Kluwer Mediation Blog

Why Mediators Need to Stop Apologising About Justice

Charlie Irvine (University of Strathclyde) · Thursday, February 13th, 2020

(This blog is adapted from a longer version published by Prof John Lande as part of Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement. The

Theory of Change symposium asked mediators and scholars to think big about their dreams and visions for the future, and was recently published on SSRN as an e-book.)

Mediation and Justice

Mediators have long been on the back foot about justice. Our critics mounted attacks so eloquent, so minutely argued (and such fun to read) that we simply retreated. Lists of mediation's benefits now rarely include justice, focusing instead on cost, speed, comprehensibility and humane-ness. In this blog I take a contrary position, setting out why mediators need to stop apologising about justice.

Theory of Change

I came across the Theory of Change when Prof John Lande invited me to contribute to a US "Theory of Change" symposium (see above). The idea is to start from your goals and then map back to articulate the steps required to achieve them, including basic assumptions, interventions required and indicators of success. I listed three goals close to my heart:
• Restore non-lawyers' confidence that they are capable of serious thinking about justice
• Make the case that mediation, by facilitating people's justice reasoning, provides more, not less, justice than formal adjudication
• Redefine justice beyond the expanding shadow of the law

Some History

From my UK perspective it seems that no sooner had the American justice system started to encourage mediation than critics found it wanting. A few key names provide the gist. Consumer champion Laura Nader found consensual dispute resolution wanting because it couldn't do what US courts had started to do: name, shame and punitively damage large corporations. Socio-legal scholar Richard Abel accused "informal" processes of favouring the powerful by removing the protections of formal procedure. And Yale law professor Owen Fiss set out the alleged harms of any outcome to a dispute other than formal adjudication, including privatising justice and reducing opportunities for courts to set precedents (full references below).

These 40-year-old critiques have rarely been challenged. By 1998 Robert Benjamin could mourn the loss of an early vision of "conspiracy with the parties" where the mediator could say, *"Here is what the law may be. What do you people want to do?"* (Benjamin, Mediation as a Subversive Activity) By 2020 mediators are as likely to say *"Here is what your clients want to do. But what does the law say?"* Similar critiques recently emerged in England and Wales (see the Genn, Mulcahy and Bartlet articles listed below) and even influenced my own jurisdiction of Scotland (Irvine, 2010, The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation, 14 *Edinburgh Law Review* 85). While the critics undoubtedly set up some straw men the substance of their argument remains troubling for mediation. If it doesn't deliver justice, savings of time and money count for little. People may resent expensive lawyers and baffling delays but they certainly don't want injustice.

Preconditions for Change

Theory of change suggests we “map back” from goals to the steps needed to achieve them. I propose two:

Step 1

We need a much better understanding of non-lawyers’ thinking about justice. I once wrote on this blog of a law student claiming: “Lay individuals are not capable of concluding rationally justified outcomes.” If no alternative view is ever presented, is it surprising that studying law heightens the belief that justice is too complicated for ordinary people?

We need to build on research like Tamara Relis’s ethnography of medical negligence mediation. From her we learn that what parties (plaintiffs and defendants) want from litigation and mediation is so different from what their lawyers think they want that they occupy “parallel worlds” (*Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties.* Cambridge University Press, 2009, p. 8) Others have studied consumer perspectives on matters like procedural preferences and satisfaction (see list below). However, ordinary people’s views on substantive justice are rarely sought. This is the subject of my own doctoral research, and I hope others will address the topic and enrich our understanding of the people we serve.

Step 2

Alongside empirical work we need to re-think our theories of justice, in particular distinguishing justice from legality. Law is important but it’s not all there is. If justice is defined solely in legal terms only legal experts deserve a seat at the table. Access to justice becomes access to law. Access to mediation becomes, at best, a quick and dirty alternative; at worst, a positive harm.

Life would grind to a halt if we needed judicial approval for every relationship and every agreement. A broader theory of justice would extend legitimacy to the energy expended by ordinary people on issues of fairness and justice outside the legal system (Sourdin, 2015, The Role of the Courts in the New Justice System, 7 *Yearbook on Arbitration and Mediation* 95).

Mediators need a theory of justice that accounts not only for parties’ substantive thinking – what’s the right thing to do here? – but strategies and tactics too. We’re comfortable with the idea that lawyers engage in the game of litigation. Why not lay people? Those I interviewed were open about their thinking on factors like risk, cost, presentation and, just like lawyers, legal rules.

Basic Assumptions

Next, what are my basic assumptions?
1) Non-lawyers have the capacity to reason about and to achieve justice.
2) Legal education narrows and focuses this capacity towards a particular purpose, i.e., predicting the

outcome of adjudicative processes, usually at appellate level.
3) This, in turn, has led those who operate the justice system to neglect and undervalue that wider capacity, characterising it as "subjective" (De Girolamo, 2018, Sen, Justice and the Private Realm of Dispute Resolution, 14 *International Journal of Law in Context*, 353).

Interventions

What interventions are required to achieve the goals? I see two:

1) More information about ordinary people's justice reasoning

This is a challenge to both researchers and practitioners, and further subdivides into qualitative and quantitative methods.

Qualitative approaches include interviews, observation, and document analysis. Hundreds of studies already exist but tend to focus on process issues like user satisfaction or mediator behaviour. Researchers should examine substantive justice and how outcomes were arrived at.

Quantitative approaches reach much larger populations by putting numbers on the subject of study, e.g., how just was the outcome on a scale of 1-10? One can also build on qualitative findings and present respondents with a list; e.g. which of the following factors influenced your thoughts on the outcome? – "teaching the other party a lesson," "getting some money," "realising things might not go my way in court," or "being put back in the position I was in before the dispute" (all things said in the course of my own research). The questions may lack subtlety but the larger sample can provide important insights.

2) Dialogue with policymakers and the justice system

We need to counterbalance the emphasis on cost and speed as mediation's primary benefits. Fairness and justice matter too. Indeed, our clients often plough on with ill-advised litigation if they view a proposed settlement as unjust. Once we know more about ordinary people's justice reasoning we can be bold in challenging the idea that our work is second-class. We offer a process where parties can negotiate both outcomes and the criteria for evaluating those outcomes. This could be seen as the ideal with adjudication the "alternative," a fall-back for hard cases.

Indicators

How will we know that change has occurred? Here are some suggestions:
• Mediation schemes employ measures other than settlement rates, cost savings, and speed.
• Mediation schemes express outcomes in terms of justice delivered.
• Mediation schemes (and individual mediators) contribute to the formation and development of justice norms through systemic reporting, for example, by contributing to an anonymised digest of outcomes.

• Consumers develop greater confidence in resolving their own disputes as a default, rather than when compelled or cajoled by the justice system.

Conclusion

The Theory-of-Change Symposium provoked me into asking what the world would look like if my dreams became reality. No doubt my vision of bringing lay people's reasoning inside the justice tent needs refinement, and not all will share it. But from the moment I first heard a famous mediation scholar say mediators had no interest in fairness and justice, my hackles were raised. I thought of the hundreds of people who had sat in my office wrestling with those very things. This post is dedicated to those clients and to all the mediators with the empathy and confidence to work with them as they hone fair and just resolutions to their disputes.

Additional References

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Linda Mulcahy (2013) The Collective Interest in Private Dispute Resolution, 33 *Oxford Journal of Legal Studies*, 59

US studies of mediation consumers:
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