

MEDIATION SUCCESS OR FAILURE: A SEARCH FOR THE ELUSIVE CRITERIA

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I. INTRODUCTION

One of the central issues in the field of conflict resolution concerns the degree to which we can define a mediated or negotiated outcome as successful. How do we know that an outcome meets the criteria of success? How can we evaluate it? For example, how would we define the conclusion of the Camp David talks, where President Carter so ably mediated between the parties, and which produced a historic agreement between Israel and Egypt in 1978? Was that ground-breaking agreement successful? There will be as many opinions on that as there are commentators, but few will stop and think carefully about what it means to be successful at mediation or negotiation or how to recognize that success. Or to take another example, the Oslo talks which culminated in the signing of another historic agreement, this time between Israel and the PLO. Were the talks successful? Here, again, we may have as many different opinions as there are commentators. Clearly, we need to think more carefully about what constitutes a successful outcome, how to recognize it, and which factors may affect it. That is what I propose to do in this Article.

Although we have a considerable body of work on the causes of conflict, its evolution, and how best to manage it, very little work has focused on developing a clear understanding of what constitutes success. Too often, it seems success or failure is assumed, postulated, or defined on a case-by-case basis, and usually in an arbitrary and poorly reasoned manner. Furthermore, the indicators utilized by those attempting to define success or failure are so diverse as to be almost unworkable. We need to engage in a more comprehensive discussion of what success entails. A clear understanding of what is success or failure is essential to the development of conflict management theory.

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II. CONFLICT MANAGEMENT AND MEDIATION

“Conflict management” is a generic term for a wide variety of approaches and methods of dealing with conflict situations. Conflict management subsumes a very wide range of behavior, from the use of military force to negotiation and mediation. Our interest is with non-violent methods of dealing with conflict. However, conflict management does not mean conflict avoidance. Conflict management should be understood as a process designed to stop the destructive aspects of a conflict and realize its constructive potential. This can be achieved through, among other things, negotiation, arbitration, adjudication, fact-finding, peace-keeping and mediation itself.

Mediation is a method of conflict management in which conflicting parties gather to seek solutions to their problems, accompanied by a mediator who facilitates discussion and the flow of information, aiding in the processes of reaching agreement. An informal process (notwithstanding the protocol associated with diplomatic mediation in the political arena), mediation follows no set process or structure. Furthermore, mediation is essentially non-coercive in nature, voluntary in structure and performance and *ad hoc* in orientation. Mediation does not have any direct legal basis or institutionalized authority; it relies on personal features and resources mediators have. For these reasons, mediation is heavily used by states and organizations that prefer it to the more directive methods of adjudication. There is considerable evidence to suggest that mediation is the most preferred method of dealing with international conflict.¹

Mediation here is defined as a process of conflict management, related to, but distinct from the parties’ own negotiations, where those in conflict seek the assistance of, or accept an offer of help from, an outsider (whether an individual, an organization, a group, or a state) to change their perceptions or behavior, and to do so without resorting to physical force or invoking the authority of law.² Mediation is, in essence, a form of “assisted negotiation.”

This definition may be broad, but it is one that can be generally and widely applied. It forces us to recognize that any media-

¹ Jacob Bercovitch, *Mediators and Mediation Strategies in International Relations*, 8 *NEGOTIATION J.* 99-112 (1992).

² Jacob Bercovitch, *Mediation in International Conflict: An Overview of Theory – A Review of Practice*, in *PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES* 125-54 (I. W. Zartman & L. Rasmussen eds., 1997).

tion situation is comprised of: (a) parties in conflict, (b) a mediator, (c) a process of mediation, and (d) the context of mediation. All these elements are important in understanding mediation and its outcomes. We must not lose sight of them since they determine the nature, quality, and success of any mediation event.

III. CATEGORIES AND CRITERIA OF SUCCESS?

Broadly speaking, a given conflict management or a mediatory episode can be referred to as successful if it achieves 'fairness,' or 'effectiveness,' or any one or a combination of a plethora of applicable concepts. One of the things we note about success is that it is usually defined by reference to other abstract concepts (e.g. justice, fairness, satisfaction, etc.). This creates many problems for anyone wishing to evaluate the effects of mediation. How do we know justice has been achieved? Who defines it? An observer, a scholar or the parties themselves? And what if they disagree about what constitutes justice or fairness?

Blair Sheppard was one of the first scholars to offer a systematic discussion of the notion of mediation success.³ Sheppard first suggests that we think seriously about the two aspects of any mediation event—namely the process and the outcome. These are usually conflated, but they should not be. They are very different aspects of a social relationship. The process refers to what transpires at the mediation table, and the outcome refers to what has been achieved (or not achieved) as a result of mediation. Success in mediation is thus a quality that may be applicable to the process or the outcome of mediation. In other words, success may be achieved if the parties in conflict feel empowered, or feel that their concerns were addressed respectfully. There may be no successful outcome (in any sense of the word), but the parties still feel they have achieved success in the process. In the same way, there may be a process of mediation marred by many procedural disagreements and dissatisfactions, but it may lead to a cessation of violence and even a formal agreement. When we talk about success in mediation, we have to ask ourselves if we are talking about success in the process itself or a successful outcome. Sheppard, and subsequently Jessica Katz

³ Blair Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, 6 RES. IN ORG. BEHAV. 226-75 (1984).

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Jameson talk about four criteria, or indices, of success (of process or outcome):⁴ fairness, efficiency, satisfaction and effectiveness.

Lawrence Susskind and Jeffrey Cruikshank, meanwhile, utilize the terms fairness and efficiency when discussing how best to evaluate mediation, but they add to these two additional criteria: wisdom and stability, in addition to making passing references to satisfaction in their discussion of 'good' outcomes.⁵ We have made some progress in thinking about mediation outcomes, but we still seem to be defining one abstract concept (success) very much in terms of other equally contentious abstract concepts (e.g. fairness, wisdom etc.). We are still not able to assess with any degree of certainty, let alone precision, whether a given mediation was successful. In truth it appears this question is far too complex to tackle. Yet, that is precisely what we must do.

IV. CRITERIA FOR SUCCESS: FROM ABSTRACT TO CONCRETE

The first criteria we need to evaluate is fairness. Fairness is an intangible abstraction. One cannot define fairness so stringently that it will not still be interpreted differently by different people, much like the term success itself. However, we do recognize that whatever it may be, fairness suggests to most people an even-handed procedure and equitable outcome that is indicative of some conception of 'success'. Sheppard presents a number of concrete indicators of fairness that serve to assuage concerns regarding the threat of abstraction including: levels of process neutrality, disputant control, equitability, consistency of results and consistency with accepted norms, all of which are relatively easily observed. Both Jameson, Susskind and Cruikshank present similar indicators of fairness (e.g. improvement of procedure and institution of precedent, access to information and opportunity for expression) that provide reasonably concrete concepts of fairness. However, while there are certain observable indices of fairness, both Sheppard, Susskind and Cruikshank talk about the importance of "perceived fairness" in proceedings. Indicators of fairness mean little to parties in conflict if they themselves do not think the proceedings are fair. This "perception of unfairness," justified or not, is often more

⁴ Jessica Katz Jameson, *Toward a Comprehensive Model for the Assessment of Intraorganizational Conflict: Developing the Framework*, 10 INT'L J. OF CONFLICT MGMT. 27-44 (1999).

⁵ LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1997).

crucial than any discussion of concrete measures of success. After all, the parties have to be convinced that what they experience is fair, and this conviction cannot be assessed *a priori*. Hence, while such indicators may emphasize balanced procedures, or even equitable solutions, if parties do not perceive that fairness, it is unlikely to have a direct link to success. As discussed in the previous section, this is typical of the assessment concerns that one faces when dealing with issues of perception and interpretation.

Thinking about fairness as one of the dimensions to evaluate mediation success is not without merit. It implies a number of qualities (even-handedness of process, equity of outcome) that may serve as indicators of a successful mediation. However, the perceptual nature of any interpretation of such an abstract concept as “fairness,” incorporated with the very fluid nature of what fairness may entail in a given situation, means that interpretation begs as many questions as it provides answers.

In some respects, participant satisfaction seems like a better indicator of success. If parties in mediation are satisfied with the process or outcome, they are more likely to perceive it as a success and, as Sheppard indicates, are more likely to be committed to it. This in turn makes success more likely by producing other relevant dimensions of a successful outcome, such as stability. Sheppard identifies a number of measurable indicators, both with regard to process (privacy, level of involvement) and outcome (benefit, commitment).

However, as with fairness, party satisfaction is largely perceptual and has a very personal quality. Satisfaction is often deemed an almost emotional response to the achievement of a goal or attainment of some requirement. The sorts of goals taken into an event by those involved in conflict are personal in nature and formed by the specific configuration of their personality, environment, values, expectations, etc. This is neither unexpected nor unusual. While satisfaction is a personal quality, it does not mean we should abandon our quest to achieve outcomes that “satisfy” the parties. Categorically, we can say that an outcome that satisfies both parties (even if we don’t quite know how to assess that) is more likely to be stable, longer-lasting, and, thus, more successful.

Perhaps the clearest concrete indication of a mediation success is the quality of effectiveness. Effectiveness is a measure of results achieved, change brought about, or behavioral transformation. Conflict management and mediation are processes of change.

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Above all, they are designed to change the behavior and attitudes of the parties, even in a violent interaction. Hence, for mediation to be deemed successful, it must have some (positive) impact, or *effect*, on the conflict. Here, we are talking about such changes as moving from violent to non-violent behavior, signing an agreement, accepting a ceasefire or settlement, or agreeing to a U.N. peacekeeping force, among others. If any of these has occurred as a result of mediation, we can safely say that the mediation was effective, and thus successful. Effectiveness allows us to observe what has changed after a mediator has entered a conflict. It is to a large extent much less subject to perceptual disagreements and more easily observable and measurable.

Efficiency is the fourth criterion of successes and is primarily focused on the procedural and temporal dimension of conflict management. Efficiency addresses such issues as the cost of conflict management, resources devoted to it, timeliness and disruptiveness of the undertaking. In some respects, this may seem extraneous. If a mediation episode is effective in other ways, does efficiency matter? Once again, it must be stressed that conflict and its management does not tend to occur in a vacuum. Costs racked up to accrue benefits may be such that those benefits lose their sheen. Susskind and Cruikshank give efficiency the most weight. They suggest that “[f]airness is not enough. A fair agreement is not acceptable if it takes an inordinately long time to achieve or if it costs several times what it should have.”⁶ An agreement may not be all that elegant, but if it is achieved within a reasonably short time without entangling too many people, there is much to be said for it.

None of these criteria can be used by itself as a total indication of success. A truly successful outcome is one that meets more than one or two criteria. Efficiency and effectiveness mean little if parties are not satisfied. Likewise, satisfaction and fairness mean little if mediation has proven to be ineffective in a practical sense. Stability can only be achieved when the parties are satisfied and the agreement is fair. These criteria can be analyzed independently, but in reality, they are all interdependent.

⁶ SUSSKIND & CRUIKSHANK, *supra* note 5, at 27.

V. SETTLEMENT OR RESOLUTION: WHICH IS MORE SUCCESSFUL?

A different, and in some ways more practical, approach to the question of what constitutes success in mediation is based on simple analysis of agreement and outcome types and their impact on the conflict in question. While doing little to deal with the more esoteric aspects of the “what-is-success” question, such an approach does provide insight on the practical results that need to follow a mediation event if it is thought to be successful.

Often, mediation attempts will result in no agreement and no change in the conflict situation that precipitated the mediation (notwithstanding those who argue that any mediation has beneficial effects, regardless of outcome). Here the question becomes, what sort of mediation outcomes should be considered success? In order to address this issue, one must first understand the different potential outcomes. Tamra d’Estree identifies four terms utilized in describing different conflict management impacts: settlement, management, resolution and transformation.⁷ Each of these terms may indicate a different degree of mediation success. Let us examine the implications of an approach that is predicated on using only the two most common categories of mediation success; settlement and resolution.⁸

The distinction between the two is simple in its explanation, but far reaching in its implications. Essentially, the dichotomy relates to the difference between dealing with a conflict’s symptoms and addressing its causes. A settlement takes place when conflict-generating behavior (most notably of the damaging or destructive kind) is neutralized, dampened, reduced, or eliminated. For example, the Dayton Accord, as well as the Camp David and Oslo agreements, can be considered as exemplars of conflict settlement. Resolution, on the other hand, occurs when the root causes of a conflict are addressed, thus negating the threat of further conflict-generating behavior. The setting up of a European economic, and then political, community is a nice example of a conflict that was once rampant and is now all but resolved. Resolution does not rely on enforcement, but rather on the establishment of common ground upon which to build a relationship free of the need to re-

⁷ Tamra Pearson D’Estree, Larissa Fast, Joshua Weiss & Monica Jakobsen, *Changing the Debate About “Success” in Conflict Resolution Efforts*, 17 *NEGOTIATION J.* 101, 109 (2001).

⁸ George Levinger & Jeffrey Rubin, *Bridges and Barriers to a More General Theory of Conflict*, 10 *NEGOTIATION J.* 202-12 (1994).

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visit the conflict. Bercovitch suggests that settlement is more useful when dealing with value-based disputes, while resolution is more suited for interest-based disputes.⁹ Resolution is more likely to be achieved in small-scale, interpersonal, or group conflicts, than in large-scale, complex, international conflicts.

The discussion on settlement versus resolution reflects a broader concern about the nature of conflict and its management. If an understanding of the international environment is informed by a neo-realist view, wherein conflict is a natural part of a system defined by power politic behavior, then resolution of conflict in any truly comprehensive manner may not be seen as realistic. Thus, the focus of conflict management is likely to be on the cessation of violence. In other words, it is suggested that conflict itself is natural, unavoidable, and unlikely to be resolved and, hence, success is best judged as the ability to avert, or end, the damaging aspects of conflict. Given such an understanding of conflict and its management, settlement would, if achieved properly, clearly suffice to indicate a successful outcome.

By comparison, for those who hold what might be described as a more idealistic view of the nature of conflict, the possibilities of transformation and the malleability of all social situations in international relations may have more exacting requirements. If conflict is perceived as an aberration of sorts, born out of structural discrepancies, rather than as part of the natural order of things, one is more likely to consider comprehensive resolution possible, and, hence, the prime indicator of mediation success. In such a view, settlement would be seen as a less satisfactory, even inferior, outcome result, ineffective in dealing with the real issues and problems of any conflict.

Within conflict management literature, resolution is often presented as being inherently superior to settlement. Complete as opposed to piece-meal, it is seen as dealing with the root causes of the conflict and negating the need for future conflict or conflict management. By comparison, settlement, often involving a simple cessation of conflict behavior (such as a cease-fire), can be seen as a potentially damaging half-measure, leaving conflict to smolder beneath the surface before erupting again.¹⁰ Such a stance implies that any conflict management effort, whether undertaken by individuals or states, should be a comprehensive undertaking with re-

⁹ JACOB BERCOVITCH, *SOCIAL CONFLICTS AND THIRD PARTIES: STRATEGIES OF CONFLICT RESOLUTION* (1984).

¹⁰ JOHN BURTON, *RESOLVING DEEP-ROOTED CONFLICT: A HANDBOOK* (1987).

sults that are equally comprehensive if it is to be deemed successful.

The idea that resolution alone implies a successful outcome is far too restrictive in the real world. In many conflict situations, a resolution may truly prove impossible as the parties may have experienced years of violence and destruction. A transformation in attitudes and behavior will not occur overnight or even in the course of a few years. It is truly hard to see the Israeli -Palestinian conflict being resolved in the near, or even not so near future. All that can be achieved in this and many other conflicts is a cessation of violence and some peaceful *modus vivendi*. That will be considered a successful outcome by just about every person in the international environment. In some conflict situations, the participants may wish to use conflict management for information gathering, learning from the process without necessarily seeking to resolve the conflict. Resolution is not always a realistic or feasible goal. Where settlement or cease-fire may be possible, the depths of feeling may be too great to achieve anything more ambitious, making a more modest settlement the best possible option. Settlement must be considered successful when resolution is simply unattainable.

The choice between settlement and resolution can also be informed by one's focus of concern as well. If one is primarily concerned with the destructive aspects of conflict behavior, an immediate settlement may be required to ensure the life and safety of individuals before all else. Where there is destruction and violence, the first and foremost task of any mediator is to stop the violence or reduce it to save lives. When a conflict is primarily about a relationship between parties, a resolution may be the only way forward.

The level at which a conflict management procedure occurs may also impact the means and goals of the process. Mediation in international relations, for example, is more likely to focus on political leaders and behavioral aspects of conflict, as with securing a cease-fire. Mediation at lower levels of complexity, such as an organization or family unit, may be more intent on building understanding, addressing structural problems at their roots, and seeking resolution. This may be in part due to the regular political requirement for a quick fix to satisfy a domestic audience, but it can also highlight the potential inability of high-level conflict management to go beyond changes in conflict behavior.

Ultimately, the idealized notion of full conflict resolution is hard to fault as an example of what mediation success *should* be in

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a practical sense. However, it is considerably less clear as to whether a line should be drawn at resolution or whether more modest, settlement-style outcomes may also be considered successes in any developed framework of that phenomenon. Again, we see how goals and perceptions of conflict can impact a definition of what success is.

VI. MEDIATOR CONCEPTIONS OF GOALS AND SUCCESS

Another way of thinking about success is to relate outcomes to expectations. What one expects may well define what one considers success or failure. If I expect to achieve levels of wealth such as a wealthy business person, then clearly not achieving such a level would be deemed a failure. If my goals were a little bit more modest, I am more likely to achieve my desired level of wealth and feel happy with a good outcome. Of course the same applies to mediators and parties in conflict. When one mediator is keen to achieve a settlement (i.e., a cease-fire) of a conflict, another may deem such settlement a failure. Perhaps the whole discussion of what is success or failure can hinge on what mediators expect from their conflict management.

Mediation outcomes are affected very much by pre-mediation goals. This notion clearly echoes Weiss' suggestion to measure the effects of a program against the goals it sets out to accomplish.¹¹ This approach may offer a reasonably straightforward way of evaluating outcomes and determining their success or failure, provided we can approach mediators in the pre-mediation phase and ask about their goals and expectations. Success and failure is now given totally to mediators to define. Objective outcomes will be assessed by reference to mediators' subjective evaluation of their goals. It seems that there are problems with this approach too.

How do we deal with mediators who have minimum goals, and contrast with those who have peak aspirations? The U.N. in conflict situations has only minimal goals. It expects to achieve a cease fire or an end to violence. The U.S.A. as a mediator in many conflicts, on the other hand, may have more complex and ambitious goals, including a new structure of relationship, new institutions, and new ways of doing things. Is it fair to talk about UN success as a mediator and to contrast it with the experience of the USA? To

¹¹ CAROL WEISS, *EVALUATION RESEARCH: METHODS OF ASSESSING PROGRAM EFFECTIVENESS* (1972).

have mediators' goals and expectations determine the success or failure of any mediation event is truly problematic and not a wholly satisfactory way of analyzing conflicts in international relations.

VII. FACTORS AFFECTING MEDIATION SUCCESS

However we think of mediation success or failure, it might be advisable to think of the factors that affect the performance and outcome of any given mediation. Generally speaking, these factors may be categorized under the subtitles of personal/role factors, situational factors, interactional factors, and motivational factors. Let us review each in turn.

Personal factors refer to the identity of a mediator. Is mediation carried out by private individuals, government officials, religious figures, regional, nongovernmental and international organizations, ad hoc groupings, or heads of states? Each of these brings to the mediation situation its own interests, perceptions, and resources. Each of them may adopt behavior that ranges from the very passive, through the facilitative, to the highly active. Individuals possess great flexibility and can work in conditions of secrecy to assure the parties of confidentiality. Heads of states, on the other hand, can bring to bear a vast array of resources and leverage to change parties' behavior. It seems safe to suggest that heads of state are more likely to achieve a successful outcome than private individuals or representatives of NGOs.

Situational factors that determine success include factors such as the physical, social, reputational and power relations between the parties. Each of these may affect the achievement of success. A neutral environment is far more conducive to success than mediation in one's own territory. Power parity between parties in conflict makes for more effective mediation (while an imbalance of power reduces motivation to engage in mediation or accept any outcome). A conflict situation where a mediator is able to frame issues in tangible, non ideological ways will produce an agreement. Mediation at the right time (however we define or assess that), using the right strategies, and deploying the requisite resources, stands a much better chance of producing a successful outcome than other mediations. Potential mediators are well advised to assess the presence or absence of these conditions before undertaking any mediation efforts.

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Interactional factors that impinge on the success or failure of mediation refer to the overall nature of the relationship and the extent to which it is competitive and based on either a zero-sum understanding of the conflict or a co-operative understanding where each party recognizes that gains may be made by all. Many other aspects come into force here: previous history of the parties is crucial (where they had a good relations in the past, they are likely to get over their current difficulties and conclude a successful agreement), nature of polity (democratic polities resolve conflicts more successfully than non democratic polities), nature of economy (open, developed economies deal with conflicts better than other economies), and adherence to established norms of interaction (do parties have the same set of normative expectations?).

Motivational factors affecting success or failure include the parties' genuine desire to submit, and commit, to mediation. A joint request for mediation is indicative of a high motivation and desire to settle a conflict. When only one party requests mediation, the chances of success are pretty slim. Adversaries in conflict have a number of motives for desiring mediation: (a) mediation may actually help them reduce the risks of an escalating conflict and get them closer to a settlement; (b) each party may embrace mediation in the expectation that the mediator will actually nudge or influence the other party; (c) both parties may see mediation as a public expression of their commitment to an international norm of peaceful conflict management; (d) the parties may want an outsider to take much of the blame should their efforts fail; or (e) the parties may desire mediation because a mediator can be used to monitor, verify, and guarantee any eventual agreement. When they both share the same set of motivations, a successful outcome is more likely to result.

All of these factors exert influence on the way mediation is undertaken, performed and terminated. They affect the success or failure of any mediation event. Success or failure of mediation is not just a matter of defining an outcome as such. There are real factors that affect mediation outcome, and there may be real differences in how we conceive of a given outcome. I have tried to argue that we will be well advised to get beyond discussions of what success means or may mean, and understand the factors that may bring about "success" and how they manifest themselves in the real world.

VIII. CONCLUSION

We are becoming increasingly aware that conflict management and mediation, in particular, is about being an agent of change, and actually achieving some change. A mediator enters a conflict to achieve a better situation upon leaving than the one she encountered when she first entered it. That is change. But how exactly can we think about change systematically? More specifically, how exactly can we evaluate the consequences of mediation or the change achieved to determine whether it has been successful? It is no easy task, and I have tried to suggest that there are no easy solutions. Some may think the change brought about by mediation is successful, others may think differently. What is important is to understand what mediators do, how do they do it, and what they can possibly achieve.

Success in conflict management is an elusive quest. Often what appears as successful to one person may be seen as unsuccessful by others. What is more, mediation may seem successful at one time, only to be seen as totally unsuccessful months or years later. We face considerable challenges in thinking about success or evaluating mediation outcomes. As suggested above, there are different perspectives of thinking about success. It seems odd that so many of these perspectives define success in terms of some other equally complex abstract notion. The challenge we face is in recognizing the multiplicity of perspectives, and the different conceptions of, and approaches to, success. Assessing whether or not change has taken place (let alone thinking about whether or not it was intended) is a major challenge in the social sciences. It is particularly difficult in conflict management. Has change really taken place? Is it really because of mediation? How do we assess what has been achieved? These are tough questions, but we have an intellectual and practical obligation to answer these questions. They are, after all, at the very heart of what we as scholars and practitioners of conflict management do on a daily basis. This paper made some tentative steps in that direction.

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