

# Mediation — the increasing necessity of incorporating cultural values and systems of empowerment

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## Introduction

There appears to be a perceptible retreat from the adversarial system. Disputing parties seem to have reached a level of 'legal maturity' where they are no longer satisfied with a paternalistic decision thrust upon them by a judge — preferring rather to participate actively in devising solutions to their problems.

Once the judicial process has been engaged

it seems to the disputants that the dispute has been taken out of their hands. Formal procedures seem to carry the dispute along with a momentum of their own. The client comes to see his actions as dictated by the requirement of procedures. He sees the lawyers actions as representing, not the clients' own choices, but rather the features of an autonomous proceeding. The outcome of the dispute seems to have been determined, not by the clients' actions but by the autonomous operation of a system of rules, a mechanism of functional roles, or a ritual of ceremonial rules.<sup>1</sup>

From this it is clear that parties wish to retain control over their own dispute,<sup>2</sup> and need 'an informality of process which allows parties to construct their own agenda and address issues which they themselves consider important'.<sup>3</sup> However, given the current paternalistic attitude of our legal system, little allowance is made for spouses who wish to resolve their own dispute.<sup>4</sup>

Given the inadequacy of traditional responses to the manifold problems of our court systems, it is not surprising that many commentators and lawyers are turning away from litigation towards new reconciliatory approaches to dispute resolution. It is against this background that the current popularity of

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<sup>1</sup>Charles Thensted 'Litigation and less: The negotiation alternative' 1984-85 *Tulane LR* at 81.

<sup>2</sup>JG Mowatt 'Some thoughts on mediation' (1988) 105 *SALJ* at 729.

<sup>3</sup>*Ibid.*

<sup>4</sup>In as much as spouses are encouraged to resolve their disputes amicably, once they are assimilated into the legal system spouses tend to be overwhelmed by its adversarial nature thereby losing their individualism.

mediation must be seen. Furthermore, given South Africa's multi-cultural environment, the central issue in the mediation of marital disputes is the context within which the dispute arises.

During the past few years, mediation has received considerable support in South Africa.<sup>5</sup> Intriguing facets of mediation in our pluralistic society are the value systems and the system of empowerment inherent in the mediation process. What exactly is the relationship between mediation and these factors? This article will focus on the inter-cultural value systems and the system of empowerment within a dynamic mediation relationship.

### The definition and dynamic of divorce mediation

Ideally, mediation is a voluntary process by which an impartial third party assists disputing parties to resolve their dispute.<sup>6</sup> The mediator does not arbitrate or adjudicate,<sup>7</sup> it is the spouses who, through discussion have reached a stage in their dispute where they are unable to resolve their conflict effectively because they are unable to choose between their respective approaches to the problem.<sup>8</sup> This win/lose attitude creates an impasse. Therefore the context within which the behaviour takes place, and one's understanding of such behaviour, are of paramount importance. In most marital disputes the spouses have little interest in 'arriving at a synthesis of ideas' which best represents the interests of the family but rather attack each other's weaknesses and test one another's strengths.<sup>9</sup> While both parties have this attitude 'it is impossible for them to even consider the perceptual reality of the other party and begin problem solving'.<sup>10</sup> It is at this point that spouses acknowledge, either personally or through the courts, the need for guidance by a third party.<sup>11</sup> However, sight must not be lost of the fact that in mediation it is the parties themselves who are proposing, modifying, rejecting or accepting the terms of agreement. Essentially, a mediator

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<sup>5</sup>ID Schafer *The concept of family courts in South Africa* (1981) Doctoral Thesis University of Natal, Durban. See further Commission of Enquiry into the Structure and Functioning of the Courts Fifth and Final Report Part B; (part vii) (RP 78/1983) (hereinafter referred to as the Hoexter Commission Report). The Mediation in Certain Divorce Matters Act of 1987; The Short Process Courts and Mediation in 'Certain Civil Cases Act 103 of 1991; DS MacNab & JG Mowatt 'Family mediation - South Africa's awaking interest' 1987 *De Jure* 41; 'Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce' 1986 *De Jure* 313. Craig Lind 'The changing face of divorce II: Real reform?' (1989) 18 *Business Man's Law* 163.

<sup>6</sup>Wendy Faulkes 'Pursuing the best ends by the best means' (1985) 59 *Australian Law Journal* 457; Leo Kanowitz *Alternate dispute resolution: Cases and materials* (1986) 83.

<sup>7</sup>*Ibid.*

<sup>8</sup>EJ Radford and PF Glaser 'The psychology of mediation' in Pretorius (ed) *Dispute resolution* (in press).

<sup>9</sup>*Ibid.*

<sup>10</sup>Perception is an active rather than a passive process and we actively seek to make sense of the world by structuring data into manageable units. Radford & Glaser n 8.

<sup>11</sup>Radford & Glaser n 8.

facilitates bilateral communication. The mediator assists the parties — whether a labour union and an employer, or husband and wife in a marital dispute — to work things out to their mutual satisfaction.<sup>12</sup>

### Value systems

The basis of our value systems is determined by our specific cultural background and life experience. Our underlying value system which determines acceptable and unacceptable behaviour, is formed through a process of socialisation. This value base is an intrinsic part of our existence, though, more often than not, we become aware of it only when it is challenged.<sup>13</sup> Generally, acceptable behaviour is activity which fits into society's goal and interests.

The importance of socialisation and the formation of a value base is central to the mediation process because the key actors, the disputing parties and the mediator, bring with them their own set of values from their own societies.<sup>14</sup> The problem with differing value system is whose values should determine the criteria on which the evaluation is made? In South Africa with its pluralistic society, the apartheid system has meant that parties are perceived as unequal. The traditional western approach to the settlement of disputes is taken as the norm<sup>15</sup> and the socialisation process therefore tends to reflect the values of the dominant group. In mediation, difficulties could arise where a mediator who is a member of the dominant group, not only views the problem in terms of his own values, but believes these norms to be appropriate. The courts, too, which tend to be manned by persons with a common cultural background, face similar problems. Mediation, then, has the unenviable task of attempting to juggle the various heterogenous cultural systems while at the same time be seen to cater for all these interests. The interplay between these variables highlights the uneasy tension between the families on the one hand and the mediators on the other.

Problems tend to arise over the basic definition of family. One definition, supported by both Roman-Dutch law and African customary law, is that the family arises from a relationship of marriage.<sup>16</sup> Another, and I believe more correct view, is to regard the traditional family as an extended household consisting of the basic unit (the nuclear family), together with parents, grandparents, unmarried, divorced or widowed brothers and sisters and their children. In terms of their cultural background the majority of people in South Africa live in such extended families. As Nhlapo states

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<sup>12</sup>However, in industrial and labour disputes, although work is disrupted and emotions run high, personal life is not disrupted to the extent it is in the case of divorce — see Lisa Parkinson *Conciliation in separation and divorce* (1986) 131.

<sup>13</sup>Radford & Glaser n 8.

<sup>14</sup>*Ibid.*

<sup>15</sup>Traditional methods of conflict resolution are viewed with scepticism and as somewhat inferior to the established court system.

<sup>16</sup>TR Nhlapo 'The African family and women's rights: Friends or foes' 1991 *South African Law Journal* 135.

the overriding value in the African family is reflected in the non-individual nature of marriage, sometimes called the collective or communal aspect of the marriage relationship.<sup>17</sup>

When a dispute arises between spouses, the greater family has almost as great an input into its solution as do the husband and wife involved. According to Goldin and Gelfand, in their discussion on dispute resolution

... [A] [tribal] court is influenced by the need to solve the dispute so that it will as far as possible please the parties, [and] avoid conflict or ill-feelings between the members of their respective families and friends ...<sup>18</sup>

Repairing the gulf between spouses, restores equilibrium between not only the spouses, but also their entire extended family. The resolution of a dispute which seeks to maintain peace and harmony within the community is regarded as normal. A mediator with a different value base will find it difficult to work within these constraints. If the mediator were to handle the conflict with disregard to or disrespect for these values, the spouses or even the entire community could lose faith in the efficacy of the mediation process — a system without credibility is toothless. Possible differences between the husband and wife on the one hand, and the mediator on the other, may be attributed directly to an underlying difference of approach stemming from differing and diverse perceptions founded upon differing values, cultures and goals.

What makes the situation even more challenging is that irrespective of cultural background, the mediator is usually the product of an educational system reflecting the dominant class. The mediators may regard traditional values and beliefs with contempt and more importantly, as inferior to their newly acquired body of knowledge. They have little tolerance for reticent wives and no patience with hostile husbands. The couple's behaviour is viewed with embarrassment by the mediator. What compounds the problem is that, more often than not, the mediator has made the transition from a rural area to an urban environment, where lifestyles have kept pace with modern technology. The economic priorities in urban areas discourage large communal lifestyles. Emphasis is placed on the four-member unit, that is, a family comprising a mother, father and two children. Being educated in this environment results in the mediator assimilating these values into his own value system. Traditional values appear backward and self-limiting. As a result the mediator may find it difficult to reconcile the needs and demands of spouses from diverse communities with his value base. By the same token, the mediator is also open to scrutiny. The community may not readily accept him into its confidence; the new ideas he propounds may be viewed with mistrust and scepticism. In such cases the mediator has the unenviable task of bridging, not only the cultural abyss and the rural/urban gap, but more importantly the educational chasm as well.

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<sup>17</sup>Nhlapo n 16 at 137.

<sup>18</sup>B Goldin and M Gelfand *African law and custom in Rhodesia* (1975) 124.

Despite this somewhat bleak picture, a mediator raised within a community during his formative years, but schooled in different values, will show a heightened perception and understanding of where and why people are in dispute. Just such a person is needed to steer the mediation process along lines compatible with shared community values. Urbanisation has ensured changing social dynamics. The original value base has been diluted by a synthesis of new and old perceptions. For mediation to operate as a credible system, the mediator must not only appreciate such change, he must act in accordance with such appreciation. It is only then that mediation can be managed.

### Empowerment

Having discussed the perceptual context within which mediation occurs, several points need to be reconsidered. According to Haynes, the nature of the legal system removes a great deal of power from the couple. People can be empowered to negotiate one of the most important events of their lives, in a non-adversarial way outside of the legal system.<sup>19</sup> Roberts adds, 'the power to decide is taken away from outsiders and is shifted back to the parties themselves'.<sup>20</sup> This process is frequently described in terms of *empowerment*. One of the main issues is which of the parties holds greater power in the dispute relationship? Early in the planning stages of Community Justice Centres established in New South Wales, Australia<sup>21</sup> as an alternative to the traditional legal system for the settlement of inter-personal disputes, concern was expressed that strong disputants would have an unfair advantage over weaker opponents. This is one of the shortcomings of mediation in that within the mediation session both disputants are assumed to be equal. 'It is a fallacious assumption'.<sup>22</sup> In an ideal world, two people who have equal economic, psychological, legal and physical resources may work out arrangements which would be rated fair and reasonable on objective criteria. In the real world, however, partners' resources are rarely equal. In this regard we must be concerned, 'lest ADR becomes a tool for diminishing the judicial development of legal rights for the disadvantaged'.<sup>23</sup> As Professor Tony Amsterdam aptly observed

ADR may result in the reduction of possibilities for legal redress of wrongs suffered by the poor and under-privileged, in the name of increased access to justice and judicial efficiency.<sup>24</sup>

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<sup>19</sup>JM Haynes *Divorce mediation* at 11 quoted in Robert Dingwall and John Eekelaar *Divorce mediation and the legal process* (1988) at 164.

<sup>20</sup>S Roberts 'Mediation in family disputes' (1983) 46 *Modern Law Review* 537 at 540.

<sup>21</sup>Faulkes n 6 at 460. After four years of operation and over 2 000 mediation sessions, this question remains unresolved.

<sup>22</sup>Mowatt n 2 at 732.

<sup>23</sup>Harry T Edwards 'Alternative dispute resolution: Panacea or anathema?' (1985-86) 99 *Harvard Law Review* 668 at 679.

<sup>24</sup>Address by Professor Anthony G Amsterdam Judicial Conference DC Circuit (21 May 1984) quoted in Edwards n 23 at 680.

He added that

Parties to disputes do not always possess equal power and resources. Sometimes because of this in-equality and sometimes because of the deficiencies in informal process lacking procedural protection, the use of ADR will produce nothing more than inexpensive, ill-informed decisions.<sup>25</sup>

The mediation process may lend itself to a weaker disputant 'sacrificing his rights on the altar of a quick and amicable settlement'.<sup>26</sup> According to Parkinson, divorcing spouses bring extremely complex power relationships to mediation.<sup>27</sup> Therefore, if lasting agreements taking account of the needs of the spouses and the children are to be reached, mediators need some understanding of the power-play between family members. Sometimes one party holds the dominant position and the other feels powerless to negotiate a different set of norms.

Very rarely will one be presented with a case where all factors are equal. More often than not one party is in a stronger bargaining position as a result of emotional strength, financial superiority or physical power.<sup>28</sup> Mediation schemes in other countries suggest that 'with few exceptions, a mediation settlement reflects the status inequalities between the disputants'.<sup>29</sup> In the United Kingdom it is argued that mediation provides a forum in which the dominant spouse (usually the man) will continue to hold sway, unchecked by judicial authority. It is this analysis which has led to the image of mediation as a process empowering *both* parties to the conflict, coming under strong attack. A false image of equality is assumed and the real inequality between the parties is both masked and perpetuated. It is also feared that hard won gains achieved by women through the courts (for example, in maintenance matters, division of property on divorce, and domestic violence) will be undermined as men resort to these informal modes of dispute resolution.<sup>30</sup> While the feminist critique of mediation assumes that the woman is more vulnerable than the man in the negotiations, the essential criticism relates to the imbalance of power, no matter in which direction it operates. For example, as far as physical violence is concerned, it has been suggested that anyone who attempts to mediate following violence by the husband against the wife, is doing no more than maintaining the *status quo*. Consequently, if the police

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<sup>25</sup>*Ibid.*

<sup>26</sup>Mowatt n 2 at 732.

<sup>27</sup>Parkinson n 12 at 131.

<sup>28</sup>These categories of different power relationships relevant to mediation are by no means exhaustive. Lisa Parkinson has identified several inequalities in power relationships: the power to control financial resources; greater intellectual or verbal ability; emotional dominance and blackmail; greater physical power; the ability to invoke religious or moral authority; the support of influential community or family members. To these must be added threats by a spouse to alienate the children of the marriage.

<sup>29</sup>SE Merry 'The social organisation of mediation in non-industrial societies' (1982)2 *Justice System Journal* 32, quoted in Parkinson n 12 at 130.

<sup>30</sup>Gwynn Davis Partisans and mediators: *The resolution of divorce disputes* (1988) 5.

are called in to investigate a domestic incident and they do no more than caution the husband, they are in effect acting in the interests of the stronger party (the husband). The domestic circumstances will be largely unchanged once the police have left. Generally speaking, a mediator can do no more than this. Equally, it should be acknowledged that males and females have different power bases, and that the woman is not without 'recourse'; she is, for example, generally in a better position to draw on her children's allegiance in any conflict that arises. Each spouse may therefore may feel powerful in different circumstances. This in no way derogates from the fact that in many important respects men occupy a privileged position within their families — a position they enjoy as a result of the male-dominant societies to which most people belong.<sup>31</sup> Yet, in a British survey, Davis and Roberts<sup>32</sup> found that over fifty per cent of self-referrals came from men — an ambiguous message indeed — suggesting on the one hand, a strategy for maintaining power and influence against which women should guard, and on the other, the man's helplessness in a difficult position. In other words, if one accepts that mediation does not alter the *status quo* between spouses, then the husband, who could revel in his dominant position, has no need for the service. If this were indeed the case, the *need* to resort to mediation would refute the view of the man eager to retain the more powerful position in the relationship.

It is important to see these arguments in their proper context. Although society is still male-dominant, the role of women has not been static. In the work place an increasing number of women occupy important posts, while within their homes women are awaking to their improving rights and responsibilities. Women appear well able to resist certain of the cultural expectations thrust on them.<sup>33</sup> In this light, when a man is the first to broach the possibility of mediation, he ought not automatically to be viewed with suspicion and hostility, but rather be credited with wishing to salvage an amicable post-divorce relationship. These imbalances do not preclude successful mediation. As Simmel observed almost eighty years ago

mediation does not even have to be performed by means of words, a gesture, a way of listening, the mood that permeates a particular session is enough to change the difference between two individuals, the two participants in a formal mediation encounter would not have come together if it were not for the framework created by mediation.<sup>34</sup>

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<sup>31</sup>The experiences of the following client of the Bristol Courts Family Conciliation Service would appear to support these observations. She felt intimidated by her husband in the mediation proceedings, as a result attention had been switched to her, as the more vulnerable partner 'the only way anything could have been solved was for one of us to give in and he wasn't willing to, so I did... I felt picked on... if the woman got custody, then it's a case of, well he has a right to see his children and I have to be a bit reasonable'. According to Davis n 30 at 6, it could be argued that one reason why these pressures will tend to bear on women rather than on men is that our culture demands that they be less confrontational or assertive of their own interests.

<sup>32</sup>G Davis and M Roberts *Access to agreements* (1988) quoted in Davis n 30 at 6.

<sup>33</sup>Dingwall & Eekelaar n 19 at 167.

<sup>34</sup>Dingwall & Eekelaar n 19 at 165 quoting K Wolff *The sociology of George Simmel* (1950) at 166.

Dingwall adds that the spouses are there because their dyadic relationship has failed, but in joining this encounter their dispute has been modified.<sup>35</sup> Furthermore, because mediation is voluntary the process acquires a momentum of its own and in so doing encourages a settlement by instilling in the spouses a sense of urgency that propels them towards the desired result. A decided advantage is that when a certain process acquires a life of its own, petty grievances and spitefulness are circumvented because they represent another stumbling block to be overcome.

### Conclusion

Fundamental to the concept of mediation is that it 'is a dynamic open-ended process'<sup>36</sup> during which the parties are empowered by the mediator through their need to settle. For mediation to be of value, it must take into account the different cultures, personalities and value systems of both the mediator and the spouses. What must be borne in mind is that the 'parties to the dispute are operating within a complex dynamic environment where each party is changing in relation to the other'.<sup>37</sup> Mediation can take such dynamism into account only if it is realised that all the parties to the mediation, that is, the mediator, the spouses and their children are influenced by and, in turn, influence all the other components of the system. The comment by Radcliffe-Brown, on family relations, is as valid today as it was some thirty years ago

For the understanding of any aspect of the social life of [a] people — economic, political or religious [or cultural] — it is essential to have a thorough knowledge of their system of kinship and marriage.<sup>38</sup>

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<sup>35</sup>Dingwall & Eekelaar n 19 at 166.

<sup>36</sup>Radford & Glaser n 8.

<sup>37</sup>*Ibid.*

<sup>38</sup>Radcliffe-Brown in AR Radcliffe-Brown & D Forde (eds) *African systems of kinship and marriage* (1950) 1 quoted in Nhlapo n 16 at 137-8.