Kluwer Mediation Blog

Mind the Gap: Mediation and Justice

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Intellectual life is beset by ‘gap’ problems. Philosophers wrestle with the ‘mind-body problem’: the gap between material and non-material aspects of human existence. All science can be construed as an attempt to bridge the gap between what is and what we can imagine: an inductive corrective to deductive supposition. Roger Cotterrell describes law’s gap problem in these terms: “What is the relationship between law and social reality?” (Roger Cotterrell, Living Law: Studies in Legal and Social Theory. Farnham: Ashgate, 2008, p.21)

The field of conflict resolution has its own gap problem: the alleged gap between mediation and justice.
“[Mediation] does not contribute to substantive justice because [it] requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving…. The outcome of mediation, therefore, is not about *just* settlement it is *just about settlement.*” (Hazel Genn, “What is Civil Justice For? Reform, ADR, and Access to Justice.” Yale Journal of Law and the Humanities, Vol.24, Issue 1, Article 18, p.15)

The problem is usually expressed as a deficit for mediation rather than for other elements of the justice system (see, for example, Owen M Fiss, ‘Against Settlement’ 93 Yale Law Journal (1984) 1073-1090; Laura Nader ‘Disputing Without the Force of Law’ 88 Yale Law Journal (1979) 998-1021; Deborah R Hensler, ‘Suppose It Isn’t True? Challenging Mediation Ideology.’ Journal of Dispute Resolution, Vol.2, (2002) 81-99). In these persistent critiques, court judgements are presented as the gold standard against which other forms of dispute resolution are weighed: arbitration measures up reasonably well given its similarities to litigation; lawyer-negotiation, that mainstay of the justice system, is tolerated as “bargaining in the shadow of the law” (Robert H Mnookin and Robert Kornhauser, ‘Bargaining in the Shadow of the Law: the Case of Divorce’ 88 Yale Law Journal (1978-1979) 950-997); mediation, however, is portrayed as a kind of rogue process: unregulated, private, informal and, potentially, unfair.

In spite of this onslaught (and mediation advocates have been equally guilty of rhetorical flourish) there have been relatively few attempts empirically to test whether mediation delivers justice. This may be in part because of another important gap: between what exists and what is measurable (see < a href="http://www.meetup.com/Data-Science-Business-Analytics/pages/Bias_toward_measurable_information/">). Much mediation research focuses on party satisfaction or its surrogate, lawyer satisfaction, along with speed, re-litigation rates and cost. All of these are fairly easy to measure using surveys or interviews. Justice is more slippery.

How do I know that a certain settlement is "just"? How do mediation parties know that they got a fair deal? One answer, which could broadly be characterised as legal positivism, is this: because the law says so. This is akin to the problem of the naïve motorist: how do I know that my car requires a new engine or a major service? Answer: because the mechanic tells me. And just as experts on cars both diagnose and profit from that diagnosis, so experts on the law are often in a position to inform us what to expect, how far they have exceeded or failed those expectations, and how much they are going to charge us anyway. The problem with this approach is that it risks conflating what is just with what the law is or, more narrowly, what the courts would do.

Another answer, for which there is a surprising amount of support, is to link process and substance. In other words we are more likely to believe we have achieved a fair result if we believe that we have been fairly treated. This phenomenon is known as "procedural justice" (see Robert McCoun, 'Voice, Control and Belonging: The Double-Edged Sword of Procedural Fairness.' Annual Review of Law and Social Science (2005) (1) 171 – 201). It turns out that having an opportunity to put our views, to be listened to and to be treated respectfully by an authority figure all have a measurable effect on our perception of justice. It has been argued that mediation provides a fair degree of procedural justice because of its inherent reliance on party voice. While I am sympathetic to this I am more interested in re-examining mediation's supposed Achilles' Heel: its capacity to deliver substantive justice.

Some commentators have noticed that mediation has the potential to provide an alternative normative order. According to Ellen Waldman mediators and their clients share responsibility for deciding which social and legal norms should apply (Ellen Waldman 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' 48 Hastings Law Journal (1997) 703-769). At its purest it is the parties who decide which norms should apply (justice, fairness, pragmatism, friendship, family responsibility, neighbourliness, expense, morality etc, etc). Even in less pure "evaluative" forms of mediation there is still constant negotiation about which legal and social norms will govern the outcome.

While this may be worrying to those who operate within the justice system, an alternative reading is possible: that in increasingly fractious and normatively contested societies mediation could provide more, rather than less, justice. By offering parties a voice in, not only the outcome to their disputes, but the criteria by which those outcomes are evaluated, mediation makes a radical move away from contemporary conceptions of justice.

Rather than seeing mediation as poorer because it is not the court, might we not assert that ordinary citizens are perfectly capable of deducing what is just given an even-handed and fair process? It may turn out that there is no gap at all between mediation and justice: rather, it is between the normative order as laid down by the justice system and that which governs everyday life. Perhaps it's time for mediators to be loud and proud that our procedurally innovative and flexible process

offers citizens a precious opportunity to work out for themselves what is fair and just.

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This entry was posted on Monday, May 12th, 2014 at 10:22 pm and is filed under Bias, Conventional wisdom, Court Procedure and Litigation, Developing the Field, Dispute Resolution, Future of mediation, Legal Issues, Mediation Lawyering, Mediation Outcomes, Mediation Practice, Practical Challenges for Mediators, Uncategorized, Understanding mediation
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