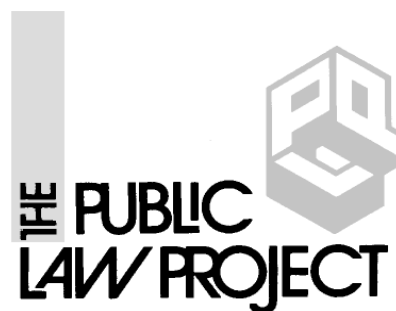


Mediation and Judicial Review

– Mind the Research Gap

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Reviewing government policy over the last few years, one could be forgiven for thinking that alternative dispute resolution (ADR) is the answer to a prayer. Since Lord Woolf's Access to Justice report in 1996, and before that in the White Paper on family law reform published in 1995¹, ADR has cropped up in a wide range of consultations, green and white papers, and consumer strategy documents. In most cases it is offered, without explanation, evidence or comment, as the solution to the problems with our legal system. This assumption begs a number of questions:

- What are the problems with our legal system?
- In what way might ADR offer a solution?
- Where is the evidence for this claim?

The government is publicly committed to offering legal aid as a path to justice for the poorest and most socially excluded people in society. As the cost of criminal legal aid soars, the civil legal aid budget is squeezed year after year. The government faces a dilemma – how to reduce legal aid costs without appearing to reduce access to justice. Mediation² offers a seemingly magical solution – a procedure which not only claims to be cheaper than adjudication, but also introduces other desirable factors into the bargain: “empowerment” (individuals are empowered to make their own decisions rather than having them imposed by the courts), “flexibility” (the process and the solutions are more flexible than the formal justice system) and “user-friendliness” (people will find mediation less intimidating than the court).

In its New Focus on Civil Legal Aid consultation paper³, the LSC sought views on proposals designed to promote the wider use of mediation and ADR⁴, in particular by introduction of a power to limit certificates to cover only attempts to pursue mediation. The Commission suggested that there may be cases “wholly suitable” for ADR in which applicants have “wholly failed” to provide any good reason for

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¹ *Looking to the Future - Mediation and the Ground for Divorce* April 1995

² We focus in this article on mediation as opposed to other forms of ADR such as ombudsmen or arbitration.

³ http://www.legalservices.gov.uk/docs/civil_consultations/new_focus_consultation_july04.pdf

⁴ *ibid* para 4.21

declining its use. It remains to be seen by what criteria “suitability” for mediation will be established, however⁵.

Public law practitioners⁶ expressed concerns over the proposal to introduce what many saw as compulsory use of mediation as an alternative to judicial review. These included the fact that the proposed measure would be at odds with current judicial thinking⁷, that there was a need to consider the implications of power imbalance between the parties and that the confidential nature of the mediation process could give rise to a perception that it lacks transparency and accountability. In short, it was premature to introduce such measures in the absence of adequate data as to their viability and implications.

The results of the consultation were published in May 2005⁸ and, despite respondents’ concerns, the LSC announced that from July 2005 the presumption of funding for judicial review cases where permission has been granted will be narrowed in some cases, to cover only attempts to pursue mediation.

It is not clear what may be driving the proposed changes to legal aid in public law cases, and the promotion of mediation, aside from considerations of cost. Unlike many county courts, the administrative court does not at present suffer from chronic case overload resulting in unacceptable delays in the adjudication process. Hence, there is no perceived need to introduce measures to free up judges’ time. While a pilot mediation scheme in Central London County Court⁹ was initiated by judges who were concerned with the disproportionate legal costs of low value cases, and with the perceived increase in the number of litigants in person, these reasons are unlikely to feature in the administrative court. Further, the use of mediation in the administrative court is potentially fraught, as ‘litigation is essential to maintenance of the rule of law and to achievement of justice for the mass of people who are never, themselves, involved in actual proceedings’¹⁰.

So is there still anything to discuss, given that the decision to introduce mediation into the administrative court appears to have been made regardless of the incomplete state of the evidence in its favour? Arguments about the pros and cons of mediation generally are often inconclusive, notwithstanding that discussions of alternative dispute resolution have been taking place for many years. Aspects of ADR hailed by some experts as beneficial are invariably countered by others as dangers to be avoided at all costs. As one academic has put it :“ Although the literature is

⁵ *ibid* para 4.22

⁶ The public Law Project submitted a response to the paper following debates among a group of practitioners. The response was signed by 66 leading practitioners.

⁷ *Halsey v Milton Keynes General NHS Trust* EWCA Civ 576

⁸ <http://www.dca.gov.uk/response-litigation.pdf>

⁹ H Genn, *Central London County Court Mediation Pilot: Evaluation Report*, LCD Research Series, Number 5/98

¹⁰ Professor Jolowicz in ‘On the Nature and Purpose of Civil Procedural Law’, Scott (ed) *International Perspectives on Civil Justice* (1990) p. 27

enormous, much of it is unoriginal; the same points are made over and over again. Thus the babble of voices is loud".¹¹

To add to those uncertainties, no distinction is usually made in these discussions between the private and public law contexts, and it is difficult to find empirical data relating specifically to mediation in public law. We do not suggest that further debates are futile. On the contrary, we seek to add to the 'babble of voices', not least because the absence of a distinction between private law and public law disputes in promoting the use of mediation suggests that insufficient consideration may have been given to it.¹²

In this article we consider some of the claims frequently made in favour of mediation and the counter-arguments by sceptics, and look at whether available research findings can actually assist us in resolving any of these conflicting views. These considerations are particularly relevant in the context of the increasing appetite displayed by the DCA and the LSC for non-voluntary mediation for legally aided parties to litigation. However, of course, the choice of dispute resolution process is always made under some constraint such as pressure from legal advisers, financial necessity, or perceived judicial expectation.

We also highlight the need for dedicated research leading to a better understanding of what role mediation might usefully play alongside judicial review, and the need to ensure that, eventually, public law practitioners will have recourse to relevant and reliable information to help them decide when to use mediation, when best to avoid it, and how to go about setting it up.

Practical problems, as well as issues of principle and social ideology, enter the analysis. The inconclusiveness of the discussion is perhaps due in part to the fact that the arguments occur across several discourses, and 'any narrative that articulates itself to several discourses will encounter the equivocation that concepts attract as they float between contexts'.¹³

Time and Costs

The pro-mediation claim: Mediation is quicker and cheaper than litigation¹⁴.

¹¹ Scott I.R.(1990) 'The Courts and Alternative Dispute Resolution' 56 Journal of the Chartered Institute of Arbitrators 176-82, quoted in Ingleby R 'In the Ball Park: Alternative Dispute Resolution and the Courts', AIJA 1991, p. 4.

¹² See V Bondy 'Who Needs ADR' [2004] JR 306 and Val Reid 'All aboard the Band Wagon', Legal Action, September 2004, flagging concerns surrounding the use of mediation in cases involving public law challenges.

¹³ Pavlich George C, 'Justice Fragmented' Routledge 1996, p.8

¹⁴ See for examples CLS Direct information leaflet 23, page 3. or

http://www.legalservices.gov.uk/civil/forms/what_is_mediation.asp: Mediation is generally more cost-effective and quicker than going to court.

The sceptics' view: Mediation can be just as expensive as litigation, and if it fails, serves to increase costs. Mediation can be used by deep pocket parties to create tactical delays and cause prejudice by forcing poorer parties to withdraw or settle.

What we know: the research evidence: The cost benefits of mediation are difficult to calculate or to predict, although much research has been dedicated to the topic¹⁵. Where early mediated dispute resolution is achieved, the costs can be significantly lower than the full costs of trial. But there is considerable variance in costs of representation, mediator fees, and the point in the litigation process at which the mediation takes place. Many non-mediated cases settle before trial, and so it is misleading simply to compare mediation costs with trial costs. Increasingly costs are front-loaded so costs are incurred early on in cases whether or not they settle, mediate, or go to trial, and cases where mediation was attempted but was unsuccessful incur higher costs¹⁶. According to Genn, the truth of the assumption that saving time will save costs "has yet to be established in any systematic way"¹⁷. Australian research suggests that mediation does not appear to produce significant costs savings, but what it may achieve is early and appropriate resolution of cases that would settle anyway.¹⁸

Comment: It is difficult, and often impossible, for practitioners to advise clients on the costs of mediation in advance of mediation being agreed with the other party¹⁹. It is only then that the parties jointly choose a mediator and ascertain mediation fees and the cost of a venue. Even then, it may be difficult to predict how long the mediation might take. A longer than anticipated mediation gives rise not only to higher legal fees, but also additional mediator's fees and venue hire. For a party with limited means, the decision to engage in mediation in preference to adjudication may prove risky, especially in view of the fact that mediation cannot guarantee a binding outcome, and that there is no appeal from a failed or otherwise unsatisfactory mediation.

In addition, the indirect costs of mediation may need to be considered. Saving legal costs might be the primary incentive for public authorities to use mediation, but for mediation to be most effective it requires the attendance of those individuals with the decision-making authority to agree settlements. In complex cases, this might entail attendance on the part of high-level representatives of more than one local authority department, or more than one public body, for example. Their time to attend mediation must be factored in.

¹⁵ Professor Hazel Genn, 'Court based ADR initiatives: the commercial court and the court of appeal' LCD Research Series 1/02, at page 111: 'The interest in establishing convincingly whether or not ADR saves legal costs has yet to be satisfied'.

¹⁶ Genn, "Solving Civil Justice Problems: What might be best?" Scottish Consumer Council Seminar on Civil Justice, January 19, 2005, p.11.

¹⁷ Genn 1998 op cit, p.73.

¹⁸ Astor, Hilary and Chinkin, Christine, 'Dispute Resolution in Australia', 2002, pp. 58 and 59

¹⁹ The same difficulty would be encountered by a judge wishing to direct parties to mediation.

Flexibility of process and outcome

The pro-mediation claim: Mediated outcomes offer a variety of tailor-made forms of redress, including agreed action, changed decisions, compensation, apologies and explanations, and changes in policy and procedure. This is in contrast to the limited and discretionary remedies available in judicial review. In addition, as the process is consensual and non-adversarial, it has the potential to preserve or restore relationships where the parties are likely to be involved in ongoing contact in future.

The sceptics' view: Flexibility of outcome does not guarantee fairness or justice. By individualising disputes which may have structural roots, mediation is offering somewhat superficial resolutions.²⁰

What we know: the research evidence: We know little about the relative fairness of the processes and outcomes of mediation as compared with adjudication. For the most part, this is a highly subjective area, and research can only reflect participants' perceptions rather than an objective 'truth' of what is fair²¹. The 'right' outcome is not necessarily the one determined by law; people perceive fairness and justice in a variety of ways. For some people, the process used is most important regardless of the outcome; for others the contrary is true. Genn suggests that "the interest of mediating parties was primarily in *outcome*, not in the mediation *process*"²². Nevertheless, the authors of a study of community mediation commissioned by the Scottish Executive point out that 'Participants' views...show a generally positive view of the process, even where it does not bring the desired outcome'²³.

Comment:

Given the subjective nature of the perception of fairness, it is important to ask who decides whether a particular process is fair, just or appropriate?

Many of the concerns about the individualised and private nature of mediated agreements apply also to negotiated settlements. Carrie Menkel-Meadow writes of the 'litigation romanticists' who presume that judges will ensure equal representation of parties, redressing the inequities of society. In her view, litigation is no more likely than alternatives to litigation to produce complete 'fairness'²⁴. As there is no consensus about what constitutes a "fair" outcome, there can be no agreed

²⁰ Abel 'The Contradictions of Informal Justice', 1982, referred to in Pavlich on p 68

²¹ See e.g. Genn, Hazel, 1998 op cit, chapter 5; Tyler, Tom, "Procedure or result: what do disputants want from legal authorities?", in *ADR in Action: A Handbook of Dispute Resolution*, ed. Karl Mackie, 1991.

²² Genn 1998 op cit, p.153.

²³ Brown, Alison P., et al., "The Role of Mediation in Tackling Neighbour Disputes and Anti-Social Behaviour", Scottish Executive Social Research, 2003, p.3.

²⁴ Menkel-Meadow, Carrie, 'Dispute Processing and Conflict Resolution: Theory, Practice and Policy', 2003, p.xxv.

criteria for deciding what would be a fairer process in any given case. Astor and Chinkin state:

“The extent to which the parties in a dispute are in reality provided with any real autonomy from the law and its procedures may depend, at least in part, on the quality of the ADR service provided and the resources at its disposal to allow the parties to make informed decisions about the law, their own needs, and the extent to which they wish to depart from the law”²⁵.

Confidentiality

The pro-mediation claim: Mediation offers confidentiality so issues can be explored more openly and settlements are private. This can be an advantage to both parties.

The sceptics' view: Confidentiality of mediated settlements compromises the accountability of public bodies and limits the scrutiny of outcomes. Mediation can mask the lack of real change. “The provision of institutional or public ADR mechanisms creates an outlet for claims by informed citizens about inadequate service or inappropriate behaviour that may foster the appearance of a responsive employer or government while concealing the lack of substantive reform”²⁶.

Comment: If judicial review is the means of ‘scrutiny by the judicial branch of government of decisions and actions of the executive branch to police compliance with values and principles of public law’²⁷, can it be safely substituted with a confidential private process facilitated by a private individual? Is mediation essentially a form of privatised justice and the antithesis of a rule-based system of law, or is it an empowering experience leading to satisfactory outcomes? On the other hand, confidentiality is not an essential aspect of mediation. “In some public sector cases it may be difficult to impose full confidentiality on the mediation process because of scrutiny by the National Audit Office, the Public Accounts Committee, local auditors, public consultation required under a statutory process or because of media pressure. ... For public policy reasons, it may also be undesirable for multi-party public policy disputes to be mediated confidentially.”²⁸

Precedents

The pro-mediation claim: Notwithstanding that mediation does not result in the setting of any legal precedents, it is unlikely to impact seriously on the volume of cases going through the courts, and therefore it poses no threat to the development

²⁵ Astor and Chinkin, 2002 op cit, p.27

²⁶ Astor and Chinkin, 2002 op cit, p.29

²⁷ Peter Cane: ‘Understanding Judicial Review and its Impact’ in M.L.M. Hertogh and Simon Halliday (eds) *Judicial Review and Bureaucratic Impact*, (Cambridge University Press 2004 at page 16

²⁸ “ADR for public authorities”, CEDR, 2003

of the law. Cases where a legal precedent is needed are usually considered unsuitable for mediation and so are filtered out in any event.²⁹

The sceptics' view: The benefits of litigation are not only for the parties in a particular dispute. It provides norms through the creation of precedents for the rest of the community³⁰. Because mediation outcomes do not set precedents, there is no case law established, particularly a concern in emerging areas of law.

Comment: It is not always easy to identify in advance cases that might establish precedents. In any event, the establishing of legal precedents is not, and need not be, of any concern to the mediator, whose role is to assist the parties in reaching a mutually satisfactory resolution. But it is a concern for judges and for public law practitioners.

Conclusion

It has been noted with some irony regarding the results of research into ADR that: 'It might not be unfair to say that if all these studies were laid end to end, they would not reach a conclusion'³¹. However, awareness of available, although often inconclusive, research data can be useful. The importance of the issues concerned make it essential for policy makers to demonstrate that their decisions are based on more than declarations of good faith in the value of mediation. Practitioners need to be aware of the arguments in order to have a say in shaping policies and also in order to explain the reasons why they choose to use or to reject mediation in a particular case. Judges, too, need to be able to engage in informed discussion with parties before directing mediation over the objection of one or both parties.

There is insufficient information, research data and training regarding the use of mediation as an alternative to judicial review to enable practitioners to advise clients on what they might expect in mediation and for judges to direct claims to mediation. The absence of relevant information is at least partly attributable to the confidential nature of mediations and lack of publicity about the types of dispute dealt with by mediators and their outcomes. This deters practitioners who are unfamiliar with the mediation process and who may thus be reluctant to consider the mediation option when its processes are opaque and it is not clear what it may have to offer specifically to clients who are in dispute with public bodies. In addition, such practitioners may not know how to find a suitable mediator in the current proliferation of providers, or how to predict the likely costs involved. The situation may not be aided by the failure on the part of those promoting mediation in public law to address the issues of concern to public law practitioners, such as power

²⁹ See CEDR, "ADR for Public Authorities", 2003.

³⁰ Eisenberg M.A.(1976): 'Private Ordering Through Negotiations: Dispute Settlement and Rulemaking' 89 Harvard Law Review 637-81. Also Astor and Chinkin, 2002, p.65.: "...the privacy and lack of precedential value of the settlement may be a significant disadvantage to third parties who have been similarly injured and who are attempting to negotiate their claims

³¹ Ingleby R S 'In the Ball Park: Alternative Dispute Resolution and the Courts' AIJA,1991,

imbalance between the parties, lack of transparency and accountability and privatisation of public law dispute resolution.

There are thus clearly a number of issues which need discussion, public debate, and a healthy dose of independent research data. In particular, greater understanding is needed as to the effects of power imbalance between parties and the fact that the public body and their legal representatives will invariably be repeat players, whereas an individual claimant in judicial review will not. There are also questions about whether mediation is most appropriate where there is an ongoing relationship between the parties (as in neighbour disputes or family mediation), and whether a degree of compulsion in what is essentially a voluntary process is needed in order to overcome the general lack of knowledge and understanding of mediation.

The Public Law Project are currently developing a research project into mediation in the context of judicial review, and discussions between the PLP and the Nuffield Foundation regarding funding possibilities are underway. The project would aim to offer independent, readily accessible mediation facilities to parties involved in any stage of judicial review proceedings, and would provide a unique opportunity to research empirically what types of public law cases might benefit from mediation and what outcomes might be achieved. It would also provide an opportunity for public law lawyers to contribute to our understanding of mediation in public law cases by commenting on their experience of the process. Such a study would make a significant contribution to the fuller understanding of these important issues at a practical and policy level.

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