Power Imbalance in Mediation

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In a study on pre-modern societies, S. Merry has argued that "mediated settlements between unequals are unequal." To what extent is power balance taken into consideration in the theoretical literature concerning Western mediation? How successful are actual programmes in dealing with it ? Provide examples from one of the following areas of practice: family, public policy/planning, or victim/offender mediation.

Abstract:

This paper will review literature on Western mediation to determine whether power balance is an issue that is considered in the theoretical literature on this subject. The impact of power imbalance on the mediation process will be discussed. Attention will also be given to the role of mediators and participants in wielding influence over the power dynamic in mediation.

The premise that there are "actual programmes" that seek to redress the issue of power imbalance in mediation will be examined. It will be argued that there are protocols and processes inherent in mediation programmes which promote equality and minimise power disparity between parties. This issue will be discussed with specific reference to the NSW Farm Debt Mediation and Telecommunications Industry Ombudsman schemes. Whether the features of these mediation programmes are sufficient in themselves to counter-balance inequality in power relations will be discussed.

After reviewing literature examining mediation in modern-industrialised societies it is apparent that there is a body of research that examines power balance and its impact on the mediation process. Authors examining power as an influence on the mediation process include Mayer (1987), Olekalns (1997) and Roehl and Cook (1985) whose research suggests that power-whether equally or unequally distributed will-impact on the outcome of mediated disputes. Mediation will be defined as a procedure where parties to a dispute agree for a neutral third party to become involved to assist them to resolve their dispute (Brownie, 1997).

When two parties enter mediation typically they do not sit as equals. An example of this is a large corporation facing an individual complainant during mediation. Power has been defined by Pfeffer (cited in Kabanoff and Nesbit, 1997) as the "ability of one social actor to overcome resistance in achieving a desired objective or result." (p.63). A power differential may originate from a variety of sources which include those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships (Carpenter and Kennedy,1988). For example, if the financial resources of one party exceed that of another, a potential power imbalance already exists and this may translated as an advantage in the mediation process.

Theoretical literature (e.g. Mayer, 1987; Astor, 1994) examining the issue of power imbalance has identified the mediation process, mediation procedures and mediators themselves as factors which can influence the existing power dynamic and the fairness of mediated settlements. Turner and Saunders (1995).argue that mediation is not responsible for the maldistribution of power in society, although it has the potential to institutionalise and perpetuate inequality if the mediation process favours the more powerful party. Interpersonal factors will influence the shape of mediated settlements (Mayer 1987) and individuals themselves play a role in challenging or falling victim to the power dynamics of the mediation process. This assertion is supported by research conducted by Olekalns (1997) who reported that "high power" individuals were less motivated to behave collaboratively and more likely to adopt competitive practices that result in win/lose outcomes. One possible explanation for this behaviour is provided by Mayer (1987) who argues that "power inequities... (can) lead to rigidity on the part of both the stronger and weaker parties (which can result in) a breakdown in the collaborative process... and unprincipled agreements (being) reached."(p.79). This problem is highlighted in single issue disputes where there is no ongoing relationship between the parties (Boulle, 1996). Single issue disputes tend to

mitigate against the use of collaborative and integrative bargaining because there is less flexibility for tradeoffs and linkages between issues.

Some commentators have argued that mediation is not appropriate in situations where the power balance is skewed. This is particularly the case in disputes involving violence where one party is intimidated by another. Boulle (1996) cites the example of a matrimonial dispute involving domestic violence as a case that is better addressed by the Family Court. This concern is highlighted by Astor (1994) who found that mediated agreements arising from a climate of intimidation or violence involving two unequal parties was likely to produce an agreement that was neither just nor equitable.

The lack of systematic review of mediators and settlements is of concern to some commentators. Burton (cited in Boulle, 1996) argues that mediation provides "private justice behind closed doors... encouraging the exploitation of the powerless "(p.56). Burton's underlying concern is whether mediation offers participants the same "procedural fairness" as the courts (Boulle, 1996). In contrast to judicial proceedings and judgements there is a lack of public record or scrutiny of mediated settlements which are usually confidential. For instance, section 16 of the NSW Farm Debt Mediation Act imposes a maximum penalty of 6 months imprisonment for any breach of confidentiality.

In mediation participants are not compelled to produce documents pertaining to a dispute and critical information cannot be subpoenaed. Individual testimony is not subject to testing through cross-examination on oath and there are no penalties for perjury (Boulle, 1996). One of the implications of this feature of mediation is the potential for either party to mislead the other. For instance, one party may underestimate income and assets in a divorce settlement. This is a concern for Astor (1994) who believes that women who are "traditionally disempowered or...oppressed by a particular relationship, (may) negotiate for what they think they can get, rather than what is... equitable."(p.5). Indeed, Ray (cited in Astor 1991) reported that agreements reached in mediation on family disputes were less favourable to women than those achieved in the courts.

A further concern around the fairness of mediation is that the settlement agreement at the conclusion of mediation often takes the form of a binding contract. Court proceedings may be necessary to overturn such an agreement (Boulle, 1996). If the less powerful party has been manipulated or coerced into an "unjust" agreement they

have the choice of either pursuing costly legal action to overturn the settlement or accepting the status quo.

The theoretical literature has also examined the role of the mediator in influencing the power relations between parties. Turner and Saunders (1995) have argued that mediation can be seen as a "biased game with an impartial referee." (p.13) The mediator is often referred to as a neutral third party (e.g. Brownie, 1997; Astor, 1991). However research suggests that mediators themselves have the potential to play an active role in influencing mediated settlements. Indeed, the notion of the mediator as a neutral third party has been challenged by research conducted by Davis (cited in Astor, 1991) who found mediators pressured women to make concessions, when their husbands were aggressive or refused to negotiate. Similarly, research conducted by Greatbatch and Dingwall (cited in Astor, 1991) suggests that mediators can be highly interventionist and create opportunities for some parties to discuss their preferred outcomes while ignoring others.

The dilemma of the mediator when faced with two unequal parties is whether to maintain a neutral stance and in doing so reinforce the status quo, or attempt to balance the imbalance between the parties. Mediators in a study conducted by Kressel, Butler-DeFreitas, Forlenza and Wilcox (1989) were rated as "most effective" when they departed from a "scrupulously neutral" position and engaged in a more robust style of questioning. Astor (1991) argues that mediators can insist on procedural equality and demand respectful behaviour between participants however this may not always compensate for significant power imbalances between parties.

Finally, Fisher and Ury (1996) argue that power imbalances such as those discussed previously can be overcome if individuals adopt certain types of negotiation tactics that go beyond simple positional bargaining. Their "can do" approach tends to rely on individuals maximising their power via their knowledge of negotiation and the negotiation process itself. However, Mayer (1987) argues that individuals with low self-esteem, poor persuasive skills who lack knowledge about resources or their rights are less likely to successfully negotiate their way through a mediated settlement than an informed and articulate participant. An individual's negotiating power may be improved through strategies such as those outlined by Fisher and Ury (1996); however, these may not be sufficient to counter variables such as feelings of personal disempowerment, mediator bias, inadequate screening procedures or limited financial resources.

Having now examined the sources of power imbalance within mediation, it is necessary to consider whether mediation schemes have explicitly adopted programmes to address this power imbalance or whether there are features of these programmes that implicitly address the issue of power imbalance. Two Australian examples have been chosen - one national (the Telecommunications Industry Ombudsman (TIO) scheme), the other a state-based scheme (the NSW Farm Debt Mediation scheme). The TIO scheme does not use mediation exclusively, however mediation is employed in more difficult disputes. In this regard, it is quite similar to the Australian Banking Industry Ombudsman scheme, another national industry based scheme.

In these two schemes there are unique procedures and features which have the potential to impact on the power balance of the negotiating parties. However, there do not appear to be external programmes separate to the mediation process itself, which have the explicit and stated purpose of countering imbalances in power that may arise from society itself.

The NSW Farm Debt Mediation programme was established in 1994 as a result of the Farm Debt Mediation Act, 1994. Mediation as an alternative form of dispute resolution between farmers and banks became popular against a rise of foreclosures on farms during a period of protracted drought. The administration of the scheme is funded by the NSW State Government but the cost of each mediation is shared between the parties. The object of mediation under the Farm Debt Mediation Act 1994 is to "provide for mediation of farm debts before a creditor can take possession of property or other enforcement action under a farm mortgage." (s.3)

Before the mediation scheme came into effect, banks had a considerable power advantage over farmers who wanted to mount a legal challenge against a bank following a notice of foreclosure. Banks could severely restrict the capacity of farmers to fund legal action against them by freezing their account. They could also prevent a farmer taking a second mortgage with another financier and therefore limit the farmers ability to raise funds in the case of dispute. Furthermore, any legal action taken by the bank is a tax deductible expense.

Since the introduction of the Farm Debt Mediation Act, banks in NSW can only take enforcement action after receiving a certificate from the Rural Assistance Authority (RAA), the government body which administers the scheme. The RAA will only issue a certificate if it is satisfied that the farmer was offered mediation and declined it

within 21 days of the offer or accepted mediation which did not produce an agreement within three months. A creditor is compelled to attend mediation if the farmer elects to pursue mediation after being served a notice of repossession from the creditor. However the farmer unlike the creditor is not obliged to attend mediation under the Act.

It is important to note that the Act includes a requirement for the creditor to negotiate "in good faith" (s.11c) and the mediator is obliged to report on the outcome of a mediation attempt to the RAA, which has the discretion to withhold the certificate if it is not satisfied at this point. The farmer is also required to participate in good faith, or risks losing the Act's protection. These aspects of the scheme mean that both parties have to genuinely negotiate in mediation, as neither side can simply rely on "holding their position." Many of the features of the Farm Debt Mediation scheme arguably balance some of the imbalances that existed prior to the implementation of this programme.

A farmer can further improve his/her negotiating position by obtaining good advice and making thorough preparations. The resources of a large bank may exceed those of a farmer, although the quality of legal advice, skills and aptitude of the negotiating parties all play a role in determining whether the mediated outcome tends to favour one party over another. It is interesting to note that all major banks initially opposed the introduction of the scheme on the basis that it would undermine their contractual rights contained in mortgages. Indeed, the results of the scheme suggest that farmers may be advantaged by the scheme. In the 12 months between February 1995-1996 , 556 cases were mediated under the Act, leading to an 87% success rate. In most of these cases, the farmers retained their property and continued farming (RAA, 1998).

Turner and Saunders (1995) argue that mediation for the more powerful group may be a "means to (an) end, especially if they (can) translate their political and economic superiority into advantages at the bargaining table." (p.9). Although the acceptance or rejection of a mediated agreement is voluntary, power dynamics can play a role in encouraging the less powerful party to accept a particular agreement. A farmer who rejects a mediated settlement is faced with the more expensive option of pursuing his/her case in the courts or meeting the demands of the creditor. It can be argued that power imbalance can influence the fairness of an agreement. However, the mediated agreement may represent a better outcome than a what is possible through a protracted and expensive judicial process.

There is no doubt that the "playing field" of farmer and bank was unequal before these two parties engaged in mediation. The Farm Debt Mediation Act has meant that the field is less skewed in favour of the creditor. Previously, farmers had the choice of expensive legal action or losing their property if they were unable to meet the demands of creditors. Although mediation has no guaranteed outcomes it provides the less powerful party (typically the farmer) with the opportunity for a settlement that is often preferable to the alternative.

The Telecommunications Industry Ombudsman (TIO) scheme is a national scheme that was established in 1993 with the purpose of "providing free, independent, just, informal and speedy resolution of complaints for residential and small business customers of telecommunications services." (TIO Annual Report, 1997, p.1). Initially participation in the scheme was voluntary, but since the Telecommunications Act 1997 came into force, all carriers and service providers are required to be members of the scheme.

The TIO scheme has a number of features that distinguish it from the Farm Debt Mediation scheme. Unlike the NSW scheme, it is a private scheme and the administration and associated costs (including mediation) are fully funded by industry members. The complainant makes no contribution unless the matter proceeds to court. An individual can also initiate a complaint, rather than the process having to be being triggered by the actions of another party (as is the case with the Farm Debt Mediation scheme). All complaints regarding carriers are addressed initially by TIO staff who investigate the complaint and attempt to resolve the matter. If the complaint is not resolved here, it moves to the "dispute phase" where the matter is settled by conciliation, mediation or arbitration. At arbitration the Ombudsman has the power to make a decision which is binding only on the scheme member and not the complainant. The ombudsman can make a "binding direction" on the carrier to pay an aggrieved party a maximum of $10,000. Recommendations for compensation not exceeding $50,000 can also be made, but this is not binding on the industry participant.

The majority of disputes between 1996-97 that were resolved as a result of conciliation, mediation or arbitration were resolved in favour of the disputant. Of the 22 cases that reached conciliation, 18 were settled "substantially in favour" of the complainant, three were "partially in favour," and one was "not in favour." A total of six cases reached mediation between 1996-97, four were found "substantially in favour" of the complainant, one was "partially in favour" and one was "not in

favour"(TIO Annual Report, 1997, p.25). The majority of cases were resolved before they reached the mediation phase. Research conducted in 1996 showed that users of the service (complainants) expressed a high degree of satisfaction with the standard of the TIO investigations team. (TIO Annual Report, 1997, p.20)

Statistics reported in the 1997 Annual Report suggest that the complainant, rather than the carrier is advantaged by the dispute resolution process that is offered by the TIO. The power imbalance that exists between a farmer and a bank entering the mediation process appears greater than that between a complainant and an industry respondent under the TIO scheme. Indeed, it can be argued that the features of the TIO scheme tend to favour the complainant. The TIO service is free to complainants, a judgement of up to $10,000 can be made at no cost to the individual and the service is instigated by a complainant, whose participation is voluntary. In conclusion, the power imbalance that exists between parties may not necessarily disadvantage the "weaker" party if the mediation scheme itself has certain features or protocols that effectively level a previously unlevel playing field.

In summary, the theoretical literature on mediation does recognise the impact of power imbalance between parties engaged in mediation. This paper has reviewed the sources of inequality and discussed its impact on the mediation process. As discussed earlier mediators also play an important role in steering the mediation process and can influence the power dynamic played out during mediation . The mediator can influence the power balance by encouraging respectful communication, facilitating equal talking time, and adopting an even handed approach to the parties (Astor, 1991) and may inadvertently exacerbate an existing power imbalance by imposing impartiality on an unlevel playing field (Turner and Saunders, 1995). It has been demonstrated that while there are no distinct programmes within the TIO and Farm Debt Mediation schemes which have the explicit purpose of overcoming power disparity between parties, there are features and procedures implicit within these schemes that encourage equality of power.

REFERENCE LIST

Astor, H. (1994) 'Violence and Family Mediation Policy.' Australian Journal of Family Law, 8: 3-21

Astor, H. (1992) Guidelines for Use if Mediating in Cases Involving Violence Against Women . National Committee on Violence Against Women May 1992, ACT: Australian Government Publishing Service.

Astor, H. (1991) Mediation and Violence Against Women. National Committee on Violence Against Women December 1991, ACT: CPN Publications.

Boulle, L. (1996) Mediation: Principles, Process and Practice, Sydney: Butterworth.

Brownie, J. (1997) 'Arbitrating and Mediating.' Arbitration and Mediation 1997 Seminar Papers, Sydney: LAAMS Publications.

Farm Debt Mediation Act 1994 (1994) No 4.

Farm Debt Mediation Act 1994: Agreement to Mediate (1994), 1-9.

Fisher, R and Ury, W. (1996) Getting to Yes. UK: Random House.

Introducing the Telecommunications Industry Ombudsman Scheme, (1997) Telecommunications Industry Ombudsman, 1-17.

Kabanoff, B and Nesbit 'Metamorphic Effects of Power as Reflected in Espoused Organisational Values: Implications for Corporate Governance.' Australian Psychologist , 32 (1): 62-70.

Kressel, K, Butler-DeFreitas, F, Forlenza, S and Wilcox, C. (1989) 'Research in Contested Custody Mediations: An Illustration of the Case Study Method.' Mediation Quarterly, 24: 55-70.

Kressel, K and Pruitt, D. (1989) Mediation Research. California: Jossey-Bass.

Mayer, B. (1987) 'The Dynamics of Power in Mediation and Negotiation.' Mediation Quarterly, 16: 75-85.

NSW Rural Assistance Authority Annual Report 1996-1997, (1997) NSW Rural Assistance Authority, 1-44.

Olekalns, M. (1997) 'Conflict at Work: Defining and Resolving Organisational Conflicts.' Australian Psychologist, 32 (1): 56-61.

Roehl, J and Cook, R. (1985) 'Issues in Mediation: Rhetoric and Reality Revisited.' Journal of Social Issues, 41: 161-178.

Schwerin, E. (1995) Mediation, Citizen Empowerment, and Transformational Politics.

USA: Praeger Publishers.

Telecommunications Industry Ombudsman 1997 Annual Report, (1997) Telecommunications Industry Ombudsman, 1-56.

Telecommunications Industry Ombudsman Constitution, (1997) Telecommunications Industry Ombudsman , 1-13.

Turner, B and Saunders, R. (1995) 'Mediating A Planning Scheme Amendment: A Case Study in the Co-Mediation of a Multi-Party Planning Dispute' Australian Dispute Resolution Journal, 6: 284-295.