring the impact of cultural diversity on mediation. (24) In addition, an individual may also belong to numerous "subcultures", each of which contributes to that individual's identity. As well, the danger of conflating "culture" with ethnicity is that it may perpetuate harmful simplistic stereotypes. A mediator should be aware of stereotypes and other negative cultural myths so that they can be quickly recognized and diffused. However, the mediator must guard against believing in, or confirming a party's belief in simplistic stereotypes. Similarly, training programs must guard against promoting an oversimplified "cook-book" approach to race relations. The focus of mediation training should instead be on techniques that enable the mediator to fully understand the goals of the parties involved in the dispute resolution. Moreover, mediator training should place a greater importance on developing the ability to recognize the subtle power plays that may be occurring during the mediation process. (25)

Limiting the Application of Mediation

Critics of mediation are united in the belief that certain disputes do not lend themselves to the mediation process. Delgado suggests that when a person of low status and power confronts a person or institution of high status and power, it will be extremely difficult to eliminate either racism or power plays from the mediation. (26) Pro-rights theorists consider mediation to pose a heightened risk of injustice when the issues being adjudicated pertain to sensitive or intimate areas. (27) In such situations, they feel that it would be advisable to employ some other form of dispute resolution. These critics feel that if mediation must be used, ideally it should be reserved for parties of comparable power and status and non-personal disputes.

Recommendations

While the accuracy and the validity of the critical theories discussed remain questionable, they serve as a warning. Measures should be enacted to insure that the integrity of the mediation process remains intact. There are three basic facets of mediation that must be preserved. First, that mediation remains a forum where minority and disenfranchised groups feel safe and have a sense of empowerment. Second, that mediators are vigilant in insuring that a fair balance of power is maintained during the mediation process. Finally, that techniques used by or taught to mediators do not either directly or indirectly promote racism or negative cultural myths. There are three recommendations that should be implemented to accomplish these goals. First, mediator training must place a greater focus on ways to

address power imbalances between parties. This includes identifying subtle power plays and understanding those situations that may be better dealt with either by another form of dispute resolution or even through the court system. The second is to have the option of a diverse mediation team. In terms of genuine cultural understanding, a diverse mediation team may be limited in what they can realistically contribute. As well, utilizing diverse mediation teams places a greater emphasis than desired on the significance of a mediators race or culture. However, the importance of having minority and disenfranchised groups feel confident in the process while sending a message of fairness and equality cannot be discounted. This is particularly true for mandatory mediation programs. Third, parties must be fully aware of their right to end the mediation process or request a new mediator at any time in the proceedings.

Conclusion

Pro-rights theorists and critics like Delgado claim that mediation does not provide minority and historically disadvantaged groups with any guarantee of a dispute resolution process that is free from bias. It is quite possible that dispute resolution enthusiasts overestimated the ability of mediation to be used as an instrument of equalization for minority and disenfranchised groups. However, mediation's ability to provide a forum where these groups feel secure in their abilities to be heard and treated as equals cannot be ignored. Given the mistrust that minorities in Canada have towards the justice system, this belief in the mediation process cannot be undervalued. With the growing number of mandatory mediation programs being implemented, it is imperative that this trust remain intact and that mediation does not begin to be viewed as simply an extension of the court.

Despite the critics assertions, it seems that mediation is a form of dispute resolution that generally provides minority groups with a high level of satisfaction regarding the outcome. (28) Even if the allegations of the critical theories discussed are dismissed, it cannot hurt to consider implementing some of the suggested remedies if only to insure that mediation does not become tainted by the same afflictions as the judicial system. Unlike the justice system, mediation is a comparatively new form of dispute resolution. It is therefore easier to address potential flaws or weaknesses now before they become entrenched. For these reasons, serious consideration of the recommendation proposed above is necessary.

In conclusion, as mediation programs become mandatory, it is crucial that both mediators and government administrators retain a perspective regarding what constitutes a successful mediation. A mediation that results in an agreement might satisfy the mediator's conception of success. However, for a mediation to be truly effective, it must accomplish the goals that flow from the participants' conception of the process. Similarly administrators must be careful that a mediator's success is not judged solely based on the number of agreements reached. To do this would likely detract from the ability of minority and disenfranchised groups to continue to extract satisfaction from the mediation process.

1. 0 Mediation is distinguished from other forms of dispute resolution in that the third party or mediator involved has no power to decide, judge or enforce. In mediation a decision or agreement must be determined or arrived at by the parties.

2. 0 For the purpose of this paper, minority groups will primarily refer to ethnic, racial or religious minorities. However, while the focus of this paper is on race, many of the principles that will be discussed are equally applicable to gender, disability or sexuality.

3. 0 Dispute resolution is often directed towards serving the poor, workers, the young, women and persons confined in total institutions. These groups have been found to contain a high proportion of

minorities. An exception to this generalization is the use of mediation by corporations as a means to settle business disputes swiftly and cheaply.

4. 0 Richard Delgado is a critical race scholar at the University of California-Berkeley. Critical race scholars approach aspects of the law by analyzing and unearthing unspoken racial assumptions and identifying and charting the impact of ostensibly neutral categories and ideas.

5. 0 In his article, Delgado states that the tense history of race relations in North America has resulted in a certain level of unconscious racism having been institutionalized. As well, psychologists have found that those with authoritarian personalities are more disposed to the exhibition of prejudice.

6. 0 R. Delgado, C. Dunn, & D. Hubbert, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) 6 Wisconsin Law Review 1391.

7. 0 In his article, Delgado cites a number of psychology texts, articles and papers. A few of these include: Fairchild & Gurin, "Traditions in the Social-Psychological Analysis of Race Relations", 21 Am. Behav. Sci. 757 (1982); H. Larsen, "Social Categorization and Attitude Change", (1980) 111 J.Soc.Psychology 213. and L. Snyder, *On the Self-Perpetuating Nature of Social Stereotypes in Cognitive Processes in Stereotyping and Inter-group Behaviour* (D. Hamilton ed. 1981) 183.

8. 0 *Supra* at note 6 at 1381.

9. 0 *Ibid at* 1379.

10. 0 For example, feminist scholars such as Catherine MacKinnnon and Anne Bottomley argue that the increasing use of mediation in the context of family law just when feminists had just begun to make progress in having the court system treat issues of women's rights as public and not private matters. Consequently, they allege that mediation is a way in which to put women's rights back in the privacy closet. Anne Bottomley, "What is happening to Family Law? A Feminist Critique of Conciliation" (1989) 8 Can. J. Fam.L 61.

11. 0 O. Abel, "The Contradiction of Informal Justice" in *The Politics of Informal Justice* (New York: NYU University Press, 1982) 267 at 295.

12. 0 E. Sparer, "Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement" (1984) 36 Stan. L. Rev. 509.

13. 0 *Supra* at 11.

14. 0 *Supra* at 11.

15. 0 A common example used by pro-rights theorist in favor of litigation as a vehicle for social change is the desegregation case of *Brown* vs. *the Board of Education* 347 U.S. 483 (1954).

16. 0 It is interesting to note that the very rules and procedures Delgado cites as protecting minority groups are many of the same ones that for over a century were routinely used to exclude both women and those of color entirely from the judicial process.

17. 0 "Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System" Edited by Eric Mills, (Kingston: Queens Printer, 1995) Chpt. Two. The report found that there is a

widespread perception among black, chinese and white Torontonians that judges do not treat people equally. For example, when comparing judges' treatment of white and black people-72% of black respondents, 51% of chinese respondents and 36% of white respondents feel that judges do not treat black people the same as white people.

18. 0 For example, in October 1990 a Mississippi judge affirmed his ruling that a white mother Tammy Brown was no longer fit to raise her own two sons because she has chosen to live with and eventually marry an African-American man. In his judgement, the trial judge states that he considered leaving the children with their mother a form of child abuse. On appeal, this decision was upheld a the Mississippi Supreme court.

19. 0 In a recent study, researchers found that 77% of minority respondents were satisfied with the mediation process versus less than 40% being satisfied with the adversarial process.

I.R. Gunning, "Diversity Issues In Mediation: Controlling Negative Cultural Myths" (1995) 55J. of Disp. Resolution182.

20. 0 *Ibid.*

21. 0 *Ibid.*

22. 0 If the mediation was a cross cultural one and one of the parties belongs to a cultural group that is politically or socially dominant, this remedy recommends that the mediator be the same ethnicity as the non-dominant party in order to prevent an imbalance of power from occurring.

23. 0 C. Savage, "Culture and Mediation: A Red Herring" (1996) 5 Am. U. J. Gender & Law 269.

24. 0 *Ibid* at 311.

25. 0 An exercise designed to provide mediators with an understanding of the power struggle that minority and disenfranchised groups face is to have the group draw random numbers. Those who draw 1's are able to make all the rules for the day. Those that draw 2's primarily obey the rules but have some recourse to change or occasionally disobey. Those who draw 3's must spend thy day simply obeying.

26. 0 Examples of ADR settings that may contain these characteristics are prison and other institutional review boards, consumer complaint panels and certain types of cases referred to an ombudsman.

27. 0 Examples of these types of dispute include: land lord tenant, interneighbor and interfamilial disputes

28. 0 *Supra* note 18.
