Small Claims and Legal Aid: Uses, Transformations, and Adaptations in the *Favela*

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Introduction

Since the 1970’s, mediation has increasingly found space within the legal sphere as an alternative to adjudication in dispute resolution. Its use in small claims, divorce, and custody cases has become a common alternative to adjudication in U.S. courts.

The success of mediation in the U.S. has resulted in its diffusion in other countries. In Brazil, for example, the use of mediation has gained primary importance in the resolution of small claims and custody cases. As in the U.S., mediation in Brazil has been promoted as a way to increase the court’s efficiency and reduce the caseload in the regular courts. In addition, mediation has also been promoted as a more inclusive and satisfactory means of dispute resolution, allowing the disputants to discuss issues outside of strict evidentiary rules of adjudication. Most importantly, mediation has been seen as a way to increase the access to legal mechanisms for those populations that have traditionally been excluded from the courts.

It is the claim that mediation increases access to justice that is the concern of this paper. It is argued that mediation, given its efficiency and informality, increases the access of justice for disadvantaged populations. In contrast to this, others have posited that the use of mediation increases the state’s social control over these populations. In Brazil this debate takes on particular importance, given the large percentage of urban poor, living in shantytowns that have been denied access to a range of city, state and federal services, including the judiciary. This paper looks at the use of mediation in two forums, the small claims court and a legal aid project for the largest of these shantytowns in the city of Rio de Janeiro.

Use of mediation for shantytown populations is not new. However, previous examinations of mediation have focused on its use in informal, non-legal settings such as in residents’ associations (see Santos, 1977) and to some extent by organized drug trafficking gangs (see Junquiera and Rodrigues, 1993). These informal forums are important means of dispute resolution in the shantytown and necessarily form part of the context in which legal uses of mediation must operate. While understanding the role of non-state sponsored agencies in mediating and resolving disputes is important, this paper will focus exclusively on the use of mediation by legal agents for property, divorce and child custody cases.

Mediation- Concepts and Concerns

In studying the use of mediation by residents of shantytowns in Brazil, two distinct issues arise. First, it is important to discuss issues related to mediation in general, and specifically its use as an alternative for adjudication within the legal sphere. Second, one must look at the use (or non-use) of the justice system by residents of the favela, especially in the context of other options available to residents to resolve disputes.
Mediation, in the legal anthropology literature, arises as a means of dispute resolution involving a third party. However, unlike arbitration and adjudication, this third party does not have the authority to impose or enforce a solution between disputants and serves to facilitate discussion among the disputants in order that they may reach a solution themselves (Gulliver, 1979; Black and Baumgartner, 1993; Nader and Todd, 1978). Within the legal sphere, uses of mediation as an alternative to adjudication began in the U.S. in the 1970’s and have become popular means of settling disputes involving small claims, custody settlements and divorce. Proponents of mediation have claimed that it is a more efficient and more inclusive way to resolve disputes than legal adjudication, providing disputants more control over proceedings and increasing compliance. The informal style of mediation is also seen as more accessible than formal adjudication procedures, increasing the access to legal structures.

In a study comparing mediation and adjudication, McEwen and Maiman found that the increased disputant participation in mediation led to a greater sense of fairness with the decision and greater compliance than in adjudicated cases (McEwen and Maiman, 1984). Greater compliance in mediation as compared with adjudication was also found by Wissler, who attributed greater compliance to the mediation process, rather than individual case characteristics (Wissler, 1995). However, in another study, the effect of mediation on compliance disappeared when case characteristics, such as admitted liability and amount of award were included in the analysis (Vidmar, 1984)

The informal style of mediation allows disputants to discuss their disputes using non-legal discourse. O’Barr and Conley looked at the effects of using legal (deductive, hypothesis testing) versus non-legal (inductive, conversational) discourse. They found that while litigant satisfaction may be higher, the effectiveness of such discourse in a legal setting is lower. This is due to the fact that legal agents (judges, lawyers, and mediators) are trained to use legal discourse and cases presented in non-legal discourse are less convincing. Thus, they argue, that the informal structure of mediation may provide more litigant satisfaction, given that litigants can use non-legal discourse but that it may ultimately be a disadvantage in presenting the case to a legal agent (O’Barr and Conley, 1985).

In regards to the greater inclusiveness of mediation, it is argued that the informality and simplicity of mediation makes it more accessible, especially to those who otherwise would not use the legal system. This claim has been widely criticized. Some argue that the accessibility of mediation has simply increased the control of the state over disputes that normally would not enter the legal system (Abel, 1982). Others express the concern that power discrepancies between litigants in mediation, or between litigants and mediators create disadvantages in the settling of disputes (Nader, 1969; Black, 1989). It is argued that the less formal and rule-regulated process of mediation is more subject to bias, allowing sociocultural characteristics to contribute to decision-making without reference to legal guidelines (Abel, 1973). It is argued that the informality of mediation is disadvantageous to less powerful social actors, particularly women, minorities and the poor (Delgado et al., 1985; Bryan, 1992). In comparing adjudication and mediation, LaFree and Rack (1996) found that disadvantages for minority males in mediation
persisted controlling for case characteristics. They also found that the ethnicity and
gender of the mediator had significant effects on monetary outcomes. Minorities had
lower monetary outcomes when one of the mediators was Anglo or both were women
(LaFree and Rack, 1996). Thus, while mediation may provide greater satisfaction,
efficiency and accessibility, it also may create disadvantages for those most likely to use
it as an alternative to adjudication.

The effect of mediation for minorities is particularly relevant for the current
study. Residents of the favela live in non-regulated city space, with non-existent or
precarious municipal services such as electricity, sewage and trash collection. While a
number of disputes by their very nature require the intervention of the legal system
(divorce and child custody for example), others have been almost exclusively resolved
outside of the legal system. In particular, disputes concerning construction, transfer and
sale of property have been resolved outside of the legal system. Favelas are occupied
land and as such, residents do not have legal land title. Issues concerning the distribution
of space, construction and transfer of housing have traditionally been resolved by
informal means. Boaventura Santos (1977) in his study of Pasagarda, demonstrated how
the residents’ association in one favela dealt with these issues, often co-opting legal terms
and processes in order to reach solutions based on non-legal principles of harmony and
social justice. More recently, other authors have pointed to the intervention of organized
drug gangs operating in the favelas in criminal and property disputes (see Leeds, 1996
and Junqueira and Rodrigues, 1993).

The use of state-sponsored mediation for property disputes in the favela is a
relatively new phenomenon. The expansion of the role of the small claims court with
state law 9.099/95 increased the monetary limit of the small claims court and emphasized
the role of mediation as the primary and preferred means of resolution (lei 9.099/95).
This opened the possibility of the use of this forum for favela property disputes. In
addition, the creation of legal aid projects in favelas that employ mediation has increased
access to legal-sponsored mediation. With the increased access to legal-sponsored forms
of mediation for favela residents, the same concerns about the viability, efficiency and
bias that occupy researchers in the U.S. arise. In particular questions concerning the
adequacy of these mediation forums to effectively resolve the unique property disputes of
the favela and the advantages and disadvantages of mediation for the favela population.

Legal Mediation in the Favela

The current study is based on archival and participant observation data of two
legal-sponsored mediation forums used by residents of Rocinha, the one of the largest
favelas in Rio de Janeiro. These are: the XXIV Juizado Especial Cível, located in
neighboring Barra da Tijuca and the Balcão de Direitos, a legal aid project located in
Rocinha, and jointly sponsored by Viva-Rio, a non-governmental organization and the
Ministry of Justice. Data on the Juizado Especial Cível was collected during
observations of the court in July and August 1997 and October 1999 to January 2000. In
addition, archival data on cases processed in the first semester of 1998 were also
collected during July and August of 1998. Data for the Balcão de Direitos was collected through observations and archival research in July and August of 1998 and in November 1999 to January 2000.

The Setting

Rocinha is one of 500 squatter settlements in the city of Rio de Janeiro called *favelas*. These low-income areas are constructed mainly on the hillsides of the city and have a population that is largely composed of immigrants from the Northeast of Brazil. Rocinha is located between two of the richest neighborhoods of the fashionable South Zone, Gávea and São Conrado. The community is built around the Estrada da Gávea, which travels over the Morro dos Dois Irmãos, connecting Gávea to São Conrado. Most of the residents are from the northeastern states of Ceará, Piauí and Pernambuco. The original occupation of Rocinha occurred in 1938 and it is today one of the largest *favelas* in the city. Population estimates for Rocinha vary. Census estimates for 1995 put the population at 42,882 people in 722,480 square meters. However, unofficial estimates go as high as 225,000. The municipal office for the city estimates the population between 100,000 and 150,000.

In 1992, Rocinha was officially incorporated into the city with the designation of the area as a municipal administrative region. This designation changed its status from *favela* to neighborhood and provided the community with access to a range of municipal services usually not available in *favelas*. Regardless, the quality of urban life in Rocinha, according to the Empresa Municipal de Informática e Planejamento, S.A. (IPLAN) ranked only 175th out of 412, when compared to other *favelas* of Rio. Information collected by the mayor's office in 1993 showed that Rocinha had only a partial official network providing the water supply, sanitary drainage and rainwater drainage systems. Public sanitation and residential trash collection were only partially provided by COMLURB, the city trash collection and public lighting was provided by RIOLUZ, a community-based joint project with LIGHT, the city electric company. Residential electric energy was provided by LIGHT in all residences, however (IPLAN, 1993).

The area is host to a large amount of commercial activity. Residents can purchase all foodstuffs, clothing, housewares, construction materials, videos, CDs and electronics without leaving Rocinha. The area is serviced by two banks, a sewing cooperative, its own television station, a fruit and vegetable fair, small-scale supermarkets, and multiple small shops, restaurants, bakeries and bars. Residents in the lower parts of Rocinha even have access to cable television. Most of the commercial activity is located close to the Estrada de Gávea, which is the principal road in Rocinha, or in the lower areas, closer to São Conrado and the beach.

Rocinha also has access to many different federal, state, municipal and NGO agencies. The area is served by three residents' associations, a municipal health post, two post offices, the municipal regional administrative office, a small claims court, free legal representation and consultation, a women's association and multiple educational training programs.
The diffusion of state-sponsored projects and agencies are what differentiate Rocinha from other smaller favelas. For the purposes of this study, Rocinha provided a unique opportunity to compare the use of legal mediation forums. With its creation in 1995, a branch of the Juizado Especial Cível was established within Rocinha and a number of other favelas. However, at the beginning of this study in 1997, Rocinha was the only favela with a functioning branch of the Juizado Especial Cível. Even this branch was subsequently closed in February of 1998. The Balcão de Direitos began with offices in seven favelas. Currently, there are ten Balcão de Direitos offices operating in favelas in the city of Rio. The office in Rocinha has been functioning for three years, since the beginning of the project, and has the largest caseload of any of the offices.

Legal-Sponsored Mediation Forums

The Juizado Especial Cível was created on the 26th of September of 1995 with the passage of federal law 9.009. This law expanded the scope of what were previously the small claims courts by increasing the possible monetary value of the cases, from 20 minimum salaries to 40 minimum salaries, (one minimum salary is R$136/month, approximately $113/month) and by creating a criminal division of the court handling minor offenses punishable up to one year in prison. The objective of these courts was to decrease the caseload in the regular civil and criminal courts and to speed up the judicial process for these minor cases. The process of the Juizado Especial Cível is oriented by "the criteria of orality, simplicity, informality, procedural economy and celerity, searching, wherever possible, a conciliation or transaction" (State Law 9.099, translation by author). The court hears a wide range of civil and consumer matters which do not exceed the monetary limit. Anyone can open a case, legal representation is only required for cases whose value exceeds 20 minimum salaries and there is no fee to use the court. To initiate a proceeding, a resident of the neighborhoods served by a specific Juizado Especial Cível has an initial interview with a lawyer in which the details of the case are registered and the address of the plaintiff and defendant are recorded. It is during this initial interview that cases are screened as to whether they fall under the jurisdiction of the Juizado Especial Cível. A mediation hearing is then scheduled and an official citation is sent out to each of the parties. At the mediation hearing, a lawyer who works as a volunteer at the Juizado Especial Cível attempts to mediate an agreement between the two parties. If an agreement is reached, both parties sign a document detailing the agreement that is legally binding in the civil legal system and enforceable by the court. If no agreement is reached, then an adjudication hearing before a judge (audiência de instrução e julgamento) is scheduled. At the beginning of this hearing, the judge again attempts to mediate an agreement between the two parties. If no agreement is reached the judge reviews the facts of the case and hands down a sentence, which is legally binding and enforceable by the court.

The XXIV Juizado Especial Cível (hereafter referred to as the JEC), the Juizado Especial Cível with jurisdictional authority over Rocinha, is located in Barra da Tijuca, a neighborhood about 15 minutes away by bus. In addition to Rocinha, the JEC also handles cases from São Conrado, Barra da Tijuca, Jacarepaguá, and Recreio. It operates Monday through Friday, from nine in the morning until five in the afternoon. Initial interviews are held on Mondays and Fridays, mediation hearings are held on Tuesdays,
Wednesdays and Thursdays. Adjudication hearings are held five days a week. When Lei 9.099 was passed in 1995, there was a branch of the JEC located in Rocinha. This branch handled the initial interviews and conciliation hearings of all the cases originating in Rocinha. While in operation, case intake and mediation hearings at the Rocinha office were heard only on Tuesdays and Thursdays. All adjudication hearings continued to be sent to the main office in Barra da Tijuca.

In February of 1998, the Rocinha branch of the JEC was abolished and all operations of the JEC consolidated in the office in Barra da Tijuca. Reasons given for the extinction of the Rocinha branch ranged from a lack of caseload to justify running the branch, to the poor performance of the civil servant in charge of the branch, to an ultimatum given by the drug traffickers to change the personnel working in the branch.

The Balcão de Direitos (hereafter referred to as the Balcão) is a joint-project of the Ministry of Justice and Viva-Rio, a local non-governmental organization. Viva-Rio, the Ministry of Justice and the Ford Foundation currently finance the Balcão. It is a legal aid office that operates in ten favelas offering legal advice and representation in diverse issues in family, civil and criminal law. The offices function to provide favela communities with legal orientation through consultation in individual cases, preparation of legal cases, solicitation of the services of public defenders, solicitation of documentation and the holding of mediations in order to resolve disputes. The Balcão works in conjunction with the community, employing a “citizen’s agent” (previously referred to as a community agent) who is a resident of the community to liaison between the individual offices and their host communities. In Rocinha, the Balcão is particularly active, with the largest caseload of any of the ten offices. It employs the services of two lawyers and ten law student interns. It is located in the bottom part of Rocinha on the third floor of a building owned and operated by the Methodist church. Any agreement reached in the mediation hearings at the Balcão can be sent to a judge for authorization and is considered legally binding under legislation that validates all extra-legal documents signed by two separate witnesses. The Balcão itself does not have the capacity to enforce any agreements between parties, these must be sent to either the JEC or the regular civil court system to request a order of execution in the case of non-compliance.

During the length of the study, the Balcão underwent a complete change in operating personnel and organizational structure. My first observations at the Balcão were conducted while the office was under the supervision of a single female lawyer. She placed greatest emphasis on the role of the Balcão in mediation of disputes, developing to a lesser degree the Balcão’s integration with the community. Due to this difference in opinion on the purpose of the Balcão, she was removed from the project in May 1999 and replaced by two other female lawyers who had been part of the original personnel who opened the office (personal communication with Pedro Strozemberg, general coordinator of the project). As a result, the organizational structure of the office was modified from the time of my first observations in 1998 and subsequent observations in 1999 and 2000.
Mediation in the Two Forums – A Comparison

The two legal-sponsored mediation forums differ in how they respond to residents’ disputes. Variables such as availability, familiarity of the personnel of each forum with the favela and its characteristics, the basis for enforcing decisions reached in mediation, the types of cases heard in each of the forums, and procedural differences each have an effect on the ability to resolve residents’ disputes. Using archival data as well as participant observation and interview data from individual cases, I will compare mediation in these two forums.

Before comparing the use of mediation by both the JEC and the Balcão, it is important to discuss the changes in the structure of these mediations over the time of the observations. Both agencies underwent dramatic changes that significantly altered their capacities to effectively resolve residents’ disputes.

As mentioned above, the JEC was located in Rocinha at the beginning of this study (July 1997). In February 1998, the Rocinha branch was abolished and all cases where heard in Barra da Tijuca. The removal of this branch affected the JEC in two ways. First, it became less accessible to residents given the increase in geographical distance between the office and Rocinha. Second, Rocinha cases in Barra were now handled by the same mediators handling all other cases in the JEC, decreasing the familiarity of any particular mediator with the unique property disputes of the community. An analysis of individual cases will demonstrate how the changes in these two elements affected the ability of the JEC to mediate residents’ disputes.

In May of 1999, the coordinator of the Balcão was replaced. With the change in coordination, the organizational structure was also modified. This resulted in two major changes in its functioning: increases in the integration among personnel and in the efficiency in the record keeping of individual cases. These changes increased the availability of the Balcão through a greater integration of the office with the community of Rocinha and increased knowledge of the Balcão in the community (personnel communication with Monica de Mendonça Ferreira, coordinator of the Balcão de Direitos of Rocinha). The improvement in record keeping has allowed the staff to better track individual cases, allowing more than one intern to access the data of a case.

Archival data revealed that from January 1997 until February 1998 there were a total of 178 cases from Rocinha initiated in the JEC, an average of 14 cases per month. Of these 178, 75% (133) of these were property disputes involving exclusively residents of Rocinha, 22% (40) were consumer disputes and 3% (5) were property disputes between residents of Rocinha and neighboring areas. From the data available (on 121 of the 133 property cases), 58% (70) of these cases had been resolved by the JEC and 42% (51) were dismissed or were still pending as of August 1998. Of those cases that were resolved, 84% (59) were mediated and 12% (11) were adjudicated.

In February 1998, the post in Rocinha was closed and Rocinha cases began to be handled in Barra da Tijuca. Data on the number of Rocinha cases for 1998 and 1999
were unavailable\(^1\), but during four months of recording of case intake at the JEC from October 1999 to January 2000, there were a total of 234 cases initiated in the JEC. This is an average of less than two a month. Only seven of these cases were from Rocinha, an average of 2 a month. Of these 7 cases, only one was a property case between residents, five were consumer disputes and the last was for recovery of damages in a car accident involving a resident of a neighboring area. These numbers suggest that the use of the JEC by residents’ of Rocinha has diminished dramatically since the JEC moved out of the community. In addition to the increased geographical distance between the community and the JEC (a fifteen minute bus ride), I offer three additional reasons for the dramatic decrease in the use of the JEC. These are: a lack of familiarity of the JEC personnel with Rocinha property disputes, procedural rules in the JEC that discourage residents’ use and the existence of another legal-sponsored mediation forum (the Balcão) within the community.

While the JEC had an office in Rocinha, it was staffed by three lawyers who handled case intake and mediations. Often, these lawyers were called upon to offer consultation to residents’, often referring residents to other legal agencies for cases outside the jurisdiction of the JEC. To demonstrate, of the 25 intake interviews observed in July and August of 1997, only 12 resulted in the opening of a case in the JEC. While these lawyers did not receive any special training in order to attend to cases in Rocinha, they benefited from the orientation of the municipal staff were the JEC was housed, all of whom resided in Rocinha. The lawyers and interns who work at the JEC in Barra da Tijuca handle intakes and mediations from a number of neighborhoods served by the JEC and are unaccustomed to the issues presented by Rocinha plaintiffs. Note the following example from the intake of a Rocinha property case in October of 1999.

The lawyer then asks if Erasmo (the plaintiff) has an address for the defendant. [An address is necessary in order to serve notice of the mediation hearing to the defendant]. Erasmo answered that he lives in the same house as he [Erasmo] does. This confused the lawyer and said, “he lives in your house”? Here Erasmo said that in order for the defendant to “go into his house he has to go through mine”. (Fieldnotes October, 8 1999)

Most of the lawyers serving in the XXIV JEC have never entered a favela and are unaccustomed to the particulars of construction, sale and transfer of property in the favela. While those lawyers working in the Rocinha branch also did not have experience in the favela, focusing exclusively on Rocinha cases, working inside the community and contact with the personnel of the municipal office provided them with an increased knowledge and familiarity of these issues that was lost when the Rocinha branch was closed. I argue that a familiarity with the types of issues in Rocinha by the lawyers handling the case allowed them to more effectively resolve the dispute in a way that was satisfactory to those who sought the JEC.

\(^1\) With the removal of the Rocinha office, Rocinha cases ceased to be catalogued separately and were entered into the main database. At the time of data collection, cases could not be disaggregated by neighborhood.
Regardless of the familiarity of the JEC personnel, certain procedural rules of the JEC make its use problematic for residents of Rocinha. Anyone wishing to open a case must provide his or her complete address and the address of the defendant. The summons for the mediation hearing is delivered first through the mail and if not successful, by an officer of the court. Many residents in Rocinha do not have a mailing address, indicating their residence with points of reference. As a result there are many areas in Rocinha that do not have mail service. This creates a problem in delivering defendants a summons to appear at a mediation hearing. The court usually awards the petitioned value of the case to the plaintiff in the case the defendant does not appear at the hearing. However, in order for this to occur there must be proof that the summons was delivered. This requirement delays judgement on Rocinha cases because mail and the court official, unfamiliar with the *favela* usually cannot deliver the summons cannot find the defendant in order to serve the summons. Observations in both the Rocinha office (while it was in operation) and the JEC in Barra da Tijuca show that this procedural rule slows down the processing of Rocinha cases. Note the following example from observations of the Rocinha office:

The first interview [to open a case] was with a woman who wanted to protest the removal of a caixa de agua [water tank] from her house. In order to fill out the paper work that will be sent to the other party in order to have an audiencia [hearing] the address has to be exact. The woman could not give an exact address. The woman was told to come back another day when she had an exact address. (Fieldnotes July, 3 1997)

In addition to slowing down the initiation of a case, faulty delivery of a summons delays the occurrence of a mediation hearing between the parties. A recent property case in the XXIV is demonstrative of this. The case is between a man and his grandson-in-law. The granddaughter is no longer living with the grandson-in-law (defendant) but he is still occupying the living space in the building of the plaintiff (Erasmo). The plaintiff opened the case in order to get the grandson-in-law evicted. The following fieldnote is from the first mediation hearing, to which the defendant did not appear\(^2\).

*Mediator:* This hearing was scheduled for 11:15am, he [the defendant] probably won’t show. So I am going to register his absence, OK? You sir came at the scheduled time but the defendant did not…

Here the conciliator returned [from registering the defendant’s absence] and began explaining that she has documented that the defendant did not appear at the hearing…. I suggested to Erasmo that he get the Associação [residents’ association were the original citation was sent] to write a letter confirming that the citation was delivered to the defendant. Erasmo explained that Aurelio [the plaintiff] uses the same door to get to his house as Erasmo does and that the original letter from the JEC to the Association never arrived. I am explaining that once it can be verified that the defendant was duly cited, if s/he does not show up, then the case is

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\(^2\) All translations from Portuguese are by the author.
awarded to the plaintiff. I asked what would be the best directions for the
“oficial da justiça” [court official] to find the defendant. He began
explaining the directions to his house…. The conciliator is trying to get
the address of Erasmo. I am explaining to the conciliator that the mail
does not come to Erasmo’s address. She leaves to check this with Nagib
[another court employee] (Fieldnotes October 27 1999).

This mediator schedules another mediation hearing for the case and the summons is to be
delivered by a court official. However, this was also ineffective, and at the second
mediation hearing the defendant still does not show because the court official could not
find the address of the defendant.

Mediator: But the address here [in the case file] is not the same as the
address on the electricity bill [Erasmo was showing the electricity bill to
the mediator to show that the defendant is not paying any of the bills].

Erasmo: The address there [in the case file] is of the residents’ association.
The last time I was here they [the mediator] said they were going to
deliver it [the summons] by hand. But the address where we live is street
#4, house #3. When I came here they [the court] were going to send a
letter to summon him [the defendant]. In the Travessa Palmas there is a
little store of a friend of mine. There they deliver mail.

Mediator: Because the address for Antonio Aurelio, the companion of
your granddaughter [the defendant] on file is Estrada da Gávea, 543,
Travessa Palmas no. 37 and in parenthesis street #4, house #3.

Erasmo: He [the defendant] said he would not come [to the hearing].

The conciliator reads the report from the court official that said that he
could not find the address and thus could not deliver the citation to the
defendant. He [the court official] requested that the plaintiff provides
more detailed directions with reference points or accompanies the court
official in order to deliver the summons.

The conciliator is re-reading the note from the court official that says that
he was unable to locate the address. She is telling Erasmo that the court
official requests that he (Erasmo) go with him or give some points of
reference. She says that she can write it down here (the points of
reference so that the court official can find the address).

Mediator: So what we are going to do is give [the court official] some
points of reference [to find the address of the defendant].

Erasmo: Give me the letter, I’ll give it to him [the defendant], I see him
everyday, he lives in my building….
Mediator: We are going to give all the indications for him [the court official] to arrive there [at the address]. By any means another hearing is scheduled for him to appear in January or February [this was Nov. 25th].

Erasmo: If it is for this [for him to not show], I'll go straight to the police station. I cannot [keep waiting].

Mediator: Let’s keep this case open also.

Erasmo: Let’s leave it open. By any means it has to be resolved because it cannot stay like this, it cannot. I’ll go to the public defender’s office…. There it will take, two, three, four months….

Author: But let’s suppose you give some indications to the court official so that he can look for such and such bar and find your house in order to deliver the summons in your building.

Erasmo: There in street #4, it starts at the police post and goes until the Estrada do Boiadeiro, in the middle is where we live, there is Gilberto, who has a bar, near the door of my building. There is also a bar of Monteiro, a large one, everyone knows it…. But if he [the court official] goes and is not interested, and doesn’t deliver [the summons], because I said, I’ll deliver the letter [summons], I’ll deliver it in his hand.

Mediator: It is better to deliver it through the court official because if there were some reaction [on the part of the defendant].

Erasmo: But he won’t react. I am coming here and he is there…

Here the conciliator asks Erasmo for the complete address and writes down the specific directions for the court official to arrive at the house. When she had gotten all the directions down, she asked him to sign and told him that the hearing was for the 27th of January, at 9:15am….

(Fieldnotes November 25, 1999)

By the third scheduled mediation hearing, January 27th, the defendant did appear. However, Erasmo had opened this case on October 8th and the resolution of the case took place three months after the originally scheduled mediation. Without proof that the summons had been delivered, i.e. that the defendant had knowledge of the hearing, the case cannot proceed to adjudication. As demonstrated from the above passage, this causes frustration among those who open cases in the JEC, as resolution becomes delayed.

The third reason why the use of the JEC as a mediation forum for dispute resolution is the existence of another legal-sponsored dispute forum in Rocinha, the Balcão. As previously mentioned, the Balcão is a legal aid project located in Rocinha.
providing legal orientation and mediations since its creation in 1996. During the first part of this study, both the JEC and the Balcão were both located in the community. Data on percentage of property cases handled by the handled by the Balcão in 1997 were unavailable.

In 1998 and 1999, mediation of all types made up 23% of the services provided by the Balcão. Civil cases (family and property) made up 54% of the total cases handled in the Balcão during this time. Of these civil cases, 32% resulted in mediation, the rest involving legal orientation (47%) or the opening or follow up of formal legal proceedings (21%). Approximately one third of these mediated civil cases are property cases. While no precise data is available to verify whether the property caseload increased after the Rocinha office of the JEC was closed, both coordinators communicated that they perceived this to be the case (personal communication with Monica de Mendonça Ferreira, coordinator of the Balcão de Direitos of Rocinha).

While the geographical proximity of the Balcão in comparison with the JEC was a factor in this shift, differences in mediation style between the two forums and the specific mission of the Balcão are also important factors in explaining the increase in property mediations.

Mediations in the Balcão differ from those in the JEC in several ways. First, these are extra-legal, and unsuccessful mediations do not automatically result in adjudication like those in the JEC. When the parties using the Balcão are unable to reach an agreement through mediation, one of the parties must decide to open a legal case, usually drawn up and handled by the Balcão. The lack of direct recourse to adjudication does not impede the mediators from using the threat of adjudication as a tactic to get the parties to reach an agreement. Phrases such as “if you go before the judge it will be worse for you” are commonly used in mediations.

Secondly, mediations in the Balcão are voluntary in nature. When a resident of Rocinha comes to the Balcão regarding a legal matter that may be resolved through mediation, the staff member handling the case asks if the resident thinks that the other party would be willing to come in participate in a mediation in order to resolve the problem. Thus, unlike in the JEC, there is a perception (at least on the part of the person initiating the case) that the parties will be able to come to an agreement. There is some evidence that mediation is most successful when both parties are willing participants in the process (see Vidmar, 1984 and McEwen and Maiman, 1984).

In addition, the procedure of mediations in the Balcão is less formal than in the JEC. Rather than an official citation, the Balcão issues the party making the complaint delivers a letter of “invitation” to the other party to appear at a mediation hearing which. This eliminates many of the localization problems seen in the above example of the JEC. However, it presents its own problems by necessitating contact between the parties prior

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3 Electronic data entry for the Balcão was begun in 1998. Data for 1997 is only archival and was not available. The statistics cited for 1998 and 1999 were graciously provided by Pedro Strozemberg, the general coordinator of the Balcão de Direitos project.
to the mediation hearing. Sometimes the party opening the case in the Balcão is not on speaking terms with the other party as a result of the dispute. This is remedied in some cases by having a mutual acquaintance of the two deliver the letter or by sending it by mail (where possible). In general, making one of the parties responsible for delivering the letter has been effective. In 25 cases observed over December 1999 and January 2000 only 3 (12%) were rescheduled because one of the parties did not show.

Lastly, and perhaps most importantly, the Balcão is a forum exclusively for the use of Rocinha residents. As such, it is more responsive to the particular needs of residents of Rocinha than another forum not exclusively designated for favela residents. In order to better serve the community, the Balcão has on staff members of the community that maintain a dialogue between the legal staff and the community in order to respond to residents’ needs. This has resulted in the creation of cooperative agreements with the Caixa Económica and the municipal office (Região Administrativa).

To facilitate the payment of child support payments negotiated in mediations held at the Balcão, an agreement was negotiated between the Balcão and the Caixa Económica, a bank whose Rocinha branch is located across the street from the Balcão. The parties can open an account in the child’s name to which monthly support payments can be deposited on the date stipulated in the mediated agreement. This avoids the necessity of direct payments between parties that more often than not are hostile towards one another.

In order to mediate better the conflicts regarding property construction in Rocinha, the Balcão has negotiated an agreement with the municipal office (Região Administrativa) in order to request the evaluative services of the municipal architect. Recourse to the municipal architect in mediating property conflicts in Rocinha is not a recent development, and is frequently used by the JEC, especially while this forum maintained its office in the municipal office’s building. However, the availability of this service for the Balcão is a recent development, begun in 1999. In addition to the services of the municipal architect, beginning in January of this year, the Balcão has included an architecture student intern to its staff for the purpose of evaluating construction and property disputes.

The Balcão as a forum for mediations is not without problems, however. Often the same personnel handling the mediation will be the ones responsible for filing a lawsuit in case the two parties fail to reach an agreement. This results in an unfair advantage to the person filing the suit, since his or her lawyer was most likely privy to compromising information during the mediation hearing. Also, the Balcão does not have any sanctioning power, either to compel a party to appear at a hearing or to enforce a mediated agreement. It must rely on the formal judicial system for sanctioning.

Regardless of whether mediation takes place in the JEC or in the Balcão, mediation has been shown to be an effective means of resolution for property cases in Rocinha. Of the property cases that were resolved by the JEC from January 1997 until February 1998 (70 out of 133), 84% (59) were mediated and 12% (11) were adjudicated.
In 1998 and 1999, 66% of the total mediations in the Balcão resulted in an agreement. Particularly in the case of property disputes, mediation provides a means to resolve cases that are not applicable to the letter of the law. Most residents do not have legal title to their property and although the JEC accepts title drawn up by the residents’ association, this is not in strict adherence to legal code. The space between buildings in Rocinha is often no more than 30 centimeters and residents commonly share exterior walls. Civil code requires distances between buildings and provisions for construction that are unrealistic to apply in the *favela*. Thus, the ability to resolve disputes using “applied law” creates a forum for disputes that otherwise would not enter the legal system.

The lack of a legal basis for the resolution of these disputes makes the technical evaluation of the structural issue under dispute all the more relevant. In fact, the technical authority of the architect’s evaluation replaces legal principles as the means by which agreements are reached both in the JEC and the Balcão. Consider the following example from the JEC Rocinha office:

The third hearing was also about construction, particularly whether or not construction could take place on the *laje*\(^4\) of the plaintiff. Both the plaintiff and defendant in this hearing were women and the hearing itself went very quickly. The mediator followed the recommendations of the architect, who advised that the defendant could not construct a second level on the *laje* because the infrastructure was insufficient to support a second level. The defendant wanted to build a second level on another part of the structure. Since this part was not considered to have insufficient infrastructure the mediator saw no problem with this. The plaintiff did not either, as long as the defendant did not build on top of the structure that could not support a second level. The two signed an agreement without much more discussion. (Fieldnotes June 19, 1997)

Use of the architect’s evaluations function in a similar way in the Balcão:

One of the interns is taking down the information about a guy who is having a problem with his neighbor about construction. She is requesting that the man go to the RA [municipal office- Região Administrativa] to request that the architect there do an “alvo” (evaluation of the construction), that he should bring to the Balcão for the date of the conciliation. (Fieldnotes November 23, 1999).

However, although the architect’s evaluation carries considerable weight with the parties, it is not always the case that the parties will abide by his decision in either of the two forums. This is in contrast to the fact that the evaluation

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\(^4\) “laje” in English translates as “a reinforced concrete floor”. In Rocinha, a laje serves as the roof of a structure which is used by residents to hang clothes, entertain and as an open space for children to play, but is also ready to use as the foundation for an additional level to the structure.
becomes “evidence” in the case. Note the example in a property mediation in the Balcão:

The intern held this conciliation in the large round back table. He opened the mediation hearing by saying that the plaintiff had called the conciliation because she did not want to build without first talking to the defendant. He is looking over the case file and said that the Balcão had asked the architectural student intern to go and look at the construction and in the case file. He (the architectural student intern) said that there was not any problem with building. There was another evaluation done in the municipal office that says that the plaintiff can build as long as she leaves a space of 70 cm for ventilation. The plaintiff says that she cannot leave a space that wide because the defendant had advanced into her housing space years before. The plaintiff is getting agitated and saying that there would not be any problem with her construction if the defendant had not “advanced”.

Both the women are talking at the same time. The defendant started talking and saying she also came here (to the Balcão) and told the intern that the municipal office had gone to the site and that she had also already been to the municipal office. The plaintiff said that she is going to continue building and that the “one in the wrong is you (to the defendant)” and that her (the defendant’s) father had “advanced” the defendant’s property and this was the problem.

The intern is saying that the plaintiff should not build without the space. To this the plaintiff said “I’m not going to stop building my house because of anyone, it is her [the defendant] fault”.

The intern is saying that he is only reflecting what the evaluation says. The plaintiff is saying that “there is no way to leave [the 70 cm]” and wanted to know what the architect said because the defendant was also wrong. The plaintiff is saying that she is going to build and she says that the municipal office said she could, as long as she left a space of 30 cm.

The plaintiff is now saying that she lived there first and she had a right to build.

Both were getting upset and agitated and the intern repeated that he did not recommend she build because if she did, the defendant could file a suit in the JEC. The intern gave the address of the JEC to the defendant and the plaintiff said she also wanted the address because she was going to go there and “follow through to the end”. (Fieldnotes February 2, 2000).

Here the plaintiff did not agree with the architect’s evaluation, wanting the mediation to take into consideration other factors, such as the defendant’s previous conduct and the impossibility of leaving the recommended space. The plaintiff was unwilling to accept the evaluation as the final authority in the case, although it is the evidence that will be used if the case goes to adjudication in the JEC. To the author’s
knowledge, despite the plaintiff’s spoken intention to do so, the case had not been opened in the JEC.

In both forums, however, questions still remain about the efficiency, compliance and inclusiveness of mediation as opposed to other forms of dispute resolution, most notably judicial adjudication. It is argued that the mediation process results in an increase in compliance among the parties. Data gathered in both forums showed a high level of compliance, or at least perception of compliance. When asked, parties responded that they believed that the other party would comply with the terms of the mediated agreement. Neither forum measure compliance as a separate variable, but those cases that were resolved in a mediation did not reappear later as new cases. In terms of efficiency, both in the JEC and the Balcão cases are resolved much quicker through mediation, at the most lasting a few months, rather than years if the cases were to follow regular formal legal channels.

Perhaps most significant is the increase in access to “law”, albeit informally, created by these legal-sponsored mediation forums. As previously mentioned, non-legal mediations are common in the resolution of property cases, given that most land issues occur on invaded land. The use of mediation in these cases allows for the presence of the legal system where previously not applicable. While some would argue that this simply increases state social control over disadvantaged populations (see Abel, 1982), this claim needs to be weighed against the alternatives available in Rocinha. In addition to non-legal community agencies such as the residence associations, residents of Rocinha, like those in most other favelas, can and do turn to drug trafficking gangs to solve disputes. These are always resolved through the use or threat of force and many times arbitrarily. Given this reality, the existence of viable legal-sponsored forums is an important step in the reduction of violence in the community.

Conclusion

While mediation in both the JEC and the Balcão are not without problems, the possibility of legal-sponsored mediation, especially in the case of property disputes is opening a space for legal access in Rocinha. The informality of the mediation process, the use of “applied law” and non-legal evidence such as technical evaluations has made the legal system available in disputes previously resolved only informally within the community. While procedural rules of the judiciary still impede that it is fully responsive to all the needs and characteristics of a community such as Rocinha, legal mediation offers a means by which residents can use the law for their everyday problems. Beyond this, mediation offered in other types of disputes such as separation and child support allows for a more efficient resolution than recourse to family court. While one must be concerned for issues of due process, discrimination and bias in mediation that have been the concern of researchers in the United States, I would argue that at this time, in the favela, the positives of legal mediation outweigh these potential negatives.
Legal mediation offers an alternative to more traditional non-legal forms of problem solving in the *favela*. The use of legal-sponsored mediation rather than other forms is important for two reasons. First, it provides residents with access to judicial process. *Favelas* are composed of Brazil’s urban poor who are most unlikely to seek out judicial processes for dispute resolution. The financial cost and time associated with the traditional legal system makes its use a remote possibility for *favela* residents. In addition, the lack of immediate results in the traditional legal system has contributed to a general sense of the futility of resolving a problem through legal means. The introduction of legal mediation into the *favela* provides an efficient and effective means for residents to use the legal system, increasing credibility as well as access.

Secondly, it decreases the reliance on other potentially dangerous forms of mediation that exist in the *favela*. The perceptions of futility of the legal system is further fueled by distrust in state agencies of social control such as the police and the real danger of violent repercussions on the part of traffickers for their use. The existence of legal mediation has provided an alternative to the traffickers that has been embraced not only by residents but also by the traffickers themselves. During the course of data collection I heard from a number of sources that the traffickers referred property cases that came to them to either the JEC (while the Rocinha office was in existence) or to the Balcão. In addition, parties who brought their cases either to the JEC or the Balcão often would make a reference to the possibility of taking the case to the traffickers, but that they had sought out legal mediation because they “wanted to do the right thing”. While it would be naïve to think that the simple existence of legal mediation has any real effect on the position the traffickers hold in the community, especially in their traditional role in sanctioning criminal behavior, it does provide, in small measure, an alternative recourse in minor-level disputes. In this respect the state has regained a role as an agent of social control within the community.

While this paper has focused exclusively on the use of legal mediation, its actually role in dispute resolution in the community must be examined in conjunction with other non-legal forms. Further research should look at these forms of legal mediation within the context of the full range of dispute resolution options available to the community and for a number of different types of disputes. Only this way can one gain a true understanding of the processes of social control in the *favela* and what role that state does and can occupy in this process.
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