The disconnect between transformative mediation and social justice

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Proponents of transformative mediation claim that it holds out great promise for changing the way individuals relate to one another. However, the approach taken by the transformative mediator could be construed as amoral and/or insensitive to issues of discrimination and bias. This apparent disconnect between transformative mediation and social justice is explored through an analysis of both the premise and practice of transformative mediation. Particular social justice concerns about mediation are detailed before discussing some approaches that might address these concerns. It is suggested that the mediator needs to ensure that parties come to the mediation informed and advised, not only about the mediation process, but also about their rights. Equally, the mediator should be cognisant of the complex nature of communications and should have considered the ethical implications for their/her practice.

[Transformative] Mediation offers a potential means to integrate the concern for rights and justice and the concern for caring and connection.¹

Think of mediation as an important democratic process. At its best, it allows parties to talk directly to each other and arrive at solutions to problems that would not be possible in other fora. At its worst, it recapitulates the power inequalities of our society and achieves unfair results for parties who don’t know what happened to them or whom to blame.²

INTRODUCTION

For those who have a cursory knowledge of transformative mediation and its methods, including empowerment and recognition, transformative mediation might seem to progress social justice concerns. Proponents of transformative mediation claim that it holds out great promise for changing the way individuals relate to one another. But on a more detailed analysis, the approach taken by the transformative mediator could be construed as amoral and insensitive to issues of discrimination and bias.³

The article’s focus is an exploration of this apparent disconnect between transformative mediation and social justice.⁴ It begins with an outline of the transformative approach to mediation and its distinguishing aspects; the concept of social justice is then discussed. The extent of a disconnect between transformative mediation and social justice is explored through an analysis of both the premise and practice of transformative mediation. Particular social justice concerns about mediation are detailed before discussing some approaches that might address the concerns raised.

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⁵ The formal essay question asked: would/does the use of the transformative model pose special problems for minorities and members of other disempowered groups and are questions about this issue raised in the literature of the field; if so are there persuasive responses that can be offered to these questions, and have such responses been articulated in the literature?
The author comes to the topic having been schooled in a rights-based approach in law but recognises that there are a range of approaches to conflict including those that focus on concepts of power: rights, needs and interests. Although there is a growing body of literature addressed at transformative mediation, there is little work critiquing it and almost none looking at the issue of transformative mediation and social justice. To inform this discussion, the author drew on more generalised literature about mediation, conflict resolution and social justice.

**Transformative mediation**

[Transformative] Mediation is a process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they discuss and explore various topics and possibilities for resolution. According to transformative theory, conflict is a crisis in human interaction, and the parties need help in overcoming this crisis and restoring constructive interaction. “The mediator’s job is to help people walk across the twin bridges from weakness to strength and from self-absorption to responsiveness.” This movement to strength and responsiveness occurs when parties are empowered and recognition occurs.

Empowerment means the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life’s problems. Recognition means the evocation in individuals of acknowledgement, understanding, or empathy for the situation and the views of the other.

This view of mediation sets transformative mediation apart from other forms of mediation. Transformative mediation does not have stages, the focus is not on needs and interests, and the mediators are not concerned with achieving settlement or agreement. There are no structured opening statements from the parties and there is no agenda unless requested. Instead, the mediators enable the parties to have a conversation and are committed to “following” the parties in that conversation. Transformative mediators are implored to “stay in the moment”. Mediators facilitate “shifts” in the parties by reflecting and summarising what the parties say and “checking in”. The parties control what happens in the mediation.

The proponents of transformative mediation distinguish it from other forms of mediation by articulating the underlying values of the approach. Transformative mediation is said to be rooted in communications theory and a relational view of the world which holds that “human beings naturally have strength and compassion, they desire to be neither victim nor victimizer, they have capacities for choice and decision-making, and they constantly harbour a desire for connection with others”. The practice of transformative mediation derives from its purpose, which is to assist the parties to change the quality of their conflict interaction from negative and destructive to positive and constructive.

**Social justice**

Social justice is what faces you when you get up in the morning-it is awakening in a house with an adequate water supply, cooking facilities and sanitation. It is the ability to nourish your children and send them to a school where their education not only equips them for employment but reinforces their...
knowledge of and appreciation of their cultural inheritance. It is the prospect of genuine employment and good health: a life of choices and opportunity, free from discrimination.\textsuperscript{12}

Social justice is a “contested concept”. It means different things to different people and depends greatly on an individual’s political, ideological and philosophical approach.\textsuperscript{13} As a concept, social justice has its roots in centuries of philosophical and political thought. In particular, it owes much to the development of ”liberalism”.\textsuperscript{14} Put at its simplest it is a concept of every one gets a “fair deal”; that certain primary goods and services are provided as a right to all citizens and equally to all citizens. This involves ensuring that everyone has an income, somewhere to live and access to proper health care. These are sometimes described as “social rights”. It also includes enjoying basic human rights like the right to liberty, free speech and freedom of movement.\textsuperscript{15}

Adherents to social justice also realise that simply ensuring these basic entitlements is not sufficient and that there must also be an attempt to minimise the effect of inequality in our society which is generated by our social and economic institutions. This includes protecting the rights of individuals and guaranteeing equality of opportunity with respect to access to education, accommodation, work, occupations and various kinds of community and social services. This aspect of social justice is based on the concept of social freedom and non-discrimination of minority or special groups. Additionally, some believe that to implement social justice and minimise inequality requires a redistribution of income.\textsuperscript{16}

A broad definition of social justice might be the provision of resources and conditions to participate fully in all aspects of social and economic life as an autonomous, creative and social individual. Many argue that access to justice including both formal and informal legal processes and fora are an important aspect of achieving social justice. Equality before the law is a fundamental concept in the justice system and to the ideology of liberalism. Substantive equality before the law is said to imply that the institutions that define and uphold the law are not biased, either overtly or in more subtle ways against particular groups in the community.

In Australia, during the last three decades, a number of inquiries have looked at this issue of inequality before the law and access to justice.\textsuperscript{17} The various reports provide significant evidence that there are systemic barriers to equality before the law based on a range of factors including gender and race. The 1994 \textit{Access to Justice} report found that “the law has been more than inaccessible and unfair to some groups, but has been an active agent of oppression and discrimination”.\textsuperscript{18} This same report identified certain groups as requiring special attention to achieve equality before the law. They were Aboriginals and Torres Strait Islander peoples; women; people from non-English speaking backgrounds; the poor; and the disabled.\textsuperscript{19}

\begin{thebibliography}{10}
\bibitem{18} Access to Justice Advisory Committee, n 17 at [2.4].
\bibitem{19} For a summary of research and reports detailing discrimination within the justice system, see Access to Justice Advisory Committee, n 17, Ch 2.
\end{thebibliography}
TRANSFORMATIVE MEDIATION AND SOCIAL JUSTICE

The premise of transformative mediation

In the last three decades, alternative forms of dispute resolution have developed as one response to access to justice concerns. In Bush and Folger’s introductory chapter, they describe the “mediation field”. They attempt to set out clearly the difference between other mediation approaches and transformative mediation. The different mediation stories they describe are the Satisfaction Story, the Social Justice Story, the Oppression Story and the Transformative Story.

In relation to the Social Justice and Oppression Stories, they comment:

Both the Social Justice and Oppression Stores are driven by [a] premise: the most important concern is promoting equality between individuals or, conversely, reducing inequality. This premise is … concerned with meeting needs and avoiding suffering: but the emphasis here is that needs should not be met, nor suffering alleviated, unequally, and especially that structures that permit such inequality should be altered.

Bush and Folger go on to describe the “unique promise of [transformative] mediation lies in its capacity to transform the quality of conflict interaction itself, so that conflicts can actually strengthen the parties themselves and the society they are part of”. They submit the most important benefit of transformative mediation is the transformation of the parties’ conflict itself from a negative and destructive interaction to a positive and constructive one. They suggest that transformation has both private and public benefits.

The public benefits of transformative mediation are the “personal experiences that reinforce the civic virtues of self-determination and mutual consideration”: Going through mediation is:

for both parties a direct education and growth experience, as to self-determination on the one hand and consideration for others on the other … simply put, it is the value of providing a moral and political education for citizens, in responsibility for themselves and respect for others.

It is argued that the transformative framework has potential even where the parties do not have an ongoing relationship. This is described as the “upstream impact of the mediation process” and relates to the impact the session has on “how people respond to conflict with others as a result of experiencing productive transformation of any conflict.” The suggestion is that insights from the transformative experience can influence how parties deal with conflict situations in the future.

Similarly, the underlying ideology of transformative mediation is that conflict interaction itself is “an essentially positive phenomenon”. The process of conflict:

if patiently supported rather than tightly controlled … will likely lead not to escalation or impasse, but to greater calm and better communication; it will lead not to injustice or oppression, but to party decisions that consider and respond to each other’s needs based on genuine choice and understanding … it will produce outcomes that are just and reasonable in the parties’ own eyes and therefore bring real satisfaction and closure, and stand up over time.

The flaw in this position is that it assumes parties have capacity, are informed, can communicate with each other and have the requisite knowledge to make just and reasonable agreements. Parties who make these agreements may not be satisfied in the long run if the agreements are unjust and unreasonable within a broader context.

20 Bottomley and Bronitt, n 14, pp 96-102.
22 Bush and Folger, n 1, p 20.
23 Bush and Folger, n 1, p 13.
24 Bush and Folger, n 1, p 21.
25 Bush and Folger, n 1, p 82.
27 Bush and Folger, n 1, p 221.
28 Bush and Folger, n 1, p 250.
The claim to long-term public benefits is as yet unsubstantiated. As Rubenstien and Bleechman comment:

With few exceptions, conflict resolvers of various types tend to combine strong, well-defined process commitments with optimistic but vague visions of the Better Society that these processes are alleged to nurture or produce. The general tendency has been to assume that "good means make good ends". ²⁹

By setting out the different mediation stories in the way they do and outlining the distinguishing features of transformative mediation, Bush and Folger clearly indicate that transformative mediation is not concerned with social justice. They say that the message the Transformation Story conveys "is not that satisfaction and suffering, justice and injustice are unimportant- but that conflict transformation, and the resulting achievement of the inherent human potential of social and moral connection, are even more important". ³⁰ They clearly place the potential to transform conflict interaction above preventing inequality or satisfying needs and alleviating suffering. ³¹

**The practice of transformative mediation**

Additionally, the proponents of transformative mediation suggest that “mediation offers the potential means to integrate the concern for rights and justice and the concern for caring and connection”, ³² but the practice of transformative mediation seems at odds with this sentiment.

Among the 10 Hallmarks of Practice listed in transformative mediation training materials are these two:

- Do not feel responsible for the outcome of the mediation.
- Consciously refuse to be judgmental about the parties’ views and decisions. ³³

For those involved in the earlier community mediation movement and other access to justice and social justice initiatives, these hallmarks seem to be anathema. As Gunning observes, for many, the support of mediation stems from social justice roots as exemplified by the community justice movement of the 1960s and 1970s. ³⁴ This movement was about seeking substantive justice and a recognition that law and the legal system did not treat everyone equally. A catchcry of many developments of this time was empowerment, particularly of the clients of the services. ³⁵ However, Bush and Folger, in detailing what “empowerment” does not mean in context of transformative mediation, again clearly distance the transformative mediation approach from broader social justice concerns.

Supporting empowerment does not mean “power balancing” or redistribution of power … to protect weaker parties … does not mean controlling or influencing the mediation process so as to produce outcomes that redistribute resources or power outside the process from stronger to weaker parties … does not mean adding to the strength of either party by becoming an advocate, adviser or counselor. ³⁶

The mantra of transformative mediation is that the role of the mediator is to focus on “being in the moment”; the “here and now”. The challenge for this approach is how the mediator deals with and address systemic and structural issues of discrimination and bias that are apparent in the disputing

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²⁹ Rubenstien and Bleechman, n 13 at 4.
³⁰ Bush and Folger, n 1, p 38.
³¹ Bush and Folger, n 1, pp 21-22.
³² Bush and Folger, n 1, p 25.
³⁶ Bush and Folger, n 1, pp 76-77.
parties to the mediation. Social injustice is caused by systemic and structural issues in society, including socioeconomic status (class), gender, race and disability. Similarly, certain individuals, institutions and organisations gain from inequality and benefit from conflict (for example, financial institutions, insurance companies or car dealers). Additionally, in certain types of conflicts, there are “repeat players” and “one shotters”; institutional parties who are regularly involved in disputes or litigation in contrast to individual defendants. In the transformative mediation approach, these factors are ignored. There is no recognition that, for some individuals and institutions (for example, debt collectors, insurance companies, and real estate agents), conflict is not necessarily a negative experience. In contrast, Bush and Folger say “conflict generates, for almost anyone it touches, a sense of their own weakness and incapacity”.

TRANSFORMATIVE MEDIATION AND SOCIAL JUSTICE CONCERNS

One of the early critics of transformative mediation noted that it was a vague concept that “is insensitive to social conditions and … too ethnocentric to reach all mediations”. She went on to suggest that transformative mediation must be contextualised. In exploring the disconnect between transformative mediation and social justice, similar concerns to those advanced in relation to mediation generally apply. There are issues of power imbalance, cultural diversity, communication issues and non-voluntariness.

In her discussion of theories of power, Astor notes that a theory that describes power as a complex set of relationships, meanings and the possibility of resistance is appealing to mediators. She cautions though that mediators also need to recognise that power is not unconstrained and “the relationships of power and gender, or power and social class … are not random and cannot be discounted in mediation. They are not rigidly determined in a binary way … but there are nevertheless inequities in relationships of power constituted by many cultural and institutional factors”.

In the Australian context, comments about native title mediation have highlighted that power imbalance is manifested along cultural lines. Dodson points to the gulf between Indigenous parties and others that arises from different perceptions of history and who can speak about and for the land. He maintains this is an issue of power but his analysis raises the need for mediators to be aware of “perspectives so radically different from their own that their ability to help some parties in mediation to tell a coherent story may be challenged and need conscious work and careful listening”.

Gunning, a North American, notes that the goals of transformative mediation are similar to those that motivated the community justice mediation movement; in particular the promotion of party self determination and recognition. However, she is critical of transformative mediation proponents who “like settlement oriented mediation advocates, are unwilling to take seriously the impact of the larger social forces on the individuals involved in the mediation”. Gunning supports the notion of mediators who are concerned with justice in terms of both process and substance. She proposes “activist” mediators who will “openly discuss issues of ’equality’ and ’justice’ with the parties, and encourage them to define and abide by these principles in creating any agreement that might result.”

38 Bush and Folger, n 1, p 49.
39 Menkel-Meadow, n 2 at 236, 239.
42 Gunning, n 34 at 89-91.
43 Gunning, n 34 at 89-91. Within the literature on paradigms of lawyering, there has recently emerged proponents of a similar approach for lawyers – to discuss with their clients the justice/morality of proposed action: see Parker C, “A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics” (2004) 30 (1) Monash University Law Review 49.
Gunning notes that Bush argues the provision of information “intrudes on decision-making autonomy and … self-determination”. She explores the ramifications of this approach for mediator neutrality and impartiality but notes that “mediators can be viewed as biased through silence and non-intervention as well”.44

If the mediator does nothing and the parties enter the mediation with societal power imbalances, with uneven collections of cultural myths from which to use in the narrative struggle, the mediator’s “neutrality” or silence will benefit the more powerful party.45

Some early North American work on whether alternative dispute resolution processes may actually foster racial and ethnic prejudice indicated a significant risk was present. Delgado and others isolated a range of factors that increase the possibility of prejudice: when a member of an in-group confronts a member of an out-group; when that confrontation is direct; when there are few rules to restrain conduct; when the setting is private and no guidelines that “public” values are preponderate; and when the controversy concerns an intimate, personal matter.46

ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power … the dangers increase when the mediator … is a member of the superior group or class … in these situations, minorities and members of other out-groups should opt for formal in-court adjudication.47

Despite significant concern about potential bias against minorities and women in mediation, as LaFree and Rack comment, there has been little empirical work to assess this concern.48 In their study of the effects of ethnicity and gender on monetary outcomes in mediated and adjudicated civil cases in New Mexico, United States, they found that controlling for case characteristics eliminated ethnic and gender differences in adjudication but some ethnic differences remained in mediated case outcomes. They also found that cases involving at least one Anglo mediator resulted in higher monetary outcomes for Anglo claimants.49

In recognising the existence of power imbalances within the mediation setting, Astor and Chinkin note it is important:

- not to be too sanguine about the ability of other methods of dispute resolution to deal with power imbalances. Nor can we expect mediation to solve systemic social problems. However, if mediation does not address systemic social problems (in ways appropriate to the nature of the process) they are thereby entrenched and may be exacerbated.50

Young, in his exploration of issues in cross cultural negotiation in Australia indigenous communities, comments:

The problems of power imbalance or inequality are often exacerbated by communication difficulties, misconceptions, assumptions and influential publicity … the absence of equality in relationship in this context may result in … exploitation through the imposition of an unfair bargain … the inequality may be enshrined in the negotiated agreement.51

Astor and Chinkin acknowledge that individual cases may not be the appropriate forum to address structural inequalities, but they argue that when mediators recognise that agreements are unfair

44 Gunning, n 34 at 92.
47 Delgado et al, n 46 at 1402-1403.
Another disconnect between transformative mediation and social justice is apparent in the claim that transformative mediation practice is founded on communication theory, when no detailed recognition or discussion of the complex nature of communication is given. It is self evident that individuals, from an early age, learn to communicate within a particular culture. We learn the language, rules and norms of that culture. Communication is culturally specific and meaning can be obtained through words, gestures, tones, context, setting and relationships.\(^{53}\) Within the practice of transformative mediation, there is little recognition that cultural differences provide particular challenges for communication in dispute resolution forums. As Boulle notes generally about mediation, there may be the predictable confusions and misinterpretations around language but he also points out this can extend to non-verbal communication such as “eye contact, interruption and silences”. For example in some cultures “silence is regarded as a sign of evasiveness, in others it is an accepted feature of the conversation”.\(^{54}\) The injustice resulting from the impact of language and culture on communication issues between Indigenous Australians and the legal system is well documented.\(^{55}\) Unless transformative mediators are cognisant of these factors, further injustice could be perpetuated.

**WAYS FORWARD FOR TRANSFORMATIVE MEDIATION AND SOCIAL JUSTICE**

Gunning, in her exploration of the critiques of mediation, recognises that the formal adversarial system of dispute resolution does not necessarily protect people from prejudice and discrimination. She suggests that rather than abandoning the use of mediation for minority or “out-groups”, the challenge is to “provide mechanisms … that can solve or ameliorate the problem of bias”.\(^{56}\) She proceeds to detail how negative cultural myths can impact on mediation outcomes and also the role of the primary narratives in setting the tone of discussion.

Gunning makes two suggestions in an attempt to address issues of disadvantage in mediation. The first is training mediators to think about power imbalances that result from negative cultural myths and interpretative frameworks. She supports an approach to mediation training that gets mediators to “explore their own negative cultural myths, to learn to identify when such myths are being relied upon in a mediation and create ways to talk about the effect of such negative interpretative frameworks in ways that may help the parties to create new interpretive frameworks”.\(^{57}\) Her second suggestion is that mediators raise the shared value of equality in mediation. This might be given symbolic meaning by having teams of diverse mediators but may also be raised directly with the parties.

Gunning notes that part of recognising the impact of negative cultural myths is also to accept that not all conflicts “in which parties have diverse interpretative frameworks can be resolved within any particular mediation”.\(^{58}\) She comments that some conflicts may not be suitable for mediation as the use of negative cultural myths “can reveal a larger political and power struggle that envelops the larger social and economic community”.\(^{59}\)

\(^{52}\) Astor and Chinkin, n 50, p 230.


\(^{56}\) Gunning, n 45 at 67.

\(^{57}\) Gunning, n 45 at 88.

\(^{58}\) Gunning, n 45 at 90.

\(^{59}\) Gunning, n 45 at 90.
Gunning’s view of activist mediation is that the “shared value of equality must be included in the mediation process to ensure justice for disadvantaged identity groups.”\(^60\) She is cognisant of the potential for mediation to disadvantage “out” identity groups but she concludes that “with careful analysis of the parties needs and goals, and the use of intervention techniques to encourage parties to confront, internally, their value conflicts between equality and prejudice, the benefits of mediation can be made available to all on a more equal basis”.\(^61\)

Clearly, this approach runs counter to the transformative mediation approach of “non-intervention”. Gunning, however, strongly rejects Bush’s view that any intervention to address power imbalance or unjust outcomes compromises the mediator’s neutrality and infringes on both parties’ self determination. She questions the authenticity of self determination that is not based on informed decision-making or consent and volitional decisions.\(^62\)

The concept of neutrality is not one that mediators do or do not possess.\(^63\) As Astor and Chinkin suggest, it is a complex concept that demands:

- we examine context and culture, identity and values and their impact on disputes and dispute settlement in order to distinguish appropriate from problematic behaviour … where the opinions and perspectives of the mediator support the status quo they may be less apparent and may masquerade as neutrality.\(^64\)

As an example, the use of mediation in family disputes where there is violence has been controversial. Many advocate that the power imbalance and safety issues in such circumstances necessitate that mediation should not occur.\(^65\) The transformative mediation approach, where the mediator is not seen to be responsible, would seem to highlight these concerns. The proponents of transformative mediation reject this notion instead suggesting that the process “amplifies voice and facilitates empowerment shifts – dynamics that can be particularly helpful in reinforcing autonomy and engendering agency for DV victims”.\(^66\)

However, it is critical to note that although transformative mediation may be positive for those women who choose to participate, it needs support facilities to enable this choice. DePorto and Miller outline the detailed process that precedes a transformation mediation program for matters involving domestic violence. They outline how important it is for women to have access to information, advice and support. Otherwise the experience of women who “found themselves increasingly silenced and without agency as they responded to escalating levels of fear, intimidation and coercion generated by the other party (ie the abuser) during the mediation” will continue to be replicated.\(^57\)

Astor and Chinkin also argue that the quality of a mediation depends in part on the resources at the disposal of the parties to allow them to make informed decisions about the law, their own needs and the extent to which they wish to depart from the law.\(^68\) This issue is of particular concern when mediation is seen as a cheap alternative to formal processes and those that are poor or disadvantaged are sent in that direction.\(^69\) For instance, it is generally recognised that for those parties that voluntarily elect to use mediation to avoid expensive litigation, this usually provides a better outcome.
than litigation. But for those who are encouraged or forced to participate in mediation (instead of having access to subsidised legal services) mediation will only sometimes provide better justice.\(^{70}\)

Doyle addresses directly the social justice implications of various models of family mediation in the context of cultural diversity. She recommends that “to develop a mediation program to serve multicultural interest will require a variety of mediators with special training … to understand the compatibility … with intervention [which] may not necessarily be neutral or value-free”.\(^{71}\)

**CONCLUSION**

The proponents of transformative mediation do not profess to progress social justice. Instead, the focus is on individual shifts where new insights are reached, choices clarified and new understandings of each other’s views are achieved.\(^{72}\) Individual empowerment is generally a good development for social justice. However, as Gunning posits, these goals could have larger societal impacts if “the view of the mediator is that clarifications and new understandings [of the parties] could lead to changes in relationships and social structures as well”.\(^{73}\)

If the transformative mediator wants to avoid perpetuating social injustice and at the same time remain true to the role of being “not responsible” and “non-judgmental”, it is suggested that the mediator needs to ensure that parties come to the mediation informed and advised, not only about the mediation process, but also about their rights in the context of previous examples and experiences of similar disputes. As the domestic violence case study described by DePorto and Miller illustrates, the intake and referrals processes that precede the mediation and mediator training must address issues of bias, power and choice in order to give parties the opportunity to make real choices and decisions within the mediation. Equally, the mediator should be cognisant of the complex nature of communications. Finally, the transformative mediator needs to be mindful of the ethical implications of his or her inaction.


\(^{71}\) Doyle FM, “Developing Models of Family Mediation to Promote Multiculturalism” (2000) 1 ADRJ 44 at 50.

\(^{72}\) Bush and Folger, n 1, p 26.

\(^{73}\) Gunning, n 34 at fn 10.