# Kluwer Mediation Blog

## Invidious choices: mediators as Homeric navigators

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Tuesday, July 25th, 2017

This is another blog in the spirit of earlier entries along the lines of “what would you do with XXX at your table.” The challenge will emerge in the course of reading.

Myth and metaphor, and the etymology of mediation, are amply available to convey the mediator’s task of steering between – or finding a balance between – the Scylla and Charybdis, a rock and a hard place, the devil and the deep blue sea of equally [un]appealing choices facing disputants. While the familiar idea of the pursuit of parties’ interests, and the avoidance of the shoals and whirlpools of positions, might seem straightforward, things get complicated when the dilemma appears to be a tension between the interests protected by legal rights and those embedded in cultural or religious values. The issue here is the relationship and choice between rights and cultural values; the tension when legal rights point in one direction and cultural norms in the opposite.

This blog arose from two chance moments, and in the process derailed the topic that I had planned to write about, but I can come back to that in a future blog. The first occurred in reading a review of a biography of Stuart Hall, the Jamaican-born founder of cultural studies. These are not the kind of studies of culture that underpin the IMI’s standards for intercultural mediator competence, or that concern authors and practitioners in the field of cross-border negotiation, or mediation in modern pluralist societies. Rather, this is the study of “popular culture” – the study of “experience lived, experience interpreted, experience defined.” Emerging in the 50s and 60s, owing much to British philosopher Raymond Williams (who regarded “culture” as one of the two or three most difficult words in the English language), this field of interdisciplinary study sought to recognise and elevate our everyday lived experience as worthy of interest and curiosity. It was also inherently political and critical in underpinning the post-modernist view that there are no ‘higher order’ or ‘privileged’ norms or realities that take precedence over the quotidian encounters in your everyday life and mine. [A critical view of this, of course, is that it might foster a view that a study of latest fashion trends is on a par with international politics; or that it has led to the narcissism of a world in which, as Mark Kingwell argues, “purely personal projects of comfort and success seem to push all other forms of value to one side.”]

The key point in Hall’s work for my purposes is the idea that culture is a “site of negotiation”, not in the sense we’d typically think of in this negotiation and mediation context, but rather in the sense that we’re constantly negotiating meaning, power, influence, relationships and – primarily – identity. Part of that negotiation will involve the tension and relationships between obligations,

power, rights (the formal stuff) and the shifting, shared, world of identities.

The second ‘moment’ arose in conversation with a friend who is a counsellor at a fertility clinic in another town. Given her work, she necessarily finds herself dealing with issues for families who are, or who have been, in donor programmes. The specific question which we explored was how to address the problem that arises when a child of a family – where that child is a ”donor child” – has a right to ask for the donor’s name once they reach the age of 18, or 16 in special circumstances, under the Human Assisted Reproductive Technology Act (2004). On the one side of the storm-toss’d seas are those legislated – though not necessarily absolute – rights to know one’s origins and identity. On the other are those strongly held cultural or religious norms of the family that donor kids are not to know that fact, nor be entitled to inquire, if they do hear (or even wonder) about their possible origins. At stake for these parties is a deeply cherished view of what constitutes a “family”, not to be disrupted by rethinking the status of the child or by the presence of a third “parent”.

This becomes complicated as it’s more than a matter of a debate between rights and – say – preferences or even interests. In the context of the international recognition of the rights of children, protected in international conventions, and equally the international protections of rights of indigenous peoples (as one ‘pool’ of potential parties in this conversation), there appears to be a stand-off between competing rights. On the other hand, there have been arguments that any such rights of the child do not necessarily outweigh, for example, a mother’s right not to reveal the father’s name (perhaps in the event of infidelity) [See Emily Jackson, “Donor Anonymity and Rights” (27 January 2004) *BioNews* 242].

Equally, key writers on legal pluralism and multiculturalism have sought to find a balance between the protection of ‘identity rights’ and the requirements of legal systems. Ayelet Shachar, for example, suggests that the modern state faces increasing demands for accommodation based on identity, religion and ethnicity; and the challenge is that of consistent policy and principle in determining which of these demands can and should reasonably be met (“Two critiques of multiculturalism” 23 *Cardozo Law Rev*, 253 (2001)). Nor is the state obliged to accommodate any and every cultural practice simply because is it claimed to be such.(284) To pick up on the theme raised by Hall, the values being negotiated in the modern context of democracy and diversity – or in the counselling rooms of a fertility clinic – are, on the one hand, those of respecting the rights of individuals who place value on their identity (whether it’s cultural, gender, faith), and on the other, the public values of “social peace, equality, and the rights and interests of historically vulnerable group members.” (Shachar, 293).

The reality is that we’re well beyond the “blindness to difference” arguments that might have held sway at other times: the recognition and strength of claims based on faith or identity, for example, reflect the distance we’ve travelled. And yet this still doesn’t resolve the immediate question as to which side of the channel to steer towards, whether it’s the primacy of legal rights or the legitimacy of identity-based claims. As befits the ethos of mediation, the challenge appears to be that of accommodating both the imperatives of legal protection (and public norms) and the claims of culture, in a modern context in which neither completely trumps the other. This may also reinforce the advantages of mediation in that the accommodation sought between contested legal and social norms is not necessarily one suited to the legal process.

The one caveat – which Shachar also raises – is that any accommodation of difference or decision based on that difference is still necessarily subject to considerations of justice and especially to the

defence of the interests of those who might be and remain vulnerable. In the context, too, of the wider "access to justice" discussion, the choices may appear to be a trade-off between versions of justice, whether it's in the form of state protection of generic citizenship [legal] rights or the protection of identity rights.

As Geoff Sharp noted in a recent Brick Court blog we need to know what is perceived to be at stake, in this case whether it is the child's rights under the HART Act, or the recognised identity rights of parents and families . . . and then the negotiation begins. Or, as Lord Bhikhu Parekh argues, it becomes a matter of "interrogating" the foundations of claims on all side, in a "spirit of critical self-understanding [which] opens up a vitally necessary theoretical and moral space for a critical but sympathetic dialogue with other ways of life, now seen . . . as conversational partners in a common search for a deeper understanding of the nature, potentialities and grandeur of human life." [*Rethinking Multiculturalism: Cultural Diversity and Political Theory*, (2nd ed) Basingstoke, Palgrave Macmillan, 2006, 111]

---

This entry was posted on Tuesday, July 25th, 2017 at 10:46 pm and is filed under Causes of Conflict, Cross-cultural, Decision making, Dialogue, General, Mediation and Society
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.